

**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

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## A. Introduction

1. Canada makes the following submissions in reply to the factums of the interveners the Criminal Lawyers' Association (CLA), the Canadian Civil Liberties Association (CCLA), the Association in Defence of the Wrongly Convicted (AIDWYC), and the David Asper Centre for Constitutional Rights and British Columbia Civil Liberties Association (DACCR & BCCLA).

## B. Clarifying the Issue on Appeal – Does s. 24(1) Authorize a Court to Award *Charter* Damages for Prosecutorial Misconduct Absent Proof of Malice?

2. Some interveners, particularly the DACCR & BCCLA, suggest that the position of the respondents BC and Canada is unclear whether malice must be proven to establish a breach of a person's s. 7 *Charter* rights (Step 1 in *Ward*<sup>1</sup>) or if malice must be established at the remedial stage (Step 3 in *Ward*). The malice threshold is clearly relevant at the third step of the analysis as confirmed in *Ward* at para. 43. According to *Ward*, it is at this stage in which the “practical wisdom”, embodied in the existing causes of action against state actors, comes into play in determining “the type of situation in which it is or is not appropriate to make an award of damages against the state.”<sup>2</sup>
3. The sole issue on this appeal is the legal test for when *Charter* damages may be awarded for prosecutorial misconduct. This is clear from the Constitutional Question set by this Court by Order made June 9, 2014. The appellant and respondents have joined issue on this question. There is no issue in this appeal on the test for finding a *Charter* breach.

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<sup>1</sup> *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28 [Respondent Canada's Book of Authorities (“RBA”) Tab 18]

<sup>2</sup> *Ward* at para 43 [RBA Tab 18]



### **C. No-fault Approach to *Charter* Damages for Prosecutorial Misconduct should be Rejected**

4. The interveners, particularly the CCLA and DACCR & BCCLA, advocate in one way or another for a no-fault approach to awarding damages for prosecutorial liability.<sup>3</sup> This approach should be rejected. It ignores the fact that this is an appeal from a decision refusing to allow the plaintiff to plead that the prosecutor's conduct constituted a "marked and unacceptable departure from the reasonable standards expected of the Crown counsel".<sup>4</sup> It also overlooks the wording of the Constitutional Question, which asks whether *Charter* damages can be awarded for prosecutorial misconduct absent proof of malice. The question itself, particularly the words "prosecutorial misconduct", contemplate fault or culpability by the prosecutor before *Charter* damages can be awarded.
5. There must be a finding of fault on the part of the prosecutors before *Charter* damages are an appropriate and just remedy. In *Ward*, this Court stated that in most cases all three interrelated functions served by damages will be present to award damages for a *Charter* breach: compensation, vindication and deterrence.<sup>5</sup> The latter two functions of *Charter* damages support the need for culpability by the prosecutor to be established before *Charter* damages are awarded. Therefore, the no-fault approach advocated by some of the interveners is inconsistent with *Ward* and should be rejected.

### **D. The Proper Threshold to Award *Charter* Damages for Prosecutorial Misconduct is Malice**

6. In *Proulx*,<sup>6</sup> this Court stated that given the importance of the role of the prosecutor in the administration of justice, courts should be very slow to second-guess a prosecutor's judgment calls when assessing Crown liability for prosecutorial misconduct. It is in the public interest to set a high threshold for liability in civil suits for damages, so as to deter all but the most serious claims against the prosecuting authorities, and to ensure that Crown liability is

<sup>3</sup> See CCLA factum at paras 5, 19 and DACCR & BCCLA factum at paras 7, 26

<sup>4</sup> *Henry v British Columbia (Attorney General)*, 2014 BCCA 15 at para 2 and *Henry v British Columbia (Attorney General)*, 2013 BCSC 665 at para 63 [RBA Tab 2 and Tab 3]

<sup>5</sup> *Ward* at paras 25, 30 [RBA Tab 18, Intervener New Brunswick BOA Tab 26; Intervener Ontario BOA Tab 117]

<sup>6</sup> *Proulx v Quebec (Attorney General)*, 2001 SCC 66, [2001] 3 SCR 9, at para 4 [RBA Tab 14]

engaged in only the most exceptional circumstances. While this was said in *Proulx* in the context of a suit for malicious prosecution, the policy considerations underlying malice as the standard for liability for damages for prosecutorial misconduct apply equally to a claim for *Charter* damages.<sup>7</sup>

7. In *Proulx*, the Court found that on the evidence in that case the malice test had been met and damages were awarded against the Crown prosecutor. The Court held that the plaintiff had established on a balance of probabilities that the prosecutorial office had been used deliberately for purposes that were improper and inconsistent with the traditional prosecutorial function.

#### **E. The Decision of this Court in *Hill v. Hamilton-Wentworth Police Board***

8. The AIDWYC relies on the decision of this Court in *Hill*<sup>8</sup> in arguing that the policy reasons identified by the respondents justifying the malice threshold for a *Charter* damages claim are speculative. This argument ignores the extensive consideration of policy reasons in *Nelles*<sup>9</sup> confirming the need for qualified immunity in the realm of prosecutorial decision making. The argument further ignores the clear statements from this Court in both *Proulx* and *Miazga*,<sup>10</sup> affirming the importance of the *Nelles* principle to the administration of justice<sup>11</sup> and emphasizing the “intentional choice” made in *Nelles* to strike a balance between the rights of the individual to be “free from groundless criminal prosecutions and the public interest in an effective and uninhibited prosecution of criminal wrongdoing.”<sup>12</sup>
9. In *Hill*, this Court explicitly recognized the difference between the investigative functions performed by the police, and the quasi-judicial role executed by prosecutors.<sup>13</sup> Crown attorneys play a “unique” role in the administration of justice<sup>14</sup> which police officers do not

<sup>7</sup> *Ward* at paras 20, 22, 43 [RBA Tab 18; Intervener New Brunswick BOA Tab 24; Intervener Ontario BOA Tab 117]

<sup>8</sup> *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] S.C.R. 129 [RBA Tab 4]

<sup>9</sup> *Nelles v Ontario*, [1989] 2 SCR 170 at pp 182-183, 199 [RBA Tab 12]

<sup>10</sup> *Miazga v Kvello Estate*, 2009 SCC 51, [2009] 3 SCR 339 [RBA Tab 11]

<sup>11</sup> *Proulx* at para 4 [RBA Tab 14]

<sup>12</sup> *Miazga* at para 52 [RBA Tab 11]

<sup>13</sup> *Hill* at paras 49 and 50 [RBA Tab 4]

<sup>14</sup> *Miazga* at para 4 [RBA Tab 11]

perform. Prosecutors are vested with extensive discretion and decision-making authority to carry out their quasi-judicial functions independently, impartially and without distraction. Police work, on the other hand, has a fact-based investigative character, and does not involve the same quasi-judicial functions including the evaluation of evidence to make judgments as to legal guilt or innocence.

10. The reliance of the AIDWYC on *Hill* is therefore misplaced. Of far greater relevance to the issue before the Court on this appeal is the “practical wisdom” articulated in *Nelles* and affirmed by this Court in *Proulx* and *Miazga*.

#### **F. The Functional Approach Was Rejected in *Nelles* and Has Not Been Revived**

11. The interveners seek to draw a distinction between discretionary decisions made by prosecutors, including decisions to initiate and continue a prosecution, from constitutional obligations imposed on the Crown, including the prosecutorial duty to provide an accused person with proper disclosure. The argument that this distinction should impact on the threshold to be met in seeking *Charter* damages for non-malicious prosecutorial conduct amounts to a call for a return to the functional approach to Crown decision-making rejected by this Court in *Nelles*.
12. The attempt to draw clear lines between the duties of a prosecutor and group prosecutorial functions into quasi-judicial and non-quasi-judicial categories was determined in *Nelles* to be both arbitrary and unprincipled. In describing the decision making powers of the prosecutor protected by qualified immunity, this Court explicitly referenced the prosecutor’s power of disclosure and non-disclosure before trial.<sup>15</sup>
13. Furthermore, the decisions of this Court in *Krieger*<sup>16</sup> and *Anderson*<sup>17</sup> do not provide assistance to the interveners in seeking to revive the functional approach. While those cases affirmed the fact that Crown disclosure is not a discretionary matter, they were not concerned

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<sup>15</sup> *Nelles* at p 192 [RBA Tab 12 ]

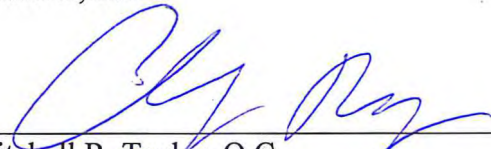
<sup>16</sup> *Krieger v Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372 [RBA Tab 8]

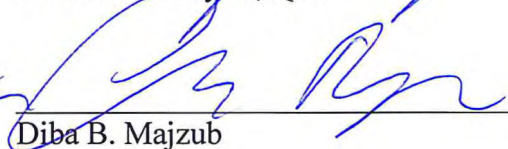
<sup>17</sup> *R v Anderson*, 2014 SCC 41 [RBA Tab 15]

with the qualified immunity rule and the distinct body of policy considerations carefully balanced by this Court in *Nelles*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver, B.C. the 6<sup>th</sup> day of November, 2014.

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**List of Authorities**

<b>Cases</b>	<b>Cited at Paragraph(s)</b>
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<i>Hill v. Hamilton-Wentworth Regional Police Services Board</i> , 2007 SCC 41, [2007] S.C.R. 129	8, 9, 10
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<i>Proulx v. Quebec (Attorney General)</i> , 2001 SCC 66, [2001] 3 SCR 9	6, 7, 8, 10
<i>R v. Anderson</i> , 2014 SCC 41	13
<i>Vancouver (City) v. Ward</i> , 2010 SCC 27, [2010] 2 S.C.R. 28	2, 5, 6