

**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  
(Respondent)

--and--

**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  
SASKATCHEWAN, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL  
OF NEWFOUNDLAND AND LABRADOR, ASSOCIATION IN DEFENCE OF THE  
WRONGLY CONVICTED, DAVID ASPER CENTRE FOR CONSTITUTIONAL  
RIGHTS, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN  
CIVIL LIBERTIES ASSOCIATION, CRIMINAL LAWYERS' ASSOCIATION, AND  
CANADIAN ASSOCIATION OF CROWN COUNSEL**

INTERVENERS

---

**FACTUM OF THE INTERVENER  
THE ATTORNEY GENERAL FOR SASKATCHEWAN**  
(Pursuant to Rules 37, 42 and 61(4) of the *Rules of the Supreme Court of Canada*)

---

**ATTORNEY GENERAL FOR  
SASKATCHEWAN**  
Constitutional Law Branch  
820 – 1874 Scarth Street  
REGINA SK S4P 4B3

**Graeme G. Mitchell, Q.C.**  
Tel: (306) 787-8385  
Fax: (306) 787-9111  
Email: [Graeme.Mitchell@gov.sk.ca](mailto:Graeme.Mitchell@gov.sk.ca)

Counsel for the Intervener  
Attorney General for Saskatchewan

**GOWLING, LAFLEUR,  
HENDERSON LLP**  
2600 – 160 Elgin Street  
OTTAWA ON K1P 1C3

**D. Lynne Watt**  
Tel: (613) 786-8695  
Fax: (613) 788-3509  
Email: [lynne.watt@gowlings.com](mailto:lynne.watt@gowlings.com)

Ottawa Agent for the Intervener  
Attorney General for Saskatchewan

**Farris, Vaughan, Wills & Murphy LLP**  
P.O. Box 10026, Pacific Centre South  
25<sup>th</sup> Floor, 700 West Georgia Street  
VANCOUVER BC V7Y 1B3

**Joseph J. Arvay, Q.C.**  
**Cameron Ward**  
**Colleen Bauman**  
**Marilyn Sandford**  
**Alison M. Latimer**

Tel: (604) 684-9151  
Fax: (604) 681-9349  
Email: [jarvay@farris.com](mailto:jarvay@farris.com)

Counsel for the Appellant,  
Ivan William Mervin Henry

**Attorney General of British Columbia**  
Ministry of Justice  
Legal Services Branch  
#1301 – 865 Hornby Street  
VANCOUVER BC V6Z 2G3

**Karen Horsman**  
**Peter Juk, Q.C.**  
Tel: (604) 660-3093  
Fax: (604) 660-2636  
Email: [karen.horsman@gov.bc.ca](mailto:karen.horsman@gov.bc.ca)  
[peter.juk@gov.bc.ca](mailto:peter.juk@gov.bc.ca)

Counsel for the Respondent, Her Majesty the  
Queen in Right of the Province of British  
Columbia, as represented by the Attorney  
General of British Columbia

**Sack Goldblatt Mitchell LLP**  
500 – 30 rue Metcalfe Street  
OTTAWA ON K1P 5L4

**Colleen Bauman**  
Tel: (613) 235-5327  
Fax: (613) 235-3041  
Email: [cbauman@sgmlaw.com](mailto:cbauman@sgmlaw.com)

Ottawa Agent for the Appellant,  
Ivan William Mervin Henry

**Gowling Lafleur Henderson LLP**  
2600 – 160 Elgin Street  
OTTAWA ON K1P 1C3

**Brian A. Crane, Q.C.**  
Tel: (613) 233-1781  
Fax: (613) 563-9869  
Email: [brian.crane@gowlings.com](mailto:brian.crane@gowlings.com)

Ottawa Agent for the Respondent, Her Majesty  
the Queen in Right of the Province of British  
Columbia, as represented by the Attorney  
General of British Columbia

**Department of Justice Canada**  
900 – 841 Howe Street  
VANCOUVER BC V6Z 2S9

**Mitchell R. Taylor, Q.C.**  
**Susanne G. Pereira**  
**Diba B. Majzub**  
Tel: (604) 666-2061  
Fax: (604) 666-2760  
Email: [mitch.taylor@justice.gc.ca](mailto:mitch.taylor@justice.gc.ca)  
[susanne.pereira@justice.gc.ca](mailto:susanne.pereira@justice.gc.ca)  
[diba.majzub@justice.gc.ca](mailto:diba.majzub@justice.gc.ca)

Counsel for the Respondent, Attorney General  
of Canada

**Attorney General of Ontario**  
720 Bay Street, 4th Floor  
TORONTO ON M7A 2S9

**Hart Schwartz**  
**Matthew Horner**  
Tel: (416) 326-4456  
Fax: (416) 326-4015  
Email: [Hart.Schwartz@ontario.ca](mailto:Hart.Schwartz@ontario.ca)

Counsel for the Intervener, Attorney General  
of Ontario

**Procureur general du Québec**  
1200 route de l'Église, 2e étage  
QUÉBEC QC G1V 4M1

**Robert Desroches**  
**Carole Soucy**  
**Sagal Bachir Osman**  
Tel: (418) 643-1477  
Fax: (418) 644-7030  
Email: [Robert.descroches@gouv.qc.ca](mailto:Robert.descroches@gouv.qc.ca)

Counsel for the Intervener, Attorney General  
of Quebec

**Department of Justice Canada**  
Civil Litigation Section  
50 O'Connor Street, Suite 500  
OTTAWA ON K1A 0H8

**Christopher M. Rupar**  
Tel: (613) 670-6290  
Fax: (613) 954-1920  
Email: [christopher.rupar@justice.gc.ca](mailto:christopher.rupar@justice.gc.ca)

Ottawa Agent for the Respondent, Attorney  
General of Canada

**Burke-Robertson LLP**  
200 - 441 MacLaren Street  
OTTAWA ON K2P 2H3

**Robert E. Houston, Q.C.**  
Tel: (613) 236-9665  
Fax: (613) 235-4430  
Email: [rhouston@burkerobertson.com](mailto:rhouston@burkerobertson.com)

Ottawa Agent for the Intervener, Attorney  
General of Ontario

**Noël & Associés**  
111, rue Champlain  
GATINEAU QC J8X 3R1

**Pierre Landry**  
Tel: (819) 771-7393  
Fax: (819) 771-5397  
Email: [p.landry@noelassociés.com](mailto:p.landry@noelassociés.com)

Ottawa Agent for the intervener, Attorney  
General of Quebec

**Attorney General of Nova Scotia**  
4<sup>th</sup> Floor, 5151 Terminal Road  
P.O. Box 7  
HALIFAX NS B3J 2L6

**Edward A. Gores, Q.C.**  
Tel: (902) 424-4024  
Fax: (902) 424-1730  
Email: [goresea@gov.ns.ca](mailto:goresea@gov.ns.ca)

-and-

**Public Prosecution Service (Appeals Branch)**  
Meritime Centre  
1225 - 1505 Barrington Street  
HALIFAX NS B3J 3K5

**James A. Gumpert, Q.C.**  
Tel: (902) 424-8995  
Fax: (902) 424-0653  
Email: [gumperja@gov.ns.ca](mailto:gumperja@gov.ns.ca)

Counsel for the Intervener, Attorney General  
of Nova Scotia

**Attorney General of New Brunswick**  
Legal Services Branch  
Chancery Place, 675 King Street  
P.O. Box 6000, Stn A  
FREDERICTON NB E3B 5H1

**Gaétan Migneault**  
**Kathryn Gregory**  
Tel: (506) 453-2222  
Fax: (506) 453-3275  
Email: [gaetan.migneault@gnb.ca](mailto:gaetan.migneault@gnb.ca)

Counsel for the Intervener, Attorney General  
of New Brunswick

**Gowling Lafleur Henderson LLP**  
2600 - 160 Elgin Street  
OTTAWA ON K1P 1C3

**D. Lynne Watt**  
Tel: (613) 786-8695  
Fax: (613) 563-9869  
Email: [Lynne.Watt@gowlings.com](mailto:Lynne.Watt@gowlings.com)

Ottawa Agent for the Intervener, Attorney  
General of Nova Scotia

**Gowling Lafleur Henderson LLP**  
2600 - 160 Elgin Street  
OTTAWA ON K1P 1C3

**D. Lynne Watt**  
Tel: (613) 786-8695  
Fax: (613) 563-9869  
Email: [Lynne.Watt@gowlings.com](mailto:Lynne.Watt@gowlings.com)

Ottawa Agent for the Intervener, Attorney  
General of New Brunswick

**Attorney General of Manitoba**

Department of Justice  
Constitutional Law Branch  
1205 – 405 Broadway  
WINNIPEG MB R3C 3L6

**Michael Conner**

**Denis Guénette**

Tel: (204) 945-6723  
Fax: (204) 945-0053  
Email: [Michael.Conner@gov.mb.ca](mailto:Michael.Conner@gov.mb.ca)

Counsel for the Intervener, Attorney General  
of Manitoba

**Attorney General of Alberta**

Appeals and Prosecution Policy Branch  
Alberta Justice, Criminal Justice Division  
3<sup>rd</sup> Floor, Centrium Place  
300 – 332 – 6 Avenue SW  
CALGARY AB T2P 0B2

**Jolaine Antonio**

**Kate Bridgett**

Tel: (403) 297-6005  
Fax: (403) 297-3453  
Email: [jolaine.antonio@gov.ab.ca](mailto:jolaine.antonio@gov.ab.ca)

Counsel for the Intervener, Attorney General  
of Alberta

**Ministry of the Attorney General of  
Newfoundland and Labrador**

Civil Division, Dept. of Justice  
Confederation Building, 4<sup>th</sup> Floor, East Block  
P.O. Box 870, Stn A  
ST. JOHN'S NL A1B 4J6

**Barbara Barrowman**

**Philip Osborne**

Tel: (709) 729-0448  
Fax: (709) 729-2129  
Email: [barbarabarrowman@gov.nl.ca](mailto:barbarabarrowman@gov.nl.ca)

Counsel for the Intervener, Attorney General  
of Newfoundland and Labrador

**Gowling Lafleur Henderson LLP**

2600 – 160 Elgin Street  
OTTAWA ON K1P 1C3

**Guy Régimbald**

Tel: (613) 786-0197  
Fax: (613) 788-3559  
Email: [guy.regimbald@gowlings.com](mailto:guy.regimbald@gowlings.com)

Ottawa Agent for the Intervener, Attorney  
General of Manitoba

**Gowling Lafleur Henderson LLP**

2600 – 160 Elgin Street  
Box 466 Station D  
OTTAWA ON K1P 1C3

**D. Lynne Watt**

Tel: (613) 786-8695  
Fax: (613) 788-3509  
Email: [lynne.watt@gowlings.com](mailto:lynne.watt@gowlings.com)

Ottawa Agent for the Intervener, Attorney  
General of Alberta

**Burke-Robertson LLP**

200 – 441 MacLaren Street  
OTTAWA ON K2P 2H3

**Robert E. Houston, Q.C.**

Tel: (613) 236-9665  
Fax: (613) 235-4430  
Email: [rhouston@burkerobertson.com](mailto:rhouston@burkerobertson.com)

Ottawa Agent for the Intervener, Attorney  
General of Newfoundland and Labrador

**Dewart Gleason LLP**  
102 – 366 Adelaide Street West  
TORONTO ON M5V 1R9

**Sean Dewart and Tim Gleason**  
Tel: (416) 971-8000  
Fax: (416) 971-8001  
Email: [sdewart@dglp.ca](mailto:sdewart@dglp.ca)

Counsel for the Intervener, Association in  
Defence of the Wrongly Convicted

**Sack Goldblatt Mitchell LLP**  
1100 – 20 Dundas Street W.  
TORONTO ON M5G 2G8

**Marlys A. Edwardh**  
Tel: (416) 979-4380  
Fax: (416) 979-4430  
Email: [medwardh@sgmlaw.com](mailto:medwardh@sgmlaw.com)

Counsel for the Intervener, David Asper Centre  
for Constitutional Rights

**Sack Goldblatt Mitchell LLP**  
1100 – 20 Dundas Street W.  
TORONTO ON M5G 2G8

**Marlys A. Edwardh**  
Tel: (416) 979-4380  
Fax: (416) 979-4430  
Email: [medwardh@sgmlaw.com](mailto:medwardh@sgmlaw.com)

Counsel for the Intervener, British Columbia  
Civil Liberties Association

**Supreme Law Group**  
900 – 275 Slater Street  
OTTAWA ON K1P 5H9

**Moira Dillon**  
Tel: (613) 691-1224  
Fax: (613) 691-1338  
Email: [mdillon@supremelawgroup.ca](mailto:mdillon@supremelawgroup.ca)

Ottawa Agent for the Intervener, Association in  
Defence of the Wrongly Convicted

**Norton Rose Fulbright Canada LLP**  
1500 – 45 O'Connor Street  
OTTAWA ON K1P 1A4

**Martha A. Healey**  
Tel: (613) 780-8638  
Fax: (613) 230-5459  
Email: [Martha.healey@nortonrose.com](mailto:Martha.healey@nortonrose.com)

Ottawa Agent for the Intervener, David Asper  
Centre for Constitutional Rights

**Norton Rose Fulbright Canada LLP**  
1500 – 45 O'Connor Street  
OTTAWA ON K1P 1A4

**Martha A. Healey**  
Tel: (613) 780-8638  
Fax: (613) 230-5459  
Email: [Martha.healey@nortonrose.com](mailto:Martha.healey@nortonrose.com)

Ottawa Agent for the Intervener, British  
Columbia Civil Liberties Association

**Blake, Cassels & Graydon LLP**  
199 Bay Street  
Commerce Court West, Suite 4000  
TORONTO ON M5L 1A9

**Bradley E. Berg**  
**Erin Hault**  
**Nicolas Tzoulas**  
Tel: (416) 863-4316  
Fax: (416) 863-2653  
Email: [brad.berg@blakes.com](mailto:brad.berg@blakes.com)

Counsel for the Intervener, Canadian Civil  
Liberties Association

**Breese Davies Law**  
101 - 171 John Street  
TORONTO ON M5T 1X3

**Breese Davies**  
**Richard Macklin**  
**Neil Wilson**  
Tel: (416) 649-5061  
Fax: (416) 352-7733  
Email: [bdavies@bdlaw.ca](mailto:bdavies@bdlaw.ca)

Counsel for the Interveners, Criminal  
Lawyers' Association

**Cavalluzzo Shilton McIntrye Cornish LLP**  
300 – 474 Bathurst Street  
TORONTO ON M5T 2S6

**Paul J.J. Cavalluzzo**  
Tel: (416) 964-1155  
Fax: (416) 964-5895  
Email: [pcavalluzzo@cavalluzzo.com](mailto:pcavalluzzo@cavalluzzo.com)

Counsel for the Intervener, Canadian  
Association of Crown Counsel

**Blake, Cassels & Graydon LLP**  
1750 – 340 Albert Street  
Constitution Square, Tower 3  
OTTAWA ON K1R 7Y6

**Nancy K. Brooks**  
Tel: (613) 788-2218  
Fax: (613) 788-2247  
Email: [nancy.brooks@blakes.com](mailto:nancy.brooks@blakes.com)

Ottawa Agent for the Intervener, Canadian Civil  
Liberties Association

**Gowling Lafleur Henderson LLP**  
2600 - 160 Elgin Street  
OTTAWA ON K1P 1C3

**D. Lynne Watt**  
Tel: (613) 786-8695  
Fax: (613) 563-9869  
Email: [Lynne.Watt@gowlings.com](mailto:Lynne.Watt@gowlings.com)

Ottawa Agent for the Intervener, Criminal  
Lawyers' Association

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
<b>I. OVERVIEW AND FACTS</b>	1
<b>A. Overview</b>	1
<b>B. Facts</b>	2
<b>II. POINTS IN ISSUE</b>	3
<b>A. The Constitutional Questions</b>	3
<b>B. Position of the Intervener</b>	3
<b>III. ARGUMENT</b>	3
<b>A. Scope of the Constitutional Question</b>	3
<b>B. The Constitutional Question Analyzed</b>	5
1. Policy Rationales Underlying Qualified Immunity for Crown Prosecutors	5
2. Section 24(1) Authorizes An “Appropriate and Just” Remedy	8
2.1 Qualified Immunity Standard Applies in <i>Charter</i> Damages Claims - Application of <i>Ward</i> Analysis	9
2.2 Proof of a <i>Charter</i> Breach	9
2.3 Functional Justification of Damages	10
2.4 Countervailing Factors – Good Governance Concerns	10
2.4.1 Existence of Alternative Remedies	11
2.4.2 Good Governance Concerns	12
2.5 Quantum of Section 24(1) Damages	14
3. Conclusion	14
<b>IV. COSTS</b>	14
<b>V. NATURE OF ORDER SOUGHT</b>	15



**PART I**  
**OVERVIEW AND FACTS**

**A. Overview**

1. In *Nelles v Ontario*<sup>1</sup>, this Honourable Court admitted that the issue of prosecutorial immunity “ultimately boils down to a question of policy”<sup>2</sup>. With this in mind, Lamer J. (as he then was) rejected absolute immunity for Crown prosecutors, a protection which operates in other jurisdictions, most notably the United States<sup>3</sup>. He preferred instead a qualified immunity which would be displaced if an accused person demonstrated on a balance of probabilities that “the prosecutor acted maliciously in fraud of his duties with the result he causes damage to the victim.”<sup>4</sup> To date, this “stringent threshold for Crown liability”<sup>5</sup> remains the civil standard by which Crown prosecutors are held accountable for breaches of their significant public duties.

2. The Appellant, Ivan William Mervin Henry, and interveners supporting him, now ask this Court to identify an alternate and lower standard for imposing civil liability on Crown prosecutors. This standard, they assert, is grounded in the *Canadian Charter of Rights and Freedoms*<sup>6</sup>. Their principal position is that a simple breach of a *Charter* right or freedom is sufficient to support a civil action for “*Charter* damages” under section 24(1).

3. The Attorney General for Saskatchewan (“Saskatchewan”) submits that should this Court accept this argument it would effectively render the tort of malicious prosecution redundant, and, additionally, impose an undesirable and unwarranted “chill” on Crown prosecutors who could be civilly liable for each and every decision they take in the course of a criminal prosecution.

---

<sup>1</sup> [1989] 2 S.C.R. 170.

<sup>2</sup> *Ibid.*, at para. 54.

<sup>3</sup> See especially: *Imbler v Pachtman*, 424 US 409 (1976), and *Rehberg v Paulk*, 132 S. Ct. 1497 (2012).

<sup>4</sup> *Supra* n. 1, at para. 56.

<sup>5</sup> *Miazga v Kvello Estate*, [2009] 3 S.C.R. 339, at para. 5.

<sup>6</sup> Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

4. Saskatchewan submits that qualified immunity as identified in *Nelles* is also the operative standard under section 24(1) for a damage award against a Crown prosecutor for breaching an individual's *Charter* rights. This immunity serves as an acceptable and principled compromise between absolute immunity at one end of the liability spectrum and strict liability on the other. It takes into account the unique constitutional role of a Crown prosecutor as a "minister of justice" in our criminal justice system, yet at the same time enables a wronged individual to seek redress for an infringement of his or her constitutional rights. The qualified immunity standard was "an intentional choice by the Court to preserve this balance"<sup>7</sup> and, accordingly, it must also operate under the *Charter*.

## **B. Facts**

5. Saskatchewan intervenes in this appeal pursuant to Rule 61(4) of the *Rules of the Supreme Court of Canada* and a Notice of Intention to Intervene filed with the Registrar dated July 11, 2014.

6. Saskatchewan accepts the facts as set out in the Respondent's Factum, the Attorney General of British Columbia.<sup>8</sup>

7. In 2010, the British Columbia Court of Appeal set aside the Appellant's convictions.<sup>9</sup> The basis for quashing those convictions was judicial error. It had nothing to do with the alleged breaches of the Appellant's *Charter* rights by the Crown prosecutors involved in that prosecution.

---

<sup>7</sup> *Miazga*, *supra* n. 5, at para. 52 (emphasis added).

<sup>8</sup> Respondent's Factum dated October 9, 2014 at paras. 7-34.

<sup>9</sup> *R v Henry*, 2010 BCCA 462. See also: Respondent's Factum, at paras. 16-18.

**PART II**  
**POINT IN ISSUE**

**A. The Constitutional Question**

8. The Constitutional Question set out in the Order of the Chief Justice<sup>10</sup> reads as follows:

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?

**B. Position of the Intervener**

9. Saskatchewan respectfully submits that this Constitutional Question should be answered “no”.

**PART III**  
**ARGUMENT**

**A. Scope of the Constitutional Question**

10. The context out of which this Constitutional Question emerges is a civil claim for malicious prosecution. More particularly, it is a motion to strike the proposed amendment found in paragraph 120 of the Appellant’s Second Amended Notice of Civil Claim which involves a claim under section 7 of the *Charter* alleging that Crown prosecutors breached their disclosure obligation to the Appellant.<sup>11</sup>

---

<sup>10</sup>Order of McLachlin C.J., dated June 9, 2014; Appellant’s Record, Volume II, Tab 21.

<sup>11</sup> See: Second Amended Notice of Civil Claim dated January 13, 2014 at para. 120; Appellant’s Record, Volume II, Tab 15 at 61.

11. However, the Constitutional Question itself transcends this context. It specifies no particular *Charter* section; rather, it anticipates that a breach of any *Charter* right or freedom committed by Crown prosecutors may expose them to liability for *Charter* damages under section 24(1). The only question is what is the level of liability? Does it require proof of malice or is evidence of a simple *Charter* breach sufficient?

12. There is no doubt that Crown prosecutors are state actors, one of the most significant and important groups of state actors in our justice system. Each and every decision they take in the course of a criminal prosecution is subject to *Charter* review and, if the Appellant's position carries the day, is now potentially susceptible to liability for *Charter* damages in the event that a violation of a *Charter* right or freedom is demonstrated.

13. Saskatchewan submits that the breadth of this Constitutional Question underscores the significance of the answer which this Court gives to it. It has the potential to create a new cause of action against Crown prosecutors, one which will render most, if not all, currently available tortious claims redundant. Writing extra-judicially, Sopinka J. opined that if damages may flow from a simple *Charter* breach, "few will wish to resort to the action of malicious prosecution with its rigorous standards when they have at hand a mechanism that is much more flexible."<sup>12</sup>

14. This appeal requires this Court to assess whether public policy and *Charter* principles compel such a result which, Saskatchewan submits, would be a startling innovation in our law. To answer this question it is necessary to assess the policy considerations motivating this Court to accept the qualified immunity first identified in *Nelles* and subsequently re-affirmed in its progeny<sup>13</sup>.

---

<sup>12</sup> Honourable John Sopinka, "Malicious Prosecution: Invasion of *Charter* interests: Remedies: *Nelles v. Ontario: R. v. Jedyneck: R. v. Simpson*" (1995), 74 Canadian Bar Review 366 ("*Sopinka*"), at 373. For a response to Justice Sopinka's commentary, see: David Butt, "Malicious Prosecution: *Nelles v. Ontario: Rejoinder – John Sopinka – [1994] 74 Can. Bar Rev. 366*" (1996), 75 Canadian Bar Review 335.

<sup>13</sup> See especially: *Proulx v. Quebec (Attorney General)*, [2001] 3 S.C.R. 9, and *Miazga, supra* n. 5.

B. The Constitutional Question Analyzed  
1. Policy Rationales Underlying Qualified Immunity for Crown Prosecutors

15. Saskatchewan submits that it is important to recall the policy rationales this Court relied upon in *Nelles* when choosing qualified immunity over absolute immunity for Crown prosecutors, as they remain very relevant when answering the Constitutional Question stated on this appeal. Justice Lamer (as he then was) identified four such rationales.

16. First, qualified immunity encourages public confidence because it means that “the person who is in a position of knowledge in respect of the constitutional and legal impact of his conduct” is not shielded “from civil liability when he abuses the process through a malicious prosecution”.<sup>14</sup>

17. Second, qualified immunity holds a prosecutor accountable to a victim for his or her malicious prosecution. Interestingly, Lamer J. in this aspect of his judgment appears to place actions for malicious prosecution on the same footing as claims seeking a remedy under section 24(1) of the *Charter*. He elaborates as follows at paragraph 50:

Granting an absolute immunity to prosecutors is akin to granting a licence to subvert individual rights. Not only does absolute immunity negate a private right of action, but in addition, it seems to me it may be that it would effectively bar the seeking of a remedy pursuant to s. 24(1) of the *Charter*. It seems clear that in using his office to maliciously prosecute an accused, the prosecutor would be depriving an individual of the right to liberty and security of the person in a manner that does not accord with the principles of fundamental justice. Such an individual would normally have the right under s. 24(1) of the *Charter* to apply to a Court of competent jurisdiction to obtain a remedy that the Court considers appropriate and just if he can establish that one of his *Charter* rights has been infringed. The question arises, then, whether s. 24(1) of the *Charter* confers a right to an individual to seek a remedy from a competent Court. In my view it does. When a person can demonstrate that one of his *Charter* rights has been infringed, access to a Court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong.<sup>15</sup>

<sup>14</sup> *Nelles*, *supra* n. 1, at 195, para. 49 (emphasis added).

<sup>15</sup> *Ibid.*, at para. 50.

18. Third, he reasoned that qualified immunity with its requirement on a plaintiff to prove malice would mitigate, if not prevent altogether, a “chill” on Crown prosecutors when carrying out their public duties.<sup>16</sup>

19. Fourth, alternate remedies such as a criminal prosecution or professional discipline proceedings against the Crown prosecutor in question, while viable options, are not entirely satisfactory as they “do not address the central issue of making the victim whole again.”<sup>17</sup>

20. Together, these rationales motivated this Court to modify the private law action for malicious prosecution in accordance with well-established public law principles relating to Crown independence. As Charron J. stated in *Miazga*<sup>18</sup>:

[T]he contours of the tort in an action against the Attorney General or his agents must be informed by the core constitutional principles governing that office. These principles animated this Court’s decision in *Nelles* to adopt a very high threshold for the tort of malicious prosecution in an action against a public prosecutor[.]<sup>19</sup>

21. For purposes of answering this Constitutional Question it is worth noting that Lamer J. acknowledged a qualified immunity would permit both an action for malicious prosecution and a claim for a remedy under section 24(1) of the *Charter* to proceed. This implies that the prerequisite of establishing malice, bad faith or some other improper willful behavior is needed to support a civil action sounding either in tort or under the *Charter*. Indeed, the British Columbia Court of Appeal in this appeal came to this very conclusion.<sup>20</sup>

22. Furthermore, Lamer J. emphasized that the stringent requirement of demonstrating malice in order to succeed in an action for prosecutorial misconduct should dispel “speculative” concerns respecting a “chilling effect” on actions taken by Crown prosecutors in the course of a criminal prosecution. Yet, Saskatchewan submits, if a standard less than malice as identified in

---

<sup>16</sup> *Ibid.*, at 196-7, paras. 51-52.

<sup>17</sup> *Ibid.*, at 198-9, paras. 53-54.

<sup>18</sup> *Supra* n. 5.

<sup>19</sup> *Ibid.*, at para. 44.

<sup>20</sup> *Henry v British Columbia (Attorney General)*, 2014 BCCA 15, at para. 24; Appellant’s Record, Volume I, at Tab 3, p. 38.

*Miazga*, for example, is employed these concerns assume far greater force. Even Sopinka J. in his commentary on *Nelles* admitted as much. He said:

Although the majority in *Nelles* did not seem concerned about the chilling effect on Crown agents if malicious prosecution could be brought against them, liability for mere negligence may be viewed in a different light.<sup>21</sup>

23. Saskatchewan acknowledges that while there is a conceptual difference respecting the standard of judicial review between prosecutorial discretion and the Crown's constitutional obligations as acknowledged by this Court most recently in *R v Anderson*<sup>22</sup>, this difference does not affect the issue of civil or professional liability of a Crown prosecutor for a breach of either of those matters.

24. In *Krieger v Law Society of Alberta*<sup>23</sup>, for example, this Court employed the qualified immunity standard in the professional regulatory context. There, it was alleged that a Crown prosecutor had failed to disclose relevant evidence to defence counsel contrary to *R v Stinchcombe*<sup>24</sup>. This Court determined that such a breach of section 7 of the *Charter* would ground professional disciplinary action only if “Krieger had acted dishonestly or in bad faith”<sup>25</sup>. Justices Iacobucci and Major explained as follows:

In *Stinchcombe*, *supra*, the Court held that the Crown has an obligation to disclose all relevant information to the defence. While the Crown Attorney retains the discretion not to disclose irrelevant information, disclosure of relevant evidence is not, therefore, a matter of prosecutorial discretion but, rather, is a prosecutorial duty. Absent an explanation demonstrating that the Crown Attorney did not act dishonestly or in bad faith, it is settled law, *per* Sopinka J. for the Court in *Stinchcombe*, *supra*, at p. 339, that “[t]ransgressions with respect to this duty constitute a very serious breach of legal ethics.”<sup>26</sup> (Emphasis in original.)

25. As *Krieger* exemplifies, the qualified immunity standard translates into other contexts in which Crown prosecutors may be held liable for failing to live up to their professional responsibilities, including constitutional obligations imposed by the *Charter*. As will be argued

---

<sup>21</sup> *Sopinka*, *supra* n. 12, at 372.

<sup>22</sup> *R v Anderson*, 2014 SCC 41, at para. 45.

<sup>23</sup> [2002] 3 S.C.R. 272, 2002 SCC 65.

<sup>24</sup> [1991] 3 S.C.R. 326.

<sup>25</sup> *Supra* n. 23, at para. 55.

<sup>26</sup> *Ibid.*, at para. 54.

in the next section, this standard should also operate in a civil action for “*Charter* damages” created in *Ward v Vancouver (City)*<sup>27</sup> when the subject against whom such a claim is brought is a Crown prosecutor acting in his or her official capacity.

## 2. Section 24(1) Authorizes An “Appropriate and Just” Remedy

26. The textual reference to an “appropriate and just” remedy in section 24(1) — the language central to the resolution of the Constitutional Question stated on this appeal — is broad. Indeed, as McIntyre J. observed in *Mills v The Queen*<sup>28</sup> it is difficult to conceive of broader language.<sup>29</sup> However, such language should not be read as authorizing “a judicial *carte blanche*” as it “would not only ‘turn the Canadian legal system upside down’ but would also be an injustice to the parties who come before the court to have their disputes resolved in accordance with basic legal principles.”<sup>30</sup>

27. The interpretation of section 24(1) cannot be untethered from established legal and constitutional principles. In *Ward*, for example, McLachlin C.J. acknowledged that the “*Charter* entered an existent remedial arena which already housed tools to correct violative state conduct. Section 24(1) operates concurrently with, and does not replace, these areas of law.”<sup>31</sup>

28. Very recently LeBel J. made the same point in *Kazemi Estate v Islamic Republic of Iran*<sup>32</sup>: “[T]here are many examples in Canadian law where remedies are subordinated to other concerns in appropriate contexts. Society does not always deem it essential that the right to a remedy ‘trump all other concerns in the administration of justice’”.<sup>33</sup> These would include a

---

<sup>27</sup> [2010] 2 S.C.R. 28, 2010 SCC 27.

<sup>28</sup> [1986] 1 S.C.R. 863.

<sup>29</sup> *Ibid.*, at p. 965.

<sup>30</sup> *Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 SCC 62, at para. 146 per LeBel and Deschamps JJ., dissenting but not on this point. The internal quotation is from *Mills*, *supra* n. 28, at p. 953 per McIntyre J.

<sup>31</sup> *Ward*, *supra* n. 27, at para. 34.

<sup>32</sup> 2014 SCC 62

<sup>33</sup> *Ibid.*, at para. 162 (citation omitted).



range of considerations from procedural bars such as statutory limitation periods<sup>34</sup> to substantive legal principles which Saskatchewan submits would include the qualified immunity for Crown prosecutors established by the common law.

## 2.1 Qualified Immunity Standard Applies in Charter Damages Claims – Application of Ward Analysis

29. *Ward* arose in the context of an unlawful strip search of an innocent by-stander conducted by members of the City of Vancouver Police Service. This Court upheld the \$5,000 damages for the strip search awarded by the lower British Columbia courts.<sup>35</sup> Chief Justice McLachlin identified a four-part test to be used when assessing whether damages for a breach of a *Charter* provision may be ordered. These steps are: (1) proof of a *Charter* breach<sup>36</sup>; (2) functional justification of damages<sup>37</sup>; (3) countervailing factors<sup>38</sup>, and (4) quantum of section 24(1) damages<sup>39</sup>. Like most cases, the bulk of the analytical work on this appeal is undertaken under the third step, namely a consideration of countervailing good governance factors militating against an award of *Charter* damages.

## 2.2 Proof of a Charter Breach

30. Saskatchewan recognizes that for purposes of this appeal the allegations set out in the Second Amended Notice of Civil Claim must be accepted as true. Indeed, the Respondent, the Attorney General of British Columbia concedes this.<sup>40</sup>

31. However, if this particular claim is permitted to go to trial, the Appellant may have difficulty proving a violation of section 7 of the *Charter*. First, the disclosure obligation which

---

<sup>34</sup> See e.g.: *Kingstreet Investments v New Brunswick*, [2007] 1 S.C.R. 3; *Ravndahl v Saskatchewan*, [2009] 1 S.C.R. 181.

<sup>35</sup> It should be remembered that the Court set aside a damage award of \$100 for the wrongful seizure of the plaintiff's car in violation of section 8 of the *Charter*, see: *Ward*, *supra* n. 27, at paras. 74-78.

<sup>36</sup> *Ibid.*, at para. 23.

<sup>37</sup> *Ibid.*, at paras. 24-31.

<sup>38</sup> *Ibid.*, at paras. 32-45.

<sup>39</sup> *Ibid.*, at paras. 46-56.

<sup>40</sup> Respondent's Factum, at para. 7.

he invokes was first identified in *R v Stinchcombe*<sup>41</sup> in 1992, a number of years after the trial and appeals in this case were completed. Second, in *Nelles*, itself, Lamer J. concluded that the Crown's disclosure responsibility fell within the scope of prosecutorial discretion and was subject to the qualified immunity standard.<sup>42</sup> This reality may well defeat the Appellant's section 7 claim.

### 2.3 Functional Justification of Damages

32. In *Ward*, McLachlin C.J. identified three objectives furthered by a damages award under the *Charter*. These are: (1) “*compensation*, usually the most prominent function”; (2) “*vindication* [which] recognizes that *Charter* rights must be maintained, and cannot be allowed to be whittled away by attrition”, and (3) “*deterrence* [which] recognizes that damages may serve to deter future breaches by state actors”<sup>43</sup>.

33. Contrary to the Appellant's assertion that all three of the objectives identified in *Ward* are relevant to this matter, Saskatchewan submits that only compensation of the victim is truly relevant. As has already been noted, constitutionalization of the Crown's disclosure obligation did not occur until almost a decade after the Appellant's convictions were entered. In this circumstance, it is simply unrealistic to speak of a damages award as vindicating the Appellant's *Charter* rights or deterring future breaches of any *Charter* rights by subsequent Crown officials.

### 2.4 Countervailing Factors

34. Saskatchewan submits that various considerations relevant under the third *Ward* criterion demonstrate that malice must remain an essential element before an award of *Charter* damages may be made against the Crown. While acknowledging that what qualifies as a countervailing factor is evolving, McLachlin C.J. identified two in particular, namely “the

---

<sup>41</sup> *Supra* n. 24.

<sup>42</sup> *Nelles*, *supra* n. 1, at 192, para. 40.

<sup>43</sup> *Ward*, *supra* n. 27 at para. 25. Emphasis in original.

existence of alternative remedies and concerns for good governance”<sup>44</sup>. Each of these factors militates in favour of maintaining the malice standard for claims brought against a Crown prosecutor under section 24(1) of the *Charter*.

#### 2.4.1 Existence of Alternative Remedies

35. In *Ward*, this Court recognized that tort law and *Charter* claims operate as “distinct legal avenues”<sup>45</sup>. At the same time, it accepted that if a plaintiff succeeded in his or her tort claim any damages awarded likely would also compensate them for a violation of the *Charter*, and any further compensation would be duplicative.<sup>46</sup>

36. Saskatchewan submits that this principle applies in this case. There are at least two private causes of action that pertain to the misconduct alleged here – the tort of malicious prosecution and the tort of misfeasance of office<sup>47</sup>. Each of these torts possesses elements of willfulness and it would undermine the utility of those causes of action were this Court now to hold that damages could be awarded for Crown misconduct under the *Charter* on a standard far less rigorous. As will be argued in the next section, evidence of malice or bad faith is already a requirement for *Charter* damages in other contexts, and there is no principled reason not to require it here.

37. In addition, there is an arsenal of other remedies for criminal courts to employ for breaches of the *Charter*. Specifically in relation to breaches of the Crown’s disclosure obligation, available remedies include adjournments of proceedings to facilitate further disclosure, an award of costs against the Crown<sup>48</sup>, or a stay of proceedings in the most egregious cases of Crown misconduct.<sup>49</sup> These remedies demonstrate that there are adequate alternative remedies available

---

<sup>44</sup> *Ibid.*, at para. 33.

<sup>45</sup> *Ibid.*, at para. 36.

<sup>46</sup> *Ibid.*, at paras. 35-6.

<sup>47</sup> See especially: *Odhavji Estate v Woodhouse*, [2003] 3 S.C.R. 263. In his Second Amended Notice of Civil Claim, the Appellant has apparently removed his original pleading of this tort, see: Appellant’s Record, Volume II, Tab 15, at 61, para. 121.

<sup>48</sup> See especially: *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 576.

<sup>49</sup> See e.g.: *R v O’Connor*, [1995] 4 S.C.R. 411.

to “meet the need for compensation, vindication and/or deterrence” so that a further award of *Charter* damages is not warranted.

38. This reality distinguishes *Ward* from the present claim for *Charter* damages. Here there are other remedies available to the Appellant.

#### 2.4.2 Good Governance Concerns

39. Contrary to the submission of the Appellant that no governance concerns exist in this case<sup>50</sup>, Saskatchewan submits there are a number of such considerations which should weigh in favour of requiring proof of malice in damage claims for Crown misconduct under the *Charter*.

40. First, this Court has already found malice to be an necessary element when a claimant seeks damages for state actions taken under laws subsequently declared by the courts to be unconstitutional. The central authority on this point is *Mackin v New Brunswick (Minister of Justice)*<sup>51</sup> which involved a provincial statute found to infringe constitutional guarantees of judicial independence. In spite of this finding, this Court declined to award damages against the provincial Attorney General and other members of the provincial government because when exercising their statutory powers under that legislation their conduct had not been “clearly wrong, in bad faith or an abuse of power”<sup>52</sup>. Justice Gonthier writing for the majority in *Mackin* stated that affording a limited or qualified immunity to state actors in such circumstances creates an appropriate “balance between the protection of constitutional rights and the need for effective governance”<sup>53</sup>. If it were otherwise, the “effectiveness and efficiency of government action would be excessively constrained”<sup>54</sup>.

41. Saskatchewan acknowledges that in *Ward*, this Court appears to confine the *Mackin* immunity to its facts, namely “a situation of state action pursuant to a valid statute that was

---

<sup>50</sup> Appellant’s Factum, at 19, para. 81ff.

<sup>51</sup> [2002] 1 S.C.R. 405, 2002 SCC 13. See also: *Guidmond (Procureur général) c Québec*, [1996] 3 S.C.R. 347.

<sup>52</sup> *Mackin*, *ibid.*, at para. 79.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.* See also: *Guidmond*, *supra* n. 50, at paras. 13-17.

subsequently declared invalid”<sup>55</sup>. At the same time, McLachlin C.J. accepted that by analogy to *Mackin* and other private law actions it is appropriate to set a “minimum threshold” for purposes a damages claim under section 24(1). In particular, she expressly referenced the qualified immunity granted to Crown prosecutors “because of the highly discretionary and quasi-judicial role of prosecutors (*Kvello v. Miazga*, 2009 SCC 51, [2009] 3 S.C.R. 339(S.C.C.))”.<sup>56</sup>

42. A further analogy can be drawn between the doctrine of abuse of process and its operation under section 7 of the *Charter*. In *O'Connor*, a majority of this Court determined that the common law doctrine is subsumed within the principles of fundamental justice. As L’Heureux-Dubé J. noted because of the overlap between the two, “there is no real utility in maintaining two distinct analytical regimes”.<sup>57</sup> To do otherwise would “invite schizophrenia into the law”.<sup>58</sup>

43. Second, the unique role of a Crown prosecutor in our criminal justice system is well-known and has been affirmed by this Court at least since *Boucher v The Queen*<sup>59</sup> and consistently through authorities such as *Nelles*, *Krieger*, *Miazga* and most recently *Anderson*. The requirement of demonstrating malice before civil liability may be found against a Crown prosecutor is now so ingrained in our jurisprudence that to remove its application for purposes of section 24(1) is neither appropriate nor just<sup>60</sup>. The following passage from *Ward* is particularly apposite:

Procedural requirements associated with existing remedies are crafted to achieve a proper balance between public and private interests, and the underlying policy considerations of these requirements should not be negated by recourse to s. 24(1) of the *Charter*. As stated earlier, s. 24(1) operates concurrently with, and does not replace, the general law.<sup>61</sup>

<sup>55</sup> *Ward*, *supra* n. 27, at para. 42.

<sup>56</sup> *Ibid.*, at para. 43.

<sup>57</sup> *Supra* n. 49, para. 71.

<sup>58</sup> *Ibid.*

<sup>59</sup> [1955] S.C.R. 16, at 21 per Taschereau J. and at 23-24 per Rand J.

<sup>60</sup> It is important to recall that in *Doucet-Boudreau*, *supra* n. 30, at para. 58 Iacobucci and Arbour JJ. noted that “an appropriate and just remedy is one that, after ensuring that the right of the claimant is fully vindicated, is also fair to the party against whom the order is made.” The remedy should not impose substantial hardships that are unrelated to securing the right” (emphasis added).

<sup>61</sup> *Ward*, *supra* n. 27, at para. 43 (emphasis added).

44. Saskatchewan submits that this is exactly what would transpire were the Appellant's position in this appeal to be vindicated. The stringent criteria of requiring malice would be removed and the general law governing civil liability for Crown prosecutors negated. This development would undermine the effective administration of the criminal justice system. It is difficult to conceive of a fundamental principle of good governance more relevant under this stage of the *Ward* analysis.

### **2.5 Quantum of Section 24(1) Damages**

45. Saskatchewan agrees with the Appellant that this aspect of the *Ward* analysis is not relevant to this appeal but for different reasons. There is an issue of causation and, more particularly, whether the alleged inadequate Crown disclosure contributed to the Appellant's wrongful conviction in light of the fact that it was set aside because of judicial error.

### **3. Conclusion**

46. As in *Nelles*, the issue presented in the Constitutional Question on this appeal is ultimately a question of good public policy. Saskatchewan submits that there is no constitutional principle compelling this Court to authorize the awarding of *Charter* damages against a Crown prosecutor if malice is not an essential aspect of the *Charter* breach at issue. Indeed, general constitutional principles point in the opposite direction. Fundamental precepts such as the office of the Attorney General in our system of governance and the unique role fulfilled by Crown prosecutors in our system of criminal justice should encourage this Court to maintain malice as a necessary pre-condition to awarding of *Charter* damages.

## **PART IV**

### **COSTS**

47. Saskatchewan does not seek costs and submits it is not liable for costs.

**PART V**  
**NATURE OF ORDER SOUGHT**

48. Saskatchewan respectfully submits that this Court should answer the Constitutional Question “no”.

49. Saskatchewan requests permission to present 10 minutes of oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Regina, Saskatchewan, this 28th day of October, 2014.



---

Graeme G. Mitchell, Q.C.

Counsel for the Intervener, the Attorney General for Saskatchewan

PART VI  
TABLE OF AUTHORITIES

<u>Cases</u>	<u>Paragraphs</u>
<i>Boucher v The Queen</i> , [1955] S.C.R. 16	43
<i>Doucet-Boudreau v Nova Scotia (Minister of Education)</i> , [2003] 3 S.C.R. 3	26, 43
<i>Guidmond (Procureur général) c Québec</i> , [1996] 3 S.C.R. 347	40
<i>Henry v British Columbia (Attorney General)</i> , 2014 BCCA 15	21
<i>Kazemi Estate v. Islamic Republic of Iran</i> , 2014 SCC 62	28
<i>Kingstreet Investments v New Brunswick</i> , [2007] 1 S.C.R. 3	28
<i>Krieger v Law Society of Alberta</i> , [2002] 3 S.C.R. 272	24, 25, 43
<i>Mackin v New Brunswick (Minister of Justice)</i> , [2002] 1 S.C.R. 405	40, 41
<i>Miazga v Kvello Estate</i> , [2009] 3 S.C.R. 339	14, 20, 22, 43
<i>Mills v The Queen</i> , [1986] 1 S.C.R. 863	26
<i>Nelles v Ontario</i> , [1989] 2 S.C.R. 170	14-19, 22, 31, 43, 46
<i>Odhavji Estate v Woodhouse</i> , [2003] 3 S.C.R. 263	36
<i>Proulx v Quebec (Attorney General)</i> , [2001] 3 S.C.R. 9	14
<i>R v 974649 Ontario Inc.</i> , [2001] 3 S.C.R. 576	37
<i>R v Anderson</i> , 2014 SCC 41	23, 43
<i>R v O'Connor</i> , [1995] 4 S.C.R. 411	37, 42
<i>R v Stinchcombe</i> , [1991] 3 S.C.R. 326	24, 31
<i>Ravndahl v Saskatchewan</i> , [2009] 1 S.C.R. 181	28
<i>Ward v Vancouver (City)</i> , [2010] 2 S.C.R. 28	25, 27, 29, 32, 33-35, 41, 43-45



**Secondary Sources**

Honourable John Sopinka, “Malicious Prosecution: Invasion of *Charter* interests: Remedies: *Nelles v. Ontario*; *R. v. Jedyneck*; *R. v. Simpson*” (1995), 74 Canadian Bar Review 366 13, 22

David Butt, “Malicious Prosecution: *Nelles v. Ontario*: Rejoinder – John Sopinka – [1994] 74 Can. Bar Rev. 306” (1996), 75 Canadian Bar Review 335 13