S.C.C. File 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

RESPONDENT
(Appellant)

-- and --

ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR, ATTORNEY GENERAL OF ONTARIO, CANADIAN ASSOCIATION OF CROWN COUNSEL, CRIMINAL LAWYERS' ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION, ASSOCIATION IN DEFENCE OF THE WRONGLY CONVICTED, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS and BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

INTERVENERS

FACTUM OF THE INTERVENER

THE ATTORNEY GENERAL OF NOVA SCOTIA

Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*

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PART I

STATEMENT OF FACTS

Facts

1. The Attorney General of Nova Scotia accepts the facts as set out in the Respondent's (Attorney General of British Columbia) factum and in the Respondent's (Attorney General of Canada) factum.

History of Proceedings Relating to the Intervener Attorney General of Nova Scotia

2. On June 9, 2014, the Chief Justice of this Court stated the following constitutional question:

> 1. Does s.24(1) of the **Canadian Charter of Rights and Freedoms** authorize a court of competent jurisdiction to award damages against the Crown for prosecutorial misconduct absent proof of malice?

3. On July 7, 2014, the Attorney General of Nova Scotia filed with this Court a Notice of Intervention Respecting Constitutional Questions, pursuant to Supreme Court of Canada Rule 61 indicating its wish to intervene, to file a factum and to participate in oral arguments.

PART II

POINTS IN ISSUE

4. At page 8, paragraph 36, of his factum, the Appellant states the following as being the question in issue in this appeal:

> 36. The issue on appeal is whether s.24(1) of the *Canadian Charter of Rights and Freedoms* authorizes a court of competent jurisdiction to award damages against the Crown for prosecutorial misconduct absent proof of malice.

PART III

BRIEF OF ARGUMENT

INTRODUCTION

5. The Intervener, Attorney General of Nova Scotia, respectfully submits that the constitutional question posed should be answered in the negative.

6. In order to avoid profoundly negative effects on our criminal justice system, the law established by this Court in requiring malice be proven when suing the Crown for a Crown Attorney's actions ought not to be altered.

7. The role of Crown Attorney is constitutionally and practically vital to our criminal justice system's proper functioning. Someone in the justice system has to make the often difficult decisions that Crown Attorneys make on a daily basis.

8. Crown Attorneys must be allowed to act in the public interest and not be forced, by lack of protection from civil suit, to be constantly considering their own self-preservation interest when making decisions.

MALICE REQUIREMENT IS VITAL FOR MAINTAINING INDEPENDENCE OF ATTORNEY GENERAL AND CROWN ATTORNEYS

9. The issues in this appeal directly impact on the powers and responsibilities of the Attorney General of Nova Scotia and the Crown Attorneys who derive their powers and responsibilities from her.

10. This Court has held in **Miazga v. Kvello Estate**, [2009] 3 S.C.R. 339, at paragraphs 50 to 52, that, in order to preserve the public interest in the effective and uninhibited prosecution of

criminal wrongdoing, a plaintiff must establish "malice" to successfully sue a Crown Attorney in a private law action. This Court held that both abuse of process and malicious prosecution have been narrowly crafted, employing stringent tests, to ensure that liability will attach in only exceptional circumstances, so that Crown discretion remains intact.

11. The Appellant proposes that the threshold for a successful lawsuit for damages for a **Charter of Rights** violation by a Crown Attorney should not require proof of malice.

12. If the state can be successfully sued for a **Charter** violation, based on a Crown Attorney's actions, which were not motivated by malice, this will produce a chilling effect on prosecutorial independence in exercising quasi-judicial powers.

13. If the state is primarily liable for damages for a Crown Attorney's breach of a **Charter** right, such liability will adversely affect the Crown Attorney's professional reputation.

14. If the Crown Attorney is also found personally liable for damages for the **Charter** breach, this will have a profound effect on his or her personal circumstances.

15. In either situation, the independence of Crown Attorneys and Attorneys General will be compromised. Crown Attorneys will be constantly looking over their shoulders for possible later second-guessing of their discretionary decisions. Reasons for making decisions would have to be defended by the Crown Attorney in a civil suit. The impact on the justice system would be negative, just as it would be if judges were civilly liable for erroneous decisions they make which are later overturned on appeal. As human beings, we all make mistakes, but in the context of preserving prosecutorial independence, civil liability should continue to only attach in cases of malice driven decisions.

16. In **Miazga v. Kvello Estate** (*supra*) this Court held at paragraph 46:

> The independence of the Attorney General is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched. The principle of independence requires that the Attorney General act independently of political pressures from government and sets the Crown's exercise of prosecutorial

discretion beyond the reach of judicial reviecw, subject only to the doctrine of abuse of process. The Court explained in *Krieger* how the principle of independence finds form as a constitutional value (at paras. 30-32):

> It is a constitutional principle in this country that the Attorney General must act independently of partisan [page363] concerns when supervising prosecutorial decisions. Support for this view can be found in: Law Reform Commission of Canada [Working Paper 62, Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor (1990)], at pp. 9-11. See also Binnie J. in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, at paras. 157-58 (dissenting on another point).
>
> This side of the Attorney General's independence finds further form in the principle that courts will not interfere with his exercise of executive authority, as reflected in the prosecutorial decision-making process... .
>
> ...
>
> The court's acknowledgment of the Attorney General's independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution. Subject to the abuse of process doctrine, supervising one litigant's decision-making process -- rather than the conduct of litigants before the court -- is beyond the legitimate reach of the court... . The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict. [Emphasis added.]
>
> See also *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 166, per Binnie J., dissenting on another issue.

17. In Nova Scotia, Crown Attorneys' quasi-judicial powers are exercised within a legal framework of common law and statute law which includes:

(a) **Nelles v. Ontario**, [1989] 2 S.C.R. 170, **Proulx v. Quebec (Attorney General)**, [2001] 3 S.C.R. 9 and **Miazga v. Kvello Estate** (supra), three decisions of this Court which require proof of actual malice in the form of a deliberate and improper use of the office of Crown Attorney in a malicious prosecution lawsuit; and

(b) The **Public Prosecutions Act**, S.N.S. 1990, c.21 which was enacted by the Nova Scotia legislature to create Canada's first independent Public Prosecution Service. The purpose of this Act was to eliminate political interference in quasi-judicial decisions made by prosecutors.

18. This legal framework of **Nelles**, **Proulx**, **Miazga** and the **Public Prosecutions Act** has functioned well for the criminal justice system in Nova Scotia. The framework allows Crown Attorneys to carry out their quasi-judicial professional duties without the chilling effect of others reviewing their decisions. Quasi-judicial decisions, just as decisions by Courts, should be made without external influence or pressure. Within this framework the only permissible review comes after a Crown Attorney has been proven to have acted maliciously or shown to have abused the powers of his or her office. This framework allows for independence from judicial review of prosecutorial discretion. This principle of independence was affirmed by this Court in **Krieger v. Law Society of Alberta**, [2002] 3 S.C.R. 372, at paragraph 32:

> The court's acknowledgment of the Attorney General's independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution. Subject to the abuse of process doctrine, supervising one litigant's decision-making process rather than the conduct of litigants before the court is beyond the legitimate reach of the court. In *Re Hoem and Law Society of British Columbia* (1985), 20 C.C.C. (3d) 239 (B.C.C.A.), Esson J.A. for the court observed, at p.254, that:
>
> The independence of the Attorney-General, in deciding fairly who should be prosecuted, is also a hallmark of a free society. Just as the independence of the bar within its proper sphere must be respected, so must the independence of the Attorney-General.
>
> We agree with these comments. The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict.

19. This legal framework would be altered and prosecutorial independence reduced if positive proof of malice, now required by **Nelles**, **Proulx** and **Miazga** were to be eliminated.

20. As this Court held at paragraph 21 in **Vancouver v. Ward**, [2010] 2 S.C.R. 28 an approach to when **Charter** damages are appropriate and just should develop incrementally.

DAMAGES FOR CHARTER VIOLATIONS

21. A **Charter** breach by a Crown Attorney could arise from, for example, a decision to seek a remand based on negligent research of the accused's criminal record, thus violating the right not to be denied reasonable bail without just cause (**Charter**, s.11(e)).

22. If the state, or a Crown Attorney personally, could be found liable for such a **Charter** breach without the requirement of proof of malice this would have a chilling effect on quasi-judicial decision making.

23. There must be certainty in the law regarding the independence of Attorneys General and Crown Attorneys who act as ministers of justice on behalf of Attorneys General.

24. This Court has clearly stated that the threshold for liability in private law suits against Crown Attorneys is malice.

25. To create consistency and certainty there ought also to be a requirement of proof of malice in a public law suit for a **Charter** breach by a Crown Attorney.

26. The reason for such a threshold was succinctly summarized in **Miazga** (supra) at paragraph 81:

> As discussed earlier, a demonstrable "improper purpose" is the key to maintaining the balance struck in *Nelles* between the need to ensure that the Attorney General and Crown prosecutors will not be hindered in the proper execution of their important public duties and the need to provide a remedy to individuals who have been wrongly and maliciously prosecuted. By requiring proof of an improper purpose, the malice element of the tort of malicious prosecution ensures that liability will not be imposed in cases where a prosecutor proceeds, absent reasonable and probable grounds, by reason of incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence, or even gross negligence. In *Nelles*, Lamer J. stated, at pp. 196-97:
>
> It should be noted that what is at issue here [in a suit for malicious prosecution] is not the exercise of a prosecutor's discretion within the proper sphere of prosecutorial activity as defined by his role as a "minister of justice". Rather, in cases of malicious prosecution we are dealing with allegations of misuse and abuse of the criminal process and of the office of the Crown Attorney. We are not dealing with merely second-guessing a Crown Attorney's judgment in the prosecution of a case but rather with the deliberate and malicious use of the

> office for ends that are improper [page379] and inconsistent with the traditional prosecutorial function.
>
> [Emphasis added.]

27. A Crown Attorney can only be held liable for being malicious, which "requires a plaintiff to prove that the prosecutor willfully perverted or abused the office of the Attorney General or the process of criminal justice": **Miazga**, at para. 80 [emphasis in original]. The same standard ought to apply regardless of whether the claim is pleaded as the tort of malicious prosecution or as a claim that the prosecution infringed a plaintiff's **Charter** rights, as the same public policy concerns apply to both the tort and the **Charter** claim. To require a lower standard of fault for the **Charter** claim would undermine the policy that requires a heightened degree of fault for the tort of malicious prosecution.

28. A majority of this Court held in **Nelles** that prosecutorial immunity "ultimately boils down to a question of policy". The majority emphasized the need, in determining the appropriate standard for liability, "to ensure that the Attorney General and Crown Attorneys will not be hindered in the proper execution of their important public duties": **Nelles**, *supra*, at paragraphs 55 and 56.

29. In **Miazga**, Justice Charron pointed out that "the 'inherent difficulty' in proving a case of malicious prosecution was an intentional choice by the Court": para. 52. It is submitted that where, in an action for malicious prosecution the facts did not support the claim, a plea of breach of **Charter** rights based upon the same facts would act as a sort of fall-back position. This would render the tort of malicious prosecution meaningless and deny the defendants the protection implicit in the very high standards established by this Court in **Nelles**.

CONCLUSION

30. It is respectfully submitted that this Court ought to consider the negative ramifications on the criminal justice system of establishing a lower than malice threshold to allow s.24(1) **Charter of Rights** damages. As this Court held in **Miazga**, like the test for abuse of process, there is a stringent standard to be met before finding liability for Crown Attorneys' conduct. This is to

ensure that courts do not second-guess decisions made pursuant to a Crown's prosecutorial discretion if the Crown Attorney's actions do not amount to willful misconduct.

PART IV

SUBMISSIONS ON COSTS

31. The Intervener submits that no costs ought to be awarded for or against the Intervener.

PART V

ORDER REQUESTED

32. The Attorney General of Nova Scotia submits that this Honourable Court ought to answer the stated constitutional question in the negative.

33. ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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Halifax, Nova Scotia
October 27, 2014

PART VI

TABLE OF AUTHORITIES

PART VII

STATUTES REFERRED TO BY INTERVENER

Canadian Charter of Rights and Freedoms, s 2, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 – Section 24(1)

Public Prosecutions Act, S.N.S. 1990, c.21

APPENDIX '1'

Canadian Charter of Rights and Freedoms, s 2,

Part I of the Constitution Act, 1982, being Schedule B

to the Canada Act 1982 (UK), 1982, c 11

Section 24(1)

CONSTITUTION ACT, 1982	**LOI CONSTITUTIONNELLE DE 1982**
PART I	**PARTIE I**
CANADIAN CHARTER OF RIGHTS AND FREEDOMS	**CHARTE CANADIENNE DES DROITS ET LIBERTÉS**
Enforcement	Recours
Marginal note: Enforcement of guaranteed rights and freedoms	Note marginale :Recours en cas d'atteinte aux droits et libertés
24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances	24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

Public Prosecutions Act

CHAPTER 21

OF THE

ACTS OF 1990

amended 1999 (2nd Sess.), c. 16

An Act to Provide for an Independent Director of Public Prosecutions

Short title

1 This Act may be cited as the *Public Prosecutions Act*. 1990, c. 21, s. 1.

Purpose of Act

2 The purpose of this Act is to ensure fair and equal treatment in the prosecution of offences by

(a) establishing the position of Director of Public Prosecutions;

(b) providing for a public prosecution service; and

(c) providing for the independence of the Director of Public Prosecutions and the public prosecution service. 1990, c. 21, s. 2.

Interpretation

3 In this Act, "prosecution" includes the decision whether to prosecute or not, the prosecution proceeding itself and matters arising therefrom, and appeals. 1990, c. 21, s. 3.

Director of Public Prosecutions

4 There shall be a Director of Public Prosecutions who

(a) is the head of the public prosecutions service and is responsible for all prosecutions within the jurisdiction of the Attorney General conducted on behalf of the Crown;

(b) may conduct all prosecutions independently of the Attorney General except that the Director of Public Prosecutions shall comply with all instructions or guidelines issued by the Attorney General in writing and published pursuant to this Act;

(c) is, for the purpose of the *Criminal Code* (Canada) and the *Summary Proceedings Act*, the Attorney Generals lawful deputy in respect of prosecutions;

(d) shall advise police officers in respect of prosecutions generally or in respect of a particular investigation that may lead to a prosecution when the police request such assistance;

(e) may issue general instructions or guidelines to a chief crown attorney, a regional crown attorney or a crown attorney in respect of all prosecutions or a class of prosecutions, and shall cause such instructions or guidelines to be published;

(f) may issue instructions or guidelines to a chief crown attorney, a regional crown attorney or a crown attorney in a particular prosecution. 1990, c. 21, s. 4.

Qualifications and appointment

5 (1) The Director of Public Prosecutions

(a) shall be a barrister of at least ten years standing at the Bar of Nova Scotia or of another province of Canada, and if of another province, shall, within one year of appointment, become a practising member of the Bar of Nova Scotia;

(b) shall be appointed by the Governor in Council after consultation with the Chief Justice of Nova Scotia, the Chief Justice of the Trial Division of the Supreme Court and the Executive of the Nova Scotia Barristers Society;

(c) holds office during good behaviour;

(d) has the status of deputy head and the provisions of the *Civil Service Act* and regulations relating to a deputy or a deputy head apply to the Director of Public Prosecutions; and

(e) shall be paid the same salary as the Chief Judge of the provincial court.

(2) The Director of Public Prosecutions may be removed from office for cause by a resolution of the Assembly.

(3) Where, while the Assembly is not sitting, the Director of Public Prosecutions fails to be of good behaviour, or is unable to perform the duties of office, the Governor in Council may appoint a person to be Acting Director of Public Prosecutions who shall take over the duties of the Director of Public Prosecutions until the Governor in Council sooner rescinds the appointment of the Acting Director of

Public Prosecutions.

(4) Where a vacancy occurs in the office of the Director of Public Prosecutions in a manner other than that referred to in subsection (2), the Governor in Council may appoint a person to be Acting Director of Public Prosecutions until a Director of Public Prosecutions is appointed pursuant to this Act. 1990, c. 21, s. 5; 1999 (2nd Sess.), c. 16, s. 1.

Power and duties of Attorney General

6 The Attorney General is the minister responsible for the prosecution service and is accountable to the Assembly for all prosecutions to which this Act applies and

(a) after consultation with the Director of Public Prosecutions, may issue general instructions or guidelines in respect of all prosecutions, or a class of prosecutions, to the prosecution service and shall cause all such instructions or guidelines to be in writing and to be published at the direction of the Director of Public Prosecutions as soon as practicable in the Royal Gazette;

(b) after consultation with the Director of Public Prosecutions, may issue instructions or guidelines in a particular prosecution, and shall cause such instructions or guidelines to be in writing and to be published at the direction of the Director of Public Prosecutions as soon as practicable in the Royal Gazette except where, in the opinion of the Director of Public Prosecutions, publication would not be in the best interests of the administration of justice, in which case the Director of Public Prosecutions, instead, shall publish as much information concerning the instructions or guidelines as the Director of Public Prosecutions considers appropriate in the next annual report of the Director of Public Prosecutions to the Assembly;

(c) may consult with the Director of Public Prosecutions and may provide advice to the Director of Public Prosecutions and, subject to clauses (a) and (b), the Director of Public Prosecutions is not bound by such advice;

(d) may consult with members of the Executive Council regarding general prosecution policy but not regarding a particular prosecution;

(e) may exercise statutory functions with respect to prosecutions, including consenting to a prosecution, preferring an indictment or authorizing a stay of proceedings, after consultation with the Director of Public Prosecutions and shall cause notice of such action to be published at the direction of the Director of Public Prosecutions as soon as practicable in the Royal Gazette. 1990, c. 21, s. 6; 1999 (2nd Sess.), c. 16, s. 2.

Meeting between Attorney General and Director

6A The Attorney General and the Director of Public Prosecutions shall meet at least twelve times a year, on a monthly basis if possible, to discuss policy matters, including existing and contemplated major prosecutions. 1999 (2nd Sess.), c. 16, s. 3.

Extraordinary prosecution

6B (1) In this Section, "extraordinary prosecution" means an unexpected or unforeseen prosecution that cannot be undertaken within the budget appropriated for the public prosecution service but is of such a magnitude and importance that, in the opinion of the Director of Public Prosecutions, the prosecution should be undertaken notwithstanding the lack of financial resources.

(2) The Director of Public Prosecutions may spend in any fiscal year an amount that is not more than five per cent more than the amount appropriated for the public prosecution service for that year for the purpose of undertaking an extraordinary prosecution.

(3) The Governor in Council shall provide the additional funds referred to in subsection (2) through a supplementary appropriation.

(4) Where the Governor in Council has provided the funds referred to in subsection (3) and deems it advisable to conduct a review of the need for the additional funds, the Governor in Council may appoint a qualified person to conduct the review. 1999 (2nd Sess.), c. 16, s. 3.

Deputy Director of Public Prosecutions

7 The Director of Public Prosecutions may, from time to time, designate a barrister in the public service to be Deputy Director of Public Prosecutions who is responsible to the Director of Public Prosecutions and who may exercise all of the powers and authority of the Director of Public Prosecutions and, for that purpose, is a lawful deputy of the Attorney General. 1990, c. 21, s. 7.

Crown attorneys

8 There shall be crown attorneys to conduct prosecutions and the crown attorneys are responsible to the Director of Public Prosecutions and, where applicable, to a chief crown attorney or a regional crown attorney. 1990, c. 21, s. 8.

Regional crown attorneys

9 There may be a regional crown attorney to supervise crown attorneys within a geographic area determined by the Director of Public Prosecutions, and a regional crown attorney is responsible to the Director of Public Prosecutions. 1990, c. 21, s. 9.

Chief crown attorneys

10 There may be a chief crown attorney to supervise crown attorneys and, where applicable, regional crown attorneys, and a chief crown attorney is responsible to the Director of Public Prosecutions. 1990, c. 21, s. 10.

Powers, authorities and duties

11 A chief crown attorney, a regional crown attorney and a crown attorney have all the powers, authorities and duties provided by the criminal law of Canada for prosecutors, for prosecuting officers or for counsel acting on behalf of the Attorney General. 1990, c. 21, s. 11.

Qualifications

12 All chief crown attorneys, all regional crown attorneys and all full-time crown attorneys shall be barristers appointed pursuant to the *Civil Service Act* upon the recommendation of the Director of Public Prosecutions after a competition. 1990, c. 21, s. 12.

Annual report

13 The Director of Public Prosecutions shall report annually to the Assembly in respect of prosecutions. 1990, c. 21, s. 13.

Appointment of barrister

14 (1) The Director of Public Prosecutions may appoint a barrister to take charge of and conduct a particular prosecution or to take charge of and conduct criminal business to the extent specified in the terms of the appointment.

(2) A barrister appointed pursuant to this Section shall be known and designated as a crown attorney and, when acting within the terms of the appointment, has all the powers and authority of a crown attorney.

(3) The Director of Public Prosecutions may, from time to time, vary the terms of appointment of a crown attorney pursuant to this Section or may, at any time, revoke the appointment. 1990, c. 21, s. 14.

Existing prosecuting officers

15 Notwithstanding Section 12, all prosecuting officers and assistant prosecuting officers employed by the Province immediately before the coming into force of this Act are crown attorneys for the purpose of this Act. 1990, c. 21, s. 15.

House of Assembly Act amended

16 Clause (c) of subsection (1) of Section 30 of Chapter 210 of the Revised Statutes, 1989, the *House of Assembly Act*, is amended by striking out the punctuation and words ", prosecuting officer" in the second and third lines thereof. 1990, c. 21, s. 16.

Repeal of Prosecuting Officers Act

17 Chapter 362 of the Revised Statutes, 1989, the *Prosecuting Officers Act*, is repealed. 1990, c. 21, s. 17.

Proclamation

18 This Act comes into force on and not before such day as the Governor in Council orders and declares by proclamation. 1990, c. 21, s. 18.

Proclaimed - July 24, 1990

In force - September 1, 1990

Indexed as:

Krieger v. Law Society of Alberta

Law Society of Alberta, appellant;
v.
Craig Charles Krieger and the Minister of Justice and Attorney General for Alberta, respondents, and The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Nova Scotia, the Attorney General of Manitoba, the Attorney General of British Columbia, the Attorney General for Saskatchewan, the Attorney General of Newfoundland and Labrador, the Federation of Law Societies of Canada, the Ontario Crown Attorneys' Association and the Criminal Trial Lawyers' Association, interveners.

[2002] 3 S.C.R. 372

[2002] S.C.J. No. 45

2002 SCC 65

File No.: 28275.

Supreme Court of Canada

Hearing: May 17, 2002.
Judgment: May 17, 2002. Reasons: October 10, 2002.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

(61 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Catchwords:

Constitutional law -- Division of powers -- Criminal law -- Administration of justice -- Rule adopted under provincial Law Society legislation requiring lawyers engaged as prosecutors to make timely disclosure of evidence to accused -- Whether rule intra vires province -- Constitution Act, 1867, ss. 91 (27), 92(14) -- Alberta Code of Professional Conduct, Rule 28(d).

Barristers and solicitors -- Crown prosecutors -- Breach of ethics -- Law Society's jurisdiction -- Law [page373] Society rule requiring lawyers engaged as prosecutors to make timely disclosure of evidence to accused -- Whether Law Society has jurisdiction to review allegation Crown prosecutor acting dishonestly or in bad faith failed to disclose relevant information -- Whether rule interfering with prosecutorial discretion -- Alberta Code of Professional Conduct, Rule 28(d).

Summary:

K was assigned to prosecute an accused charged with murder. Prior to the commencement of the preliminary inquiry, he received the results of DNA and biological tests conducted on blood found at the scene of the crime which implicated a different person than the accused. Ten days later, he advised the accused's counsel that the results of the testing would not be available in time for the preliminary inquiry. The defence counsel only learned of the testing results at the preliminary hearing, and complained to the Deputy Attorney General that there had been a lack of timely and adequate disclosure. K was reprimanded and removed from the case after a finding that the delay was unjustified. Six months later, the accused complained to the appellant Law Society about K's conduct. K sought an order that the Law Society had no jurisdiction to review the exercise of prosecutorial discretion by a Crown prosecutor and an order that the Rule of the *Code of Professional Conduct* requiring a prosecutor to make timely disclosure to the accused or defence counsel was of no force and effect. K's application was dismissed by the Court of Queen's Bench, but that decision was overturned by the Court of Appeal.

Held: The appeal should be allowed and the trial judgment restored.

The legislature of Alberta has the power to regulate the legal profession, which it has duly conferred upon the Law Society under the *Legal Profession Act*. Since the federal government has jurisdiction over criminal law and procedure and the province has jurisdiction over the administration of justice, including the regulation of lawyers and reviews of alleged breaches of ethics, there is a strong possibility of overlap between the provincial and federal spheres. Regard must be had to the pith and substance of the impugned rule to determine if it is an unconstitutional regulation by the province of criminal law and procedure. Here, the Rule requiring timely disclosure is directed at governing the ethical conduct of lawyers, is authorized by the *Legal Profession Act*, is limited to circumstances in which the lawyer acted dishonestly or in [page374] bad faith, and is not intended to interfere with the proper exercise of prosecutorial discretion. Accordingly, the Rule applies only to matters of professional discipline and does not intrude into the area of criminal law and procedure.

A decision of the Attorney General within the authority delegated by the sovereign is not subject to interference by other arms of government. An exercise of prosecutorial discretion will, therefore, be treated with deference by the courts and by other members of the executive, as well as statutory bodies like provincial law societies. Prosecutorial discretion will not be reviewable except in cases of flagrant impropriety. Decisions that do not go to the nature and extent of the prosecution, such as the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion, however, but are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum.

Because Crown prosecutors must be members of the Law Society, they are subject to the Law Society's code of professional conduct, and all conduct that is not protected by the doctrine of prosecutorial discretion is subject to the conduct review process. As the disclosure of relevant evidence is not a matter of prosecutorial discretion but rather a legal duty, the Law Society possesses the jurisdiction to review an allegation that a Crown prosecutor acting dishonestly or in bad faith failed to disclose relevant information, notwithstanding that the Attorney General had reviewed it from the perspective of an

employer. A clear distinction exists between prosecutorial discretion and professional conduct, and only the latter can be regulated by the Law Society. The Attorney General's office has the ability to discipline a prosecutor for failing to meet the standards set by that office, but that is a different function from the ability to discipline the same prosecutor in his or her capacity as a member of the Law Society. The Act gives the Law Society jurisdiction over a very broad range of conduct including prosecutorial decisions made dishonestly or in bad faith. Disclosure of relevant evidence is a matter of prosecutorial duty, and transgressions related to this duty constitute a very serious breach of legal ethics. Here, it appears that K failed to disclose relevant information, a violation of his duty, but later offered an explanation which would help to determine if he had acted dishonestly or in bad [page375] faith. If so, this would be an ethical breach falling within the Law Society's jurisdiction. The Law Society's jurisdiction to review K's failure to disclose relevant evidence to the accused is limited to examining whether it was an ethical violation.

Cases Cited

Applied: Nelles v. Ontario, [1989] 2 S.C.R. 170; R. v. Stinchcombe, [1991] 3 S.C.R. 326; R. v. Regan, [2002] 1 S.C.R. 297, 2002 SCC 12; Global Securities Corp. v. British Columbia (Securities Commission), [2000] 1 S.C.R. 494, 2000 SCC 21; approved: Re Hoem and Law Society of British Columbia (1985), 20 C.C.C. (3d) 239; referred to: R. v. Chaplin, [1995] 1 S.C.R. 727; Wilkes v. The King (1768), Wilm. 322, 97 E.R. 123; R. v. Power, [1994] 1 S.C.R. 601; Law Society of British Columbia v. Mangat, [2001] 3 S.C.R. 113, 2001 SCC 67; Whitbread v. Walley, [1990] 3 S.C.R. 1273; R. v. Osborne (1975), 25 C.C.C. (2d) 405; R. v. Osiowy (1989), 50 C.C.C. (3d) 189; Campbell v. Attorney-General of Ontario (1987), 35 C.C.C. (3d) 480; Chartrand v. Quebec (Minister of Justice) (1987), 59 C.R. (3d) 388.

Statutes and Regulations Cited

Alberta Act, S.C. 1905, c. 3 [reprinted in R.S.C. 1985, App. II, No. 20], s. 16(1).

Alberta Code of Professional Conduct, Rule 28.

Constitution Act, 1867, ss. 63, 91(27), 92(13), (14), 135.

Criminal Code, R.S.C. 1985, c. C-46, ss. 579, 579.1 [ad. 1994, c. 44, s. 60].

Department of Justice Act, R.S.C. 1985, c. J-2, s. 5.

Government Organization Act, R.S.A. 2000, c. G-10, Sch. 9, s. 2.

Legal Profession Act, S.A. 1990, c. L-9.1 [now R.S.A. 2000, c. L-8], ss. 6(l), 47(1), 103(1).

Ministry of the Attorney General Act, R.S.O. 1990, c. M.17, s. 5.

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Canada. Law Reform Commission. Working Paper 62. Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor. Ottawa: The Commission, 1990.

[page376]

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Solicitor-General of England with an account of the office of the Director of Public Prosecutions of England. London: Sweet & Maxwell, 1964.

Hogg, Peter W. Constitutional Law of Canada, loose-leaf ed., vol. 1. Scarborough, Ont.: Carswell, 1992 (updated 2001, release 1).

Proulx, Michel, and David Layton. Ethics and Canadian Criminal Law. Toronto: Irwin Law, 2001.

History and Disposition:

APPEAL from a judgment of the Alberta Court of Appeal (2000), 191 D.L.R. (4th) 600, 277 A.R. 31, 242 W.A.C. 31, [2001] 2 W.W.R. 102, 86 Alta. L.R. (3d) 195, 25 Admin. L.R. (3d) 161, 3 C.P.C. (5th) 212, [2000] A.J. No. 1129 (QL), 2000 ABCA 255, setting aside a judgment of the Court of Queen's Bench (1997), 149 D.L.R. (4th) 92, 51 Alta. L.R. (3d) 363, 205 A.R. 243, 47 Admin. L.R. (2d) 55, [1997] 8 W.W.R. 221, [1997] A.J. No. 689 (QL). Appeal allowed.

Counsel:

Lindsay MacDonald, Q.C., for the appellant.

Christopher D. Evans, Q.C., for the respondent Krieger.

Richard F. Taylor, Q.C., for the respondent the Minister of Justice and Attorney General for Alberta.

Robert J. Frater, for the intervener the Attorney General of Canada.

Kenneth L. Campbell, for the intervener the Attorney General for Ontario.

Alain Gingras, for the intervener the Attorney General of Quebec.

James A. Gumpert, Q.C., and Marc C. Chisholm, Q.C., for the intervener the Attorney General of Nova Scotia.

Shawn Greenberg, for the intervener the Attorney General of Manitoba.

George H. Copley, Q.C., and M. Joyce DeWitt-Van Oosten, for the intervener the Attorney General of British Columbia.

Graeme G. Mitchell, Q.C., for the intervener the Attorney General for Saskatchewan.

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Kathleen Healey, for the intervener the Attorney General of Newfoundland and Labrador.

Alan D. Gold, for the intervener the Federation of Law Societies of Canada.

Paul J.J. Cavalluzzo and Rosella Cornaviera, for the intervener the Ontario Crown Attorneys' Association.

Donald W. MacLeod, Q.C., for the intervener the Criminal Trial Lawyers' Association.

The judgment of the Court was delivered by

IACOBUCCI and MAJOR JJ.:--

I. Introduction

1 These are the reasons following the decision of the Court on May 17, 2002 to allow the appeal. The appellant Law Society of Alberta claimed the jurisdiction to apply the standards for the practice of law in the province to all members of the profession including those employed by the Attorney General of Alberta.

2 The respondents Attorney General and Craig Charles Krieger ("Krieger"), its employee, a Crown prosecutor, submitted that the Law Society does not have the jurisdiction to review the exercise of prosecutorial discretion by an agent of the Attorney General in the conduct of a prosecution. The respondents submitted on this basis that the appellant does not have the jurisdiction to investigate an allegation of bad faith or dishonesty against a Crown prosecutor in connection with a failure to disclose relevant information to the accused as required by law.

3 We agree that there are certain decisions of Crown prosecutors that cannot be reviewed by the Law Society. It is a constitutional principle that the Attorneys General of this country must act independently of partisan concerns when exercising their delegated sovereign authority to initiate, continue or terminate prosecutions. So long as they are made honestly and in good faith, prosecutorial [page378] decisions related to this authority are protected by the doctrine of prosecutorial discretion.

4 However, we do not agree that the Law Society lacks the jurisdiction to review an allegation that a Crown prosecutor in bad faith failed to disclose relevant information. As a consequence of its exclusive jurisdiction over property and civil rights in the province, under s. 92(13) of the *Constitution Act, 1867*, the Legislature of Alberta has the power to regulate the legal profession, which it has duly conferred upon the Law Society under the *Legal Profession Act*. Because Crown prosecutors must be members of the Law Society, it thereby follows Crown prosecutors are subject to the Law Society's code of professional conduct. All conduct that is not protected by the doctrine of prosecutorial discretion is subject to the conduct review process.

5 As the disclosure of relevant evidence is not a matter of prosecutorial discretion but, rather, is a legal duty, the Law Society possesses the jurisdiction to review an allegation that a Crown prosecutor acting dishonestly or in bad faith failed to disclose relevant information.

II. Facts

6 In 1993, Douglas Ward ("Ward") was charged with murder. In 1994, Ward was prosecuted for that murder. The prosecutor was the respondent Krieger, a member of the Law Society of Alberta employed by the Attorney General of that province. The Crown theory was that the deceased attacked and wounded the accused with a knife. Later, out of revenge, the accused stabbed the deceased to death while he lay on his bed.

7 On June 1, 1994, the respondent Krieger telephoned Ward's lawyer, Thomas Engel, and advised Engel that the results of DNA and biological testing conducted by the Crown of the blood found at the crime scene would not be available for the [page379] preliminary inquiry which commenced on June 6, 1994.

8 After the first day of the inquiry, Engel learned that there were preliminary results from the blood

partisan concerns when supervising prosecutorial decisions. Support for this view can be found in: Law Reform Commission of Canada, *supra*, at pp. 9-11. See also Binnie J. in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, at paras. 157-58 (dissenting on another point).

31 This side of the Attorney General's independence finds further form in the principle that courts will not interfere with his exercise of executive authority, as reflected in the prosecutorial decision-making process. In *R. v. Power*, [1994] 1 S.C.R. 601, L'Heureux-Dubé J. said, at pp. 621-23:

> It is manifest that, as a matter of principle and policy, courts should not interfere with prosecutorial discretion. This appears clearly to stem from the respect of separation of powers and the rule of law. Under the doctrine of separation of powers, criminal law is in the domain of the executive ... .
>
> Donna C. Morgan in "Controlling Prosecutorial Powers -- Judicial Review, Abuse of Process and Section 7 of The Charter" (1986-87), 29 *Crim. L.Q.* 15, at pp. 20-21, probes the origins of prosecutorial powers:
>
> > Most [prosecutorial powers] derive ... from the royal prerogative, defined by Dicey as the residue of discretionary or arbitrary authority residing in the hands of the Crown at any given time. Prerogative powers are essentially those granted by the common law to the Crown that are not shared by the Crown's subjects. While executive action carried out under their aegis conforms with the rule of law, prerogative [page389] powers are subject to the supremacy of Parliament, since they may be curtailed or abolished by statute.
> >
> > ...
>
> In "Prosecutorial Discretion: A Reply to David Vanek" (1987-88), 30 *Crim. L.Q.* 378, at pp. 378-80, J. A. Ramsay expands on the rationale underlying judicial deference to prosecutorial discretion:
>
> > ...
> >
> > It is fundamental to our system of justice that criminal proceedings be conducted in public before an independent and impartial tribunal. If the court is to review the prosecutor's exercise of his discretion the court becomes a supervising prosecutor. It ceases to be an independent tribunal. [Emphasis in original.]

32 The court's acknowledgment of the Attorney General's independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution. Subject to the abuse of process doctrine, supervising one litigant's decision-making process __ rather than the conduct of litigants before the court __ is beyond the legitimate reach of the court. In *Re Hoem and Law Society of British Columbia* (1985), 20 C.C.C. (3d) 239 (B.C.C.A.), Esson J.A. for the court observed, at p. 254, that:

> The independence of the Attorney-General, in deciding fairly who should be prosecuted, is also a hallmark of a free society. Just as the independence of the bar within its proper sphere must be respected, so must the independence of the Attorney-General.

We agree with these comments. The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system [page390] of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict.

B. *Is the Rule Intra Vires the Act and the Legislature of Alberta?*

33 Section 91(27) of the *Constitution Act, 1867* grants jurisdiction over criminal law and criminal procedure to the Federal Government. Federal jurisdiction over criminal law and criminal procedure includes the authority to determine the procedures that govern criminal trials. Sections 92(13) and (14) grant jurisdiction over property and civil rights and the administration of justice, both criminal and civil, to the Provinces. Provincial jurisdiction over property and civil rights and the administration of justice includes licensing and regulation of lawyers, including reviews of alleged breaches of ethics. See P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at p. 21-10; and *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67, at paras. 38-43 and para. 46. It would thus appear that there is a strong possibility of overlap between the provincial and federal spheres. Provincial regulations establishing the proper conduct of a lawyer in a criminal trial are likely to impact procedure in a criminal trial. Nonetheless, it is our view that the Rule is *intra vires* the province. Although the legislative competence of the province to regulate the Law Society has been grounded in both ss. 92(13) and (14), the weight of authority with which we agree finds greater comfort in s. 92(13).

34 To determine whether the Rule is an unconstitutional regulation by the province of criminal law and procedure or a constitutional regulation with respect to property and civil rights and the administration of justice, we look to the "pith and substance" of the [page391] Rule: *Whitbread v. Walley*, [1990] 3 S.C.R. 1273, at p. 1286.

35 In *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21, the Court held at para. 19:

> Federalism cases, like many other areas of legal interpretation, greatly involve the proper characterization of the law under attack. In *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 (hereinafter "*GM Canada*"), at pp. 666-69, Dickson C.J. offered a useful three-step structure for analyzing a claim that a law is *ultra vires*... . With respect to the first step, Dickson C.J. said the following (at pp. 666-67):
>
> > The first step should be to consider whether and to what extent the impugned provision can be characterized as intruding into provincial powers. If it cannot be characterized as intruding at all, i.e., if in its pith and substance the provision is federal law, and if the act to which it is attached is constitutionally valid (or if the provision is severable or if it is attached to a severable and constitutionally valid part of the act) then the investigation need go no further.
>
> If, on the other hand, the legislation is not in pith and substance within the constitutional powers of the enacting legislature, then the court must ask if the impugned provision is nonetheless a part of a valid legislative scheme. If it is, at the third stage the impugned provision should be upheld if it is sufficiently integrated into the valid legislative scheme.

Indexed as:

Miazga v. Kvello Estate

Matthew Miazga Appellant;

v.

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

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General for Saskatchewan, Attorney General of Alberta, Director of Criminal and Penal Prosecutions of Quebec, Canadian Association of Crown Counsel, Association in Defence of the Wrongly Convicted, Criminal Lawyers Association (Ontario) and Canadian Civil Liberties Association Interveners

[2009] 3 S.C.R. 339

[2009] 3 R.C.S. 339

[2009] S.C.J. No. 51

[2009] A.C.S. no 51

2009 SCC 51

File No.: 32208.

Supreme Court of Canada

Heard: December 12, 2008;
Judgment: November 6, 2009.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

(102 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Catchwords:

Torts -- Malicious prosecution -- Crown prosecutors -- Malice requirement -- Absence of reasonable and probable cause to initiate prosecution -- Provincial Crown attorney found liable for [page340] malicious prosecution -- Whether prosecutor's lack of subjective belief in existence of reasonable and probable cause to initiate prosecution sufficient to ground finding of malice -- Whether malice element requires proof of improper purpose.

Summary:

Three children made allegations of sexual assault against their biological parents, their mother's boyfriend and the respondents, who were the children's foster parents and members of the foster parents' extended family. Charges were subsequently laid and M, a provincial Crown attorney, prosecuted the case against the parents and the mother's boyfriend. All three were convicted, and the convictions were upheld by the Court of Appeal. The Supreme Court of Canada overturned the convictions, but concluded that the evidence of the children was sufficient to order new trials against the parents. Meanwhile, taking under advisement the trial judge's comments urging that the children not be made to endure another criminal proceeding, M negotiated a plea bargain with one of the accused (who is not a respondent in this case). The charges against the respondents were stayed. Some years later, all three children recanted their allegations against the respondents. The respondents commenced a civil suit for malicious prosecution against a number of individuals involved in the proceedings against them, including M.

M was found liable. The trial judge held that there were no objectively reasonable grounds upon which M could have believed that the respondents were probably guilty of the offences alleged. He held that M could not have had a subjective belief in the existence of reasonable and probable cause because of the unbelievable nature of the children's allegations against the respondents. He concluded that the absence of reasonable and probable cause raised a presumption of malice which, in the circumstances of this case, was itself sufficient to ground a finding of malice. In the event he was wrong on this conclusion, the trial judge held that there were other "indications of malice" to support the conclusion that M's prosecution of the respondents was animated by an improper purpose. While the Court of Appeal was unanimous in rejecting virtually all of the trial judge's "indicators of malice", the majority nevertheless concluded that the trial judge's finding that M did not have a subjective belief in the probable guilt of the respondents was sufficient to support the conclusion that he was actuated by malice and dismissed the appeal.

Held: The appeal should be allowed and the action dismissed.

[page341]

To succeed in an action for malicious prosecution, a plaintiff must prove that the prosecution was: (1) initiated by the defendant; (2) terminated in favour of the plaintiff; (3) undertaken without reasonable and probable cause; and (4) motivated by malice or a primary purpose other than that of carrying the law into effect. Only the last two elements are at issue in this appeal. [para. 3]

The third element of the tort requires a plaintiff to prove an absence of reasonable and probable cause for initiating the prosecution. It is well established that the reasonable and probable cause inquiry comprises both a subjective and an objective component, such that for grounds to exist, there must be actual belief on the part of the prosecutor and that belief must be reasonable in the circumstances. However, principles established in suits between private parties cannot simply be transposed to cases

involving Crown defendants without necessary modification. While the accuser's personal belief in the probable guilt of the accused may be an appropriate standard in a private suit, it is not a suitable definition of the subjective element of reasonable and probable cause in an action for malicious prosecution against Crown counsel. The reasonable and probable cause inquiry is not concerned with a prosecutor's personal views as to the accused's guilt, but with his or her professional assessment of the legal strength of the case. Given the burden of proof in a criminal trial, belief in "probable" guilt means that the prosecutor believes, based on the existing state of circumstances, that proof beyond a reasonable doubt could be made out in a court of law. The public interest is engaged in a public prosecution and the Crown attorney is duty-bound to act solely in the public interest in making the decision whether to initiate or continue a prosecution. This decision may not entirely accord with the individual prosecutor's personal views about a case, but Crown counsel must take care not to substitute his or her own views for that of the judge or the jury. Furthermore, where the action is taken against a Crown attorney, the inquiry into the prosecutor's subjective state of belief does not properly belong at the third stage of the test. In the context of a public prosecution, the third element necessarily turns on an objective assessment of the existence of sufficient cause. If the court concludes, on the basis of the circumstances known to the prosecutor at the relevant time, that reasonable and probable cause existed to commence or continue a criminal prosecution from an objective standpoint, the criminal process was properly employed, and the inquiry need go no further. If a judge determines that no objective grounds for the prosecution existed at the relevant time, the court [page342] must next inquire into the fourth element of the test for malicious prosecution. [para. 58] [para. 63] [para. 69] [para. 73] [para. 75] [para. 77]

Malice is a question of fact, requiring evidence that the prosecutor was impelled by an "improper purpose". The malice element of the test will be made out when a court is satisfied, on a balance of probabilities, that the defendant Crown prosecutor commenced or continued the impugned prosecution with a purpose inconsistent with his or her role as a "minister of justice". The plaintiff must demonstrate on the totality of the evidence that the prosecutor deliberately intended to subvert or abuse the office of the Attorney General or the process of criminal justice such that he or she exceeded the boundaries of the office of the Attorney General. The need to consider the "totality of all the circumstances" does not mean that the court is to embark on a second-guessing of every decision made by the prosecutor during the course of the criminal proceedings. It simply means that a court shall review all evidence related to the prosecutor's state of mind, including any evidence of lack of belief in the existence of reasonable and probable cause, in deciding whether the prosecution was in fact fuelled by an improper purpose. While the absence of a subjective belief in reasonable and probable cause is relevant to the malice inquiry, it does not equate with malice and does not dispense with the requirement of proof of an improper purpose. By requiring proof of an improper purpose, the malice element ensures that liability will not be imposed in cases where a prosecutor proceeds, absent reasonable and probable grounds, by reason of incompetence, inexperience, honest mistake, negligence or even gross negligence. [para. 78] [paras. 80-81] [para. 85] [para. 89]

In this case, there is no evidence to support a finding of malice. The trial judge's "indicators of malice" find no support in law or on the record. Moreover, the approach adopted at trial in the review of M's conduct of the prosecution exemplifies the very kind of second-guessing of prosecutorial discretion that should be avoided. The trial judge's basis for concluding that M did not have the requisite subjective belief amounts to a palpable and overriding error and, as such, is not entitled to deference. M testified that, while he did not believe some aspects of the allegations, he believed the children. The trial judge did not reject this testimony but faulted M for failing to state that he believed in the respondents' "probable guilt". However, even if he had so testified, his testimony would have been rejected because, in the trial judge's view, the children's allegations could not possibly give rise to a reasonable belief [page343] in probable guilt. That conclusion is not supported by the evidence. Several judges at both the trial and appellate levels in the criminal proceedings accepted and relied upon the same allegations by the children in convicting their biological parents. In the circumstances of this case, reliance on the

findings of courts in antecedent proceedings does not amount to improper "bootstrapping", but simply belies the trial judge's assertion that no one could possibly have believed the children. [para. 91] [para. 94] [para. 96]

The Court of Appeal erred in upholding the trial judge's finding that M was liable for malicious prosecution. The court was unanimous in overturning virtually all of the facts relied upon by the trial judge as indicative of malice on the part of M. Nevertheless, the majority relied on the "totality of all the circumstances" requirement to forgo the need for evidence beyond absence of reasonable and probable cause to prove that M was in fact actuated by an improper purpose. The majority erred by concluding that M's lack of subjective belief in the existence of grounds was sufficient to ground a finding of malice without identifying any improper purpose. Neither the plaintiffs nor the courts below have pointed to any improper purpose that impelled M to prosecute the respondents. [para. 92] [paras. 100-101]

Cases Cited

Referred to: *Nelles v. Ontario*, [1989] 2 S.C.R. 170; *Proulx v. Quebec (Attorney General)*, 2001 SCC 66, [2001] 3 S.C.R. 9; *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372; *R. v. R. (D.)* (1995), 98 C.C.C. (3d) 353, rev'd [1996] 2 S.C.R. 291; *Heath v. Heape* (1856), 1 H. & N. 478, 156 E.R. 1289; *Hicks v. Faulkner* (1878), 8 Q.B.D. 167, aff'd [1881-5] All E.R. Rep. 187; *Abrath v. North Eastern Railway Co.* (1886), 11 App. Cas. 247; *Joint v. Thompson* (1867), 26 U.C.Q.B. 519; *Prentiss v. Anderson Logging Co.* (1911), 16 B.C.R. 289; *Jewhurst v. United Cigar Stores Ltd.* (1919), 49 D.L.R. 649; *Gabler v. Cymbaliski* (1922), 15 Sask. L.R. 457; *Love v. Denny* (1929), 64 O.L.R. 290; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Boucher v. The Queen*, [1955] S.C.R. 16; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. Jewitt*, [1985] 2 S.C.R. 128; *Danby v. Beardsley* (1880), 43 L.T. 603; *Ramsay v. Saskatchewan*, 2003 SKQB 163, 234 Sask. R. 172; *Hainsworth v. Ontario (Attorney General)*, [2002] O.J. No. 1390 (QL); *Hunt v. Ontario*, [2004] O.J. No. 5284 (QL); *Ferri v. Root*, 2007 ONCA 79, 279 D.L.R. (4th) 643; [page344] *Wilson v. Toronto (Metropolitan) Police Service*, [2001] O.J. No. 2434 (QL); *Glinski v. McIver*, [1962] 1 All E.R. 696; *A v. State of New South Wales*, [2007] HCA 10, [2007] 3 L.R.C. 693; *Marley v. Mitchell* (1988), [2006] N.Z.A.R. 181; *Al's Steak House & Tavern Inc. v. Deloitte & Touche* (1999), 45 C.C.L.T. (2d) 98.

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Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 3.

Jury Act, R.S.P.E.I. 1988, c. J-5, s. 3(5).

Proceedings against the Crown Act, R.S.S. 1978, c. P-27, s. 5.

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History and Disposition:

APPEAL from a judgment of the Saskatchewan Court of Appeal (Vancise, Sherstobitoff and Lane JJ.A.), 2007 SKCA 57, 293 Sask. R. 187, 397 W.A.C. 187, 282 D.L.R. (4) 1, [2007] 7 W.W.R. 577, 49 C.C.L.T. (3d) 194, [2007] S.J. No. 247 (QL), 2007 CarswellSask 237, upholding the judgment of Baynton J., 2003 SKQB 559, 244 Sask. R. 1, 234 D.L.R. (4) 612, [2004] 9 W.W.R. 647, [2003] S.J. No. 830 (QL), 2003 CarswellSask 898. Appeal allowed.

Counsel:

Michael D. Tochor, *Q.C.*, and *Gregory Fingas*, for the appellant.

[page345]

Edward Holgate, for the respondents Estate of Dennis Kvello (by his personal representative, Diane Kvello), Diane Kvello, S.K.1, S.K.2, Pamela Sharpe, Estate of Marie Klassen (by her personal representative, Peter Dale Klassen), John Klassen, Myrna Klassen, Peter Dale Klassen and Anita Janine Klassen.

Richard Klassen, on his own behalf and on behalf of the respondent Kari Klassen.

Written submissions only by *Robert Frater* and *Christopher Mainella*, for the intervener the Attorney General of Canada.

Written submissions only by *Michele Smith*, *Michael Fleishman* and *Jeremy Glick*, for the intervener the Attorney General of Ontario.

Sophie Cliche, *Lizann Demers* and *Rachel Boivin*, for the interveners the Attorney General of Quebec and the Director of Criminal and Penal Prosecutions of Quebec.

James A. Gumpert, *Q.C.*, and *Mark Scott*, for the intervener the Attorney General of Nova Scotia.

John J. Walsh, *Q.C.*, for the intervener the Attorney General of New Brunswick.

Eugene B. Szach, for the intervener the Attorney General of Manitoba.

Joyce DeWitt-Van Oosten and *Tara Callan*, for the intervener the Attorney General of British Columbia.

Written submissions only by *Jerome A. Tholl*, for the intervener the Attorney General for Saskatchewan.

Written submissions only by *Goran Tomljanovic*, *Q.C.*, for the intervener the Attorney General of Alberta.

Paul J. J. Cavalluzzo and *Stephen J. Moreau*, for the intervener the Canadian Association of Crown Counsel.

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Louis Sokolov and *Colleen Bauman*, for the intervener the Association in Defence of the Wrongly Convicted.

Sean Dewart, for the intervener the Criminal Lawyers Association (Ontario).

Bradley E. Berg, *Allison A. Thornton* and *Shashu M. Clacken*, for the intervener the Canadian Civil Liberties Association.

The judgment of the Court was delivered by

CHARRON J.:--

1. Overview

1 The respondents were charged with about 70 counts of sexual assault against children in their care. The charges were ultimately resolved in their favour when, following their committal but before trial, the appellant, Crown Attorney Miazga, entered a stay of proceedings. The child complainants, upon whose testimony the prosecution was based, subsequently recanted their allegations. The respondents then commenced this action for malicious prosecution.

2 There is no question that the respondents were the victims of a clear miscarriage of justice which undoubtedly had a devastating effect on their lives. Especially in the absence of an acquittal, it is often difficult for people wrongly accused of such crimes to fully regain their positions in society and free themselves from the stigma and trauma of those false allegations. The fact that we now know that the children's allegations of sexual abuse were false, however, does not provide the answer to whether the respondents' action in malicious prosecution against the Crown prosecutor can succeed.

3 To succeed in an action for malicious prosecution, a plaintiff must prove that the prosecution was: (1) initiated by the defendant; (2) terminated in favour of the plaintiff; (3) undertaken without reasonable and probable cause; and (4) motivated [page347] by malice or a primary purpose other than that of carrying the law into effect.

4 The four-part test for malicious prosecution is of long standing in the common law. It evolved in the 18th and 19th centuries at a time when prosecutions were conducted by private litigants and the Crown was wholly immune from civil liability. In *Nelles v. Ontario*, [1989] 2 S.C.R. 170, this Court held that the Attorney General and Crown prosecutors no longer enjoy absolute immunity from a suit for malicious prosecution and set out the requisite standard for Crown liability under the pre-existing four-part test. The present appeal asks the Court to provide further guidance on the absence of reasonable and probable cause and malice requirements, in light of the unique role played by Crown prosecutors in our

authority peculiar to the office of the Attorney General.

> Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum. [Emphasis added.]

46 The independence of the Attorney General is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched. The principle of independence requires that the Attorney General act independently of political pressures from government and sets the Crown's exercise of prosecutorial discretion beyond the reach of judicial review, subject only to the doctrine of abuse of process. The Court explained in *Krieger* how the principle of independence finds form as a constitutional value (at paras. 30-32):

> It is a constitutional principle in this country that the Attorney General must act independently of partisan [page363] concerns when supervising prosecutorial decisions. Support for this view can be found in: Law Reform Commission of Canada [Working Paper 62, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor* (1990)], at pp. 9-11. See also Binnie J. in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, at paras. 157-58 (dissenting on another point).
>
> This side of the Attorney General's independence finds further form in the principle that courts will not interfere with his exercise of executive authority, as reflected in the prosecutorial decision-making process... .
>
> ...
>
> The court's acknowledgment of the Attorney General's independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution. Subject to the abuse of process doctrine, supervising one litigant's decision-making process -- rather than the conduct of litigants before the court -- is beyond the legitimate reach of the court... . The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict. [Emphasis added.]

See also *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 166, *per* Binnie J., dissenting on another issue.

47 In exercising their discretion to prosecute, Crown prosecutors perform a function inherent in the office of the Attorney General that brings the principle of independence into play. Its fundamental importance lies, not in protecting the interests of individual Crown attorneys, but in advancing the public

interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their *quasi*-judicial role as "ministers of justice": *Boucher v. [page364] The Queen*, [1955] S.C.R. 16, at p. 25, *per* Locke J. In *R. v. Power*, [1994] 1 S.C.R. 601, at p. 616, L'Heureux-Dubé J. acknowledged the importance of limiting judicial oversight of Crown decisions in furtherance of the public interest:

> [T]he Attorney General is a member of the executive and as such reflects, through his or her prosecutorial function, the interest of the community to see that justice is properly done. The Attorney General's role in this regard is not only to protect the public, but also to honour and express the community's sense of justice. Accordingly, courts should be careful before they attempt to "second-guess" the prosecutor's motives when he or she makes a decision. [Emphasis added.]

Thus, the public good is clearly served by the maintenance of a sphere of unfettered discretion within which Crown attorneys can properly pursue their professional goals.

48 That said, the general rule of judicial non-intervention in the prosecutorial exercise is not absolute. In the public law context, this Court in *R. v. Jewitt*, [1985] 2 S.C.R. 128, unanimously affirmed the availability of the doctrine of abuse of process in criminal proceedings, but (at p. 137) strictly limited judicial discretion to stay proceedings as a result of abuse of process to the "clearest of cases". In *Power*, L'Heureux-Dubé J. for a majority of this Court described the high threshold that must be met to justify judicial interference with a Crown attorney's decision to prosecute an accused (at pp. 615-16):

> I, therefore, conclude that, in criminal cases, courts have a residual discretion to remedy an abuse of the court's process but only in the "clearest of cases", which, in my view, amounts to conduct which shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention.
>
> To conclude that the situation "is tainted to such a degree" and that it amounts to one of the "clearest of cases", as the abuse of process has been characterized by the jurisprudence, requires overwhelming evidence [page365] that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice... . Where there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed, then, and only then, should courts intervene to prevent an abuse of process which could bring the administration of justice into disrepute. Cases of this nature will be extremely rare. [Emphasis added.]

49 As stated earlier, the question of whether the Attorney General and Crown attorneys enjoy absolute immunity from a suit for malicious prosecution in the private law context was answered in the negative by this Court in *Nelles*. As the Court explained, the question was ultimately one of policy. The Court concluded that when a prosecutor acts maliciously, in fraud of his or her professional duties, that prosecutor steps outside his or her proper role as "minister of justice", and as a result, immunity from civil liability is no longer justified. Where an accused is wrongly prosecuted as a result of the prosecutor's abusive actions, he or she may bring an action in malicious prosecution. Like the test for abuse of process, however, there is a stringent standard that must be met before a finding of liability will be made, in order to ensure that courts do not simply engage in the second-guessing of decisions made pursuant to a Crown's prosecutorial discretion.

50 In deciding that *absolute* immunity from civil liability was not justified, the Court in *Nelles* made

clear that the principles underlying the case for immunity were still engaged and informed the high threshold to be met in an action for malicious prosecution (at p. 199):

> Further, it is important to note that what we are dealing with here is an immunity from suit for malicious prosecution; we are not dealing with errors in judgment or discretion or even professional negligence. By contrast the tort of malicious prosecution requires proof of an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve and as such incorporates an abuse of the office of the Attorney General and his agents the Crown Attorneys. [Emphasis added.]

[page366]

In *Proulx*, at para. 4, the Court reiterated the stringent test for malicious prosecution established in *Nelles*:

> 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 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. [Emphasis added.]

51 Thus, the public law doctrine of abuse of process and the tort of malicious prosecution may be seen as two sides of the same coin: both provide remedies when a Crown prosecutor's actions are so egregious that they take the prosecutor outside his or her proper role as minister of justice, such that the general rule of judicial non-intervention with Crown discretion is no longer justified. Both abuse of process and malicious prosecution have been narrowly crafted, employing stringent tests, to ensure that liability will attach in only the most exceptional circumstances, so that Crown discretion remains intact.

52 The respondents and some of the interveners in the present appeal urge that the test for malicious prosecution be amended such that malice under the fourth element may be inferred solely from a finding of lack of reasonable and probable grounds under the third element. They argue that to require independent evidence of malice presents too high a barrier for any wrongly prosecuted person to obtain a remedy against a Crown prosecutor. In my view, these arguments are ill-conceived and do not account for the careful balancing established in *Nelles* and *Proulx* between the right of individual citizens to be free from groundless criminal prosecutions and the public interest in the effective and [page367] uninhibited prosecution of criminal wrongdoing: P. H. Osborne, *The Law of Torts* (3rd ed. 2007), at p. 245. 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 (p. 199).

4.3 *The Elements of Malicious Prosecution: A Brief Overview*

53 Under the first element of the test for malicious prosecution, the plaintiff must prove that the prosecution at issue was initiated by the defendant. This element identifies the proper target of the suit,

> To succeed in an action for malicious prosecution against the Attorney General or Crown Attorney, the plaintiff would have to prove both the absence of reasonable and probable cause in commencing the prosecution, and malice in the form of a deliberate and improper use of the office of the Attorney General or Crown Attorney, a use inconsistent with the status of "minister of justice". In my view this burden on the plaintiff amounts to a requirement that the Attorney General or Crown Attorney perpetrated a fraud on the process of criminal justice and in doing so has perverted or abused his office and the process of criminal justice. In fact, in some cases this would seem to amount to criminal conduct. [Emphasis in original.]

79 In order to prove malice, a plaintiff must, in accordance with *Nelles*, bring evidence that the defendant Crown was acting pursuant to an improper purpose inconsistent with the office of the Crown attorney. As we have seen, in deciding whether to initiate or continue a prosecution, the prosecutor must assess the legal strength of the case against the accused. The prosecutor should invoke the criminal process only where he or she believes, based on the existing state of circumstances, that proof beyond a reasonable doubt could be made out in a court of law. It follows that, if the court concludes that the prosecutor initiated or continued the prosecution based on an *honest*, albeit mistaken, professional belief that reasonable and probable cause did in fact exist, he or she will have acted for the proper purpose of carrying the law into effect and the action must fail.

80 The inverse proposition, however, is not true. The absence of a subjective belief in sufficient grounds, while a relevant factor, does not equate with malice. It will not always be possible for a plaintiff to adduce direct evidence of the prosecutor's lack of belief. As is often the case, a state of mind may be inferred from other facts. In [page378] appropriate circumstances, for example when the existence of objective grounds is woefully inadequate, the absence of a subjective belief in the existence of sufficient grounds may well be inferred. However, even if the plaintiff should succeed in proving that the prosecutor did *not* have a subjective belief in the existence of reasonable and probable cause, this does not suffice to prove malice, as the prosecutor's failure to fulfill his or her proper role may be the result of inexperience, incompetence, negligence, or even gross negligence, none of which is actionable: *Nelles*, at p. 199; *Proulx*, at para. 35. Malice requires a plaintiff to prove that the prosecutor *wilfully* perverted or abused the office of the Attorney General or the process of criminal justice. The third and fourth elements of the tort must not be conflated.

81 As discussed earlier, a demonstrable "improper purpose" is the key to maintaining the balance struck in *Nelles* between the need to ensure that the Attorney General and Crown prosecutors will not be hindered in the proper execution of their important public duties and the need to provide a remedy to individuals who have been wrongly and maliciously prosecuted. By requiring proof of an improper purpose, the malice element of the tort of malicious prosecution ensures that liability will not be imposed in cases where a prosecutor proceeds, absent reasonable and probable grounds, by reason of incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence, or even gross negligence. In *Nelles*, Lamer J. stated, at pp. 196-97:

> It should be noted that what is at issue here [in a suit for malicious prosecution] is not the exercise of a prosecutor's discretion within the proper sphere of prosecutorial activity as defined by his role as a "minister of justice". Rather, in cases of malicious prosecution we are dealing with allegations of misuse and abuse of the criminal process and of the office of the Crown Attorney. We are not dealing with merely second-guessing a Crown Attorney's judgment in the prosecution of a case but rather with the deliberate and malicious use of the office for ends that are improper [page379] and inconsistent with the traditional prosecutorial function. [Emphasis

added.]

82 The test was reiterated in *Proulx* (para. 35). The circumstances in *Proulx* provide an example of a prosecution motivated by an improper purpose sufficient to ground liability for malicious prosecution. The circumstances can be briefly summarized as follows.

83 In *Proulx*, Crown counsel concluded in 1986 that there did not exist sufficient evidence to prosecute Proulx for the murder, and the case was closed. Five years later, in the midst of a widely publicized defamation action launched by Proulx against a radio station and a retired police officer who had worked on his case, the prosecutor was advised by the defendants in the defamation case of a potential new identification witness. The prosecutor added the retired police officer to the prosecution team notwithstanding that he was a defendant in the defamation action, reopened the file and went ahead with the prosecution of Proulx for murder. The Crown attorney was aware of the retired police officer's involvement in the defamation action but allowed him to gather evidence against Proulx without restriction. Proulx was convicted. The conviction was reversed on appeal and an acquittal entered, with the court strongly criticizing the lack of credible evidence. Proulx then launched a malicious prosecution action against the Crown attorney.

84 Writing for the majority, Iacobucci and Binnie JJ. began with the proposition from *Nelles* that malice involves "serious allegations, which relate to the misuse and abuse of the criminal process and the office of the Crown Attorney" (para. 35). They found that the evidence demonstrated the improper mixing of public and private business and that the prosecutor had knowingly manipulated evidence before the jury and prosecuted Proulx with "an active effort to obtain a conviction at any price" (para. 41). They therefore concluded that the prosecutor lent his office to a defence strategy in a defamation case, which was a perversion of the powers [page380] of the office of the Crown and an abuse of his prosecutorial power, holding (at para. 43):

> In our opinion, this juxtaposition of events shows the importance of the prosecutor's duty not to allow the criminal process to be used as a vehicle to serve other ends, in this case the ends of Arthur and Tardif in attempting to defend against the appellant's defamation action. The Crown made the decision to prosecute with the full knowledge that prosecuting the appellant would potentially assist the defendants in the defamation actions. This was thus more than a simple abdication of prosecutorial responsibilities to the police or, in the case of Tardif, to a former police officer. Rather, the prosecutor lent his office to a defence strategy in the defamation suits and, in so doing, was compromised by Tardif's manipulation of the evidence and the irregularities that took place during the 1991 investigation process. [Emphasis added.]

85 The court must consider the relevant evidence and decide whether, on a balance of probabilities, the prosecutor was in fact motivated by an improper purpose. Consistent with the approach courts must take in every case, this requires an assessment of the "totality of all the circumstances" (*Proulx*, at para. 37). The need to consider the "totality of all the circumstances" does not mean that the court is to embark on a second-guessing of every decision made by the prosecutor during the course of the criminal proceedings. It simply means that a court shall review all evidence related to the prosecutor's state of mind, including any evidence of lack of belief in the existence of reasonable and probable cause, in deciding whether the prosecution was in fact fuelled by an improper purpose, as alleged.

86 Evidence of the prosecutor's lack of subjective belief in reasonable and probable cause may assist in proving that the prosecution was driven by an improper purpose. However, for the reasons explained earlier, malice cannot simply be inferred from a finding of absence of belief in reasonable and probable

Indexed as:

Nelles v. Ontario

Susan Nelles, appellant;
v.
Her Majesty The Queen in right of Ontario, the Attorney General for Ontario, John W. Ackroyd, James Crawford, Jack Press and Anthony Warr, respondents.

[1989] 2 S.C.R. 170

[1989] S.C.J. No. 86

File No.: 19598.

Supreme Court of Canada

1988: February 29 / 1989: August 14.

Present: Dickson C.J. and Beetz *, Estey *, McIntyre, Lamer, Wilson, Le Dain *, La Forest and L'Heureux-Dubé JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

* Beetz, Estey and Le Dain JJ. took no part in the judgment.

Crown -- Immunity -- Civil action -- Malicious prosecution -- Whether Crown, Attorney General and Crown Attorneys are immune from suit for malicious prosecution -- Whether a ruling on the issue of prosecutorial immunity should be made on an appeal of a preliminary motion -- Proceedings against the Crown Act, R.S.O. 1980, c. 393, s. 5(6) -- Rules of Practice and Procedure, R.R.O. 1980, Reg. 540, Rule 126.

The appellant was charged with the murder of four infants and was discharged on all counts at the conclusion of the preliminary inquiry. She then brought an action against the Crown in right of Ontario, the Attorney General for Ontario, and several police officers, alleging that the Attorney General and his agents, the Crown Attorneys, counselled, aided and abetted the police in charging and prosecuting her and that the Attorney General and the Crown Attorneys were actuated by malice. Proceedings were later discontinued against the police officers and the Crown Attorneys were not named as defendants. Before trial, the respondents moved to have the action dismissed under Rule 126 of the Ontario Rules of Practice on the ground that the pleadings disclosed no reasonable cause of action and, in the alternative, for leave under Rule 124 to set down a point of law raised in the pleadings and to argue it on the return of the motion. The Supreme Court of Ontario allowed the motion and struck out the statement of claim. The Court of Appeal upheld the judgment. Both the Supreme Court of Ontario and the Court of Appeal [page171] seemed to have acted under Rule 126. This appeal is to determine whether the Crown, the Attorney General and the Crown Attorneys enjoy an absolute immunity from a suit for malicious prosecution.

Held (L'Heureux-Dubé J. dissenting in part): The appeal should be dismissed as against the Crown. The appeal should be allowed as against the Attorney General and the matter returned to the Supreme Court of Ontario for trial of the claim against the Attorney General.

The Crown enjoys absolute immunity from a suit for malicious prosecution. Section 5(6) of the Ontario Proceedings Against the Crown Act exempts the Crown from any proceedings in respect of anything done or omitted to be done by a person while discharging or purporting to discharge responsibilities of a judicial nature or responsibilities that he has in connection with the execution of judicial process. The decision to prosecute is a judicial decision vested in the Attorney General and executed on his behalf by his agents, the Crown Attorneys. The Crown Attorneys and the Attorney General in deciding to prosecute the appellant came within s. 5(6) of the Act and the Crown is thus immune from liability to the appellant.

Per Dickson C.J. and Lamer and Wilson JJ.: There is no need for a trial to permit a conclusion on the question of prosecutorial immunity. This issue, disposed of in the courts below upon a pre-trial motion under Rule 124 or Rule 126 of the Ontario Rules of Practice, should be addressed by this Court. The issue has been given careful consideration in the Court of Appeal and in argument before this Court. To send the matter back for trial without resolving the issue would not be expeditious and would add both time and cost to an already lengthy case. The rules of civil procedure should not act as obstacles to a just and expeditious resolution of a case.

The Attorney General and Crown Attorneys are not immune from suits for malicious prosecution. A review of the authorities on the issue of prosecutorial immunity reveals that the matter ultimately boils down to a question of policy. In the interests of public policy, an absolute immunity for the Attorney General and his agents, the Crown Attorneys, is not justified. An absolute immunity has the effect of negating a private right of action and in some cases may bar a remedy under the Canadian Charter of Rights and Freedoms. As such, the existence of absolute immunity is a threat to the [page172] individual rights of citizens who have been wrongly and maliciously prosecuted. While the policy considerations in favour of absolute immunity have some merit, these considerations must give way to the right of a private citizen to seek a remedy when the prosecutor acts maliciously in fraud of his duties with the result that he causes damage to the victim. The tort of malicious prosecution requires not only proof of an absence of reasonable and probable cause for commencing the proceedings but also proof of an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve and as such incorporates an abuse of the office of the Attorney General and his agents the Crown Attorneys. The inherent difficulty in proving a case of malicious prosecution combined with the mechanisms available within the system of civil procedure to weed out meritless claims is sufficient to ensure that the Attorney General and Crown Attorneys will not be hindered in the proper execution of their important public duties. Finally, attempts to qualify prosecutorial immunity in the United States by the so-called functional approach and its many variations have proven to be unsuccessful.

Per La Forest J.: The common law position as set out by Lamer J. is accepted. The Charter implications need not be considered.

Per McIntyre J.: The state of the law relating to the immunity of the Attorney General is far from clear and a ruling on a point of this importance should not be made on an appeal of a preliminary motion. Before laying down any proposition to the effect that the Attorney General and his agents enjoy absolute immunity from civil suit, there should be a trial to permit a conclusion on the question of prosecutorial immunity and to provide -- in the event that it is decided that the immunity is not absolute -- a factual basis for a determination of whether or not in this case the conduct of the prosecution was such that the appellant is entitled to a remedy.

Furthermore, the Attorney General's immunity from judicial review, which is based on the exercise of a judicial function, does not equate with immunity from civil suit for damages for wrongful conduct in the performance of prosecutorial functions which do not involve the exercise of a judicial function. Indeed, most of the functions and acts performed by Crown Attorneys as agents of the Attorney General would fall into this category and, accordingly, the immunity may not extend [page173] to claims for damages as a result of a prosecution, however instituted, that is carried out with malice. A ruling on a preliminary motion to the effect that Attorneys General and their agents are absolutely immune from all liability for suits for malicious prosecution may be too expansive and even ill-founded.

This case, therefore, should not have been disposed of upon a pre-trial motion under Rule 126 of the Ontario Rules of Practice. Under that rule, it is only in the clearest of cases that an action should be struck out. This is not such a case.

Per L'Heureux-Dubé J. (dissenting in part): Appellant's action is completely dependent upon whether or not Attorneys General and Crown Attorneys are immune from civil suit and, as such, the matter can and should be decided by this Court in the present appeal. While, in general, important questions should not be disposed of in interlocutory fashion, this rule does not apply where the defence offered at the outset is one of law only -- namely, that the right of action is barred independently of the facts alleged. There is every advantage, in terms of saving the time and cost of a trial, to decide a question of law at the outset. This, in fact, is the very reason for the existence of Rule 126 of the Ontario Rules of Practice.

Adopting the reasons of the Ontario Court of Appeal, the Attorneys General and Crown Attorneys enjoy an absolute immunity from civil suit when they are acting within the bounds of their authority. The role of absolute immunity is not to protect the interests of the individual holding the office but rather to advance the greater public good. The Attorneys General and Crown Attorneys are often faced with difficult decisions as to whether to proceed in matters which come before them and their freedom of action is vital to the effective functioning of our criminal justice system.

Cases Cited

By Lamer J.

Considered: Imbler v. Pachtman, 424 U.S. 409 (1976); referred to: Owsley v. The Queen in Right of Ontario (1983), 34 C.P.C. 96; Richman v. McMurtry (1983), 41 O.R. (2d) 559; Levesque v. Picard (1985), 66 N.B.R. (2d) 87; Curry v. Dargie (1984), 28 C.C.L.T. 93; [page174]; German v. Major (1985), 39 Alta. L.R. (2d) 270; Wilkinson v. Ellis, 484 F. Supp. 1072 (1980); Marrero v. City of Hialeah, 625 F.2d 499 (1980), cert. denied, 450 U.S. 913 (1981); Taylor v. Kavanagh, 640 F.2d 450 (1981); Riches v. Director of Public Prosecutions, [1973] 2 All E.R. 935; Hester v. MacDonald, [1961] S.C. 370; Boucher v. The Queen, [1955] S.C.R. 16; Hicks v. Faulkner (1878), 8 Q.B.D. 167; Mitchell v. John Heine and Son Ltd. (1938), 38 S.R. (N.S.W.) 466; Bosada v. Pinos (1984), 44 O.R. (2d) 789; R. v. Groves (1977), 37 C.C.C. (2d) 429.

By McIntyre J.

Referred to: Owsley v. The Queen in right of Ontario (1983), 34 C.P.C. 96; Richman v. McMurtry (1983), 41 O.R. (2d) 559; The Queen v. Comptroller-General of Patents, Designs, and Trade Marks, [1899] 1 Q.B. 909; Curry v. Dargie (1984), 28 C.C.L.T. 93; Roncarelli v. Duplessis, [1959] S.C.R. 121; Mostyn v. Fabrigas (1774), 1 Cowp. 161, 98 E.R. 1021; Henly v. Mayor of Lyme (1828), 5 Bing. 91, 130 E.R. 995; Asoka Kumar David v. Abdul Cader, [1963] 3 All E.R. 579; Imbler v. Pachtman, 424 U.S. 409 (1976); Unterreiner v. Wilson (1982), 40 O.R. (2d) 197 (H.C.), aff'd (1983), 41 O.R. (2d) 472 (C.A.); Bosada v. Pinos (1984), 44 O.R. (2d) 789; German v. Major (1985), 39 Alta. L.R. (2d) 270;

Levesque v. Picard (1985), 66 N.B.R. (2d) 87; Gregoire v. Biddle, 177 F.2d 579 (1949); Riches v. Director of Public Prosecutions, [1973] 2 All E.R. 935; Warne v. Province of Nova Scotia (1969), 1 N.S.R. (2d) 27; Re Van Gelder's Patent (1888), 6 R.P.C. 22; Morier v. Rivard, [1985] 2 S.C.R. 716; Barrisove v. McDonald, B.C.C.A., No. 490/74, November 1, 1974.

By L'Heureux-Dubé J. (dissenting in part)

Roncarelli v. Duplessis, [1959] S.C.R. 121; Morier v. Rivard, [1985] 2 S.C.R. 716; Gregoire v. Biddle, 177 F.2d 579 (1949); Imbler v. Pachtman, 424 U.S. 409 (1976); Yaselli v. Goff, 12 F.2d 396 (1926).

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 11, 24(1).
Code of Civil Procedure, R.S.Q., c. C-25, art. 94.
Criminal Code, R.S.C., 1985, c. C-46, ss. 122, 139(2), (3), 465(1)(b), 504, 579(1) [rep. & subs. c. 27 (1st Supp.), s. 117], 737.
Crown Attorneys Act, R.S.O. 1980, c. 107.
Ministry of the Attorney General Act, R.S.O. 1980, c. 271.
Proceedings Against the Crown Act, R.S.O. 1980, c. 393, ss. 2(2)(d), 5(2) to (6).
Rules of Civil Procedure, O. Reg. 560/84, Rules 1.04(1), 20, 21.01.
[page175]
Rules of Practice and Procedure, R.R.O. 1980, Reg. 540, Rules 124, 126.

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Manning, Morris. "Abuse of Power by Crown Attorneys," [1979] L.S.U.C. Lectures 571.
Note, "Delimiting the Scope of Prosecutorial Immunity from Section 1983 Damage Suits" (1977), 52 N.Y.U. L. Rev. 173.
Pilkington, Marilyn L. "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984), 62 Can. Bar. Rev. 517.

APPEAL from a judgment of the Ontario Court of Appeal (1985), 51 O.R. (2d) 513, 21 D.L.R. (4th) 103, 16 C.R.R. 320, 1 C.P.C. (2d) 113, affirming an order of Fitzpatrick J. granting respondents' application to strike out appellant's statement of claim and dismissing her action. Appeal dismissed as against the Crown and appeal allowed as against the Attorney General, L'Heureux-Dubé J. dissenting in part.

John Sopinka, Q.C., and David Brown, for the appellant.
T.C. Marshall, Q.C., and L.A. Hunter, for the respondents.

Solicitors for the appellant: Stikeman, Elliott, Toronto.
Solicitor for the respondents: R.F. Chaloner, Toronto.

The judgment of Dickson C.J. and Lamer and Wilson JJ. was delivered by

1 **LAMER J.**:-- I have read the reasons for judgment of my colleague McIntyre J. and I agree with his disposition of the appeal but I do so for somewhat different reasons. McIntyre J. in his reasons for judgment concludes that there must be a trial to permit a conclusion on the question of [page176] prosecutorial immunity. I am in respectful disagreement with him in this regard. I am of the opinion that the question of immunity should be addressed by this Court in this case, and that nothing prevents the Court from so doing. I set out the relevant rules of the Ontario Rules of Practice as they were at the time of the case for ease of reference:

> 124. Either party is entitled to raise by his pleadings any point of law, and by consent of the parties or by leave of a judge, the point of law may be set down for hearing at any time before the trial, otherwise it shall be disposed of at the trial.
>
> 126. A judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in the case of the action or defence being shown to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly.

2 As McIntyre J. points out the respondents moved to have the action dismissed under Rule 126 on the ground that the pleadings disclosed no reasonable cause of action and, in the alternative, for leave under Rule 124 to set down a point of law raised in the pleadings and to argue the same on the return of the motion. Both Fitzpatrick J. of the Supreme Court of Ontario and the Court of Appeal for Ontario (1985), 51 O.R. (2d) 513, in allowing the motion to strike out the statement of claim, seemed to have acted under Rule 126.

3 A review of the cases dealing with the application of Rule 124 and Rule 126 reveals the following. The difference between the two rules lies in the summary nature of Rule 126 as opposed to the more detailed consideration of issues under Rule 124. A court should strike a pleading under Rule 126 only in plain and obvious cases where the pleading is bad beyond argument. Rule 124 is designed to provide a means of determining, without deciding the issues of fact raised by the pleadings, a question of law that goes to the root of the action. I would like to point out that what is at issue here is not whether malicious [page177] prosecution is a reasonable cause of action. A suit for malicious prosecution has been recognized at common law for centuries dating back to the reign of Edward I. What is at issue is whether the Crown, Attorney General and Crown Attorneys are absolutely immune from suit for the well-established tort of malicious prosecution. This particular issue has been given careful consideration both by the Court of Appeal and in argument before this Court. The Court of Appeal for Ontario undertook a thorough review of authorities in the course of a lengthy discussion of arguments on both sides of the issue. As such it matters not in my view whether the matter was disposed of under Rule 124 or 126. To send this matter back for trial without resolving the issue of prosecutorial immunity would not be expeditious and would add both time and cost to an already lengthy case.

4 Furthermore I am of the view that the rules of civil procedure should not act as obstacles to a just and expeditious resolution of a case. Rule 1.04(1) of the Rules of Civil Procedure in Ontario confirms this principle in stating that "[t]hese rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."

5 In terms of whether the Crown enjoys absolute immunity from a suit for malicious prosecution, McIntyre J. concludes that s. 5(6) of the Proceedings Against the Crown Act, R.S.O. 1980, c. 393, exempts the Crown from any proceedings in respect of anything done or omitted to be done by a person

53 As for alternative remedies available to persons who have been maliciously prosecuted, none seem to adequately redress the wrong done to the plaintiff. The use of the criminal process against a prosecutor who in the course of a malicious prosecution has committed an offence under the Criminal Code, addresses itself mainly to the vindication of a public wrong not the affirmation of a private right of action. Of special interest in this regard is s. 737 of the Criminal Code which deals with the making of a probation order. Section 737(2) stipulates that certain conditions may be prescribed in a probation order, one of them being that the convicted person "make restitution or reparation to any person aggrieved or injured by the commission of the offence for the actual loss or damage sustained by that person as a result thereof" (s. 737(2)(e)). This section would seem to be an indirect method of at least partially remedying a wrong done to an individual as a result of a malicious prosecution. However the section is only operative when an accused has been convicted of an offence and when a probation order is made. In addition, the Court's power to award compensation to a victim is limited to damages that are relatively concrete and ascertainable. (See R. v. Groves (1977), 37 C.C.C. (2d) 429 (Ont. H.C.)) As such it would seem a rather inadequate substitute for a private right of action. I do however pause to note that many cases of genuine malicious prosecution will also be offences under the Criminal Code, and it seems rather odd if not incongruous for reparation to be possible through a probation order but not through a private right of action.

54 Further, the use of professional disciplinary proceedings, while serving to some extent as punishment and deterrence, do not address the central issue of making the victim whole again. And as has already been noted, it is quite discomforting to realize that the existence of absolute immunity may bar a person whose Charter rights have been [page199] infringed from applying to a competent court for a just and appropriate remedy in the form of damages.

III. Conclusion

55 A review of the authorities on the issue of prosecutorial immunity reveals that the matter ultimately boils down to a question of policy. For the reasons I have stated above I am of the view that absolute immunity for the Attorney General and his agents, the Crown Attorneys, is not justified in the interests of public policy. We must be mindful that an absolute immunity has the effect of negating a private right of action and in some cases may bar a remedy under the Charter. As such, the existence of absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted. Further, it is important to note that what we are dealing with here is an immunity from suit for malicious prosecution; we are not dealing with errors in judgment or discretion or even professional negligence. By contrast the tort of malicious prosecution requires proof of an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve and as such incorporates an abuse of the office of the Attorney General and his agents the Crown Attorneys.

56 There is no doubt that the policy considerations in favour of absolute immunity have some merit. But in my view those considerations must give way to the right of a private citizen to seek a remedy when the prosecutor acts maliciously in fraud of his duties with the result that he causes damage to the victim. In my view the inherent difficulty in proving a case of malicious prosecution combined with the mechanisms available within the system of civil procedure to weed out meritless claims is sufficient to ensure that the Attorney General and Crown Attorneys will not be hindered in the proper execution of their important public duties. Attempts to qualify prosecutorial immunity in the United States by the so-called functional approach and its many variations have proven to be unsuccessful and unprincipled as I have previously [page200] noted. As a result I conclude that the Attorney General and Crown Attorneys do not enjoy an absolute immunity in respect of suits for malicious prosecution. I would therefore dismiss the appeal as against the Crown, there being no order as to costs. I would allow the appeal as

against the Attorney General with costs and direct that the matter be returned to the Supreme Court of Ontario for trial of the claim against the Attorney General.

The following are the reasons delivered by

57 McINTYRE J.:-- This appeal concerns the question of the liability of the Crown and the Attorney General of the province in a suit for malicious prosecution arising out of the institution of criminal proceedings, charges of murder, brought against the appellant.

58 In March, 1981, the appellant, then a nurse at the Toronto Hospital for Sick Children, was charged with the murder of four infant patients. At the conclusion of her preliminary hearing, the Provincial Court Judge who conducted the proceedings discharged the appellant upon a finding of an absence of evidence: (1982), 16 C.C.C. (3d) 97. The appellant later commenced an action against the Crown in right of Ontario, the Attorney General for Ontario, and several police officers, alleging that the Attorney General and his agents, the Crown Attorneys, counselled, aided and abetted the police in charging and prosecuting the plaintiff, and that in so doing the Attorney General, the Crown Attorneys, and police were acting as agents for the Crown in right of Ontario. It was also alleged that in the prosecution the Attorney General and the Crown Attorneys were actuated by malice while acting as agents for the Crown. Proceedings were later discontinued against the police officers and the Crown Attorneys were not named as defendants. The Crown and the Attorney General remained the only defendants and are the respondents in this Court.

[page201]

59 Before trial, the respondents moved to have the action dismissed under Rule 126 of the Ontario Rules of Practice, on the ground that the pleadings disclosed no reasonable cause of action and, in the alternative, for leave under Rule 124 to set down a point of law raised in the pleadings and to argue the same on the return of the motion. Rule 124 and Rule 126 are set out hereunder:

> 124. Either party is entitled to raise by his pleadings any point of law, and by consent of the parties or by leave of a judge, the point of law may be set down for hearing at any time before the trial, otherwise it shall be disposed of at the trial.
>
> 126. A judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly.

The question of law for which leave was sought was in these terms:

> A defendant in a preliminary inquiry held under the provisions of the Criminal Code of Canada and discharged thereof has no cause of action based in malicious prosecution or negligence against the Crown Attorneys conducting such proceedings or as against those in law responsible for their conduct.

60 Fitzpatrick J., of the Supreme Court of Ontario, allowed the motion and struck out the statement of claim. In doing so, he seems to have acted under Rule 126. He concluded on the basis of two decisions of the Supreme Court of Ontario (Owsley v. The Queen in right of Ontario (1983), 34 C.P.C. 96 (Ont. H.C.), and Richman v. McMurtry (1983), 41 O.R. (2d) 559 (Ont. H.C.)), that the Attorney General for

Indexed as:

Vancouver (City) v. Ward

City of Vancouver, Appellant;
v.
Alan Cameron Ward, Respondent.
And
Her Majesty The Queen in Right of the Province of British Columbia, Appellant;
v.
Alan Cameron Ward, Respondent, and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Aboriginal Legal Services of Toronto Inc., Association in Defence of the Wrongly Convicted, Canadian Civil Liberties Association, Canadian Association of Chiefs of Police, Criminal Lawyers' Association (Ontario), British Columbia Civil Liberties Association and David Asper Centre for Constitutional Rights, Interveners.

[2010] 2 S.C.R. 28

[2010] 2 R.C.S. 28

[2010] S.C.J. No. 27

[2010] A.C.S. no 27

2010 SCC 27

File No.: 33089.

Supreme Court of Canada

Heard: January 18, 2010;
Judgment: July 23, 2010.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

(80 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Catchwords:

Constitutional law -- Charter of Rights -- Enforcement -- Damage award as remedy for breach of rights -- Quantum -- Claimant strip searched and his car seized in violation of his constitutional rights -- Whether claimant entitled to damages as remedy under s. 24(1) of [page29] Canadian Charter of Rights and Freedoms -- If so, how should quantum of damages be assessed.

Summary:

During a ceremony in Vancouver, the city police department received information that an unknown individual intended to throw a pie at the Prime Minister who was in attendance. Based on his appearance, police officers mistakenly identified W as the would-be pie-thrower, chased him down and handcuffed him. W, who loudly protested his detention and created a disturbance, was arrested for breach of the peace and taken to the police lockup. Upon his arrival, the corrections officers conducted a strip search. While W was at the lockup, police officers impounded his car for the purpose of searching it once a search warrant had been obtained. The detectives subsequently determined that they did not have grounds to obtain the required search warrant or evidence to charge W for attempted assault. W was released approximately 4.5 hours after his arrest. He brought an action in tort and for breach of his rights guaranteed by the *Canadian Charter of Rights and Freedoms* against several parties, including the Province and the City. With respect to the strip search and the car seizure, the trial judge held that, although the Province and the City did not act in bad faith and were not liable in tort for either incident, the Province's strip search and the City's vehicle seizure violated W's right to be free from unreasonable search and seizure under s. 8 of the *Charter*. The trial judge assessed damages under s. 24(1) of the *Charter* at $100 for the seizure of the car and $5,000 for the strip search. The Court of Appeal, in a majority decision, upheld the trial judge's ruling.

Held: The appeal should be allowed in part.

The language of s. 24(1) is broad enough to include the remedy of constitutional damages for breach of a claimant's *Charter* rights if such remedy is found to be appropriate and just in the circumstances of a particular case. The first step in the inquiry is to establish that a *Charter* right has been breached; the second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches.

[page30]

Once the claimant has established that damages are functionally justified, the state has the opportunity to demonstrate, at the third step, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. Countervailing considerations include the existence of alternative remedies. Claimants need not show that they have exhausted all other recourses. Rather, it is for the state to show that other remedies including private law remedies or another *Charter* remedy are available in the particular case that will sufficiently address the *Charter* breach. Concern for effective governance may also negate the appropriateness of s. 24(1) damages. In some situations, the state may establish that an award of *Charter* damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity.

If the state fails to negate that the award is "appropriate and just", the final step is to assess the quantum of the damages. To be "appropriate and just", an award of damages must represent a meaningful response to the seriousness of the breach and the objectives of s. 24(1) damages. Where the objective of

compensation is engaged, the concern is to restore the claimant to the position he or she would have been in had the breach not been committed. With the objectives of vindication and deterrence, the appropriate determination is an exercise in rationality and proportionality. Generally, the more egregious the breach and the more serious the repercussions on the claimant, the higher the award for vindication or deterrence will be. In the end, s. 24(1) damages must be fair to both the claimant and the state. In considering what is fair to both, a court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests. Damages under s. 24(1) should also not duplicate damages awarded under private law causes of action, such as tort, where compensation of personal loss is at issue.

[page31]

Here, damages were properly awarded for the strip search of W. This search violated his s. 8 *Charter* rights and compensation is required, in this case, to functionally fulfill the objects of constitutional damages. Strip searches are inherently humiliating and degrading and the *Charter* breach significantly impacted on W's person and rights. The correction officers' conduct which caused the breach was also serious. Minimum sensitivity to *Charter* concerns within the context of the particular situation would have shown the search to be unnecessary and violative. Combined with the police conduct, the impingement on W also engages the objects of vindication of the right and deterrence of future breaches. The state did not establish countervailing factors and damages should be awarded for the breach. Considering the seriousness of the injury and the finding that the corrections officers' actions were not intentional, malicious, high-handed or oppressive, the trial judge's $5,000 damage award was appropriate.

With respect to the seizure of the car, W has not established that damages under s. 24(1) are appropriate and just from a functional perspective. The object of compensation is not engaged as W did not suffer any injury as a result of the seizure. Nor are the objects of vindication of the right and deterrence of future breaches compelling. While the seizure was wrong, it was not of a serious nature. A declaration under s. 24(1) that the vehicle seizure violated W's right to be free from unreasonable search and seizure under s. 8 of the *Charter* adequately serves the need for vindication of the right and deterrence of future improper car seizures.

Cases Cited

Considered: *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405; **referred to:** *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Dunlea v. Attorney-General*, [2000] NZCA 84, [2000] 3 N.Z.L.R. 136; *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Anufrijeva v. Southwark London Borough Council*, [2003] EWCA Civ 1406, [2004] Q.B. 1124; *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Taunoa v. Attorney-General*, [2007] NZSC 70, [2008] 1 N.Z.L.R. 429; *Fose [page32] v. Minister of Safety and Security*, 1997 (3) SA 786; *Attorney General of Trinidad and Tobago v. Ramanoop*, [2005] UKPC 15, [2006] 1 A.C. 328; *Smith v. Wade*, 461 U.S. 30 (1983); *R. v. B.W.P.*, 2006 SCC 27, [2006] 1 S.C.R. 941; *Simpson v. Attorney-General*, [1994] 3 N.Z.L.R. 667; *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129; *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679.

Statutes and Regulations Cited

Act respecting industrial accidents and occupational diseases, R.S.Q., c. A-3.001.

Canadian Charter of Rights and Freedoms, ss. 8, 9, 24, 32.

Charter of human rights and freedoms, R.S.Q., c. C-12, ss. 49, 51.

Constitution Act, 1982, s. 52(1).

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Saunders and Low JJ.A.), 2009 BCCA 23, 89 B.C.L.R. (4) 217, 265 B.C.A.C. 174, 446 W.A.C. 174, 304 D.L.R. (4) 653, [2009] 6 W.W.R. 261, 63 C.C.L.T. (3d) 165, [2009] B.C.J. No. 91 (QL), 2009 CarswellBC 115, affirming a decision of Tysoe J., 2007 BCSC 3, 63 B.C.L.R. (4) 361, [2007] 4 W.W.R. 502, 45 C.C.L.T. (3d) 121, [2007] B.C.J. No. 9 (QL), 2007 CarswellBC 12, finding a breach of *Charter* rights and awarding damages. Appeal allowed in part.

Counsel:

Tomasz M. Zworski, for the appellant the City of Vancouver.

Bryant Alexander Mackey and *Barbara Carmichael*, for the appellant Her Majesty the Queen in Right of the Province of British Columbia.

Brian M. Samuels, *Kieran A. G. Bridge* and *Jennifer W. Chan*, for the respondent.

Mark R. Kindrachuk, *Q.C.*, and *Jeffrey G. Johnston*, for the intervener the Attorney General of Canada.

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Robert E. Charney and *Josh Hunter*, for the intervener the Attorney General of Ontario.

Isabelle Harnois and *Gilles Laporte*, for the intervener the Attorney General of Quebec.

Kimberly R. Murray and *Julian N. Falconer*, for the intervener the Aboriginal Legal Services of Toronto Inc.

Louis Sokolov and *Heidi Rubin*, for the intervener the Association in Defence of the Wrongly Convicted.

Stuart Svonkin and *Jana Stettner*, for the intervener the Canadian Civil Liberties Association.

Vincent Westwick and *Karine LeBlanc*, for the intervener the Canadian Association of Chiefs of Police.

Sean Dewart and *Tim Gleason*, for the intervener the Criminal Lawyers' Association (Ontario).

Kent Roach and *Grace Pastine*, for the interveners the British Columbia Civil Liberties Association and the David Asper Centre for Constitutional Rights.

The judgment of the Court was delivered by

McLACHLIN C.J.:--

I. Introduction

1 The *Canadian Charter of Rights and Freedoms* guarantees the fundamental rights and freedoms of all Canadians and provides remedies for their breach. The first and most important remedy is the nullification of laws that violate the *Charter* under s. 52(1) of the *Constitution Act, 1982*. This is supplemented by s. 24(2), under which evidence obtained in breach of the *Charter* may be excluded if its admission would bring the administration of justice into disrepute, and s. 24(1) - the provision at issue in this case - under which the court is authorized to grant such remedies to individuals [page34] for infringement of *Charter* rights as it "considers appropriate and just in the circumstances".

2 The respondent Ward's *Charter* rights were violated by Vancouver and British Columbia officials who detained him, strip searched his person and seized his car without cause. The trial judge awarded Mr. Ward damages for the *Charter* breaches, and the majority of the Court of Appeal of British Columbia upheld that award.

3 This appeal raises the question of when damages may be awarded under s. 24(1) of the *Charter*, and what the amount of such damages should be. Although the *Charter* is 28 years old, authority on this question is sparse, inviting a comprehensive analysis of the object of damages for *Charter* breaches and the considerations that guide their award.

4 I conclude that damages may be awarded for *Charter* breach under s. 24(1) where appropriate and just. The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages.

5 I conclude that damages were properly awarded for the strip search of Mr. Ward, but not justified for the seizure of his car. I would therefore allow the appeal in part.

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II. Facts

6 On August 1, 2002, Prime Minister Chrétien participated in a ceremony to mark the opening of a gate at the entrance to Vancouver's Chinatown. During the ceremony, the Vancouver Police Department ("VPD") received information that an unknown individual intended to throw a pie at the Prime Minister, an event that had occurred elsewhere two years earlier. The suspected individual was described as a white male, 30 to 35 years, 5' 9", with dark short hair, wearing a white golf shirt or T-shirt with some red on it.

7 Mr. Ward is a Vancouver lawyer who attended the August 1 ceremony. On the day, Mr. Ward, a white male, had grey, collar-length hair, was in his mid-40s and was wearing a grey T-shirt with some red on it. Based on his appearance, Mr. Ward was identified - mistakenly - as the would-be pie-thrower.

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19 Third, the prohibition on cutting down the ambit of s. 24(1) does not preclude judicial clarification of when it may be "appropriate and just" to award damages. The phrase "appropriate and just" limits what remedies are available. The court's discretion, while broad, is not unfettered. What is appropriate and just will depend on the facts and circumstances of the particular case. Prior cases may offer guidance on what is appropriate and just in a particular situation.

20 The general considerations governing what constitutes an appropriate and just remedy under s. 24 (1) were set out by Iacobucci and Arbour JJ. in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3. Briefly, an appropriate and just remedy will: (1) meaningfully vindicate the rights and freedoms of the claimants; (2) employ means that are legitimate within the framework of our constitutional democracy; (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and (4) be fair to the party against whom the order is made: *Doucet-Boudreau*, at paras. 55-58.

21 Damages for breach of a claimant's *Charter* rights may meet these conditions. They may meaningfully vindicate the claimant's rights and freedoms. They employ a means well-recognized within our legal framework. They are appropriate to the function and powers of a court. And, depending on the circumstances and the amount awarded, they can be fair not only to the claimant whose rights were breached, but to the state which is required to pay them. I therefore conclude that s. 24(1) is broad enough to include the remedy of damages for *Charter* breach. That said, granting damages under the *Charter* is a new endeavour, and an approach to when damages are appropriate and just should develop incrementally. *Charter* damages are only one remedy amongst others available under s. 24(1), and often other [page40] s. 24(1) remedies will be more responsive to the breach.

22 The term "damages" conveniently describes the remedy sought in this case. However, it should always be borne in mind that these are not private law damages, but the distinct remedy of constitutional damages. As Thomas J. notes in *Dunlea v. Attorney-General*, [2000] NZCA 84, [2000] 3 N.Z.L.R. 136, at para. 81, a case dealing with New Zealand's *Bill of Rights Act 1990*, an action for public law damages "is not a private law action in the nature of a tort claim for which the state is vicariously liable but [a distinct] public law action directly against the state for which the state is primarily liable". In accordance with s. 32 of the *Charter*, this is equally so in the Canadian constitutional context. The nature of the remedy is to require the state (or society writ large) to compensate an individual for breaches of the individual's constitutional rights. An action for public law damages - including constitutional damages - lies against the state and not against individual actors. Actions against individual actors should be pursued in accordance with existing causes of action. However, the underlying policy considerations that are engaged when awarding private law damages against state actors may be relevant when awarding public law damages directly against the state. Such considerations may be appropriately kept in mind.

(2) Step One: Proof of a *Charter* Breach

23 Section 24(1) is remedial. The first step, therefore, is to establish a *Charter* breach. This is the wrong on which the claim for damages is based.

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