Court 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,

-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,

-and-

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PART I
STATEMENT OF FACTS

Overview

1. The Attorney General of Manitoba (Manitoba) intervenes in this appeal to argue that it is not appropriate and just to award damages against the Crown for breach of *Charter* rights in the course of a criminal prosecution, absent proof of malice.

2. Section 24(1) of the *Charter* furnishes a wide discretion to grant responsive remedies to vindicate *Charter* rights meaningfully and effectively. However, the *Charter* was not intended to turn the legal system upside down by negating the important policy considerations that animated this Court's decision in *Nelles* to grant the Crown qualified immunity from civil liability. This Court's jurisprudence has consistently held that tort liability arising from prosecutorial decisions must have due regard to the quasi-judicial role of prosecutors and the difficult judgment calls that must be made on a daily basis in the public interest. The same policy rationale for limiting tort liability to cases of bad faith or malice applies equally when the misconduct is framed as a *Charter* violation.

3. Permitting damages for prosecutorial misconduct on a standard other than malice would be harmful to the administration of justice. It would expose prosecutors to many more civil actions for damages, resulting in the re-litigation and rehashing of many decisions made during criminal trials. Not only would this undermine the important objective of finality in the criminal process, it would divert Crown Attorneys from the exercise of their prosecutorial duties to defend civil claims and have a chilling effect on their independent decision-making.

4. Adequate alternative remedies for prosecutorial misconduct already exist within the criminal trial and appellate process. In the criminal context, the *Charter* is intended to control the power of the state and ensure that every accused receives a fair trial. The disclosure obligation is geared to avoid unfair surprise so that an accused can fully answer and defend against charges. When that duty is breached, an appropriate and just remedy should strive primarily to restore fairness of the criminal trial. If that is not possible, a new trial, or in

exceptional circumstances, a stay of proceedings may be ordered. Limiting damages against the Crown in civil actions to cases of bad faith, including malicious breaches of the *Charter*, maintains the remedial focus where it belongs: trial fairness.

5. Many safeguards exist within the criminal justice system to prevent wrongful convictions, including a wide array of remedies under s. 24(1). However, no system is perfect. *Charter* damages for prosecutorial misconduct in the criminal process must remain a rare and exceptional remedy of last resort in order to maintain the important balance struck in *Nelles* and *Miazga*. That balance lies between protecting the ability of prosecutors to perform their important quasi-judicial functions in the public interest and permitting an accused to recover damages for bad faith or malicious conduct. Regardless of whether the misconduct involves a prosecution brought for improper motives or a *Charter* breach, damages must be reserved to cases when prosecutors act maliciously so as to step outside their proper role as "ministers of justice," perverting the system of criminal justice.

Facts

6. Manitoba relies on the facts as set out in the courts below and summarized by the appellant and respondents in their factums.

PART II

QUESTIONS IN ISSUE

7. The issue on appeal is stated in the 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?

8. Manitoba submits that the Constitutional Question should be answered in the negative. *Charter* damages under s. 24(1) are not an appropriate and just remedy for breach of the Crown's disclosure obligation in a criminal prosecution absent proof of a malicious suppression of information relevant to making full answer and defence.

PART III
ARGUMENT

9. The wide discretion conferred by s. 24(1) to fashion appropriate and just remedies for *Charter* violations has never been wholly unfettered or unbounded by principle or overarching policy constraints.[1] Valid policy considerations necessary to the proper administration of justice - for example, limitation periods[2] or the need for finality in the criminal process[3] - have been recognized by this Court as precluding access to damages or other *Charter* remedies under s. 24(1). Similarly, in *Ward*, this Court held that countervailing factors such as the existence of adequate alternative remedies in tort or under the *Charter* and good governance concerns may negate the appropriateness of a s. 24(1) damage award. This list is not exhaustive.[4]

10. Manitoba submits that several countervailing factors strongly suggest *Charter* damages are not an appropriate remedy for a breach of the duty to disclose, absent malice: (1) The policy considerations identified in *Nelles, Proulx* and *Miazga* offer an important and principled restraint on the availability of *Charter* damages; (2) Adequate alternative remedies are available within the criminal trial and appellate process; and (3) Allowing *Charter* damages for prosecutorial misconduct absent malice would open the floodgates to civil claims against prosecutors and undermine finality within the criminal process. Manitoba will address each of these points below.

Allowing *Charter* damages absent malice would undermine the policy concerns in *Nelles* and render malicious prosecution redundant

11. In *Nelles, Proulx* and *Miazga*, this Court restricted prosecutors' civil liability to cases of malice or bad faith in order to protect Crown Attorneys in the exercise of their quasi-judicial functions. A prosecutor is immune from damages for failing to fulfill his or her proper role as a result of inexperience, errors in judgment or even gross negligence.[5] The requirement to prove

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[1] *Vancouver (City) v. Ward,* 2010 SCC 27 [*Ward*] at paras. 17-21, 43 [Book of Authorities, TAB 29].
[2] *Ravndahl v. Saskatchewan*, 2009 SCC 7 [Book of Authorities, TAB 28].
[3] *R. v. Sarson*, [1996] 2 S.C.R 223 [Book of Authorities, TAB 24].
[4] *Ward, supra*, at paras. 32-45.
[5] *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at p. 196-197, 199 [Book of Authorities, TAB 13]; *Miazga v. Kvello Estate*, 2009 SCC 51 at paras. 80-81 [Book of Authorities, TAB 11].

malice was a deliberate policy choice. Manitoba submits the same policy considerations equally constrain any remedial claim to *Charter* damages for prosecutorial misconduct, except in rare circumstances involving malice or bad faith. Indeed, s. 24(1) remedies were squarely in mind when *Nelles* opened the door narrowly to civil liability.[6]

12. Manitoba supports the Respondents' arguments that permitting actions against the Crown for simple negligence or gross negligence would detrimentally impact the administration of criminal justice. It would upset the careful balance this Court has established in *Nelles*, *Proulx* and *Miazga* between the need to ensure that Crown prosecutors can perform their important public duties unhindered by the threat of civil action and the need to provide damages to those who are maliciously prosecuted, in fraud of the office of the Attorney General.[7] Instead, the Crown's focus would be diverted from important prosecutorial functions to defend against damage claims. Unless civil liability is limited to exceptional circumstances of malice, the potential for *Charter* damages would hang over the prosecutor's head in every criminal trial, chilling the exercise of independent judgment and discretion.

13. In essence, the Appellant's argument creates liability for "malicious prosecution-lite". If the Crown's civil liability were expanded to include damages for non-disclosure absent malice, it would enable individuals to circumvent the stringent threshold established by this Court for the tort of malicious prosecution by simply framing their action as a *Charter* breach. It is far too easy to convert a malicious prosecution claim into an action for *Charter* damages for negligent non-disclosure because often, the same underlying facts give rise to both allegations.[8] In effect, permitting damages for a negligent or grossly negligent breach of the *Charter* would render the tort of malicious prosecution redundant and unnecessary.[9]

14. In their scholarly article, Robert Charney and Josh Hunter astutely remark that the first rationale for pleading both a tort and *Charter* infringement is the plaintiff's hope that even if all

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[6] *Nelles*, *supra*, at p. 194, 195, 199.
[7] *Nelles*, *supra*, at pp. 194-195, 197, 199; *Miazga*, *supra*, at paras. 56, 80-81; *Proulx v. Quebec (Attorney General)*, 2001 SCC 66 at para. 4 [Book of Authorities, TAB 15].
[8] *Nelles*, *supra*, at pp. 194. Lamer J. noted that many if not all cases of malicious prosecution would also amount to a breach of s. 7 of the *Charter*.
[9] Paul Bourque, *Constitutional Torts and Criminal Prosecutions: Making the Prosecutor Pay* (1995) 37 C.LQ. 428 [Book of Authorities, TAB 30]; *Elguzouli-Daf v. Commissioner of Police of the Metropolis*, [1995] Q.B. 335 (C.A.) at p. 352 [Book of Authorities, TAB 3].

of the tort elements cannot be proven, damages will be recoverable under the *Charter* based on lesser requirements. Related to this is an effort to circumvent the qualified immunity recognized at common law. This Court should not accede to this approach. Consistent with this Court's decision in *Ward*, the authors argue:

> The constitutional requirement of an "appropriate and just" remedy for *Charter* breaches can and should be read harmoniously with the principles of common law tort liability which have been developed with similar rights and policy interests in mind.[10]

15. The foregoing is particularly apt in the context of this appeal. While the duty to disclose was reinvigorated by the adoption of the *Charter*, it was already regarded as a component of the accused's right to a fair trial and to make full answer and defence under the common law, albeit the parameters of the duty were not clarified until *Stinchcombe*.[11] The fact that the disclosure obligation has been subsumed and amplified by s. 7 of the *Charter* should not mean that common law principles concerning the Crown's qualified immunity from liability should suddenly be jettisoned.

16. For this reason, appellate courts have declined to award damages for prosecutorial misconduct without proof of malice or bad faith simply because the claim can be framed alternatively under tort and the *Charter*.[12]

17. The Appellant suggests that the policy reasons underlying *Nelles* do not apply to constitutional obligations such as the duty to disclose. However, the fact that the constitutional duty to disclose can be distinguished from the exercise of prosecutorial discretion to initiate or continue proceedings (as explained in *Krieger* and *Anderson*)[13] does not detract from the rationale underlying the qualified immunity of the Crown from damage claims. The issue is not

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[10] Robert Charney and Josh Hunter, "*Tort Lite? – Vancouver (City) v. Ward and the Availability of Damages for Charter Infringements* (2011), 54 S.C.L.R. (2d) 393 at 404, 413, 416 [Book of Authorities, TAB 31].
[11] *R. v. Taillefer; R. v. Duguay*, 2003 SCC 70 at para. 64 [Book of Authorities, TAB 26].
[12] *Gilbert v. Gilkinson*, 2005 CarswellOnt 7261 (Ont.C.A.) at paras. 3-8 [Book of Authorities, TAB 7]; *Ferri v. Root*, 2007 ONCA 79 at paras. 108-109, 167, citing *McGillivary v. New Brunswick* (1994), 116 D.L.R. (4th) 104 (NBCA) [Book of Authorities, TAB 5]; *Pispidikis v. Ontario (Justice of the Peace)*, 2002 CarswellOnt 4508 at paras. 64-70, aff'd 2003 CarswellOnt 4957 (Ont.C.A.) [Book of Authorities, TAB 14].
[13] *Krieger v. Law Society of Alberta*, 2002 SCC 65 at para. 42-47, 54 [Book of Authorities, TAB 9]; *R. v. Anderson*, 2014 SCC 41 at paras. 44-45 [Book of Authorities, TAB 17].

whether the Crown's fulfillment of the constitutional duty to disclose is subject to judicial review but rather, under what circumstances should breach of that right translate into civil liability for damages in addition to the array of s. 24(1) remedies already available in the criminal process.

18. While disclosure issues are subject to broader judicial review within the criminal process than the decision to initiate a prosecution, this does not mean disclosure decisions should be any more amenable to damage claims than other exercises of prosecutorial functions. Notably, in *Stinchcombe*, Sopinka J. refers to Crown Attorneys as "ministers of justice" when fulfilling their disclosure obligations.[14] Disclosure remains a key prosecutorial function. Fulfilling that duty often requires a nuanced analysis of issues such as relevance, privilege, the safety or security of witnesses and the impact of disclosure on an investigation. Much leeway is accorded to the discretion of Crown counsel with respect to the manner and timing of disclosure.

19. Indeed, given that the Crown's fundamental decision to subject an individual to prosecution can only result in liability for damages if a prosecutor acted maliciously, it would be highly incongruous to find that a good faith error in judgment with respect to one disclosure decision within the course of the trial could potentially result in a damage award.

20. The direction from *Nelles*, *Proulx* and *Miazga* was to deter all but the most serious claims against prosecuting authorities and to ensure that liability is engaged only in the most exceptional circumstances.[15] The malice threshold is essential to that objective. Providing a sphere of unfettered discretion to enable Crown Attorneys to properly pursue their professional goals serves the public good and the administration of justice. These are principles of public law that apply equally to all damage claims arising from alleged prosecutorial misconduct, whether framed in tort or under the *Charter*.

Availability of alternative remedies in criminal proceedings

21. *Ward* established that the availability of alternative remedies is another countervailing factor against an award of *Charter* damages.[16] In this respect, the purpose of the *Charter* right in

[14] *R. v. Stinchcombe*, [1991] 3 SCR 326 at 340-341 [Book of Authorities, TAB 25].
[15] *Proulx*, *supra*, at para. 4; *Miazga*, *supra*, at paras. 5-8, 47, 50-52, 56.
[16] *Ward*, *supra*, paras. 33-35.

question and the context ought to be important considerations in fashioning meaningful and effective remedies for *Charter* violations. Trial and appellate courts are armed with a large arsenal of s. 24(1) remedies within the criminal process to respond to a breach of the duty to disclose. The appropriate remedy will vary depending on the timing of the application, the seriousness of the breach and its effect on trial fairness.[17] Remedies may include: an adjournment and disclosure order, withdrawal of a guilty plea, the exclusion of evidence under s. 24(1), sentence reductions and in exceptional cases, costs. As well, on appeal, errors committed by the trial judge may be redressed. A conviction may be quashed and a new trial ordered. These remedies are all geared to give meaningful effect to the underlying purpose of the *Charter* right – to enable full answer and defence and maintain trial fairness under s. 7 of the *Charter*. Ultimately, if it is impossible to restore trial fairness or repair the harm done to the administration of justice, a stay of proceedings may be granted.

22. In the vast majority of cases, an accused person can obtain a meaningful remedy for non-disclosure within the criminal justice system that is far more responsive to the breach than damages.[18] Therefore, at most, damages ought to play an exceptional role in remedying *Charter* breaches within the criminal process, such as where there has been an intentional and malicious suppression of evidence, in flagrant disregard of a prosecutor's duties as "minister of justice".

23. The Appellant argues that without the ability to claim *Charter* damages for a breach of s. 7, a wrongfully convicted person may be left without any meaningful or effective remedy. Manitoba acknowledges that in a case of wrongful conviction, the ordinary trial and appeal process may have initially failed to prevent a miscarriage of justice. However, there may be a myriad of reasons for this. For example, an accused may not have diligently pursued disclosure or exercised appeal rights; a trial judge may have made legal errors that were left uncorrected on appeal; the conviction may have been based on evidence of questionable reliability before the law of evidence evolved to ensure adequate safeguards (e.g., Mr. Big confessions). None of these are actionable in damages. But this does not mean an accused is left without recourse.

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[17] For example, see *R. v. Henkel*, 2003 ABCA 23 at paras. 14-15, 18 [Book of Authorities, TAB 19].
[18] *Ward*, *supra*, at para. 21.

24. First, the conviction may ultimately be quashed and a new trial ordered or charges may be stayed. This can occur even long after an accused has been convicted. For example, in *R. v. Taillefer; R. v. Duguay*, convictions for first degree murder and manslaughter were set aside as a result of the Crown's failure to disclose a considerable amount of relevant evidence, including witness statements gathered by police, and investigation notes which could have been used to impeach the credibility of certain prosecution witnesses. The Crown's failure to meet its disclosure obligation resulted in a serious violation of the constitutional right to make full answer and defence.

25. In considering the remedy under s. 24(1), Lebel J. observed there was no evidence that the Crown acted in bad faith, for improper motives or in any other way that would tarnish the integrity of the justice system. Although the non-disclosure was serious, it was the result of an incorrect understanding of the nature and scope of the duty to disclose (as the case arose prior to *Stinchcombe*). A new trial was ordered for Taillefer. However, this Court granted a stay to Duguay, primarily because he had already spent eight years in prison out of his 12 year sentence for manslaughter. The lengthy period of detention was a relevant factor leading this Court to conclude that a stay of proceedings was an appropriate and just remedy to avoid perpetuating an injustice.[19]

26. Thus, appellate courts are able to fashion appropriate and just *Charter* remedies for non-disclosure even after the accused has already spent a lengthy period of time in jail. In *R. v. Wood*, the Alberta Court of Appeal considered the fact the accused had already served the entire defined term of a life sentence to be relevant but not determinative of the appropriate remedy for breach of disclosure. Other factors, including the conduct of the Crown and the unsettled state of the law at the time, led the court to conclude that a new trial was warranted, rather than a stay of proceedings.[20]

27. Secondly, while it is true that absent malice, the individual may not be financially compensated under s. 24(1) of the *Charter*, this is justified on important public policy grounds

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[19] *R. v. Taillefer; R. v. Duguay*, *supra*, at paras. 123-124, 128-129, 133.
[20] *R. v. Wood*, 2006 ABCA 343 at paras. 1-4, 53-56 [Book of Authorities, TAB 27].

identified in the jurisprudence. But the inability to obtain damages under s. 24(1) for valid policy reasons does not mean the individual is left without other meaningful redress.

28. For example, in *Ravndahl*, this Court unanimously held that the well-known policy reasons behind limitation periods apply equally to bar actions for personal *Charter* remedies such as damages or restitution. However, limitation periods do not prevent the court from granting a declaration on the constitutionality of the Crown's conduct, which may assist the claimant to obtain extrajudicial relief from the Crown. [21]

29. A declaration that a wrongful conviction was caused, even in part, by the Crown's failure to disclose information is surely an important remedy that will be taken very seriously. The repute of the administration of justice is tarnished by any wrongful conviction. Not only does a declaration vindicate the *Charter* right from society's perspective but it acts as a strong deterrent to avoid such occurrences in future. Absent malice, there is no need for damages to act as a further deterrent.

30. Further, a declaration may assist a wrongfully convicted individual to obtain extrajudicial relief from the Crown via *ex gratia* compensation in accordance with existing guidelines.[22] A wrongful conviction may also result in a public inquiry to determine such matters as the cause and recommend ways to improve the administration of justice, including recommendations for compensation, if appropriate.

31. Finally, it remains open to an individual to seek *Charter* damages provided there is proof of malice.

32. The primary focus of criminal proceedings is the determination of guilt and meting out appropriate punishment for crime. Compensation for losses incurred in the course of those proceedings has been strictly limited on public policy grounds to cases of prosecutorial

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[21] *Ravndahl v. Saskatchewan*, *supra*, at paras. 16-17, 24-27; *Manitoba Metis Federation v. Canada (A.G.)*, 2013 SCC 14 at paras. 134-137, 140, 143 [Book of Authorities, TAB 10]; *Ernst v. Alberta (Energy Resources Conservation Board)*, 2014 ABCA 285 at para. 26 [Book of Authorities, TAB 4]; *Ward*, *supra*, at para. 34.
[22] *Manitoba Métis Federation v. Canada (A.G.)*, *supra*, at paras. 131 and 137.

misconduct amounting to malice. The fact a *Charter* right was breached during the criminal trial should not alter that basic paradigm.

33. In fact, even when an accused has been convicted under a provision of the *Criminal Code* that is subsequently found to be unconstitutional, that individual is not necessarily entitled to a *Charter* remedy outside of the ordinary appeal process. This Court's decision in *Sarson* is instructive. Eleven months after Sarson was convicted under the "constructive murder" provision of the *Criminal Code*, the provision was struck down under s. 7 of the *Charter* in *Vaillancourt*. Sarson applied for *habeus corpus* both at common law and under s. 24(1) of the *Charter*. This Court unanimously denied his application on the ground that once an accused is no longer in the judicial system, finality in criminal proceedings is of the utmost importance.[23]

34. Notwithstanding that Sarson's conviction had been based on an unconstitutional statute, the Court gave effect to the strong policy reasons underlying the doctrine of *res judicata*. Perfect justice is not possible. Rather, in the circumstances, the appropriate form of the redress lay in the exercise of the Royal prerogative of mercy. In concurring reasons, L'Heureux-Dubé J. wrote:

> This rule "affords a means of striking a balance between the wholly impractical dream of providing perfect justice to *all* those convicted under the overruled authority and the practical necessity of having some finality in the criminal process": *Wigman, supra,* at p. 257, adopted by Sopinka J., for the court, in *R. v. Thomas*, [1990] 1 S.C.R. 713, at p. 715. As my colleague McLachlin J. observed in *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 193, "[p]erfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice, but fundamentally fair justice."[24]

35. It is acknowledged that unlike in *Sarson*, the Appellant does not purport to challenge his conviction outside the criminal appeal process. Rather, he seeks *Charter* damages in separate civil proceedings for his wrongful conviction. Nonetheless, *Sarson* stands for the proposition that *Charter* remedies cannot always provide perfect justice and at times, strong policy considerations render a *Charter* remedy inappropriate, leaving one to seek redress *ex gratia*. If it is not unjust or inappropriate to leave Sarson to serve his jail sentence despite having been

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[23] *R. v. Sarson*, *supra*, at paras. 13, 26-27, 51.
[24] *R. v. Sarson*, *supra*, at para. 56.

convicted of an unconstitutional offence, it is difficult to understand how it is unjust to deny the Appellant a remedy of damages for a *Charter* violation that occurred in the course of a criminal trial, absent proof of malice.

36. The Appellant succeeded in having his conviction quashed in the ordinary appeal process. He remains able to seek damages for alleged malicious conduct. And like Sarson, he can seek a remedy *ex gratia* for the time spent in prison.

37. There is a risk that a person who has suffered a non-malicious *Charter* violation might go financially uncompensated but only if: (i) the person was wrongfully convicted; (ii) because of a negligent or grossly negligent failure to disclose information and (iii) the person was denied *ex gratia* compensation. However, a consistent line of this Court's jurisprudence from *Nelles* to *Miazga* has made a deliberate policy choice: it is better to risk a rare accused going without financial compensation rather than accept the certainty that the system will be flooded with claims undermining the ability of prosecutors and the courts to carry out their functions properly.

Floodgates concerns and the need for finality in criminal proceedings

38. In *Nelles*, this Court declined to adopt the American position affording prosecutors absolute immunity from civil liability. Lamer J. (as he then was) rejected concerns about floodgates as speculative precisely because the need to prove malice imposes a strict and onerous requirement, which acts as a deterrent from bringing claims against the Crown. Liability involves far more than merely second guessing a Crown Attorney's judgment. It requires demonstrating a deliberate and malicious act for improper ends, in fraud of one's prosecutorial duties.[25] The malice threshold is critical so as not to unduly hinder Crown prosecutors in the independent exercise of their duties.

39. Disclosure motions are ubiquitous and continue to be litigated on a daily basis in criminal courts. Thus, if claimants could simply recast their actions as one for *Charter* damages, without the need to demonstrate malice, the spectre of a flood of litigation against the Crown becomes real.

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[25] *Nelles, supra,* at pp. 197 and 199; *Miazga, supra*, at paras. 7-8, 50-51, 78.

40. Lower courts have recognized that, despite good faith attempts on the part of police and Crown prosecutors to discharge their duties, disclosure issues continue to occupy much time and attention in criminal trials. They have expressed a legitimate and serious concern that allowing claims for a negligent failure to disclose would create even more disclosure litigation. The threat of liability for negligent conduct would undermine the ability of prosecutors to perform their functions objectively and independently, far more so than malicious prosecution for which the threshold of liability is high.[26]

41. Allowing an accused to sue for damages under s. 24(1) for non-disclosure based on a standard of negligence or heightened negligence would lead to the rehashing of *Charter* issues in the civil courts, undermining the goal of finality in the criminal process. The Saskatchewan Court of Appeal recently commented on the complexity and nuance involved in reviewing disclosure decisions:

> As a practical matter, during a review of the Crown's disclosure obligations prior to trial, a trial judge must look at a myriad of relevant factors touching on whether the Crown has fulfilled its obligation in good faith and in a timely manner. Without providing an exhaustive list, this could include looking at the essential elements of the offence, the complexity of the investigation, the volume and type of disclosure already provided, what the Crown refuses or is unable to provide, a preliminary assessment of how the further disclosure sought is relevant in the sense of assisting the accused, whether it is part of the case to meet, the interaction between the Crown and defence, the behaviour of the Crown and defence, the timing of disclosure and the nature of the defence requests for disclosure. The interplay of these factors is case specific.[27]

42. Many of these same considerations would have to be re-tried in the civil courts, involving the expenditure of scarce judicial and litigation resources and opening up the potential for conflicting results between the criminal trial and subsequent civil proceedings. Recently, in *Hyra v. Her Majesty the Queen et al.*, the plaintiff was convicted of criminal harassment, which

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[26] *R. v. Robinson*, 1999 ABCA 367 at para. 30, in the context of costs awards [Book of Authorities, TAB 23]; *Driskell v. Dangerfield et al.*, 2007 MBQB 142 at para. 75 [Book of Authorities, TAB 2]. The court declined to strike out the claim against Crown prosecutors for negligent breach of disclosure and breach of the *Charter* on the basis that the law was unsettled. Note that *Driskell* was decided before this Court's decision in *Miazga* which firmly ruled out prosecutorial liability in negligence. See also *Elguzouli-Daf, supra* at pp. 345, 349 where the English Court of Appeal expressed concern that liability for negligence would enmesh the Crown in an avalanche of civil claims.

[27] *R. v. Anderson*, 2013 SKCA 92 at paras. 63-64 [Book of Authorities, TAB 16].

was upheld on appeal. He then brought a civil action alleging the prosecutor negligently failed to make disclosure, resulting in an unfair trial. The Court struck out the claim as an abuse of process because proving that the failure to disclose caused damages would necessarily entail a review of what took place at the criminal trial and a reassessment of the merits of the case.[28]

43. In *German v. Major*, the Alberta Court of Appeal also struck out a claim for negligence against the prosecutor in a tax evasion case, which had eventually resulted in an acquittal on appeal. Kerans J.A. held that policy considerations negated any duty of care owed to an accused. First, finding a prosecutor liable on a negligence standard is anathema to our adversarial system of justice. Further, unlike questions of malice or bad faith which raise new issues, a negligence-based action would provide the accused a second chance to re-litigate claims in the civil courts. Kerans J.A. put it this way:

> Every suit which arises in consequence of an earlier suit raises the spectre of a rehash of fact-issues decided in the first. The tort of malicious prosecution raises the new issues of bad faith and an indisputably bad case; even so, as I have earlier argued, care must be taken.
>
> The sum of the duty of prosecuting counsel during the trial is to assure that the accused is fairly tried. If the accused is not fairly tried, his remedy is to appeal and get a new trial or other disposition. I say again that, in this context, there is no suggestion that Major suppressed evidence or otherwise acted in bad faith. The attack is simply on his judgment on the question whether to prosecute and whether to continue to prosecute. Such an attack, in the absence of any suggestion of bad faith, necessarily involves reconsideration of all the issues at trial. This argument, if sound, would also be open to a convict. Indeed, how much more compelling is the case of an innocent man who was convicted! If this suit were permitted, every convict would have his case retried in a civil court. The consideration which defeats German is that which commands finality for trial decisions.[29]

44. It should be borne in mind that expanding the scope of Crown liability to include a non-malicious breach of disclosure under s. 7 also opens the door to other *Charter* damage claims. For example, anytime an action is stayed for unreasonable delay under s. 11(b) of the *Charter*, an accused might sue for s. 24(1) damages, absent malice, on the basis he or she was subject to the

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[28] *Hyra v. Her Majesty The Queen et al.*, 2014 MBQB 21 (Note: case is on appeal) [Book of Authorities, TAB 8].
[29] *German v. Major*, 1985 ABCA 176 at paras. 56-57 [Book of Authorities, TAB 6].

vicissitudes of the criminal process (and perhaps pre-trial detention) allegedly due to the Crown's negligent conduct of the case. As unreasonable delay motions are frequently precipitated by allegations of non-disclosure and consequent adjournments, this concern is hardly theoretical.[30]

45. In this regard, it is noteworthy that in *Mills v. The Queen*, Lamer J. (dissenting but not on this point) alluded to the fact that a stay of proceedings is not necessarily the only appropriate remedy for unreasonable delay. He held that damages may possibly be an additional remedy, but only "if it be proved that there was malice on the part of the Crown and resulting prejudice."[31]

46. Manitoba submits that if *Charter* damages are available against the Crown for breach of disclosure obligations, without needing to meet high threshold of malice, the threat of increased civil actions against the Crown along with the associated interlocutory civil proceedings bodes ill for the efficiency and quality of our criminal justice system. Nor would such claims be limited to cases of wrongful conviction. This is an important policy consideration that militates against broadening the availability of *Charter* damages against the Crown.

Conclusion

47. In determining whether *Charter* damages are just and appropriate, this Court should not depart from the deliberate policy choice it made in *Nelles*, *Proulx* and *Miazga* to shield prosecutors from the threat of liability when fulfilling their important prosecutorial duties, absent malice or bad faith. The malice requirement is essential to maintain the proper balance.

48. No justice system is perfect. On rare occasions, an individual may be wrongfully convicted. That alone does not justify imposing civil liability for a breach of the Crown's disclosure obligation. As long as the Crown acts in good faith, hardship endured as a result of the criminal process is not compensable. As the majority of this Court stated in *R. v. Malmo-Levine*, it is part of the cost of having a criminal justice system:

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[30] For example, see: *R. v. M (N.N.)* (2006), 209 O.A.C. 331, 2006 CarswellOnt 2721 (Ont. C.A.) at paras. 6, 35-44 [Book of Authorities, TAB 20]; *R. v. Barkman*, 2004 MBCA 151 at para. 1 [Book of Authorities, TAB 18]; *R. v. Melrose*, 2014 BCCA 148 at para. 21 [Book of Authorities, TAB 22].

[31] *Mills v. The Queen*, [1986] 1 SCR 863, at p. 948 per Lamer J. [Book of Authorities, TAB 12].

> In any system of criminal law there will be prosecutions that turn out to be unfounded, publicity that is unfairly adverse, costs associated with a successful defence, lingering and perhaps unfair consequences attached to a conviction for a relatively minor offence by other jurisdictions, and so on. These effects are serious but they are part of the social and individual costs of having a criminal justice system. Whenever Parliament exercises its criminal law power, such costs will arise.[32]

49. That does not mean individuals are left without meaningful redress. The criminal justice system includes a wide variety of *Charter* remedies to ensure trial fairness and a robust appeal process to correct errors. Claimants may also seek a declaration in aid of extrajudicial remedies. However, for all the reasons identified in the jurisprudence, the cost of expanding the Crown's liability for damages to include negligent *Charter* violations is simply too great for the proper administration of criminal justice.

50. To paraphrase this Court's recent decision in *Anderson*, expanding the scope of civil liability to include *Charter* damages for non-disclosure, absent malice, would put at risk the adversarial nature of our criminal justice system by hobbling Crown prosecutors in the performance of their work and by inviting civil claims regarding the numerous disclosure decisions that Crown prosecutors make on a daily basis.[33]

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[32] *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74 at para. 174 [Book of Authorities, TAB 21]; See also *Arthur J.S. Hall and Co. v. Simons*, [2000] 3 All E.R. 673 (H.L.) per Lord Hobhouse (dissenting in part) at pp. 745-748 [Book of Authorities, TAB 1], Lord Hope (dissenting in part) at pp. 722, 723-724 and Lord Steyn at p. 679. While three of seven justices dissented in part on the issue of whether immunity from liability for negligence should extend to defence counsel in criminal cases, the majority did not question the immunity from civil liability for prosecutors.

[33] *R. v. Anderson, supra* at para. 31.

PART IV
ORDER SOUGHT CONCERNING COSTS

51. Manitoba does not seek costs in this appeal and submits that costs should not be ordered against the interveners.

PART V
ORDER SOUGHT

52. Manitoba submits that the Constitutional Question should be answered in the negative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated October 27, 2014 at Winnipeg, Manitoba.

Michael Conner and Denis Guénette,

Counsel for the Intervener,
The Attorney General of Manitoba

PART VI

TABLE OF AUTHORITIES

25	*R. v. Stinchcombe*, [1991] 3 S.C.R. 326	18
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29	*Vancouver (City) v. Ward*, 2010 SCC 27 [*Ward*], [2010] 2 S.C.R. 28	9, 21, 22, 28

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30	Paul Bourque, *Constitutional Torts and Criminal Prosecutions: Making the Prosecutor Pay* (1995) 37 C.LQ. 428	13
31	Robert Charney and Josh Hunter, "*Tort Lite? – Vancouver (City) v. Ward and the Availability of Damages for Charter Infringements* (2011), 54 S.C.L.R. (2d) 393	14