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

- and –

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

- and –

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PART I – CONCISE STATEMENT OF FACTS

A. *Overview*

1. Over the last 25 years, this Court has ruled on three occasions that a Crown prosecutor's liability cannot be engaged absent proof of malice. This principle should not be set aside because a claimant chooses to ground his claim under the *Canadian Charter of Rights and Freedoms.*

2. In *Nelles v. Ontario*[1], this Court thoroughly canvassed the policy considerations informing whether or to what extent prosecutors should be immune from suit in their prosecutorial function in Canada. The Court concluded that prosecutors should have qualified immunity. Specifically, only where a prosecutor acts with malice can the Crown attorney and Attorney General be held liable to a person who has been wrongfully convicted. In *Proulx*[2] and *Miazga*[3] this Court affirmed the approach taken in *Nelles*.

3. This Court carefully considered the *Charter* rights of the victim of a wrongful conviction in setting malice as the appropriate standard for bringing civil claims against the Crown. The Court balanced the competing factors of the broad discretion vested in prosecutors in carrying out their duties as part of the administration of justice as against the rights of the wrongfully convicted to redress. The policy considerations and reasoning of the Court in *Nelles* apply whether the claim is framed in private law or as a *Charter* breach. Permitting a plaintiff to seek damages under the *Charter* using a lower standard than malice would result in a dismantling of the careful balance struck in *Nelles*. In turn, this would have a significant impact upon the administration of justice. Prosecutors would have to look over their shoulder in making prosecutorial decisions involving judgment and would be diverted from their core prosecutorial functions as part of the administration of justice.

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[1] *Nelles v Ontario,* [1989] 2 S.C.R. 170 at p 199 [RBA Tab 12].
[2] *Proulx v Québec (Attorney General),* 2001 SCC 66 at paras 104, 119 [RBA Tab 14].
[3] *Miazga v Kvello Estate,* 2009 SCC 51 at para 4 [RBA Tab 11].

4. *Ward v. Vancouver (City)*[4] does not alter the *Nelles* principle. In fact, in *Ward* the Court endorses the approach taken in *Nelles, Proulx and Miazga* in relation to the malice requirement for suits for prosecutorial misconduct. Further, common law immunities are not to be cast aside simply because a plaintiff seeks to alternatively frame his case as a claim for a *Charter* breach.

B. *Statement of Facts*

5. In brief, the relevant facts and Rulings are as set out below.

6. On March 15, 1983, after 12 days of trial, a jury convicted the appellant of multiple sexual offences involving eight complainants. On November 23, 1983, the trial judge declared the appellant a dangerous offender and sentenced him to an indefinite period of incarceration. On February 24, 1984, the Court of Appeal dismissed his appeal from conviction and sentence for want of prosecution.[5] The appellant sought leave to appeal the dismissal to this Court, but this was refused, along with his subsequent application for reconsideration of the leave refusal. The appellant represented himself at trial, on appeal and in the leave to appeal proceedings.

7. The appellant was incarcerated for almost 27 years. On January 13, 2009, the Court of Appeal granted his unopposed application to reopen his 1983 appeal for consideration on its merits. The appellant was granted bail and released from custody on June 13, 2009. On October 27, 2010, the Court of Appeal allowed his appeal, quashed the convictions on the basis of faulty identification evidence used to convict the appellant, and entered acquittals.[6]

8. On June 28, 2011, the appellant commenced an action in the Supreme Court of B.C. seeking substantial damages for wrongful conviction and imprisonment. The named defendants are the Province of B.C., as represented by the Attorney General of B.C., the City of Vancouver, three police officers involved in the criminal investigation, and the Attorney General of Canada. The allegations that are subject of this appeal are those made against the Province and relate to the conduct of a provincial Crown prosecutor.[7] However, the legal issue in this appeal has

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[4] *Vancouver (City) v Ward*, 2010 SCC 27 at para 43 [RBA Tab 18].
[5] *R v Henry*, BCCA #001505, Feb 24, 1984 [RBA Tab 16].
[6] *R v Henry*, 2010 BCCA 462 at paras 32, 34, 155 [RBA Tab 17].
[7] Notice of Civil Claim filed June 28, 2011 [Appellant's AR Vol I Tab 5].

significant implications for all prosecution services, including the Public Prosecution Service of Canada.

9. The appellant's claim against the Province is for alleged malicious prosecution and breaches of his *Charter* rights.[8] The appellant seeks s. 24(1) *Charter* damages for what is said to have been egregious breaches of disclosure obligations by the Crown attorney resulting in a violation of his rights under ss. 7 and 11(d) of the *Charter*.[9]

10. The allegations made against Canada in the underlying action are that the Minister of Justice was negligent and breached the appellant's s.7 *Charter* rights in reviewing his convictions under s. 690, now s. 696.1, of the *Criminal Code* for possible miscarriage of justice.[10] The issue(s) raised against Canada in the underlying action is similar to one of the questions before this Court in *Hinse v. Canada*,[11] namely, under which standard, negligence or bad faith, the exercise of the Minister of Justice's review power in s. 690[12] of the Criminal Code should be assessed.

11. The underlying B.C. Supreme Court action is scheduled for trial for 100 days commencing August 31, 2015.

12. The specific allegations made by the appellant against the provincial Crown in his Second Amended Notice of Civil Claim ("the Claim") are, *inter alia*, that the conduct of the provincial Crown counsel before, during and after the prosecution and conviction constituted the torts of negligence, malicious prosecution and misfeasance in public office.[13] The appellant further pleads that the same conduct breached his rights under ss. 7 and 11(d) giving rise to a remedy in damages under s. 24(1) of the *Charter*.[14] The essence of the appellant's allegations against the provincial Crown counsel is that the prosecutor failed to disclose and/or deliberately

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[8] Notice of Civil Claim filed June 28, 2011 at paras 113-123 [Appellant's AR Vol I Tab 5].
[9] *Canadian Charter of Rights and Freedoms*, ss. 7, 11(d), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [RBA Tab 19].
[10] Notice of Civil Claim filed June 28, 2011 at paras 124-125 [Appellant's AR Vol I Tab 5].
[11] *Hinse v. Attorney General of Canada*, SCC #35613, on appeal from 2013 QCCA 1513, dated Sept. 11, 2013 [RBA Tab 5].
[12] *Criminal Code* RSC 1985 c C46 s 690, now s 696.1 [RBA Tabs 21 and 22].
[13] Second Amended Notice of Civil Claim ('the Claim') filed Jan. 14, 2014, at paras 113-122 [Appellant's AR Vol II Tab 15].
[14] The Claim at paras 131-132 [Appellant's AR Vol II Tab 15].

withheld crucial evidence and information from the defence before, during and after trial.[15] The evidence and information in question was as to statements made by complainants and the existence of another suspect with a similar *modus operandi*.

13. The respondent Attorney General of B.C. applied to strike out those portions of the Notice of Civil Claim which alleged negligence against the prosecutor and the Province and non-malicious breaches of *Charter* rights. By order made September 24, 2012, the chambers judge allowed British Columbia's application in part by striking out the appellant's allegations of negligence against Crown counsel and required him to seek leave to amend his pleading if he wished to maintain an allegation of a non-malicious breach of the *Charter*.[16]

14. The appellant then applied to further amend his Claim. By order made April 18, 2013,[17] the judge granted his application to amend in part. The appellant was allowed to plead in paragraph 120(k) of his Notice of Civil Claim that:

> [120(k)] The various acts and omissions that violated the Plaintiff's right to disclosure and/or his right to full answer and defence and/or his right to a fair trial, as described in paragraphs 113-119 above, were a marked and unacceptable departure from the reasonable standards expected of the Crown counsel.

15. The appellant alleges that the impugned acts and omissions constitute both *Charter* breaches and the tort of malicious prosecution.[18]

16. The respondent British Columbia appealed the Chambers judge's decision. By decision dated January 21, 2014, the Court of Appeal allowed British Columbia's appeal and dismissed the application to amend the Claim to plead non-malicious *Charter* breaches.[19] The Court of Appeal held that there is a consistent line of authority from this Court stipulating the parameters of civil liability for prosecutorial misconduct and they foreclose prosecutorial liability for non-malicious wrongdoing. The Court of Appeal held that this Court's decision in *Ward* does not

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[15] The Claim at paras 113-122 [Appellant's AR Vol II Tab 15].
[16] *Henry v British Columbia (Attorney General)*, 2012 BCSC 1404 at para 73 [Appellant's AR Tab 9].
[17] *Henry v British Columbia (Attorney General)*, 2013 BCSC 665 at para 63 [RBA Tab 2].
[18] The Claim at paras 119-122 [Appellant's AR Vol II Tab 15].
[19] *Henry v British Columbia (Attorney General)*, 2014 BCCA 15 at para 30 [RBA Tab 3].

alter the situation and that it would be an unwarranted extension of the language in *Ward* to find that the Supreme Court of Canada was altering the principles set forth in *Nelles* and *Miazga*. The Court of Appeal further held that the chambers judge ought to have refused the amendment to the pleadings sought by the appellant.

PART II – RESPONDENT'S POSITION ON ISSUE ON APPEAL

17. By order made June 9, 2014 the Court 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?[20]

18. The respondent, Attorney General of Canada, says that the Constitutional Question should be answered in the negative.

PART III – STATEMENT OF ARGUMENT

A. *The Analysis in Nelles is Sound and Equally Applicable to the Analysis of a Section 24(1) Claim*

19. The analysis in *Nelles,* and subsequent cases, remains valid today and should apply whether a claim is framed as malicious prosecution or under s. 24(1) of the *Charter*. In *Nelles*, Lamer J., speaking for the majority, reviewed the history of prosecutorial immunity, considered the law in other jurisdictions, and thoroughly analysed the policy and legal implications of giving prosecutors absolute, qualified or no immunity.[21] The Court held that prosecutors have qualified immunity, such that proof of malice is required in any action. A finding of malice requires more than recklessness or gross negligence. It requires evidence of "a willful and intentional effort on the Crown's part to abuse or distort its proper role within the criminal justice system."[22] This includes conduct that is fueled by an "improper purpose."[23] In reaching this conclusion, the majority in *Nelles* considered and relied heavily on the *Charter* implications of granting or

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[20] *Henry v British Columbia (Attorney General),* SCC #35745 [Appellant's AR Vol II Tab 22, pps 110-111].
[21] *Nelles, supra* at p 188-189 [RBA Tab 12].
[22] *Proulx, supra* at para 35 [RBA Tab 14].
[23] *Nelles, supra* at p 199 [RBA Tab 12]; *Miazga, supra* at para 8 [RBA Tab 11].

withholding immunity and the competing factors of administration of justice and the interests of the person wrongfully convicted.[24] This is to be contrasted with the law in the United States where prosecutors have absolute immunity from suit in regards to their prosecutorial role in the judicial phase of the criminal process.[25]

20. If a prosecutor used his or her 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.[26] Absolute immunity would bar both a private right of action and effectively bar seeking a remedy under s. 24(1) of the *Charter*. In many, if not all, cases of malicious prosecution by an Attorney General or Crown attorney, there will have been an infringement of an accused's rights as guaranteed by ss. 7 and 11 of the *Charter*. In *Nelles*, the majority acknowledged that policy considerations in favor of absolute immunity have some merit, but those considerations should give way to the right of a private citizen to seek a remedy in cases where a prosecutor has acted in a manner contrary to the role and society's expectations of the office of Crown attorney.[27] The majority reasoned that a result which bars a *Charter* remedy would be undesirable and provides a compelling reason for rejecting an absolute immunity for prosecutors.

21. However, in choosing malice as the appropriate standard for liability for prosecutorial misconduct, the Court recognized the overriding importance of policy considerations that justify a level of immunity for Crown prosecutors who perform an integral and crucial function in the administration of justice. These considerations include: (i) maintaining public trust and confidence in the fairness and impartiality of those who act and exercise discretion in bringing and conducting prosecutions; (ii) the need to prevent prosecutors from being diverted from their work in serving the public and having to defend their conduct after the fact; and (iii) other

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[24] *Nelles, supra* at pp 194, 199 [RBA Tab 12].
[25] *Imbler v Pachtman* 424 US 409 (1976), 95 S Ct 984 at pp 422-425 *per* Powell J.: "The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties"; at 437, *per* White J.: "The general rule was, and is, that a prosecutor is absolutely immune from suit for malicious prosecution. The rule, like the rule extending absolute immunity to judges, rests on the proposition that absolute immunity is necessary to protect the judicial process." [RBA Tab 6].
[26] *Nelles, supra* at pp 195-196 [RBA Tab 12].
[27] *Nelles, supra* at p 199 [RBA Tab 12].

remedies are available to address misconduct by a prosecutor, including sanctions by the Attorney General and law societies.[28]

22. The careful balance struck by this Court in *Nelles* emphasizes the importance of permitting Crown counsel to perform their duties independently and without distraction. A prosecutor is not immune from suit where malice is alleged, but he or she should not be exposed to lawsuits in which the numerous decisions made during the course of initiating and conducting a prosecution are subject to review. These interests, *Nelles* reveals, outweigh those of a very small group that have suffered damages by reason of non-malicious prosecutorial conduct including poor judgment, honest mistake, negligence, or even gross negligence.[29]

23. As the Court explained in *Nelles* the question is ultimately one of policy.[30] 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.[31]

24. This reasoning applies with equal force whether one is speaking of a common law suit or a *Charter*-based claim. In the *Charter* context, the above considerations bear on the defence of good governance. In *Nelles*, the Court balanced the interests of the public right to have prosecutions conducted by professionals acting in the public interest without fear of reprisal for the actions taken or not taken, on the one hand, against the rights of those persons charged and convicted and incarcerated. [32] This Court settled on malice as the appropriate threshold for liability for prosecutorial misconduct to "ensure that the Attorney General and Crown Attorneys will not be hindered in the proper execution of their important duties."[33] That reasoning is based on a solid foundation and principle. The test has served society and the administration of justice for some 25 years since this Court's decision in *Nelles*.

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[28] *Nelles, supra* at p 178-179 [RBA Tab 12].
[29] *Nelles, supra* at p 197 [RBA Tab 12].
[30] *Nelles, supra* at p 199 [RBA Tab 12]; *Miazga, supra* at para 49 [RBA Tab 11].
[31] *Miazga, supra* at para 49 [RBA Tab 11].
[32] *Nelles, supra* at p 199 [RBA Tab 12].
[33] *Nelles, supra* at p 199 [RBA Tab 12].

B. *Post-Nelles Jurisprudence Affirms the Nelles Principle*

25. This Court strongly endorsed the appropriateness and necessity to maintain the threshold of malice as a precondition to prosecutorial liability in *Proulx* (2001) and *Miazga* (2009). In *Proulx*, this Court affirmed the high threshold for malice for Crown liability established in *Nelles*, noting the important role played by prosecutors within the administration of justice and the public interest in ensuring that "Crown liability is engaged in only the most exceptional circumstances."[34] The Court concluded that the prosecutorial conduct proven in *Proulx* met the standard of "exceptional circumstances" in which Crown liability was justified.[35]

26. *Miazga* was a case involving prosecutorial discretion to initiate and continue a prosecution, and did not deal with a prosecutor's duty to disclose relevant evidence. Nonetheless, the Court clearly considered the prosecutor's tactics and conduct in that case in determining the proper standard of review of prosecutorial conduct and imposed the high threshold of malice. This is to enable prosecutors to fulfill their "quasi-judicial role as 'ministers of justice'."[36]

27. In *Miazga*, the Court held that an accused person has a private right of action when a prosecutor acts maliciously, in fraud of his or her prosecutorial duties, resulting in damage.[37] Under the standard established in *Nelles*, malicious prosecution will only be made out where there is proof that the prosecutor's conduct was fuelled by "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.[38] Malice does not include recklessness, gross negligence or poor judgement.[39]

28. The malice threshold is the "key to maintaining the balance struck in *Nelles*."[40] In *Miazga*, the Court rejected the plaintiff's assertion that the requirement for independent evidence

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[34] *Proulx*, *supra* at para 4 [RBA Tab 14].
[35] *Proulx*, *supra* at para 7 [RBA Tab 14].
[36] *Miazga*, *supra* at paras 33, 47, 49 [RBA Tab 11].
[37] *Miazga*, *supra* at para 49 [RBA Tab 11].
[38] *Miazga*, *supra* at para 7 [RBA Tab 11]; *Nelles*, *supra* at p 199 [RBA Tab 12].
[39] *Miazga*, *supra* at para 8 [RBA Tab 11].
[40] *Miazga*, *supra* at para 8 [RBA Tab 11].

of malice set too high a barrier for a wrongfully prosecuted person to obtain a remedy. Charron J. stated at para 52:

> [52] ...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 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).

C. *Ward does Not Alter the Application of the Principled Analysis and Result in Nelles*

29. The appellant's reliance on *Ward* is misplaced. The wide discretion of the Court to craft remedies and award damages for a *Charter* breach under s. 24(1) is not unfettered or unbounded, nor should it be exercised without regard to the "practical wisdom" concerning the type of situations addressed in previous jurisprudence.[41] The Court noted that s. 24(1) was intended to operate concurrently with and not replace, or act in opposition to, the common law.[42] Common law immunities are not to be abandoned or overlooked simply because a plaintiff seeks to alternatively frame his case as a claim for a *Charter* breach.

30. Importantly, in dealing with the third stage of the analysis set forth in *Ward*, the Court specifically addressed the legal liability of prosecutors and the Attorney General for prosecutorial conduct and, indeed, endorses the requirement of malice identified in *Nelles*, *Proulx* and *Miazga* from other claims requiring only negligence. This is summed up by the Chief Justice in the following passage:

> [43] .... Different situations may call for different thresholds, as is the case at private law. Malicious prosecution, for example, requires that "malice" be proven because of the highly discretionary and quasi-judicial role of prosecutors (*Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339), while negligent police investigation, which does not involve the same quasi-judicial decisions as to guilt or innocence or the

[41] *Ward, supra* at paras 19, 43 [RBA Tab 18].
[42] *Ward, supra* at para 34 [RBA Tab 18].

> evaluation of evidence according to legal standards, contemplates the lower "negligence" standard (*Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129). When appropriate, private law thresholds and defences may offer guidance in determining whether s. 24(1) damages would be "appropriate and just". While the threshold for liability under the *Charter* must be distinct and autonomous from that developed under private law, the existing causes of action against state actors embody a certain amount of "practical wisdom" concerning the type of situation in which it is or is not appropriate to make an award of damages against the state...

31. As noted by the Court of Appeal in its Reasons, *Ward* was not a case about wrongful prosecution.[43] Rather, it was about police activity. In considering the threshold for *Charter* damages stemming from police conduct, the Court did not disturb the careful balancing of competing policy considerations applicable to the standard for prosecutorial liability. *Ward* was not intended to bypass the "practical wisdom" reflected in *Nelles* and *Miazga*, which remains sound.[44]

32. In *Nelles*, *Proulx* and *Miazga*, this Court held that the same body of conduct giving rise to a malicious prosecution claim will, in the preponderance of cases, also ground a claim for *Charter* damages under s. 24(1). With this in mind, this Court identified the malice threshold as striking the proper balance between permitting prosecutors to focus on their public duties and ensuring that a plaintiff has a right to seek a remedy under the *Charter* that is just and appropriate.

33. This is illustrated by the decision of the Quebec Court of Appeal in *Dumont*.[45] Mr. Dumont served 34 months of a 52 month sentence upon conviction for sexual assault before he was acquitted after referral of his case by the federal Minister of Justice pursuant to s. 690 of the Criminal Code.[46] Mr. Dumont's conviction rested substantially on identification evidence and on the rejection of his defences, which consisted of an alibi and erectile dysfunction.[47] It later came

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[43] *Henry v Province supra* at paras 28-29 [RBA Tab 3].
[44] *Ward, supra* at para 43 [RBA Tab 18].
[45] *Dumont c Québec (Procureur général)*, 2012 QCCA 2039, leave to appeal to SCC refused, No. 35168 (May 16, 2013) [RBA Tab 1].
[46] *Dumont, supra* at paras 1, 5 [RBA Tab 1].
[47] *Dumont, supra* at para 6 [RBA Tab 1].

to light that the victim expressed doubt to the prosecutor concerning her identification of Mr. Dumont as the perpetrator, which information had not been disclosed to the defence. Following his acquittal, upon referral under s. 690, Mr. Dumont commenced a civil action seeking damages for wrongful conviction and imprisonment. On the facts, Mr. Dumont could not establish malice on the part of the prosecutor. He therefore sought damages under s. 24(1) of the *Charter* on the basis that in not disclosing the victim's doubts about her identification of him as the perpetrator, the Crown attorney had violated his ss. 7 and 11(d) *Charter* rights.

34. Mr. Dumont argued that the malice standard articulated in *Nelles* did not shield the prosecutor from liability in the exercise of the Crown attorney's duty to disclose evidence, and he was entitled to damages under s. 24(1).[48] The Quebec Court of Appeal had to grapple with the same issue faced by the Court in this appeal, namely, whether a victim of a wrongful conviction can claim damages under s. 24(1) of the *Charter* absent proof of malice.[49] The Court of Appeal dismissed Mr. Dumont's claim for *Charter* damages. It stated that if Mr. Dumont was incarcerated following a trial that complied with all the applicable requirements, then his imprisonment was the result of a legal process consistent with the principles of fundamental justice, which meets the criterion of s. 7 of the *Charter*.[50] Mr. Dumont's application for leave to appeal to this Court was dismissed.[51]

35. Further, the decision in *Dumont* is an answer to the appellant's allegation in paragraph 133 of the Claim that he is entitled to *Charter* damages for a violation of Article 14(6) of the *International Covenant on Civil and Political Rights* (the "*International Covenant"*).[52] The Quebec Court of Appeal noted that the rights granted in ss. 7 and 24(1) of the *Charter* do not correspond to those in Article 14(6) of the *International Covenant*, which was ratified but not implemented in Canadian domestic law. The *International Covenant* is of no assistance to a person claiming damages for wrongful conviction.[53]

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[48] *Dumont, supra* at paras 28, 36-45, 107-112 [RBA Tab 1].
[49] *Dumont, supra* at para 112 [RBA Tab 1].
[50] *Dumont, supra* at para 116 [RBA Tab 1].
[51] *Dumont, supra* at para 117 [RBA Tab 1].
[52] *International Covenant on Civil and Political Right*, GA res 2200A (XXI), 21 UN GAOR Supp (no 16) at 52, UN Doc A/6316; 999 UNTS 171; 6 ILM 368 (1961) at Article 14(6) [RBA Tab 20].
[53] *Dumont, supra* at para 118 [RBA Tab 1].

36. Whether a claim against a prosecutor is based on private law or an alleged *Charter* breach, the concern for effective and good governance, the quasi-judicial role of the prosecutor in the administration of justice, and the overall proper administration of justice all point to the wisdom of the principled analysis and result in *Nelles.* Permitting a plaintiff to claim *Charter* damages using a lower standard than malice would result in a dismantling of the careful balance struck in *Nelles* and affirmed by *Proulx* and *Miazga*.

D. *Charter Damages Should Not be Awarded for Non-Malicious Conduct by a Prosecutor*

37. The appellant's argument on damages for a *Charter* breach in the context of prosecutorial conduct is overly simplistic and in error. The appellant wrongly suggests that where there has been a wrongful conviction and incarceration the court must necessarily be able to award *Charter* damages against the prosecutor without regard to the motivation of the prosecutor or good governance considerations.

38. The gravamen of the appellant's complaint in this case is that the prosecutor failed to disclose important, crucial evidence and information pertaining to the complainants' statements and about another police suspect.[54] These failures are said to have occurred before, during and after the trial and conviction in 1983 and constitute both malicious prosecution and a *Charter* breach. The reasons for the failure to disclose must be determined at trial. They could include inadvertence or a good faith belief there was no legal requirement to disclose. It is only where the reasons rise to the level of a malicious attempt to deprive the accused of a fair trial that they become actionable.

39. It would not be appropriate and just to award *Charter* damages for prosecutorial omissions that are inadvertent. The policy considerations of good governance outweigh any benefit achieved by providing compensation to a plaintiff for non-malicious conduct by a prosecutor. Conversely, where a prosecutor acts with malice and in doing so breaches the *Charter* rights of a person, the law properly calls for an award of damages whether the claim be grounded in common law or a *Charter* breach, or both. Contrary to the appellant's contention,

[54] Appellant's factum paras 47-49.

this approach, which is based on a threshold of malice in the context of prosecutorial conduct, would fulfil the functions outlined in *Ward*.[55]

40. Moreover, in the context of a *Charter* breach it should be borne in mind that the appellant is not seeking private law damages, but the distinct remedy of constitutional damages. The nature of the remedy is to require the state or society at large to compensate an individual for breaches of their constitutional rights where it is just and appropriate to do so. Constitutional damages are not merely to augment other private law damages to which an individual may be entitled. They are damages awarded against the state (as opposed to damages awarded to the plaintiff, even though the plaintiff is the recipient of *Charter* damages) and should be made only where the state's conduct is deserving of such sanction. Inadvertent failures to disclose do not meet the necessary threshold. Malice does.

41. Vindication, deterrence and the seriousness of the state's misconduct were the cornerstones of this Court's reasoning in *Ward*.[56] The appellant relies on vindication and deterrence in his factum as a justification for the court having jurisdiction to award *Charter* damages in this case. Consideration of the principles of vindication and deterrence leads to the conclusion that *Charter* damages should only be awarded for bad faith, dishonesty or other malicious conduct. In other words, in the absence of malice on behalf of a Crown prosecutor, an award of damages is not a remedy that is just and appropriate under s. 24 of the *Charter*.

E. *Damages for Malicious Prosecution may be Available for Proven Malicious Conduct by a Prosecutor*

42. Contrary to the appellant's suggestion,[57] victims of wrongful prosecution have an effective remedy against the Crown within the parameters of malicious conduct which, for the reasons given in *Nelles* and subsequent decisions, is the proper threshold for imposing liability and awarding damages for prosecutorial misconduct.[58]

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[55] *Ward*, *supra* at para 20 [RBA Tab 18].
[56] *Ward*, *supra* at paras 47, 51, 52, 57 [RBA Tab 17]; Appellant's factum paras 58-62.
[57] Appellant's factum paras 66-72.
[58] The Claim at paras 97-99, 100-101, 103, 113-119, 122, 131-132 [Appellant's AR Vol II Tab 15].

43. While *Charter* damages for a breach of *Charter* rights and common law damages in tort serve different functions – *Charter* damages being aimed at deterrence and common law damages being compensatory – *Charter* remedies are to operate in tandem with common law damages, not in opposition.

44. In addition to the appellant pursuing his common law cause of action for malicious prosecution against the Province, seeking substantial damages, he seeks to graft a *Charter* claim onto that private law claim, relying on the same alleged misconduct. The only difference between the private law claim and the *Charter* damages claim in this case is that whereas the appellant has to meet the threshold of malice to prove malicious prosecution he seeks to recast the same alleged misconduct by the prosecutors as a marked and unacceptable departure from the reasonable standards expected of Crown counsel.[59] This underscores the ease with which a plaintiff can circumvent the careful reasoning and balance struck in *Nelles* through artful pleading if this Court were to permit *Charter* damages to be awarded for non-malicious conduct by a prosecutor.

F. *Krieger and Anderson do Not Assist the Appellant*

45. The appellant relies on *Krieger*[60] and *Anderson*[61] at paragraphs 89-93 of his factum. However, these decisions do not assist the appellant and, in fact, support the respondents.

46. Firstly, *Krieger* and *Anderson* are not about prosecutorial liability. *Krieger* deals with after-the-fact judicial review of the scope of the Law Society of Alberta's jurisdiction to review the decision of a prosecutor to withhold relevant evidence from the defence. In *Anderson*, the Court dealt with the standard of review for abuse of process by a prosecutor.[62]

47. Judicial review for abuse of process and prosecutorial liability involve different considerations. While the courts afford broad discretion to the Crown attorney in the conduct of a prosecution, courts can intervene and review a prosecutor's actions taken in the course of a trial, including to protect an accused's *Charter* rights. This includes the ability of the court to review

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[59] The Claim at para 120 [Appellant's AR Vol II Tab 15].
[60] *Krieger v Law Society of Alberta*, 2002 SCC 65, [2002] 3 SCR 372 [RBA Tab 8].
[61] *R v Anderson*, 2014 SCC 4 [RBA Tab 15].
[62] *Anderson*, *supra* at paras 1, 4-5, 36 [RBA Tab 15].

the decisions of the Crown attorney to not disclose evidence at trial. This power of review may be exercised by the court without any suggestion of wrong-doing by the prosecutor. Judicial review is to ensure that the accused has a fair trial. Prosecutorial liability, on the other hand, involves a determination of whether the prosecutor's conduct is so egregious as to justify an award of damages. This entails meeting the high threshold of malice.

48. Secondly, *Krieger* and *Anderson* affirm the high threshold that applies when assessing prosecutorial conduct. In *Krieger*, the Court upheld the Law Society's jurisdiction to review prosecutorial conduct for dishonesty or bad faith.[63] The specific conduct in question was the failure to disclose relevant evidence.

49. In *Anderson*, the Court addressed two aspects of Crown counsel decision-making: (i) exercises of prosecutorial discretion and (ii) tactics and conduct before the court.[64] The specific issue in *Anderson* was the standard of judicial review of matters that fall within a prosecutor's discretion. The Court identified the standard as improper motive, bad faith or abuse of process where there is evidence that the Crown's decision "undermines the integrity, of the judicial process" or "results in trial unfairness."[65]

50. Both *Krieger* and *Anderson* support applying a high threshold when assessing prosecutorial conduct. As stated by this Court in *Miazga* at para. 51:[66]

> [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.

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[63] *Krieger, supra* at para 60 [RBA Tab 8].
[64] *Anderson, supra* at para 35 [RBA Tab 15].
[65] *Anderson* at paras 49, 51 [RBA Tab 15].
[66] *Miazga, supra* at para 51 [RBA Tab 11].

G. *The Appellant's Proposed Alternative Standards of Negligence or Marked Departure Should be Rejected*

51. The appellant's proposed alternative standards of negligence or marked departure should be rejected.[67]

52. There are principled reasons why prosecutors and the Crown vicariously should only be liable on a higher standard than negligence or marked departure. Prosecutors have an integral function in the administration of justice and serve as local "ministers of justice." Their role is fundamentally different from employees in an operational department of government,[68] the police[69] or professionals, such as doctors or lawyers, *vis a vis* their clients. It is for this reason that the Court undertook the analysis in *Nelles* and reached the conclusion that malice is the appropriate threshold for liability for prosecutorial misconduct.

PART IV – COST SUBMISSION

53. The respondent Attorney General of Canada does not seek costs in this appeal.

54. If this Court were to allow the appeal, costs should follow the event and be assessed at prescribed amounts in accordance with Schedule B of the Tariff of Fees and Disbursements to be Taxed of the *Rules of the Supreme Court of Canada*. The appellant has not alleged or provided evidence of misconduct connected with this litigation or other exceptional circumstances that would justify special costs.[70] While special costs may be awarded on public interest grounds,[71] the appellant claims substantial damages in the underlying action and is therefore not a public interest litigant.[72]

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[67] Appellant's factum paras 98-103.
[68] *Just v British Columbia*, [1989] 2 SCR 1228 at pp 1239-1242 [RBA Tab 7].
[69] *Hill, supra* at paras 52-54 [RBA Tab 4].
[70] *Ludco Enterprises Ltd v Canada*, 2001 SCC 62, [2001] 2 SCR 1082 at para 79 [RBA Tab 9].
[71] *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*, 2002 SCC 13, [2002] 1 S.C.R. 405 at para 86 [RBA Tab 10].
[72] *Odhavji Estate v Woodhouse*, 2003 SCC 69, [2003] 3 SCR 263 at para 76 [RBA Tab 13].

PART V - ORDER SOUGHT

55. The respondent Attorney General of Canada says that the Constitutional Question should be answered in the negative.

56. The respondent Attorney General of Canada asks that this appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver, B.C. the 7th day of October, 2014.

Mitchell R. Taylor, Q.C.

Diba B. Majzub

Counsel for the Respondent Attorney General of Canada

PART VI - LIST OF AUTHORITIES

Cases	Cited at Paragraph(s)
Dumont c. Québec (Procureur general) 2012 QCCA 2039, leave to appeal to SCC refused, No. 35168 (May 16, 2013)	33, 34, 35
Henry v. British Columbia (Attorney General), 2013 BCSC 665	7, 14
Henry v. British Columbia (Attorney General), 2014 BCCA 15	16, 31
Hill v. Hamilton-Wentworth Regional Police Services Board, 2007 SCC 41, [2007] 3 S.C.R. 129	52
Hinse v. Attorney General of Canada, SCC #35613, on appeal from 2013 QCCA 1513, dated Sept. 11, 2013	10
Imbler v. Pachtman, 424 U.S. 409 (1976), 96 S. Ct. 984	19
Just v. British Columbia, [1989] 2 S.C.R. 1228	52
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Ludco Enterprises Ltd. v. Canada, 2001 SCC 62, [2001] 2 S.C.R. 1082	54
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Miazga v. Kvello Estate, 2009 SCC 51, [2009] 3 S.C.R. 339	2, 23, 26, 27, 28, 50
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Odhavji Estate v. Woodhouse, 2003 SCC 69, [2003] 3 S.C.R. 263	54
Proulx v. Québec (Attorney General), 2001 SCC 66, [2001] 3 S.C.R. 9	2, 19, 25
R. v. Anderson, 2014 SCC 41	45, 46, 49
R. v. Henry, BCCA #001505, Feb. 24, 1984	6
R. v. Henry, 2010 BCCA 462	7
Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 S.C.R. 28	4, 29, 33, 39, 41

PART VII – SCHEDULE OF STATUTES

Statute	Cited at Paragraph(s)
Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(d), 24, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11	9
International Covenant on Civil and Political Right, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316; 999 UNTS 171; 6 ILM 368 (1961) at Article 14(6)	35
Criminal Code, RSC 1985 c. C-46 s. 690	10
Criminal Code, s. 696.1, SC 2002 c. 13 s. 71	10