File Number: 35745

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

BETWEEN:

IVAN WILLIAM MERVIN HENRY

Appellant (Respondent)

- and -

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

Respondent (Appellant)

- and –

ATTORNEY GENERAL OF CANADA

Respondent (Respondent)

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FACTUM OF THE INTERVENER

PART I – OVERVIEW AND FACTS

Overview

1. Awarding damages for prosecutorial misconduct below the level of malice would be novel in Canadian law. To show how novel, Alberta has accepted this Court's invitation in *Vancouver (City) v Ward* to explore related fields of law for applicable policy considerations and practical wisdom.[1] The rationales and results are remarkably consistent, even in areas that do not invoke prosecutorial discretion or immunity.

2. Unsurprisingly, Alberta's survey reveals proportionality between conduct and remedy. Simple *Charter* breaches will lead to minor remedies, such as adjournments or disclosure orders. For greater remedies, a surprising consistency appears: misconduct is required, at a level proportionate to the remedy sought. Professional discipline requires bad faith. Criminal costs generally require misconduct or equivalent misbehaviour. Damages in related torts, even beyond malicious prosecution, require malice.

3. These disparate fields also share policy commonalities. Thresholds are set high not only to limit the award of damages, but to curtail nuisance suits. The tort of misfeasance in public office recognizes that public servants must not be deterred from making hard decisions. The tort of abuse of process recognizes that litigants must not be deterred from accessing the courts. Applying these concepts, and the jurisprudence on criminal costs, it follows that Crown counsel must not be deterred from carrying out their public duties.

4. The rationales and results of criminal law, *Charter* law, and tort law all lead to the same conclusion: Even for *Charter* breaches, damages against the Crown will only be justified at the level of malice.

Facts

5. The Attorney General of Alberta takes no position on the facts of the case.

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[1] *Vancouver (City) v Ward*, [2010] 2 SCR 28 (SCC) at paras 22, 43 [Tab 8]

PART II – ISSUES

6. This intervention addresses only the constitutional question as framed by this Court:

> 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?

Alberta's position on this issue is stated at paragraph 4 above.

PART III – ARGUMENT

Charter breaches: the hierarchy of remedies

7. This case presents a novel question: when the Crown has breached the *Charter*, at what threshold, if any, are damages an appropriate remedy? In the second section of this factum, Alberta will discuss damages against the Crown. First, however, it seems sensible to discuss *Charter* breaches by the Crown – not by the police or the courts or any other arm of government, but by Crown prosecutors during the course of a prosecution.

8. Experience shows that the most likely scenario is a breach of the Crown's disclosure obligations. Though much of the following discussion can be extended to *Charter* breaches generally, Alberta will begin by focusing on disclosure, its evolution and its present remedies. Having learned from the past, today's criminal justice system provides numerous checks against and remedies for disclosure problems. In general, higher thresholds must be met for the award of more significant remedies.

Disclosure: Lessons learned

9. Canadian Crown prosecutors may not have perfected the art of disclosure yet, but we have come a very long way. The disclosure practices of 30 years ago would be unrecognizable by today's standards. Then, Crown agencies typically provided disclosure on a voluntary basis, but no mandatory framework was in place.[2]

10. Jurisprudence on disclosure was scant. In 1952, this Court held that the Crown has a duty to "bring forward every material fact", though it was not clear that it had pre-trial disclosure in

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[2] *R v Stinchcombe*, [1991] 3 SCR 326 (SCC) at p 332 [Tab 19]

mind.[3] In an *obiter* statement in 1972, this Court held that, absent a legal obligation to do so, the Crown's failure to disclose evidence does not result in an unfair trial.[4] In 1988, the British Columbia Court of Appeal divided on a disclosure issue, with the majority finding "no affirmative duty on Crown counsel '...to give the defence statements of witnesses whose evidence he deems to be adverse to the prosecution or supportive of the defence.'"[5] The dissent, later upheld by this Court, found a general duty to disclose all evidence the Crown intends to adduce and all potentially exculpatory evidence.[6]

11. Even in 1991, when this Court decided two cases on the Crown's obligations to disclose, "the law with respect to the duty of the Crown to disclose [was] not settled."[7] In *R v C (MH)*,[8] this Court found a common law duty to disclose. In *R v Stinchcombe,* it found that an accused has a right to disclosure under section 7 of the *Charter*. That finding was motivated by various studies and experiments through the 1970s and 1980s, as well as a report on a wrongful conviction.[9]

12. Since then, disclosure has been the subject of ongoing expansion and refinement, with some issues presenting significant challenges. For example, fair trial rights must be balanced with competing privacy or safety interests in counselling records,[10] past complaints of victimization,[11] and informant protection.[12] Though disclosure is not typically considered a core aspect of prosecutorial discretion,[13] there are times when disclosure issues can force core decisions about the continuation or termination of a prosecution. For instance, a prosecutor may be required to stay charges if the court orders disclosure of information that could identify an

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[3] *Lemay v R*, [1952] 1 SCR 232 at 257 (SCC) [Not reproduced] ; cited in *R v Stinchcombe*, [1991] 3 SCR 326 (SCC) at p 338 [Tab 19]; *R v C (MH)*, [1991] 1 SCR 763 (SCC) at p 774 [Tab 13]

[4] *Duke v R*, [1972] SCR 917 (SCC) [Not reproduced], cited in *R v C (MH)*, [1991] 1 SCR 763 (SCC) at p 774 [Tab 13]

[5] *R v C (MH)*, 1988 CarswellBC 789 (CA) at para 40 [Tab 14]; reversed by *R v C (MH)*, [1991] 1 SCR 763 (SCC) [Tab 13]

[6] *R v C (MH)*, 1988 CarswellBC 789 (CA) at paras 94-97 [Tab 14]; see also *R v C (MH)*, [1991] 1 SCR 763 (SCC) [Tab 13]

[7] *R v Stinchcombe*, [1991] 3 SCR 326 (SCC) at p 331 [Tab 19]; see also *R v C (MH)*, [1991] 3 SCR 326 (SCC) [Tab 13]

[8] *R v C (MH)*, [1991] 3 SCR 326 (SCC) [Tab 13]

[9] *R v Stinchcombe*, [1991] 3 SCR 326 (SCC) at pp 331-332, 336-338 [Tab 19]

[10] *R v O'Connor,* [1995] 4 SCR 411 (SCC) [Not reproduced]

[11] *R v Quesnelle*, 2014 SCC 46 (SCC) [Not reproduced]

[12] *R v Scott*, [1990] 3 SCR 979 (SCC) pp 992-993 [Tab 18]. See also *R v Leipert*, [1997] 1 SCR 281 (SCC) [Not reproduced]

[13] *Krieger v Law Society (Alberta)*, [2002] 3 SCR 372 (SCC) at para 54 [Tab 2]

informant.[14] Or she may face a public interest decision between pursuing a sexual assault prosecution and disclosing the counselling records of a fragile victim.

13. Led by this Court's jurisprudence, the criminal justice system has learned from its errors of the distant past and has reshaped itself to prevent them as much as possible. Notoriously, the volume of disclosure is greater than ever before.[15] Police, prosecutors and defence counsel are all more alive to their responsibilities than ever before;[16] each may catch errors or omissions made by the other. Though refinements (and errors) continue, the stark disclosure failures of the past are unlikely to be repeated.

Functional remedies for disclosure breaches

14. There is no question that a criminal trial court has the power to control its own process. This power may be triggered by failings of fairness or order, such as incivility, abusive examination of witnesses, or ignored rulings. Of course, a trial court also has the power to remedy *Charter* breaches.

15. Before or during a trial, the court is interested in two disclosure-related questions: has the accused received the disclosure to which he is entitled? and if not, what must be done to enable the trial to proceed fairly? The first remedy for a disclosure breach is a disclosure order. It may be accompanied by ancillary orders to give it functional effect – adjournments are common; mistrials or orders affecting the leading of evidence less so.[17] The trial court's role is to solve *present* problems, observable in their context, with *functional* remedies.[18] Since these remedies are relatively minor, the threshold for awarding them is relatively low.

16. The exception is a judicial stay of proceedings, which may be imposed when the Crown's courtroom conduct has been "egregious and seriously compromises trial fairness and/or the integrity of the justice system" or "shocks the conscience of the community and is so detrimental

[14] eg *R v Scott*, [1990] 3 SCR 979 (SCC) at pp 986-987, 992-993 [Tab 18]

[15] eg Adrian Humphreys, "'The system is sick': Canada's courts are choking on an increase in evidence", *The National Post*, (3 May 2013), online: <http://news.nationalpost.com/2013/05/03/canadas-courts-are-choking-on-an-increase-in-evidence/?__federated=1> [Tab 21]

[16] "As officers of the court, defence counsel have an obligation to pursue disclosure diligently": *R v Dixon*, [1998] 1 SCR 244 (SCC) at para 37 [Tab 15]

[17] *R v Robinson*, 1999 CarswellAlta 1192 (CA) at para 30 [Tab 17]; *R v Bjelland*, [2009] 2 SCR 651 (SCC) [Not reproduced]

[18] *R v Anderson*, 2014 SCC 41 (SCC) at paras 57-59 [Tab 11]

to the proper administration of justice that it warrants judicial intervention." In other words, the threshold for awarding the ultimate functional remedy is extremely high[19] – though still somewhat lower than the malice requirement for prosecutorial liability in tort.[20]

17. Post-trial, an appellate court may remedy a past disclosure breach with a new trial or a stay of proceedings. A finding of breach does not guarantee the award of such significant remedies. Rather, the existence of a breach and the award of a remedy are separate analytical steps, carrying distinct tests. To award a new trial, an appellate court must be satisfied that (i) the non-disclosure breached the *Stinchcombe* standard, and (ii) there is a reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process. In other words, the appellant must establish a reasonable possibility that his ability to make full answer and defence was prejudiced. To award the still more significant remedy of a stay of proceedings, a still more stringent test is required: the appellant must establish that his right to a fair trial has been impaired irreparably.[21]

18. There is one more potentially relevant factor on appeal: the parties' conduct at the trial level. Since "[t]he very nature of the disclosure process makes it prone to human error," both counsel are obligated to make honest efforts to secure complete disclosure. If defence counsel failed to pursue disclosure diligently, that failure may militate against the award of any remedy.[22]

Financial remedies for disclosure breaches

19. In criminal matters, financial remedies take the rare form of costs against the Crown. Costs may be rooted in the court's ability to control its own process or as part of its *Charter* jurisdiction.[23] Either way, an award of costs will typically require some degree of deliberate misconduct by the prosecution.

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[19] *R v Anderson*, 2014 SCC 41 (SCC) at para 50 [Tab 11]; *R v Nixon*, [2011] 2 SCR 566 (SCC) at paras 34, 36, 37 [Tab 16]

[20] *C (G) v Ontario (Attorney General)*, 2014 CarswellOnt 6733 (SCJ) at paras 52-54 [Tab 1]

[21] *R v Dixon*, [1998] 1 SCR 244 (SCC) at paras 23-24, 33-35 [Tab 15]

[22] *R v Dixon*, [1998] 1 SCR 244 (SCC) at para 37 [Tab 15]. If the Crown's efforts to complete disclosure are not honest, professional discipline may follow: see below at para 27.

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

20. As a general rule, costs are not available as against the Crown in criminal litigation.[24] Unlike a private litigant, the Crown does not commence its actions for its own gain, but to benefit the public interest. "There is a concern that if costs awards were routine, the discretion of the Crown when acting in the public interest would be unduly influenced or fettered."[25]

21. In rare instances, however, costs may be awarded against the Crown. Purposively, a court's power to award costs flows from its duty to guard against abuse of process. Jurisdictionally, a court's power to award costs arises either as part of its ability to control its own process, or as a s 24(1) remedy for a *Charter* breach. In either case, because of the unique role of the Crown, and because of the purpose of preventing abuse of process, the power to award costs is to be exercised most sparingly.[26]

22. This Court's most-cited comment on the threshold for awarding criminal costs was made in *obiter,* during the remedy's relative infancy. Still, it was clear that the threshold was a high one:

> Crown counsel is not held to a standard of perfection, and costs awards will not flow from every failure to disclose in a timely fashion. Rather, the developing jurisprudence uniformly restricts such awards, at a minimum, to circumstances of a marked and unacceptable departure from the reasonable standards expected of the prosecution.[27]

This passage clearly rules out any award of costs for mere breach or negligence.[28] Arguably, it left open the possibility of a *minimum* threshold akin to gross negligence. As the jurisprudence continued to develop, however, few courts were willing to award costs on a "marked and unacceptable departure" (MUD) standard, without more. Instead, most have recognized a standard of "MUD Plus".

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[24] *R v Taylor*, 2008 CarswellNS 12 (CA) at para 43 [Tab 20]; *R v Brown*, 2009 CarswellOnt 5072 (CA) at para 16 [Tab 12]

[25] *R v Brown*, 2009 CarswellOnt 5072 (CA) at para 18 [Tab 12]; *R v Robinson*, 1999 CarswellAlta 1192 (CA) at paras 29-30 [Tab 17]

[26] *R v 974649 Ontario Inc*, [2001] 3 SCR 575 (SCC) at paras 80-81 [Tab 10]; *R v Taylor*, 2008 CarswellNS 12 (CA) at para 54 [Tab 20]; *R v Robinson*, 1999 CarswellAlta 1192 (CA) at paras 29-30 [Tab 17]; *R v Brown*, 2009 CarswellOnt 5072 (CA) at para 17 [Tab 12]

[27] *R v 974649 Ontario Inc*, [2001] 3 SCR 575 (SCC) at para 87 [Tab 10]

[28] See also *R v Robinson*, 1999 CarswellAlta 1192 (CA) at paras 29-30 [Tab 17]; *R v Cole*, 2000 CarswellNS 80 (CA) at para 61 [Not reproduced]; *R v Bhatti*, 2006 CarswellBC 18 (CA) at para 33 [Not reproduced]

23. Appellate courts have commonly required MUD plus some element of deliberate misconduct."[29] Specific examples have included MUD plus deliberate *Charter* breach amounting to abuse of process;[30] MUD plus misconduct or exceptional circumstances akin to abuse of process;[31] MUD plus abuse of process occasioned by prosecutorial misconduct;[32] malicious intent or intentional breach;[33] and misconduct or a serious interference with the authority of the court or with the administration of justice.[34]

24. Sometimes appellate courts have applied an implicit MUD Plus standard by defining MUD as including deliberate misconduct.[35] A leading example is *R v Taylor,* a 2008 decision of the Nova Scotia Court of Appeal. After surveying the jurisprudence, the Court drew three conclusions:

(a) A criminal court may award costs against the Crown in "exceptional circumstances";

(b) Costs may flow from Crown misconduct that goes "well beyond inadvertence or carelessness, and amount[s] to oppressive or otherwise improper conduct."

(c) A costs award against the Crown is reserved to circumstances of MUD, "or if not involving prosecutorial misconduct, conduct by the police or systemic failures so extraordinary as to be virtually unique in character."[36]

R v Taylor situated MUD well above carelessness, at a level of oppressive misconduct. If the particular situation did not involve misconduct, then the Court would require MUD plus some other extraordinary failure.

25. Circumstances calling for costs have not been exhaustively defined, but the jurisprudence uses language "intended to highlight the unique nature of such an award." In other words, even as a *Charter* remedy, "absent improper or oppressive conduct on the part of the Crown, an

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[29] eg *R v Neil*, 2003 CarswellAlta 191 (CA) at para 8 [Not reproduced]
[30] *R c Leboeuf*, 2005 CarswellQue 13709 (CA) at paras 40, 45, 47, 61 [Not reproduced]
[31] *R v Tiffin*, 2008 CarswellOnt 2424 (CA) at paras 94-95 [Not reproduced]
[32] *R v Arcand*, 2008 CarswellOnt 4971 (CA) at paras 77-78 [Not reproduced]
[33] *R v Speirs*, 2012 CarswellOnt 14603 (CA) at para 93 [Not reproduced]
[34] *R v Magda*, 2006 CarswellOnt 6734 (CA) at para 18 [Not reproduced]
[35] eg *R v Leduc*, 2003 CarswellOnt 2926 (CA) at para 161 [Not reproduced]; *R v Sweeney*, 2003 CarswellMan 419 (CA) at para 62 [Not reproduced]
[36] *R v Taylor*, 2008 CarswellNS 12 (CA) at para 54 [Tab 20]

accused will not generally be entitled to costs unless the circumstances are 'remarkable.'"[37] Other "remarkable" circumstances, beyond deliberate misconduct, have included obvious systemic failures, the known consequence of which was a pattern of *Charter* breaches;[38] and cases that were not strictly criminal, but quasi-civil, possibly with implications for the public interest or third party interests.[39] (Even this power should be used sparingly, since systemic or public interest issues arise commonly in criminal law, and should not be used to defeat the costs threshold:[40]) A few courts have awarded costs where there has been MUD with no explanation from the Crown, hinting at adverse inferences.[41] There are also some cases that may appear to have applied a simple MUD standard. In these cases, the courts typically found no MUD on the facts, so there was no need to go further.[42]

26. By adopting a MUD Plus standard, appellate courts have recognized that "[i]n the absence of proof of misconduct, an award of costs against the Crown would be a harsh penalty for a Crown officer carrying out such public duties."[43] An inadvertent or careless breach will not suffice. A *bona fide* disagreement about the law will not suffice; costs will not necessarily be justified for decisions that are deliberate but not improper. The threshold for costs must remain high, lest the Crown and the courts be inundated with applications for costs, and with even more allegations of *Charter* breach in the hope of obtaining costs. In other words, the availability of costs must be restricted for the same "reasons for limiting the award of costs against the Crown in other circumstances."[44]

External review of disclosure breaches

27. Outside of the criminal litigation process itself, only one forum is currently capable of reviewing a prosecutor's tactics or conduct before the court. Disclosure engages the prosecutor's

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[37] *R v Taylor*, 2008 CarswellNS 12 (CA) at paras 15, 49, 50, 54 [Tab 20]

[38] *R v Brown*, 2009 CarswellOnt 5072 (CA) at para 21 [Tab 12]. See also *R v Zarinchang*, 2010 CarswellOnt 2253 (CA) at para 71 [Not reproduced]. By contrast, "dysfunctional organization" will not justify an award of costs: *R v Munoz*, 2008 CarswellOnt 719 (CA) at paras 10-11 [Not reproduced]

[39] *R c Caron*, 2007 CarswellAlta 522 (QB) at para 44 [Not reproduced]; *R v Connolly*, 2007 CarswellNfld 16 (CA) at paras 58-65 [Not reproduced]; *R v Ciarniello*, 2006 CarswellOnt 5162 (CA) at paras 38-42 [Not reproduced].

[40] *R v Griffin*, 2011 CarswellAlta 1056 (CA) at paras 40, 41 [Not reproduced]

[41] *R v Logan*, 2002 CarswellOnt 1592 (CA) at para 4 [Not reproduced]; *R c Caron*, 2007 CarswellAlta 522 (QB) at para 23 [Not reproduced]

[42] *R v Krueger*, 2006 CarswellAlta 221 (CA) at para 30 [Not reproduced]; *R v Pidskalny*, 2012 CarswellSask 131 (CA) at para 11 [Not reproduced]

[43] *R v Robinson*, 1999 CarswellAlta 1192 (CA) at para 29 [Tab 17]

[44] *R v Robinson*, 1999 CarswellAlta 1192 (CA) at para 30 [Tab 17]

professional duties and may therefore be reviewed by a law society for dishonesty, bad faith or improper purpose. To impose professional discipline in a disclosure matter, a law society would first need to find a breach of the duty to disclose. It must then go on to consider whether the prosecutor acted dishonestly or in bad faith. This intention-based threshold is higher than mere breach, negligence or gross negligence.[45]

Hierarchy of remedies

28. Today, it is hard to believe that stark absences of disclosure could have been the norm in past decades. Having learned from academic studies, wrongful conviction reports and appellate jurisprudence, all participants in the criminal process are now acutely aware of their disclosure obligations. The system itself is more robust now: when errors or disputes do arise, there are several opportunities for review and remedy before, during and after the trial. After trial, the available remedies are more significant. Commensurately high thresholds must be met to justify their award.

29. Costs, awarded at a MUD Plus threshold, are a rare financial remedy for a present wrong. The next question is whether or on what test damages may be awarded as a financial remedy for a past wrong.

Damages: malice required, with or without prosecutorial discretion

30. Before the Crown should be liable for damages for a *Charter* breach, malice should be proven. Alberta agrees with the Attorneys General of British Columbia and Canada that this result is mandated by prosecutorial independence and qualified Crown immunity, as the jurisprudence on malicious prosecution has concluded. Rather than repeat those submissions, however, Alberta will explore other "existing causes of action against state actors, [which] 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."[46]

[45] *Kreiger v Law Society Alberta)*, [2002] 3 SCR 372 (SCC) at paras 3, 5, 30, 50, 51, 55 [Tab 2]
[46] *Vancouver (City) v Ward*, [2010] 2 SCR 28 (SCC) at para 43 [Tab 8]

31. Most closely related, and most instructive, are the torts of misfeasance in public office and abuse of process. Neither tort targets prosecutors.[47] Neither engages any quasi-judicial function, Crown independence or core discretion. Still, for policy reasons that would apply equally in the prosecutions context, the elements of both torts include high intentionality and improper purpose akin to malice.

Tort of misfeasance in public office

32. The tort of misfeasance in public office "involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff."[48] Its salient elements are (i) deliberate unlawful conduct[49] by a public officer in the exercise of public functions and (ii) awareness or knowledge that the conduct is unlawful and that it is likely to injure the plaintiff.[50]

33. The tort exists to protect each citizen's reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions.[51] Its rationale is that "in a legal system based on the rule of law, executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes."[52]

34. Limitations on the scope of the tort also serve a protective purpose. "In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens."[53] Even a blatant disregard of duty will not ground the tort; nor will negligence, inadvertence, or inadequate resources.[54] To balance a public officer's ability to act with the public's need to be protected from bad-faith decisions, a high double-threshold of

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[47] Both may lie against prosecutors, but would be subsumed in the tort of malicious prosecution if the latter were proven: *O (J) v Alberta*, 2013 CarswellAlta 2415 (QB) at para 51 [Tab 5]
[48] *Odhavji Estate v Woodhouse*, [2003] 3 SCR 263 (SCC) at para 23 [Tab 6]
[49] Or failure to act: *Odhavji Estate v Woodhouse*, [2003] 3 SCR 263 (SCC) at para 24 [Tab 6]
[50] Additionally, a plaintiff must prove the other elements common to all torts: that the tortious conduct was the legal cause of her injuries and that the injuries are compensable in tort law. *Odhavji Estate v Woodhouse*, [2003] 3 SCR 263 (SCC) at para 32 [Tab 6]
[51] *Odhavji Estate v Woodhouse*, [2003] 3 SCR 263 (SCC) at para 30 [Tab 6]
[52] *Odhavji Estate v Woodhouse*, [2003] 3 SCR 263 (SCC) at para 26 [Tab 6], qtng *Three Rivers District Council v. Bank of England (No 3)*, [2000] 2 WLR 1220, [2000] 3 All ER 1, (2000) 150 New LJ 769 (UK HL) [Not reproduced]
[53] *Odhavji Estate v Woodhouse*, [2003] 3 SCR 263 (SCC) at para 28 [Tab 6]
[54] *Odhavji Estate v Woodhouse*, [2003] 3 SCR 263 (SCC) at paras 26, 29 [Tab 6]

intentionality has been imposed: knowledge that the conduct was unlawful *and* knowledge or subjective recklessness that it would likely injure the plaintiff.[55]

Tort of abuse of process

35. Though there are differences between the two, the tort of abuse of process has been described as the "civil equivalent" to the tort of malicious prosecution.[56] A party may be liable in this tort if he initiated an action for an improper purpose unrelated to the action itself – for instance, to extort property or to impede an investigation.[57] The tort has two elements: (i) "a collateral and improper purpose, such as extortion," and (ii) "a definite act or threat, in furtherance" of the illegitimate purpose. "Some such overt conduct is essential, because there is clearly no liability when the defendant merely employs regular legal process to its proper conclusion, albeit with bad intentions."[58]

36. The improper purpose is the gravamen of liability. It is immaterial whether the abusive suit was founded on reasonable cause or what its outcome was.[59] The tort will not be made out merely because its effect may be to antagonize, impoverish or intimidate the opposing party, or to eliminate a competitor.[60] The strict requirement for an external improper purpose has been imposed to stop "a proliferation of abuse of process claims that might themselves be an abusive means to discourage access to justice."[61] The tort aims to prevent flagrant abuse of the court process, without deterring its use. Members of the public must be able to assert their rights without fear of liability beyond costs.[62]

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[55] *Odhavji Estate v Woodhouse*, [2003] 3 SCR 263 (SCC) at paras 25, 28 [Tab 6]; also *Elder Advocates of Alberta Society v Alberta*, [2011] 2 SCR 261 (SCC) at para 78 [Not reproduced]

[56] *O (J) v Alberta*, 2013 CarswellAlta 2415 (QB) at para 48 [Tab 5]

[57] Paul Perell, "Tort Claims for Abuse of Process", 33 Advoc Q 193 2007at pgs 193-194 [Tab 22]

[58] *O (J) v Alberta*, 2013 CarswellAlta 2415 (QB) at para 49 [Tab 5], citing *Metrick v. Deeb,* (2003), 16 CCLT (3d) 298 (ONCA) [Not reproduced]

[59] *M (A) v Matthews*, 2003 CarswellAlta 1629 (QB) at para 18 [Not reproduced]; *Folland v Ontario*, 2003 CarswellOnt 1087 (CA) at para 21 [Not reproduced], (leave refused 2003 CarswellOnt 3811 (SCC)) [Not reproduced]; *Teledata Communications Inc v Westburne Industrial EnterprisesLtd*, 1990 CarswellOnt 812 (SC) at para 9 [Not reproduced]; *Scintilore Explorations Ltd v Larche*, 1999 CarswellOnt 2345 (SCJ) at paras 209, 215-219 [Not reproduced]

[60] *Rocky Mountain Rail Society v H & D Hobby Distributing Ltd*, 1995 CarswellAlta 94 (QB) at para 20 [Tab 7], qtng *Poulos v. Matovic*, 1989 CarswellOnt 681 (SC, HCJ) at para 6 [Not reproduced]; *Westjet Airlines Ltd v Air Canada*, 2005 CarswellOnt 2101 (SCJ) at para 19 [Tab 9]

[61] Paul Perell, "Tort Claims for Abuse of Process", 33 Advoc Q 193 2007 at p 203 [Tab 22]

[62] *Rocky Mountain Rail Society v H & D Hobby Distributing Ltd*, 1995 CarswellAlta 94 (QB) at para 15 [Tab 7], qtng *Teledata Communications Inc v Westburne Industrial EnterprisesLtd*, 1990 CarswellOnt 812 (SC) at para 9 [Not reproduced]

Practical wisdom has established a malice threshold

37. The policy considerations underpinning misfeasance in public office and abuse of process were not designed to apply to prosecutions, but they could.[63] Both torts can apply to public officials. Both recognize the need to protect individuals from abuse, either via improper decisions of public officials or via improper litigation. At the same time, both torts recognize that they must not have the effect of deterring legitimate decisions or litigation, even when harm to individuals may result. In both torts, the courts' solution has been to require proof of the highest level of intentionality and an improper purpose.

38. Improper purpose in these two torts is synonymous with malice in the tort of malicious prosecution.[64] Malice has "a wider meaning than spite, ill-will or a spirit of vengeance, and includes any other improper purpose, such as to gain a private collateral advantage". It has been defined as "a primary purpose other than that of carrying the law into effect", "a deliberate and improper use of the office of the Attorney General or Crown Attorney…", and "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".[65]

39. In sum, the torts of abuse of process and misfeasance in public office require what amounts to a malice threshold, coupled with the highest levels of intentionality. Courts have imposed these requirements for public policy reasons that apply with equal or greater force to prosecutions – but that do not derive from prosecutorial independence or discretion.

<u>Conclusions drawn from practical wisdom</u>

40. The answer to the constitutional question is "no". Damages should not be awarded for prosecutorial misconduct that breaches the *Charter* absent proof of malice. To complement the submissions of the Respondents, Alberta has attempted to analyze the constitutional question using every pertinent analogy except malicious prosecution.

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[63] cf *Vancouver (City) v Ward*, [2010] 2 SCR 28 (SCC) at para 22 [Tab 8]
[64] *Miazga v Kvello Estate*, [2009] 3 SCR 339 (SCC) at para 81 [Tab 3]
[65] *Nelles v Ontario*, [1989] 2 SCR 170 (SCC) at pp 192-194, 199 [Tab 4]

41. Not every *Charter* breach merits the same remedy. For small functional problems, the courts provide small functional remedies. Thresholds for their award are low. Thresholds for new trials or stays of proceedings are higher, but still functional.

42. As the remedies become more significant, and more distant from the criminal forum, the thresholds grow higher:

- Professional discipline: failure of professional duty committed in bad faith.
- Costs: a marked and unacceptable departure from reasonable prosecutorial standards, plus misconduct or some other remarkable feature ("MUD Plus").
- Damages for misfeasance in public office: deliberate unlawful conduct, known to be unlawful, plus knowledge (or subjective recklessness) that the conduct is likely to cause harm to an individual.
- Damages for abuse of process: intentionally initiating a civil action for a separate improper purpose, such as extortion.

It is worth noting that damages are likely to be a second remedy. That is, by the time a plaintiff seeks damages for breach of a *Charter* right, he has likely already received an acquittal, a stay of proceedings, or other functional remedy.

43. For all of these public and private law remedies, in all of their different fields and with all of their different goals, intentional conduct is required. Practical wisdom has ruled out any negligence threshold.

44. For all of these remedies, there is an added requirement of improper purpose. In the contexts of professional discipline or costs, that means bad faith or misconduct. Damages will only be justified in the presence of a directed intent to cause harm, in a manner that is deliberately unlawful or otherwise intentionally abuses a public system. In other words, damages will only be justified at the level of malice.

PART IV – SUBMISSIONS ON COSTS

45. Alberta makes no submissions regarding costs.

PART V – ORDER SOUGHT

46. Alberta takes no position on the outcome of the case at bar. Pursuant to Rule 71(5)(c) of the *Rules of the Supreme Court of Canada*,[66] Alberta is prepared to present oral argument of no longer than 10 minutes at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Calgary, Alberta, this 27th day of October, 2014.

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[66] *Rules of the Supreme Court of Canada*, SOR/2002-156, s 71(5)(c) [Not reproduced]

PART VI – TABLE OF AUTHORITIES

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SECONDARY SOURCES	Cited at Paragraph No.
Adrian Humphreys, "'The system is sick': Canada's courts are choking on an increase in evidence", *The National Post*, (3 May 2013), online: <http://news.nationalpost.com/2013/05/03/canadas-courts-are-choking-on-an-increase-in-evidence/?__federated=1>	13
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PART VII – LEGISLATION AT ISSUE

No Legistation