FILE NO. 35745

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

BETWEEN:

IVAN WILLIAM MERVIN HENRY

APPELLANT
(Respondent)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, as represented BY THE ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

- and -

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR, CANADIAN ASSOCIATION OF CROWN COUNSEL, CRIMINAL LAWYERS' ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION, ASSOCIATION IN DEFENCE OF THE WRONGLY CONVICTED and DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS AND BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

INTERVENERS

FACTUM OF THE INTERVENER
ASSOCIATION IN DEFENCE OF THE WRONGLY CONVICTED
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

Dewart Gleason LLP
102 – 366 Adelaide Street West
Toronto ON M5V 1R9

Sean Dewart/Tim Gleason
Tel: (416) 971-8000
Fax: (416) 971-8001
Emails: sdewart@dgllp.ca
tgleason@dgllp.ca

Solicitors for the Intervener, The Association in Defence of the Wrongly Convicted

Supreme Law Group
900-275 Slater Street
Ottawa ON K1P 5H9

Moira Dillon
Tel: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

Agent for The Association in Defence of the Wrongly Convicted

Farris, Vaughan, Wills & Murphy LLP
25th Floor
700 West Georgia Street
Vancouver BC V7Y 1B3

Joseph A. Arvay, Q.C., Cameron Ward, Marilyn Sandford and Alison M. Latimer
Tel: (604) 684-9151
Fax: (604) 661-9349
E-mail: jarvay@farris.com

Lawyers for the Appellant, Ivan William Mervin Henry

Sack Goldblatt Mitchell LLP
500 - 30 Metcalfe St.
Ottawa ON K1P 5L4

Colleen Bauman
Tel: (613) 235-5327
Fax: (613) 235-3041
E-mail: cbauman@sgmlaw.com

Agent for Ivan William Mervin Henry

Attorney General of British Columbia
1301 - 865 Hornby Street
Vancouver BC V6Z 2G3

Karen A. Horsman and Peter Juk, Q.C.
Tel: (604) 660-3093
Fax: (604) 660-3833
E-mail: karen.horsman@gov.bc.ca
peter.juk@gov.bc.ca

Lawyers for the Respondent, Attorney General of British Columbia

Gowling Lafleur Henderson LLP
2600 - 160 Elgin St
Box 466 Station D
Ottawa ON K1P 1C3

Brian A. Crane, Q.C.
Tel: (613) 233-1781
Fax: (613) 563-9869
E-mail: brian.crane@gowlings.com

Agent for the Respondent, Attorney General of British Columbia

Attorney General of Canada
900 - 840 Howe Street
Vancouver BC V6Z 2S9

Susanne Pereira
Mitchell R. Taylor, Q.C.
Tel: (604) 264-2829
Fax: (604) 264-2818
E-mail: susanne.pereira@justice.gc.ca
mitch.taylor@justice.gc.ca

Lawyers the for the Respondent, Attorney General of Canada

Attorney General of Canada
50 O'Connor Street, Suite 500, Room 557
Ottawa ON K1A 0H8

Christopher M. Rupar
Tel: (613) 670-6290
Fax: (613) 954-1920
E-mail: christopher.rupar@justice.gc.ca

Agent for the Respondent, Attorney General of Canada

Procureur général du Québec
1200, route de l'Église
2e étage
Québec QC G1V 4M1

Robert Desroches, Carole Soucy and Sagal Bachir Osman
Tel: (418) 643-1477
Fax: (418) 644-7030
Email: Robert.desroches@justice.gouv.qc.ca

Lawyers for the Intervener, Attorney General of Quebec

Noël & Associés
111, rue Champlain
Gatineau QC J8X 3R1

Pierre Landry
Tel: (819) 771-7393
Fax: (819) 771-5397
E-mail: p.landry@noelassocies.com

Agent for the Intervener, Attorney General of Quebec

Attorney General of Saskatchewan
Constitutional Law Branch
1874 Scarth Street, Suite 820
Regina SK S4P 4B3

Graeme G. Mitchell, Q.C.
Tel: 306.787.8385
Fax: 306.787.9111
Email: graeme.mitchell@gov.sk.ca

Lawyers for the Intervener, Attorney General of Saskatchewan

Gowling Lafleur Henderson LLP
2600 - 160 Elgin St, 26th Floor
Ottawa ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
E-mail: lynne.watt@gowlings.com

Agent for the Intervener, Attorney General of Saskatchewan

Department of Justice (NS)
5151 Terminal Road, 4th Floor
PO Box 7
HaliFax: NS B3J 2L6

Edward A. Gores, Q.C.
Tel: (902) 424-4024
Fax: (902) 424-1730
Email: goresea@gov.cs.ca

- and -

Nova Scotia Public Prosecution Service
1505 Barrington Street, Suite 1225
HaliFax: NS B3J 3K5

James A. Gumpert, Q.C.
Tel: (902) 424-8995
Fax: (902) 424-0653
Email: gumperja@gov.ns.ca

Lawyers for the Intervener, Attorney General of Nova Scotia

Gowling Lafleur Henderson LLP
2600 - 160 Elgin St, 26th Floor
Ottawa ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
E-mail: lynne.watt@gowlings.com

Agent for the Intervener, Attorney General of Nova Scotia

Attorney General of New Brunswick
Legal Services Branch
PO Box 6000, Stn A
Fredericton NB E3B 5H1

Gaétan Migneault
Tel: 506.453.2222
Fax: 506.453.3275
Email: gaetan.migneault@gnb.ca

Lawyers for the Intervener, Attorney General of New Brunswick

Gowling Lafleur Henderson LLP
2600 - 160 Elgin St, 26th Floor
Ottawa ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
E-mail: lynne.watt@gowlings.com

Agent for the Intervener, Attorney General of New Brunswick

Department of Justice
Constitutional Law Branch
1205 - 405 Broadway
Winnipeg MB R3C 3L6

Michael Conner and Denis Guénette
Tel: 204.945.6723
Fax: 204.945.0053
Email: Michael.Conner@gov.mb.ca

Lawyers for the Intervener, Attorney General of Manitoba

Gowling Lafleur Henderson LLP
2600 - 160 Elgin St, 26th Floor
Ottawa ON K1P 1C3

Guy Régimbald
Tel: (613) 786-0197
Fax: (613) 788-3559
E-mail: guy.regimbald@gowlings.com

Agent for the Intervener, Attorney General of Manitoba

Attorney General of Alberta
Appeals and Prosecution Policy Branch
Alberta Justice, Criminal Justice Division
3rd Floor, Centrium Place
300, 332-6 Avenue SW
Calgary AB T2P 0B2

Jolaine Antonio
Tel: 403.297.6005
Fax: 403.297.3453
Email: jolaine.antonio@gov.ab.ca

Lawyers for the Intervener, Attorney General of Alberta

Gowling Lafleur Henderson LLP
2600 - 160 Elgin St, 26th Floor
Ottawa ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
E-mail: lynne.watt@gowlings.com

Agent for the Intervener, Attorney General of Alberta

Ministry of the Attorney General of Newfoundland & Labrador
Civil Division, Dept. of Justice
Confederation Bldg, 4th Floor, East Block
PO Box 8700, Stn. A
St. John's NL A1B 4J6

Barbara Barrowman and Philip Osborne
Tel: 709.729.0448
Fax: 709.729.2129
Email: barbarabarrowman@gov.nl.ca

Lawyers for the Intervener, Attorney General of Newfoundland and Labrador

Burke-Robertson LLP
200 – 441 MacLaren Street
Ottawa ON K2P 2H3

Robert E. Houston, Q.C.
Tel: (613) 236-9665
Fax: (613) 235-4430
Email: rhouston@burkerobertson.com

Agent for the Intervener, Attorney General of Newfoundland and Labrador

Attorney General of Ontario
720 Bay Street, 4th Floor
Toronto ON M7A 2S9

Hart Schwartz and Matthew Horner
Tel: 416.326.4456
Fax: 416.326.4015
Email: Hart.Schwartz@ontario.ca

Lawyers for the Intervener, Attorney General of Ontario

Burke-Robertson LLP
200 – 441 MacLaren Street
Ottawa ON K2P 2H3

Robert E. Houston, Q.C.
Tel: (613) 236-9665
Fax: (613) 235-4430
Email: rhouston@burkerobertson.com

Agent for the Intervener, Attorney General of Ontario

Cavalluzzo Shilton McIntyre Cornish LLP
Barristers & Solicitors
474 Bathurst Street, Suite 300
Toronto ON M5T 2S6

Paul J. Cavalluzzo and Adrienne Telford
Tel: 416.964.1115
Fax: 416.964.5895
E-mail: pcavalluzzo@cavalluzzo.com

Lawyers for the Intervener, the Canadian Association of Crown Counsel

Supreme Advocacy LLP
340 Gilmour Street, Suite 100
Ottawa ON K2P 0R3

Tel: 613.695.8855
Tax: 613.695.8580
E-mail: mfmajor@supremeadvocacy.ca

Agent for the Intervener, the Canadian Association of Crown Counsel

Stevensons LLP / Breese Davies Law
15 Toronto Street, Suite 202
Toronto ON M5C 2E3

Richard Macklin, Breese Davies and Neil Wilson
Tel: 416.599.7900
Fax: 416.559.7910
E-mail: rmacklin@stevensonlaw.net
bdavies@bdlaw.ca
nwilson@stevensonlaw.net

Lawyers for the Intervener, the Criminal Lawyers' Association

Gowling Lafleur Henderson LLP
2600 - 160 Elgin St, 26th Floor
Ottawa ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
E-mail: lynne.watt@gowlings.com

Agent for the Intervener, the Criminal Lawyers' Association

Blake, Cassels & Graydon LLP
Barristers & Solicitors
Suite 4000, Commerce Court West
199 Bay Street
Toronto ON M5L 1A9

Bradley E. Berg, Erin Hoult and Nickolas Tzoulas
Tel: 416.863.4316
Fax: 416.863.2653
E-mail: brad.berg@blakes.com
Erin.hoult@blakes.com
Nickolas.tzoulas@blakes.com

Lawyers for the Intervener, the Canadian Civil Liberties Association

Blake, Cassels & Graydon LLP
Barristers & Solicitors
Suite 2000, World Exchange Plaza
45 O'Connor Street
Ottawa ON K1P 1A4

Nancy Brooks
Tel: 613-788-2218
Fax: 613-778-2247
E-mail: nancy.brooks@blakes.com

Agent for the Intervener, the Canadian Civil Liberties Association

Sack Goldblatt Mitchell LLP
20 Dundas Street West, Suite 1100
Toronto ON M5G 2G8

Marlys A. Edwardh and Frances Mahon
Tel: 416.979.4380
Fax: 416.979.4430
E-mail: medwardh@sgmlaw.com

Lawyers for the Intervener, the David Asper Centre for Constitutional Rights and British Columbia Civil Liberties Association

Norton Rose Fulbright Canada
45 O'Connor Street, Suite 1500
Ottawa ON K1P 1A4

Martha A. Healey
Tel: 613.780.8638
Fax: 613.230.5459
E-mail:
Martha.healey@nortonrosefulbright.com

Agent for the Intervener, the David Asper Centre for Constitutional Rights and British Columbia Civil Liberties Association

TABLE OF CONTENTS

I. Overview and Statement of Facts

1. The development of tort law has been deliberately protective of crown prosecutors, on the theory that they must be afforded a wide berth in order to perform their duties properly.[1] The law views the tort of malicious prosecution with "disfavour", and "there are built-in devices particular to the tort [that are designed] to dissuade civil suits" against prosecutors.[2] The Association in Defence of the Wrongly Convicted submits that the policy arguments that are used to justify this deference should be scrutinized closely before they are extended to completely bar compensation for persons who have been wrongfully convicted because their *Charter* rights were violated.

2. The presumed facts in this case are compelling: The Court is to assume that recklessness, neglect or indifference on the part of prosecutors led to the incarceration of an innocent man for more than a quarter of a century. The governments before the Court contend that the public interest in maintaining law and order requires that he nevertheless be barred from seeking any form of redress for a wrong of this nature and magnitude. This Court has previously rejected the reasoning that is advanced to justify this result and should do so again. The criminal justice system is not as fragile as the Attorneys General contend, and it will not be compromised if the victims of its errors are compensated for the harm they have suffered.

3. In addition to being compelling, the presumed facts in this case are stark. The appellant repeatedly asked prosecutors for disclosure, and for reasons that remain unexplained, they repeatedly failed to provide it, in breach of the appellant's *Charter* rights. The undisclosed material included forensic evidence that might have completely exculpated the appellant, numerous statements by complainants that would have exposed fatal inconsistencies in eye-witness identifications, and information concerning an alternate suspect that would by itself have given rise to reasonable doubt on the part of any reasonable trier of fact.[3] The prosecutors were in possession

---

[1] *Proulx v. Quebec (Attorney General)*, 2001 SCC 66 at ¶4; *Miazga v. Kvello Estate*, 2009 SCC 51 at ¶81.

[2] *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at 194, citing J.G. Fleming, *The Law of Torts*, 5th ed (Sydney: Law Book Co, 1977) at 606.

[3] Second Amended Notice of Claim filed January 13, 2014, Appellant's Record, vol. II, tab 15, pp 42-45 at ¶¶41, 45 to 46, 50, and 52 to 54.

of the undisclosed material, and were alive to its importance.[4] Moreover, they adduced evidence before the jury that suggested that some of the undisclosed material did not exist.[5]

II. Issues

4. The Chief Justice has stated the constitutional question on this appeal: '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?' AIDWYC submits that the question should be answered affirmatively.

III. Argument

5. This Court has recognized that "wrongful convictions are a blight on our justice system".[6] Even "one wrongful conviction is too many, and Canada has had more than one".[7] When an innocent person is convicted of a crime that he or she did not commit, "it is undeniable that justice has failed in its most fundamental sense".[8] The law reports are filled with proclamations about the common law's abhorrence of wrongful convictions, captured most memorably in Blackstone's ratio.

6. In the development of the criminal law since medieval times, "courts and commentators repeatedly affirmed that an individual's liberty interest was valued over society's interest in obtaining a conviction".[9] There are countless manifestations of the common law's long-established and sacred regard for the liberty of the subject, such as the presumption of innocence, the right against self-incrimination, the requirement for proof beyond a reasonable doubt, the right to confront adverse witnesses, the writ of *habeas corpus* and (perhaps most notably on this appeal), the right to disclosure of all relevant evidence.[10] These safeguards are so fundamental to Anglo-Canadian law that many of them were elevated to constitutional rights with the enactment of the *Charter*.

---

[4] *Ibid* , pp 43-45 at ¶¶46 and 50 to 53.
[5] *Ibid*, p. 46 at ¶58.
[6] *R. v. Hart*, 2014 SCC 52 at ¶8.
[7] *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at ¶36.
[8] *Ibid* at ¶107.
[9] William S. Laufer, "The Rhetoric of Innocence" (1995) 70 Wash. L. Rev. 329 at 332.
[10] *Ibid* at 333-334; and see *Lemay v. The King*, [1952] 1 S.C.R. 232.

7. In short, the criminal law has evolved over the course of centuries to prevent the state from punishing the innocent. AIDWYC submits that the immense value that the law places on not punishing the innocent should find expression not only in safeguards designed to prevent miscarriages of justice, but also in the form of meaningful redress when those safeguards fail, resulting in catastrophic harm. The "manner in which a society concerns itself with persons who may have been wrongly convicted and imprisoned must be one of the yardsticks by which civilization is measured."[11]

8. On the assumed facts on this appeal, serious and repeated breaches of the appellant's *Charter* rights caused his wrongful conviction and incarceration.[12] Thus, the only issue on this appeal is remedy. Specifically, ought there to be a blanket restriction on the ability of trial courts to award damages under s. 24(1) of the *Charter*, for non-malicious prosecutorial misconduct, regardless of its nature and consequences?

9. In *Vancouver (City) v. Ward*, the Court established a four-part test for determining whether damages may be awarded under s. 24(1):

> (a) The claimant must establish that a *Charter* right has been breached.
>
> (b) The claimant must establish that damages are a just and appropriate remedy, in the sense that an award of damages would compensate the claimant for the infringement, vindicate the public interest in upholding the constitution and/or deter future breaches.
>
> (c) Once the claimant has demonstrated that damages are functionally justified, the state has the opportunity to demonstrate that an award should not be made because it would interfere with the state's ability to govern effectively.
>
> (d) If the state fails to negate the appropriateness of a damage award, the court will fix the *quantum*.[13]

---

[11] British Section of the International Commission of Jurists, *Miscarriages of Justice* (London: JUSTICE, 1989) at 5-6.

[12] Second Amended Notice of Claim, *supra* note 3, p. 53 at ¶97. (The appellant also advances alternative theories of liability against both the prosecutors and other parties. Contrary to the submissions of the Attorney General of British Columbia, they are irrelevant to the stated question on this appeal.)

[13] *Vancouver (City) v. Ward*, 2010 SCC 27.

10. This appeal (and the trial of the action if the case proceeds) will presumably turn on the third branch of the test, *i.e.* the 'effective governance' defence. It cannot be controversial that the appellant's wrongful conviction and the resulting 27-year incarceration are ripe for compensation. Indeed, in *Ward*, the Chief Justice specifically identified prolonged detention caused by a breach of *Charter* rights as the type of harm for which damages are appropriate.[14]

11. Writing for the majority in *Ward*, the Chief Justice contemplated that the scope of the 'effective governance' defence will be refined as the law in this area matures. The Attorneys General are quick to point out that in this context, she referred to the tort of malicious prosecution, and distinguished it from police negligence:

> ... 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*), 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*). When appropriate, private law thresholds and defences may offer guidance in determining whether s. 24(1) damages would be "appropriate and just". ... These are complex matters which have not been explored on this appeal. I therefore leave the exact parameters of future defences to future cases.[15]

12. As a preliminary matter, AIDWYC submits that because the scope of the 'effective governance' defence has been explicitly left open, it would be preferable to determine the parameters of the defence on a fully developed record. As noted, the reason for the prosecution's failure to provide the appellant with constitutionally mandated disclosure remains unexplained. The only facts that are established for the purposes of this appeal are that a *Charter* breach resulted in appalling harm to an innocent victim, and that the breach is explained by something other than malice. It is one thing to say that private law defences may offer guidance in the development of the 'effective governance' defence. It is quite another thing to say that private law defences categorically preclude the possibility of any *Charter* remedy when the most the government can say for itself is that its actors' unexplained constitutional breaches were not driven by malice.

---

[14] *Ibid* at ¶49.

[15] *Ibid* at ¶¶42-43 [citations omitted].

13. The Attorneys General nevertheless make that very argument and contend that the mere absence of malice is, by itself, sufficient to definitively preclude recovery for a breach of *Charter* rights, because the proper administration of the criminal justice system commands this strict and narrow result. The submission turns the law on its head for the reasons that follow.

14. The *Charter* is to be interpreted purposively, generously and expansively.[16] A right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach.[17] The requirement of a generous and expansive interpretive approach holds equally true for *Charter* remedies as it does for *Charter* rights.[18] Section 24(1) confers broad remedial jurisdiction:

> It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.[19]

15. Thus, the starting point for determining an appropriate remedy for non-malicious prosecutorial misconduct is not private tort law, but rather the vindication of rights established by the supreme law of Canada:

> In selecting an appropriate remedy under the *Charter* the ***primary concern*** of the court must be to apply the measures that will best vindicate the values expressed in the *Charter* and to provide the form of remedy ... that best achieves that objective. This flows from the court's role as guardian of the rights and freedoms which are entrenched as part of the supreme law of Canada.[20]

16. As noted, the Chief Justice wrote in *Ward* that private law defences "may offer guidance" in the development of the 'effective governance' defence and, as also noted, she referred to the tort of malicious prosecution. AIDWYC submits that the tort should be considered in its historic context.

---

[16] *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 156; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344.

[17] *R. v. 974649 Ontario Inc.*, 2001 SCC 81 at ¶20.

[18] *Doucet-Boudreau, v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at ¶24.

[19] *Mills v. The Queen*, [1985] 1 S.C.R. 863 at 965. This specific passages is cited with approval in *R. v. Rahey*, [1987] 1 S.C.R. 588 at 640, *R. v. 974649 Ontario Inc.*, *supra* note 17 at ¶18, *Doucet-Boudreau*, *ibid* at ¶¶24, 50 and 52, *R. v. Bjelland*, 2009 SCC 38 at ¶53 (in dissent), and *Vancouver (City) v. Ward*, *supra* note 13 at ¶¶17-18.

[20] *Osborne v. Canada (Treasury Board)*, [1991] 1 S.C.R. 69 at 104 [emphasis added].

17. This Court's first consideration of the tort following the enactment of the *Charter* came in *Nelles*. A motion judge struck Ms. Nelles' claim for malicious prosecution on the basis that crown attorneys enjoy an absolute immunity at common law from any liability in respect of the exercise of their prosecutorial discretion. The court at first instance held that the *Charter* did not displace the immunity. The Court of Appeal for Ontario agreed.[21]

18. When *Nelles* reached this Court, Justice Lamer (as he was) wrote for the majority. He reviewed the varying states of the law in Canada including Quebec, and the law in the United States, England,[22] Scotland, Australia and New Zealand, and carefully reviewed the policy arguments advanced on both sides. He concluded that an absolute immunity could not be justified in Canada. He was mindful of the *Charter*:

> … [It] should be noted that in many if not all cases of malicious prosecution … there will have been an infringement of an accused's [*Charter*] rights. … Not 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*. … When a person can demonstrate that one of his *Charter* rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the *Charter* which surely is to allow courts to fashion remedies when constitutional infringements occur. Whether or not a common law or statutory rule can constitutionally have the effect of excluding the courts from granting the just and appropriate remedy, their most meaningful function under the *Charter*, does not have to be decided in this appeal. …[23]

19. The majority in *Nelles* held that there was no absolute immunity for prosecutors insofar as the existing tort of malicious prosecution is concerned. The Court did not add a 'malice' requirement to the tort if the defendant happened to be a Crown prosecutor. Rather, it held that Crown prosecutors stand in the same shoes as anybody else insofar as the tort is concerned. Justice

---

[21] *Nelles v. Ontario*, [1985] O.J. No. 2599, 21 D.L.R. (4th) 103 (Ont. C.A.).

[22] Notably, at that time, the law in England admitted of the possibility of an action against a prosecutor where evidence had been suppressed. Similarly, although prosecutors in the United States enjoy the protection of an absolute immunity by reason of the decision of the Supreme Court in *Imbler v. Pachtman*, Justice White in dissent wrote that he would carve out an exception for the unconstitutional suppression of evidence: "A prosecutor seeking to protect himself from liability for failure to disclose evidence may be induced to disclose more than is required. But this will hardly injure the judicial process. Indeed, it will help it." See *Nelles v. Ontario* (SCC), *supra* note 2 at 184f and 190c.

[23] *Nelles*, *ibid* at 194 to 196.

Lamer described the government's arguments about a flood of claims from disgruntled accused and the chilling effect of potential liability as "largely speculative". He responded to the arguments by noting that the existing elements of the tort presented formidable obstacles for plaintiffs.[24] This is not to say he accepted the alarmist arguments. He simply did not deal with them.

20. *Nelles* was the first and last time that this Court considered the effect of the *Charter* on claims against prosecutors for damages arising from their misconduct. The Court revisited the tort of malicious prosecution in *Proulx* and *Miazga,* without so much as mentioning the implications of the *Charter*. AIDWYC submits that in light of the narrowness of the issues in *Nelles,* and the complete absence of any *Charter* analysis in *Proulx* and *Miazga,* these cases provide little helpful guidance in the proper development of the 'effective governance' defence.

21. By contrast, the Court concluded in *Hill v. Hamilton-Wentworth Regional Police Services Board* that police officers can be held liable for the harm caused by the negligent investigation of crime. If an innocent person is wrongly convicted because of a negligent investigation, he or she may be able to obtain redress from the responsible party. The Chief Justice, writing for the majority, noted that recognition of a duty of care "is consistent with the values and spirit underlying the *Charter,* with its emphasis on liberty and fair process".[25] This in turn is consistent with the proposition that the common law should develop in a manner that it is consistent with *Charter* values.[26]

22. The submissions made by the Attorneys General in this case mirror those made by the respondents in *Hill*. It was argued that recognizing a duty of care in negligence would have a chilling effect and cause police officers to become unduly defensive, meaning that their decision-making would be distorted by the prospect of liability. It was said that the potential for liability would distract police officers' energies from their important public duties, meaning they would be inconvenienced if they became involved in litigation. The potential for easy recovery would lead to a flood of meritless cases from disgruntled accused persons. The proposed liability fails to take the discretionary nature of police work into account. Finally, the respondents argued that existing

---

[24] *Ibid* at 197 and 199.

[25] *Hill, supra* note 7 at ¶38.

[26] *Grant v. Torstar Corp.,* 2009 SCC 61 at ¶44.

remedies were sufficient. The Chief Justice wrote for the majority, and conducted a comprehensive analysis of these arguments, prefaced with the following:

> In approaching these arguments, I proceed on the basis that policy concerns raised against imposing a duty of care must be more than speculative; a real potential for negative consequences must be apparent.[27]

23. AIDWYC submits that this approach commends itself. The result of the exercise in *Hill* was revealing. The majority was entirely un-persuaded by speculative arguments about the supposed chilling effect on police officers if they faced potential liability. The only empirical evidence before the Court suggested that tort liability had no adverse influence on police conduct. In any event, the argument is counter-intuitive. The prospect of potential liability is generally thought to encourage more prudent behaviour on the part of individuals, and to encourage organizations to implement loss-prevention measures. The Chief Justice also noted that professionals are ordinarily indemnified for claims pertaining the exercise of their duties, belying the suggestion that fear of personal liability will cause undue timidity.[28]

24. Similarly, the majority held that police officers may be liable for negligent investigations, even though they exercise discretion and make difficult judgment calls. In this regard, they are no different from other professionals.[29] The Chief Justice noted that the discretion exercised by police officers differs from that exercised by crown attorneys, and held that conduct is to be measured by the standards of one's own profession.[30]

25. The attributes of the discretion exercised by crown attorneys militate against an absolute ban on the recovery of damages under s. 24(1) for non-malicious prosecutorial misconduct. The discretion is quasi-judicial, but it is also *sui generis*: Conventional judicial officers conduct their work in public and on the record. They are required to explain and justify their decisions, and are subject to review and reversal if their decisions are incorrect or unreasonable. None of this is true for prosecutors. In fact, crown prosecutors are largely unaccountable for their conduct in the course of a prosecution. They are quite properly independent of the executive. They are not subject to

---

[27] *Hill*, *supra* note 7 at ¶48, and see ¶43.
[28] *Ibid* at ¶¶56 to 59.
[29] *Ibid* at ¶53.
[30] *Ibid* at ¶¶49 to 54.

the discipline of Law Societies for the exercise of prosecutorial discretion, and their decisions are not subject to review by courts, except in the "clearest of cases" justifying the "drastic" remedy of a stay of proceedings.[31] More fundamentally, true judicial officers publicly adjudicate a contest between adversaries. By virtue of their role in an adversarial process, prosecutors are quite properly in the fray. All of this being so, compensation may be appropriate when they have breached the supreme law of the land and caused injury, even if their failings are explained otherwise than by malice.

26. The majority in *Hill* was also unimpressed by what the Chief Justice described as the "spectre of a glut of jailhouse lawsuits". She observed that the class of potential claimants is limited by the requirement that the plaintiff establish that the impugned conduct resulted in compensable injury. "Treatment rightfully imposed by the law does not constitute compensable injury."[32] The appellant is only able to seek s. 24(1) damages in this case because his *Charter* rights were violated *and* he was wrongly convicted as a result.

27. The respondents' remaining arguments are equally groundless. The respondents are unable to articulate how public confidence in the administration of justice is enhanced if an innocent person is jailed for much of his adult life because of a breach of his *Charter* rights, and then barred from seeking compensation.

28. Similarly, they suggest that there are alternative remedies available to the appellant. None affords any redress for the only type of wrong in issue on this appeal. The fact that the appellant can recover from the police if he establishes that their investigation was negligent, or that he can recover from the Crown if the prosecution was malicious, is irrelevant to the issue on this appeal. If the investigation was exemplary and the failure to disclose is explained by the prosecutors' merely reckless disregard of their disclosure obligations, there is no remedy apart from that identified by the constitutional question. Again, the Chief Justice dealt with this argument in *Hill* noting that "the existing remedies for wrongful prosecution and conviction are incomplete" and that "government compensation schemes possess their own limits".[33] She continued by quoting

---

[31] *Krieger v. Law Society of Alberta*, 2002 SCC 65 at ¶¶24 to 32; and *R. v. Ryan*, 2013 SCC 3 at ¶88, per Fish J. (dissenting but not on this point).

[32] *Hill, supra* note 7 at ¶60.

[33] *Ibid* at ¶35.

from the report authored by the Honourable Peter Cory following his inquiry into the wrongful prosecution of Thomas Sophonow:

> If the state commits significant errors in the course of [an] investigation and prosecution, it should accept the responsibility for the sad consequences. ... Society needs protection from both the deliberate and careless acts of omission and commission which lead to wrongful conviction and imprisonment.[34]

29. In brief, *Hill* offers more helpful guidance in determining the scope of the 'effective governance' defence to a claim for damages for a breach of *Charter* rights than *Proulx* and *Miazga*, which contain no *Charter* analysis at all.

30. In *Nelles*, the Court did not need to conduct a comprehensive analysis of the governments' alarmist arguments, because the elements of the tort under consideration mitigated those concerns. In *Hill*, the alarmist arguments had to be addressed, were thoughtfully considered, and did not pass muster. The *Charter* analysis in *Nelles* is not extensive, but what little there was wholly supports a broad remedial response for *Charter* breaches,[35] and foreshadowed *Doucet-Boudreau*, *Mills*, *Hill* and *Ward*.[36]

31. In *Ward*, the Chief Justice held that "*Charter* rights must be maintained, and cannot be allowed to be whittled away by attrition."[37] AIDWYC respectfully agrees and submits that this is nowhere more true than in the case where the state wrongly convicts the innocent, whose need for compensation is unaffected by the state of mind of those responsible.

IV. Costs

32. AIDWYC does not seek costs and asks that none be awarded against it.

V. Order Sought

33. AIDWYC asks that it be permitted to present oral argument at the hearing of this appeal.

October 29, 2014

Sean Dewart and Tim Gleason
Counsel for AIDWYC

---

[34] The Honourable Peter Cory, *The Inquiry Regarding Thomas Sophonow* (2001), cited with approval in *Hill*, *ibid* at ¶37; and see *Nelles*, *supra* note 2 at 198-199.

[35] *Nelles*, *ibid* at 196.

[36] *Osborne*, *supra* note 20 at 104.

[37] *Ward*, *supra* note 13 at ¶25.

VI. Table of Authorities

VI. Statutory Provisions

Statute

Canadian Charter of Rights and Freedoms, s. 24(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11

http://laws-lois.justice.gc.ca/

Enforcement of guaranteed rights and freedoms	**Recours en cas d'atteinte aux droits et libertés**
24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.	24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.