

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

BETWEEN:

IVAN WILLIAM MERVIN HENRY

APPELLANT

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH
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PART I
OVERVIEW

1. It has been clear under Canadian law for a quarter of a century that crown prosecutors are immune from tort liability absent proof of malice. The question is, to what extent does the careful balancing of policy considerations which led this Honourable Court to establish and repeatedly confirm this qualified immunity, offer guidance in determining when s. 24(1) damages against the Crown for prosecutorial misconduct would be appropriate.
2. The Attorney General of Newfoundland and Labrador submits that the careful balancing of policy considerations underpinning the private law threshold for malice provide strong justification for the conclusion that s. 24(1) damages should not be available against the Crown for prosecutorial misconduct, absent proof of malice.
3. Allowing s. 24(1) damages to be awarded for prosecutorial misconduct in the absence of malice could have a significant adverse impact on the independent exercise of prosecutorial discretion and decision-making in the discharge of prosecutorial duties. Prosecutors could feel pressure to make the most conservative decisions; lest there be an accusation that the decision in question was in error and subject to a claim under the *Charter*. A lower threshold for s. 24(1) damages would also invite a demand for the retrial of criminal proceedings in the form of *Charter* claims by any accused person unhappy to have found themselves the object of a criminal prosecution; notwithstanding at the time the prosecution proceeded in good faith.
4. These outcomes are realistic. This is because all aspects of Crown counsel's conduct in a prosecution are circumscribed by the *Charter*, and in particular by an accused's fundamental

right to a fair trial under s. 7 and 11(d). If s. 24(1) damages are available in the absence of malice, then *any* allegation of prosecutorial misconduct could be framed or alternately pleaded as a *Charter* claim in order to avoid the qualified immunity standard of malicious prosecution. Such a result could undermine the careful balancing of policy considerations that led this Court to establish the qualified immunity in the first place. Qualified immunity could be rendered effectively meaningless.

STATEMENT OF FACTS

5. The Attorney General of Newfoundland and Labrador takes no position on the facts.

PART II

ISSUES

6. The Chief Justice stated the following constitutional question:

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?

7. The Attorney General of Newfoundland and Labrador says that the question should be answered in the negative.

PART III
ARGUMENT

A. Introduction

8. The ability to award damages against officials who have exceeded their legal powers is an important requirement of the rule of law. It is an effective tool to influence government behavior. The availability of damages under s.24 (1) of the *Charter* is an expansion of this tool kit, and a means by which a democratic society can secure state compliance with constitutional obligations.

9. Yet the availability of damages at either tort law or under s.24 (1) is not absolute. In *Ward*, this Honourable Court addressed the question of when damages are available under s. 24(1), setting out a four step test for determining whether an award of damages would be “appropriate and just”.¹

10. In the third step of that test, the Court recognized that even where a *Charter* right has been breached and there are functional justifications in support of an award of damages, there may be countervailing factors which outweigh these considerations and would render s. 24(1) damages inappropriate or unjust.

11. Where such countervailing considerations are established, this Court held that a minimum threshold for liability, beyond simple establishment of a breach of a *Charter* right, may be appropriate.

12. In *Ward* one of the countervailing considerations referred to was described as the need for good governance. The Chief Justice said:

¹ *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28 (“*Ward*”).

In some situations, however, 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.²

13. It is submitted the principle of “qualified immunity” for crown prosecutors is one of the “good governance” considerations contemplated in *Ward*.³ Qualified immunity is a pillar of the independence of the Office of the Attorney General. The independence of the Attorney General finds its source in the rule of law under the Constitution in the separation of powers and the proper administration of justice. The balance between the affording of effective remedies for the breach of constitutional rights and the need for effective governance lies at the heart of determining why s. 24(1) damages are not appropriate as a public law remedy for prosecutorial misconduct absent proof of malice.

14. Although liability under the *Charter* is separate from liability developed under private law, this Court recognized the important guiding role that existing causes of action may play. Private law embodies “practical wisdom” concerning the type of situation in which it is or is not appropriate to make an award of damages against the state.”⁴

15. In acknowledging the utility of private law principles, because of the highly discretionary and quasi-judicial role of prosecutors, this Honourable Court made specific reference to the requirement of “malice” in a malicious prosecution action. It is submitted this quasi-judicial and highly discretionary role of a Crown prosecutor is equally relevant in the *Charter* context.

² *Ward*, at para. 39.

³ *Ward*, at para. 38.

⁴ *Ward*, at para. 43.

B. The malice requirement in *Nelles* applies to damages for constitutional wrongs

16. The Attorney General of Newfoundland and Labrador adopts the thorough explanation of *Nelles* and Canada's common law immunity principle as laid out in the Attorney General of British Columbia's Factum at paragraphs 43 to 73.

17. In balancing the right to redress for having been wronged, this Honourable Court in *Nelles* accepted that the policy reasons underlying the historical immunity of Crown prosecutors justified an extremely high threshold to succeed in an action for malicious prosecution.⁵

18. The policy reasons behind this threshold of almost absolute immunity are rooted in maintaining the integrity of prosecutorial discretion and the independence of the Attorney General's Office. As stated above, the independence of the Office of the Attorney General is an example of a good governance requirement. The independence of the Office of the Attorney General, if not an explicit component of, is in accordance with the principles of fundamental justice. It is summed up by the following passage from *Anderson*:

This Court has repeatedly affirmed that prosecutorial discretion is a necessary part of a properly functioning criminal justice system: *Beare*, at p. 410; *R. v. T. (V.)*, [1992] 1 S.C.R. 749, at pp. 758-62; *R. v. Cook*, [1997] 1 S.C.R. 1113, at para. 19. In *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, at para. 47, the fundamental importance of prosecutorial discretion was said to lie, "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'". More recently, in *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609, at para. 27, this Court observed that "[n]ot only does prosecutorial discretion accord with the principles of fundamental justice — it constitutes an indispensable device for the effective enforcement of the criminal law".⁶

19. Given the importance of maintaining this independence, which includes the ability to make discretionary decisions, the Attorney General of Newfoundland and Labrador submits that

lowering the threshold from malice even for constitutional wrongs, is contrary to the principles of good governance.

20. Where a wrong, including a constitutional wrong, arises out of prosecutorial misconduct, the principles of good governance *require* the threshold be on the standard of malice. To do otherwise may negatively impact the administration of justice. No one disputes that there must be effective remedies for constitutional wrongs. But for the reasons articulated in *Nelles*, when the constitutional wrong arises from prosecutorial misconduct, good governance and maintenance of the independence of the Attorney General's Office, *requires* the standard for an award of damages to be malice.

21. The independence of the Attorney General must be guarded to ensure that the Attorney General and prosecutors remain free from outside or partisan influences. This protection of the independence of the Office is the rationale that grounded the Court's insistence on a high threshold for malicious prosecution. The independence of the Office is central to the proper functioning of the criminal justice system.

22. The Attorney General of Newfoundland and Labrador submits that applying any standard less than malice to award s 24(1) damages could have practical implications for the independence of the decisions of the Attorney General and Crown prosecutors.

23. For example, as articulated in the Attorney General of Ontario's Factum, it is difficult to segregate disclosure obligations from prosecutorial discretion for the purpose of determining liability. Decisions respecting disclosure illustrate the kinds of practical implications for

⁵ *Nelles v. Ontario*, [1989] 2 S.C.R. 170, [S.C.J. No. 86 [*Nelles*], at paras. 48-54.

⁶ *R. v. Anderson*, 2014 SCC 41 [*Anderson*], at para. 37.

prosecutors in their day to day work if such decisions were to be held liable on a standard less than malice.

24. The difficulties for prosecutors handling complex cases or cases with conflicting public interests would be amplified. A lower threshold for liability could dissuade the prosecutor from making an independent decision in these situations. Instead, with the prospect of having the good faith, but mistaken decision possibility subject to liability, there will be pressure to make a “safe” decision: the underling purpose will be to avoid liability⁷. Making decisions to avoid liability undermines the very independence that the standard of malice is intended to protect.

25. Decisions of Crown Attorneys are challenged daily in courts across this country. While there is deference to the exercise of prosecutorial discretion, the challenges are precisely as to whether the decision in question is encompassed by that discretion. Given this, and that all Crown conduct is ultimately circumscribed by the *Charter* under “fair trial” principles, a lower threshold for damages will negatively influence the ability of the Crown Attorney to make the difficult decisions.

C. *Krieger and Anderson have not changed the threshold established in Nelles*

26. The Attorney General of Newfoundland and Labrador disagrees with the Appellant’s submission that because the duty to provide disclosure is a constitutional obligation and not discretionary, it should not benefit from the qualified immunity principle articulated in *Nelles*.

⁷ As noted in her article on *In the name of the Public Good: “The Public Interest as a Legal Standard”*, MacNair, Deborah M., (2006) 10 Canadian Criminal Law Review 175, at page 193,

... With more parties appearing before the courts as intervenors and the trend towards the use of court-ordered counsel, it remains challenging for Attorneys General to identify and define the public interest in their own terms apart from the competing rights of litigants and competing policy and political interests. It will be increasingly difficult to sculpt a unified and comprehensive public interest concept and duty. The challenges ahead are not for the faint of heart

27. To the contrary, in establishing the threshold of malice, in *Nelles*, Lamer, J. rejected a hierarchy of liability of prosecutors based on the nature of the conduct; or what he termed the “functional” approach to liability.⁸ This approach creates the problem of “line drawing” between conduct which may attract liability and conduct that is immune.

28. In taking this approach, Lamer J. was concerned that all conduct that presented with malice should be liable. Conduct that was imbued with malice ought not to enjoy immunity. However in order to ensure the continued independence of the Office, and the separation of powers, *whatever* the conduct, the Attorney General should not be held accountable on any standard other than *malice*.

29. Contrary to the assertions of the Appellant, it is submitted *Krieger* and *Anderson* are not about prosecutorial immunity in a claim for damages. They should not be taken out of context. Rather, they involve the scope of review of prosecutors conduct; whether judicial review within the context of a criminal trial; or as in *Krieger* the scope of a law society to review Crown conduct.⁹ *Anderson* was a criminal case in which a specific decision of Crown counsel, the decision to seek greater punishment, was challenged as affecting the *Charter* rights of an aboriginal accused.

30. Controlling the court’s own process within a criminal proceeding, or the scope of review by a law society, is not the same as a civil action for damages. While there is some overlap there are different policy considerations. Judicial review of prosecutorial conduct, *within* a particular

⁸ *Nelles*, at para. 55.

⁹ *Krieger v. Law Society (Alberta)*, 2002 SCC 65, [2002] 3 S.C.R. 372.

criminal proceeding, is to ensure the accused has a fair trial at the time. This is a function of the Court's ability to control its own processes. Even then the standard is high.¹⁰

31. The duty to provide disclosure is illustrative of the difficulties with the "functional approach" to delineating Crown prosecutor's conduct. This "line drawing" in determining whether conduct of a prosecutor attracts liability is fraught with uncertainty. It is difficult to separate the constitutional duty of providing disclosure from other conduct that falls under the rubric of prosecutorial discretion; which is protected by qualified immunity.

32. This is because the legal duty to disclose includes discretionary decision making;¹¹ the Crown has the discretion to determine the timing of disclosure. The Crown has the discretion to withhold information it deems clearly irrelevant or privileged.

33. The discretionary decisions that occur *within* the constitutional obligation to disclose, mean that errors in judgment will be made. It is submitted that these errors may arise from the same good faith of the Crown acting in their role as public officer, as the good faith errors made in the exercise of prosecutorial discretion which are protected by the standard of malice at private law.

34. It may be difficult, if not impossible, to segregate at what point the decision made or conduct was contrary to the legal duty, and at what point the decision or conduct was made in the deferential sphere of prosecutorial discretion.

35. If the errors arise in such decision making in the same way, then to avoid arbitrariness, the policy reasons that warrant protection for decisions made in the exercise of prosecutorial discretion, also warrant protection for discretionary decisions made in the course of fulfilling the legal duty to disclose.

¹⁰ *R. v. 974649 Ontario Inc.*, [2001] 3 SCR 575, 2001 SCC 81 (974649).

36. The plethora of *Charter* jurisprudence challenging crown decisions regarding disclosure, and the enactment of provisions such as section 278.1 of the *Criminal Code*, is a testament to the unclear lines between what prosecutorial discretion is, and what falls under legal duty to disclose.¹²

37. The difficulty in deciding what conduct is at issue where a failure to disclose has occurred will be no easier in the context of a claim for damages under s. 24(1).

38. To be clear, there is no dispute that the Crown duty to provide disclosure is a constitutional obligation and legal duty. Accordingly, unlike prosecutorial discretion, this conduct may not be accorded the same deference by the Court when that conduct is at issue within a criminal proceeding. But to find that *Krieger* and *Anderson* erode the qualified immunity for civil action or for *Charter* damages, requires the Court to engage in the functional approach of line drawing that Lamer, J. rejected in *Nelles*.

39. To apply the standards set in such cases as *Krieger* and *Anderson* to the context of a civil claim for damages under s. 24(1) may effectively eliminate the tort of malicious prosecution. All conduct would be framed as the source of a violation of fair trial principles under section 7 and or 11(d) of the *Charter*.

Conclusion

40. A lower threshold for awarding damages because the prosecutorial conduct in question is imbued with constitutional ramifications, is contrary to the careful balancing that occurred in *Nelles*. A rule that departs from this balance established in *Nelles*, also runs counter to this

¹¹ *R. v. Stinchcombe*, [1991] 3 S.C.R. 307 (*Stinchcombe*) at para. 20.

¹² For example see *R. v. O'Connor* [1995] 4 S.C.R. 566, *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, and from Newfoundland and Labrador, *R. v. Ryan (R.)*, 2004 NLCA 2, *R. v. Vokey*, [1992] Can Lii 7089 (NLCA).

Court's pronouncement in *Ward* that s. 24(1) operates concurrently with, and does not replace, the general law.¹³

41. *Nelles* established the key to the proper balance between the need to protect the integrity of the independence of the Attorney General and the need to address wrongs, including constitutional wrongs that may have occurred in the course of the administration of criminal justice.

42. The balance struck in *Nelles* does not absolutely deny a claimant a remedy where they have suffered a constitutional wrong. This approach only requires, that where the *Charter* violation is related to alleged prosecutorial misconduct, the countervailing factor of good governance including the maintenance of the independence of the Office of the Attorney General, require that malice must be established, before damages will be awarded.

43. *Nelles* provides the answer to the constitutional question. *Nelles* provided the means by which society protects the independence of the Attorney General; while affording remedies for those who have suffered constitutional wrongs.

PART IV COSTS

44. The Attorney General of Newfoundland and Labrador does not seek her costs in this appeal and requests that no costs be awarded against her.

¹³ *Ward*, at para 43.


PART V
ORDER SOUGHT

45. The Attorney General of Newfoundland and Labrador says that the constitutional Question should be answered in the negative.


46. The Attorney General of Newfoundland and Labrador intends to present oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at St. John's, NL this 30th day of October, 2014



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PART VIALPHABETICAL TABLE OF AUTHORITIES

<u>Cases</u>	<u>Paragraph(s)</u>
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MacNair, Deborah M., <i>In the name of the Public Good: "The Public Interest as a Legal Standard"</i> , (2006) 10 Canadian Criminal Law Review 175, at page 193.	24