

S.C.C. FILE NO. 35745

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

IVAN WILLIAM MERVIN HENRY

APPELLANT
(Respondent)

-and-

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH
COLUMBIA, AS REPRESENTED BY THE ATTORNEY GENERAL OF
BRITISH COLUMBIA

RESPONDENT
(Appellant)

-and-

ATTORNEY GENERAL OF CANADA

RESPONDENT
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PART I – FACTS

Overview

1. This matter is framed in the context of a motion for leave to amend a pleading and to the extent that a record does not allow for a proper determination of the constitutional issue, its analysis at this time would likely be unsatisfactory.

10 2. Contrary to police officers who may use the most coercive powers of the state without the checks of the judicial system, Crown prosecutors are typically involved within the machinery of justice, in which they are but one participant. It should not be presumed that all prosecutorial misconduct automatically leads to wrongful convictions and/or incarceration. The criminal justice system is replete with procedural and evidentiary safeguards specifically designed to ensure a level playing field, fairness and a creditable result.

20 3. The criminal justice system holds all the necessary powers to protect against and to remedy any procedural failing, whether derived from misconduct or violations of the *Canadian Charter of Rights and Freedoms* (hereinafter “*Charter*”). There is no substantial distinction in this respect whether the failing is related to the discharge of a legal duty or to the exercise of prosecutorial discretion. Whether an accused is found guilty or discharged, the system is predicated on the presumption that it is the result of fair, public and transparent proceedings; otherwise it is the integrity of the entire machinery of justice that is in jeopardy. Once judicial proceedings are terminated, several legal doctrines preclude their re-opening outside of the traditional appeal process.

30 4. To allow independent and separate causes of action against prosecutorial misconduct arising in the course of criminal proceedings, whether *Charter* based or otherwise, essentially amounts to a collateral attack against the original proceedings. It encourages multiple proceedings and an inefficient use of judicial resources. It further invites a wholesale judicial review of prosecutorial decisions and actions associated with the original proceedings. It compromises the impartial role of Crown prosecutors and may

discourage the laying of charges that are in the public interest for fear of separate civil liabilities.

5. The only misconduct that may evade the criminal justice system and warrant a remedy is where a Crown prosecutor perpetrates a fraud on the tribunal, i.e. where the prosecutor wilfully abuses the office of the Attorney General or the process of criminal justice. That situation is closely related to the tort of malicious prosecution. It supports the argument that similar considerations should dictate the analysis of this Court with respect to prosecutorial misconduct associated with *Charter* breaches.

10

Facts

6. The Attorney General of New Brunswick (hereinafter “AGNB”) intervenes in this matter pursuant to a Notice of Intervention filed on July 23, 2014.

7. The AGNB accepts the facts as presented by the Respondents.

PART II – ISSUES

20 8. The constitutional question as formulated in Chief Justice McLachlin’s Order of June 9, 2014 is:

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?

1. Le par. 24(1) de la *Charte canadienne des droits et libertés* autorise-t-il un tribunal compétent à condamner le ministère public au paiement de dommages intérêts pour la conduite répréhensible du poursuivant lorsque nulle malveillance n’a été prouvée ?

9. The AGNB submits, to the extent that it is necessary to address the constitutional question, that it be answered in the negative for the reasons provided hereinafter.

PART III –ARGUMENTS

10. Before proceeding to the arguments on the constitutional question, the AGNB wishes to formulate some preliminary observations to properly frame the context within which the issue arises.

11. Firstly, it is important to note that the constitutional question arises in the context of a preliminary motion for leave to amend a pleading. To the extent that the record before the Court does not allow for a proper consideration of the issue, the AGNB submits that its analysis should be left to another time, leaving the parties the fullest opportunity to make representations in relation thereto.

12. This Court has also acknowledged that personal remedies founded on s. 24(1) of the *Charter* are subject to limitation periods. Therefore, to the extent that the principles formulated in the matters of *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] 1 SCR 3 paras 59-61, and *Ravndahl v. Saskatchewan*, [2009] 1 SCR 181, apply to cases of this sort, any determination by this Court of the constitutional question should not be viewed as a judgment on the admissibility of the action.

13. Thirdly, although the constitutional issue is formulated broadly, in this case the individual was ultimately convicted of his crimes, albeit wrongfully, and incarcerated for those crimes. The Crown prosecutors are but one participant in that entire process. The AGNB submits that it should not be presumed that all prosecutorial misconduct automatically leads to wrongful convictions and/or incarceration. A wrongful conviction can occur without prosecutorial misconduct, just as prosecutorial misconduct does not automatically lead to wrongful convictions. Although malicious prosecutions may generally involve breaches of ss. 7 and/or 11 of the *Charter* (*Nelles v. Ontario*, [1989] 2 SCR 170 pp 194 & 195-96 (CJ Lamer)), the constitutional question in this case is concerned with a cause of action where no malice is involved.

A Contextual Reading of *Ward*

14. When invoking and applying the law as formulated by this court in *Vancouver (City) v. Ward*, [2010] 2 SCR 28, the AGNB submits that it is important to read it in its proper context. As explained more fully in the next section, the plaintiff in that case could not rely on all the procedural safeguards arising within the course of criminal prosecutions.

10 15. In *Ward*, the plaintiff had been arrested and searched contrary to his constitutionally protected rights. His vehicle was also impounded. After the various infringements, the police officers involved simply released the plaintiff without laying any charges.

16. Had charges been laid against the plaintiff, he would then have had the opportunity to invoke all his constitutional and procedural protections directly before the tribunal called on to try the accusations, opening up the remedial jurisdiction of the court. The failure of the state to lay charges constrained the plaintiff into the civil courts to obtain remedy for the infringements to his constitutional rights.

20 17. The situation as presented in *Ward* raises particular concerns. It is undeniable that police officers hold some of the most coercive powers of the state. Their abuse of those powers can lead to invasive and damaging actions against the citizenry going well beyond the strictures of criminal proceedings. To leave the review of those powers to the sole responsibility of criminal tribunals would open the door to unchecked uses of state powers where no charges are laid, as in the case of *Ward*, which is an unacceptable scenario in a country guided by the rule of law. That is not generally the case for Crown prosecutors however.

A Systemic Protection against Prosecutorial Misconducts

30 18. While the duties of police officers place them in conflict situations with the population on a daily basis, with all the opportunities for constitutional infringements that

the scenarios entail, Crown prosecutors take the lead on a file generally only when charges are laid and a matter proceeds to criminal court. Prosecutors do not control police investigations or police actions and they will be involved before charges are laid in an advisory capacity only. Where Crown prosecutors are involved, the entire machinery of justice usually follows; thus the distinction made by this Court between police officers and Crown prosecutors (*Miazga v. Kvello Estate*, [2009] 3 SCR 339 paras 49-50).

10 19. The opportunity for constitutional infringements by Crown prosecutors is greatly limited by their role in the judicial process. Furthermore, even where such infringements occur, the machinery of justice can easily and rapidly be summoned to remedy any injury, real or contemplated, that a participant in the criminal proceedings may suffer. In this respect, there is no substantial difference whether the failure of the Crown prosecutor is in relation to the discharge of a legal duty or the exercise of a prosecutorial discretion as distinguished in *Air Canada v British Columbia (AG)*, [1986] 2 SCR 539 pp 545-46 & 548-49, *Krieger v. Law Society of Alberta*, [2002] 3 SCR 372 paras 5 & 54, and *R. v. Anderson*, 2014 SCC 41 para 45.

20 20. This Court has already addressed on various occasions the nature and type of remedies that can be awarded to a participant in the criminal process when his or her constitutional rights are infringed. From an adjournment to a stay of proceedings (*R. v. O'Connor*, [1995] 4 SCR 411 paras 75, 77, 78 & 82) or a contempt order and even special costs (*R. v. 974649 Ontario Inc.*, [2001] 3 SCR 575 paras 35-36, 39-41 & 80), criminal courts have a whole spectrum of orders that can be relied upon to redress infringements to constitutional rights in relation to their processes. In fact, as explained in *Anderson*, supra paras 24-25 & 58-60, it is the duty of the tribunal to protect the constitutional rights of participants in the process, whether the participant is an accused, a victim (*R. v. Mills*, [1999] 3 SCR 668) or a witness.

30 21. The Canadian criminal justice system benefits from several centuries of evolution in the common law and procedural safeguards. Several of those safeguards can now be found in the *Charter*, from s. 7 to s. 14 and s. 24(2).

22. Although Crown prosecutors may advise in relation to the laying of charges before a criminal court, they do not control the institution of justice nor its proceedings. The trial is conducted by an independent and impartial judge, through procedural and evidentiary rules designed to ensure a level playing field with reliable evidence. The process is public and transparent: *Nova Scotia (AG) v. MacIntyre*, [1982] 1 SCR 175 pp 183-86; *Canadian Broadcasting Corp. v. New Brunswick (AG)*, [1996] 3 SCR 480 paras 20-22; *Vancouver Sun (Re)*, [2004] 2 SCR 332 para 24-25. “Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity”
10 (quoted in *Vancouver Sun*, supra para 24).

23. In line with a public and transparent process, the Crown in a criminal proceeding has the legal duty to disclose the relevant information pertaining to the charges: *R. v. Stinchcombe*, [1991] 3 SCR 326. The role of the Crown in criminal proceedings is not to obtain a finding of guilt at all costs, but to serve the public interest: *R. v. Boucher*, [1955] SCR 16 pp 21, 23-24 & 25-26.

24. Among the other constitutional protections applicable in criminal proceedings are the right of the accused to be informed within a reasonable time of the specific offence (s. 11(a)) and to be tried within a reasonable time (s. 11(b)). Furthermore, the accused
20 cannot be compelled to testify against himself or herself (s. 11(c)) and has the right to be tried by a jury in certain circumstances (s. 11(f)).

25. Another fundamental protection of the Canadian criminal justice system is the presumption of innocence. Unless the Crown can demonstrate the guilt of an accused beyond a reasonable doubt, he or she will be deemed innocent of the offence. Except for some positive defenses to be invoked by an accused, the burden rests entirely on the Crown to obtain a successful prosecution.

30 26. The evidentiary rules also ensure a process based on objectivity and rationality. Only reliable, relevant and probative evidence will be admitted. In this respect, the importance of the process of examination and cross-examination of witnesses cannot be

overestimated. It is the procedural safeguard to the reliability of evidence and testimonies.

27. Although not constitutionally protected, rights of appeal operate as an additional safeguard against poorly considered lower court decisions. It allows a review of the proceedings, including the involvement of the Crown, where misconduct or irregularities may have tainted the process, or where flawed legal principles and reasoning are relied upon.

10 28. All these systemic protections, to name only a few, are not premised on a presumption that the Crown prosecutors will abuse their responsibilities in criminal proceedings, but they nevertheless act as checks against unfair tactics and conduct, including any *Charter* violations that can arise in the course of litigation. The presiding judge is in the best position to assess the conduct of Crown prosecutors and to address any failures, whether related to the *Charter* or otherwise, arising within his or her tribunal.

20 29. That is not to say that *Charter* violations by Crown prosecutors go unpunished; only that they are addressed and remedied within the course of the judicial proceedings where they arise. As a matter of practice, this Court has already addressed scenarios where disclosure was not carried out or was carried out improperly by Crown prosecutors. It is sufficient to refer to the cases of *Stinchcombe*, *O'Connor*, and *974649 Ontario*, *supra*. This Court has also addressed other scenarios where abuses of process were alleged: see *R. v. Keyowski*, [1988] 1 SCR 657; *R. v. Nixon*, [2011] 2 SCR 566. It is apparent that the issues were adequately addressed within the context of the proceedings in which they arose.

30 30. For all practical purposes, there is one scenario of prosecutorial misconduct that can potentially evade the normal course of the proceedings where it arises. That situation is when the Crown prosecutor successfully perpetrates a fraud on the tribunal. That is described in *Miazga*, *supra* para 80, as a case where “the prosecutor *wilfully* perverted or abused the office of the Attorney General or the process of criminal justice” [*italic in the*

original]. When that conduct is discovered in the normal course of the proceedings, the presiding judge or the appellate tribunal is empowered to fully address the matter. It is only when the fraud is not discovered that the systemic protections are incapable of remedying the abuses.

31. The systemic protections ingrained within the criminal process lead to a further consideration, which is the proximity between the prosecutorial misconduct and the damages allegedly suffered. Although, as explained in *Ward*, supra paras 25-31, damage awards pursuant to s. 24(1) of the *Charter* generally serve one or more of three purposes (i.e. indemnification, vindication and deterrence), Crown prosecutors cannot be made automatically responsible for the failings deriving from the other parts of the system. For example, in the case of wrongful convictions, assuming that damages are payable, they serve none of the three purposes if ordered against the Crown prosecutor unless the error in the conviction can be directly linked to prosecutorial misconduct. Otherwise, Crown prosecutors would become the easy targets of every systemic failing.

32. In this case, the Appellant concedes that his original appeal was dismissed due to his failure to perfect the record in a timely manner (*Factum of the Appellant*, para 26; *Appellant Record*, vol. II, pp. 48-49). The fact that the Appellant was self-represented (*Appellant Record*, vol. II, p. 43) may have complicated the matter and no fact is pleaded as to the quality and quantity of information contained in the “approximately 11 statements” disclosed after his request (*Appellant Record*, vol. II, p. 44). No information is provided either as to the scope and extent of the cross-examination made of the eight complainants, either at the preliminary hearing or at trial, namely in relation to their various statements made to the police (*Appellant Record*, vol. II, pp. 10 & 12-13). Actually, the Appellant admits that he failed to use the information available to him “to elicit evidence that would undermine the reliability of the trial complainants’ identification of him as their attacker” (*Appellant Record*, vol. II, p. 46). It is not clear that a better disclosure would have led to a different result and, without intending to diminish or trivialize the injury that he suffered, the Appellant may bear the main responsibility for his misfortune.

33. All these considerations support the view that the test formulated in *Ward*, supra, for *Charter* damages where police officers exceed their powers is ill suited in relation to Crown prosecutors. The two groups operate in completely different environments. While Crown prosecutors may also be at the source of *Charter* violations, they almost exclusively act within a structure that can rapidly, easily and efficiently address misconducts, compared to police actions where only a fraction eventually end up within the criminal justice system.

10 34. The AGNB submits that these considerations demonstrate the close proximity between a s. 24(1) of the *Charter* cause of action for prosecutorial misconduct and the tort of malicious prosecution. The Canadian criminal justice system is fully equipped to address the issues arising within its proceedings, whether *Charter* based or otherwise; it is only in the case of fraud committed against the tribunal, which implies a wilful perversion or abuse of its process, which also implies malice, that an independent or separate remedy is warranted.

Public Policy Reasons for Excluding Prosecutorial Misconducts

20 35. In *Ward*, supra paras 16-22 & 61, this Court formulated a 4-part test for *Charter* damage awards. It is first necessary to demonstrate a *Charter* breach; followed by a demonstration that an award of damages serves a functional purpose of s. 24(1) of the *Charter*; even if the second step is satisfied, damages will not be granted where the state shows that such an award would not be appropriate; finally, where appropriate, the damages have to be assessed. At the third stage, “the underlying policy considerations that are engaged when awarding private law damages against state actors may be relevant when awarding public law damages directly against the state” (*Ward*, supra para 72).

30 36. With respect to the situation of prosecutorial misconduct, three broad public policy considerations can be invoked to exclude *Charter* damage awards: (1) avoiding a multiplication of legal proceedings and ensuring an efficient use of judicial resources; (2)

ensuring a careful balance between constitutional principles; and (3) fulfilling the public policy reasons associated with the strict application of the tort of malicious prosecutions.

(i) *Efficient use of judicial resources*

37. The fact that Crown prosecutors are involved where the entire machinery of justice is also involved has some heightened relevance where prosecutorial misconduct is alleged. Several longstanding principles promote the efficient use of judicial resources through a reduction in the number of proceedings and ensuring a “direct and early access
10 to *Charter* remedies in forums competent to issue such relief” (974649 *Ontario*, supra para 75). Those principles also apply where infringements to the Constitution are raised.

38. To allow a challenge to prosecutorial misconduct outside of the criminal proceedings where they occur, even when it involves *Charter* breaches, opens the door to multiple proceedings on the same subject matter. In 974649 *Ontario*, supra para 79, this Court confirmed

20 a front-line role for statutory criminal courts in dispensing *Charter* remedies, with the superior courts occupying a complete and concurrent, but primarily residual role in proceedings not originating before them. [...] Provincial offences courts, like other criminal courts, are the preferred forum for issuing *Charter* remedies in the cases originating before them, where they will have the “fullest account of the facts available” [...]. This is particularly true where the *Charter* violation relates to the conduct of the trial[.]

[Underlined in the original]

According to *Krieger*, supra para 47, and *Anderson*, supra paras 57-58, the presiding judges are fully empowered to sanction tactics and conducts of Crown prosecutors, even those that do not amount to *Charter* violations or abuses of processes. Even in the exercise of prosecutorial discretion, the Crown’s actions can be reviewed, albeit pursuant
30 to a strict evidentiary threshold demonstrating a prima facie case of egregious conduct: *Nixon*, supra.

39. The doctrines of collateral attacks and res judicata both protect against re-litigating issues already disposed of, as well as issues that should have formed part of the original litigation. Any complaint against Crown prosecutors should therefore be formulated first

and foremost within the criminal proceedings where they occur, or in the appeal process associated thereto. However, this rule has also limited application where fraud or new evidence is discovered: *R. v. Wilson*, [1983] 2 SCR 594 pp. 599-600 & 604.

40. Civil proceedings against the actions of Crown prosecutors, albeit formulated in the form of an award of damages, amount essentially to an attack against the criminal proceedings where the alleged misconduct occurred. That previous proceedings concluded in favour of an accused says nothing about the attention the alleged prosecutorial misconduct may have received from the original tribunal. As explained in
10 the preceding section, it is implicit in our judicial system that the prosecutor's actions were likely screened through the procedural safeguards of the previous litigation.

41. Actually, even where the previous proceedings did not conclude in favour of the accused and *Charter* infringements are subsequently established, this Court generally refuses to revisit the previous proceedings. See *R. v. Thomas*, [1990] 1 SCR 713, *R. v. Sarson*, [1996] 2 SCR 223, and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 SCR 3, where the legitimacy of judicial findings were subsequently challenged on constitutional grounds. In *Sarson*, this Court refused to
20 discharge an accused incarcerated pursuant to a provision subsequently declared unconstitutional. The same result inevitably follows from the *Reference re Manitoba Language Rights*, [1985] 1 SCR 721. In the 1998 *Provincial Court Judges' Reference*, this Court refused to revisit all judicial findings rendered by tribunals found not to be independent.

42. This Court seems more likely to reconsider previous final judicial findings on *Charter* grounds where jurisdictional errors are demonstrated: see *Sarson*, supra paras 42-44; *R. v. Gamble*, [1988] 2 SCR 595 p. 630. In *Gamble*, "the overwhelmingly significant fact [was] that the applicant was not 'properly convicted and sentenced'. She was convicted and sentenced under the wrong law" (p. 630). There were no allegations of
30 irregularities with the proceedings. As further explained (p. 639): "rendering a conviction and sentence under the wrong provisions of the *Criminal Code* seems to me

clearly to constitute jurisdictional error. Certainly the defect is apparent on the face of the warrant of committal and an appreciation of the error does not require a re-trial on the merits or an evaluation of the evidence presented at trial". The same cannot usually be said where prosecutorial misconduct is concerned.

10 43. Therefore, absent fraud or jurisdictional error, the doctrines of collateral attacks and res judicata preclude a re-litigation of issues arising from previous proceedings. It fosters an efficient use of scarce judicial resources and ensures that the issues are presented to the "front-line" tribunal with the "fullest account of the facts available". To allow a separate cause of action for *Charter* violations occurring in the course of a previous criminal trial encourages multiple legal proceedings.

20 44. In principle, *Charter* violations associated with criminal proceedings would not be different from *Charter* violations associated with civil proceedings: see *Chiasson v. Chiasson* (1999), 222 NBR (2d) 233 paras 4-5 (NBCA). The only difference could be the extent of damages suffered although incarceration for contempt is also possible in the context of civil proceedings. To allow the claim of the Appellant in this case would likely open up similar claims in other contexts against all state participants in the proceedings, possibly even the judiciary.

(ii) *Balancing of constitutional principles*

45. A second consideration that weighs in favour of excluding prosecutorial misconduct from judicial review outside of the proceedings within which it occurs derives from the following statement in *Krieger*, supra para 3:

30 It is a constitutional principle that the Attorneys General of this country must act independently of partisan concerns when exercising their delegated sovereign authority to initiate, continue or terminate prosecutions. So long as they are made honestly and in good faith, prosecutorial decisions related to this authority are protected by the doctrine of prosecutorial discretion.

[Underline added]

See also paras 30 to 32 and 45. This Court is explicit that this rule has the status of a constitutional principle and one part of the Constitution cannot be used to eliminate another. At para 32, this Court further stated:

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

That rationale closely resembles the one invoked by this Court to limit the tort of malicious prosecution. In fact, this Court has written that the decision to bring the prosecution of a charge laid by police falls squarely within the “core elements of prosecutorial discretion” (*Krieger*, supra para 46). See also *Miazga*, supra paras 45-52.

46. To allow an increased supervision of decisions of Crown prosecutors, in addition to diluting the constitutional principle referred to above, would greatly interfere in the daily operations of our criminal justice system and its adversarial character: *Anderson*, supra paras 31 & 37. Or, as also stated in *Anderson*: “The imposition of a sweeping duty that opens up for routine judicial review all of the aforementioned decisions is contrary to our constitutional traditions. It cannot be a principle that is considered fundamental to the way in which our legal system ought fairly to operate” (para 32).

20 47. These considerations are also present where the judicial review is sought on *Charter* grounds. As this Court did in *Nixon* and *Anderson*, supra, a careful balancing of constitutional principles is necessary in order to preserve a viable criminal justice system.

(iii) *Public policy reasons underlying the tort of malicious prosecutions*

48. Thirdly, as stated by Chief Justice Lamer in *Nelles*, supra p 199, “[t]here is no doubt that the policy considerations in favour of absolute immunity have some merit”. The AGNB is not here arguing in favour of an absolute immunity. However, the public policy considerations invoked to limit the tort of malicious prosecutions (*Miazga*, supra para 50) are still relevant in the *Charter* context. They are, generally: (1) to encourage trust and confidence in the impartiality of prosecutors; (2) to avoid a chilling effect on prosecutors’ exercise of discretion; and (3) the availability of alternative remedies (*Nelles*, supra pp 183 & 195-98).

49. The AGNB submits that it is not unusual to see common law and *Charter* doctrines converge into one whole. In fact, in relation to abuse of process, the Court, in *O'Connor*, supra para 59-71, applied an analysis that led to the integration of a common law doctrine within the scheme of the *Charter*. Most interestingly, it also involved allegations of prosecutorial misconduct and the disclosure of information. Therefore, the fact that some considerations were formulated in the context of a common law cause of action does not automatically preclude them from a *Charter* analysis.

10 50. A similar comment was formulated by this Court in *Ward*, supra para 43. When determining whether an award of damages pursuant to s. 24(1) of the *Charter* is “appropriate and just”, private law tort principles can inform public law claims against the Crown:

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.

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In fact, if the narrow malicious prosecution cause of action can be circumvented by alleging a *Charter* breach instead of a claim in torts, the principles supporting the restricted tortious cause of action would be effectively defeated.

PART IV – COSTS

51. The AGNB does not seek costs on this intervention and argues that none should be ordered against him.

30

PART V – ORDER SOUGHT

52. Pursuant to par. 71(5)(c) of the *Rules of the Supreme Court of Canada*, an Attorney General intervening in response to a Notice of Constitutional Question is entitled to 10

minutes on oral argument and it is respectfully requested that the AGNB be allocated the stated time.

53. The AGNB submits that the constitutional question should be answered in the negative.

RESPECTFULLY SUBMITTED this 22th day of October 2014.

10

**ATTORNEY GENERAL OF THE PROVINCE
OF NEW BRUNSWICK, Intervener**

Per: _____

Gaetan Migneault

Solicitor and Agent of the Attorney General

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Per: _____

Kathryn Gregory

Solicitor and Agent of the Attorney General

PART VI – TABLE OF AUTHORITIES

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PART VII – STATUTES

CANADIAN CHARTER OF RIGHTS AND FREEDOMS	CHARTE CANADIENNE DES DROITS ET LIBERTÉS
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. 8. Everyone has the right to be secure against unreasonable search or seizure. 9. Everyone has the right not to be arbitrarily detained or imprisoned. 10. Everyone has the right on arrest or detention (a) to be informed promptly of the reasons therefor; (b) to retain and instruct counsel without delay and to be informed of that right; and (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful. 11. Any person charged with an offence has the right (a) to be informed without unreasonable delay of the specific offence; (b) to be tried within a reasonable time; (c) not to be compelled to be a witness in proceedings against that person in respect of the offence; (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale. 8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives. 9. Chacun a droit à la protection contre la détention ou l'emprisonnement arbitraires. 10. Chacun a le droit, en cas d'arrestation ou de détention : a) d'être informé dans les plus brefs délais des motifs de son arrestation ou de sa détention; b) d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit; c) de faire contrôler, par habeas corpus, la légalité de sa détention et d'obtenir, le cas échéant, sa libération. 11. Tout inculpé a le droit : a) d'être informé sans délai anormal de l'infraction précise qu'on lui reproche; b) d'être jugé dans un délai raisonnable; c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche; d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

(e) not to be denied reasonable bail without just cause; (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment; (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations; (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment. 12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment. 13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence. 14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter. 24(2) (2) Where, in proceedings under subsection (1), a court concludes that evidence	e) de ne pas être privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable; f) sauf s'il s'agit d'une infraction relevant de la justice militaire, de bénéficier d'un procès avec jury lorsque la peine maximale prévue pour l'infraction dont il est accusé est un emprisonnement de cinq ans ou une peine plus grave; g) de ne pas être déclaré coupable en raison d'une action ou d'une omission qui, au moment où elle est survenue, ne constituait pas une infraction d'après le droit interne du Canada ou le droit international et n'avait pas de caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations; h) d'une part de ne pas être jugé de nouveau pour une infraction dont il a été définitivement acquitté, d'autre part de ne pas être jugé ni puni de nouveau pour une infraction dont il a été définitivement déclaré coupable et puni; i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence. 12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités. 13. Chacun a droit à ce qu'aucun témoignage incriminant qu'il donne ne soit utilisé pour l'incriminer dans d'autres procédures, sauf lors de poursuites pour parjure ou pour témoignages contradictoires. 14. La partie ou le témoin qui ne peuvent suivre les procédures, soit parce qu'ils ne comprennent pas ou ne parlent pas la langue employée, soit parce qu'ils sont atteints de surdité, ont droit à l'assistance d'un interprète. 24(2) (2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des
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was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.