The Illusionary Tort of Malicious Prosecution

By Jacqueline Sanderson 19145097

Common Law (JD) & Transnational Law

Faculty of Law

University of Sherbrooke

Presented to Caroline Gendron, Marie-Andrée Plante, Adriane Porcin, Sophie Taschereau

For the course of

DTN 745

Projet Final

Carignan 23-08-2024

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1. INTRODUCTION

The right to an attorney upon arrest is breached on a daily basis by the police without any malicious intention. The police breach this fundamental right by simply refusing to allow an accused to speak to his attorney after he is detained (see for example *Labarge v. The King*[1]).

It is submitted that Crown prosecutors also breach the right to an attorney in a less direct and obvious manner. For example, in *R. v. Delchev*[2], a Crown prosecutor made an offer for a more lenient sentence directly to an accused, notwithstanding that he was represented by an attorney, conditional upon him testifying against his attorney. The Judge concluded that this behaviour by the Crown prosecutor was serious enough to put aside settlement privilege in order for the Court to appraise the conduct of the Crown prosecutor to establish whether or not an abuse of process had occurred and a stay of proceedings was warranted.

The author will argue that another manner by which the right to an attorney could be violated by a Crown prosecutor is to file a motion to declare the lawyer of the accused unable to act for strategic reasons on the pretext that there is a potential conflict of interest between two (2) or more co-accused. The author will argue that these types of strategic motions which are sometimes filed by the Crown to prevent the accused from having their lawyer of choice such that the accused can no longer defend themselves against the criminal charges. The author believes that conduct should not be condoned by the courts.

The author will argue that in certain cases if the Crown prosecutor intentionally tries to deny an accused his right to council of choice, the tort of malicious prosecution should be applicable. However, as will be demonstrated the threshold is so high that it is almost impossible to succeed in an action for the tort of malicious prosecution.

The author will use a specific factual example in which the author was declared unable to act in a criminal case in *The Queen v. Michael Lacoste-Méthot*[3]. Mr. Lacoste-Méthot ("Lacoste")

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1 2024 QCCQ 418.
2 2015 ONCA 381.
3 Unreported decision, dated December 11, 2017, Honourable Justice Marco Labrie in file number 505-01-127883-151 (the "*Labrie Judgment*").

requested the judicial review of said judgment and applied for permission to appeal to the Supreme Court of Canada.[4]

The focus of this paper will be with respect to the professional conduct by Crown prosecutors and other ethical issues, such as conflicts of interest issues. Finally, I will analyze whether due to the breach of ethical duties of the Crown prosecutor, Lacoste should be entitled to damages against the State for malicious prosecution.[5]

This paper will not analyze the constitutional issues or the criminal defence issues. Nevertheless, in certain cases it will be necessary to refer to same for certain principles.

2. FACTUAL EXAMPLE

The factual example that will be used in my essay is not unusual. In fact, due to the delays caused by joint criminal charges with several accused, it is likely that these types of cases will arise more in the future. That is, the crown prosecutor will decide to sever the files and proceed with separate trials as opposed to having one joint trial with numerous accused which take a long time to proceed through the system.

Lacoste was arrested in 2015 with 17 other individuals on drug trafficking charges.[6] In 2017, Jacqueline Sanderson ("Sanderson"), replaced council of record for two (2) co-accused, being Lacoste and another individual, being Samuel Roberge ("Roberge"). In April 2017, the joint trial for both Lacoste, Roberge and three (3) other co-accused was fixed for a duration of two (2) weeks starting on February 5, 2018. At this hearing, Sanderson had announced her plans to file a

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[4] *Lacoste-Méthot v. Court of Quebec*, 2018 QCCA 228, permission to appeal to the Supreme Court refused in *Lacoste-Méthot v. The Queen*, 2018 CanLII 78757 (SCC). It should be noted that the writ in certiorari was dismissed summarily by the Superior Court because there was no error on the face of the record. The test to appeal an interlocutory judgment in criminal files was described in *obiter* at paragraph 57 of *R. v. Cunningham*, 2010 SCC 10 (CanLII), [2010] 1 SCR 331 as being very narrow. That is, the error must be evident on the face of the record or due to an error in jurisdiction. Sanderson argued that since the error affected the fairness of the trial, the interlocutory judgment should be reviewable based on *Cunningham*, however, the Court of Appeal of Quebec in *Lacoste-Méthot v. Court of Quebec* was not convinced of same at paragraphs 3 and 4. Nevertheless, the SCC revisited this issue shortly after this case in *R. v. Awashish*, 2018 SCC 45, [2018] 3 S.C.R. 87 and it appears the review of interlocutory decisions was narrowed even more in this case.

[5] It is possible for a person to also sue in virtue of subsection 24(1) of the *Canadian Charter of Rights and Freedoms*, *The Constitution Act, 1982, Schedule B to the Canada Act* 1982 (UK), 1982, c 11 (the "***Charter***") for breach of a constitutional right by the State. Although the author will borrow certain principles from this case law, the focus of the paper is the tort of malicious prosecution as a matter of private law.

[6] The facts are summarized by Justice Anne-Marie Jacques in *R. v. Raymond*, 2015 QCCQ 6266, however, the facts in the underlying criminal case are not relevant for purposes of this essay.

Charter motion for unreasonable delay because the delay would have been 34 months by that date, being over the delays established by the Supreme Court of Canada in *Jordan v. R*.[7]

In the summer of 2017, the Supreme Court of Canada released the next important decision with respect to unreasonable delays, being *R. v. Cody*.[8] In this case, the Supreme Court of Canada confirmed that the new ceilings applied to cases already in the system, except in exceptional circumstances.[9] Consequently, they applied to Lacoste and Roberge.

Shortly after *Cody*, the previous prosecutor with more seniority, who had been on the file while there were many co-accused, returned on the file for the sole purpose of filing a motion to declare Sanderson unable to act for both Lacoste and Roberge. The main reason for the potential conflict of interest argued by the Crown (and for that matter the only reason retained by the Judge in first instance) was that Lacoste and Roberge could have conflicting defences.[10] This would be for a potential conflict of interest and not an actual conflict. The Judge also did not allow a signed waiver by Lacoste and Roberge.[11] Nevertheless, the Judge only declared Sanderson unable to act for Lacoste and allowed Sanderson to continue to represent Roberge.[12]

Lacoste filed a writ in certiorari to the Superior Court but it was summarily dismissed by the Superior Court. The Court of Appeal dismissed the appeal but did not in any manner review the issue of waiver and finally permission to appeal to the Supreme Court of Canada was refused.[13]

The day after the judgment of the Court of Appeal, the trial of Roberge continued and the trial of Lacoste was postponed because he needed time to find a new lawyer. At that moment, the author submits that the potential conflict of interest ceased because the trial was no longer a joint trial, therefore, the reasons enumerated in the *Labrie Judgment* no longer applied. That is, Sanderson would no longer have to favour one defence over another because she would not represent both of them at the same time before the same Judge.[14]

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7 *Jordan v. R.*, 2016 SCC 27 ("*Jordan*").

8 *R. v. Cody*, 2017 SCC 31 ("*Cody*").

9 *Ibid*., at paras 67-74.

10 Pages 26 to 29 of the stenographic notes of the unreported judgment of the Honourable Justice Marco Labrie, dated December 11, 2017 (the "*Labrie Judgment*").

11 *Ibid.*, at pages 37 to 42. Justice Labrie confirmed that such a waiver was contrary to public order, nevertheless, see below the bright line rule established in *R. v. Neil*, *infra*, at note 30.

12 *Ibid.*, at page 43.

13 *Supra*, note 6.

14 *Regina v. Silvini*, 1991 CanLII 2703 (ON CA), 5 O.R. (3d) 545, [1991] O.J. No. 1931. The Court of Appeal of Ontario specifically addressed the issue of severance because the Crown argued that the co-accused should have requested severance of the files to proceed using the same lawyer. This is implicit recognition that the potential conflict of interest for contradictory or antagonistic defences no longer existed after the files were severed. See also

Notwithstanding that the conflict of interest had ceased, the Crown prosecutor continued to contest that Sanderson represent Lacoste even though the trial of Roberge was completed. The Crown attorney wanted to ensure that Sanderson could not assist Lacoste even outside the court room; consequently, she made a complaint to the Quebec Bar.[15] The Crown prosecutor proceeded to plead before the Court of Quebec that the conflict of interest continued such that Lacoste was prevented from having Sanderson represent him for his criminal proceedings. On August 13, 2018, the Court of Quebec rejected another motion to declare Sanderson able to act (the "Second Judgment"). In October 2019, Lacoste was forced to plead guilty to a sentence of 18 months in prison for his alleged participation in a drug trafficking conspiracy.

3. IMMUNITY OF A CROWN PROSECUTOR

On the assumption that the above-mentioned facts had occurred in Ontario, the author believes that Lacoste has two (2) recourses in damages against the Attorney General of Ontario, one being a recourse in the tort for malicious prosecution and the other in *Charter* damages. This paper will only focus on the former recourse under tort private law while using certain principles from the case law derived under ***Henry v. British Columbia (Attorney General)***[16].

Historically, the Crown had absolute immunity which was based on the King's prerogative. Myles Frederick McLellan in his article entitled "Innocence Compensation: the Private, Public and Prerogative Remedies"[17] described the process in which a person who was harmed by the Crown could ask permission to the King to address the ordinary courts. Nevertheless, there was no recourse under private law as explained at page 63 of his article:

> A significant immunity that remained in favour of the Crown in the face of a petition of right was that it did not permit the Crown to be sued in tort. This was based upon the maxim "the King can do no wrong."

McLellan explains that in 1947 the UK abolished this absolute immunity and the Canadian provinces followed suit. Nevertheless, he explains that the potential suits against the Crown are expensive and difficult to prove.[18]

R. v. Dufour, 2011 QCCS 6149, *R. v. Widdifield*, 1995 CanLII 3505 (ON CA), 25 O.R. (3d) 161, [1995] O.J. No. 2383 and *Barbeau v. The Queen*, 1996 CanLII 6391 (QC CA).

15 *Barreau du Québec (assistant syndic) v. Sanderson*, 2021 QCCDBQ 110 (CanLII), presently under appeal to the Professions Tribunal under file number 505-07-000121-221.

16 2015 SCC 24.

17 Myles Frederick McLellan, "Innocence Compensation: the Private, Public and Prerogative Remedies" (2015) 45-1 *Ottawa Law Review* 59 at 63, 2015 CanLIIDocs 153.

18 *Ibid.*, at 64.

4. EXCEPTIONS TO THE IMMUNITY OF A CROWN PROSECUTOR

In *Whitehead v. Attorney General of Ontario*[19], the Superior Court of Ontario recognized two (2) exceptions to the immunity of the Crown with respect to civil litigation, being malicious prosecution and wrongful non-disclosure. The Judge cited with approval the history of Crown immunity found at paragraphs 25 to 38 in a recent Supreme Court of Canada case, being *Ontario (Attorney General) v. Clark*[20]. The second branch named "wrongful non-disclosure" as breach of non-disclosure is actually a broader category of damages based on subsection 24(1) of the *Charter* for breach of a constitutional right initially established by the Supreme Court of Canada in *Ward.*[21]

In *Whitehead*, the Court summarized the conditions to prove malicious prosecution at paragraph 36 as follows:

> The elements of the tort of malicious prosecution are as follows: (a) the prosecution was initiated by the defendant; (b) it was terminated in favour of the plaintiff; (c) it was undertaken without reasonable and probable cause; and (d) it was motivated by malice or a primary purpose other than that of carrying the law into effect. See *Miazga v. Kvello Estate*, 2009 SCC 51 at para. 3

In *Clark*, certain individual police officers were suing the Ontario government for misfeasance of public office against several Crown prosecutors who they alleged breached their duties by not calling the police as witnesses in a case in which the accused had alleged police brutality to obtain a confession. In essence, the police argued that the Crown prosecutors should have allowed the police officers to testify to defend their names in the criminal cases. The majority of the Supreme Court rejected the claim by the police due to the Crown's immunity against prosecution. The Supreme Court explained that the recourses against the Crown were very restricted and limited to the accused and not the police.[22]

The Supreme Court in *Clark* concluded that the Crown immunity established in *Nelles*[23], and refined in *Proulx*[24] and *Miazga*[25] only applied to the accused and should not be extended to third parties. The Court noted the responsibilities of the Crown prosecutor were towards the public and the accused, who was uniquely vulnerable.

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19 2023 ONSC 1073 (CanLII) at paras 35-37 ("*Whitehead*").
20 2021 SCC 18 (CanLII) ("*Clark*").
21 *Vancouver (City) v. Ward*, 2010 SCC 27 (CanLII), [2010] 2 SCR 28 ("*Ward*").
22 *Clark, supra*, note 20 at para 40.
23 *Nelles v. Ontario*, 1989 CanLII 77 (SCC), [1989] 2 S.C.R. 170 ("*Nelles*").
24 *Proulx v. Quebec (Attorney General)*, 2001 SCC 66, [2001] 3 S.C.R. 9 ("*Proulx*").
25 *Miazga v. Kvello Estate*, 2009 SCC 51 (CanLII), [2009] 3 SCR 339 ("*Miazga*").

4.1. Duties of a Crown Prosecutor

In *Clark* the Supreme Court of Canada summarized certain duties of prosecutors as follows at paragraphs 35 and 36 thereof:

> [32] This means that the responsibility of the Crown includes the obligation to act objectively, independently and fairly toward the accused. These imperatives are "not confined to the courtroom and attac[h] to the Crown Attorney in all dealings in relation to an accused" more generally (Regan, at paras. 155-56, per Binnie J., dissenting). In *R. v. Cawthorne*, 2016 SCC 32 (CanLII), [2016] 1 S.C.R. 983, this Court recognized that an accused person has a constitutional right, as a principle of fundamental justice under s. 7 of the Charter, to be tried by a prosecutor who acts independently of improper purposes (paras. 23-26, per McLachlin C.J.).
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> [33] The Attorney General and its agents are also required to act as protectors of the public interest in the discharge of their prosecutorial functions (*Cawthorne*, at para. 27). They act in "the interest of the community to see that justice is properly done" (*R. v. Power*, 1994 CanLII 126 (SCC), [1994] 1 S.C.R. 601, at p. 616, per L'Heureux-Dubé J.). Their ultimate task "is to see that the public interest is served, in so far as it can be, through the use, or non-use, of the criminal courts" (Regan, at para. 159, per Binnie J., dissenting in the result, quoting Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (1993) ("Martin Report"), at p. 117 (emphasis deleted)).

Moreover, the *Model Code of Professional Conduct* provides as follows at section 5.1-3:

> 5.1-3 When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.
>
> Commentary
>
> > [1] When engaged as a prosecutor, the lawyer's primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to defence 81 counsel or directly to an unrepresented accused of all relevant and known facts and witnesses, whether tending to show guilt or innocence. [26]

The author believes that the Crown prosecutor in Lacoste's file intentionally filed a motion to declare Sanderson unable to act because she knew that it was probable that a stay of proceedings would be ordered due to the unreasonable delays but if Lacoste did not have an attorney, then he would not be able to file a motion for unreasonable delays.

The author believes that there were several *Charter* rights that were infringed by the Crown prosecutor[27] with respect to the criminal proceedings of Lacoste, being the right of an accused to

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[26] Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: 2024, section 5.1-3, commentary 1.

[27] As explained above, this essay is not intended to provide detailed arguments with respect to Constitutional issues or the breach thereof.

retain a lawyer of his choice and the right to make full defence to the charges against him.

In *Fédération des médecins spécialistes du Québec*[28], the Court of Appeal cited a case from the Court of Appeal in Ontario in which the latter characterized the choice of the right to an attorney as a fundamental right based on the common law.[29] Moreover, by preventing Sanderson from even speaking to Lacoste in the hallway breached his right to make full defense because she could not share her strategies with her client after she was declared unable to act.

Based on the foregoing, it is probable that a case in *Charter* damages is available to Lacoste, the analysis below considers whether or not a case in malicious prosecutions can also be proven by the plaintiff based on the facts above, assuming that they happened in Ontario.

As will be noted below, it is not sufficient for the plaintiff in a malicious prosecution case to prove that the Crown prosecutor breached one of their duties. The conduct must be more than even "recklessness, gross negligence or poor judgment"[30]. This requirement will be discussed below within the context of the fourth condition of malicious prosecution, being malice.

5. THE FOUR CONDITIONS FOR MALICIOUS PROSECUTION

As noted above, there are four conditions of malicious prosecution which are the following:

1. The action was initiated by the defendant;
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.[31]

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[28] *Fédération des médecins spécialistes du Québec v. Association des médecins hématologistes-oncologistes*, 1988 CanLII 856 (QC CA).

[29] *Ibid*., Le juge Dubin, de la Cour d'Appel de l'Ontario dans l'affaire *R. c. Speid*, 1983 D.L.R. (4th) p. 246 résumait les principes gouvernant l'exclusion de l'avocat d'une cause où il a accepté un mandat. L'arrêtiste présente ainsi l'opinion de la Cour d'appel l'Ontario: "The right of an accused to retain counsel of his choice has long been recognized at common law as a fundamental right. It has been carried forth as a singular feature of the Legal Aid Plan in this province and has been inferentially entrenched in the Charter of Rights which guarantees everyone upon arrest or detention the right to retain and instruct counsel without delay. However, although it is a fundamental right and one to be zealously protected by the court, it is not an absolute right and is subject to reasonable limitations."

[30] *Augusto Crecco v. Canada (Minister of Transport)*, 2023 TATCE 4 (CanLII) at para 27 citing *Proulx*.

[31] *Miazga, supra,* note 25, at para 3.

5.1. Initiated by the Defendant

This condition is often admitted in most of the cases of malicious prosecution because the plaintiff chooses the defendant and it is either the Crown or one of the alleged victims in matters not involving the Crown. In the case of Lacoste, the defendant that he has chosen in his factual mix is the Attorney General of Ontario.

5.2. Terminated in Favour of the Plaintiff

In the factual matrix provided Lacoste was eventually forced to plead guilty because he did not have his lawyer of choice because the Crown prosecutor chose to file a motion to declare Sanderson unable to act and insisted on pleading that the alleged appearance of a conflict of interest persisted even after the cases of Roberge and Lacoste were severed and there was no longer even a potential conflict of interest. Since Lacoste pleaded guilty this condition would not be met. However, the author believes that since the Crown prosecutor acted inappropriately the *Labrie Judgment* and the Second Judgment should be re-litigated.

5.2.1. Re-Litigation of the *Labrie Judgment* and the Second Judgment

The Crown first filed a motion to declare Sanderson unable to act for Lacoste after the trial had already been fixed. The author submits that this motion was tactical in nature and constituted misconduct by the Crown. Consequently, the author submits that fairness dictates that the issue of the conflict of interest initially decided in the *Labrie Judgment* should be re-litigated in the context of the civil litigation.

However, even if the *Labrie Judgment* was confirmed by a civil court as *res judicata* and re-litigation was not acceptable, the Crown continued to plead to the courts that there was a continued conflict of interest between Roberge and Lacoste after their cases had been severed. Therefore, even without re-litigation of the *Labrie Judgment*, the Crown prosecutor breached the right of Lacoste to his lawyer of choice, accordingly, Lacoste should be entitled to redress. Moreover, the Crown prosecutor, with the assistance of the Bar, insisted that the *Labrie Judgment* applied outside the Court, contrary to the findings of the Supreme Court of Canada in *R. v. Neil*[32].

[32] [2002] 3 S.C.R. 631, 2002 SCC 70 ("*Neil*"). In *Neil*, the Supreme Court of Canada refused to consider that Mr. Neil was represented by the lawyer because the lawyer only provided legal advice outside the court, therefore, such "advice" could not constitute ineffective advice from counsel and could not be a ground for appeal of the

In *Hicks v Gazley*[33], the Court of Queen's Bench of Alberta outlined the circumstances first addressed by the Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79*[34], in which re-litigation could be possible. At paragraph 52 in *CUPE*, the Supreme Court of Canada noted the following exceptions in which re-litigation could enhance the justice system:

> There may be instances where re-litigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context.[35]

At paragraph 13 in *Hicks*, the Judge noted that misconduct could be a reason to re-litigate an issue. The author submits that the motive of the Crown to file the first motion to declare Sanderson unable to act was to prevent him from having a lawyer to file a *Jordan* motion because as explained above, the motion was filed shortly after *Cody*. Moreover, the Crown prosecutor pretended that the conflict of interest continued after the files of Roberge and Lacoste were separated, that is she pleaded the law incorrectly to obtain the Second Judgment.

The author argues that both the first and third exceptions described in *CUPE* apply in the circumstances of Lacoste in favour of reviewing the *Labrie Judgment* and the Second Judgment.

There are very few cases in which a judge allowed re-litigation. However, the dissenting Judge in *Clark*, being Justice Suzanne Côté, at paragraph 166 noted that where prosecutors acted unlawfully and deliberately, the first trial is tainted with fraud and dishonesty and re-ligation is justified. It should be noted that in *Clark* the prosecutor simply decided not to have the police officers testify, therefore, there was no evidence to contradict the testimonial evidence of the accused. In Lacoste, our factual example, the Crown prosecutor knew that the apparent conflict of interest had ceased when the files of Roberge and Lacoste were severed but pretended that it existed still in order to obtain the Second Judgment.

Proving the dishonesty or fraud with respect to the *Labrie Judgment* would be slightly harder than for the Second Judgment because it was based on the timing of the motion filed by the

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conviction. This argument was made by Brooke McKenzie, *Explaining Disqualification: An Empirical Review of Motions for the Removal of Counsel* (2020) 45-2 Queen's Law Journal 199, 2020 CanLIIDocs 3869 at para 57. It is interesting to note that it was the Crown who made the complaint to the Quebec Bar and not Lacoste. Lacoste wanted Sanderson to continue to represent him notwithstanding the potential conflict of interest. As noted above, Lacoste and Roberge signed a waiver of the conflict after obtaining advice from an independent attorney.

[33] 2020 ABQB 548 at para 11 ("***Hicks***").

[34] [2003] 3 S.C.R. 77, 2003 SCC 63 ("***CUPE***").

[35] *Ibid*., at para 52. It should be noted that there are very few cases in which a judge exercised his discretion to allow re-litigation based on these exceptions. One such case which contains a good summary of the principles is *Tapics v. Dalhousie University*, 2015 NSCA 72 (CanLII).

Crown. That is, the Crown filed the motion to declare Sanderson unable to act shortly after the judgment in *Cody*. At paragraph 38 in *Neil*, the Supreme Court noted that in the criminal context, the motion to remove counsel of choice should be filed at the earliest practical moment. In Lacoste's case, the motion was filed 9 months after Sanderson entered into the file. In a criminal context this is long delay considering that it is one-half of one of the ceilings in *Jordan*, being 18-months for trials without a preliminary enquiry before a single judge.

In *CN v. McKercher*[36] at paragraph 36, the Supreme Court explained that parties using the alleged conflicts for tactical reasons are forfeited from using it.[37] Although the Supreme Court used the example of professional litigants, it is submitted that claiming an apparent conflict of interest for all co-accused a few weeks before the trial is abusive.[38]

Finally, Lacoste was forced to plead guilty because he did not have a lawyer. Furthermore, it should be noted that the *Labrie Judgment* and the Second Judgment could not be appealed because they were interlocutory judgments, therefore, re-litigation of these judgments should not be an abuse of process as explained in *CUPE* because it was impossible to appeal the judgments in the past.[39] This would fall into the third exception in *CUPE* and fairness would dictate that re-litigation should be available.

5.2.1.1. Waivers of Conflicts of Interests and the Bright Line Rule

Once it is established that re-litigation should be authorized for the Labrie Judgment and the Second Judgment, the issue becomes whether or not Sanderson should have been disqualified from representing Lacoste even prior to the severance of his file from Roberge. The most

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[36] *Canadian National Railway Co. v. McKercher LLP*, [2013] 2 SCR 649, 2013 SCC 39 (CanLII) ("*CN v. McKercher*").

[37] *Ibid*., at para at Section 3.4-1 of the *Model Code of Professional Conduct*, *supra*, note 26, provides as follows: [1] Lawyers have an ethical duty to avoid conflicts of interest. Some cases involving conflicts of interest will fall within the scope of the bright line rule as articulated by the Supreme Court of Canada. The bright line rule prohibits a lawyer or law firm from representing one client whose legal interests are directly adverse to the immediate legal interests of another client even if the matters are unrelated unless the clients consent. However, the bright line rule cannot be used to support tactical abuses and will not apply in the exceptional cases where it is unreasonable for the client to expect that the lawyer or law firm will not act against it in unrelated matters. See also rule 3.4-2 and commentary [6].

[38] It should be noted that in the case of Lacoste and Roberge, another lawyer had represented 8 co-accused and presumably because the 8 co-accused all pleaded guilty, the Crown did not raise the conflict of interest. Before the Court of Appeal, *supra*, note 4 at 11:34 A.M., the Crown alleged that the conflict was raised before the Justice Jacques during the hearings at which the other co-accused pleaded guilty, however, Sanderson obtained the recordings of all the hearings and there was no such mention. Sanderson also contacted many of the co-accused who confirmed that they were not aware of the alleged conflict of interest. These misrepresentations would also fall into the first exception described in *CUPE*.

[39] See the comments of the author made, *supra*, note 6.

prominently cited case with respect to conflicts of interest is *CN v. McKercher*. In that case, the issue was whether or not a law firm, McKercher LLP, could accept a mandate to represent a new client against a current client, being CN, without the client's consent (*i.e. CN*). The Supreme Court in *CN v. McKercher* explained the reason for the bright line rule which was previously established in *Neil*.[40]

In criminal cases where a lawyer who represents two co-accused, a potential conflict of interest arises due to ineffective representation. The Chief Justice, as she then was, explained this issue at paragraph 25 of *Neil* as happening when a lawyer has clients with competing interests, the lawyer is put in a position in which they may be required to choose between the interests of one client over the other and as such will not be able to zealously represent both clients at the same time. Brooke Mackenzie explained the issue of competing interests as when the lawyer could have divided loyalties between the clients and could soft peddle the defence of one client to favour the defence of the other client.[41] There is a potential that the lawyer could not zealously represent both clients at the same time in the same trial.

At paragraph 27 of *CN v. McKercher*, the Chief Justice cited the bright line rule established in *Neil*:

> The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client — *even if the two mandates are unrelated*[42]— unless both clients consent after receiving full disclosure[43] (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.

Roberge and Lacoste signed a waiver that was deposited before Justice Labrie and was not contested by the Crown. Notwithstanding that the bright line rule above specifically allows an exception if both clients consent to the conflict of interest, Justice Labrie concluded that it would be contrary to public order to allow Sanderson to continue to represent both clients. The author believes that Justice Labrie erred in principle because the bright line rule should apply in criminal as *Charter* rights are involved. Nevertheless, it appears that the criminal courts have not been consistent with respect to this issue and rarely even apply the bright line rule even if it was established in *Neil* a criminal case.

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40 *CN. v. McKercher*, *supra*, note 35, at 662-663.

41 *Supra*, note 32 at subpara 40 ii.

42 Emphasis was in the original.

43 Emphasis added.

There is one case that did however explain and apply the bright line rule in order to dismiss the motion to disqualify in *R. v. Sutherland*.[44] However, even in this case, Justice Doulis concluded that the courts have an overriding power to quash a waiver. The Judge concluded with the following comments at paragraph 30:

> [30] In my view, to disqualify Mr. LeBlond would prejudice the integrity of the justice system by unnecessarily impairing Damiond Sutherland's access to justice and the right to counsel of his choice. I find the appropriate remedy is for Damiond Sutherland and Colin Durrand to obtain independent legal advice and sign waivers if they still wish to proceed with Mr. LeBlond as their legal counsel in their respective matters. Should at some point the risk to his duty of loyalty to his client progress from a mere possibility to a genuine realistic risk, then Mr. LeBlond will have to withdraw as legal counsel.[45] [Emphasis added]

The same conclusions should have applied in the case of Lacoste who waived the potential conflict of interest with Roberge. Similarly, Lacoste's right to choice of council caused him to not have access to justice because he was unable to file a motion for a stay of proceedings for unreasonable delays.

In *R. v. St. Clair Wright*[46], the Judge cited *CN v. McKercher* and allowed a waiver, in a situation where the lawyer who was representing the defendant also represented a potential Crown witness. The Judge essentially concluded that the bright line rule did not apply because the clients' interests were not adverse and the lawyer would no longer be representing the witness at the time of the trial.[47] It appears that conflict in St. Clair was more apparent than the one in Lacoste and Roberge. Therefore, it is submitted that the waiver should have applied.

As explained above, the conflict ceased after the trials of Roberge and Lacoste were severed. Therefore, the Judge in the Second Judgment simply erred at law and as a result, a waiver was not even necessary.

A final argument in favour of overturning the *Labrie Judgment* and the Second Judgment is that if there is an ambiguity in applying a legal principle or statute, then it should be interpreted in a manner that does not restrict a *Charter* right.[48] The author believes that there is no ambiguity in that the bright line rule is clear and allows for the parties to consent to the waiver. However, even

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44 2022 BCPC 130.
45 *Ibid*., at para 30.
46 2015 ONSC 1764.
47 *Ibid*., at para 14.
48 *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 RCS 559, 2002 CSC 42 (CanLII) at paras 28, 60-62.

if it was unclear in criminal cases, as it is dealing with a constitutional right of being represented by a lawyer of choice, it should be interpreted in favour of allowing the waiver.

5.2.2. Stay of Proceedings for Unreasonable Delay

The test for the second condition for malicious prosecution is that the charges against the plaintiff must stayed or the plaintiff must be acquitted. A full analysis of the application of the principles in *Jordan* is beyond the scope of this essay. However, the author strongly argues that a stay would have been ordered for Lacoste by a competent court especially based on the comments of the Court of Appeal at paragraph 10 which provides as follows:

> [10] Dans un autre ordre d'idées, il se peut bien que l'intimée [the Crown], qui a tardé à présenter sa requête en déclaration d'inhabilité, doive supporter le poids du délai qui s'est ensuivi, au moins pour partie, mais la Cour n'est pas celle qui devra statuer sur ce point, du moins pas dans le cadre du présent débat.[49]

The delays at the time of the judgment of the Court of Appeal were already 34 months which was at least 4 months over the 30-month ceiling.[50] Since the trial was later fixed for August 2018, the delays would have been way over the ceiling by the trial date.

With respect to the issue of factual innocence, it should not be required to be proven as in the case of *Charter* damages. Dr. Emma Cunliffe in an article entitled "Henry v. British Columbia: Still Seeking a Just Approach to Damages for Wrongful Conviction"[51] writes that:

> If one cleaves (as I do) to the view that Charter rights have inherent value, one must accept the correlate that any person is entitled to the protection of those rights, regardless of factual innocence.

Based on the foregoing, the author argues that the second condition for the tort of malicious prosecution is also met in the Lacoste case.

5.3. Reasonable Grounds to Prosecute

The third and fourth elements of the tort of malicious prosecution are linked because the third element deals with the prosecutor's decision to institute or continue litigation and the fourth is whether the decisions of the prosecutor were made with malice.

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[49] *Supra*, note 4, at para 10.

[50] Lacoste renounced to his preliminary enquiry, therefore, it is arguable that the 18-month ceiling applied (see for example *R. v. Chrétien-Barrette*, 2023 QCCQ 5857 (CanLII) at para 36).

[51] Emma Cunliffe, "Henry v British Columbia: Still Seeking a Just Approach to Damages for Wrongful Conviction" (2016) 76 *Supreme Court Law Review* 143, 2016 CanLIIDocs 4509, at 154.

Justice Charron noted that the decision of whether to initiate or continue to prosecute is at the core of prosecutorial discretion[52] which requires deference by the courts due to prosecutorial independence and added the following at paragraph 46:

> The independence of the Attorney General is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched. The principle of independence requires that the Attorney General act independently of political pressures from government and sets the Crown's exercise of prosecutorial discretion beyond the reach of judicial review, subject only to the doctrine of abuse of process.

The decision not to declare a stay of proceedings in the summer of 2017 by the Crown prosecutor would have been reasonable had it not been coupled with a motion to declare Sanderson unable to act. However, the decision to continue to prosecute after the comments of the Court of Appeal cited above with respect to *Jordan* knowing that the ceiling was already broken was unreasonable.

The author submits that the decision of the Crown prosecutor to file a motion to declare Sanderson unable to act after the trial had already been fixed and after *Cody* was not however a decision that fell into the core discretionary functions of a prosecutor. This decision was tactical in nature.

Justice Suzanne Côté in her dissenting reasons in *Clark* noted that the prosecutor's decision under attack by the police was the decision on whether or not to have the police officers testify at the trial was not a decision within the core discretionary functions of the prosecutor.[53] Justice Côté added that these decisions are tactical in nature. This reasoning can be applied to the decision of the Crown prosecutors in Lacoste to file a motion to declare Sanderson unable to act as opposed to simply declaring a stay of proceedings due to the unreasonable delay. The decision for the prosecutor to file a complaint with the Bar notwithstanding that the conflict of interest had clearly ceased was also definitely tactical in nature. Similarly, the Crown prosecutor arguing before the court that the conflict continued after the cases of Roberge and Lacoste were severed was also tactical.

Nevertheless, the Supreme Court of Canada noted in *Miazga*[54] that, even if there was insufficient subjective belief by the prosecutor to continue to litigate, if there were still objective reasons to

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52 *Miazga*, *supra*, note 25, at para 45.

53 *Clark*, *supra*, note 20, at para 129.

54 *Supra*, note 25, at para 73.

pursue the prosecution, then the third element of malicious prosecution would not be met. The rationale behind this is based on acting in the public interest and not the personal interest of the prosecutor. Based on this last element, it would be difficult to attack the decision of the first prosecutor to file the motion to declare Sanderson unable to act. Consequently, it would only be the decision of the second prosecutor who continued her actions to prevent Lacoste from being represented by counsel of choice after the conflict of interest has ceased that would meet the high threshold established to protect the Crown.

5.4. Malice

The fourth and final step in the analysis is whether the decisions made by the Crown were made with malice. The judgment in *Arsenovski v. Bodin*[55], provides a good summary of the trilogy cases, being *Nelles, Proulx* and *Miazga*.[56] The Judge noted from *Nelles* that the conduct must be equivalent to an improper purpose and involving "an abuse or perversion of the system of criminal justice for ends it was not designed to serve".[57]

As noted above, the filing of the motion to declare Sanderson unable to act would not meet the third element of the tort of malicious prosecution. However, the filing of a complaint with the Bar by the Crown prosecutor was malicious because the conflict of interest had ceased at the time of the complaint as the criminal files of Roberge and Lacoste had already been severed. Moreover, the intent of this complaint was to prevent Sanderson from even speaking to Lacoste outside the courtroom. The complaint was worded as having breached an order of the court even though the order was no longer applicable. This same prosecutor pleaded before the Court that after the files had been severed, the conflict of interest continued which was false. These acts were necessarily malicious and done with the intent to remove counsel of choice from Lacoste to prevent him from being able to file a *Jordan* motion.

This conduct is objectively worse than the conduct of the Crown prosecutor in *Proulx*, being the only known case in which damages have been awarded for malicious prosecution. The conduct of the prosecutor in *Proulx* was summarized in *Arsenovski v. Bodin*[58] as having an element of malice because the evidence was weak and the prosecutor tried to manipulate the evidence to

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55 2016 BCSC 359 (CanLII).
56 *Arsenovski v. Bodin*, *supra*, note 52, at paras 26-32.
57 *Ibid.*, at paras 26-27.
58 *Ibid.*, at para 35.

obtain a "conviction at any price". The use of the words at any price is telling in the case of Lacoste because Sanderson was convicted by the Disciplinary Council for breach of an order that was no longer applicable.[59]

6. CONCLUSION

The author believes that the tort of malicious prosecution would be applicable in the case of Lacoste. However, since there has only been one reported case of malicious prosecution it is unlikely that a lower court would grant damages and it is likely that the case would be dismissed summarily.[60]

This high threshold was discussed by Justice Barrington-Foote with the concurrence of two other Judges of the Court of Appeal in *AB v. Rodgers* as a "troubling reality".[61] The Court of Appeal went to note that the findings of fact about the conduct of the prosecutor, of a person in such a position, were difficult to fit squarely with the fact that the Judge in first instance had summarily dismissed the action.[62] The Court of Appeal added that he was unaware of any case other than *Proulx*, one of the trilogy, in which the Crown prosecutor was found liable. The following passages by the Court of Appeal are quite indicative of the law of malicious prosecution on many levels:

> [52] The fact that *Proulx* is a unicorn reflects the reality that an accused who claims in malicious prosecution against a Crown prosecutor faces a monumental task. The legal test they must meet strikes a particular balance between "the right of individual citizens to be free from groundless criminal prosecutions and the public interest in the effective and uninhibited prosecution of criminal wrongdoing": *Kvello* at para 52; *Proulx* at para 35. Among other things, a plaintiff must prove malice, and, as Charron J. reiterated in *Kvello*, "malice does not include recklessness, gross negligence or poor judgment" (at para 8). For that reason, a Crown prosecutor that is found to have had an honest subjective belief in reasonable and probable cause cannot be found liable, regardless of how unreasonable that belief may be: *Kvello* at para 79.
>
> [53] These real-world results give me pause for thought. The seminal decision in *Nelles v Ontario*, 1989 CanLII 77 (SCC), [1989] 2 SCR 170 [*Nelles*] – the first of the Supreme Court's trilogy on this tort – rejected the notion of absolute immunity for prosecutors. As Lamer J. there said, "the existence of absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted" (at 171–172). On the assumption that prosecutors must err, and being human, will sometimes err grievously, it might be asked whether the tort of malicious prosecution is

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59 *Supra*, note 15.

60 *Lacoste-Méthot c. Attorney General of Québec*, 2023 QCCS 4794, and permission to appeal refused in *Lacoste-Méthot v. Procureur général du Québec*, 2024 QCCA 894 (CanLII).

61 *AB v. Rodgers*, 2021 SKCA 96 (CanLII) at para 49.

62 *Ibid*., at para 51.

an adequate response to this threat, and whether these results square with this observation by Abella J. in *Ontario (Attorney General) v Clark*, 2021 SCC 18, 456 DLR (4th) 361 [*Clark*]:

> [26] Since *Nelles*, our judgments on prosecutorial liability have been underscored by a careful balancing between the policy consequences of exposing prosecutors to liability, versus the need to safeguard and vindicate the rights of the accused, who is uniquely vulnerable to the misuse of prosecutorial power.

[54] Put differently, has the tort been defined and applied in such a manner that, for practical purposes, absolute immunity lives quietly on behind a veil created by the trilogy? If so, does that result accord with the recognition by *Nelles* that the courts must have a role – although for very good reasons, a strictly constrained role – in relation to this important aspect of the rule of law? It is arguable it does not.

[…]

[56] There is, however, another side to this coin. In the long run, prosecutorial independence can be justified only if the core elements of the prosecutorial function are exercised "objectively and independently in the interests of the integrity of the system and the rights of the accused" (*Clark* at para 30). There is compelling evidence that Crown prosecutors and senior Crown prosecutions officials consistently strive to and do meet that goal. *Nelles* was intended to create a remedy for those rare cases where they do not. If that remedy has proven to be illusory, an important piece of the accountability puzzle may be missing. [Emphasis added]

The use of the term "unicorn" above by the Court of Appeal in respect the cases in which a plaintiff has succeeded in a case of malicious prosecution suggest a certain ridicule of the law considering the conduct of the prosecutor in that case. The Court suggests that perhaps the threshold has placed so high that the action of malicious prosecution is "illusory" and that prosecutors are thus never held accountable for their actions.

The Supreme Court of Canada noted at paragraph 39 in *Clark* in 2021 that there has been an "evolutionary approach to prosecutorial immunity"…. "restricting [the] immunity … based on fairness to the accused". However, as noted above by the Court of Appeal of Saskatchewan, the actions are illusory because the bar to prove malicious prosecution has been put too high.

Justice Côté, in her dissenting reasons noted in *Clark* at paragraph 122, stated that it was not "plain and obvious" that the conduct of the prosecutor was not "shocking" and later added "common law courts must be responsive to obvious injustice and must make the rules evolve within the constraints of precedent". I believe that this case in Lacoste begs that the issue be submitted to the Supreme Court to add a fourth case to the trilogy to reduce the said threshold such that the tort of malicious prosecution is less imaginary.

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Word count 7,939