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
(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

Respondents
(Respondents)

AND

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Part I: Ontario's Response to the Constitutional Question

1. This Court has only recently reaffirmed[1] that the improper purpose/malice threshold is essential to maintaining the balance struck "between the need to ensure that the Attorney General and Crown prosecutors will not be hindered in the proper execution of their important public duties and the need to provide a remedy to individuals who have been wrongly and maliciously prosecuted." There is no sound reason in principle or policy why this balance should be dramatically redrawn where the alleged prosecutorial misconduct is recast as a *Charter* breach. The Attorney General of Ontario (Ontario) submits that the Constitutional Question should be answered in the negative.

Part II: Ontario's Response to the Questions Raised by the Appellant's Factum

2. Ontario makes four main points in response to arguments raised by the Appellant:

- There is no principled reason to create a novel lower threshold for claims relating to a prosecutor's disclosure decisions. These involve "the evaluation of evidence according to legal standards" and are as vital a part of a prosecutor's duties as commencing or continuing a prosecution. Following *Ward*, the same high threshold employed under the common law to protect key prosecutorial decisions should apply equally to public law *Charter* damage claims.

- The malice threshold for *Charter* damage claims directed at Crown disclosure errors has already been affirmed by this Court and there is no principled basis to overturn that decision. In *Nelles* this Court held that, **under the *Charter***, disclosure decisions should not be distinguished from other decisions made by a prosecutor and that the same high improper purpose/malice threshold should apply.

- The international case law relied upon by the Appellant does not support a lower threshold for *Charter* damage claims against Crown Attorneys than that which is provided for under the common law.

- There is no remedial gap that warrants expanding the liability of the Crown for *Charter* damages arising from a prosecution beyond the parameters affirmed by this

[1] *Miazga v. Kvello Estate* [2009] 3 S.C.R. 339 at para. 81 [*Miazga*]. This portion of *Miazga* was cited with approval as an example of the appropriate threshold that may apply in a *Charter* damages case at para. 43 of *Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28 [*Ward*].

Court in *Nelles, Proulx* and *Miazga*. Remedies for rights-violating prosecutorial conduct occur at trial, on appeal, through disciplinary proceedings, malicious prosecution claims, *ex gratia* payments for wrongful conviction and by declaration.

Part III: Statement of Argument

A. Overview: The Case for Convergence: Private Law Principles, Defences and Thresholds Should Not be Wholly Divorced from *Charter* Damage Claims

3. The policy rationale underlying the need to protect non-malicious prosecutorial conduct from private or public damage claims remains as necessary today as it was when *Nelles v. Ontario*[2] was decided. The policy rationale has been described as necessary in order to:

- ensure Crown Attorneys not be hindered in the proper execution of their important public duties;
- deter any inhibiting effect on the discharge by a Crown Attorney of her central function of prosecuting crime;
- avoid damage to the public trust of the prosecutor's office;
- avoid a defensive approach by prosecutors to their multifarious duties to protect themselves from potential damage claims;
- eliminate the need for prosecutors to become diverted from the pressing duty of enforcing the criminal law by spending valuable time and using scarce resources in order to prevent, or respond to law suits.[3]

4. This Court recognized, however, that immunity from civil suit could be displaced where the criminal proceedings were initiated by the defendant, terminated in favour of the plaintiff, undertaken without reasonable and probable cause and motivated by malice or a primary purpose other than that of carrying the law into effect.[4] The presence of these elements, in order for the "qualified" immunity otherwise enjoyed by Crown Attorneys to be displaced, act as a brake or appropriate restriction on civil suits. They prevent Crown Attorneys from becoming "enmeshed in an avalanche of interlocutory civil proceedings and civil trials. That is a spectre that would bode ill for the efficiency . . . and the quality of our justice system".[5]

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[2] *Nelles v. Ontario*, [1989] 2 S.C.R. 170 ("*Nelles*").
[3] *Nelles, supra at p.* 183 and 199; *Proulx v. Quebec (Attorney General),* [2001] 3 S.C.R. 9 at para. 4; *Miazga, supra* at paras. 56 and 81 And see: *Elguzouli-Daf v. Commission of Police of the Metropolis*, [1995] Q.B. 335 at 349 (U.K.C.A.); *A. v. New South Wales* (2007), 230 CLR 500 at paras. 46, 54 (High Court of Australia); *Imbler v. Patchman* (1976), 424 U.SA. 409 at 424 to 429; *Van de Kamp v. Goldstein* (2009), 555 U.S. 335 at 340 to 342; *Carter v. Burch* (1994), 34 F. 3d 257 at 261 (4th Cir., C.A.).
[4] These elements were summarized in *Miazga, supra* at para. 3.
[5] *Elguzouli-Daf, supra* at 349.

5. In *Ward*, this Court acknowledged that in appropriate circumstances, a distinct and autonomous remedy could be sought for public law or constitutional damages. In so doing, however, the Court also recognized that claims for constitutional damages operate concurrently with, and do not replace, the general law. As such, the Court held that private law thresholds would offer guidance for determining whether s. 24(1) remedies would be "appropriate and just" in the circumstances. As an example the Court expressly noted that malicious prosecution:

> requires that 'malice' be proven because of the highly discretionary and quasi-judicial role of prosecutors (*Miazga v. Kvello Estate*), while negligent police investigation, which does not involve the same quasi-judicial decisions as to guilt or innocence or the evaluation of evidence according to legal standards, contemplates the lower "negligence" standard (*Hill v. Hamilton-Wentworth Regional Police Services Board*).[6]

6. The Court's approach in *Ward* is consistent with academic writings on this issue, which have been critical of the idea that claims for constitutional damages should be wholly divorced from the principles and thresholds established in private law.[7] Nor has such an approach generally been adopted in common law jurisdictions that have embraced public law damages.[8]

7. This convergence of the liability standards is to be expected given that compensation, vindication and deterrence are goals of both the private law of tort[9] and *Charter* damage

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[6] *Ward*, *supra* at para. 43 (and see para. 22). This paragraph also referred to the "distinct and autonomous thresholds" for Charter liability being informed by the "practical wisdom" of the private law. An example of a distinct and autonomous approach arises is in the context of discrimination. While there is no common law tort of discrimination (*Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181) tort principles inform a claim for damages under s. 15(1) of the *Charter* against a state actor. See ex.: *Jane Doe v. Toronto (Comm. of Police)* (1989), 39 O.R. (3d) 487 at para. 180 (Ont. Ct. (Gen. Div.).

[7] Robert E. 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 424-425; Geoff McLay, ""Torts and Constitutional Damages: Towards a Framework" [2012] P.L. 47 at 52 to 55; Jason N.E. Varuhas, "A Tort-Based Approach to Damages under the Human Rights Act 1998" (2009) 72 Modern Law Review 750 at 764-765, 768-770 and 773-774; K. Stanton et al. *Statutory Torts* (London: Sweet & Maxwell, 2003) at para. 14.024. See also Joint Report, English, Scottish Law Commission on *Damages Under the Human Rights Act, 1998*, Law Com No. 266/Scot Law Com No. 180 at pp. iv and 51 to 52, 56 to 63 (2000).

[8] *Attorney General v. Chapman*, [2012] 1 NZLR 462 (Sup. Ct.) ["*Chapman*"]; *Smith v. Chief Constable of Sussex Police*, [2008] EWCA Civ 39 at 45, 56 affirmed [2008] UKHL 50 at 58 per Lord Bingham; *JD v. East Berkshire Community Health NHS Trust* [2005] UKHL 23 at 50.

[9] With respect to deterrence and compensation, see: *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at 267-269; *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403 at paras. 20, 26; *British Columbia v. Canadian Forest Products Ltd.*, [2004] 2 S.C.R. 74 at paras. 65, 72; E. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995) at pp. 3 to 8. With respect to vindication, this has long been a goal of those torts that are actionable, *per se*, such as trespass, false imprisonment and defamation. See: *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420 at para. 15; *Éditions Écosociété Inc. v. Banro Corp.*, [2012] 1 S.C.R. 636 at para. 30; See also: Jason NE Varuhas, "The Concept of Vindication in the Law of Torts: Rights, Interest and

claims.[10] The two areas of the law share common underlying functions and protect similar fundamental interests. For example, the torts of false imprisonment and wrongful arrest and the right to liberty and security of the person protect similar interests in liberty and freedom of movement. Further, the law of tort damages provides a developed, coherent and generally consistent body or principles and precedent and a robust methodology to draw on.

8. Accordingly, in this appeal, Ontario asks this Court to reaffirm its statement in *Ward* at para. 43 that "different situations may call for different thresholds" and confirm that the "practical wisdom" of limiting *Charter* damage claims against Crown Attorneys to those circumstances where the qualified immunity is displaced, as identified by this Court in its careful reasons in *Nelles, Proulx* and *Miazga* applies with equal force to claims against prosecutors that are recast as *Charter* breaches. If a lower standard is adopted here, all claims for harm caused by prosecutors will become *Charter* claims. *Nelles, Proulx* and *Miazga* will become dead letters.

B: There is no principled reason to create a novel lower threshold for claims relating to a prosecutor's disclosure decisions

9. There are two reasons to reject the Appellant's position that "disclosure is different" and that therefore a lower threshold should be used when *Charter* damages are sought in relation to disclosure decisions. First, this Court in *Nelles* expressly rejected a "functional" approach that categorized different prosecutorial decisions with some being worthy of qualified immunity, but not others. Second, and in the alternative, even if this Court were to separately examine the Crown Attorney's exercise of her *Stinchcombe* obligations, disclosure decisions are similar in nature and kind to other quasi-judicial prosecutorial decisions requiring the evaluation of evidence according to legal standards.

i. *Nelles* Rejected a Functional Approach that Categorized Disclosure Differently

10. The Appellant seeks to revive the functional approach to the categorization of prosecutorial duties that was rejected in *Nelles.* As highlighted by British Columbia,[11] *Nelles* dealt specifically and directly with the question of whether the suppression of, or failure to

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Damages" (2014), 34 Oxford Journal of Legal Studies 253 at 254 and 267; T.R. Hickman, "Tort Law, Public Authorities, and the *Human Rights Act 1998*" in D. Fairgrieve, M. Andenas and J. Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective* (London: BIICL, 2002) at pp. 17 to 22.

[10] *Ward, supra* at para. 25.

[11] Factum of the Attorney General of British Columbia, at para. 57 to 62.

disclose relevant, evidence should involve a lower threshold than malice. It was argued in *Nelles* that while a prosecutor had immunity for the exercise of prosecutorial discretion she should not be immune for so-called non-core or "administrative" functions such as disclosure. A majority said "no".[12] Specifically, the Court rejected the approach adopted by White J., of the U.S. Supreme Court in his concurring decision in *Imbler*, to treat the intentional suppression of evidence differently than other prosecutorial functions:

> An example of the difficulty with the functional approach is the disagreement in the lower courts in the United States over whether quasi-judicial absolute immunity extends to investigative functions of a prosecutor. In addition, and in light of the White concurring judgment in *Imbler*, there is disagreement over whether leaks of information **and destruction or alteration of evidence** are acts that are protected by absolute immunity….**In my view, these disagreements demonstrate the futility of attempting to distinguish between functions of a prosecutor in a principled way.** The result is often arbitrary line-drawing which leads to seemingly irresolvable conflict and the diversion of attention from the central issue, namely whether or not a prosecutor has acted maliciously.
>
> . . . .
>
> In my view to decide the scope of the immunity on the basis of categorization of functions **is an unprincipled approach** that obscures the central issue, namely whether the prosecutor has acted maliciously. If immunity is to be qualified it should be done **other than by the drawing of lines between *quasi*-judicial and other prosecutorial functions**.[13]

11. The range of prosecutorial activities that were to be subject to the qualified immunity rule is reflected in Lamer J's listing of prosecutorial powers:

> Among the many powers of a prosecutor are the following: the power to detain in custody, the power to prosecute, the power to negotiate a plea, the power to charge multiple offences, **the power of disclosure/non-disclosure of evidence before trial**, the power to prefer an indictment, the power to proceed summarily or by indictment, the power to withdraw charges, and the power to appeal…[14] (emphasis added).

12. Subsequently, clear majorities of this Court in *Proulx* and *Miazga* have fully adopted the *Nelles* requirements and threshold for the displacement of the qualified immunity. This Court should continue to reject the approach urged by the Appellant in this case, which Lamer J. described as "unprincipled", and refused to adopt in *Nelles.*

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[12] Justice LaForest concurred with the reasons of Lamer J. (writing for three members of the Court) endorsing the common law standard of a qualified immunity displaced by malice.
[13] *Nelles, supra* at 184-185, 189, 199.
[14] *Nelles, supra* at 192.

ii. In the Alternative: Disclosure Decisions Are Equally Subject to the Policy Rationales for Qualified Immunity

13. The "disclosure is different" argument[15] is premised on the position that the policy rationales for the high threshold for displacing the prosecutor's qualified immunity was designed to protect only those activities that are critical or central to the exercise of prosecutorial discretion to commence or continue a proceeding. However, the Court in *Ward*, in a passage deleted and replaced by an ellipsis in the Appellant's factum, recognized that legal decisions, such as those involving "the evaluation of evidence according to legal standards" (an inherent part of the disclosure process) would *not* be subject to a lower threshold:

> Different situations may call for different thresholds, as is the case at private law. Malicious prosecution, for example, requires that "malice" be proven because of the highly discretionary and quasi-judicial role of prosecutors (*Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339), **while negligent police investigation, which does not involve the same quasi-judicial decisions as to guilt or innocence or the evaluation of evidence according to legal standards, contemplates the lower "negligence" standard.** (emphasis and double emphasis added, bolded portion was deleted from para. 83 of the Appellant's factum)

14. While disclosure of relevant information is a constitutional obligation, determining the content, scope and breadth of what, in fact, the Constitution requires in a given case is, nonetheless, a legal determination. This Court's decisions in *Anderson* and *Krieger* distinguish between prosecutorial discretion and the constitutional obligation to provide "proper" disclosure of "relevant" evidence. However, contrary to the Appellant's arguments, nothing in the Court's reasons in those cases suggest that a Crown Attorney's determination of whether evidence is relevant (and, even if relevant, whether disclosure is still legally "proper") is straightforward, automatic, or not at the heart of a prosecutor's job or responsibilities.[16]

15. Disclosure decisions are difficult and complex. "Evaluating evidence according to legal standards" is complicated. A Crown Attorney making disclosure decisions must make a legal determination as to what is required by the common law, statutory provisions and the *Charter* itself (as part of the supreme *law* of Canada). The particular context or stage of the proceeding may well be germane to the information disclosed (e.g., bail hearing, *Garifolli* applications, trial, sentencing). A complex body of case law and even conflicting decisions and legal principles

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[15] Appellant's Factum, paras. 90 to 96.
[16] *R. v. Anderson*, 2014 SCC 41 at para. 45; *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372.

must be reviewed. These difficult prosecutorial decisions are quasi-judicial in the sense that they apply legal standards to evidence and are subject to, and frequently are, judicially reviewed by the trial court.[17] These are no different in gravity, complexity or scope as the decision to commence or continue a prosecution. Indeed, as the *Martin Report* observed the two are often inextricably intertwined as the review of the investigation file for disclosure purposes will often inform the Crown Attorney's charge screening decision as to whether to commence or continue the prosecution.[18] Specifically, a prosecutor must decide whether the document or evidence is:

- relevant (often without knowing, at this stage, the defendant's theory of the case or of the potential new or emerging legal and factual issues that could arise at a later point in the proceedings) ;[19]
- part of the Crown's work product and subject to litigation privilege;[20]
- subject, in whole or in part, to solicitor-client privilege (including a consideration of the innocence-at-stake exception to the privilege);[21]
- subject to a confidential informant privilege;[22]
- subject to the public interest exception in section 37 of the *Canada Evidence Act*;[23]
- subject to the prohibition on disclosure on "sensitive" and "potentially injurious information" relating to international relations, national defence or national security set out in sections 38 and 38.15 of the *Canada Evidence Act*;[24]
- if involving a sexual assault, subject to the special protections available for the private records of a complainant or witness contained in sections 278.1 to 278.9 of the *Criminal Code*[25] (and if involving third-party records not covered by ss. 278.1 to 278.9, determining if the information is subject to the common law principles established by this Court in *O'Connor* and *Mills*);

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[17] *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129 at paras. 49 and 50.
[18] *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions*, (Toronto: Queen's Printer for Ontario, 1993) at pp. 131 to 135 ["Martin Report"]
[19] *R. v. Horan*, 2008 ONCA 589, at paras. 26-27;
[20] *Blank v. Canada (Minister of Justice)* [2006] 2 S.C.R. 319 at paras. 31 to 36; *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 87; *R. v. Brennan Paving and Construction Ltd.*, [1998] O.J. No. 4855 at para. 21 (C.A.); *R. v. Regan*, [1997] N.S.J. No. 428 at paras. 38-39. (N.S.S.C.).
[21] *R. v Brown*, [2002] 2 S.C.R. 185 at para. 5; *R. v McClure*, [2001] 1 S.C.R. 445 at paras. 52-60.
[22] *R. v. Basi*, [2009] 3 S.C.R. 389 at para. 4; *Named Person v. Vancouver Sun*, [2007] 3 S.C.R. 253 at para. 4; *R. v. Leipert* [1997] 1 S.C.R. 281 at para. 9; *R. v. Chaplin*, [1995] 1 S.C.R. 727 at paras. 21, 22.
[23] *R. v.Richards*, [1997] O.J. No. 2086 at para. 13 (Ont. C.A.).
[24] *R. v. Ahmad*, [2011] 1 S.C.R. 110.
[25] *R. v. Quesnelle*, 2014 SCC 46; *R. v. Batte* (2000), 49 O.R. (3d) 321 (C.A.); *R. v. RC*, [2002] O.J. No. 865 (C.A.).

- if involving a police officer's prior conduct, subject to the rules and exceptions set out in this Court's decision in *McNeil*[26], including, but not limited to, ensuring that only relevant material is produced and that no unwarranted invasion of privacy interests occurs. In this regard, the trial court may find it necessary to review the Crown's decision and to make a production order subject to redactions or other conditions;

- protected by the *Youth Criminal Justice Act* in which case notification of the existence, but not the content of, records relating to young persons may be permitted by s. 125 of that Act;[27]

- subject to the Crown's discretion to delay disclosure or withhold details with respect to search warrants to protect a legal privilege, including protecting the identify of a confidential informer;[28]

- subject to special considerations such as where the accused is unrepresented and not aware of the implied undertaking rule, whether a special order from the Court is required to restrict subsequent use or further disclosure;[29]

- subject to special considerations concerning the disclosure of illegal and contraband material, such as child pornography; and

- subject to special considerations over highly sensitive material involving extreme personal privacy interests, such as videotapes or photographs that depict sexual and/or child abuse.[30]

16. "Relevance" in particular is often a moving target. Absent defence disclosure the prosecutor cannot know the defence's theory of the case. A prosecutor may be unaware, for example, that a defendant intends to raise an issue of racial profiling or police misconduct. Indeed, the defendant may not choose to pursue such arguments until mid-trial or even after the Crown's case is completed.[31] In their *Report of the Review of Large and Complex Criminal Case Procedures* by the Hon. Patrick J. LeSage and Professor Michael Code (as he then was), the authors note that even on the issue of what constitutes "relevance" there is considerable disagreement and difficulty:

> [T]he most common problems with disclosure practices and procedures all tend to revolve around requests for materials that are not part of the

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[26] *Attorney General of Ontario (3rd Party Record Holder) v. McNeil*, [2009] 1 S.C.R. 66 at paras. 43 to 46
[27] *S.L. v. N.B.*, [2005] O.J. No. 1411 at paras. 55 to 57 (C.A.)
[28] *R. v. Egger*, [1993] 2 S.C.R. 451 at para. 19; *R. v. Girimonte*, [1997] O.J. No. 4961 at paras 11-12 (Ont. C.A.).
[29] *R. v. Papageorgiou*, [2003] O.J. No. 2282 at paras. 10 to 16 (C.A.)
[30] See, for example, *R. v. Blencowe*, [1997] O.J. No. 3619 at para. 58 (Ont. Ct. (Gen. Div.)); *R. v. Schertzer*, [2004] O.J. No. 5879 at paras. 6 - 7 (S.C.J.).
[31] See, for example: *R. v. Horan*, *supra* at paras. 26-27

> investigation and that are at the outer edges of relevance. The *Stinchcombe* test – "not…clearly irrelevant" – has been "set quite low" and, therefore, "includes material which may have only marginal value to the ultimate issues at trial." Defence requests for "marginal" **materials are very difficult for the Crown to evaluate**, especially if the defence fails to particularize and explain the request. These requests may also raise third party privacy interests when they seek files outside of the particular investigation. For all these reasons, lengthy litigation in court tends to ensue where **the judge is required** to examine large numbers of documents.[32] (emphasis added)

17. In addition, the Crown Attorney is under a continuing obligation[33] to reassess the issue of disclosure, often against a changing background. Decisions made months, or even year before, will need to be revisited, such as where the defendant's theory of the case begins to emerge. This continuing obligation continues post-trial and throughout the appeal process.[34]

18. Often, requests for disclosure are for material that is outside of the "investigative file". These requests can involve evidence that may be inadmissible at the trial. While inadmissibility is not necessarily synonymous with irrelevance, nevertheless the decisions as to whether a prosecutor is constitutionally obligated to disclose this type of material are far from obvious, and often will require the intervention of the Court to resolve. Accordingly, to suggest that these types of decisions are simple, or categorical, is to deny reality.[35]

19. Relevance questions are particularly difficult in *Garofoli* applications, where the guilt or innocence of the accused is not the principal concern but instead the conduct of the police in requesting the wiretap authorization and the information provided to the issuing justice is often the critical issue. For example, in *R. v. Ahmed*, defence counsel sought access to handwritten source notes not relied on by the affiant so as to check whether the subsequent typewritten

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[32] Hon. Patrick J. LeSage and Professor Michael Code, *Report of the Review of Large and Complex Criminal Case Procedures*, Queen's Printer for Ontario, Toronto, November 2008 at 22.
[33] *R. v. Girimonte, supra* at 41-42.
[34] *R. v. Trotta*, [2004] O.J. No. 2439 at para. 25 (C.A.) rev'd on other grounds [2007] 3 S.C.R. 453.
[35] See e.g. *R. v. Chaplin, supra* (request for any wiretap authorizations in which the accused was named even if it was unrelated to investigation of current criminal charges); *R. v. Toms*, [2003] O.J. No. 952 (Ont. C.A.) (request for investigative files relating to the work of an undercover police agent over the previous 21 years); *R. v. Girimonte, supra* at 40-41 (Ont. C.A.) (request for all disciplinary records, internal discipline records and personnel files of "each police officer and government agent"); *R. v. Ngo*, 2006 MBQB 183 (records sought relating to over 200 motor vehicle stops carried out be the arresting officer over the past two years); *R. v. Dykstra*, [2007] O.J. No. 5132 (Ont. S.C.J.) (request was for all police records relating to any investigations of drug smuggling by airport employees); *R. v. Gateway Industries Ltd.*, 2003 MBQB 97 (request for prior drafts of the information to obtain the search warrant, offers made during plea bargaining negotiations and notes of discussions with a Minister of the Crown); See also: *R. v. Chan*, 2002 ABQB 287.

reports fully, fairly and accurately reflected what a number of informants had conveyed to the police. The Crown's conclusion that these source notes were not relevant to the wiretap authorization, while ultimately upheld, was neither obvious nor easily resolvable. Indeed, in *R. v. Gallant*, a markedly similar case, the Court held against the Crown and found such material to be relevant and disclosable.[36] These cases amply demonstrate that reasonable prosecutors (and judges) can properly disagree about what material is relevant and ought to be disclosed.

20. Similarly, until the decision of this Court in *R. v. Quesnelle*, Canadian courts could not agree if police occurrence reports from other cases that happened to involve some of the same witnesses as in the case before the court must be disclosed, or alternately be treated as third party records.[37] Although the law on that particular issue is now clear, this further illustrates that "reasonable people may disagree"[38] and that the law is not static on these issues. Likewise, in impaired driving cases, Courts are currently divided on whether historical testing and maintenance records must be disclosed.[39] Here, too, reasonable people, and judges, can disagree.

21. Even greater complexity arises in the disclosure of information relating to confidential informants. This privilege imposes a strict duty on the Crown to *not* disclose material that *is relevant* but which might identify the informant (or lead the accused to narrow the range of people who could be the informant). Here, the consequences of getting it wrong could be catastrophic as the life of the informant can be put in jeopardy.[40] The privilege is “nearly absolute” and will be lifted by judicial order only when the innocence of the accused is demonstrably at stake. The privilege itself is “a matter beyond the discretion of a trial judge”.[41] The determination of whether the privilege exists involves a judicial hearing in which the trial judge must be satisfied on a balance of probabilities.[42]

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[36] *R. v. Gallant* [2010] N.B.J. No. 224 (Q.B.).
[37] *R. v. Quesnelle, supra*.
[38] *X.Y. v. U.S.A.* 2013 ONCA 497 at para. 12 per Rouleau J.A: "reasonable people may disagree"
[39] Cases finding that historical maintenance logs, records, certificates of inspections, work sheets, etc. for the devices are relevant "first-party" *Stinchcombe* records include: *R. v. Olesiuk*, 2014 ONCJ 313 and *R. v. Oler*, 2014 ABPC 130. Cases holding, to the contrary, that such material are third-party records and are not relevant to the issue before the Court include: *R. v. Coughlin*, 2013 ONCJ 776 at para. 52; *R. v. Sutton*, [2013] A.J. No. 1266 (Alta. P.C.) and *R. v. Worden*, [2014] S.J. No. 439 at paras. 82 and 83 (Sask. P.C.).
[40] See: *Named Person v. Vancouver Sun*, *supra* at para. 101
[41] *Named Person, Vancouver Sun, supra* at para. 19.
[42] *R. v. Basi*, *supra* at para. 39.

22. Similarly, the issue of whether solicitor-client privilege is applicable to a disclosure request, and whether that privilege is subject to an innocence-at-stake exception, also involve the exercise of difficult judgment calls by prosecutors which may be reviewed, and set aside, on judicial review. Indeed, this Court has confirmed that in such applications the trial court exercises a residual discretion to relax strict rules of evidence in favour of the accused when necessary to prevent a miscarriage of justice.[43]

23. To subject Crown Attorneys to a mere causation, negligence or even gross negligence threshold, for a non *mala fides* exercise of their decision-making in relation to disclosure has the same negative impact on the prosecutor's office, responsibilities and duties (including its negative impact on the public interest) as the common law recognized in setting the high threshold for displacing the qualified immunity in tort. By the Appellant's rationale, any error in these decisions, even one that is wholly innocent, would support the awarding of *Charter* damages. By extension, the Appellant's argument that the Court should not be constrained by the "practical wisdom" of private law criteria would also expand liability for such errors to the trial judges that make such decisions.

C. The criteria for overturning this Court's prior decisions are not met

24. There are two significant holdings in *Nelles.* First, as noted, Lamer J. rejected as unprincipled the functional test to the different duties of Crown Attorneys. Second, he applied the high improper purpose/malice threshold equally to disclosure decisions. Justice Lamer, for a plurality of the Court, ruled that a claim for damages for a *Charter* breach committed by a prosecutor should be subject to the same qualified immunity, i.e., liability only when the malice threshold is met.[44] These two holdings in *Nelles* should not be disturbed. *Nelles* has been

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[43] *R. v. Brown*, *supra* at para. 116; *R. v. McClure*, [2001] 1 S.C.R. 445 at paras. 51 and 52. This Court has also recognized that where work product/litigation privilege exists the Crown can exercise a discretion to decide whether or not to disclose. Here, too, however, the Crown's exercise of discretion, or judgment call, may be subject to judicial review. The litigation privilege would not protect from disclosure evidence of an abuse of process or similar blameworthy conduct. Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party. The court may review the materials to determine whether their disclosure should be ordered on this ground. See: *Blank*, *supra* at paras. 44-45 and 72.

[44] Justice McIntryre also employed a malice standard that removed a qualified immunity with respects to prosecutorial acts of a non-judicial nature. Relying on *Roncarelli v. Duplessis* he stated at p. 211 where the executive actor "acts improperly in fraud of his duties and powers, or acts with malice in the discharge of his duties, he does not have immunity from civil suit". Justice LaForest concurred with Lamer J. as to the common law standard of a qualified immunity displaced by malice. Justice L'Heureux-Dubé J. held that all conduct,

subsequently affirmed by unanimous courts in *Miazga* and *Proulx*. The test for overturning a prior decision of this Court, as set out in *Canada v. Craig*, is not met.[45] Neither *Krieger*, *Anderson* or *Ward* cast doubt on the correctness of *Nelles'* conclusion that, for strong policy reasons, subjecting prosecutors to a standard of gross negligence, negligence, or mere causation, would have a disproportionately negative impact on the execution of their duties[46].

25. Contrary to paragraph 75 of the Appellant's Factum, the action in *Nelles* ***was*** brought under the *Charter* as well as in tort. In the Ontario High Court of Justice the *Charter* claim was struck out on a pleadings motion. Justice Fitzpatrick, in his endorsement, wrote as follows:

> It was argued on behalf of the respondent that this case is distinguishable from those because here the respondent has the rights and remedies of the *Canadian Charter of Rights and Freedoms* whereas the claimants in those cases had not. I find that the *Canadian Charter of Rights and Freedoms* has not removed the immunity from civil action of the Attorney-General for Ontario.[47]

26. The Ontario Court of Appeal did not address the issue, holding that even if the *Charter* applied the conduct alleged by the prosecutors did not amount to an infringement.[48] However, this Court, in dismissing the pleadings motion, proceeded on the basis that the allegation of malice in the statement of claim was deemed to be true. This included the allegation that there had been a breach of Ms. Nelles' rights under the *Charter*. Justice Lamer, it is submitted, applied the approach first identified in *Dolphin Delivery*[49] that, "the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution", to modify the common law, changing the immunity from an absolute to a qualified one dependent on a finding of malice.[50]

27. In determining that absolute immunity should be rejected in favour of a qualified immunity, Lamer J. relied heavily on the need to provide a remedy for a *Charter* breach. First, at

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whether judicial, quasi-judicial, or administrative, was subject to an absolute immunity. The adoption by 5 of the 6 members of the Court of the high malice standard constitutes a clear majority.

[45] *Canada v. Craig,* [2012] 2 S.C.R. 489 at paras. 24 to 31.

[46] See also *Miazga, supra* at para. 80.

[47] Motion court endorsement reproduced in *Nelles v. The Queen in right of Ontario et al.* (1985), 51 O.R. (2d) 513 at para. 9 (C.A.).

[48] *Nelles v. The Queen in right of Ontario et al*. (1985), 51 O.R. (2d) 513 at paras. 54 to 57 (C.A.)

[49] *RWDSU v. Dolphin Delivery Ltd*., [1986] 2 S.C.R. 573 at 603; And see: *RWDSU, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.,* [2002] 1 S.C.R. 156 at para. 19 to 22 [*Pepsi-Cola*].

[50] See: *R. v. Salituro,* [1991] 3 S.C.R. 654 at 675; *R. v. Mann*, [2004] 3 S.C.R. 59 at paras. 17- 18; *Pepsi-Cola, supra* at paras. 16 -17; *Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640 at para. 46.

p. 194 Lamer J. "noted that in many, if not all cases of malicious prosecution by an Attorney General or Crown Attorney, there will have been an infringement of an accused's rights as guaranteed by ss. 7 and 11 of the *Canadian Charter of Rights and Freedoms*." Second, he also referred, at p. 195, to Professor Pilkington's article on *Charter* damages to find that "[t]he existence of an absolute immunity strikes at the very principle of equality under the law and is especially alarming when the wrong has been committed by a person who should be held to the highest standards of conduct in exercising a public trust."

28. Finally, Lamer J's lengthy discussion at p. 195 demonstrates that he clearly applied constitutional principles when changing the absolute immunity at common law to a qualified immunity that could be displaced where a Crown Attorney acted for an improper purpose or with malice. He noted that "to maliciously prosecute an accused . . . does not accord with the principles of fundamental justice". His Honour was concerned that "[n]ot only does absolute immunity negate a private right of action, but in addition, it seems to me, it may be that it would effectively bar the seeking of a remedy pursuant to s. 24(1) of the *Charter"*. It was precisely because an absolute liability standard was too stringent that the qualified immunity standard, which, in contrast, struck the correct constitutional balance, was created.[51]

29. *Proulx* and *Miazga* subsequently applied the qualified immunity standard set in *Nelles.* One part of the successful malicious prosecution claim in *Proulx* did involve consideration of a *Charter* breach, i.e., a violation of section 8 of the *Charter* through the reliance by the prosecutor of a surreptitiously recorded telephone conversation, both in the course of making his decision to prosecute and in his use during the trial.[52]

30. The Appellant has not identified a compelling reason for overruling *Nelles, Proulx* or *Miazga*.[53] Subsequent cases do not establish that these cases were wrongfully decided or have

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[51] While Lamer J also stated at 195 that he did not have to decide the question of whether the common law or a statutory rule can constitutionally exclude the courts from granting a remedy, was, it is submitted, a reference to common law rules **other than** the common law rules respecting the Crown Attorney's immunity from civil suit. Otherwise, he would not have lowered that immunity from absolute to a qualified one. Indeed, this point was recognized in *McGillivary v. New Brunswick,* [1993] N.B.J. No. 514 at para. 20 (Q.B.) affirmed [1994] N.B.J. No. 265 (N.B.C.A.) leave to appeal denied [1994] S.C.C.A. No. 408.

[52] *Proulx, supra* at paras. 27 to 29 and 44 to 45.

[53] *Craig v. Canada, supra* at paras. 24 to 31; *R. v. Salituro, supra* at 665; *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518 at 527; *Hamstra (Guardian ad litem of) v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092 at paras. 18-19; *R. v. Henry*, [2005] 3 S.C.R. 609 at para. 44.

led to confusion or uncertainty. To the contrary, *Nelles, Proulx* and *Miazga* have provided certainty and coherence to this area of the law with an overwhelming majority of Canadian courts applying the high threshold to both tort and to *Charter* claims alleging prosecutorial misconduct.[54] The high threshold is clear and consistent.

31. In contrast, the test proposed by the Appellant leads to uncertainty and the potential for markedly different outcomes. The Appellant proposes that on a case-by-case basis the severity of the alleged *Charter* breach in the specific case and the particular need for compensation, vindication or deterrence (steps 1 and 2 of *Ward*), would then be weighed against good governance concerns (step 3 of *Ward*). This ignores, entirely, the concept of a fault threshold. This Court at para. 43 of *Ward* recognized the importance of establishing discrete thresholds for distinct *Charter* claims, that would not be elastic or fungible based on the facts of a given case.

32. Nor have subsequent cases demonstrated that the qualified immunity in *Nelles/Proulx/Miazga* was wrongly decided. Neither *Krieger* nor *Anderson* dealt specifically with the issue of the immunity of Crown Attorneys with respect to civil liability. Neither purported to address, let alone overturn or alter the qualified immunity held by prosecutors in a civil action. With respect to *Krieger*, the fact that a lawyer may be subject to discipline for a breach of his *Charter* disclosure obligation does not open the door to liability for damages in civil court. For example, the conduct of trial Judges may also be "entirely responsible" for the

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[54] *G.C. v. Ontario (Attorney General)*, 2014 ONSC 455 at paras. 41 – 47; *McCreight v. Canada (Attorney General)*, 2013 ONCA 483 at paras. 41 – 46; *Ferri v. Ontario (Attorney General)*, 2007 ONCA 79 at para. 108, leave to appeal to SCC refused, [2007] S.C.C.A. No. 175; *Hawley v. Bapoo et. al.*, 2007 ONCA 503 at paras. 6-10 (C.A.); *Pearson v. Ontario (Attorney General)*, [2006] O.J. No. 1269 at para. 28, leave to appeal to SCC refused, [2007] S.C.C.A. No. 223 (S.C.J.); *Fitzpatrick v. Durham Regional Police Services Board et al.* (2005), 76 O.R. (3d) 290 at para. 34 (S.C.J.); *Bond v. Ontario*, [2002] O.J. No. 3499 at paras. 23 – 24 (S.C.J.); *Scott v. Ontario*, [2002] O.J. No. 4111 at para. 94 (S.C.J.) affirmed [2003] O.J. No. 4407 (C.A.); *Pispikikis v. Scroggie*, (2002), 62 O.R. (3d) 596 at para. 69 (S.C.J.) affirmed 68 O.R. (3d) 665 (C.A.); *Skandarajah v. Canada (Attorney General)*, [2001] O.J. No. 4282 at para. 34 (S.C.J.); *Mori et al. v. Thomas*, [1998] O.J. No. 3827 (C.A.); *Howell v. Ontario* [1998] O.J. No. 175 at paras. 27 to 31 (S.C.J.); *Thompson v. Ontario* [1998] O.J. No. 3917 at para. 57 (C.A.); *Osborne v. Ontario*, [1996] O.J. No. 2678 at para. 15 (Gen. Div.), affirmed [1998] O.J. No. 4457 (CA); *McGillivary, supra* at paras. 7, 10 and 12 (C.A.); *German v. Major* (1985) 20 D.L.R. (4th) 703 at para. 18 (Alta. C.A.). Ontario recognizes that some Canadian courts, after *Krieger*, have left open the question of whether a failure to disclose should be subject to a lower standard. See: *Milgaard v. Saskatchewan* (1994), 123 Sask.R. 164 (C.A.); *Driskell v. Dangerfield* 2007 MBQB 142 varied 2008 MBCA 60; *McTaggart v. Ontario*, [2000] OJ No. 4766 (Sup. C.J.); *Hyra v. Manitoba*, 2013 MBQB 83 (Master), dismissed on other grounds [2014] M.J. No. 59 (S.C.); *Ferron v. Goodier*, 2010 ONSC 540. However, no Canadian court has held a prosecutor liable for misconduct using a lower negligence standard.

breach of the accused's *Charter* rights.[55] Judges, like lawyers, are also subject to professional discipline through federal and provincial judicial councils. This does not, however, displace or lower the absolute immunity enjoyed by Superior Court Judges as a matter of common law, and by inferior courts through statute.[56] As the Quebec Court of Appeal stated in *Royer v. Mignault, supra* at 13:

> [T]he mere limitation of a remedy under Sec. 24(1) does not, in itself, make the limitation "inconsistent" with the Constitution. The only remedies available under Sec. 24(1) are those that are considered "appropriate and just in the circumstances." It is difficult to see how the awarding of damages against a judge for what he said in his judicial capacity could be considered "appropriate and just" under Sec. 24(1) when claims of this kind have, for several centuries, been struck out as inappropriate [Emphasis added].

33. Further, the decision in *Krieger* was an affirmation, rather than a departure, from *Nelles.* The Appellant's focus is on the Court's distinction between "core" prosecutorial functions, which would not be subject to law society review, and more peripheral trial tactics decisions, such as a failure to disclose, that could be subject to discipline proceedings. The Appellant fails to note, however, that this Court held that Law Society review of such tactical/disclosure decisions would occur using the ***same*** high threshold from *Nelles* for a malicious prosecution. As the Court noted:

> Review by the Law Society for **bad faith or improper purpose** by a prosecutor does not constitute a review of the exercise of prosecutorial discretion *per se*, since an official action which is undertaken in **bad faith or for improper motives** is not within the scope of the powers of the Attorney General. (at para. 51)
>
> A finding that the Law Society does not have the jurisdiction to review or sanction conduct which arises out of the exercise of prosecutorial discretion would mean that prosecutors who act in **bad faith or dishonestly** could not be disciplined for such conduct. A prosecutor who laid charges as a result of **bribery or racism or revenge** could be discharged from his or her office but, in spite of such malfeasance, would be immune to review of that conduct by the Law Society. (at para. 52)[57] (emphasis added)

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[55] See, for example, *R. v. Rahey,* [1987] 1 S.C.R. 588 at 630 to 631.

[56] *Taylor v. Canada (A.G.),* [2000] 3 F.C.R. 298 at para. 28 (C.A.), leave to appeal to S.C.C. denied 12 October 2000; *Royer v. Mignault* (1988), 50 D.L.R. (4th) 345 at p. 13 (Que. C.A.), leave to appeal dismissed [1988] 1 S.C.R. xiii; *Morier v. Rivard,* [1985] 2 S.C.R. 716 at para. 89; *Prefontaine v. Gosman,* [2000] A.J. No. 307 (Q.B.); *LawPost v. New Brunswick,* [1999] N.B.J. No. 492, leave refused [2000] S.C.C.A. No. 5; *Kopyto v. Ontario (Court of Justice, Civil Division),* [1995] O.J. No. 601 (Gen. Div.); *Sirros v. Moore,* [1974] 3 All E.R. 776 (C.A.).

[57] These have been identified as examples that meet the test for malice. See, in this regard, Lewis N. Klar, *Tort Law,* (5th ed., 2012, Thomson Reuters, Toronto) at pp. 74-75. See, also, *Nelles, supra* at 193-194 and 199; *Miazga, supra* at paras. 48, 78 to 87;

34. Finally, the application of the qualified immunity from *Nelles* to *Charter* damage claims alleging prosecutorial misconduct is also consistent with this Court's and lower Courts' decisions to also retain qualified immunities from damages for conduct under a law later found to be unconstitutional;[58] for non-operational policy and planning decisions;[59] and for the conduct of a tribunal member.[60]

D. A malice threshold for *Charter* damage claims against Crown Attorneys is consistent with the international case law relied upon by the Appellant.

35. In support of expanding the scope of *Charter* damages to include any breach of a *Charter* right, the Appellant relies on a small selection of international case law selected from a single book chapter. In fact, the selected cases relied upon provide little support for expanding the use of *Charter* damages. Instead, the U.S. and U.K. case law relied upon by this Court in *Nelles* continues to support a high threshold for *Charter* damage claims arising out of alleged Crown Attorney misconduct.

36. First, the Appellant relies on the dissenting judgment of the New Zealand Supreme Court in *Attorney General v. Chapman*.[61] However, the majority of the Court, in detailed and persuasive reasons, reached the opposite conclusion. At issue in that case was whether public law damages were available under their *Bill of Rights Act* to remedy a rights violation resulting from the judicial dismissal of an earlier appeal. The majority denied damages holding that "all in all, allowing compensation claims for judicial breach of the *Bill of Rights Act* would be as inimical to judicial independence as permitting claims to be advanced against judges personally."[62]

37. The majority in *Chapman* rejected arguments, advanced by the Appellant in this appeal, that the principles underlying public law remedies differed substantially from those underlying private claims.[63] Indeed, they further cautioned that maintaining such a distinction would be

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[58] *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405 at paras. 78-79.
[59] *Blackwater v. Plint*, [2005] 3 S.C.R. 3 at para. 9; *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal)*, [2004] 1 S.C.R. 789 at paras. 19 and 22-23; *Just v. British Columbia*, [1989] 2 S.C.R. 1228 at 1239-42; *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420 at 432-37 and 441; *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562 at paras. 14 and 19.
[60] *Ernst* v. *EnCana Corp.*, 2014 ABCA 285 at paras. 29 and 30.
[61] *Chapman, supra*.
[62] *Chapman, supra* at paras. 192, 204.
[63] *Chapman, supra* at paras. 188-190.

untenable and that "allowing this claim to proceed may well be the thin edge of what in the end would be a rather large wedge…if public law compensation for judicial breach is available, it would be a small step to conclude that the principles of judicial immunity in relation to private law claims against judge should be reconsidered."[64]

38. Finally, the New Zealand Supreme Court, like this Court in *Ward*, recognized that in some circumstances public policy considerations outweigh the need for a specific remedy for the individual and, moreover, that the general availability of existing remedies through *current* appellate processes (not available at the time of the alleged rights infringement) and the availability of *ex gratia* payments for wrongful convictions were relevant considerations in determining whether to expand the availability of public law damages:

> in the present case, there are extensive remedies in the judicial process, including, at the present time, remedies by way of appellate review of the judgments of the Court of Appeal. This is not to say that such remedies will invariably be effective. There can be situations where wrongly convicted persons may have inadequate remedies because of high public policy considerations. But in deciding whether the *Baigent* cause of action should be extended to judicial breaches of rights, the high degree of general effectiveness of existing remedies in the appellate process may be reduced if the rules of trial fairness must also be used to determine entitlements to compensation. There could be changes in judicial practice that disadvantage criminal appellants.[65]

39. The Appellant also cites two Indian cases and a European Commission case in support of his alternative argument for a "negligence" standard. However, those cases, which involved in-custody torture, killing and other intentional police misconduct, did not address the appropriate standard where prosecutorial conduct is at issue. As such, they are not germane to the Constitutional Question or the issue facing this Court.[66]

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[64] *Chapman, supra* at para. 187.
[65] *Chapman, supra* at paras. 198-202.
[66] See Appellant's factum at para. 100 citing *Nilabati Behera v. State of Orissa* (1993), S.C.R. (2) 581 (India S.C.): "The allegation made is that it is a case of custodial death since Suman Behera died as a result of the multiple injuries inflicted to him while in police custody; and thereafter his dead body was thrown on the railway track."; *D.K. Basu v. State of West Bengal* (1997), 1 SCC 416 (India S.C.) at paras. 4, 9: "In almost every states there were allegations and these allegations are now increasing in frequency of deaths in custody described generally by newspapers as lock-up deaths. At present there doesn't appear to be any machinery to effectively deal with such allegations…The protection of an individual from torture and abuse by the police and other law enforcing officers is a matter of deep concern in a free society"; *Osman v. United Kingdom* (2000), 29 EHRR 245 (European Ct. Human Rights) at para. 116: "In the opinion of the Court, where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context

40. With respect to prosecutor liability in particular, the U.S. and U.K. case law, remains consistent with that reviewed by this Court in *Nelles*. In the U.S., absolute immunity continues to apply to a wide-spectrum of prosecutorial conduct, including private law or constitutional claims relating to the suppression of evidence.[67] In the U.K.,the availability of private actions against prosecutors remains limited to circumstances in which malice is proven.[68] The European Court for Human Rights has held that such a limit results from a "careful balancing of the policy reasons for and against the imposition of liability" on prosecutors and did not violate the right to a fair hearing under Article 6 § 1 of the *European Convention on Human Rights*.[69]

E. Alternate Remedies: Tort, Compensation and the Absence of a Remedial Gap

41. Finally, Ontario submits that there is no remedial gap that warrants expanding the liability of the Crown for *Charter* damages arsing from a prosecution beyond the parameters affirmed by this Court in *Nelles, Proulx* and *Miazga.* As discussed in more detail by British Columbia, there are a multiplicity of remedies available in the event of a Crown Attorney failing to disclose a relevant document in violation of the *Charter*.

- First, accused persons have access to the full panoply of *Charter* remedies available through the criminal justice process. This includes judicial review of disclosure decisions, stays of prosecution, cost orders in appropriate circumstances, as well as

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of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."

[67] *Imbler, supra* at 430-431 and at fn 34; *Van de Kamp v. Goldstein*, *supra* at 344-46. On the basis of *Imbler* and *Goldstein* prosecutors in the U.S. enjoy absolute immunity for their prosecutorial decisions, including those involving disclosure. Under the common law in a number of American states a claim in tort for malicious prosecution may be brought against persons other than prosecutors (ex., the police, investigators, police chiefs and municipalities). *Albright v. Oliver*, 510 US 266 at 270 (fn. 4) (1993) observed that the various federal Courts of Appeal have adopted two approaches to determining whether a claim can also be brought under 42 U.S.C. § 1983 [i.e., statutory tort for a breach of constitutional rights]. Under the expansive approach the "elements of a malicious prosecution action under § 1983 are the same as the common-law tort of malicious prosecution". In short, the common law tort and the constitutional tort are co-extensive. Under the narrower approach, other Courts of Appeal have held that "in addition to elements of malicious prosecution under state law, plaintiff must show an egregious misuse of a legal proceeding resulting in a constitutional deprivation". The fact remains, however, that in the United States that threshold for the constitutional tort under § 1983, even in claims against non-prosecutors, has never been ***lower*** than the threshold for the tort of malicious prosecution.

[68] *Elguzouli-Daf, supra* at 347; *Thacker v. Crown Prosecution Service*, [1997] EWCA Civ 3000 (16 December 1997) (C.A.);

[69] *Reid v. The United Kingdom,* Application No. 33221/96. 26 June 2001, at 14-15 (E.C.H.R.).

statutory rights of appeal. This Court recognized in *Ward* that provincial criminal courts are not the appropriate venue for determining *Charter* damages.[70] Conversely, civil actions will rarely, if ever, be the appropriate venue for remedying *Charter* breaches resulting from disclosure decisions. It is the criminal courts that are best situated to review the decisions of Crown Attorneys in the full context of the prosecution before them (including the changing nature of a criminal prosecution). Civil courts lack this institutional capacity.

- Second, misconduct by a prosecutor in fulfilling her disclosure role is subject to law society review as well as internal discipline.[71] This oversight provides a significant deterrent to *Charter* breaches by Crown Attorneys. The threat of professional sanction arguably provides a greater deterrent to *Charter* breaches by prosecutors than the threat of the state being held liable for monetary damages.[72]

- Third, where the requirements for a malicious prosecution claim set out in *Nelles, Miazga* and *Proulx* are met, damages for a related *Charter* breach are available (subject to double recovery considerations). As Lamer J. recognized in *Nelles*, a malicious prosecution will frequently overlap with a related *Charter* breach.[73]

- Fourth, where the *Charter* breach results in a wrongful conviction, individuals have access to *ex gratia* payments in accordance with the *The Federal/ Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons*, which were agreed to by the federal government, Ontario and other provinces in 1988.[74] In cases that fall within the Guidelines (including a determination of factual innocence), the remedy of compensation is provided by the public to the wrongfully convicted person without any need for the person to establish fault or a cause of action in malicious prosecution, negligence, or breach of *Charter*.

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[70] *Ward*, *supra* at para. 58.
[71] *Nelles, supra* at 183 citing *Imbler, supra* at 429; *Krieger, supra* at paras. 38-39.
[72] It should be noted that in Ontario, individual Crown Attorneys are personally immune from claims of malicious prosecution. By statute, all such claims must name the Attorney General, with payment being made out of the Consolidated Revenue Fund: see *Ministry of the Attorney General Act*, R.S.O. 1990, c. M.17, s. 8; *Proceedings Against the Crown Act*, R.S.O. c. P.27, s. 22. As well, *Ward, supra* at para. 22 confirms that in an action for public law damages lies against the state and not against individual actors.
[73] *Nelles, supra* at 195.
[74] See footnote 76 of the Factum of the Attorney General of British Columbia.

- Finally, in all cases, the legal remedy of a declaration is available. This Court recognized in *Ward* that a declaration of a *Charter* breach may provide an adequate remedy and that such declarations can adequately serve the need for vindication of the right and deterrence of future rights breaches.[75]

42. Whether there may be individual circumstances in which no remedy is available does not on its own justify rejection of the *Nelles/Proulx/Miazga* criteria for *Charter* damages arising out of the conduct of prosecutors. For instance, this Court has repeatedly held that limitation periods and notice requirements of general application can act to bar constitutional claims.[76]

43. Finally, the historical aspect of this litigation must be accorded significant weight when assessing the nature of the alleged remedial gap. Since the time of the alleged rights infractions (several months after the adoption of the *Charter*), the courts and attorneys general have developed an extensive regime of protections to ensure that the disclosure process proceeds in an orderly, *Charter* compliant manner.[77] This decreases the risk of a *Charter* rights violation, and increases the likelihood that any such violation would be found and remedied during the course of the criminal trial and appeal process. Accordingly, Ontario submits that there is no overarching policy reason to depart from the standards set in *Nelles/Proulx/Miazga* and fashion an entirely new, lower threshold to solve a remedial gap that no longer (if it ever did) exists.

Part IV & V: Costs and Request for Oral Argument

44. Ontario does not seek costs. Ontario requests permission to present oral argument at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30th DAY OF OCTOBER, 2014

Hart Schwartz

Hart Schwartz

Matthew Horner

Counsel for the Intervenor, the Attorney General of Ontario

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[75] *Ward*, *supra* at paras. 37 and 78.

[76] *Thibodeau v. Air Canada*, 2014 SCC 67 at para. 60; *Kingstreet Investments v. New Brunswick*, [2007] 1 S.C.R. 3 at paras. 59-61; *Ravndahl v. Saskatchewan*, [2009] 1 S.C.R. 181 at paras. 16 and 17; and *Alexis v. Darnley* (2010), 100 O.R. (3d) 232 at para. 17 (C.A.)). See also, *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62 at para. 158.

[77] See: *The Martin Report, supra*; Ministry of the Attorney General, Ontario, Practice Memorandum: *Disclosure*, PM [2009] No. 1 (June 11, 2009) (Publicly available); cases cited at paras. 15 to 22 of this factum.

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Part VII - Statutes

		Paragraph Reference in Factum
1.	*Ministry of the Attorney General Act*, R.S.O. 1990, c. M.17, s. 8	41
2.	*Proceedings Against the Crown Act*, R.S.O. c. P.27, s. 22	41

Ministry of the Attorney General Act

R.S.O. 1990, CHAPTER M.17

Limit on proceedings against Crown Attorneys, etc.

8. (1) No action or other proceeding for damages shall be commenced by a person who is or was the subject of a prosecution, in respect of any act done or omitted to be done in the performance or purported performance of a duty or authority in relation to the prosecution, against any of the following:

1. A Crown Attorney, Deputy Crown Attorney or assistant Crown Attorney appointed under the *Crown Attorneys Act*.
2. A person authorized under section 6 of the *Crown Attorneys Act* to be a provincial prosecutor.
3. Any other employee appointed for the purposes of section 4.
4. A person who was, but no longer is, a person described in paragraph 1, 2 or 3. 2009, c. 33, Sched. 2, s. 46.

Proceedings against Attorney General

(2) An action or other proceeding described in subsection (1) may be commenced against the Attorney General by a person who is or was the subject of a prosecution and, for the purpose, the Attorney General stands in the place of the person against whom the action or other proceeding would have been brought but for that subsection, and may be found liable in his or her stead. 2009, c. 33, Sched. 2, s. 46.

Same

(3) An action or other proceeding may only be brought against the Attorney General under subsection (2) if, but for subsection (1), the action or proceeding could have been brought against a person referred to in that subsection. 2009, c. 33, Sched. 2, s. 46.

Liability without prejudice

(4) A finding of liability against the Attorney General under subsection (2) is without prejudice to the right of the Attorney General or the Crown to indemnity or other relief from the person in whose place the Attorney General stood in the action or other proceeding. 2009, c. 33, Sched. 2, s. 46.

Notice of claim; discovery; service; trial without jury; payment by Attorney General

(5) Subsections 7 (1) and (2) and sections 8, 10, 11 and 22 of the *Proceedings Against the Crown Act* apply, with necessary modifications, to an action or other proceeding under subsection (2) and, for the purpose, a reference to the Crown shall be read as a reference to the Attorney General. 2009, c. 33, Sched. 2, s. 46.

Proceedings Against the Crown Act

R.S.O. 1990, CHAPTER P.27

Payment by Crown

22. The Minister of Finance shall pay out of the Consolidated Revenue Fund the amount payable by the Crown,

(a) under an order of a court that is final and not subject to appeal;

(b) under a settlement of a proceeding in a court;

(c) under a settlement of a claim that is the subject of a notice of claim under section 7; or

(d) under a final order to pay made by a competent authority under a trade agreement that the Crown has entered into with the government of another province or territory of Canada, the government of Canada or any combination of those governments. 1994, c. 27, s. 51; 2009, c. 24, s. 32.