



THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2007 SKCA 57

Date: 20070530

Between:

Docket: 877

Matthew Miazga and Carol Bunko-Ruys
(Defendants) Appellants

- and -

The Estate of Dennis Kvello (by his personal representative, Diane Kvello),
Diane Kvello, [S.K. 1], [S.K. 2], Kari Klassen,
Richard Klassen, Pamela Sharpe, The Estate of Marie Klassen
(by her personal representative, Peter Dale Klassen), John Klassen,
Myrna Klassen, Peter Dale Klassen, Anita Janine Klassen
(Plaintiffs) Respondents

- and -

Sonja Hansen, the Estate of Richard Quinney
(by his personal representative, Murray Brown) and Brian Dueck
(Defendants) Non-Parties

Between:

Docket: 884

The Estate of Dennis Kvello (by his personal representative, Diane Kvello),
Diane Kvello, [S.K. 1], [S.K. 2], Kari Klassen,
Richard Klassen, Pamela Sharpe, The Estate of Marie Klassen
(by her personal representative, Peter Dale Klassen), John Klassen,
Myrna Klassen, Peter Dale Klassen, Anita Janine Klassen
(Plaintiffs) Appellants

- and -

Sonja Hansen, The Estate of Richard Quinney (by his personal
representative, Murray Brown) Matthew Miazga, Carol Bunko-Ruys
and Brian Dueck
(Defendants) Respondents

Coram:

Vancise, Sherstobitoff & Lane JJ.A.

Counsel:

Michael Tochor, Q.C. for Matthew Miazga

K.A. Stevenson, Q.C. for Carol Bunko-Ruys

R.L. Borden and E.J. Holgate for Respondents excluding R. Klassen

Richard Klassen appearing for himself

D.A. McKillop, Q.C. for Intervenor, A.G. of Saskatchewan

P. Cavalluzzo for Intervenor, Canadian Association of Crown Counsel

Appeal:

From: 2003 SKQB 559

Heard: May 9, 2006

Disposition: Bunko-Ruys – Allowed
Miazga – Dismissed

Written Reasons: May 30, 2007

By: The Honourable Mr. Justice Sherstobitoff

In Concurrence: The Honourable Mr. Justice Lane

In Dissent: The Honourable Mr. Justice Vancise

SHERSTOBITOFF J.A.***OVERVIEW***

[1] This appeal is from a judgment finding the appellant Miazga, a Crown prosecutor, and the appellant, Bunko-Ruys, a child therapist, liable for the malicious prosecution of the twelve respondents. The respondents, along with four others, had been charged with about 70 counts of sexual assault upon children. The charges relating to the respondents were eventually stayed by the Crown after a preliminary inquiry and committal of ten of the twelve respondents, but before trial of any of the respondents. Brian Dueck, the police officer who investigated the case and laid the charges, was also found liable for malicious prosecution, but has not appealed the decision.

[2] Bunko-Ruys says the judge erred in finding that she had, in law, initiated the prosecution, when her only role in both the investigation and prosecution was as a child therapist, retained by the Department of Social Services to aid and support the children. She says that Dueck swore the charges without asking for or receiving advice from her. Similarly she says that Miazga decided to prosecute the case without advice from her, except with respect to the evidence she gave at the preliminary inquiry, which was given under subpoena.

[3] Miazga says the trial judge erred in two respects. He says the judge erred in finding that there was no reasonable and probable cause to believe that he could prove the case beyond a reasonable doubt because the only evidence to support the case was that of children, parts of whose evidence was

patently false. He also says that the trial judge erred in finding that he was actuated by malice in prosecuting the case when the only evidence to support a finding of malice was the lack of reasonable and probable cause.

THE FACTS

[4] There are several unusual aspects to this case.

[5] First, this summary of the facts is a mere outline of the most relevant facts since the record in this case consists of 14,735 pages. The transcript of the evidence given at trial has 3,997 pages; the transcript of the evidence at the preliminary inquiry into the criminal charges against the respondents, (Exhibit D-9), 2,194 pages; the transcript of evidence at the preliminary inquiry into the charges against the [R.] parents and D.W., (Exhibit D-10), 1,039 pages; and the transcript of evidence at the [R.] parents and D.W. trial, (Exhibit D-11), 3,661 pages.

[6] Second, an important aspect of this case is that the sexual abuse of the children took place in the late 1980's and the early 1990's, and the criminal proceedings arising from the abuse took place from 1991 to 1993. The prohibitions in the *Criminal Code* and *Canada Evidence Act* against convictions upon the unsworn evidence of children, unless their evidence was corroborated in a material particular, had just been repealed effective January 1, 1988. Many cases of child abuse in the past were coming to light. In both Canada and the United States cases involving allegations of child abuse with overtones of Satanism or ritual abuse were given wide publicity. It was a time of change for police and prosecutors who had to adapt to new laws, which in

turn were adapting to new and changing public attitudes. In being required now, some fourteen years later, to assess what the appellants did at the time, these things must be kept in mind.

[7] Third, it must also be borne in mind that the trial of the action giving rise to this appeal took place during the year 2002, a full ten years after the conclusion of the events giving rise to the action. As a result, many witnesses had difficulty remembering things that had not been recorded, but which had a significant bearing on the outcome of the action.

[8] Most of the criminal charges with which we are concerned arose from the evidence of three siblings, [M.R.1], a boy born on October 18, 1979; and [M.R.2] and [K.R.], twin girls born on March 4, 1982. (The nomenclature used throughout is that used by the trial judge in his reasons for judgment for the purpose of protecting the identity of the children.) Their parents were deaf mutes and alcoholics who did not get along well together. The mother was also a prostitute who brought customers home. The parents not only neglected the children but also sexually abused them. As the trial judge put it, “the whole family was dysfunctional and likely sexually perverted.” Eventually, the boy was sexually abusing the girls.

[9] The Department of Social Services, after providing some degree of supervision in the birth home, apprehended the children in February 1987, and placed them in a foster home operated by the respondents Dale and Anita Klassen. In September 1987, after the children had an unsupervised visit with their natural father, Anita Klassen noticed blood on [M.R.2]’s panties. On

inquiry, the child said her father put his penis in her bum. Ms. Klassen reported the incident to the appropriate authorities. The child was examined and a report prepared, but the police, upon interview of all the children, were unable to obtain a reliable explanation.

[10] The Klassens found the children difficult to handle. They required constant supervision, not only to keep them from sexually touching one another, but others as well. [M.R.1]'s conduct, both at school and among the people with whom the family socialized, was so disruptive that they ultimately asked Social Services to place him elsewhere, although they were prepared to keep the girls. On December 12, 1989, [M.R.1] was placed in the foster care of Lyle and Marilyn Thompson.

[11] Just prior to [M.R.1]'s move to the Thompson's, the respondent Bunko-Ruys, a child therapist, was engaged by the Department of Social Services to provide therapy to [M.R.1] because of his conduct as outlined above. They first met on October 23, 1989.

[12] At about the same time, Peter Klassen, the father of Dale Klassen, pleaded guilty to fondling two children of neighbours. As a result, the police began an investigation of the Dale and Anita Klassen foster home as well as the Pamela Sharpe foster home, Pamela Sharpe being a daughter of Peter Klassen, and a sister to Dale Klassen. Brian Dueck, at the request of the Department of Social Services interviewed all children in the two homes, including [M.R.1], [M.R.2], and [K.R.] with respect to possible abuse, but the children disclosed none.

[13] Not long after his move to the Thompson home, [M.R.1] told Marilyn Thompson that he was concerned about the safety of his sisters in the Klassen foster home because of the abuse he suffered there. His disclosures continued, and were conveyed to both Bunko-Ruys and the Department of Social Services. On May 29, 1990, Social Services moved the girls to the Thompson home. The trial judge found that [M.R.1]'s real reason for the disclosures, was to be reunited with his sisters so that he would have them available for further abuse, which, indeed, took place. After the move, all three children continued to make disclosures of abuse to the Thompsons or one of them.

[14] In June 1990, the children were examined by Dr. Yelland. He prepared reports based on the examinations, and gave evidence at the criminal proceedings. The trial judge was highly critical of the reports and of Dueck and Miazga for relying on them and using them in court. However, as frequently noted throughout the proceedings, the reports, and Dr. Yelland's evidence, while they may have confirmed the likelihood of sexual abuse having occurred, could not identify the persons who committed the abuse.

[15] After their move to the Thompsons, the Department of Social Services had Bunko-Ruys provide therapy to [M.R.2] and [K.R.] as well as [M.R.1]. After Bunko-Ruys had determined that the children were settled down enough to be interviewed, Brian Dueck formally interviewed them at the "soft room" at the police station in October and November of 1990. Bunko-Ruys attended at the interviews in order to support the children and asked some questions, usually follow-up questions to those asked by Dueck. The interviews were

videotaped and played in court at the trial of this action. They formed the basis of the charges ultimately laid.

[16] The allegations made by the children were that certain adults had committed upon them, and had forced them to commit, many kinds of sex acts such as sexual intercourse, anal intercourse, fellatio, digital penetration of body orifices and so on. The allegations included sexual assaults of various kinds by the adults upon other children as well as assaults by those children themselves. But their allegations had many more bizarre elements including the mutilation and killing of animals, cutting out their bones and popping their eyeballs; saving and drinking their blood in ritual fashion; the killing and dismemberment of babies and drinking their blood; cutting of the children themselves, for the purpose of obtaining blood to drink; and so on. It should be noted that the so-called satanic or ritual elements raised by the children were made only with respect to their parents and D.W. No such allegations were made with respect to any of the respondents in this case.

[17] As a result of these allegations, the police also interviewed the other children in the homes of the persons accused by the [R.] children.

[18] Dueck at some point, probably in April 1991, approached Terry Hinz, a Crown prosecutor employed by the Government of Saskatchewan with 13 years experience, to review his file and give an opinion as to laying charges. At that time, this kind of procedure was done on an informal basis, with the police officer approaching whatever prosecutor he wanted or whatever prosecutor was available. Upon reading the file, Hinz told Dueck that in view

of the bizarre nature of some the allegations made by the children, he did not think that a conviction could be obtained without some independent corroboration of their evidence.

[19] Dueck later, probably in May 1991, took the file to the appellant Miazga, another Crown Prosecutor employed in the same office as Hinz. Miazga was never told of the previous opinion given by Hinz. Miazga suggested interviews of some of the persons against whom the accusations were made, and also some search warrants respecting premises occupied by some of the suspects, as the children had said photographs and videos had been made respecting some of the offences. Miazga's advice to Dueck was that if he believed the children, he should proceed. Dueck proceeded to obtain the search warrant, but the search found nothing of use. Dueck also conducted the interviews suggested.

[20] On July 6, 1991, Brian Dueck swore an information charging the parents of the [R.] children and D.W. each with nine counts of either sexual assault or gross indecency against the [R.] children. The father was also charged with two counts of incest and the mother with one.

[21] On the same day, Dueck swore another information charging Peter Klassen, and the respondents Marie Klassen, Dale Klassen, Anita Klassen, John Klassen, Myrna Klassen, Richard Klassen, Kari Klassen, Dennis Kvello, Diane Kvello, and Pamela Sharpe each with one count of sexual assault against each of the three [R.] children. The same information had 12 additional charges in four counts alleging that some of this group of persons

committed assaults against three other children. These children were foster children in the Pamela Sharpe home and in the Kvello home.

[22] Dueck swore another information on the same date charging [S.K. 1] and [S.K. 2] each with one count of sexual assault on [M.R.2], and [S.K. 1] with one count of sexual assault on another child.

[23] Peter Klassen is the person who pleaded guilty to the sexual assault referred to in para. 12 hereof. He was the husband of Maria Klassen, and the father of John Klassen, Pamela Sharpe, Richard Klassen, and Dale Klassen. Myrna Klassen is the spouse of John; Kari of Richard, and Anita of Dale. Diane Kvello is the sister of Anita Klassen and Dennis Kvello is her spouse. [S.K. 1] and [S.K. 2] are children of Diane and Dennis Kvello.

[24] Some of these charges were dropped, changed, or added to one way or another before the conclusion of the proceedings, but the changes are not relevant to this appeal.

[25] Dueck then arranged for the simultaneous arrest of the respondents, and the apprehension of their foster children on July 10, 1991. Some of the respondents lived in Red Deer, Alberta by this time. All respondents were arrested and kept in prison until released on bail, with Miazga's consent, at their first appearance in court on July 16, 1991.

[26] The prosecution of the charges was divided into three parts. The first case was the charges against the [R.] parents and D.W. The second was the

charges against Peter Klassen, his children, and their spouses. The third was the charges against [S.K. 1] and [S.K. 2], who were separated because *The Young Offenders Act*, R.S.C. 1985, c. Y-1, applied to them.

[27] The [R.] and D.W. preliminary inquiry, prosecuted by Miazga, began on November 21, 1991. On December 2, 1991, all three accused were committed for trial on all charges against them, based on the evidence of the [R.] children.

[28] The Klassen-Kvello preliminary inquiry, also prosecuted by Miazga, ran from December 2, 1991 to January 16, 1992. During the proceedings, some charges were stayed by the Crown. The judge declined to commit on some charges. The result was that Peter Klassen and the ten respondents in this case faced only the charges based on the allegations of the [R.] children, with two exceptions that we need not concern ourselves with.

[29] The case against the respondents [S.K. 1] and [S.K. 2] never proceeded. All charges were stayed by the Crown by February of 1992.

[30] The trial of the [R.] parents and D.W. was conducted by Miazga and ran from October 29, 1992 to December 18, 1992. All three accused were convicted on some of the charges. The parents were each sentenced to six years imprisonment and D.W. was sentenced to three years. The trial judge, in her reasons for judgment made a plea that the children not be put through yet another criminal proceeding.

[31] With respect to the remaining Klassen-Kvello accused, a plea bargain was entered into. Peter Klassen pleaded guilty to four charges, one charge respecting each [R.] child, and one against another child on February 2, 1993 and was sentenced on February 28, 1993 to four years imprisonment. All other charges against him were stayed. The charges against the rest of the members of the Klassen-Kvello family were stayed on February 10, 1993.

[32] The [R.] parents and D.W. brought an appeal against their convictions to this Court. The appeal was dismissed on May 10, 1995 [(1995), 98 C.C.C. (3d) 353]. On a further appeal to the Supreme Court of Canada, the convictions were set aside [[1996] 2 S.C.R. 291]. The case against D.W. was dismissed, and a new trial was ordered with respect to the [R.] parents. The Crown elected to proceed no further.

[33] The respondents commenced their action for malicious prosecution in 1994. The trial ran from September 8, 2003 to November 13, 2003, some ten years after the conclusion of the events that gave rise to the action. Each of the [R.] children gave evidence at the trial recanting their allegations and the evidence previously given against these respondents.

[34] The judge found Dueck, Bunko-Ruys, and Miazga liable to the respondents for malicious prosecution. Bunko-Ruys and Miazga have appealed to this Court. Dueck has not appealed.

[35] The reasons for judgment [(2003), 234 D.L.R. (4th) 612] consist of 189 pages and incorporate by reference the reasons for judgment [(2003), 234

D.L.R. (4th) 578] in an application for non-suit at the close of the plaintiffs' case consisting of an additional 43 pages.

THE BUNKO-RUYS APPEAL

[36] One of the elements of the tort of malicious prosecution is that the proceedings must have been initiated by the defendant: *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at p. 193. Bunko-Ruys says that the trial judge erred both in fact and in law in finding that this element of the offence had been established against her.

Did the trial judge err, when considering whether Bunko-Ruys initiated the action, in considering evidence of her conduct subsequent to the date of the laying of the charges?

[37] Since Bunko-Ruys is neither a police officer nor a prosecuting lawyer, she must be sued in her capacity as an ordinary private citizen. Professor Klar, in his text *Tort Law*, 3d. ed. (Toronto: Carswell, 2003) at p. 65 says this:

Private citizens also may be sued if they are responsible for having initiated the proceedings.... The proceedings must have been initiated, i.e., set in motion, by the defendant. The test is whether "the informant had done all he could do to launch criminal proceedings against the accused."

[38] The test referred to is derived from *Casey v. Automobiles Renault Canada Ltd.* [1965] S.C.R. 607 at p. 613. In that case, an information was sworn and filed with a Magistrate who had jurisdiction, but was withdrawn at the request of the complainant before any action was taken. In issue was whether a prosecution had been initiated in law when no steps other than the

swearing and filing of the information had taken place. Martland J.A., writing for the majority, upheld a judgment for malicious prosecution.

[39] Bunko-Ruys cited this decision for the proposition, a valid one, that a prosecution was initiated when the information was sworn and filed. Accordingly, the only evidence relevant to the issue of whether this appellant initiated the prosecution is that respecting what she did on or before July 6, 1991. She says that the trial judge erred in taking into account what she did subsequent to that date. Paragraphs 341 to 348 of the reasons for judgment make it clear that that is what the trial judge deliberately did. In these paragraphs he reviewed the role of Bunko-Ruys during the actual prosecution of the case to support his determination that she was a part of the “team” that investigated and prosecuted the case, thus making her somehow responsible for both the initiation of the proceedings and also the prosecution of them. He was wrong in law so doing. While the evidence may have been relevant to other issues, such as malice, it had no relevance to the issue of whether she had initiated the proceedings.

Did the trial judge err in finding, as a fact, that but for the involvement of Bunko-Ruys, the charges would not have been laid or prosecuted?

[40] The findings of fact respecting the role of Bunko-Ruys in the proceedings against the respondents are difficult to summarize as they are often vague and are scattered throughout the reasons for judgment: paragraphs 63, 96, 99, 101, 210, 211, 231 to 235, 253 to 256, 272, and 334 to 348.

[41] However, the following paragraphs of the reasons for judgment give a good idea of the basis upon which he found Bunko-Ruys to have initiated the proceedings, and to be liable for malicious prosecution:

[234] In this particular case, Bunko-Ruys became far more involved in its investigation and prosecution than would most therapists in the normal course of events. Had she remained within the confines of her office and carried out her duties as a therapist and a therapist only, her "role" would have remained that of a therapist and her obligations would be confined primarily to the children who were being treated by her. But she left the confines of her office and not only became integrally involved in the police investigation in gathering and recording evidence on which to found charges, but also became integrally involved in the prosecution of those charges. She met regularly with the prosecutors, provided advice to them, attempted to assist them to find expert witnesses, appeared in every court proceeding as an expert witness for the Crown, testified in every court proceeding on behalf of the Crown respecting the children.

[235] By conducting herself in this fashion, Bunko-Ruys expanded her "role" far beyond that of a therapist. In doing so, her professional obligations expanded accordingly and became much more onerous and significant than those associated with the role of a therapist. Another way of putting it is that Bunko-Ruys voluntarily became part of the team that investigated and prosecuted the plaintiffs. She cannot avoid civil liability on the basis that she is a therapist any more than a driver who negligently injures someone can avoid liability on the basis that he is a police officer. Her involvement or "role" in this case is characterized and determined on the basis of what she in fact did throughout. It is not governed by the occupational title or the name of the role that she ascribes to herself. For the reasons I have outlined, Bunko-Ruys cannot rely on the Protocol to exclude her from liability.

...

[345] The professional status, experience and expertise attributed to Bunko-Ruys, and her prominence as a primary witness in each of the three criminal proceedings, lent credibility not only to the children's allegations, but also to Dueck's investigation, the prosecution conducted by Miazga and Hansen and the court testimony of the children. I am satisfied that but for the involvement of Bunko-Ruys, the plaintiffs would never have been charged and even if charges had been laid, the prosecutors would never have proceeded with the court hearings. I conclude that Bunko-Ruys was instrumental in initiating and maintaining the criminal proceedings against the plaintiffs.

[42] Insofar as his determination that but for the involvement of Bunko-Ruys the charges would not have been laid, and even if laid, the prosecutors would

never have proceeded, is a finding of fact, the trial judge made a palpable and overriding error, as that determination is simply not supported by the evidence, and, indeed, is contrary to the sworn evidence of all those with personal knowledge of the investigation and prosecution, as well as the documentary evidence.

[43] Before embarking on a detailed examination of the evidence in this respect, some undisputed facts should be outlined. Bunko-Ruys was retained by the Department of Social Services to provide therapy to the children. The original allegations of sexual abuse were made, over a lengthy period of time, to the Thompsons, not to Bunko-Ruys. The matter was put into the hands of the police by the Department of Social Services, not Bunko-Ruys. The informations launching the proceedings were sworn and filed by Dueck on behalf of the police, not by Bunko-Ruys. When Bunko-Ruys gave evidence on behalf of the Crown at various proceedings, she did so under subpoena, and after being found by the respective courts to be an expert witness.

[44] During the period up to July 6, 1991, the date on which the charges were sworn against the respondents, Bunko-Ruys prepared five reports to the Department of Social Services respecting her work with the [R.] children. They were introduced into evidence by the respondents and are a part of Exhibit P-68 and are found at pp. A001495 to A001529 of the Appeal Book. The reports disclose that her purpose was to provide therapy to the children; that the purpose of her involvement did not change after the children began disclosing sexual abuse; that she considered it her responsibility to cooperate with other persons and agencies involved with the care of the children

including the foster parents, the schools, Social Services, as well as the police.

While the reports said that the children disclosed sexual abuse, they did not refer to the respondents nor draw any conclusions as to what happened to the children. Respecting the videotaped interviews, the report mentioned that they took place, but did not discuss them and said that Dueck will prepare a report respecting them.

[45] Bunko-Ruys herself did not give evidence at the trial. However, the respondents read in and adopted as their evidence many of the answers given by her when examined for discovery by the respondents. This evidence was consistent with her reports. Some excerpts are as follows, from Bunko-Ruys' examination for discovery by Mr. Borden:

Q117 Now, the question I have for you is what was your role in relation to those interviews?

A My role was to support the kids through that process.

Q128 Now how were you supporting the children by asking questions?

A In terms of, I guess, providing opportunities for them to share their perceptions.

Q159 Did you have any other role during those interviews?

A No.

Q512 Were you the one that went to the police and said [M.R.1]'s disclosing all this sexual abuse?

A No.

Q513 You weren't the person, were you?

A No

Q514 You didn't get this thing started regarding the Klassens and Kvellos?

A No.

Q515 But sooner or later you heard that other people had been given that kind of information?

A Yes.

Q516 That was their job; that was not your job?

A Yes.

Q403 Was it important that you know very much about these allegations for your job? When you looked at what you had to do, was it important that you knew about all of the suspects and all of the allegations?

A No, not in great detail, no.

Q404 Your role was more child-centred; is that correct?

A Yes.

From Bunko-Ruys' examination for discovery by Richard Klassen:

Q981 And so then you were now told you're going to be there for those as well, and you're going to help Brian Dueck, and you're going to get paid for that. Is that part of you –

A I don't remember being told to help Brian Dueck. I remember being requested to support the kids through that process. That I was clear at the time that my role was not as an investigator.

Q982 Somebody requested you to help them through the process of being – dealing with the investigator, Brian Dueck?

A Yes.

Q983 Who was the person that requested that, in particular?

A I think that decision was made by the case manager and probably would have been discussed. And that I may have said that it was important for the children to have the support and did ask for somebody to do that. That there should be a Social Services worker with the kids, somebody they knew. They were feeling very afraid about the possibility of going and sitting with one male in a room by themselves. I would have advocated that a social worker be with them.

Q768 Had you discussed with Brian Dueck prior to the interviews what the children had disclosed to you?

A I don't recall if I discussed that with him prior or if I did at the time. But what I remember my focus being was supporting the children to let him know what they had shared with me and with others.

Q958 And if they're not disclosing that information directly, you do not interject and have a role to help them recall. This is just a tool to help them express? I need to make this clear, Carol.

A Again, if I was aware of information that they had expressed to me or others, I saw it as my role to assist them in sharing that with Brian Dueck, yes.

[46] Since this evidence was entered by the respondents as a part of their case, and was not contradicted by the rest of the evidence, they should be bound by it: *Ontario Marble Co. Ltd. v. Creative Memorials Ltd.* (1964), 45 D.L.R. (2d) 244 (Sask. C.A.), *Schmelnisky v. Kewley Estate*, (1981), 11 Sask. R. 91 (Sask. Q.B.)

[47] Another area of the evidence that reveals the involvement of Bunko-Ruys in the investigation into the allegations made by the [R.] children and others respecting sexual abuse is the reports prepared for the Department of Social Services by social workers Carol Middleton and Janet Matkowski. The reports are a part of Exhibit D-2 and are found at pp. A002122 to A002142 of the Appeal Book. These reports demonstrate, as Bunko-Ruys argued, that the Department of Social Services, and not Bunko-Ruys, was orchestrating events in terms of advancing the criminal investigation, apprehending the children, and getting the respondents charged and arrested. In particular, Middleton writes, at p. A002123, that after Cpl. Shindel of the police had interviewed [M.R.1], Social Services had Bunko-Ruys re-interview [M.R.1] for the purpose of allowing Middleton “to hear [M.R.1]’s disclosure and then to pursue the investigation and make a report for the Department of Social Services.” This evidence is of some importance in view of some things said by the judge in paras. 335 and 336 of his reasons.

[48] Dueck's evidence at the trial with respect to the role of Bunko-Ruys in the investigation was simple, direct, and consistent throughout his evidence. He said, on examination-in-chief as follows at pp. 2438-2439 of the transcript of evidence:

Q And did you have any discussions with Carol Bunko-Ruys either before or after the interviews concerning the potential of criminal charges being laid or what criminal charges might be laid that might have lead from those interviews?

A I don't believe I did, no.

Q What role did Carol Bunko-Ruys play in any decisions that were made with respect to the institution of criminal charges as a result of the investigation that commenced with the [R.] children?

A None whatsoever. [Transcript pp. 2438-39]

...

Q You get from Carol as much information as you can so that you can try and get that information from the children in the interview?

A I don't believe that that was ever a conscious thing that we did. Carol's position in this whole thing was to be the child – the children's therapist, to work with them in therapy. My job in this thing was to do a criminal investigation. Social Services was child protection, and that's how the – that's how the duties, if you can call them that, or the responsibilities, were divided. So certainly anything that Carol might tell me, but Carol wasn't there eliciting information from the children to pass on to me. That wasn't her job.

Q Well, my question is, did she?

A Pardon me?

Q Did she pass on information that was elicited from the children?

A I already said, yes, she did. There were times when she gave me information.

Q All right. And that information is contained where?

A I don't know if it's contained anywhere.

Q Did you pass on information to Carol Bunko-Ruys regarding your investigation and how it was proceeding and what was going on with it?

A I believe I probably did, yes.

Q So you shared information with her as well?

A Well, I think I would have, yes.

Q Would you have shared, say, your occurrence reports with Carol Bunko-Ruys?

A I'm not sure I ever shared occurrence reports with her. By the time that I left my first report basically our dealings were – other than stopping in to see the kids, our dealings were done.

Q Did you – you had taken the interviews with the children with Carol Bunko-Ruys present. Did you give a copy of the interviews to Carol Bunko-Ruys, for example?

A Of the tape?

Q Yes.

A No, I don't believe I ever did.

Q Would that be something you would normally do or something that you would not usually do?

A I wouldn't normally do that, no.

Q Okay. And your occurrence reports are based on the videotapes and are drawn up as a result of the videotapes and Carol really didn't have anything to do with this prosecution, is your – she was a therapist; correct?

A Well, that's my opinion, yes. [Transcript pp. 2621-23]

[49] Thereafter, according to Dueck, Bunko-Ruys had practically nothing to do with the investigation. She had no part in his analysis of the information obtained by him during the interviews of all of the children involved in order to determine what charges should be laid and against whom charges should be laid. In summarizing the documents available to him (transcript pp. 2475-2480), he had available some Social Services reports, medical reports, the Thompson's notes of the children's disclosures, the videotapes of the interviews with the children, but no documents from Bunko-Ruys. She had no part in the communications or meetings Dueck had with the prosecutors Hinz and Miazga prior to the charges being laid; in interviews of the respondents by the police; in the preparation and swearing of the informations; in the arrests of the respondents by the police and the

apprehension of their children or children in their care by the Department of Social Services; or the interviews of the natural children of the respondents who were interviewed at the time of the arrests.

[50] Prior to the date the charges were laid, July 6, 1991, Miazga was able to recall not much more than the following with respect to the involvement of Bunko-Ruys in the investigation (transcript pp. 3258-3260):

A I didn't say I went to see her.

Q Or spoke –

A We had a conversation. And quite frankly, my best recollection of that is that I may well have run into her in connection with something else, one of these meetings perhaps that we both were on the same organization and I might have mentioned something along the lines of, oh, I see you were involved with these children and you know, the conversation was more of an informal one. I don't recall going to see her at that point, certainly later on there would have been more formal structured meetings with her, but early on I think it was more of a casual encounter or I – I just made some comments. And it may have been by phone, it may have been in person, I can't tell you which, but I do recall having some kind of conversation with her reasonably early on in the process.

[51] As to the role of Bunko-Ruys in the decisions to lay charges and to prosecute, he said as follows (transcript pp. 3117-3118):

Q . . . Did Ms. Bunko-Ruys at any time during your handling of the Klassen and Kvello prosecution make any suggestion to you, give any advice to you, give any direction to you as to what charges ought to be laid?

A No.

. . .

Q Using the same time frame, again the whole of the time that you were handling the prosecution of the Klassen and Kvello matter, did Ms. Bunko-Ruys indicate to you in any way her opinion or conclusions as to who had been the perpetrator of any particular abuse or assault?

A I'm just trying to think. I certainly had opinion evidence given to me that normally for children to be as damaged as these are, experts would suggest that the assaults usually happened by somebody close to the children, in terms of a parent

or a guardian or somebody of that sort, but in terms of identifying a specific person, no, but she may well have suggested to me a general category of persons.

[52] The only other evidence respecting the role of Bunko-Ruys up to July 6, 1991, is the videotapes of the interviews of the [R.] children. If, as the judge said in para. 340 of his reasons, the decision to lay charges had already been made, it is, as Bunko-Ruys argued, difficult to see how the videotapes were relevant to the issue of whether Bunko-Ruys can be said to have initiated the charges. On the other hand, at para. 112, the judge called the interviews critical to the case as they constituted the entire investigation. Whatever the judge intended, the videotapes show nothing more and nothing less than that Bunko-Ruys was present at the interviews, that Dueck led the questioning and that Bunko-Ruys provided some follow-up questioning.

[53] In analyzing the foregoing evidence, which is essentially all of the evidence bearing upon Bunko-Ruys' role in initiation of the proceedings, one must begin with the judge's assessment of the credibility of the witnesses involved. He made it clear throughout the judgment that he did not believe much of what Bunko-Ruys, Dueck and Miazga said in evidence. Respecting the evidence of Dueck and Miazga that Bunko-Ruys had no role in laying the charges or prosecuting them, he simply dismissed it on the basis that "the facts and their conduct belie these bald statements" (para. 334). Respecting the evidence of Bunko-Ruys, he found "some" of her evidence to be not credible, but says "In fairness to her, she likely confuses fantasy with reality" (para. 346). Yet the evidence of these three witnesses is the only direct evidence of Bunko-Ruys' involvement in the initiation of proceedings. Their version of events is the only version of events – there is no other, and it is supported by

the contemporaneous documents, most of which were prepared by the same three persons.

[54] The judge, in para. 335 insinuates, without saying directly, that it was Bunko-Ruys who was behind the children beginning to make disclosures of sexual abuse to the Thompsons. Although he seems to base this on something Bunko-Ruys said during the criminal trial of the [R.] parents and D.W., there is simply no evidence in any of the proceedings to support such a conclusion.

[55] In paragraphs 335 and 336, the judge says that Bunko-Ruys “in reality replaced police officer Schindel as the investigator of [M.R.1]’s allegation of abuse” when the Department of Social Services had her re-interview [M.R.1]. This conclusion is not supported by the evidence. As noted above, the Social Services report prepared by Carol Middleton showed that the re-interview was arranged by the Department of Social Services for Middleton to hear what [M.R.1] had to say and to report to the Department. There was no evidence that Bunko-Ruys even knew of the Schindel interview. Nor was there any evidence that Bunko-Ruys contacted Dueck after the interview. The evidence was that Social Services, not Bunko-Ruys, contacted Dueck. (Transcript pp. 2402-2403 and 2875-2876.)

[56] At paras. 337, 338 and 340, the judge notes that some four months passed between the date when Dueck first met with the children and the date when he began the formal videotaped interviews of them. He also notes that Dueck gave evidence that the delay was to allow Bunko-Ruys to get them ready emotionally for the interviews. The judge did not accept this evidence

but inferred that it was for the purpose of allowing Bunko-Ruys to get more disclosures. The use by the trial judge of quotation marks around the words “disclosure” and “ready” insinuates that Bunko-Ruys was doing something quite improper. There is no direct evidence of this whatsoever, and the facts do not support the inferences drawn.

[57] One of Bunko-Ruys’ reports, referred to above, says, at p. A001500 of the Appeal Book, as follows:

PERIOD OF CONTACT: Note that contact with the [R.] children was very minimal over the summer months. Thus, this update will focus on involvement from September, 1990 to present.

This evidence was put in by the respondents and indicates that Bunko-Ruys had little contact with the children over that period of time. As to Dueck, his evidence was that he saw Bunko-Ruys and the children seldom over the period in question (transcript pp. 2829-30), that he always took holidays or annual leave in August or September (transcript p. 2887), and that the soft room in which the interviews take place was not always easily available (transcript pp. 2890-91).

[58] The foregoing summarizes the evidence bearing upon the participation of Bunko-Ruys in the investigation of the alleged offences against the [R.] children up to July 6, 1991, the date upon which the charges were laid. The evidence does not support the finding of fact made by the trial judge that but for the involvement of Bunko-Ruys in the investigation, the charges would not have been laid or prosecuted. The evidence is quite to the contrary. The only evidence before the court was that Dueck, with the advice of Miazga, made the

decision to lay the charges without any input from Bunko-Ruys. The trial judge made a palpable and overriding error of fact. The judgment against Bunko-Ruys must be set aside on the ground that it has not been established, as a matter of fact, that she initiated the charges as required by *Nelles*.

Did the trial judge err in law in finding Bunko-Ruys liable for initiating the prosecution when the police had available all of the information available to her, and were in a position to exercise an independent discretion as to whether charges should be laid?

[59] But if we are wrong in our conclusion, and the findings of fact made by the trial judge were correct, that is not sufficient in law to make Bunko-Ruys liable for initiation of the proceedings, since the police had available all of the information available to Bunko-Ruys and were able to exercise an independent discretion as to whether charges should be laid, what charges should be laid, and against whom charges should be laid.

[60] The trial judge failed to take into account and to apply the judgment of the House of Lords in *Martin v. Watson*, [1995] 3 All E.R. 559. That case involved neighbours, one of whom reported to the police that the other had exposed himself to her. The police, acting upon the report charged the neighbour. The prosecution was dismissed when the Crown offered no evidence. In the House of Lords, Lord Keith of Kinkel carefully reviewed reported decisions throughout the Commonwealth, including Canada. He concluded as follows, at pp. 567-568:

Where the circumstances are such that the facts relating to the alleged offence can be within the knowledge only of the complainant, as was the position here, then it becomes virtually impossible for the police officer to exercise any independent discretion or judgment, and if a prosecution is instituted by the police officer the

proper view of the matter is that the prosecution has been procured by the complainant.

[61] *Clerk & Lindsell on Torts*, 18th ed. (London: Sweet & Maxwell, 2000) at 16-11 summarizes this to mean:

The judgment clearly establishes that the claimant must demonstrate that the defendant acted in such a manner as to be responsible **directly** for the initiation of proceedings. The responsibility for initiating the prosecution must be his, not the result of a truly independent judgment to prosecute on the part of the police, or some other third party. [Emphasis added]

[62] *Clerk & Lindsell* elaborates at 16-12. A person who gives information to the police on the basis of which the police decide to prosecute will not be liable for malicious prosecution unless:

- (1) The defendant falsely and maliciously gave information about an alleged crime to a police officer stating a willingness to testify against the claimant and in such a manner as makes it proper to infer that the defendant desired and intended that a prosecution be brought against the claimant.
- (2) The circumstances are such that the facts relating to the alleged crime are exclusively within the knowledge of the defendant so that it is virtually impossible for the police officer to exercise any independent discretion or judgment on the matter.
- (3) The conduct of the defendant must be shown to be such that he makes it virtually inevitable that a prosecution will result from the complaint. His conduct is of a nature that "... if a prosecution is instituted by the police officer the proper view of the matter is that the prosecution has been procured by the complainant". [*Martin v. Watson*, [1996] A.C. 74 (H.L.) at 86-87]

[63] *Martin v. Watson* has been followed and applied in Canada: *Wood v. Kennedy* (1998), 165 D.L.R. (4th) 542 (Ont. Gen. Div.) and *Small v Newfoundland* (2003), 227 Nfld. & P.E.I.R. 1 (S.C.T.D.).

[64] Bunko-Ruys does not fall within the test set by *Martin v. Watson*. Although she certainly co-operated with the police and participated in the questioning of the children by Brian Dueck, that constituted no wrong, actionable or otherwise. Nothing in the evidence indicates any participation by her in the decision to lay charges. It was Dueck's legal responsibility to make that decision, not that of Bunko-Ruys. But most importantly, the police had available to them all the information available to Bunko-Ruys and were in a position to make an independent judgment as to laying charges without reliance on Bunko-Ruys. And the only evidence available respecting the matter indicates that Dueck did exercise that discretion independently of Bunko-Ruys.

[65] Accordingly, the judge erred in finding that, in law, Bunko-Ruys, initiated the prosecution.

Conclusion Respecting Bunko-Ruys Appeal

[66] For all of the foregoing reasons, the appeal of Bunko-Ruys is allowed and the judgment against her is set aside. She shall have her costs to be taxed.

THE MIAZGA APPEAL

Lack of Reasonable and Probable Cause

[67] Although the appellant Miazga appealed against the trial judge's finding of lack of reasonable and probable cause, his presentation, both in his factum and counsel's oral argument, concentrated almost exclusively on his appeal against the finding of malice. The presentation respecting lack of reasonable and probable cause was almost perfunctory. The two areas of appeal are

interrelated because the trial judge seemed to rely mainly on the evidence he found to support his finding of lack of reasonable and probable cause to be the evidence which supported his finding of malice.

[68] Because of the length of the reasons for judgment which have findings of fact and conclusions scattered throughout, it is not easy to summarize the judge's conclusions respecting lack of reasonable and probable cause, but a summary is necessary. At para. 138, he identified the credibility of the [R.] children and their allegations as "the most critical issue of the case." The judge clearly believed it should have been evident to anyone, from the outset of the investigation and throughout the prosecution, that the evidence of the [R.] children, because of the bizarre and incredible nature of some of their allegations, and their propensity to lie, was not sufficiently credible or reliable to support the laying of charges or the prosecution of them. This was reinforced by the lack of any corroborative evidence implicating the respondents in a material particular, as well as what the judge termed exculpatory evidence, such as the denials of guilt by all of the respondents when questioned.

[69] The judge said, at para. 366:

. . . In general terms, the charges were brought solely on the allegations of the three dysfunctional [R.] children who were known to be untruthful and who demonstrated that they were witnesses who lacked credibility. . . . Nor was any independent physical evidence found by the police "investigation" that should have been available to support some of the bizarre allegations that the children made if the allegations of the children were substantially true.

[70] He also said, at para. 368:

Not only was there no corroboration or independent support of the allegations made by the [R.] children, the nature of their allegations alone was so unbelievable as to be patently absurd.

[71] Miazga argues that the judge erred in law in requiring corroboration. But that is a misconstruction of what the judge said. The judge did not say anywhere in his judgment that corroboration of a child's evidence was required before there could be a conviction on the basis of that evidence alone. What he said was that in view of the incredible nature of some of the children's allegations and their "known untruthfulness", their evidence was so unreliable that it was unreasonable to proceed without corroboration. The evidence of Mr. Hinz dealt with this aspect of the case. He said, in effect, that the more outlandish the allegations, the greater the need for corroboration if a court was to be expected to accept them as true, and that is what he advised Dueck. The judge made no error of law in that respect.

[72] The only other argument advanced in respect of lack of reasonable and probable cause was that Miazga, as a prosecutor, had no responsibility to investigate the alleged offences. But that has nothing to do with the issue.

[73] The test for reasonable and probable cause was set out by Lamer J., as he then was, in *Nelles*, at p. 193:

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" (*Hicks v. Faulkner* (1878), 8 Q.B.D. 167, at p. 171, Hawkins J.)

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.

[74] The trial judge found that Miazga, subjectively, did not have an honest belief in the guilt of the accused, and that, objectively, reasonable and probable grounds did not exist. Miazga did not address these findings in the context of reasonable and probable cause, but only in the context of malice. We find it convenient to also deal with the issues of reasonable and probable cause and malice in the same way, and to deal with the issue of malice as if lack of reasonable and probable cause was proven.

MALICE

[75] As to malice, the trial judge said in paras. 365 and 381 of his reasons for judgment, that the lack of reasonable and probable cause *per se* gave rise to a presumption of malice and that, in the circumstances of this case, lack of reasonable and probable cause constituted a strong presumption of malice.

[76] He went on to say that even if he were wrong in that conclusion, the lack of reasonable and probable cause was an “indicator of malice” and that it, along with other such “indicators of malice” that he had noted in various parts of his judgment, established malice on the part of Miazga.

[77] Miazga says that in doing so he made two distinct sets of errors.

[78] The first is that he erred in law in “diluting” the onerous and strict burden placed on a plaintiff to prove malice in a case of malicious prosecution

against a Crown counsel by the law as stated by the Supreme Court of Canada in *Nelles v. Ontario* and *Proulx v. Quebec*, [2001] 3 S.C.R. 9. In this respect, he was supported by the intervenor, Canadian Association of Crown Counsel, which took the position that the judge not only diluted the test for malice, but applied the wrong test.

[79] The second set of errors concerns the “indicators of malice” found by the trial judge. Miazga said that some indicators concerned areas of the case, such as the police investigation and the laying of the charges, which were the legal responsibility of the police and not the prosecutor. Accordingly, Miazga said, the judge erred in charging these things to him. Others were not supported by the evidence. Still others indicated, at most, negligence or recklessness rather than malice.

The Test for Malice

[80] The test for malicious prosecution is set out in *Nelles v. Ontario* at p. 193:

- a) the proceedings must have been initiated by the defendant;
- b) the proceedings must have terminated in favour of the plaintiff;
- c) the absence of reasonable and probable cause;
- d) malice, or a primary purpose other than that of carrying the law into effect.

Nelles at p. 193 also provides the most concise definition of malice, being an “an improper purpose”:

The required element of malice is for all intents, the equivalent of "improper purpose". It has according to Fleming, a "wider meaning than spite, ill-will or a spirit of vengeance, and includes any other improper purpose, such as to gain a private collateral advantage" (J.G. Fleming, *The Law of Torts*, 5th ed. (Sydney: Law Book Co., 1977) at p. 609).

[81] The test was developed by the common law during the 19th century when the Crown and its agents were immune from liability in tort unless an action was authorized by the Crown. See *The Queen v. Comptroller-General of Patents, Designs, and Trade Marks*, [1899] 1 Q.B. 909. All reported judgments involved actions against private parties, for example *Hicks v. Faulkner* (1878), 8 Q.B.D. 167 (Div. Ct.) and *Abrath v. North Eastern Railway Co.* (1886), 11 App. Cas. 247 (H.L.).

[82] In many of the cases involving private parties, the relationship or “history” of the parties suggested an improper motive. For example, in *Jewhurst v. United Cigar Stores* (1919), 49 D.L.R. 649 (Ont.C.A.) a prosecution was used to collect a debt; in *Gabler v. Cymbaliski* (1922), 15 Sask. L.R. 457 (K.B.), to take physical possession of an office. In other cases, the court inferred malice from the circumstances such as, in *Kinloch v. Tarasoff* (1984), 33 Sask. R. 66 (Q.B.) lodging a complaint only after a delay of two months and being barred from certain premises. In this kind of context, the Supreme Court of Canada in *Montreal (City) v. Hall* (1885), 12 S.C.R. 74 said, at p. 108: “Malice may be, and frequently is, implied from the absence of probable cause.”

[83] It is these judgments that led the trial judge in this case to find, in paras. 365 and 381 of his reasons, that the lack of reasonable and probable cause alone, in the circumstances of this case, constituted a “strong presumption of malice” upon which he acted to find that Miazga was actuated by malice in proceeding with the prosecutions.

[84] The intervenor, Canadian Association of Crown Counsel, argued that the trial judge erred in law in taking the approach that malice could be inferred from lack of reasonable and probable cause alone. It says that when the defendant in an action for malicious prosecution is a Crown counsel a different test for malice is required since the recent extension of the tort to Crown counsel was made for reasons of public policy different from those that governed the development of the tort in respect of private citizens.

[85] In Canada, it became possible to sue the Crown and its agents as of right in the 1950's. In Saskatchewan, the right came from *The Proceedings Against the Crown Act, 1952*, S.S. 1952, c. 35. Two lines of authority developed. One said that at common law Crown counsel should still be immune from civil action while performing their duties as prosecutors. The other recognized a limited cause of action for malicious prosecution. The judgments are reviewed by the Supreme Court in *Nelles*, which settled the matter by extending the tort to Crown counsel.

[86] In *Nelles*, Lamer J. said at p. 199, that the question of prosecutorial immunity boils down to a question of policy, and that the policy considerations in favour of absolute immunity had some merit. The policy considerations were stated at p. 178-9 to be as follows:

First, the rule encourages public trust in the fairness and impartiality of those who act and exercise discretion in the bringing and conducting of criminal prosecution; the rule is designed for the benefit of the public not the benefit of the individual prosecutor. Second, the threat of personal liability for tortious conduct would have a chilling effect on the prosecutor's exercise of discretion and third, to permit civil suits against prosecutors would invite a flood of litigation which would deflect a prosecutor's energies from the discharge of his public duties. In short, the absence of an absolute immunity would open the door to unmeritorious claims and would be a threat to prosecutorial independence.

[87] In concluding that these policy reasons favouring immunity had to give way to the right of a private citizen to a remedy when maliciously prosecuted, Lamer J. said at p. 199 that the inherent difficulty in proving a case of malicious prosecution combined with the mechanisms in the system of civil procedure to weed out meritless claims was sufficient to ensure that Crown prosecutors would not be hindered in the proper execution of their important public duties.

[88] The difficulties he referred to were that the burden on the plaintiff is onerous and strict (p. 197); that a plaintiff must prove misuse and abuse of the criminal process (p. 196); or malice in the form of a deliberate and improper use of the office of Crown Attorney (p. 193); or a perversion or abuse of the office and the criminal process (p. 194). Furthermore, Lamer J. was careful to say, at pp. 196-97, that the court was not dealing “with merely second-guessing a Crown Attorney’s judgment in the prosecution of a case but rather with the deliberate and malicious use of the office for ends that are improper and inconsistent with the traditional prosecutorial function.”

[89] The intervenor argues that these considerations, being significantly different from those giving rise to the liability of private citizens require a different test for malice than that in the cases that went before. In view of the prominent place improper motive is given in the definition of malice in *Nelles*, the lack of reasonable and probable cause alone should not give rise to an inference of malice sufficient to support a finding of liability in the case of Crown prosecutors because they usually do not have any personal relationship

or “history” with the person bringing the action. To permit malice to be found on the basis of lack of reasonable and probable cause alone would, in effect, collapse the last two parts of the four part test for liability, and would allow findings of malicious prosecution where the Crown prosecutor was merely negligent or reckless.

[90] The third part of the test in *Nelles*, lack of reasonable and probable cause, is an objective test. The fourth part of the test, malice, is subjective in that it involves the motive or purpose of the Crown counsel in prosecuting the proceeding. If lack of reasonable and probable cause may be sufficient to find malice, this would, in effect, remove the requirement of improper motive or purpose and adopt a negligence or recklessness standard rather than an improper motive standard for proving fault.

[91] Accordingly, the Canadian Association of Crown Counsel argues, the only way to give effect to the policies outlined in *Nelles* is to require a plaintiff to first identify the improper purpose or motive Crown counsel is alleged to have had, and then to provide evidence beyond the absence of cause that justifies drawing an inference of malice.

[92] The test proposed by the Canadian Association of Crown Counsel is not inconsistent with the reasoning in the judgment of the Supreme Court in *Proulx v. Quebec (Attorney General)*, *supra*. In that case the defendant Crown counsel had decided in 1986 that he did not have sufficient evidence to prosecute the plaintiff for murder. Five years later, in the midst of a defamation claim made by the plaintiff against a radio station and a retired

police investigator who had worked on the case against him, the Crown counsel was advised by the defamation defendants of a potential new identification witness. The prosecutor added the police investigator to the prosecution team, re-opened the file, and obtained a conviction. The conviction was reversed on appeal with the appeal court strongly criticizing the lack of credible evidence. In the subsequent action for malicious prosecution, the Crown counsel admitted that the new identification witness did not make a positive identification.

[93] Iacobucci and Binnie JJ., writing for the majority, reaffirmed the judgment in *Nelles* respecting the “very high” threshold for liability, the need to show “exceptional circumstances” and the need to prove use of the office for improper purposes (para. 4).

[94] Respecting malice, they also noted, quoting *Nelles*, that proof of gross negligence or recklessness is not enough to establish malice. It is necessary to show a “willful and intentional effort on the Crown’s part to abuse or distort its proper role within the criminal justice system” (para. 35).

[95] While the court did consider lack of reasonable and probable cause as one factor to be considered in determining whether there was malice, it explicitly declined to act on lack of reasonable and probable cause alone. It said at para. 37:

In the case at bar, various significant factors stand out as indicators of an improper purpose underlying the Crown's decision to initiate proceedings against the appellant. In discussing these factors, we do not wish to emphasize the importance of one over another. In the final analysis, it is the totality of all the circumstances that are to be considered in cases of this kind.

[96] The court then went on to find that Crown counsel had allowed his office to be used as leverage in the civil action brought by the police investigator, and had, in effect, made misleading statements in his address to the jury. The court made it clear that it relied on far more than the lack of reasonable and probable cause alone.

[97] There is a good deal of merit to the argument for a test requiring some proof of malice in addition to and independent of the lack of reasonable and probable cause. However, as will be seen from our conclusion in this case, the test cannot be reduced to such a rigid formula. As stated in *Proulx*, at para. 37, in determining an issue of malice, “it is the totality of all the circumstances that are to be considered in cases of this kind.”

The Indicators of Malice other than Reasonable and Probable Cause

[98] The first group of indicators of malice concern what Miazga did in respect of advising Dueck prior to the date on which the charges were laid. Miazga takes the position that the judge erred in taking into account any of these matters since, in Saskatchewan, responsibility for the investigation of an offence and for any decision as to whether and what charges should be laid is that of the police and not of the Crown prosecutor.

[99] It will be recalled that Dueck provided Miazga with his file and asked his opinion as to whether he should lay charges. Miazga read the file and told Dueck that if he believed the children, he should lay charges.

[100] In para. 286 of his reasons, the trial judge severely criticized Miazga for failing to interview the children or to view the videotapes of their interviews before the charges were laid. At para. 141, he called the failure to interview the children before giving advice to Dueck, a strong indicator of malice.

[101] At para. 390, the trial judge found that Dueck and Miazga were not even-handed in their “zeal to charge and prosecute all the alleged perpetrators” since all of the persons identified by the children as abusers were not charged and that this was an indicator of malice.

[102] At para. 294, the judge again criticized Miazga for failure to adequately investigate or assess the case.

[103] There is more in the same vein in paras. 287 and 384.

[104] In support of his argument that the judge erred in taking any of these pre-charge matters into account, Miazga cites the judgment of the Supreme Court in *R. v. Regan*, [2002] 1 S.C.R. 297. In that case, the police sought the advice of the Director of Public Prosecutions as to the laying of appropriate charges. The Director made recommendations with which the police did not agree. They continued to investigate and ultimately laid charges other than those recommended.

[105] The court, at para. 66, quoted with approval this passage from p. 232 of the *Royal Commission on the Donald Marshall, Jr., Prosecution* (1989) (the “Marshall Report”):

We recognize that cooperative and effective consultation between the police and the Crown is also essential to the proper administration of justice. But under our system, the policing function -- that of investigation and law enforcement -- is distinct from the prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice.

[106] In the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions*, 1993, (the "Martin Report") this was said at pp. 37-38:

As a matter of law, police officers exercise their discretion in conducting investigations and laying charges entirely independently of Crown counsel. The police seek the advice of the Crown only where they think it appropriate. And while it is no doubt prudent to do so in many cases, the police are not bound to follow the advice of Crown counsel, as that advice relates to the conduct of the investigation and the laying of charges. [footnote omitted]

[107] The Martin Report also relied upon this observation made by a former Solicitor General for Canada, at p. 38:

It seems to me that to vest the authority for the investigative functions of the government in the same person who is going to conduct the criminal process is foreign to the spirit of justice. [H.C. Debates, Vo. V, at p. 5524, May 25, 1966]

[108] Further, in *The Discretion to Prosecute Inquiry*, British Columbia, 1990 (the "Owen Report") the Commissioner canvassed all jurisdictions in the country to determine the prevailing practice and concluded, at p. 19:

The only Canadian jurisdictions in which Crown Counsel makes the decision whether a charge will be laid are British Columbia, Quebec, and New Brunswick. In all other provinces and territories the police lay the Information, after which the Crown decides whether it will proceed with the prosecution.

[109] The Owen Report reiterated this at p. 29:

In all Canadian jurisdictions other than British Columbia, Quebec and New Brunswick, the police decide whether an Information will be sworn, . . .

[110] These authorities reflect the practice in Saskatchewan. Miazga gave evidence to that effect.

[111] In answer to questions in cross-examination, Miazga said, at pp. 3224-25 of the transcript of evidence:

You have to understand, and maybe I think people sometimes don't understand this, in Canada we don't tell the police what to do. They conduct their investigations, we prosecute cases. We're not sort of – we don't go in like perhaps you might see on television, where the DA is involved with their own office investigators and that sort of thing, we don't have that. The police would conduct their investigation as they see fit with any suggestions they might ask from us, but because I tell an officer to do something, he's under no obligation to do that, I'm not his superior.

[112] He also pointed out at p. 3226 of the transcript of evidence:

My point I'm trying to make and maybe I didn't make it very well is that we do not direct the course of an investigation, the police do investigations and they certainly ask us for help from time to time and we give it to them as they see fit to ask.

[113] See, also the transcript of evidence at pp. 3217, 3393, and 3407-08.

[114] Accordingly, the trial judge erred in law insofar as he attributed malice to Miazga for any failure to properly investigate the matter. The investigation was the responsibility of the police,

[115] As to failure to interview the children before charges were laid, *Regan* makes it clear that pre-charge Crown interviews of witnesses are frowned upon because of the legal separation of investigative duties and prosecutorial duties. However, they are allowed for the purpose of screening out doubtful

charges, and that is the purpose for which the judge in this case suggested they should have been used. Accordingly, it was properly taken into account.

[116] The same may be said of the pre-charge advice given by Miazga. While the police were free to ignore the advice, once Miazga elected to give it and it was acted upon, he can hardly disclaim responsibility for the consequences because the police were not required to act upon it. By electing to give the advice, Miazga assumed responsibility for it.

[117] This does not necessarily detract from Miazga's case, for even if one agrees with the trial judge that Miazga should have interviewed the children and viewed the videotapes before giving advice to Dueck, there remains the question of whether these failures are indicators of malice rather than indicators of bad judgment, negligence, or even recklessness which are not, of course, actionable. The trial judge never really made any distinction except by saying that taking all of the evidence into account, it amounted to malice.

[118] The next group of indicators of malice found by the judge are matters Miazga says are not supported by the evidence.

[119] Six of the respondents resided in Alberta at the time of their arrest. On the day of their arrest, they were remanded in custody for six days. They were then transported to Saskatoon where they spent one night in custody. They were released upon their first appearance in Provincial Court in Saskatoon.

[120] The trial judge, at para. 176, said this:

I have a concern about the lack of evidence on another issue. Dueck, Taylor or Miazga never gave any explanation as to why three couples, who were presumed innocent until proven guilty according to law, were kept locked up for a full week before being released on bail. These three couples were obviously not considered a threat to society nor to their children because no steps had been taken to arrest them or apprehend their children for a year and a half after they were implicated in the so-called abuse "disclosures". None had any criminal record except for Richard Klassen who had a past record of unrelated offences that went back to his youth. Nor was any explanation given for the stringent non-contact provisions imposed on the plaintiffs as a condition of their release from custody. In fairness to Miazga, he did consent to an amendment of the non-contact provisions so that the families could spend Christmas together. But the way they were held in remand and were treated in remand in Saskatoon, are indications of malice.

[121] There was no evidence that Miazga had anything to do with deciding when and how to arrest the respondents, or deciding that they be remanded in custody for six days, or the conditions under which they were held. It was Dueck who went to Alberta to arrange with the Alberta authorities for the arrests.

[122] The only evidence concerning Miazga's role in these matters was his own evidence at pp. 3212 and 3213, where he said he had no personal knowledge of those matters.

[123] Exhibit D-15, the information charging the respondents shows that Miazga's first formal step in the proceedings was to appear when the respondents first appeared in court in Saskatchewan, and that he agreed to the release of each of them without a show cause hearing or further adjournment of the matter.

[124] The evidence does not support any finding that Miazga bore any responsibility for these matters. The judge erred in finding otherwise and attributing malice to him.

[125] At paras. 404 and 405, the judge said this:

One aspect of the evidence of each of the defendants is particularly telling. I read pages of the testimony of Bunko-Ruys in the form of evidence given in each of the court proceedings and in the read-ins of her testimony in her examinations for discovery. In that testimony she went on and on about her concern for the needs and welfare of the children, for the need to support them, for the importance of believing their assertions and for the need to prevent them from being traumatized by the court process. Yet I read not a word by way of an apology to any of the plaintiffs, not a word by way of an expression of any regret or remorse for the part she played in the wrongful charging and prosecution of the plaintiffs and not a word for the disastrous consequences and significant trauma that were suffered by the plaintiffs as a result of her involvement in the case.

I also read pages and heard hours of testimony of Dueck, Miazga and Hansen. The same that I said about Bunko-Ruys applies to each of them. In my respectful view, the lack of any regret or remorse for what was done to the plaintiffs is a strong indicator of malice on the part of each of the defendants, including Hansen.

[126] Miazga complains about this finding because Miazga was never asked by anyone throughout his evidence whether he felt any remorse, and nothing in the record showed whether he felt any remorse. And if the matter of remorse was relevant to the issue of his liability, he should have been given the opportunity to address the matter unless he had prior knowledge that remorse was to be considered: *Browne v. Dunn* (1893), 6 R. 67 (H.L.).

[127] Furthermore, given that there was simply no evidence on the point, it was not open to the judge to infer lack of remorse and thus malice. Put simply, his finding on the point was not supported by any evidence.

[128] The next group of indicators of malice found by the trial judge are with respect to Miazga's conduct of the various criminal proceedings.

[129] At para. 272, the judge found an indicator of malice to be the use of expert witnesses as "oath helpers" when they gave evidence that the children were extremely dysfunctional and sexually abused children who should be expected to have inconsistencies in their perceptions, allegations and testimony. He thus "masked" evidence that would have helped the court in assessing credibility.

[130] At paras. 412 to 416, he found that Miazga improperly sheltered the children throughout the various criminal proceedings by objecting to the defence lawyer for the respondents sitting with a watching brief at the preliminary hearing into the charges against the [R.] parents and D.W.; objecting to the cross-examination of the children on the videotaped interviews and previous statements; and in his questioning of the expert witnesses. It must, however, be observed that all of these things were under the control of the presiding judge, and that the ultimate decisions as to whether Miazga's approach was proper, or whether any evidence should go in or not, were in the hands of the presiding judge, not Miazga. And even if one agrees with the trial judge that Miazga's aggressive approach to the prosecution went far beyond the limits set out in cases such as *R. v. Boucher*, [1955] S.C.R. 16, which contains a widely accepted statement of the duties and obligations of a Crown prosecutor to see that justice is done rather than to be concerned with winning or losing, one is again left with the problem that

such misconduct is equally consistent with bad judgment, negligence or recklessness as opposed to malice.

[131] In summary, the judge erred in taking some of the prosecutor's actions he considered to be indicators of malice into account in deciding the question of malice. Still others were properly taken into account. However, what seems to be missing from the reasons for judgment is any explanation of why the judge considered the actions in question to indicate malice in the sense of some improper purpose, rather than merely indications of simple bad judgment, negligence or recklessness. It seems to us that most of the actions are equivocal in indicating the prosecutor's intentions.

Lack of Reasonable and Probable Cause as Proof of Malice

[132] That brings us to the final indicator of malice relied on by the trial judge: the lack of reasonable and probable cause. 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.

[133] It is best to use the judge's own words:

[357] 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. In any event, what would such a statement mean? Would it mean a belief that each plaintiff was guilty of each count charged respecting each complainant? Or would it mean a belief that each plaintiff was guilty of one of the counts charged

respecting one of the complainants? All the defendants however did say that they "believed the children" whatever that may mean in the circumstances of this case.

[358] All the defendants testified in one forum or another to the effect that the children told them lies and fabricated stories on occasion. All of them said they did not believe everything that the children alleged. Dueck and Miazga said they disbelieved all the ritualistic and satanic abuse allegations of the children. These allegations were a substantial component of the children's "disclosure" allegations and the evidence they gave in court. None of the defendants has ever clarified just what it is that he or she did believe of the various allegations made by the children. The testimony of each of the defendants that "I believed the children" is meaningless when each defendant has testified that he or she has been lied to by the children and does not believe a substantial number of their allegations.

[359] Neither Dueck or Miazga, with few exceptions, was prepared to say with any degree of certainty what he could remember about his state of mind or beliefs about the children's allegations at specific times. In some of those instances in which they did give direct evidence as to what they disbelieved about the children's allegations, I find that evidence to be inconsistent with the circumstantial evidence of those beliefs that can be inferred from the direct evidence of their respective conduct.

...

[362] I am satisfied that none of the defendants believed many of the [R.] children's allegations. As the case against the plaintiffs was based solely on these allegations, it is difficult for me to accept that any of the defendants honestly believed in the guilt of each of the plaintiffs respecting each of the offences charged against them. The evidence overwhelmingly points to the opposite conclusion. Even if each defendant had testified that he or she believed that each of the plaintiffs was guilty of each of the offences charged, I could not have accepted such evidence as truthful in the face of the unique circumstances of this case and the circumstantial evidence of belief.

[363] I am satisfied by all the evidence on this issue that the defendants did not have an honest belief that the plaintiffs had committed the assaults alleged by the [R.] children nor did they have an honest belief that the plaintiffs were guilty of the offences charged against them. In my view, the subjective belief held by each of the defendants was that the children had been sexually abused and that one or more of the 12 plaintiffs who were charged must have done it. I need not comment on what belief the defendants may have had respecting the [R.], [R.] and [W.] allegations because those individuals have not brought a malicious prosecution action and the evidence that pertains to them is quite different than that which pertains to the plaintiffs.

[134] These are pure findings of fact. Whether we agree with them or not, we cannot interfere with such findings of fact in the absence of palpable and overriding error or where there is an absence of any evidence to support the findings. See: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235; *H.L. v. Canada (Attorney-General)*, [2005] 1 S.C.R. 401, and subsequent cases.

[135] We are satisfied, upon a consideration of the whole of the evidence, that the trial judge's finding was a reasonable one. There was evidence to support it, and there was no palpable and overriding error. It is not without significance that Miazga did not attack this finding of fact, or suggest that it was not supported by the evidence. The quotation itself refers to some of the evidence upon which the judge relied. More is referred to in paras. 284 to 297 of his judgment. The finding sets out the trial judge's firm opinion, which permeates the entire judgment, 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 respondents, particularly when the mere laying of charges of this nature are known to have devastating consequences to those charged. And, as the trial judge noted in para. 1 of his reasons for judgment, the media labeled the case as the "Scandal of the Century."

[136] 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.

[137] Miazga led evidence that he was encouraged to proceed by the judge presiding at the preliminary inquiry, and by colleagues and some superiors after discussing his doubts about the children's credibility. However, *Proulx* held, at para. 33, that a prosecutor cannot rely on consultations that he had with his colleagues and superiors, because he obviously knew much more about the case than they did, and, as the holder of an important office under the *Criminal Code*, the decision to proceed with the charges was his and his alone.

[138] As to the circumstances prevailing at that time, as referred to in para. 6 hereof, the trial judge took these into account. He referred to them in para. 419 of his reasons for judgment. Furthermore, he dealt extensively, in paras. 212 to 230 of his reasons with the Saskatoon Sexual Abuse of Children Protocol, a document subscribed to by various agencies including Social Services, the Saskatoon Police Service, and Public Prosecutions. The document contained recommendations respecting investigation of child abuse cases and was designed to overcome past attitudes which viewed the evidence of children to be unreliable.

[139] In summary, we are of the view that the trial judge took all relevant evidence into account, and whether we agree with his decision or not, it was open on the evidence available to him to find, as he did, that Miazga did not

have an honest belief in the guilt of the respondents nor that he could prove each of the charges against each of them beyond a reasonable doubt.

[140] That being so, there were no reasonable and probable grounds to either recommend the laying of charges or to proceed with the prosecution of them.

[141] For a Crown prosecutor to proceed with a prosecution without a belief in the credibility of his complainants, and without a belief in the guilt of the accused amounts to the “willful and intentional effort on the Crown’s part to abuse or distort its proper role within the criminal justice system” as referred to in *Proulx* at para. 35, and takes the case beyond bad judgment, negligence or recklessness and into the realm of malice.

[142] Furthermore, the finding that Miazga did not have an honest belief in the guilt of the respondents casts quite a different light on those indicators of malice referred to above which the trial judge had properly taken into account. The prosecutor’s actions in those cases are tainted by the lack of belief. They can no longer be considered as possibly matters of bad judgment, negligence or recklessness.

[143] For these reasons, the Miazga appeal must be dismissed with costs.

DATED at the City of Regina, in the Province of Saskatchewan, this
30th day of May, A.D. 2007.

“Sherstobitoff J.A.”_____

SHERSTOBITOFF J.A.

I concur

“Lane J.A.”_____

LANE J.A.

VANCISE J.A. (in dissent)**I. Introduction**

[144] I have read the reasons for judgment of my colleague Sherstobitoff J.A. and while I agree with much of what he has written I am unable to find that Matthew Miazga, a Crown prosecutor, should have been held liable for the malicious prosecution of the plaintiffs (respondents). Because I concur with the majority of Sherstobitoff J.A.'s analysis I will attempt to avoid as much repetition as possible but a certain amount of overlap is unavoidable. He has admirably summarized the evidence, no easy task, as well as the background leading up to this litigation.

[145] Some facts are however worth repeating. The allegations of sexual abuse made by the children took place in the late 1980s at a time when there was a certain amount of hysteria surrounding the sexual abuse of children not only in Canada, but in the United States as well.¹ A number of sensational sexual scandals, such as the Martensville sexual abuse cases,² centred in and around Saskatoon. Allegations of abhorrent sexual behaviour, including Satanism, were rampant.

[146] The changes in the *Criminal Code*³ and the *Canada Evidence Act*⁴ removing the need for corroboration of the unsworn evidence of children to

¹ *Alberto Ramos v. City of New York*, 729 N.Y.S. 2d 678; 2001 N.Y. App. Div. LEXIS 8060; *Margaret Kelly Michaels v. State of New Jersey et al.*, 222 F. 3d 118; 2000 U.S. App. LEXIS 12235.

² For example, see: *R. v. Sterling*, (1995), 102 C.C.C. (3d) 481 (C.A.).

³ R.S.C. 1985, c. C-46.

⁴ R.S.C. 1985, c. C-5.

obtain a conviction occurred in January of 1988. A great deal of pressure was placed on the police and law enforcement agencies to protect children from sexual abuse. There was also at that time a prevailing and pervasive doctrine that “children don’t lie - they can’t make these allegations up.” Though we now know this is and was false. A number of psychologists however advanced this as gospel. It was a cottage industry, they cashed in and caused incalculable harm.

[147] It was in this milieu that the sad tale of this case began. The allegations which are at the root of the charges began in the late 1980s. The respondents were finally charged with a number of offences in July of 1991.

[148] In order to better understand the nature of the criminal proceedings which were brought against the respondents, it is necessary to keep in mind the role of the three complainants in this case and in the [R.] and [W.] proceedings. Most of the criminal charges with which we are concerned resulted from the evidence of the three [R.] children: [M.R. 1] a boy, was born on October 18, 1979; his twin sisters [M.R. 2] and [K.R.] were born on March 4, 1982. The trial judge described the children as I have just done in order to protect their identity.

[149] These children were born into a dysfunctional home. The parents were both deaf mutes and alcoholics. The mother was a prostitute who regularly brought her customers home. The three children were neglected and sexually abused. In due course, [M.R. 1] began sexually abusing his two sisters. The children were apprehended by the Department of Social Services in February

of 1987 and were placed in a foster home operated by the respondents, Dale and Anita Klassen.

[150] My colleague, Sherstobitoff J.A. has accurately summarized the involvement of these children with the Department of Social Services, the Klassens and other persons who operated foster homes between 1987 and 1991. Suffice it to say that in September of 1987 after the children had an unsupervised visit with their natural father, Anita Klassen noticed blood on [M.R. 2's] panties. On inquiry, the child said her father put his penis in her bum. This incident was reported to the appropriate authorities and the child was examined by a doctor. A report was prepared but no action was taken.

[151] The Klassens found the children difficult to handle and on December 12, 1989, [M.R. 1] was placed in the foster care of Lyle and Marilyn Thompson. The respondent Bunko-Ruys, a child therapist, was hired by the Department of Social Services in October of 1989 to provide therapy to [M.R. 1]

[152] Not long after his arrival at the Thompson foster home, [M.R. 1] said he was concerned about the safety of his two sisters in the Klassen foster home because of the abuse he suffered there. As a result of these disclosures, Social Services moved the girls to the Thompson home on May 29, 1990. After the move all three children disclosed information of sexual abuse to the Thompsons. The trial judge found that [M.R. 1's] real reason for his disclosure of sexual abuse was to be reunited with his sisters so he could continue to abuse them.

[153] The children were examined in June of 1990 by Dr. Yelland who prepared a report based on his examinations and gave evidence at the criminal trial. The reports of Dr. Yelland, while they confirmed sexual abuse, did not identify the person or persons who could have committed the abuse.

[154] Bunko-Ruys provided therapy to all of the [R.] children commencing in October and November of 1990 and eventually they were interviewed by Brian Dueck of the Saskatoon Police Service. The interviews were videotaped and formed the basis of the charges that were ultimately laid.

[155] The three children accused a number of adults, including the respondents, their birth parents and their mother's boyfriend [W.] of sexual abuse including sexual intercourse, fellatio, digital penetration and anal intercourse. Their allegations also consisted of more bizarre elements such as the mutilation and killing of animals, cutting out their bones, popping out their eyeballs, drinking their blood, killing babies and cutting and mutilating children as well as certain satanic rituals. The accusations of satanic rituals were only made against their natural parents and not against the respondents. No physical evidence of these allegations was discovered.

[156] Dueck investigated and interviewed all of the persons accused by the [R.] children.

[157] The sequence of events that followed is accurately described by Sherstobitoff J.A. in paras. 17-26 of his judgment. The [R.] and [W.] preliminary inquiry, prosecuted by Miazga, commenced on November 21, 1991 and ended on December 2, 1991. All three [R.] and [W.] defendants

were committed to stand trial on all of the charges brought against them based on the evidence of the [R.] children.

[158] The preliminary inquiry against Klassen-Kvello commenced on December 2, 1991 and ended on January 16, 1992. Miazga, assisted by Sonja Hansen, prosecuted this matter. Certain charges brought against some of the respondents were stayed at the outset of the preliminary inquiry and certain other charges were stayed during the proceedings. The preliminary inquiry judge discharged Pamela Sharpe and Peter Klassen with respect to the allegations made by [M.R.]. He also discharged Marie Klassen respecting the charges brought against her on the allegations of [M.R. 1]. He committed Peter Klassen and the ten other respondents to stand trial on all the other charges. The importance of this is that with two exceptions, the outstanding charges in the Klassen-Kvello case were reduced to those laid on the basis of the allegations of the [R.] children, allegations, as we shall see, that were accepted by a Queen's Bench judge.

[159] The first exception was a charge against Pamela Sharpe based on the allegations of [T.H.]. All of the charges against the other individuals that were based on [T.H.'s] allegations had been stayed by the Crown. The second exception was a charge against Peter Klassen based on the allegations of [C.H.], a child who had made no allegations against anyone but Peter Klassen.

[160] The case against the respondents [S.K. 1] and [S.K. 2] did not proceed. All charges were stayed by the Crown by February of 1992.

[161] The trial of the [R.] parents and [W.] was conducted by Miazga from October 29, 1992 to December 18, 1992. The Queen's Bench judge found that all the elements necessary to found the charges had been proved beyond a reasonable doubt with the result that all three were convicted of the charges brought against them. Each of the parents was sentenced to six years imprisonment and [W.] was sentenced to three years imprisonment.

[162] They all appealed their convictions to this Court. A majority of this Court found that there was sufficient evidence on which to base the convictions and that the trial judge had committed no reversible error. In the result the convictions were upheld.

[163] The parties appealed their convictions to the Supreme Court of Canada. The Supreme Court set aside the conviction of the [R.] parents and ordered a new trial and entered an acquittal with respect to [W.]. The Crown did not proceed with a new trial. Significantly, the Supreme Court of Canada did not order an acquittal of the [R.] parents.

[164] With respect to the respondents Klassen-Kvello, a plea bargain was entered into with Peter Klassen. On February 2, 1993 he pled guilty to four charges, one charge respecting each [R.] child and one against another child. He was sentenced on February 28, 1993 to four years of imprisonment. All of the other charges against him were stayed. The charges against the remaining members of the Klassen-Kvello family were stayed on February 10, 1993.

[165] The case involving the plaintiff young offenders was never proceeded with. The charges brought against them on the allegations of [K.R.], [M.R. 2], [S.L.H.] and [S.W.H.] were stayed by the Crown on November 27, 1991. In late January or early February of 1992, all of the remaining charges outstanding against them were stayed by the Crown.

[166] The respondents commenced an action for malicious prosecution against Dueck, Bunko-Ruys and Miazga and the trial judge held they were liable to the respondents. Bunko-Ruys and Miazga appeal that decision to this Court. Dueck has not appealed.

II. The Bunko-Ruys Appeal

[167] I agree entirely with the reasoning and disposition of Sherstobitoff J.A. with respect to the Bunko-Ruys appeal.

III. The Miazga Appeal

[168] I am unable to agree with my colleague, Sherstobitoff J.A., that Miazga is liable for the tort of malicious prosecution.

[169] I do not agree with the finding that the absence of reasonable and probable cause in and of itself is proof of malice. The findings of malice or “indications of malice” are found throughout the long judgment of the trial judge. One must therefore go through the judgment from one end to the other to find the basis on which he found Miazga liable for malicious prosecution of the respondents. The trial judge was certainly correct when he stated that the judgment was more like a report of a public inquiry than a judgment.

A. Malice

[170] The issue in this case is whether the trial judge was correct in finding that the lack of reasonable and probable cause *per se* gave rise to a presumption of malice. I say, *per se*, because even though he went on to consider other indications of malice, it is clear from his judgment that those indications were for the most part either based on erroneous assumptions, based on errors in law or based on no evidence. It is significant that he made no finding of improper purpose. One must assess the evidence against the legal standard of malice and it is a question of mixed fact and law. It involves the judge's interpretation of the evidence. On this branch of the test I am of the opinion that his findings were unsupported by the evidence, were clearly wrong and that he committed an error in law. He was required to determine questions of fact and of law. He was called upon mainly to find the facts and on that aspect of his responsibility he is entitled to considerable deference.

[171] We are concerned here with an unlimited right of appeal in which the judge's identification of the law and the application of the law to the facts is a question of law. It is the application of a legal standard which is a question of law that demands a standard of correctness. In my opinion, he erred in law in finding Miazga's conduct constituted malice or that he possessed a primary purpose other than that of carrying the law into effect. See: *St-Jean v. Mercier*, [2002] 1 S.C.R. 491; *R. v. Biniaris*, [2000] 1 S.C.R. 381; *R. v. Araujo*, [2000] 2 S.C.R. 992 and *Farm Credit Corp. v. Valley Beef Producers Co-operative Ltd.* (2003), 218 D.L.R. (4th) 86 (Sask. C.A.).

1. The Test for Malicious Prosecution

[172] The test for malicious prosecution is set out in *Nelles*:⁵

There are four necessary elements which must be proved for a plaintiff to succeed in an action for malicious prosecution:

- a) the proceedings must have been initiated by the defendant;
- b) the proceedings must have terminated in favour of the plaintiff;
- c) the absence of reasonable and probable cause;
- d) malice, or a primary purpose other than that of carrying the law into effect.⁶

[173] Malice was defined in *Nelles* as being the equivalent of an “improper purpose”:

The required element of malice is for all intents, the equivalent of “improper purpose”. It has according to Fleming, a “wider meaning than spite, ill-will or a spirit of vengeance, and includes any other improper purpose, such as to gain a private collateral advantage” (Fleming, *op. cit.*, at p. 609). To succeed in an action for malicious prosecution against the Attorney General or Crown Attorney, the plaintiff would have to prove both the absence of reasonable and probable cause in commencing the prosecution, and malice in the form of a deliberate and improper use of the office of the Attorney General or Crown Attorney, a use inconsistent with the status of “minister of justice”.⁷

[174] Miazga contends the trial judge erred in expanding the narrow test for malicious prosecution against Crown prosecutors and the strict burden of proof placed on plaintiffs to prove malice on a balance of probabilities as set out by the Supreme Court of Canada in *Nelles* and *Proulx v. Quebec (Attorney General)*.⁸ More importantly, Miazga argues that the trial judge erred in finding that malice can be inferred from the absence of reasonable and probable cause alone.

⁵ *Nelles v. Ontario*, [1989] 2 S.C.R. 170.

⁶ *Ibid.* at pp. 192-193.

⁷ *Ibid.* at pp. 193-194.

⁸ [2001] 3 S.C.R. 9.

[175] In examining the fourth element of the tort, it is useful to consider its historical development. The tort of malicious prosecution has long been recognized at common law as far back as the reign of Edward I insofar as it pertains to private individuals.

[176] The four-part test for malicious prosecution developed at common law during the 19th century was created 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. See: *The Queen v. The Comptroller-General of Patents, Designs, and Trade Marks*.⁹ All of the leading judgments at that time involved actions against private prosecutors and private complainants. See: *Hicks v. Faulkner*¹⁰ and *Abrath v. North Eastern Railway Co.*¹¹ Indeed, Lamer J. in *Nelles* adopted the definition of reasonable and probable cause articulated in *Hicks v. Faulkner*.

[177] In many of the cases there was a relationship between the parties and the surrounding circumstances from which one could infer an improper motive. For example, in *Jewhurst v. United Cigar Stores Limited*¹² a prosecution was initiated to collect a debt. In *Gabler v Cymbaliski*¹³ the action was initiated to take physical possession of an office.

⁹ [1899] 1 Q.B. 909 (C.A.).

¹⁰ (1881), 8 Q.B.D. 167.

¹¹ [1886] 11 App. Cas. 247 (H.L.).

¹² (1919), 49 D.L.R. 649 (Ont. Sup. Ct.).

¹³ (1922), 15 Sask. L.R. 457 (K.B.).

[178] In most cases, motive was inferred from the surrounding circumstances. See: *Kinloch v. Tarasoff*¹⁴ where the Court inferred malice in part because of the timing of the complaint which occurred two months after the defendant had been barred from the plaintiff's arcade.

[179] Thus, the courts were prepared to infer malice where there was no reasonable and probable cause in circumstances where the plaintiff and defendant had a relationship that would indicate an improper motive for the commencement of the action. As the intervenor, Canadian Association of Crown Counsel notes, the pre-*Nelles* cases almost exclusively involved private complainants who were involved in a history or relationship with the defendant with the result that the language of presuming malice from the absence of reasonable and probable cause became pervasive. It was in that context, it submits, that the Supreme Court of Canada stated in *The Mayor et al., of The City of Montreal v. Dame M.E. Hall et al.*¹⁵ that “[m]alice may be, and frequently is, implied from the absence of probable cause,…”.

[180] The trial judge relied on these judgments to find that a lack of reasonable cause alone constitutes a strong presumption of malice and led him to find that Miazga acted maliciously in proceeding with these prosecutions.

[181] The Canadian Association of Crown Counsel submits that one cannot apply this line of reasoning, that is, the line of reasoning which existed prior to *Nelles* and dealt primarily with individuals as opposed to Crown

¹⁴ (1984), 33 Sask. R. 66 (Q.B.).

¹⁵ [1885] 12 S.C.R. 74 at 108.

prosecutors, for actions for malicious prosecution against Crown prosecutors. It contends that the test to be applied to Crown counsel must reflect the role Crown counsel play as prosecutor where they have no personal relationship with the complainant and must be a different test than applicable to private citizens.

[182] At common law the Crown and its agents were immune from prosecution for any tort. A plaintiff could not bring an action against the Crown without its consent. This included actions against Crown prosecutors for the way in which they prosecuted an accused person. That situation, with respect to Crown immunity, only changed in the 1950s in Canada with the adoption of Crown liability legislation.

[183] In Saskatchewan, *The Proceedings against the Crown Act* was enacted in 1952.¹⁶ Following its enactment Crown counsel, as agents of the Crown, could theoretically be held liable for the way in which they prosecuted a case. Two lines of authority emerged. One, that the absolute immunity historically granted to Crown prosecutors from civil action while performing their duties as prosecutors should continue. The other recognized a limited cause of action for malicious prosecution based on public policy.

[184] The Supreme Court of Canada decided the debate in favour of extending the tort of malicious prosecution to Crown counsel for policy reasons. The Court noted those same policy reasons justified an extremely high threshold

¹⁶ *The Proceedings against the Crown Act, 1952*, S.S. 1952, c. 35.

to succeed in an action for malicious prosecution. Lamer J. speaking for the majority stated:

A review of the authorities on the issue of prosecutorial immunity reveals that the matter ultimately boils down to a question of policy. For the reasons I have stated above I am of the view that absolute immunity for the Attorney General and his agents, the Crown Attorneys, is not justified in the interests of public policy.... Further, it is important to note that what we are dealing with here is an immunity from suit for malicious prosecution; we are not dealing with errors in judgment or discretion or even professional negligence.¹⁷

[185] Lamer J. concluded that the policy reasons for granting private citizens the right to sue outweighed the reasons calling for absolute immunity. In his opinion “the inherent difficulty in proving a case of malicious prosecution combined with the mechanisms available within the system of civil procedure to weed out meritless claims is sufficient to ensure that the Attorney General and Crown Attorneys will not be hindered in the proper execution of their important public duties.”¹⁸ Establishing a higher threshold and the built-in mechanisms available within the system included a definition of malice that was equivalent to improper motive.

[186] The requirement of proving malice means the plaintiff must prove that the prosecutor intended to prosecute the plaintiff for improper motives. The Supreme Court of Canada emphasized that in a malicious prosecution one is not dealing with merely second guessing a Crown attorney’s judgment in the prosecution of a case but rather the deliberate and malicious use or abuse of office.

¹⁷ *Supra* note 5 at p. 199.

¹⁸ *Ibid.*

[187] The Canadian Association of Crown Counsel contends that the malice test which applies to Crown counsel should be different from that applicable to private citizens and must reflect different origins and policy reasons behind the tort and the removal of immunity from prosecution and civil liability.

[188] Malice as motive (malice in fact) is to be distinguished from malice as intention (malice in law). It is malice as motive that a plaintiff must prove in order to succeed:

... “Malice in Law” is established by a wrongful act done intentionally without just cause or excuse, but it does not necessarily require ill-will against a particular person... “Malice in fact”, on the other hand, is indicated where a party was actuated either by spite or ill-will towards an individual or by indirect and improper motives ... In an action for malicious prosecution, the malice which must be proved is not malice at law but malice in fact...¹⁹

[189] The Canadian Association of Crown Counsel submits that the only way to give effect to the policy considerations outlined in *Nelles* is to (a) identify the improper purpose Crown counsel is alleged to have had; and (b) then to provide evidence, other than an absence of reasonable cause, that justifies drawing an inference of malice.

[190] In its submission, the improper purpose alleged must be one personal to Crown counsel. He or she must be motivated by some purpose other than the due and proper functioning of the office, such as vengeance, career advancement or using the criminal process as leverage in a civil action against the accused as in *Proulx*. Personal motive such as those described, which are extraneous to their prosecutorial duties, should form the basis of a suit for malicious prosecution. If the evidence is that one of these improper motives

¹⁹ *Owsley v. Ontario*, [1983] O.J. No. 2128 at para. 8 (QL).

was the reason motivating Crown counsel, confidence in the administration of justice can only be restored by bringing an action against the improperly motivated Crown counsel. See: *Forster v. MacDonald*.²⁰

[191] The test proposed by the Canadian Association of Crown Counsel is consistent with both *Nelles* and *Proulx*. In *Proulx*, the majority examined the test of malice. There, Crown counsel had concluded in 1986 that he did not have sufficient evidence to prosecute *Proulx* for the murder of his former girlfriend. The case was closed. Five years later in the middle of a sensational defamation action launched by *Proulx* against a radio station and a retired police officer who had worked on the file, the prosecutor was advised by the defendants in the defamation case of a potential new identification witness. The prosecutor added the retired police officer to the prosecution team even though he was one of the defendants in the defamation action, reopened the file and decided to prosecute *Proulx* for first degree murder. Crown counsel was aware of the retired police officer's involvement in the defamation action but allowed him free reign to gather evidence against *Proulx*.

[192] The Supreme Court found that the prosecutor lent his office to a defence strategy in a defamation action which was a perversion of the powers of his office and an abuse of his prosecutorial power. The plaintiff proved, on a balance of probabilities, that the prosecutor's office had been used deliberately for purposes inconsistent with the traditional prosecutorial function.

²⁰ (1993), 108 D.L.R. (4th) 690 (Alta. Q.B.) aff'd (1995), 127 D.L.R. (4th) 184 (C.A.).

[193] Justices Iacobucci and Binnie framed their decision very narrowly in finding the Crown prosecutor liable. They found that courts should be very slow to second guess a prosecutor's judgment call when assessing Crown liability for prosecutorial misconduct. Significantly, they noted that a failed prosecution without more – much more - does not give rise to a viable claim for prosecutorial wrongdoing.²¹

[194] Justices Iacobucci and Binnie found the prosecutor lacked reasonable and probable cause. After examining the frailties of the prosecutor's case, they concluded that the case against *Proulx* was based on fragments of tenuous unreliable and likely inadmissible evidence grounded in mere suspicion and hypothesis. They then considered whether or not there was malice. They stated that a suit for “an allegedly abusive prosecution may succeed *only* where malice or an improper purpose is shown.”²² [My emphasis] The case of malicious prosecution involved serious allegations of the misuse and abuse of the criminal process and the office of the Attorney General. Justices Iacobucci and Binnie reiterated the comments of Lamer J. in *Nelles* that to succeed the plaintiff has to prove *both* the absence of reasonable and probable cause for commencing the prosecution and malice in the form of a deliberate and improper use of the office of the Attorney General. It is more than second guessing and more than recklessness or gross negligence.

[195] The Supreme Court stated:

37 In the case at bar, various significant factors stand out as indicators of an

²¹ *Supra*, note 8 at para 8.

²² *Ibid.* at para. 35.

improper purpose underlying the Crown's decision to initiate proceedings against the appellant. In discussing these factors, we do not wish to emphasize the importance of one over another. In the final analysis, it is the totality of all the circumstances that are to be considered in cases of this kind.²³

[196] While there was a lack of reasonable and probable cause there were also a number of other indicators from which they could infer malice such as the improper use of the prosecutor's office.

[197] The trial judge in this case found, at para. 365, that persons who charge others without reasonable and probable grounds to do so *usually* act out of malice. He continued at paras. 381 and 382:

381 Some of the cases I cited hold that in extraordinary circumstances, laying criminal charges and proceeding with the prosecution of them in the absence of reasonable and probable cause, can of itself constitute malice or at least constitute an indication of malice. Surely if a malicious prosecution case with extraordinary circumstances exists, it is the case before me. It is a high profile case that charged many individuals with serious criminal offences. It had the potential to visit disastrous consequences on those charged even if they were later found to be innocent. There was a glaring absence of any reasonable and probable cause to lay and prosecute the charges. If these factors do not constitute extraordinary circumstances, I cannot conceive of a set of circumstances that would do so. In my view, proceeding with charges in such an extraordinary case in the absence of reasonable and probable cause constitutes a strong presumption of malice. The same consequences flow from continuing on with the prosecution of such a case.

382 In any event, even if I am in error in finding that such a case raises a presumption of malice, the law is clear that there is a strong indication of malice in such a case. As well, there are many other strong indications of malice that are inferred from the conduct of the defendants. I have previously outlined many of those indications of malice, but will comment briefly on some of the more salient ones.²⁴

[198] He classified the case as extraordinary and found, as a result, that the absence of reasonable and probable cause was sufficient to prove malice. His

²³ *Ibid.*

²⁴ [2004] 9 W.W.R. 647 (Sask. Q.B.).

finding that “there was a glaring absence of any reasonable and probable cause to lay and prosecute the charges” is a conclusion, an application of the law to the facts demanding a standard of correctness. In my opinion, he erred in law in finding that the absence of reasonable and probable cause in and of itself can be proof of malice.

[199] First, the test for malicious prosecution does not depend on presuming malice *only* from the absence of reasonable and probable cause. The absence of reasonable and probable cause can be consistent with an improper motive, for example, where there is absolutely no evidence to support the prosecution – something which does not exist in this case. But it is not the sole factor in the determination of malicious prosecution.

[200] The third part of the *Nelles* test contains an objective and subject element while the fourth part of the test is subjective, by reason that it involves the motives of Crown counsel. The problem with inferring malice solely or exclusively from a lack of reasonable or probable cause is that the third and fourth elements of the *Nelles* test are collapsed and the distinction between the third objective element and the fourth subjective element disappears.

[201] The result is that the fourth element is rendered redundant and applies to anyone who simply lacked reasonable cause to prosecute. It results in second guessing prosecutors or determining responsibility based on recklessness or gross negligence, something the Courts have been reluctant to

do. See: *Thompson v. Ontario*²⁵ where the court refused to expand the scope of malicious prosecution to the negligent prosecution of a case.

[202] In *Proulx*, the majority did not find that the absence of reasonable and probable cause *per se* constituted malice. Indeed the reference relied on by the trial judge in support of his conclusion merely indicates that no prosecutor acting in good faith would have proceeded with the first degree murder charge with such substandard proof. The inference of malice in *Proulx* was not the absence of reasonable and probable cause but the improper mixing of public and private business.

[203] For there to be a finding of malicious prosecution the trial judge must be able to find an inference of malice from *both* an absence of reasonable and probable cause *and* other evidence of malice or improper purpose.

[204] None of the cases relied on by the trial judge support the conclusion that the absence of reasonable and probable cause in exceptional circumstances can in and of itself constitute malice. For the most part the cases cited from the lower courts dealt with actions for malicious prosecution against police officers and not Crown counsel, and as noted above, different considerations apply.

[205] Thus for the respondents to succeed they must prove malice on a balance of probabilities and an absence of reasonable and probable cause. Nowhere in the pleadings do the respondents identify or specify what improper purpose

²⁵ [1998] O.J. No. 3917 (C.A.) (QL).

or deliberate and improper use of the office of the Attorney General was committed. The closest one comes to an allegation of improper purposes and an allegation of an abuse of power is para. 57 of the statement of claim. The trial judge did not make a specific finding of malice. Thus to properly determine the issue one must examine in detail all the “indications” of malice which are scattered throughout the judgment with a view to deciding whether such actions of the prosecutor in their totality constitute an improper use of the office of the Attorney General.

2. The Indicators of Malice

[206] Miazga contends the trial judge erred in three fundamental respects in arriving at his conclusion that he, Miazga, was liable for malicious prosecution:

- (a) He misunderstood the role of the prosecutor *vis-à-vis* the role of the investigating officer and erroneously attributed certain acts of the investigating Officer Dueck as indications of malice to Miazga;
- (b) Some so-called “indications of malice” were without any foundation or evidentiary basis;
- (c) Some indications of malice relating to Miazga’s conduct of the criminal proceedings relied on by the trial judge were not acts to which malice could be attributed.

I will deal with these in order.

(a) Role of the Prosecutor in Saskatchewan

[207] Miazga contends that the trial judge failed to recognize the discreet roles played by the police and the prosecutor in the criminal justice system in Saskatchewan. He appears to have proceeded on the basis that prosecutors have an active role to play in the investigation of criminal offences before charges are formally laid. In the appellant's submission the trial judge blurred the line between the function of the police and prosecutor and treated them as one with the result that he made findings of "indications of malice" based on the failure of Miazga to take certain steps before charges were laid. In effect he expanded the role of the prosecutor to include an investigative function, a function which does not exist in Saskatchewan.

[208] At paras. 135 and 136 the trial judge criticized Miazga for reviewing the incident report prepared by Dueck and simply telling Dueck to lay the charges if he believed the children.²⁶ The trial judge said that Miazga should have cautioned Dueck on the apparent lack of reasonable and probable cause and that he should have seriously questioned whether Dueck's belief was reasonably founded and not just whether he believed the [R.] children. He continues in the same vein by saying that the apparent lack of reasonable and probable cause should have been seriously questioned particularly by Miazga at this juncture.²⁷ This is looking at the factual situation which existed at the time with the benefit of hindsight.

[209] The trial judge continues to find an investigative role by stating that Miazga could not reliably or responsibly determine the merits of the case

²⁶ *Supra*, note 24.

²⁷ *Ibid.* at para. 139.

before viewing the videotaped interviews of the children or personally interviewing the children to determine the merits of the case and his failure to do so was a “strong indication of malice”.²⁸ He returned to the subject when he criticized Miazga for not interviewing the children before the charges were filed. He stated:

286 Miazga did not speak to the children before the charges were laid nor did he view the videotapes until sometime in September 1991. Again this is surprising and somewhat appalling in view of the fact that the videotapes of the children’s evidence were equivalent to their witness statements.²⁹

[210] The trial judge criticized Miazga for a lack of pre-charge investigation.

He states:

294 He said that he reviewed the allegations of the children to justify the charges that were laid against each of the plaintiffs. He in effect went through the same exercise as did Dueck. That was simply to see if each of the respective plaintiffs charged with the alleged acts of sexual assault given by rote by the children had been named as the perpetrator by at least one of the children. This does not constitute an investigation or an assessment. All it does is categorize the allegations. It does not amount to an assessment of their feasibility or credibility.³⁰

[211] The trial judge stated at para. 390 that another indication of malice was that Miazga was not “evenhanded” in his zeal to charge all the named perpetrators because persons other than the parents of the [R.] children and the plaintiff respondents were named but not charged. Only the Klassen and Kvello families and the [R.] parents and the boyfriend of Mrs. [R.] were prosecuted. The police lay charges – not the prosecutors.³¹ All of this criticism is based on a misconception of the role of the police and prosecutors.

²⁸ *Ibid.* at paras. 140-141.

²⁹ *Ibid.* at para. 286.

³⁰ *Ibid.* at para. 294.

³¹ *Ibid.* at para. 390.

[212] The appellant contends and I agree, that the trial judge demonstrated a lack of understanding of the role of the police and the role of the prosecutor. His findings of malice or “indications of malice pre-charge” were based on this fundamental misunderstanding of the respective roles of the police and the prosecutors. It is the police and the police alone who are responsible for the laying of charges. The prosecutor cannot be criticized pre-charge for failing to investigate fully the accusations of the complainants.

[213] The respective roles of the police and prosecutors were considered by the Supreme Court of Canada in *R. v. Regan*.³² In that case, the Court quoted with approval the following passage found at p. 232 of the *Royal Commission on the Donald Marshall, Jr., Prosecution*, vol. 1, *Findings and Recommendations* (1989) (“*Marshall Report*”):

We recognize that cooperative and effective consultation between the police and the Crown is also essential to the proper administration of justice. But under our system, the policing function – that of investigation and law enforcement – is distinct from the prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice.³³

[214] Justice LeBel, writing for the majority stated:

...The distinct line appears to be that police, not the Crown, have the ultimate responsibility for deciding which charges should be laid. This can still be true after the Crown has made its own pre-charge assessment, and when the two arms of the criminal justice system disagree on whether to lay charges.³⁴

[215] As noted in *Regan*, the police sought the advice of the Director of Public Prosecutions as to laying of charges then ignored the advice that was given.

³² [2002] 1 S.C.R. 297.

³³ *Ibid.* at para. 66.

³⁴ *Ibid.* at para. 67.

[216] To this effect, see the comments of Lord Denning in *R. v. Commissioner of Police of the Metropolis, Ex parte Blackburn*³⁵ wherein he stated at p. 136:

I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. ... He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. ... The responsibility for law enforcement lies on him. He is answerable to the law and the law alone.³⁶

[217] Comments of a similar nature are found in the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions*, 1993 (the "Martin Report") as follows at pp. 37-38:

As a matter of law, police officers exercise their discretion in conducting investigations and laying charges entirely independent of Crown counsel. The police seek the advice of the Crown only where they think it appropriate. And while it is no doubt prudent to do so in many cases, the police are not bound to follow the advice of Crown counsel, as that advice relates to the conduct of the investigation and the laying of charges. [Footnote omitted]

[218] The Martin Report continues by quoting an observation made by a former Solicitor General for Canada at p. 38:

It seems to me that to vest the authority for the investigative functions of the government in the same person who is going to conduct the criminal process is foreign to the spirit of justice. [H.C. Debates, Vol V., at p. 5524, May 25, 1996]

[219] The Martin Report also noted the different practices in various countries. The Report points out at p. 38:

This relationship of independence between Crown counsel and the police appears to differ from the relationship between investigators in the United States,

³⁵ [1968] 2 Q.B. 118 (C.A.).

³⁶ *Ibid.* at p. 136.

and a District or U.S. Attorney. While the practice varies among the various states and the federal government, it appears that American prosecutors may be, generally speaking, actively involved in charging decisions, and in the conduct of the investigation. [Footnotes omitted]

[220] Finally, one finds the following comments in *The Discretion to Prosecute Inquiry*, British Columbia, 1990 (the “Owen Report”), where the Commissioner canvassed all jurisdictions in the country to determine the prevailing practice. He concluded at p. 19:

The only Canadian jurisdictions in which Crown counsel makes the decision whether a charge will be laid are British Columbia, Quebec, and New Brunswick. In all other provinces and territories the police lay the Information, after which the Crown decides whether it will proceed with the prosecution.

[221] He continued at p. 29:

In all Canadian jurisdictions other than British Columbia, Quebec and New Brunswick, the police decide whether an Information will be sworn...³⁷

[222] Miazga attempted to explain the role of the prosecutor in Saskatchewan. During his cross-examination he stated:

You have to understand, and maybe I think people sometimes don't understand this, in Canada we don't tell the police what to do. They conduct their investigations, we prosecute cases. We're not sort of -- we don't go in like perhaps you might see on television, where the DA is involved with their own office investigators and that sort of thing, we don't have that. The police would conduct their investigation as they see fit with any suggestions they might ask from us, but because they tell an officer to do something, he's under no obligation to do that, I'm not his superior.³⁸

³⁷ See also: Henry Bull, *The Career Prosecutor of Canada* (1962), 53 J. Crim. L. Criminology & Police Sci. 89 at pp. 94-95; John Pearson, *Proulx and Reasonable and Probable Cause to Prosecute*, 46 C.R. (5th) 156 at 157; James Stribopoulos, *Unchecked Power: The Constitutional Regulation of Arrest Reconsidered* (2003), 48 McGill L.J. 225.

³⁸ Appeal Book, Vol. XLI at pp. 3224-3225.

He also pointed out:

My point I'm trying to make and maybe I didn't make it very well is that we do not direct the course of an investigation, the police do investigations and they certainly ask us for help from time to time and we give it to them as they see fit to ask.³⁹

[223] This evidence is uncontradicted. The evidence is clear. In Saskatchewan it is the responsibility of the police to lay the charges and not the prosecutor. Thus to the extent that the trial judge relied on the failure to investigate pre-charge as an indication of malice, he was in error. The course of conduct followed by Miazga is consistent with prevailing practice in Saskatchewan and cannot constitute malice.

[224] The trial judge criticized Miazga for his role in the arrest of the respondents in Red Deer; their transport to Saskatoon; and, their stay in remand which the trial judge found was another indication of malice. This is clearly an error. Miazga was not aware of the arrest of the respondents⁴⁰ and had nothing to do with how they were treated on remand. It should be noted that Miazga represented the Crown when each of the respondents made their first appearance and immediately consented to their release on bail without a show cause hearing.⁴¹ Thus the finding of an indication of malice was based on no evidence or a complete misapprehension of evidence.

(b) The Conduct of the Trial

[225] The trial judge found the way in which Miazga conducted the criminal proceedings against the respondents was another indication of malice. These

³⁹ *Ibid.* at p. 3226.

⁴⁰ Appeal Book, Vol. XLI at pp. 3212-13.

⁴¹ Appeal Book, Vol. XL at pp. 3001-02.

comments are once again scattered throughout the judgment but in the end all must be examined against the proper role of the prosecutor in the prosecution of a criminal trial as well as the role of the trial judge or judges in this case.

[226] Any examination of the proper role of Crown counsel must begin with *R. v. Boucher*⁴² where the Supreme Court of Canada said:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.⁴³

[227] The trial judge said that Miazga succeeded in convincing the Court to adopt special measures to minimize the potential trauma to the children.⁴⁴ These are described as follows: the public and media were excluded from the proceedings when the children testified; the alleged perpetrators were hidden from the children by being huddled behind a screen; the judges doffed their gowns before conducting the proceedings; the children were given a special room in the judges' chambers and presumably entered and left the courtroom by the same doorway as that utilized by the judge; and, the children's wishes for breaks were honoured and the court proceedings adjusted to suit their convenience. He concludes that one can hardly fault the plaintiffs from perceiving that the deck was stacked against them.

⁴² [1955] S.C.R. 16.

⁴³ *Ibid.* at pp. 23-24.

⁴⁴ *Supra*, note 24 at para. 108.

[228] The trial judge concludes that all of these “concessions” were exacted from the courts and that the prosecutors deliberately overplayed the trauma of the children to focus the criminal proceedings on the needs of the children rather than on the validity of the allegations. Surely one must ask where were the courts in all of this? Didn’t the preliminary court judge and the trial judge in the [R.] trial have a role in this? Surely the very experienced trial judge was capable of saying, I’m going to decide how the trial is conducted?

[229] The trial judge found that the use of the medical reports of Dr. Yelland and presumably his testimony regarding the fact the children had been sexually abused was not reasonable and that Miazga deliberately disregarded other evidence that strongly inferred that it was the sexual activity between the children which was the basis for the sexual abuse described in the “so-called independent medical evidence”.

[230] The trial judge criticized Miazga for calling “so-called” child experts which he stated could be qualified as “oath helpers”. He criticized at length the medical evidence of Dr. Yelland who based his testimony on the allegations of sexual abuse by the children and the histories provided by the Thompson foster parents. He found that this evidence was not, to be kind, worse than worthless. The trial judge found that it was unobjective and while I will not reproduce all of his criticism, I note that these comments were made in hindsight after examining all of the proceedings. The trial judge, without the slightest evidence, classified the medical evidence as contaminated and unobjective. He stated:

269 Once he contaminates his professional findings by basing them in part on the allegations of the child he examines, any value of the report as corroboration of

the child's allegations is lost because the report is no longer evidence that is independent of the child's allegations. A medical doctor has no more expertise than a lay person in determining the veracity of a child's allegations by simply listening to the recounting of them. I acknowledge that this would not be the case if the doctor, for example, had some special expertise in child psychology and utilized the disciplines of that specialty to test or question the child in an attempt to verify the allegations. The examinations conducted by Dr. Yelland, however, were physical examinations, not psychological examinations.

270 The unobjective attitude displayed by Dr. Yelland respecting sexual abuse allegations is not unlike that of many of the child care workers who gave extensive evidence in the criminal proceedings. Many of the individuals who testified in those proceedings had a financial interest in referrals from Social Services. Numerous witnesses testified about the floodgates opening in the late 1980s in the number of child sexual assaults that began to be reported. As is demonstrated by the evidence in this case, this has created a growth industry for professional child care workers, professional child therapists and medical care professionals. This is understandable and likely beneficial, but if these professionals are to effectively serve the interests of the children entrusted to them, they must conduct themselves as professionals with a level of objectivity and independence that is apparent to anyone who is asked to rely on their opinions and reports. If they fail to do so, courts and other institutions or agencies that routinely receive these opinions and reports will lose confidence in them and will not rely upon them.⁴⁵

[231] At para. 271 the trial judge finds that “[t]he evidence pertaining to the manner in which this medical evidence was presented to the court is another example of how zealously Miazga prosecuted the charges based on the incredible allegations of the [R.] children.” He concluded:

... The manner in which he presented the medical information bordered on an attempt to distort the inferences that would otherwise be drawn from that evidence and to mask the difficulties that it posed to the successful prosecution of the plaintiffs. In my respectful view, this is an indication of malice on his part.⁴⁶

[232] I have read and re-read the evidence regarding the presentation of the medical evidence and I am unable to conclude that Miazga did anything more than put in the evidence of Dr. Yelland of the sexual abuse of the children,

⁴⁵ *Supra*, note 24. See also: paras. 261, 262, 263 and 115-132.

⁴⁶ *Ibid.* at para. 271.

which of course was subject to cross-examination by the respondent's counsel.

[233] The trial judge returns to the issue of "oath helpers" at para 272 of his judgment. He said:

272 Miazga called Bunko-Ruys in three of the proceedings and [M.T.] in two of the proceedings, as witnesses to satisfy the court that the [R.] children were extremely dysfunctional and sexually abused children who should be expected to have inconsistencies in their perceptions and in their allegations and testimony. These two witnesses and all the other child therapists of the various child complainants in effect became oath helpers for the children to prop up an otherwise hopeless case. The extent to which Miazga used such witnesses as oath helpers is again, in my respectful view, an indication of malice on his part. This is particularly so in a case involving so many individuals and such incredible allegations presented by inconsistent testimony. Miazga knew the disastrous consequences that would accrue to the plaintiff families if the allegations of the children were false. Even if his view of the role of a prosecutor was to record all allegations and let the courts decide, he should not have pushed so aggressively to mask evidence that would have helped the court in making an accurate assessment of the credibility of the allegations.⁴⁷

[234] This criticism of Miazga seems to ignore that the Supreme Court of Canada in *R. v. B.(G.)*,⁴⁸ found that the presentation of expert evidence of this nature was well within the bounds of acceptable and admissible testimony in cases of this kind and that in cases of sexual assault against children, the opinion of an expert often proved invaluable. Indeed in the decision of this Court in *R. v. B.(G.)*⁴⁹ Wakeling J.A. stated:

[54] I do not need to resort to statistics to establish that there are many more cases now coming to trial involving sexual abuse of children and requiring a very difficult evaluation of youthful testimony. Under these circumstances, it is understandable that the courts should seek as much assistance as possible from those who can be qualified as experts. They can shed some additional light on

⁴⁷ *Ibid.*

⁴⁸ [1990] 2 S.C.R. 30.

⁴⁹ (1988), 65 Sask. R. 134.

evidence that would otherwise be of negligible value, so as to assist the judge in reaching a determination of what facts have been adequately corroborated or otherwise established.⁵⁰

⁵⁰ *Ibid.*

He continued:

[59] ... I see no objection to expert testimony which does nothing more, ..., than show that psychological and physical conditions which occurred were consistent with sexual abuse, a factor which might otherwise be nothing more than conjecture or speculation on the part of the judge or jury.⁵¹

[235] These cases were the leading authorities at the time dealing with accusations of sexual assault against children. I fail to see how the decisions to call the evidence can be an “indication of malice”. Miazga’s conduct of the cases is clearly distinguishable from the manipulative approach and the abdication of prosecutorial responsibility referred to in *Proulx* and the use of the prosecutor’s office for an improper purpose.

[236] The trial judge returns to the conduct of the trial by Miazga to demonstrate malice at para. 412. While admitting that one cannot fault a “hardnosed prosecutor” he goes on to say that a reading of the transcripts demonstrated that Miazga was at times neither fair nor objective. While conceding he cannot be faulted for convincing the courts to make special arrangements and concessions to protect the children during their testimony, he then criticizes Miazga for aggressively objecting to the cross-examination of the children and objecting to the introduction into evidence of video statements of the children. This, he contends, along with objecting to the presence of counsel for the respondents to be present during the preliminary inquiry in the [R.] matter, resulted in the Court being denied the benefit of being able to assess the credibility of the [R.] children as well as a impediment to the proper cross-examination of them on their credibility.

⁵¹ *Ibid.*

[237] Miazga was criticized for taking an overly protective position on behalf of the children.⁵² He was also criticized for his handling of the expert witness, Dr. Santa Barbara.⁵³ In reading all this I noted in the margin of the judgment “where was the trial judge?” One cannot forget that the prosecutor does not control the proceedings. All of the concessions were ordered by the courts not by Miazga or his co-counsel.

[238] The trial judge returned to the manner in which the criminal trial was conducted at para. 384 wherein he stated that Miazga “totally abrogated his duty as the primary prosecutor to make an objective and competent assessment of the case he was consulted about and which he aggressively prosecuted.”

[239] The trial judge notes no explanation was ever given as to why seminars dealing with satanic abuse and sexual abuse were held in Saskatoon and then theorizes about the reason without any evidence. It is clear that at that time there was a certain hysteria not only in Canada but elsewhere (*supra*) and it is hardly unusual that law enforcement agencies and social service agencies would be interested in the subject. There were accusations of satanic abuse in the Martensville case as well as in this case. One cannot ignore the fact that the prosecution was under a certain amount of pressure from social services not to stay charges on the basis of the lack of corroboration eluding to what I earlier stated, there was a prevailing view at that time in the 90s that children

⁵² *Supra*, note 24 at para. 416.

⁵³ *Ibid.* at para. 417.

don't lie. Once again, the trial judge lays the shortcoming of Dueck's investigation at Miazga's feet.

[240] I have read all of the comments and so-called indications of malice regarding the conduct of the trial and in my opinion they do not support the conclusion that Miazga had a primary purpose other than initiating and carrying out criminal proceedings. They do not support the conclusion that Miazga acted with malice in the legal sense identified in *Nelles*, which is to say that they do not sufficiently support the conclusion that Miazga had a primary purpose other than that of carrying the law into effect. I am unable to find that he abdicated his legal and professional responsibility. There is no evidence that he used his office for an improper purpose. Crown counsel are advocates and they are entitled to present their cases diligently and forcefully. See: *R. v. Savion and Mizrahi*⁵⁴ and *R. v. Conway*.⁵⁵ In all of this one cannot overlook the fact that at the conclusion of the preliminary inquiry regarding the respondents, Miazga sought an adjournment to consider his position to determine whether or not the proceedings ought to be stayed.⁵⁶ That is hardly an indication of a win at all costs prosecutor, one who is using his office for an improper purpose.

(c) Lack of Remorse

[241] The trial judge was highly critical of all the defendants for failing to apologize or show remorse to the plaintiffs. He stated:

⁵⁴ (1980), 52 C.C.C. (2d) 276 (Ont. C.A.) at p. 289.

⁵⁵ (1989), 70 C.R. (3d) 209 (S.C.C.) at p. 225.

⁵⁶ Appeal Book, Vol. XVIII, Exhibit D-10, pp. 006775-006778.

404 One aspect of the evidence of each of the defendants is particularly telling. I read pages of the testimony of Bunko-Ruys in the form of evidence given in each of the court proceedings and in the read-ins of her testimony in her examinations for discovery. In that testimony she went on and on about her concern for the needs and welfare of the children, for the need to support them, for the importance of believing their assertions and for the need to prevent them from being traumatized by the court process. Yet I read not a word by way of an apology to any of the plaintiffs, not a word by way of an expression of any regret or remorse for the part she played in the wrongful charging and prosecution of the plaintiffs and not a word for the disastrous consequences and significant trauma that were suffered by the plaintiffs as a result of her involvement in the case.

405 *I also read pages and heard hours of testimony of Dueck, Miazga and Hansen. The same that I said about Bunko-Ruys applies to each of them. In my respectful view, the lack of any regret or remorse for what was done to the plaintiffs is a strong indicator of malice on the part of each of the defendants, including Hansen.*⁵⁷ [Emphasis added]

[242] While it is true that Miazga did not offer any feelings about his remorse for the plaintiffs, he was never asked about this during the course of the trial. Indeed the trial judge appeared to foreclose any opportunity to discuss current opinions or feelings about the case by stating that the scope of the review here is obviously fairly restricted in how would exculpatory evidence today bear on this matter. It was not pursued by counsel for the respondents.⁵⁸

[243] Indeed, the trial judge's reliance on lack of remorse would violate the oft-cited rule in *Browne v. Dunn*⁵⁹ dealing with the issue of fairness to a witness. A recent articulation of that rule is found in *R. v. K. (O.G.)*:⁶⁰

20 What underlies these expressions of a duty to cross-examine and the effect of a failure to cross-examine is the fundamental proposition that a court of law must treat all persons who come before it in whatever capacity fairly. It is not fair to a witness to adduce evidence which casts doubt upon his veracity when he has not been given an opportunity to deal with that evidence.

⁵⁷ *Supra*, note 24.

⁵⁸ Appeal Book Vol. XLII at pp. 3455-56.

⁵⁹ (1893), 6 R. 67 (H.L.).

⁶⁰ (1994), 28 C.R. (4th) 129 (B.C.C.A.).

[244] Of course the rule is designed to protect witnesses from being unable to defend themselves from evidence which casts doubt upon their veracity. The finding of malice on this basis is unfounded.

B. Disposition With Respect to Malice

[245] It is clear from an examination of all the “indications of malice” that the trial judge erred in attributing certain of the indicia to Miazga and, in particular, in basing his findings of malice on no evidence that certain investigative acts pertained to Miazga and were the direct result of his misunderstanding of the role of the prosecutor. His primary preoccupation was with determining whether there was reasonable and probable cause. There is, on this branch of the four-part *Nelles* test, no evidence of the improper use of his office for personal advancement, vengeance or any evidence of the use of the office for a purpose inconsistent with the office of a prosecutor. There is no evidence that reveals a “willful and intentional effort on the Crown’s part [Miazga] to abuse or distort its proper role within the criminal justice system.”⁶¹

[246] The Supreme Court of Canada stated in *Proulx* that the key to a malicious prosecution is malice which they describe as conduct fueled by an “improper purpose”.⁶² The trial judge did not identify or find that there was an improper purpose. The closest he came to identifying an improper purpose was to say that Miazga, and he lumped him in with Dueck and Bunko-Ruys, had malice as a primary purpose other than that of carrying the law into effect in initiating and continuing the criminal proceedings against the plaintiffs. He speculates that Miazga “likely got himself into a prosecution that he knew was doomed from the start and did not know how to extricate himself from it. In so doing, he abdicated his legal and professional responsibilities as a

⁶¹ *Supra*, note 8 at para. 35.

⁶² *Ibid.*

prosecutor and was responsible for the malicious prosecution of the plaintiffs that ensued.”⁶³

[247] In reviewing the reasons for judgment, it is apparent that all of the so-called indications of malice which could be attributed to Miazga were not evidence of some improper purpose but rather indications of at best bad judgment, negligence or recklessness.

[248] The trial judge relied on his findings of an absence of reasonable and probable cause to find Miazga liable for malicious prosecution. He in effect used that finding as a method to obviate the necessity to find malice.

[249] Viewed as a whole, the respondents failed to prove on a balance of probabilities one of the four essential elements of malicious prosecution, that is, malice. In my opinion, as I stated earlier, the trial judge committed an error in law in finding malice on the part of Miazga. That finding was, for the most part, unsupported by the evidence and he erred in the application of the law to the facts.

C. Reasonable and Probable Cause

[250] While it is strictly not necessary for me to deal with this issue given that the trial judge erred in law in finding malice, the fourth essential element of the tort of malicious prosecution, I find it necessary at least to make some comments on this issue.

⁶³ *Supra*, note 24 at para. 419.

[251] The trial judge found as a fact that Miazga, Dueck and Bunko-Ruys did not have an honest belief that the respondents committed the assaults alleged by the [R.] children nor did they have an honest belief that the respondents were guilty of the offences with which they were charged.

[252] I am of the opinion that the trial judge committed a palpable and overriding error. This case involves the credibility of the complainant and given the history of the various proceedings which one cannot separate involving two preliminary inquiries, a trial and appeals to the Court of Appeal for Saskatchewan and the Supreme Court of Canada, one cannot argue that it was overwhelmingly obvious the respondents were innocent.

[253] Once again, it is useful to remember the sequence of events. Dueck investigated and after asking Miazga's opinion on the results of his investigation, he was told if he believed the children he should proceed and in due course laid a number of charges against not only the respondents but against the [R.] parents and Mrs. [R.'s] boyfriend. Dueck obviously believed the children.

[254] Some time later Miazga reviewed the file to determine whether to lay charges in addition to the charges of sexual assault. He concluded that he would not and the matter proceeded to preliminary inquiries.

[255] The preliminary inquiries resulted in the committal to stand trial of the charges in the [R.] matter and in the Klassen-Kvello matter. In both cases the evidence of the three [R.] children was the evidence on which the allegations

of sexual abuse was founded. The preliminary trial judge found there was sufficient evidence to go to trial. Even though he is not required to make findings of credibility, all parties were committed to stand trial. More importantly, the same three children testified at the [R.] trial in the Court of Queen's Bench. Their evidence was accepted as credible by a very experienced trial judge, indeed a former Chief Justice of the Court of Queen's Bench. All three defendants were convicted and that conviction was upheld by a majority of this Court. As noted, the majority decided there was evidence before the trial judge on which she could have found the applicants guilty and as a result she committed no reversible error. The Supreme Court of Canada subsequently quashed the convictions and ordered a new trial. The Supreme Court of Canada did not order an acquittal of all the defendants but rather returned the matter to the Court of Queen's Bench for a new trial. One can deduce from all this there was at least some credible evidence from which one could reasonably infer that there was reasonable and probable cause.

[256] I am well aware of the comments of Justices Iacobucci and Binnie in *Proulx* that the prosecutor cannot bootstrap his own position on the basis of flawed court decisions that were "swept away by the acquittal directed by the Court of Appeal." Here, we do not have an acquittal "swept away by the Court of Appeal." We have an order for a new trial directed by the Supreme Court. Surely one has to read the comments in para. 32 of *Proulx* in the context of that decision, which was one of the most egregious acts of prosecutorial misuse of office where there was a clear absence of reasonable and probable cause in which the judgment was swept away on appeal. Here we have just the

opposite. This is not bootstrapping. This is an indication of reasonable and probable cause.

[257] In the circumstances of this case, where Miazga had successfully prosecuted the [R.] parents, did the prosecutor have before him facts that pointed so overwhelmingly to the respondents' innocence that no reasonable person could have believed in the respondents' guilt? I don't think so.

[258] Indeed, the Ontario Court of Appeal in *Temilini v. Ontario Provincial Police (Commissioner)*⁶⁴ faced with the issue of whether or not a committal for trial after a preliminary inquiry was sufficient to establish reasonable and probable cause held that while it was cogent evidence of reasonable and probable cause, it was not determinative of the issue. One must of course look at all of the surrounding circumstances. It does not necessarily follow that because the Crown has failed to prove its case beyond a reasonable doubt and an accused has been acquitted that the police did not have reasonable and probable grounds for arresting and charging the accused person.

[259] The difficulty in establishing an absence of reasonable and probable cause is particularly problematic in cases where credibility is in issue. Credibility was certainly an issue in this case and it may be easy in hindsight to find that the evidence of the [R.] children lacked credibility, but I am not satisfied that in the milieu and context in which these actions originated and were eventually brought that one could say that. Clearly an experienced trial judge found the evidence credible.

⁶⁴ (1990), 73 O.R. (2d) 664, leave to appeal denied (1991), 1 O.R. (3d) xii (S.C.C.).

IV. Conclusion

[260] I would therefore allow the appeal with costs against the respondents represented by counsel.

DATED at the City of Regina, in the Province of Saskatchewan, this 30th day of May, A.D. 2007.

“Vancise J.A.”_____

VANCISE J.A.