Court No.: 35745

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for British Columbia)

BETWEEN:

IVAN WILLIAM MERVIN HENRY

Appellant
(Respondent)

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, as represented by THE ATTORNEY GENERAL OF BRITISH COLUMBIA

Respondent
(Appellant)

AND:

ATTORNEY GENERAL OF CANADA

Respondents
(Respondents)

AND:

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Interveners

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TABLE OF CONTENTS

PART I
OVERVIEW AND STATEMENT OF FACTS

Overview

1. The Appellant's statement of issue at paragraph 1 of his factum misstates the true question to be resolved on this appeal. British Columbia has always conceded that a plaintiff can pursue a claim for damages under s. 24(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") for *Charter* breaches that occur in the course of a criminal investigation or prosecution. What is at issue in this appeal is whether malice is a necessary element for a *Charter* damages claim founded on the decision-making of a prosecutor. To answer that question, the Court must consider whether and to what extent a remedy in damages under s. 24(1) of the *Charter* is to be informed by the liability threshold for analogous tort claims based on prosecutorial misconduct.

2. Since this Court's decision in *Nelles v. Ontario*, [1989] 2 S.C.R. 170 ("*Nelles*"), a common law principle of qualified immunity from civil liability has shielded Crown counsel in the exercise of all prosecutorial functions. The immunity prohibits actions in negligence, even gross negligence, against Crown counsel. If prosecutors act maliciously in the sense described in *Nelles* they act outside the scope of the immunity. The malice requirement was designed to strike a balance between the rights of citizens to be free from groundless criminal prosecutions and the public interest in the effective and uninhibited prosecution of criminal wrongdoing. The same balance must be struck regardless of the cause of action advanced by a plaintiff.

3. The Appellant argues that the consistent liability rules that have applied to tort claims for damages for prosecutorial misconduct for the past 25 years in Canadian law are inapplicable or should be modified when a remedy in s. 24(1) *Charter* damages is pleaded. The Appellant's proposed modification of the law would empty the qualified immunity of its content and disrupt the careful balancing of competing policy alternatives on which it is based. If Crown counsel are exposed to suits for negligent breach of *Charter* rights, there would no longer be any principled reason to shield them from actions in simple negligence for the same alleged misconduct. Getting around the immunity becomes simply an exercise in artful pleading.

4. The primary justification offered by the Appellant for such a radical modification in the law is the need to provide a remedy in cases of "wrongful conviction".[1] In addition to the array of potential tort and *Charter* remedies available to the wrongfully convicted, most common law jurisdictions (including Canada) have state-funded compensation schemes. There are difficult questions of policy inherent in defining eligibility requirements for compensation, including such matters as whether factual innocence is a prerequisite and on what standard of proof, and the significance (if any) of the claimant's conduct in contributing to the conviction or length of incarceration.[2]

5. The Appellant's argument ignores not only 25 years of the development of Canadian common law as it relates to damages for prosecutorial misconduct, but also over 30 years of policy debate in Canada and elsewhere about the terms on which state-funded compensation should be provided to the wrongfully convicted. The Appellant avoids the policy debate in asserting that the wrongfully convicted should not have to rely on the "whim of the state" to provide an *ex gratia* payment. Instead, the Appellant says that s. 24(1) of the *Charter* should be the foundation for a no fault compensation scheme.[3]

6. The Appellant's arguments do not demonstrate that the existing remedies available to the wrongfully convicted leave a remedial gap. A claimant seeking damages for wrongful conviction can pursue tort and *Charter* claims against state actors (as the Appellant is doing), including the recently established tort of negligent investigation.[4] As the case studies cited by the Appellant evidence, *ex gratia* payments have functioned effectively to provide compensation in many cases of wrongful conviction, a category of claims that the Appellant concedes to be exceptional.[5] To the extent that the Appellant rests his proposed overhaul of the law of prosecutorial immunity on cases of wrongful conviction, the proposed solution vastly overshoots any demonstrated deficiency in existing remedies.

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[1] The Appellant repeatedly uses the term "wrongful conviction" without actually defining it. As reviewed *infra* at paras. 111-126, there is significant policy debate over the question of who should qualify for state-funded compensation for wrongful conviction.
[2] *Infra,* at paras. 124-125.
[3] Appellant's factum, para. 4.
[4] *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 ("*Hill*").
[5] Appellant's factum, para. 3.

Background Facts

7. British Columbia takes no issue with the Appellant's review of the allegations in the Second Amended Notice of Civil Claim and agrees that the pleaded facts are assumed to be true for the purpose of the pleadings motion that grounds this appeal.[6] The Appellant rests this appeal fundamentally on his ultimate acquittal by the British Columbia Court of Appeal, thus prompting the Appellant's characterization of this case as one of wrongful conviction. For this reason, it is also useful to consider the additional context provided by the Court of Appeal's decision as to the basis for the acquittal and the trajectory of the criminal proceeding.[7]

8. A review of the procedural history of this case is also necessary for a full understanding of what was in issue before the British Columbia Court of Appeal in the decision under appeal.

The Appellant's conviction and incarceration

9. The Appellant was committed to trial following a preliminary hearing which took place over eight days in October and November 1982. The Appellant had commenced representing himself following the preliminary hearing and continued in-person throughout the trial. (*Henry 2010*, at paras. 5, 15-17)

10. The Appellant also represented himself in appealing the March 15, 1983 convictions. On the Crown's motion, the British Columbia Court of Appeal dismissed the appeal for want of prosecution on February 24, 1984. The Court of Appeal noted that the Appellant had not ordered appeal books and that he had refused to do so. The Appellant sought leave to appeal the dismissal to the Supreme Court of Canada, but leave was refused along with the Appellant's subsequent application for reconsideration of the leave refusal. (*Henry 2010*, at paras. 20-21)

11. The Appellant brought a number of *habeas corpus* applications during the 1980s and 1990s, but these were dismissed. On December 16, 1997, the British Columbia Court of Appeal dismissed applications by the Appellant to re-open his appeal and for the appointment of counsel under s. 684 of the *Criminal Code*.[8]

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[6] Appellant's factum, paras. 9-34.

[7] The Court of Appeal's decision is reported at: *R. v. Henry*, 2010 BCCA 462, 262 C.C.C. (3d) 307 ("*Henry 2010*").

[8] *R. v. Henry*, [1997] B.C.J. No. 2792 (C.A.); leave to appeal dismissed [1998] S.C.C.A. No. 77.

12. In 2002, the Vancouver City Police began "Project Smallman", a re-investigation of 25 unsolved sexual assaults that had been committed between 1983 and 1988. None of the assaults could have been committed by the Appellant because he was imprisoned at the time. Another individual linked by D.N.A. to three of these later assaults eventually pleaded guilty to three offences. (*Henry 2010*, at paras. 25-26)

13. Two senior Crown counsel in the Vancouver regional office, including the lead prosecutor at the Appellant's trial, became aware of similarities between the case against the Appellant and information uncovered in the course of Project Smallman. In what the Court of Appeal described as the "*best traditions of prosecutorial fairness*", the prosecutors brought their concerns to the attention of the Criminal Justice Branch in the Ministry of Attorney General. (*Henry 2010*, at para. 27)

14. In 2005, the Criminal Justice Branch appointed Leonard Doust, Q.C. to investigate a potential miscarriage of justice in the Appellant's March 15, 1983 convictions. In his report of March 2008, Mr. Doust recommended, *inter alia*, that the Crown make full disclosure to the Appellant of relevant evidence in its possession, including the results of "Project Smallman". Mr. Doust recommended as well that the Criminal Justice Branch appoint a special prosecutor to represent the Crown in response to any application by the Appellant to reopen his appeal and adduce fresh evidence. (*Henry 2010*, at paras 28-29)

15. The Appellant subsequently did apply to reopen his appeal on the merits, without opposition from the Crown. On January 13, 2009, the Court of Appeal set aside its previous order of February 24, 1984 and reopened the appeal.[9] In June 2009, the Appellant was released on bail pending hearing of the appeal. (*Henry 2010*, at para. 34)

The Appellant's acquittal by the Court of Appeal

16. On October 27, 2010, the British Columbia Court of Appeal quashed the Appellant's March 15, 1983 convictions and entered an acquittal on each count.

17. The errors that the Court of Appeal identified as bases for setting aside the Appellant's convictions were errors by the trial judge, not errors by any other state actors involved in the events leading to the March 15, 1983 convictions. Specifically, the errors that the Court of

[9] *R. v. Henry*, 2009 BCCA 12.

Appeal identified in the trial judge's conduct of the trial, any one of which in its view justified an order for a new trial, were:

i. instructing the jury that they could infer consciousness of guilt from the Appellant's resistance to participate in the police line-up; (paras. 40-69)

ii. providing inadequate instruction to the jury on the element of identification; (paras. 70-81) and

iii. failing to sever the counts and declare a mistrial when the Crown abandoned its application for jury instruction on count-to-count similar fact evidence. (paras. 82-88)

18. The Court of Appeal declined to rule on the potential use of the evidence of sexual assaults that occurred after the appellant was permanently in custody (the Smallman evidence), and specifically declined to find the Appellant factually innocent:

> **151** In my opinion, it cannot be said that the Smallman evidence, whether viewed in broad focus or in narrow focus by being confined to the known conduct of D.M., leads one to conclude that the appellant is innocent of the offences for which he was convicted. It does not exonerate him. At best, it is evidence that might be admitted at a new trial under the law relating to other suspects, not on the basis that it disproves the element of identity, but on the basis that it is capable of raising a reasonable doubt on that issue.

The original notice of civil claim and British Columbia's motion to strike

19. The Appellant filed the present action on June 28, 2011, eight months after the Court of Appeal decision acquitting him.

20. The Appellant alleges that the fault for his wrongful conviction and imprisonment lies with various state actors: the police officers who investigated the sexual assaults of which he was convicted (the defendants Harkema, Sims, and Campbell), the local government responsible for training the police officers and operating the forensic lab that had custody of exhibits collected in the investigation (the defendant City of Vancouver), the various provincial Crown counsel who had conduct of the 1982-1983 prosecution conviction appeal and post-conviction proceedings (the defendant Province of British Columbia), and the federal Crown officials who reviewed the Appellant's post-conviction applications for review (the defendant Attorney General of Canada).

21. The gravamen of the claim against Crown counsel is that they failed to disclose relevant and potentially exculpatory evidence to the Appellant in the course of trial or afterwards. The Appellant also alleges that Crown counsel knowingly elicited inconsistent and unreliable testimony from the complainants, and implied to the trial judge that full disclosure had been made when it had not.[10]

22. In his original notice of civil claim, the Appellant pleaded that this alleged misconduct of Crown counsel constituted the torts of negligence, malicious prosecution, and misfeasance in public office. The Appellant further pleaded that the same misconduct constituted a breach of his rights under ss. 7 and 11(d) of the *Charter* giving rise to a remedy in damages under s. 24(1).[11]

23. British Columbia applied to strike those portions of the notice of civil claim which alleged negligence against the Crown and any non-malicious breach of the Appellant's *Charter* rights.[12] The test to be applied on such an application is whether it is plain and obvious that the pleaded claims, the facts underlying which are presumed to be true, do not disclose a reasonable cause of action.[13] British Columbia's position on the strike-out motion was that *any* cause of action for damages for prosecutorial misconduct (however pleaded or framed) must include as a necessary element the threshold requirement of malice as defined in *Nelles*, and applied in *Proulx v. Quebec (Attorney General)*, 2001 SCC 66, [2001] 3 S.C.R. 9 ("*Proulx*"), and *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339 ("*Miazga*"). Thus it was plain and obvious that causes of action which did not allege malice were not viable.

24. In a judgment rendered September 24, 2012, Goepel J. allowed British Columbia's application in part.[14] In striking out the claim in negligence, Goepel J. stated:

> **58** Those decisions [*Nelles, Proulx* and *Miazga*] recognized that there is a credible case for complete prosecutorial immunity, but determined that on balance,

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[10] June 28, 2011 Notice of Civil Claim, paras. 113-118, Appellant's Record Vol. 1, Tab 5.
[11] June 28, 2011 Notice of Civil Claim, paras. 113-119, 122-23, 130.
[12] British Columbia did not apply to strike out paragraph 121 of the Appellant's notice of civil claim, which alleged that the actions of Crown counsel constituted the tort of misfeasance in public office. In his Second Amended Notice of Civil Claim filed January 13, 2014, the Appellant has abandoned the claim for misfeasance in public office. [Appellant's Record Vol. 2, Tab 15] This was not as a consequence of any application by British Columbia.
[13] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 17-25.
[14] *Henry v. British Columbia (Attorney General)*, 2012 BCSC 1401 [Appellant's Record Vol. 1, Tab 9].

> public policy mandated an exception in those cases where the prosecutor's conduct rose to the level of malice. Only in circumstances where a prosecutor has so perverted or abused his office in the process of criminal justice should an action lie.
>
> . . . .
>
> **60** I find that it is plain and obvious that the claim in negligence has no reasonable prospect of success. In regard to remedy, having reached the conclusion that the claim in negligence is without legal foundation regardless of how it is pleaded, I order the negligence claim against the Province dismissed. (emphasis added)

25. Goepel J.'s ruling on British Columbia's motion to strike did not conclusively resolve the question of whether the rule of prosecutorial immunity also applied to bar the Appellant's claim for damages under s. 24(1) of the *Charter* to the extent it did not include a plea of malice. Goepel J. presumed that the Appellant's plea of breaches of his *Charter* rights (while not drafted "in the most artful manner"), amounted to an allegation of malicious conduct. Alternatively:

> **72** If the plaintiff intends to argue at the trial of this matter that it [*sic*] is entitled to *Charter* damages against the Province absent a finding that the acts of the prosecutor were done maliciously, it will have to apply for leave to amend its pleading to make such an allegation. I am seized of any such application.

26. No party appealed this ruling.

The Appellant's application to amend the notice of civil claim

27. The procedural ruling which gives rise to the present appeal is the Appellant's February 2013 application to amend his notice of civil claim to address Goepel J.'s ruling on British Columbia's motion to strike. Although the proposed amendments purported to remove the claims in negligence, in fact the amendments had the effect of expanding rather than narrowing the Appellant's case against British Columbia. The proposed amendments may be summarized as follows:[15]

i. The allegations against Crown counsel in the Appellant's Part 1 Statement of Facts (paras. 50-53) were expanded to include the plea that Crown counsel "ought to have known" of facts said to be relevant to the alleged non-disclosure of evidence.

ii. The negligence plea in Part 3 of the Legal Basis (paras. 113-118) was amended to remove the words "duty of care", but to add the allegation that Crown counsel "ought to have known" certain pleaded facts in relation to the alleged non-disclosure.

[15] February 5, 2013 Notice of Application [Appellant's Record Vol. 1, Tab 10].

iii. The application proposed an entirely new paragraph 120 pleading that the various acts of Crown counsel described in paras. 113-118 violated the Appellant's rights under ss. 7 and 11(d) of the *Charter*.

iv. Paragraph 120 contained a number of sub-paragraphs variously defining the liability of Crown counsel with a long list of adjectives ranging from "negligent" and/or "without the necessary care", to "a marked and unacceptable departure from reasonable standards" to "malicious".

28. British Columbia objected to the proposed amendments on the same basis it had argued the motion to strike: the common law principle of prosecutorial immunity barred any claims for damages for wrongful prosecution and conviction (whether in tort or under s. 24(1) of the *Charter*) in relation to the alleged misconduct of Crown counsel falling short of malice.

29. Goepel J. allowed the application to amend in part.[16] Goepel J. accepted that there must be limits on the nature of claims that may be brought against Crown counsel, even in a claim for damages under s. 24(1) of the *Charter*. However, Goepel J. found that malice set too high of a liability threshold in the context of a claim for *Charter* damages. Instead, Goepel J. imported a lower threshold of "marked and unacceptable departure" borrowed from the test for costs in criminal proceedings:

> **61** I see no need to limit an individual's claim for *Charter* damages by importing the malice requirement which governs private law actions for malicious prosecution. In my view the good governance concerns[17] can be properly protected by applying the standard that has been followed in the criminal costs cases. That standard has been developed to deal with *Charter* breaches in a criminal setting. It provides guidance in determining when s. 24(1) damages would be "appropriate and just" in a civil claim and strikes the appropriate balance between the competing policy interests.

30. In the result, Goepel J. allowed all of the proposed amendments (including the addition of the term "ought to have known") with the exception of paragraph 120. The proposed plea in paragraph 120 was disallowed except for paragraph 120(k) which pleaded that the conduct of

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[16] Reasons for Judgment in Chambers [Appellant's Record Vol. 1, Tab 1].

[17] This is a reference to the third step of the test for damages under s. 24(1) of the *Charter* laid out by this Court in *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28 ("*Ward*").

Crown counsel constituted a "marked and unacceptable departure from the reasonable standards expected of Crown counsel".[18]

The judgment of the British Columbia Court of Appeal

31. British Columbia appealed the ruling of Goepel J. on the pleadings amendment application. The Appellant did not appeal. As such, Goepel J.'s refusal to permit the Appellant to amend his pleading to plead a claim in damages for, *inter alia*, negligent breach of *Charter* rights or any other standard of fault less than a "marked and unacceptable departure from the reasonable standards expected of Crown counsel" was not argued before, or addressed by, the Court of Appeal. The only issue before the Court of Appeal was whether malice was the liability threshold for both tort and *Charter* damage claims or whether a lower threshold (in the form of the marked and unacceptable departure standard) applied to claims for *Charter* damages for prosecutorial misconduct.

32. The Court of Appeal held that proof of malice (within the meaning of *Nelles*) was a prerequisite to an award of damages for prosecutorial misconduct regardless of the cause of action alleged:

> **24** In my opinion, if a plaintiff demonstrates malicious conduct, a prosecutor could be liable for tort and *Charter* damages, subject always to double recovery considerations. This allays Lamer J.'s concern in *Nelles* that a plaintiff could be without a remedy for breach of *Charter* rights. The case of *Proulx* is recent high authority that demonstrates that proceedings in malicious prosecution can afford an effective remedy for a wronged plaintiff.

33. In the view of the Court of Appeal, the criminal costs cases were not a "relevant paradigm" for determining liability in damages as the costs remedy was fashioned for a different purpose – to allow criminal courts a method to control their own processes.[19] Instead, the Court of Appeal found that the issues on appeal were governed by the consistent line of authority from this Court establishing the parameters of civil liability for prosecutorial misconduct. For reasons of policy, those parameters exclude liability absent proof of malice.[20]

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[18] April 18, 2013 Order Made After Application [Appellant's Record Vol. 1, Tab 2].
[19] Reasons for judgment of the British Columbia Court of Appeal, at paras. 26-27 [Appellant's Record Vol. 1, Tab 3].
[20] Reasons for judgment of the British Columbia Court of Appeal, at paras. 28-29 [Appellant's Record Vol. 1, Tab 3].

34. In the result, the Court of Appeal held that Goepel J. should have refused the amendment sought by the Appellant to plead what the Court of Appeal characterized as a species of "gross negligence" on the part of Crown counsel.

PART II
STATEMENT OF QUESTION IN ISSUE

35. The constitutional question stated by this Court is whether s. 24(1) of the *Charter* authorizes a court of competent jurisdiction to award damages against the Crown for prosecutorial misconduct absent proof of malice.

36. The answer to the question turns on whether the rule of qualified immunity applied in *Nelles*, *Proulx*, and *Miazga* to restrict a claim for tort damages applies equally to a claim for *Charter* damages premised on the same alleged misconduct of Crown counsel in a criminal prosecution.

PART III
ARGUMENT

37. In light of the manner in which the Appellant has framed his arguments on appeal, it is necessary to offer certain preliminary observations.

38. First, this case is not simply about the distinction between the tort of malicious prosecution and the Appellant's claim for *Charter* damages.[21] It is true that in the leading decisions of this Court recognizing the qualified immunity, and defining its parameters, the damage claims for prosecutorial misconduct were advanced primarily through the tort of malicious prosecution. However, British Columbia's essential point is that the specific cause of action alleged is immaterial to the policy rationale which underlies the immunity. Regardless of how the action is framed (malicious prosecution, misfeasance in public office, abuse of process, breach of *Charter* rights, or some other liability theory), the qualified immunity must apply to any action for damages based on the conduct of Crown counsel in the course of a criminal prosecution. Otherwise, the immunity is emptied of its content and cannot achieve its critical public policy objectives.

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[21] Appellant's factum, paras. 66-72.

39. Second, the issues on appeal arise out of an interlocutory pleadings motion. The trial of this action has been scheduled to last 20 weeks, originally to start in the fall of 2014 but adjourned to accommodate this appeal. At trial, the Appellant's multiple claims against three levels of government will be determined and, if liability is established, then damages will be assessed. This is not a case in which the Appellant is deprived of a remedy. The Appellant is already pursuing a wide spectrum of existing remedies in tort and under the *Charter* against the police officers who investigated the crime, the Crown counsel who conducted the criminal trial and post-conviction proceedings, and the federal Crown in its handling of the Appellant's post-conviction applications for review.

40. Through this appeal, the Appellant seeks to expand his remedial options to include one not previously recognized under Canadian law – a state-funded, no fault compensation scheme for individuals who have had their *Charter* rights breached in the course of a criminal trial. This constitutes a significant re-shaping of the Appellant's case – beyond even the pleadings amendments that were sought before Goepel J., and certainly beyond the amendment permitted by Goepel J. (alleging gross negligence) which the Appellant sought to defend before the British Columbia Court of Appeal. Assuming it is open to the Appellant to advance such arguments, having failed to appeal even Goepel J.'s refusal to allow a claim of negligent breach of *Charter* rights, it must be recognized that what the Appellant seeks is the effective obliteration of existing and long-standing liability principles.

41. For this reason, and because these issues arise in the context of an interlocutory process for formalizing pleadings in advance of trial, it is necessary to be clear on the Appellant's theories (not consistently advanced in the factum) as to what *Charter* remedy the law should provide. The Appellant argues that "in circumstances such as those in the case at bar", *Charter* damages should be available, alternatively, on a no fault basis; on proof of simple negligence; or on proof of gross negligence (the marked departure standard).[22] At least four alternative theories emerge (expressly or impliedly) from the Appellant's factum as to why the existing qualified immunity should not apply to his claim:

i. The qualified immunity should not apply at all to claims for damages under s. 24(1) of the *Charter*. In every case, there must be a trial to determine if s. 24(1) damages are

[22] Appellant's factum, para. 8.

an "appropriate and just" remedy for alleged *Charter* breaches by a prosecutor on consideration of the factors in *Ward*.[23]

ii. The qualified immunity should not apply if the impugned actions of Crown counsel fall outside the "core" of prosecutorial discretion.[24]

iii. The qualified immunity should not apply if the impugned actions of Crown counsel are alleged to have contributed to a plaintiff's wrongful conviction.[25]

iv. If governance concerns necessitate some higher liability threshold than a no fault or simple negligence regime for *Charter* damages claims for prosecutorial misconduct, then Goepel J.'s "marked and unacceptable departure" standard is preferable to a standard of malice.[26]

42. Although varying in their scope, each of the Appellant's theories would require *Nelles* to be at least modified and perhaps abandoned altogether. The Appellant offers no principled basis for such a departure, and ignores entirely any consideration of the policy considerations at the heart of the qualified immunity. In addressing each of the Appellant's theories as to the modified liability regime that should apply to his claims, it is first necessary to provide a more complete review of the rationale for the rule of prosecutorial immunity.

The principle of prosecutorial immunity in Canada

43. The decision of this Court in *Nelles* remains the leading authority on the rule of prosecutorial immunity in Canadian law. *Nelles* was an action for malicious prosecution which had been struck out by the lower courts, relying on the absolute immunity rule for alleged prosecutorial misconduct established by the United States Supreme Court in *Imbler v. Pachtman*, 424 U.S. 409 (1976) ("*Imbler*"). This Court allowed the appeal in *Nelles*, concluding that the immunity rule in Canada should not be absolute but rather limited to non-malicious breach of duty by a prosecutor.

44. Given that the issue in *Nelles* was whether the absolute immunity rule in *Imbler* should be adopted in Canada, a review of *Imbler* is an instructive starting point in understanding *Nelles*.

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[23] Appellant's factum, paras. 40-44, 73-80.
[24] Appellant's factum, paras. 85-94.
[25] Appellant's factum, paras. 2-3, 44, 55, 59-61.
[26] Appellant's factum, paras. 101-103.

Imbler v. Pachtman

45. *Imbler* was an action for constitutional damages in the context of what was alleged to have been a wrongful prosecution. The plaintiff in *Imbler* was convicted of robbery and murder in 1961 and spent close to a decade in prison before obtaining a writ of *habeas corpus* from the Federal District Court which secured his release. The District Court found eight instances of state misconduct at Imbler's trial, including the culpable use by the prosecutor of misleading or false testimony, and evidence suppression by police.

46. Imbler subsequently filed a civil rights lawsuit under 42 U.S.C.§ 1983[27] against Pachtman (the prosecutor) and various Los Angeles police officers involved in his investigation and prosecution, alleging a conspiracy among them to deprive him of his liberty without due process. The law in the United States had long granted prosecutors an absolute immunity from liability in tort, including for malicious prosecution. In *Imbler*, the U.S. Supreme Court unanimously held that the absolute immunity rule also applied to bar the claim against Pachtman for constitutional damages.

47. The majority and minority judgments in *Imbler* differed in one respect as to the scope of the immunity, but were otherwise in agreement as to its animating policy considerations. The policy considerations, which ultimately also informed the analysis in *Nelles*, centred on the concern that §1983 claims would distract prosecutors' energies from their public duties, engaging them in a virtual retrial of criminal offences years later, and the possibility that prosecutorial decision-making, as well as post-conviction judicial decisions, would be distorted by the prospect of liability.[28]

48. Both the majority and minority judgments in *Imbler* conceived of the prosecutor's role in initiating a prosecution and in bringing evidence to the court as essentially "judicial" in nature.

[27] Title 42, Chapter 21 ("Civil Rights") § 1983 ("Civil Action for Deprivation of Rights"), derived from the Civil Rights Act of 1871, provides that anyone whose constitutional rights have been violated under the colour of state authority has a right of action for damages against the person who caused the violation.
[28] *Imbler*, at pp. 424-425.

Thus the absolute immunity rule was viewed as an extension or analogue of the same absolute rule which protects judges from damages claims.[29]

49. The majority judgment in *Imbler* extended the absolute immunity rule to all acts of a prosecutor which form part of the judicial phase of the criminal process – that is, in general terms "initiating a prosecution and presenting the State's case".[30] Included within the immunity were all of the allegations against Pachtman, including the allegations of suborning perjury and intentional suppression of evidence. Misconduct alleged in the course of the judicial process was, in the view of the Court in *Imbler*, to be distinguished from pre-trial prosecutorial duties that were "administrative or investigative" in nature. The latter duties are subject to only a qualified immunity under U.S. law. Hence the so-called "functional approach" to prosecutorial immunity as it has come to be known in that jurisdiction.

50. Justice White, in a concurring judgment in *Imbler*, was in substantial agreement with the majority judgment except in one area: an allegation that a prosecutor has intentionally failed to disclose exculpatory evidence to an accused. Justice White would have held that a prosecutor's alleged failure to disclose evidence is protected only by a *quasi*-immunity and therefore actionable if the duty to disclose is not performed in good faith.

51. The majority judgment in *Imbler* continues to represent the law of prosecutorial immunity in the United States. Provided that the impugned actions of the prosecuting attorney relate to the conduct of the trial rather than administrative or investigative tasks, absolute immunity governs. This includes an allegation of intentional suppression of evidence.[31] The functional test does not serve to parse out tasks which can properly be labelled "administrative" or "judicial" in the course of a criminal trial. All actions of a prosecuting attorney which occur within the trial process itself (including disclosure of evidence to an accused) are covered by

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[29] *Imbler*, at pp. 422-423, *per* Powell J.: "The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties"; at p. 437, *per* White J.: "The general rule was, and is, that a prosecutor is absolutely immune from suit for malicious prosecution. The rule, like the rule extending absolute immunity to judges, rests on the proposition that absolute immunity is necessary to protect the judicial process."

[30] *Imbler*, at p. 431.

[31] *Fields v. Wharrie*, 672 F 3d 505 (2012) ("*Fields*").

absolute immunity. What is not covered are job responsibilities that do not form part of the prosecution itself.[32]

52. This distinction is of no importance in Canada where, as reviewed *infra*, the functional approach to prosecutorial immunity has been rejected as "arbitrary" and "unprincipled".[33] However, in considering the rejection of the functional test in Canada, it bears emphasis that even that test would include within the scope of immunity all acts related to the "*judicial phase of the criminal process*".[34]

53. *Imbler* is consistent with the general approach the U.S. Supreme Court has taken to § 1983 claims. Despite the broad terms of the provision, the Court has long recognized that the remedy it provides was not intended to effect a "*radical departure from ordinary tort law and the common law immunities applicable in tort suits*".[35]

Nelles v. Ontario

54. The plaintiff in *Nelles* was a nurse charged in connection with the death of four infant patients at Toronto Hospital for Sick Children. After the plaintiff was discharged on all counts following a preliminary inquiry, she commenced an action against, *inter alia*, the Attorney General for Ontario alleging that Crown counsel had acted improperly and maliciously in pursuing the charges. The Attorney General applied to strike the action on the ground that the Crown counsel were protected by a rule of absolute immunity.

55. This Court in *Nelles* accepted the compelling policy reasons identified in *Imbler* for not exposing prosecutors to civil damage claims as a consequence of their conduct of a criminal prosecution. Stated generally, the policy reasons include: maintenance of the public confidence in the exercise of prosecutorial duties; the existence of other adequate remedies; and the desire to avoid lengthy re-litigation of criminal trials.[36] However, the majority in *Nelles* held that the concerns could be met with a qualified immunity that permitted suits against Crown counsel but only when a prosecution is conducted maliciously. Prosecutorial mistakes made in good faith – even if they rise to the level of professional negligence – would not found liability for damages.

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[32] *Fields*, at pp. 6-7.
[33] *Nelles*, at pp. 189, 199.
[34] *Fields*, at p. 7.
[35] *Rehberg v. Paulk*, 132 S Ct 1497 (2012).
[36] *Nelles*, at pp. 183, 199-200, 223-224.

56. In the view of the majority, the malice threshold was a sufficient brake on liability to ensure Crown counsel would not become defensive in their decision-making or be distracted from their core public functions, and achieved a more appropriate balancing of the policy considerations in favour of immunity against the right of private citizens to seek redress for deliberate abuse of prosecutorial power. Malice, as defined in *Nelles*, is the equivalent of "improper purpose". In an action against Crown counsel, the plaintiff must prove malice in the form of a deliberate and improper use of the office of the Crown Attorney for ends that are inconsistent with the traditional prosecutorial function.[37]

57. The Court in *Nelles* expressly rejected the functional approach to prosecutorial immunity that governed U.S. law, concluding that the drawing of distinctions between the "judicial" and "administrative" activities of prosecutors was an unprincipled approach. The Court's concerns with the functional approach of *Imbler* extended to Justice White's proposed modification to remove the protection of absolute immunity for intentional suppression of evidence:

> An example of the difficulty with the functional approach is the disagreement in the lower courts in the United States over whether *quasi*-judicial absolute immunity extends to investigative functions of a prosecutor. In addition, and in light of the White concurring judgment in *Imbler*, there is disagreement over whether leaks of information and destruction or alteration of evidence are acts that are protected by absolute immunity....In my view, these disagreements demonstrate the futility of attempting to distinguish between functions of a prosecutor in a principled way. The result is often arbitrary line-drawing which leads to seemingly irresolvable conflict and the diversion of attention from the central issue, namely whether or not a prosecutor has acted maliciously.
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> . . . .
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> In my view to decide the scope of the immunity on the basis of categorization of functions is an unprincipled approach that obscures the central issue, namely whether the prosecutor has acted maliciously. If immunity is to be qualified it should be done other than by the drawing of lines between *quasi*-judicial and other prosecutorial functions.[38]

58. In defining the scope of the qualified immunity, and consistent with its rejection of the functional approach, the Court in *Nelles* had in view the full range of tasks involved in carrying out a prosecution, both the decision to initiate and broadly, thereafter, the bringing of evidence and argument to the court. The breadth of prosecutorial conduct which the Court contemplated in

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[37] *Nelles*, at pp. 193-194, 199-200.
[38] *Nelles*, at pp. 184-185, 189, 199.

its scheme of the immunity rule is underscored by Lamer J.'s description of the powers of a prosecutor:

> Among the many powers of a prosecutor are the following: the power to detain in custody, the power to prosecute, the power to negotiate a plea, the power to charge multiple offences, the power of disclosure/non-disclosure of evidence before trial, the power to prefer an indictment, the power to proceed summarily or by indictment, the power to withdraw charges, and the power to appeal…[39]

59. The Court in *Nelles* was mindful of the possibility of a claim for *Charter* damages under s. 24(1) of the *Charter* as an adjunct to a claim for malicious prosecution, and assumed that an immunity rule would equally apply to a claim for *Charter* damages. Indeed, this was one of the considerations that led the Court to reject absolute immunity. This qualified immunity was considered sufficient to meet the concern that there would be no remedy for a denial of *Charter* rights, while at the same time meeting the policy underlying the immunity:

> …it should be noted that in many, if not all cases of malicious prosecution by an Attorney General or Crown Attorney, there will have been an infringement of an accused's rights as guaranteed by ss. 7 and 11 of the *Canadian Charter of Rights and Freedoms*….
>
> Granting an absolute immunity to prosecutors is akin to granting a license to subvert individual rights. Not only does the absolute immunity negate a private right of action, but in addition, it seems to me, it may be that it would effectively bar the seeking of a remedy pursuant to s. 24(1) of the *Charter*.[40]

60. Thus the potential for a claim of damages under s. 24(1) of the *Charter* in the context of a claim for wrongful prosecution expressly influenced the liability standard established in *Nelles*. With that potential squarely in mind, the Court established a qualified immunity from civil liability extending to all prosecutorial misconduct except that animated by malice.

61. The qualified immunity serves a public good in protecting independent decision-making by Crown counsel in the prosecution of criminal offences. In *Nelles*, the Court described the traditional role of a Crown attorney as that of a "*minister of justice*" who "*ought to regard himself as part of the Court rather than as an advocate*".[41] The independence of Crown counsel is fundamental to our criminal justice system and has been recognized as a constitutional

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[39] *Nelles*, at p. 192.
[40] *Nelles*, at pp. 194-195.
[41] *Nelles*, at p. 191.

principle,[42] which precludes political or judicial influence in the prosecutorial function. Subjecting Crown counsel to routine second-guessing in after-the-fact civil suits is undermining of this principle of constitutional independence, regardless of efforts by a plaintiff to compartmentalize the attack on prosecutorial decisions. It is only when Crown counsel act in a manner inconsistent with their role as a "minister of justice" that the policy reasons for the immunity cease to apply and liability in damages may arise.

62. A final point to emphasize in *Nelles* is that the qualified immunity is not simply a mechanism to avoid an award of damages but also to avoid subjecting Crown counsel to civil actions at the behest of every disgruntled person who has been subjected to the criminal process. Quite apart from the potential for an award of damages, simply exposing Crown counsel to after-the-fact civil actions creates the dangers identified in *Nelles*, including the diversion from duties which would result from the frequent need to defend civil actions, the second guessing of prosecutorial judgment, and the chilling effect this would have on the effective exercise of important public duties. In *Nelles*, the Court pointed to the availability of pleadings motions and summary trials to weed out meritless claims, and also emphasized the malice threshold as a brake on liability to address the countervailing policy concerns.[43]

Qualified Immunity post-*Nelles*

63. This Court has subsequently considered prosecutorial immunity in *Proulx* and *Miazga*. *Proulx* was an exceptional case in which an action for malicious prosecution succeeded, and *Miazga* was one in which the Court held that the actions of Crown counsel could not support a finding of malice. In both decisions, this Court expressed strongly, and in terms consistent with its prior decision in *Nelles*, the need to maintain the high threshold of malice as a precondition to prosecutorial liability.

64. In *Proulx*, the principle was put in the following terms:

> **4** Under our criminal justice system, prosecutors are vested with extensive discretion and decision-making authority to carry out their functions. Given the importance of this role to the administration of justice, courts should be very slow indeed to second-guess a prosecutor's judgment calls when assessing Crown liability for prosecutorial misconduct. *Nelles* affirmed unequivocally the public

[42] *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372 ("*Krieger*"), at paras 29-30; *Miazga*, at para.46.
[43] *Nelles*, at pp. 197-99.

> interest in setting the threshold for such liability very high, so as to deter all but the most serious claims against the prosecuting authorities, and to ensure that Crown liability is engaged in only the most exceptional circumstances....

65. In the same vein, the liability threshold was summarized in *Miazga* as follows:

> **8** ... In the context of a case against a prosecutor, malice does not include recklessness, gross negligence or poor judgment. It is only where the conduct of the prosecutor constitutes an "abuse of prosecutorial power", or the "perpetuation of a "fraud on the process of criminal justice" that malice can be said to exist ... . (emphasis added)

66. This Court has resisted any attempt to relax the strict requirements for liability established in *Nelles*, and the malice requirement in particular. In *Miazga*, the Court rejected the plaintiff's complaints that the requirement of independent evidence of malice set "too high a barrier" for a wrongfully-prosecuted person to obtain a remedy:

> **52** In my view, these arguments are ill-conceived and do not account for the careful balancing established in *Nelles* and *Proulx* between the rights of individual citizens to be free from groundless criminal prosecutions and the public interest in an effective and uninhibited prosecution of criminal wrongdoing....As this Court made plain in *Nelles*, the "inherent difficulty" in proving a case of malicious prosecution was an intentional choice by the Court, designed to preserve this balance.

67. The respondents in *Miazga* were charged in 1991 with several counts of sexual assault of children in their care and committed to trial. The charges were stayed in 1993, and some years later the children recanted. The Court accepted there was "no question" but that the respondents were victims of "a clear miscarriage of justice" which had a devastating effect on their lives.[44] In addition to suing for malicious prosecution, the respondents had initially pursued what were described at trial as "collateral causes of action" including damages under s. 24(1) of the *Charter*. These collateral causes of action were disposed of by the trial judge as follows:

> [324] Some of the causes of action collateral to a malicious prosecution action, such as abuse of public office, breach of *Charter* rights and conspiracy to injure, are for policy reasons, subsumed into the malicious prosecution cause of action and do not exist as stand alone causes of action.[45]

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[44] *Miazga*, at para. 2.
[45] *D.K. v. Miazga*, 2003 SKQB 559 (Q.B.), at paras. 323-327.

68. The collateral causes of action, including the claim for damages under s. 24(1) of the *Charter*, were not directly addressed by this Court in *Miazga*. Having concluded that the trial judge erred in inferring malice from the absence of reasonable and probable grounds, the Court dismissed the action.

69. Although *Nelles*, *Proulx* and *Miazga* were all concerned with the tort of malicious prosecution, the qualified immunity rule is of general application and not limited to specific causes of action. As stated by the Ontario Court of Appeal in *Miguna v. Ontario (Attorney General)* (2005), 205 O.A.C. 257:

> **11** Thus there exists a narrow exception to the Crown's immunity from suit for prosecutorial misconduct in cases where "the prosecutor acts maliciously in fraud of his duties with the result that he causes damage to the victim". Whether that narrow exception is confined to the tort known as "malicious prosecution" is not clear from the authorities. But one thing is clear: however the claim is framed, the Crown's conduct must rise to the level of malice.

70. Assuming that other causes of action that might be raised in relation to a prosecution are not "subsumed" by the tort of malicious prosecution, the Ontario Court of Appeal must be correct that they are subject to a qualified immunity. Otherwise, a prosecutor could be liable for false imprisonment or negligence for a prosecution conducted with "recklessness, gross negligence or poor judgment".[46]

71. The qualified immunity is a principle of general law, rather than a peculiarity of a particular cause of action. This is evident from *Hill*, another post-*Nelles* decision of this Court. In *Hill*, the Court held for the first time that police owe a duty of care to a person suspected of committing a crime and may be subject to a claim in negligence for steps taken in the course of an investigation. In so concluding, the Court noted the qualitative difference between the role of the police in gathering and evaluating evidence and the prosecutors' role in evaluating whether the evidence is sufficient to support a conviction.[47] Among the reasons cited by the Court for recognizing the duty of care on the part of police was the limits of existing common law remedies for wrongful prosecution.[48]

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[46] *Miazga*, at para. 8.
[47] *Hill*, at para. 49.
[48] *Hill*, at para. 35.

72. *Hill* has thus added negligent investigation by police to "complete the arsenal" of common law and statutory remedies available to individuals who are the subject of a wrongful prosecution.[49] This development undermines the notion that there is any gap in liability principles. Over the more than twenty years since *Nelles*, this Court has constructed a careful balance between the need to ensure that the common law is responsive to claims of wrongful prosecution and the powerful policy considerations that support the existence of a qualified immunity from liability for Crown counsel.

73. The remainder of British Columbia's factum will address the four alternative theories we understand the Appellant to be advancing on this appeal as to why *Nelles* should not apply to his claim for damages for prosecutorial misconduct.

i. The qualified immunity applies to claims for *Charter* damages

Damages as a remedy under s. 24(1) of the *Charter*

74. Section 24(1) of the *Charter* permits an individual whose *Charter* rights have been breached to apply to a court of competent jurisdiction to "*obtain such remedy as the court considers appropriate and just in the circumstances*". The possibility of a remedy in damages under s. 24(1) has long been recognized (indeed was recognized by this Court in *Nelles*), but only in *Ward* was a structured approach to a claim for *Charter* damages established.

75. Prior to *Ward*, this Court had repeatedly cautioned that s. 24 of the *Charter* was intended to operate in tandem with (not in opposition to) existing legal structures. The comments of this Court in *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 are apposite:

> **23** As McIntyre J. cautioned in *Mills*, *supra*, at p. 953, the *Charter* was not intended to "turn the Canadian legal system upside down". The task facing the court is to interpret s. 24(1) in a manner that provides direct access to *Charter* remedies while respecting, so far as possible, "the existing jurisdictional scheme of the courts": *Mills*, at p. 953 (per McIntyre J.); ....
>
> **24** In summary, the task of the court in interpreting s. 24 of the *Charter* is to achieve a broad, purposive interpretation that facilitates direct access to appropriate and just *Charter* remedies under ss. 24(1) and (2), while respecting the structure and practice of the existing court system and the exclusive role of Parliament and the legislatures in prescribing the jurisdiction of courts and tribunals. ...

[49] *Hill*, at para. 35.

76. The Appellant argues that *Ward* has overtaken the common law principle of qualified prosecutorial immunity, requiring a trial in every case to determine whether damages are an "appropriate and just" remedy under s. 24(1) for alleged prosecutorial misconduct. Such a sweeping interpretation of *Ward* is not borne out by the judgment itself which explicitly preserves a role for existing liability thresholds where damages are sought under s. 24(1), including a continuing role for common law immunities.

77. The plaintiff in *Ward* was awarded $5,000 in damages under s. 24(1) of the *Charter* for the breach of his s. 8 *Charter* rights after being subjected to an unlawful strip search at a provincial jail facility. In confirming the award, this Court set out a four-part test for assessing when an award of damages is a "just and appropriate" remedy under s. 24(1): (i) proof of a *Charter* breach; (ii) functional justification of damages; (iii) countervailing factors; and (iv) quantum.

78. The third stage of the *Ward* test includes consideration of whether countervailing factors such as good governance concerns render an award of damages inappropriate. It is at this stage of the analysis that common law immunities are relevant. One example cited by the Court in *Ward* is the "*Mackin* principle" which provides that government is immune from a damage award under s. 24(1) of the *Charter* for actions taken under a statute subsequently declared unconstitutional.[50] The *Mackin* principle finds its source in the common law: specifically, in the immunity for legislative and *quasi*-judicial decision-making recognized in *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957.[51]

79. The Court in *Ward* expressly identified malicious prosecution as another body of common law jurisprudence that might influence the liability threshold for *Charter* damages:

> **43** ....Different situations may call for different thresholds, as is the case at private law. Malicious prosecution, for example, requires that "malice" be proven because of the highly discretionary and *quasi*-judicial role of prosecutors (*Miazga v. Kvello Estate* [citation omitted]), ...When appropriate, private law thresholds and defences may offer guidance in determining whether s. 24(1) damages would be "appropriate and just". While the threshold for liability under the *Charter* must be distinct and autonomous from that developed under private law, the existing causes of action against state actors embody a certain "practical wisdom" concerning the type of

[50] *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405 ("*Mackin*"), cited in *Ward* at paras. 39-40.
[51] *Mackin*, at paras. 78-84.

> situation in which it is or is not appropriate to make an award of damages against the state....

Common law immunities and damages under s. 24(1) of the *Charter*

80. Section 24(1) of the *Charter* was intended to operate concurrently with and not replace, or act in opposition to, our system of civil law. Although the threshold for liability under the *Charter* is developed distinctly from private law, common law immunities are not simply to be abandoned in the face of a possibility of a remedy in damages under s. 24(1). To be "appropriate and just", *Charter* remedies must be measured, limited and principled.[52]

81. The immunity for legislative decision making in the form of the *Mackin* principle is, as noted *supra*, one example of a common law immunity that has continued in force even under the *Charter*. The four-step *Ward* test does not require a trial in every case to determine whether government should be immune for enacting, in good faith, an unconstitutional statute. Absent threshold misconduct, an action for damages under s. 24(1) *cannot* be combined with an action for invalidity based on s. 52 of the *Constitution Act*.[53]

82. Although not specifically cited in *Ward*, another example of a common law immunity which may bar an award of damages under s. 24(1) of the *Charter* is the rule of absolute immunity for acts undertaken in a judicial capacity. The policy rationales for the rule of judicial immunity are similar to those which underpin the rule of qualified prosecutorial immunity: protecting judicial independence, ensuring finality in litigation, and preserving scarce judicial resources by ensuring that time and energy is devoted to judicial work rather than defending lawsuits at the behest of disgruntled litigants.[54]

83. The common law rule of immunity for judicial acts is of particular significance in the present case given that errors by the trial judge (as identified by the British Columbia Court of Appeal in overturning the Appellant's convictions) were the most direct cause of the Appellant's incarceration. The Appellant's claims for damages in this case do not extend to the actions of the trial judge, notwithstanding the Court of Appeal's finding of significant errors in his

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[52] *Ernst v. EnCana Corp.*, 2014 ABCA 285, at para. 25.
[53] *Ward*, at para. 39
[54] *Taylor v. Canada,* [2000] 3 F.C. 298, at paras. 25-29; *Morier and Boily v. Rivard*, [1985] 2 S.C.R. 716. See also *Attorney General v. Chapman*, [2011] NZSC 110 (cited at para. 97 of the Appellant's factum) in which a majority of the Court held that the common law principle of judicial immunity precluded public law damages for breaches of the *New Zealand Bill of Rights Act* in the context of a criminal proceeding.

management of the trial. The Appellant appears to accept the long-standing common law principle of absolute judicial immunity.

84. There is nothing unprincipled from a constitutional perspective in applying statutory and common law limits on liability where a monetary remedy is sought for breach of *Charter* rights. Section 24(1) provides a court with discretion to provide a remedy that it considers appropriate and just. Where a remedy in money damages is sought, common law and statutory thresholds on liability may have equal force regardless of whether the claim is framed in tort or under the *Charter*: As recently stated by the Alberta Court of Appeal in the context of common law immunity for *quasi*-judicial tribunals:

> **28** In determining whether a *Charter* remedy is "appropriate and just" in the circumstances, individual judges, and the court system as a whole, will have regard to these traditional limits on remedies….
>
> **29** The law recognizes that moving from a *Charter* breach to a monetary damages remedy is not automatic or formalistic, but requires a careful analysis of whether that remedy is legitimate within the framework of a constitutional democracy, as one which vindicates the *Charter* right through an appropriate invocation of the function and powers of a court….Protecting administrative tribunals and their members from liability for damages is constitutionally legitimate.[55]

85. The consideration of immunities at the pleadings stage is entirely consistent with *Ward*. Section 24(1) does not presumptively entitle a claimant to a remedy on proof of a *Charter* breach. Instead, s. 24(1) entitles a claimant to apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. The existence of common law immunities may legitimately influence the question of whether damages are a just and appropriate remedy for an alleged *Charter* breach.

Not "appropriate and just" to award damages in light of the immunity rule

86. In considering whether a remedy is "appropriate and just" under s. 24(1) of the *Charter*, the courts must have regard to a broader range of considerations than simply a plaintiff's interest in receiving a monetary award. In cases involving alleged prosecutorial misconduct, the relevant

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[55] *Ernst v. EnCana Corp.*, *supra*. See also *Stenner v. British Columbia (Securities Commission)* (1993), 23 Admin. L.R. (3d) 247 (B.C.S.C.), [1993] B.C.J. No. 2359, at para. 78; aff'd (1996), 141 D.L.R. (4th) 122 (B.C.C.A.); leave to appeal dismissed 1996 S.C.C.A. 595.

considerations include the public's strong interest in the "*effective and uninhibited prosecution of criminal wrongdoing*".[56]

87. In the present case, the Appellant seeks damages under s. 24(1) of the *Charter* for precisely the same alleged prosecutorial misconduct that founds his claim for malicious prosecution and his original claim for negligence which was struck by Goepel J. If, as the Appellant argues, the qualified immunity established in *Nelles* is inapplicable to a claim for *Charter* damages there is very little of the immunity rule left. The Appellant's claim in negligence, struck by Goepel J. on the basis that it was "*without legal foundation regardless of how it is pleaded*"[57] can, on the Appellant's theory, simply be replaced by a claim for negligent breach of *Charter* rights. Indeed, the Appellant urges an even lower threshold of strict liability as his first position.

88. *Charter* rights are inherently at stake in any criminal prosecution, whether or not the prosecution leads to a period of incarceration. If pursuing a claim for damages for prosecutorial misconduct is as simple as pleading that a prosecutor's trial conduct led to a breach of ss. 7 or 11(d) rights, the malice threshold becomes effectively meaningless as the safeguard this Court intended it to be. If prosecutors are routinely subjected to the civil trial process, the result will be to deter them from firmly pressing their cases to the fullest extent of the evidence and their ethical obligations. This would be manifestly contrary to the public interest, as has been consistently recognized through *Nelles*, *Proulx* and *Miazga*.

89. On the Appellant's "contextualized" approach to s. 24(1), there is no effective limitation on unmeritorious nuisance suits against Crown counsel. All that is required is that the plaintiff can allege that before, during, or after the trial some aspect of the conduct of Crown counsel infringed the plaintiff's *Charter* rights. Viewed in this way, the issue presented by the Appellant's attempt to carve out *Charter* damage claims from the qualified immunity in *Nelles* is whether one individual's right to receive monetary compensation should trump society's right to full, fair and firm prosecutions, without prosecutors having to fear that every action they take and every decision they make will be dissected and second-guessed years later in a *Charter* damages lawsuit.

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[56] *Miazga*, at para. 52.
[57] *Supra* footnote 14, at para. 60.

90. The fact that a remedy under s. 24(1) of the *Charter* is claimed in a direct right of action against government does not change the analysis for the reasons highlighted by the Court of Appeal in the judgment under appeal.[58]

91. As a practical reality, individuals exercising judicial and *quasi*-judicial functions do not face personal liability for negligent acts in the course of their duties – they are inevitably indemnified by government. Reference to fear of "personal liability" in the relevant case law is a shorthand for concerns with allowing prosecutors to be routinely brought into a civil action for a virtual re-trial of the criminal trial after the fact; inviting a civil court to second-guess decisions made along the way; and the impact all of this has on a prosecutor's professional reputation and integrity. These are concerns not because a Crown prosecutor will have to pay a damages award out of his or her own pocket, but because of the influence such a process will have on the prosecutor's constitutional independence, freedom of action, decision-making in the course of a criminal trial, and the on-going performance of prosecutorial duties.

ii. Charter damages and "non-core" functions of the Crown

92. The Appellant alternatively suggests that the qualified immunity should not apply if the alleged *Charter* breach relates to a decision, action or omission falling outside the "core" of prosecutorial discretion, such as the decision to withhold disclosure of potentially relevant evidence. The Appellant argues that if impugned actions of Crown counsel do not involve the exercise of a judicial or *quasi*-judicial function, the case does not raise concerns about the Crown's constitutional independence and thus, on the Appellant's theory, the immunity is not engaged.[59]

The Appellant's submission would require this Court to directly overrule *Nelles*

93. *Nelles* rejected the very test now proposed by the Appellant on the ground that it would lead to "*arbitrary line drawing*" between prosecutorial functions. The Court held that to decide the scope of the immunity on the basis of categorization of functions is an "*unprincipled approach*" that obscures the central issue – whether the prosecutor has acted maliciously:

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[58] Reasons for judgment of the British Columbia Court of Appeal, at para. 4 [Appellant's Record Vol 1, Tab 3].

[59] Appellant's factum, paras. 93-94.

> ....If immunity is to be qualified it should be done in a manner other than by the drawing of lines between *quasi*-judicial and other prosecutorial functions.[60]

94. The approach in *Nelles* is entirely consistent with the policy that motivates the qualified immunity. Defining liability by drawing what this Court in *Nelles* fairly described as the "nearly impossible" line between the different functions of a prosecutor once again amounts to an effective abandonment of the immunity. Provided the plaintiff can point in his or her pleadings to a non-core function of the Crown (which would include a range of prosecutorial decisions made or actions taken during the course of a criminal trial) contributing to a breach of *Charter* rights, at the very least a trial will be required in every case. This would defeat the purpose of the immunity which is not simply to protect prosecutors from an award of damages but to protect them from civil suit.

95. In support of his argument, the Appellant relies on the scope of review exercised by criminal trial judges in reviewing prosecutorial conduct. The standard of judicial review in a criminal context depends, at least in part, on whether the conduct at issue falls within a "core" of prosecutorial discretion.[61] When this Court has spoken of "core" powers, it has referred to discretionary decisions made in the fulfillment of the Attorney General's primary role in determining the nature and extent of a prosecution.[62] As a matter of constitutional principle deriving from the separation of powers and the rule of law, this Court has repeatedly endorsed a deferential standard of review of these decisions. Prosecutorial discretion must be exercised independently and free from "*the influence of improper political and other vitiating factors*".[63] Courts should not interfere with prosecutorial discretion or risk becoming a "*supervising prosecutor*".[64]

96. Even before the *Charter*, courts could review decisions or actions falling within the "core" of prosecutorial discretion, but only for abuse of process. The *Charter*, of course, has expanded the grounds of judicial review in a criminal trial as well as the interventions that courts may make to protect an accused's *Charter* rights.

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[60] *Nelles*, at p. 189.
[61] *R. v Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566, at pp. 584-585; *R. v. Anderson*, 2014 SCC 41. As a practical matter, in *Anderson* this court pointed out the significant difficulty courts have had since *Krieger* in distinguishing between prosecutorial discretion on the one hand and tactics and conduct on the other.
[62] *R. v Nixon*, at pp. 578-580.
[63] *Krieger,* at para. 43.
[64] *Krieger*, at para. 31.

97. The distinction between actions within and outside the "core" of prosecutorial discretion within the course of a criminal trial does not implicate the scope of the immunity established in *Nelles* which is based on quite separate policy considerations. The goal of a criminal trial court in reviewing the conduct of Crown counsel is the promotion of a fair trial to the accused and control of the trial process. Where a prosecutorial decision involves a "core" power, the role of a criminal trial judge in controlling the court process must be balanced against the constitutional independence of the Crown. The immunity rule defined in *Nelles*, in contrast, balances different competing policy considerations – the right of individual citizens to be free from groundless criminal prosecutions on the one hand and the strong public interest in the effective and uninhibited prosecution of criminal wrongdoing on the other.[65] The core/non-core distinction is not determinative, as *Nelles* expressly held.

98. The fact that a criminal accused has broader access to judicial review and remedies in relation to non-core functions of the Crown is a consideration that supports rather than detracts from the qualified immunity articulated in *Nelles*. The decisions of Crown counsel to withhold disclosure are subject to review at trial, without any evidence or even any allegation of impropriety on the part of Crown counsel. This is a very direct and effective means of preventing miscarriage of justice based on non-disclosure. The available remedies for non-disclosure include an award of costs against the Crown at trial; discipline proceedings before the Law Society; an adjournment of the trial; a review by the trial judge of the Crown's discretion to withhold evidence; a disclosure order; exclusion of evidence; a judicial stay of proceeding; and an appeal from conviction.

99. Contrary to the Appellant's suggestion that there is no appeal from the decisions of Crown counsel, there is a significant body of case law confirming that disclosure decisions are reviewable on appeal and may found a successful appeal against conviction.[66] A criminal appeal provides a clear and well-established legal remedy for any Crown failure to make disclosure that violates the *Charter*, with or without bad faith.

100. The same point may be made about the Appellant's reliance on *Krieger*, which acknowledged a role for a provincial law society in reviewing the conduct of Crown counsel in

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[65] *Miazga*, at para. 51.
[66] *R. v. Dixon*, [1998] 1 S.C.R. 244; *R. v. Taillefer*, [2003] 3 S.C.R. 307.

relation to non-disclosure of evidence. The existence of alternative mechanisms for reviewing and correcting the conduct of Crown counsel is a reason that favours rather than undercuts the rule of qualified immunity from liability. In *Imbler*, for example, the U.S. Supreme Court pointed to the possibility of professional disciplinary proceedings against a prosecutor as a "check" that undermined the argument that civil liability was the only means of deterrence.[67]

101. Finally, it must be acknowledged that the simple statement that Crown counsel has a duty to disclose relevant evidence masks a much deeper complexity to the issue. In practice, there is significant room for debate and dispute about how the obligation to disclose may be applied in any particular case. The question is especially fraught in cases of alleged sexual violence, like the case at bar, where the privacy rights of complainants and other innocent third parties must sometimes be weighed against the fair trial rights of the accused. Even in the immediate context of a criminal trial process, disclosure disputes are a constant source of litigation in the criminal courts of this country because of the difficulty and complexity of the issues.[68]

102. The difficulties are particularly acute in the present case, where the allegation of prosecutorial misconduct concerns disclosure made (or withheld) some 30 years ago. Prior to *Stinchcombe*[69] and continuing at least into the mid-1980s, disclosure was often viewed as a matter of prosecutorial discretion, not duty.[70] The loosely defined and evolving nature of the concept of prosecutorial discretion in Canadian law – a concept perhaps even less susceptible of bright-line definition than the American test of "intimately associated with the judicial phase of the proceeding" – heightens the concern with adopting the Appellant's version of a functional test for civil liability.

103. Whatever dispute exists as to the state of development of the substantive and procedural law of disclosure at the time of the Appellant's trial in 1983, there can be no doubt it has developed very significantly since then. In the intervening years, this Court has revisited the

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[67] *Imbler*, at p. 429.

[68] In *R. v. Bottineau,* [2005] O.J. No. 4034, at para. 30, Justice Watt noted that "*Despite nearly a decade and a half of judicial development, disputes about disclosure continue, apparently unabated...*". That sentiment is no less true today, after nearly two and a half decades of judicial development.

[69] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 ("*Stinchcombe*").

[70] Philip Stenning, *Appearing for the Crown: a legal and historical review of criminal prosecutorial authority in Canada* (Cowansville: Brown, 1986) at 251-54; *Study Report: Discovery in Criminal Cases* (Ottawa: Law Reform Commission of Canada, 1974) at 19; *Cunliffe v. Law Society (British Columbia)*, [1984] 4 W.W.R. 451 (B.C.C.A.) at paras. 45-46.

issue of disclosure many times, in some instances adding very significant glosses to the general principles propounded in *Stinchcombe*.[71] The *Stinchcombe* decision itself, which first recognized disclosure as a *Charter* right under s. 7, was rendered eight years after the Appellant's trial.

104. Establishing a structure under which such disclosure issues might be litigated at length in the course of a criminal trial and then re-litigated at length after the fact on a lower threshold in the course of a subsequent action for *Charter* damages, would be both inappropriate and unjust. More to the point, it would be contrary to *Nelles* and its rejection of the functional test for prosecutorial immunity which has been affirmed in a consistent line of authority from this Court in the 25 years that has followed that decision.

iii. *Charter* damages in cases of wrongful conviction

105. A third alternative theory posited by the Appellant is that a remedy in *Charter* damages is necessary in cases of "wrongful conviction" where the conviction arises from breach of an individual's *Charter* rights in the course of trial. Although grounded in the actions of Crown counsel (in this case the alleged failure to disclose relevant evidence), the Appellant again proposes a form of strict liability without the requirement to prove fault, or alternatively a standard of simple negligence.[72] In support of this theory, the Appellant invites this Court to "develop and shape principles of Canadian law" by reference to historical cases of wrongful conviction and the role of non-disclosure of evidence in contributing to unsafe convictions. [73]

106. The Appellant's proposed solution – to recognize a legally enforceable right to compensation through the vehicle of s. 24(1) *Charter* damages – is presented without clear parameters. It is over-inclusive because without parameters (in particular around who is to qualify as wrongfully convicted) the proposed solution significantly expands the potential range of damages claims for *Charter* breaches to matters that previously would have been barred by the qualified immunity.

107. The Appellant's proposed solution is under-inclusive because it provides a remedy only to the wrongfully convicted who can prove that their *Charter* rights were breached at trial, for example by a failure to disclose relevant evidence. Excluded from the compensation regime

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[71] *R. v. Chaplin and Chaplin*, [1995] 1 S.C.R. 727; *R. v. O'Connor* [1995] 4 S.C.R. 411; *R. v. Mills* [1999] 3 S.C.R. 668; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66; and, *R. v. Quesnelle*, 2014 SCC 46.
[72] Appellant's factum, para. 8.
[73] Appellant's factum, paras. 3 and 61.

would be those who could not prove that their wrongful conviction was the result of a *Charter* breach by prosecutors – for example a claimant who was convicted and incarcerated following a criminal trial that complied with *Charter* standards but who was subsequently exonerated through DNA evidence.

108. Also excluded would be individuals who were tried and convicted before the *Charter* was enacted in 1982 and thus cannot claim damages for a breach of *Charter* rights regardless of whether some form of prosecutorial misconduct contributed to the wrongful conviction. This category of exclusion notably encompasses several case studies cited by the Appellant to justify the *Charter* remedy this Court is urged to recognize, including Stephen Truscott (convicted in 1959), David Milgaard (convicted in 1970), Donald Marshall Jr. (convicted in 1971). Indeed, the Appellant himself would only narrowly qualify to claim a remedy in *Charter* damages, having been tried and convicted in 1983.

109. The evolution in constitutional standards is also deserving of note. That evolution may provide, on the Appellant's theory, inconsistent remedies over time for the same conduct on the part of the Crown. In every case, of course, a civil trial would be required after-the-fact to assess whether the conduct of Crown counsel was consistent with constitutional standards of the day.

110. In reality, those who favour a more generous compensation regime for the wrongfully convicted generally rest their arguments on a broader conception of moral obligation on the part of the state. It is argued that it is an inherent miscarriage of justice when an individual is convicted and incarcerated, and later exonerated. [74] The miscarriage of justice is said to lie in the unjustified deprivation of an individual's liberty by the state, regardless of whether that deprivation is ultimately found to have been caused (in whole or part) by any breach of the individual's *Charter* rights at trial.

111. The debate over compensation for the wrongfully convicted raises difficult issues of public policy that are reflected in the various compensation schemes (whether or not based in statute) that have been adopted in Canada, the United Kingdom, New Zealand, and certain jurisdictions in the United States and Australia. Grounding most compensation schemes is the

[74] Adele Bernhard, "When Justice Fails: Indemnification for Unjust Conviction" (1999), 6 U. Chi. L. Sch. Roundtable 73 at 74; H. Archibald Kaiser, "Wrongful Conviction and Imprisonment: Towards an End to the Compensation Obstacle Course" (1989), 9 Windsor Y.B. Access Just. 96 at 100-103, 139.

commitment of ratifying states (including Canada) to Article 14(6) of the *International Covenant on Civil and Political Rights* ("*ICCPR*"):[75]

> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

112. Ratifying states have implemented their commitment to Article 14(6) in a variety of ways: incorporation of the Article into domestic legislation; the creation of a structured discretion through executive guidelines; or through ad hoc *ex gratia* payments. In all jurisdictions where compensation schemes have been established there are qualifying criteria that must be met and some include limits (or at least guidelines) on the quantum of compensation available. A common requirement of most compensation schemes is that a claimant must prove factual innocence in order to establish a miscarriage of justice as a threshold to entitlement to compensation.

113. In Canada, federal and provincial governments have established guidelines for the compensation of wrongfully convicted persons.[76] The Federal/Provincial Guidelines set out certain prerequisites for eligibility, including that the wrongful conviction resulted in a term of imprisonment that has been served by the applicant in full or part. A further eligibility prerequisite is that an applicant has either received a free pardon under s. 749(2) (now s. 748(2)) of the *Criminal Code* or a verdict of acquittal pursuant to a referral made by the Minister of Justice under s. 617(b) (now s. 696.3(3)(ii)) of the *Code*. This requirement reflects the underlying policy of the Federal/Provincial Guidelines that compensation should only be granted to those persons who did not commit the crime of which they were found guilty.

114. If an individual meets the eligibility criteria, the Federal/Provincial Guidelines provide for the responsible federal or provincial minster of justice to appoint a judicial or administrative

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[75] 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976).

[76] *Federal Provincial Guidelines – Compensation for Wrongfully Convicted and Imprisoned Persons (1988)* (the "Federal/Provincial Guidelines"), cited in *Truscott Opinion, infra,* at pp. 20-21, *Sophonow Inquiry*, *infra*, at pp. 95-97, and Kaiser, "Wrongful Conviction and Imprisonment", *supra* note 72, at pp. 152-153, Appendix "A".

inquiry to examine the issue of compensation on the basis of prescribed criteria. The quantum of compensation is to be assessed in relation to both pecuniary and non-pecuniary losses. While non-pecuniary damages are capped at $100,000, the cap is a guideline only and has been exceeded where the circumstances of a particular case are found to warrant it.[77] The Guidelines also require consideration of an applicant's blameworthy conduct or other acts which contributed to the wrongful conviction and the due diligence of the applicant in pursuing available remedies.

115. Other jurisdictions that have similarly formalized rules around compensation for the wrongfully convicted reflect a range of choices around the policy decisions facing government in adopting such schemes. Factual innocence is a common pre-requisite to eligibility, although the standard of proof varies.[78]

116. The experience in the United Kingdom provides a useful illustration of the intricacies of the policy debate inherent in implementing the language of Article 14(6). The *Criminal Justice Act 1988*[79] provides a statutory compensation scheme which mirrors the language of Article 14(6), including the requirement for a claimant to show a miscarriage of justice based on a new or newly discovered fact.[80] The right to compensation is determined (on application) by the

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[77] In a number of wrongful conviction case examples cited by the Appellant, governments made *ex gratia* payments without regard to the monetary limits in the Federal/Provincial Guidelines. See *In the Matter of Steven Truscott: Advisory Opinion on the Issue of Compensation* (Toronto: Ontario Ministry of Justice, 2008) ("*Truscott Opinion*"), at pp. 54-55; *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: Manitoba Department of Justice, 2001) ("*Sophonow Inquiry*"), at pp. 129-133; See also references in the *Truscott Opinion* to: Donald Marshall, Jr., at pp. 40, 48; Gregory Parsons, at p. 48; Clayton Johnson, at p. 48; Randy Druken, at p. 48; and David Milgaard, at pp. 48, 49.

[78] For example: New Zealand has adopted Cabinet guidelines for the wrongfully convicted following a 1998 report of the Law Commission [Compensation and Ex Gratia Payments for Persons Wrongly Convicted and Imprisoned in Criminal Cases, New Zealand (POL Min (01) 34/5, 12 December 2001; NZ, Report 49: *Compensating the Wrongly Convicted*, September 1998 E31AJ]; one Australian state has adopted a statutory compensation scheme [Australia Capital Territory, *Human Rights Act 2004* (ACT), s. 23]; and in the United States the federal government and 27 states have adopted statutory compensation schemes: The Innocence Project, "Making Up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation", Report (2009) at 12 and Appendix "A", pp. 27-31; Adele Bernhard, "A Short Overview of the Statutory Remedies for the Wrongfully Convicted: What Works, What Doesn't and Why", 18 B.U. Pub. Int. L.J. 403.

[79] *Criminal Justice Act 1988* (UK), c. 33, s. 133.

[80] Until 2006, a parallel discretionary compensation scheme for wrongful convictions also existed in the United Kingdom. This scheme was abolished in 2006 on the grounds that its continued existence was anomalous given the introduction of the statutory compensation scheme, and expensive to operate relative to the few applications received: *R. v. Home Secretary ex p Niazi*, [2008] EWCA Civ 755, at para. 10.

Secretary of State. If a right to compensation is established, the amount of compensation is determined by an independent assessor.[81]

117. In *R (Adams) v. Secretary of State for Justice*, [2011] UKSC 18 ("*Adams*"), the United Kingdom Supreme Court held (by a 5-4 majority) that the reference to "miscarriage of justice" in s. 133(1) of the *Criminal Justice Act 1988* was not restricted to applicants who were able to conclusively demonstrate their innocence. Rather the language of s. 133 was interpreted to extend to cases where a new or newly discovered fact "so undermines the evidence against the defendant that no conviction could possibly be based on it".[82]

118. In *R (Ali and others) v. Secretary of State for Justice*, [2013] EWHC 72 ("*Ali*"), the Supreme Court heard five test cases for the purposes of providing guidance as to what constitutes a "miscarriage of justice" in light of *Adams*. The test, as formulated in *Ali* was whether the claimant had established beyond reasonable doubt that "no reasonable jury…properly directed as to the law, could convict on the evidence now to be considered".[83]

119. The decisions in *Adams* and *Ali* were legislatively reversed in the United Kingdom in 2014 with the enactment of the *Anti-social Behaviour, Crime and Policing Act 2014*, c. 12. Section 175 provides that there will have been a miscarriage of justice "if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence".

120. The adequacy of the compensation schemes adopted by the signatory states to Article 14(6) has been the subject of ongoing academic debate. The debate is not one-sided. What is fundamentally at issue is whether governments should be compelled to establish a no fault statutory scheme to ensure full compensation of all victims of wrongful conviction. The proposition that a no fault scheme would necessarily serve the goals of vindication and deterrence, as the Appellant assumes, is not one universally endorsed even in the academic literature.[84]

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[81] Section 133.
[82] *Adams*, at paras. 9, 55.
[83] *Ali*, at para. 41.
[84] See for example, Lawrence Rosenthal, "Second Thoughts on Damages for Wrongful Convictions" (2010) 85 Chi.-Kent Law Rev. 127.

121. In emphasizing the importance of a presumptive right to compensation in what the Appellant concedes to be the "relatively rare phenomenon" of a wrongful conviction, the Appellant largely sidesteps the policy debate. To the extent the Appellant urges this Court to use s. 24(1) of the *Charter* to establish what Canadian governments have declined to establish to date – a no fault compensation scheme for the wrongfully convicted, at least where a *Charter* breach can be proven – the policy debate cannot be avoided.

122. As a starting point is the question of who qualifies for inclusion within the group of "wrongfully convicted" entitled to access the proposed no fault compensation scheme. Most jurisdictions that have adopted compensation provisions for the wrongfully convicted (whether based in statute or executive guidelines) require that applicants have served a term of imprisonment following their conviction. However, this prerequisite is not uniform.[85] Indeed it has been argued that eligibility to compensation should extend to individuals who are arrested and detained but released without charge, individuals detained and charged but who have had the charges dropped before trial, and to individuals tried and acquitted.[86] If, as the Appellant argues, breach of *Charter* rights is the premise upon which our existing liability structure is to be overhauled, it is necessary to consider how a distinct line may be drawn between the convicted and imprisoned who allege a breach of *Charter* rights, and the charged but not convicted who allege a breach of *Charter* rights (such as the plaintiffs in *Miazga*).

123. The temporal cut-off for wrongful conviction claimants is only the first issue that must be addressed in determining who falls within the class of the "wrongfully convicted". Still to be considered is the question of factual innocence. Those jurisdictions to have adopted some form of compensation regime (including Canada) uniformly provide that factual innocence is a prerequisite to eligibility for compensation.

124. The requirement for proof of factual innocence is supported by several policy considerations. Our criminal justice system is premised on significant procedural protections for the accused with the aim of preventing wrongful convictions. The corollary of that principle is

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[85] Section 23 of the *Human Rights Act, 2004* of the Australian Capital Territory, for example, requires only that a claimant has suffered "punishment" because of the conviction.

[86] Adrian Hoel, "Compensation for Wrongful Conviction", Trends and Issues in Crime and Criminal Justice (May 2008), Australian Institute of Criminology Research Paper No. 356: – "*Arguably, all these categories of people deserve some form of restitution*"; Kaiser, "Wrongful Conviction and Imprisonment", *supra* note 74 at 98-99.

recognition that guilty persons may be acquitted in the pursuit of the goal of avoiding wrongful convictions. As a matter of policy, compensation should not automatically flow from all acquittals. Further, in the absence of a requirement for proof of factual innocence, persons who are guilty of criminal wrongdoing may receive compensation, effectively allowing them to profit from their crime which is contrary to the interests of justice. Finally, state-funded compensation for guilty persons also implicates principles of democratic accountability as the public may rightly question gratuitous payment of public funds to such individuals.[87]

125. Other policy questions that face government in setting up compensation schemes for the wrongfully convicted include the relevance of contributory conduct by the claimant to his or her conviction or the length of incarceration; the relevance of misconduct by a state actor (to quantum at least); and whether there should be any presumptive caps on quantum, such as for non-pecuniary losses.

126. It cannot be open to the Appellant to urge this Court to create what amounts to an exemption from the qualified immunity to permit his personal claim for *Charter* damages without some attempt at defining the parameters of his proposed new wrongful conviction cause of action. In reality, the Appellant falls within a very small class of Canadians who have suffered a prolonged incarceration in circumstances where an appellate court has ultimately determined his convictions to have been unsound due to judicial error. The Appellant can pursue, and is pursuing, a range of legal remedies against the state actors he holds responsible. He can, additionally, seek compensation from the state on a no fault basis by invoking the procedure in the Federal/Provincial Guidelines. If there is any remedial gap, it is an exceedingly narrow one. To base a remedy of general application upon the unique circumstances of the Appellant's case would overshoot the mark by a significant margin.

iv. The "marked and unacceptable departure standard"

127. In a bare three paragraphs of his factum, the Appellant presses a further alternative argument that seeks to support the liability standard adopted by Goepel J. and which was the primary focus of argument before the British Columbia Court of Appeal.[88]

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[87] For a discussion of these policy considerations, see *Truscott Opinion*, at pp. 23-27.
[88] Appellant's factum, paras. 101-103.

128. In denying the Appellant the ability to plead, *inter alia*, negligent breach of *Charter* rights, Goepel J. inferentially accepted that some form of common law immunity applied to the Appellant's claim for damages under s. 24(1) of the *Charter*. However, rather than applying the product of the "careful balancing" of *Nelles* in the form of a malice requirement, Goepel J. struck a different balance. In Goepel J.'s view, the appropriate balance between individual rights and prosecutorial independence was the liability standard applicable in criminal costs cases: a marked and unacceptable departure from the reasonable standards expected of the prosecution.[89]

129. Goepel J. cited no authority for the proposition that the criminal costs standard is applicable in any context outside the criminal trial process. The quantum of criminal costs awards generally reflect out-of-pocket expenses for legal fees and disbursements that are a direct result of the Crown misconduct or *Charter* breach. Courts have consistently maintained that criminal costs and civil/constitutional damages are conceptually and functionally distinct. There is no support in the case law for importing the standard of conduct for criminal costs awards into the s. 24(1) civil/*Charter* damages analysis.

130. The British Columbia Court of Appeal correctly held that Goepel J. had erred in adopting a criminal costs standard for determining liability in damages:

> **27** I view the costs remedy as a summary type of process integral to the criminal trial process that can afford a speedy remedy for perceived prosecutorial lapses. As a remedy, it is very distinct from the relief being sought in the case at bar. In my respectful view, it was erroneous for the chambers judge to rely on costs cases when deciding whether to allow the amendment that was sought in this case.

131. The Court of Appeal's conclusion is overwhelmingly supported by a review of criminal costs jurisprudence.

132. Outside of specific costs provisions of the *Criminal Code*, there are two bases upon which a criminal court can award costs: (1) the courts' inherent jurisdiction; and (2) s. 24(1) of the *Charter*. Generally speaking, on either jurisdictional basis an award of costs in a criminal trial, unlike in civil proceedings, is considered exceptional. An award is only justified where

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[89] Reasons for Judgment in Chambers [Appellant's Record Vol. 1, Tab 1], at paras. 59-61.

there has been a "*marked and unacceptable departure from the reasonable standards expected of the prosecution*".[90]

133. In *R. v. 974649*, the Court held that a justice of the peace appointed under a provincial statute and sitting as a "trial justice" was a "court of competent jurisdiction" for the purpose of granting costs under s. 24(1) as a remedy for a *Charter* breach. The Court emphasized the "front-line role" for statutory criminal trial courts in dispensing *Charter* remedies. Trial courts are the "preferred forum" for granting *Charter* remedies in cases originating before them because they have the "fullest account of the facts available", particularly where the *Charter* violation relates to the conduct of a trial:

> **59** ….In effect, a judge sitting on a criminal trial, by reason of the function he or she is discharging, has the power to grant *Charter* remedies incidental to that trial. To this end, the judge may draw from the full ambit of criminal law remedies in fashioning an appropriate and just response to a *Charter* violation. This approach facilitates the function of the trial court, by promoting complete resolution of *Charter* issues at the trial level and allowing the court significant flexibility in fashioning remedies to meet the precise circumstances of the case at bar. At the same time, it heeds the structural limits of the criminal trial process, by confining the courts' remedial powers to the criminal sphere.

134. As explained in *R. v. 974649*, the remedy of a costs award in a criminal trial is not an invention of the *Charter* – superior courts have always had the inherent jurisdiction to award costs in a criminal proceeding. In the context of non-disclosure, an award of costs serves as a valuable halfway house between a mere adjournment and a stay of proceedings, thus supplementing the remedial jurisdiction of the trial court to grant "appropriate and just remedies" *in the criminal trial process*. Extending the jurisdiction to award costs under s. 24(1) of the *Charter* to provincial offence courts is also consistent with the principle, confirmed in *Ward*, that there should be parity between *Charter* and non-*Charter* remedies for the same conduct.

135. Canadian courts have consistently maintained the conceptual and functional distinction between criminal costs and civil/constitutional damages, based in part on the different policy considerations that apply.[91]

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[90] *R. v. 974649 Ontario Inc.*, *supra*, at para. 87.

[91] *R. v. B.M.*, [2003] O.J. No. 1373, 63 O.R. 3(d) 299 (Ont. S.C.). See also: *R. v. Fidler*, 2009 BCSC 1253, at paras. 42-45; *R. v. Leblanc*, 1999 N.S.J. No. 179 (C.A.), at para. 16; *R. v. Taylor*, [2008] N.S.J. No. 14 at paras. 59-68; *O'Neill v. Canada (AG)*, [2007] O.J. No. 496, at paras. 7-20.

136. Criminal costs awards, although not without a compensatory element, are integrally connected to the court's control of its trial process.[92] The criminal costs standard was formulated by courts in contemplation of rare costs awards designed to compensate for unnecessary steps in criminal proceedings and to help control the trial process. It was not formulated in contemplation of damages awards that can span a wide array of pecuniary and non-pecuniary damages based on a post-*facto* review of the reasonableness of the conduct of Crown counsel in the course of a criminal prosecution.

137. For the reasons already articulated, the rule of qualified immunity for prosecutorial misconduct must apply to all causes action, however framed, if it is to have any effect. There is no principled reason to apply a lower liability threshold when a claim for *Charter* damages in additional to tort damages is advanced. To the extent that Goepel J. engaged in a re-balancing of the competing policy considerations in lowering the liability threshold, he was in error. The appropriate balance has already been struck in *Nelles*, *Proulx*, and *Miazga* in the form of the malice threshold.

Summary

138. This appeal is not about whether the Appellant should receive compensation for his conviction and incarceration. It is about what viable causes of action are available to the Appellant in his claim for damages against British Columbia arising from the alleged misconduct of Crown counsel in the course of a criminal proceeding. Pleadings remain important in a civil action which includes a claim for a *Charter* remedy. Indeed, given the tendency of plaintiffs to use the *Charter* to expand or override existing civil causes of action, pleadings are even more critical where a *Charter* remedy is sought. Crown defendants are entitled to know the case they have to meet; the liability thresholds that apply; and the availability of common law and statutory defences.

139. The Appellant's proposed "contextualized approach" to s. 24(1) damages, to the extent that it mandates a case-by-case consideration of whether damages are an appropriate and just remedy for alleged prosecutorial misconduct, must be seen for what it is – a proposal that *Nelles*, *Proulx* and *Miagza* be overruled. There is nothing that remains of an immunity rule if a trial is required in every case.

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[92] *R. v. 974649*, at para. 80.

140. Even after the decision of the British Columbia Court of Appeal in this case, the Appellant still has claims for tort and *Charter* damages against British Columbia based on the alleged misconduct of Crown counsel. The common liability threshold for these claims, after the Court of Appeal's decision, is malice in the sense described in *Nelles*. If the Appellant can prove that Crown counsel acted for an improper purpose and in a manner inconsistent with the duties of their office, he is entitled to damages. The current pleadings, without the amendments granted by Goepel J., provide for several viable causes of action, consistent with the qualified immunity in *Nelles*, and do not disrupt the carefully struck balance that has governed liability for prosecutorial misconduct in Canada for over two decades.

PART IV
SUBMISSIONS ON COSTS

141. There is no principled basis for the Appellant's request for an award of "special (or solicitor-client) costs at all levels of court, in any event of the outcome". The Appellant is not a public interest litigant. The Appellant's ultimate objective in this action is to recover a substantial monetary award, and the objective of this appeal is to increase the Appellant's likelihood of that substantial monetary recovery.

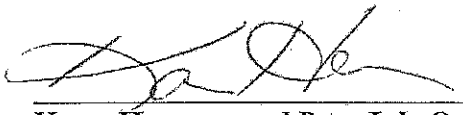
142. There is no reason to depart from the ordinary rule that costs follow the event, to be assessed as ordinary costs on the tariff.

PART V
ORDER SOUGHT

143. British Columbia requests an order that this appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: October 7, 2014 at Vancouver, British Columbia



Karen Horsman and Peter Juk, Q.C.
Counsel for British Columbia

PART VI
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Case Law		Paragraph Nos.
1.	*Attorney General v. Chapman*, [2011] NZSC 110	82
2.	*Cunliffe v. Law Society (British Columbia)*, [1984] 4 W.W.R. 451 (B.C.C.A.)	102
3.	*D.K. v. Miazga*, 2003 SKQB 559	67
4.	*Ernst v. EnCana Corp.*, 2014 ABCA 285	80, 84
5.	*Fields v. Wharrie*, 672 F 3d 505 (2012)	51-52
6.	*Henry v. British Columbia (Attorney General)*, 2012 BCSC 1401	24-25, 87
7.	*Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129	6, 71, 72
8.	*Imbler v. Pachtman*, 424 U.S. 409 (1976)	43-51, 53, 57, 100
9.	*Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372	61, 95, 100
10.	*Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405	78
11.	*Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339	23, 24, 36, 61, 63, 65-70, 86, 88, 122, 137, 139
12.	*Miguna v. Ontario (Attorney General)* (2005), 205 O.A.C. 257; [2005] O.J. No. 5346	69
13.	*Morier and Boily v. Rivard*, [1985] 2 S.C.R. 716	82
14.	*Nelles v. Ontario*, [1989] 2 S.C.R. 170	2, 23, 24, 32, 36, 42-44, 47, 52, 54-64, 66, 69, 72-74, 87-89, 93-94, 97-98, 104, 128, 137, 139-140
15.	*O'Neill v. Canada (AG)*, [2007] O.J. No. 496, 151 C.R.R. 2(d) 370	135

16.	*Proulx v. Quebec (Attorney General)*, 2001 SCC 66, [2001] 3 S.C.R. 9	23, 24, 36, 63-64, 69, 88, 137, 139
17.	*R (Adams) v. Secretary of State for Justice*, [2011] UKSC 18	117, 119
18.	*R (Ali and others) v. Secretary of State for Justice*, [2013] EWHC 72	118, 119
19.	*R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575	75, 133-134, 136
20.	*R. v. Anderson*, 2014 SCC 41	95
21.	*R. v. B.M.*, [2003] O.J. No. 1373 (Ont. S.C.); 63 O.R. 3(d) 299	135
22.	*R. v. Bottineau*, [2005] O.J. No. 4034	101
23.	*R. v. Chaplin and Chaplin*, [1995] 1 S.C.R. 727, 96 C.C.C. (3rd) 225	103
24.	*R. v. Dixon*, [1998] 1 S.C.R. 244	99
25.	*R. v. Fidler*, 2009 BCSC 1253	135
26.	*R. v. Henry*, [1997] B.C.J. No. 2792 (C.A.), 100 B.C.A.C. 183; leave to appeal refused [1998] S.C.C.A. No. 77	11
27.	*R. v. Henry*, 2009 BCCA 12	15
28.	*R. v. Henry*, 2010 BCCA 462, 262 C.C.C. (3d) 307	7, 9, 10, 12-18
29.	*R. v. Home Secretary ex p Niazi*, [2008] EWCA Civ 755	116
30.	*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45	23
~~31.~~	~~*R. v. Leblanc*, 1999 N.S.J. No. 179 (C.A.)~~	~~135~~
32.	*R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66	103
33.	*R. v. Mills* [1999] 3 S.C.R. 668	103
34.	*R. v Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566	95
35.	*R. v. O'Connor* [1995] 4 S.C.R. 411	103
36.	*R. v. Quesnelle*, 2014 SCC 46, [2014] S.C.J. No. 46	103
37.	*R. v. Stinchcombe*, [1991] 3 S.C.R. 326	102-103
38.	*R. v. Taillefer*, [2003] 3 S.C.R. 307	99

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40.	*Rehberg v. Paulk*, 132 S. Ct. 1497 (2012)	53
41.	*Stenner v. British Columbia (Securities Commission)* (1993), 23 Admin. L.R. (3d) 247 (B.C.S.C.), [1993] B.C.J. No. 2359; aff'd (1996), 141 D.L.R. (4th) 122 (B.C.C.A.); leave to appeal dismissed 1996 S.C.C.A. 595	84
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43.	*Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28	29, 41, 74-79, 81-82, 85
44.	*Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957	78

Legislation		**Paragraph Nos.**
45.	42 U.S.C. § 1983 ("Civil Action for Deprivation of Rights")	46, 47, 53
46.	*Anti-social Behaviour, Crime and Policing Act 2014* (UK), c. 12, s. 175	119
47.	*Constitution Act, 1982*, ss. 7, 8, 11 and 24(1) and 52	1, 3-6, 22, 23, 25, 27-29, 31, 35-36, 38-41, 59-60, 67-68, 74-82, 84-90, 92, 94, 96, 99, 103-108, 110, 121-122, 126, 128-129, 132-134, 137-140
48.	*Criminal Code of Canada*, ss. 690 [repealed], 696.1-696.6 and 748	11, 113
49.	*Criminal Justice Act 1988* (UK), c. 33, s. 133	116
50.	*Human Rights Act 2004* (ACT), s. 23	115, 122

International Agreements		Paragraph Nos.
51.	*International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 14(6) (entered into force 23 March 1976, accession by Canada 19 May 1976)	111-112, 116, 120

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