Court 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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FACTUM OF THE INTERVENER, CRIMINAL LAWYERS' ASSOCIATION
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

PART I - OVERVIEW

1. In this appeal, the appellant applied for and obtained an order dated September 6, 2014 stating a constitutional question as follows:

> 1. Does section 24 (1) of the *Canadian Charter of Rights and Freedoms* ("*Charter*") authorize a court of competent jurisdiction to award damages against the Crown for prosecutorial misconduct absent proof of malice?

2. In the lower court proceedings, the Court of Appeal for British Columbia refused to permit an amendment to a *Charter* damages claim, against the Crown, framed as follows:

> The various acts and omissions that violated the Plaintiff's right to disclosure and/or his right to full answer and defence and/or his right to a fair trial, as described in paragraphs 113-119 above, were a **marked and unacceptable departure** from the reasonable standards expected of the Crown counsel. [Emphasis added][1]

3. The Court of Appeal appears to have been concerned that the proposed pleading subverted the private law tort related to Crown prosecutors – malicious prosecution. The case law that has developed around malicious prosecution, as it relates to Crown attorneys, posits that such a claim can only succeed if founded on proof of actual malice. In *Proulx v. Quebec*, this Court stated:

> ... a suit for malicious prosecution must be based on more than recklessness or gross negligence. Rather, it requires evidence that reveals a willful and intentional effort on the Crown's part to abuse or distort its proper role within the criminal justice system. [2]

4. In the case at bar the Court of Appeal found the proposed amendment (which had been granted by the motions court judge) pleaded a claim for prosecutorial misconduct that could found liability on what was essentially a gross negligence standard, *i.e.* a standard below actual malice. The appeal from the motions court judge was allowed and the amendment set aside.

CLA POSITION

5. The CLA submits as follows:

> 1) This appeal is in respect of the Crown's liability for breach of the plaintiff's section 7 *Charter* rights to full and fair disclosure. Hence, as argued by the appellant, the grounds for

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[1] *Henry v. British Columbia (A.G.)*, 2014 BCCA 15, at paras. 2 and 30.
[2] *Proulx v. Quebec (Attorney General)*, 2001 SCC 66, at para. 35 [*Proulx*].

qualified prosecutorial immunity are attenuated. Such an immunity may apply to "core" Crown powers which are discretionary, but does not apply to the Crown's disclosure duties – such as the duty to make full and fair disclosure. On this issue, the CLA refers to the submissions of the appellant and will not duplicate them in this factum;

2) A more robust constitutional remedy for breach of disclosure obligations will lead to positive behavioural effects that benefit all stakeholders in the criminal justice system. Requiring proof of actual malice undermines a central tenet of prosecutorial responsibility: the duty to provide full and fair disclosure in criminal proceedings;

3) There already exists closely analogous jurisprudence in the criminal trial costs law, where monetary awards are made against the Crown,[3] for breach of constitutional disclosure duties based on the "marked departure" standard (*i.e.* the standard proposed in the amendment). The application of this long-standing jurisprudence has not compromised the "effective and uninhibited prosecution of criminal wrongdoing" and, it is submitted, has enhanced trial fairness; and

4) The application of a standard below the threshold of actual malice ensures that *Charter* rights are given practical effect and is consistent with the application of standards less onerous than malice in public law civil cases (abuse of public office), in punitive damages cases and in defamation law. Put in other words, this Court's jurisprudence has established that barriers to remedies for breaches of *Charter* rights are to be avoided.[4] A malice requirement is such a barrier.

PART II - INTERVENER'S ARGUMENT

Reinforcing Respect for Disclosure Obligations

6. Recognition of a potential entitlement to *Charter* damages for prosecutorial misconduct absent proof of malice will reinforce the importance of adherence to appropriate standards of Crown conduct and, in particular, the disclosure of evidence as a non-discretionary duty of the highest importance. Quite simply, requiring malice for an award of damages sends the wrong message: that a non-malicious breach of disclosure obligations, however blatant, is not serious enough to warrant a remedy outside of the criminal proceeding itself.

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[3] As noted in *Vancouver (City) v Ward*, 2010 SCC 27 [*Ward*], at paragraph 22, a monetary order under s. 24(1) is made against the state, not the individual involved in the *Charter* breach. Thus, any monetary order flowing from a breach of the duty to disclose, will be made against the Crown and not the individual Crown prosecutors.

[4] *Dunedin Construction, infra*, note 14, at para. 1: "To the extent that it is difficult or impossible to obtain remedies for Charter breaches, the Charter ceases to be an effective instrument for maintaining the rights of Canadians." *Ward, supra*, note 3, at para. 18 "... it is improper for courts to reduce this discretion [the discretion to grant "appropriate and just" remedies for Charter breaches] by casting it in a strait-jacket of judicially prescribed conditions."

7. Providing meaningful recourse for a non-malicious breach of the Crown's duties will serve the important public interest in avoiding miscarriages of justice by encouraging timely and robust disclosure of evidence. The recognition of this public interest and the potential for civil liability to influence the behaviour of actors in the criminal justice system led this Court to recognize the tort of negligent police investigation in *Hill v. Hamilton-Wentworth Regional Police Services Board*.[5] In *Ward* this Court recognized that the availability of damages may provide a meaningful deterrent to future *Charter* breaches by state actors.[6] Most recently, this Court reaffirmed in *R. v. Hart* that "proactive measures" should be taken to avoid the blight of wrongful convictions.[7] Access to damages for breaches of Crown duties will further the goals of deterrence and behaviour modification identified in this Court's jurisprudence.

8. Conversely, applying the strict requirements of an ancient common law tort will have the opposite effect. In *Proulx*, this Court stated that Crown liability for malicious prosecution, which requires proof of malice, would only be engaged "in the most exceptional circumstances."[8] In *Miazga v. Kvello Estate*, this Court suggested that liability for malicious prosecution will not be made out in cases where a prosecutor proceeds without reasonable and probable grounds "by reason of incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence, or even gross negligence."[9] Rather than deterring breaches of the *Charter*, a recognition of these prosecutorial shortcomings as a defence to a claim for damages – in the case of a breach of the duty to disclose – will foster disrespect for the sanctity of the Crown's disclosure duties and a lax attitude towards their observance.

The Trouble With Malice

9. Long before the advent of the *Charter,* the law posited that if a plaintiff has a right, he or she must also have a remedy by which to vindicate that right.[10] This rule attained constitutional status in Canada in the case of *Nelles v. A.G. (Ontario)*, where Lamer J. (as he then was) stated:

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[5] 2007 SCC 41, at para. 36 [*Hamilton-Wentworth*].
[6] 2010 SCC 27, at para. 25.
[7] 2014 SCC 52 at para. 8.
[8] *Proulx, supra*, note 2, at para. 4.
[9] 2009 SCC 51, at para. 81 [*Miazga*].
[10] *Ashby v. White*, (1703) 92 ER 126.

> 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.[11]

10. A malice standard, however, can leave a wronged person without recourse, effectively requires proof of a person's thoughts,[12] and renders objective standards elusive. In *Miazga* this Court characterized malice in the context of prosecutorial misconduct as incorporating an improper purpose involving an "abuse of prosecutorial power," as being akin to a "fraud on the process of criminal justice," and as requiring that a prosecutor "*wilfully* perverted or abused the office of the Attorney General ... [emphasis in original]"[13] This subjective character of malice renders it frequently incapable of proof, thus creating a nearly insurmountable barrier to relief in circumstances where on any objective assessment relief is appropriate.

11. As a result, the law has adopted alternative approaches to establishing liability where the threshold of subjective intention is undesirable and impracticable. As set out below, these alternatives have been applied in the criminal law costs jurisprudence, in public law civil cases (abuse of public office), punitive damages cases and defamation law. This application of standards that are below the threshold of actual malice ensures that legal rights are given practical effect. The law surrounding prosecutorial misconduct should be developed in a holistic manner consistent with our broader legal system.

(i) Criminal Law – Costs

12. Requiring proof of malice is inconsistent with jurisprudence addressing cost awards against the Crown for failure to disclose evidence in a timely manner in breach of the *Charter*, including this Court's decision in *Dunedin Construction* where such costs were awarded.[14] As McLachlin C.J.C. explained in *Dunedin*, costs awards against the Crown, granted under s. 24(1), have risen in prominence in the *Charter* era and are an effective means by which a court can enforce standards of disclosure: "Such awards, while not without a compensatory element, are integrally connected to the court's control of its trial process, and intended as a means of disciplining and

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[11] *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at p.196.

[12] The difficulty with proving subjective intention is well-expressed in Lord Diplock's analysis of subjective and objective recklessness in *Commissioner of Police for the Metropolis v Caldwell* [1982] A.C. 341, at p. 352: "The only person who knows what the accused's mental processes were is the accused himself."

[13] *Miazga, supra*, note 9, at paras. 8 and 80.

[14] *Ontario v. 97649 Ontario Inc.*, 2001 SCC 81 [*Dunedin Construction*].

discouraging flagrant and unjustified incidents of non-disclosure."[15] From this case, the standard of "marked and unacceptable departure" was confirmed as the test for awarding costs against the Crown in criminal proceedings for breaches of the accused's *Charter* rights:

> Crown counsel is not held to a standard of perfection, and costs awards will not flow from every failure to disclose in a timely fashion. Rather, **the developing jurisprudence uniformly restricts such awards, at a minimum, to circumstances of a marked and unacceptable departure from the reasonable standards expected of the prosecution**. I fail to see how the provision of an expedient remedy in such cases, from a trial court that is not only competent but also ideally situated to make such an assessment, risks disrupting the existing system of justice. [Emphasis added] [16]

13. However, in situations like the case at bar, where the criminal process has been completed without the full disclosure of evidence, an award of costs against the Crown is no longer a practical possibility because the criminal process has been concluded. This gives rise to the incongruous result that the same wrong – non-disclosure of evidence – may afford a monetary remedy where the evidence is disclosed during the course of the criminal proceedings but not where the evidence is disclosed decades later following a lengthy period of imprisonment.

14. In addition, awards of costs against the Crown, though important, have limitations in their ability to deter flagrant non-disclosure in that they are largely limited in quantum.[17] The important prophylactic objectives of costs awards in criminal proceedings will be more fully achieved by the option of an accessible remedy, in the civil courts, which reflects the actual damages that failure to disclose evidence can inflict.

15. Finally, recognizing a potential cause of action for prosecutorial misconduct absent malice is consistent with the civil liability criminal defence counsel may face for negligence in the performance of their duties. Recognition of Crown liability for misconduct short of malice will avoid the asymmetry of near-absolute immunity for Crown conduct and ensure that some degree of accountability is present on both sides of criminal proceedings.

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[15] *Dunedin Construction*, *supra*, note 14, at paras. 80-81.

[16] *Dunedin Construction*, *supra*, note 14, at para. 87, and see *R v Zarinchang*, 2010 ONCA 286, at para. 67.

[17] *Ward*, *supra*, note 3, at para. 22.

(ii) Misfeasance in Public Office

16. The intentional tort of misfeasance in public office provides an example in the civil context where the route to liability provides for a standard short of express malice. The tort provides an apt analogy to the *Charter* claim in this appeal in that it is meant to deter public office holders from misconduct. In *Three Rivers DC v Bank of England (No. 3)*,[18] the House of Lords considered the tort of misfeasance in public office and articulated a "second branch" to the tort which may be established absent proof of a deliberate and dishonest abuse of power. As explained by Lord Steyn, misfeasance in public office has four elements: (1) the defendant must be a public officer; (2) the defendant must be exercising power as a public officer; (3) the defendant must be acting with the appropriate state of mind; and (4) a duty must be owed to the plaintiff. It is the third element, state of mind, which was the primary subject of the Court's consideration. As set out in *Three Rivers,* the state of mind element of the tort may be established in two distinct ways:

> The case law reveals two different forms of liability for misfeasance in public office. First there is the case of targeted malice by a public officer … The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff.[19]

17. Thus liability may flow through targeted malice or reckless indifference on the part of a public officer. This duality is a natural development of tort law:

> This is an organic development, which fits into the structure of our law governing intentional torts. The policy underlying it is sound: **reckless indifference to consequences is as blameworthy as deliberately seeking such consequences**. It can therefore now be regarded as settled law that an act performed in reckless indifference as to the outcome is sufficient to ground the tort in its second form.[20] [Emphasis added]

18. This Court in *Odhavji Estate v Woodhouse*[21] expanded upon the decision in *Three Rivers*. Iacobucci J., for a unanimous Court, classified the alternative means of establishing liability as "Category A and Category B".[22] The facts in *Odhavji* did not necessitate an analysis of the recklessness standard. Nonetheless, the effect of this dual approach to establishing the requisite

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[18] [2000] 3 All ER 1 [*Three Rivers*].

[19] *Three Rivers, supra*, note 18, at p. 8ef.

[20] *Three Rivers*, *supra*, note 18, at p. 9fg. There is agreement amongst the rest of the House with Lord Steyn on this point; see Lord Hutton at p. 36gh Lord Hobhouse at p. 45f-h, and Lord Millet at p. 49. In addition, as stated strongly by Lord Hobhouse (at p. 42cd) and somewhat less categorically by Lord Millet (at p. 50dg), the tort may also be established in the case of an omission by a public officer.

[21] 2003 SCC 69 [*Odhavji*].

[22] *Odhavji*, *supra*, note 21, at para. 22.

mental element is that the scope of the tort is extended to allow for its application, in appropriate circumstances, without proof of subjective intent. Without this flexibility, the tort risks losing practical application and becoming a footnote in legal history.

(iii) Punitive Damages

19. Requiring proof of malice for a remedy under s. 24(1) of the *Charter* would also lead to the anomalous development of the law of damages. In one of the leading judgments on the development of exemplary or punitive damages, *Rookes v. Barnard and Others*,[23] the House of Lords laid out three general situations in which such damages will flow. One such situation, apposite to the case at bar, is "oppressive, arbitrary or unconstitutional action by the servants of the government."[24] Thus, the law on punitive damages developed in part as a response to the need to deter, in the strongest terms, abusive actions by public office holders. In *Whiten v. Pilot Insurance Co.*, this Court identified the requirements for an award of punitive damages that looks for a "marked departure" from ordinary standards to found liability. Specifically, the Court stated: "(1) Punitive damages are very much the exception rather than the rule, (2) imposed *only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour."[25] [Emphasis in original]

20. Given that punitive damages, which are reserved for the most exceptional circumstances, may be awarded absent malice, it is illogical to require proof of malice in order to obtain damages for the violation of constitutional rights through a breach of the Crown's duty to disclose evidence.

(iv) Qualified Privilege

21. The defence of qualified privilege to defamation is an example in the civil context in which a softened approach to malice is adopted. Qualified privilege is a defence to defamation. It is open to a plaintiff, however, to defeat a qualified privilege defence by showing that the defendant acted with malice. In addition, recklessness is recognized as a subset of malice that, if established, will also defeat a qualified privilege defence. As explained in *Hill v. Church of Scientology*:

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[23] [1964] AC 1129 [*Rookes*].
[24] *Rookes*, *supra*, note 23, at p. 1226.
[25] *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, at para. 94.

> Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes, as Dickson J. (as he then was) pointed out in dissent in Cherneskey, supra, at p. 1099, "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created. See, also, Taylor v. Despard, [1956] O.R. 963 (C.A.). Malice may also be established by showing that the defendant spoke dishonestly, or in knowing **or reckless disregard for the truth**. See McLoughlin, supra, at pp. 323-24, and Netupsky v. Craig, [1973] S.C.R. 55, at pp. 61-62.[26] [Emphasis added]

(v) Conclusion re: The Trouble with Malice

22. The law's recognition that strict proof of malice is inappropriate in many circumstances suggests that a standard that does not include malice is appropriate when considering an award of *Charter* damages against the Crown for prosecutorial misconduct, at least in the disclosure context. The development of a flexible approach to liability absent proof of malice in this Court's decisions in *Odhavji*,[27] *Hamilton-Wentworth*,[28] and *Ward*[29] has not resulted in a flood of claims. Conversely, this Court's decision in *Ward* provides an appropriate framework for assessing when *Charter* damages will be awarded.

23. While malicious prosecution may provide a plaintiff with an overlapping cause of action in some cases, where it does not, it is essential that a remedy be available; as observed by Sopinka J., "... often, conduct of the police or the prosecutor that does not constitute malicious prosecution may amount to a *Charter* breach and attract a remedy under s. 24(1)."[30] Such a remedy must be flexible and unencumbered by the unduly restrictive requirements of the tort of malicious prosecution. As noted by the Court in *Ward*, although existing causes of action against state actors embody a certain "practical wisdom", tort law and the *Charter* are "distinct legal avenues".[31] This is particularly so when an existing private law tort does not provide a remedy.

Conclusion: Defining the Marked Departure Test

24. If the marked departure standard is to be applied to civil claims against the Crown for disclosure failings, there remains the matter of defining the standard. The marked departure standard

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[26] *Hill v. Church of Scientology*, [1995] 2 SCR 1130 at para. 145.
[27] *supra*, note 21.
[28] *supra*, note 5.
[29] *supra*, note 3.
[30] Sopinka, John, "Malicious Prosecution: Invasion of Charter interests: Remedies: Nelles v. Ontario: R v. Jedynack: R. v. Simpson." (1995) 74 Can. Bar Rev. 366, at pp. 373-373.
[31] *Ward, supra*, note 3, at paras. 36, 43 and 59.

finds application in criminal law and civil litigation. In civil litigation, the marked departure standard appears to closely resemble the concepts of fault based on recklessness, gross fault or gross negligence. Yet as noted by LeBel J. in *Finney v. Barreau du Québec*, "it remains easier to describe than to define those categories of fault".[32]

25. Ultimately, the test to be applied must consider the factors outlined above. A meaningful remedy must be available in cases where a failure to disclose has caused the suffering of damages. The test must also accord deference in large measure to mistakes that can occur in the criminal prosecution context. A marked departure threshold strikes that balance. Thus, the CLA submits that following helpful *dictum* from the Court of Appeal for Alberta in the criminal trial costs case of *R. v. Robinson*[33] captures these competing principles. Specifically, as stated by McFadyen J.A., concurred with by Foisy J.A., at paragraph 30:

> ... Something more than a bona fide disagreement as to the applicable law, or a technical, unintended or innocent breach, whether clearly established or not, must be required. Otherwise, the criminal courts will be inundated with applications in this regard. We cannot ignore the fact that disclosure issues continue to occupy much of the Courts' time and attention in criminal trials, despite the existence of rules relating to disclosure, and often, good faith attempts on the part of police and Crown prosecutors to discharge their duties. **Some degree of misconduct or an unacceptable degree of negligence must be present before costs are awarded against the Crown under s. 24(1) of the Charter. ...** [Emphasis added]

26. A review of additional leading failure to disclose cases, where costs were awarded under the marked departure standard, indicates that the principles enunciated in *R. v. Robinson* are being applied in those rare cases where criminal trial cost are awarded against the Crown.

- The Crown failed to disclose notes of a Crown interview with an eyewitness until six months after the interview and following nearly two weeks of trial. No explanation was advanced for the failure to disclose the notes other than that the originally assigned Crown had been replaced: *R. v. Logan*, [2002] O.J. No. 1817 (C.A.).
- The Crown failed to disclose critical inculpatory evidence until three days into the trial, despite prior defence requests for the information: *R. v. Leboeuf*, 2005 QCCA 637.
- An "extensive" failure to disclose evidence, after the trial commenced, included disclosure related to a potential alibi. A stay application brought by the defence was dismissed but several

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[32] 2004 SCC 36, at para. 35.
[33] [1999] A.J. No. 1469 (C.A.).

adjournments of the trial were necessitated by the non-disclosure: *R. v. Corkum* (1997), 163 N.S.R. (2d) 197 (N.S.S.C.).

- A mistrial followed discovery that the Crown had obtained and utilized information to screen juror candidates that was not provided to the defence. Crown counsel turned their minds to the disclosure issue during the selection process. The trial had proceeded for 33 days, prior to the eventual mistrial: *R. v. Huard*, [2009] O.J. No. 6221 (Ont. Sup. Ct. J.).

27. This jurisprudence demonstrates that the law on criminal trial costs can be applied to civil claims against the Crown under s. 24(1) of the *Charter* in an efficacious manner. The criminal law costs jurisprudence elucidates a defined class of acts for which the courts already provide review of Crown conduct. A damages remedy under s. 24(1) for conduct short of actual malice based on marked departure achieves balance between ensuring access to justice for wronged accused persons, advancing respect for disclosure obligations and ensuring prosecutors' actions are not unduly hampered.

PART III - SUBMISSION ON COSTS

28. The CLA does not request costs and requests that no costs be awarded against it.

PART IV - REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT

29. The CLA requests permission to present oral argument not to exceed ten (10) minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

October 30, 2014

Richard Macklin/Breese Davies/Neil Wilson
Lawyers for the Intervener, Criminal Lawyers' Association (Ontario)

PART V - TABLE OF AUTHORITIES

Cases		Cited at Paragraph(s)
1.	*Ashby v White*, 1703 92 ER 126	9
2.	*Commissioner of Police of the Metropolis v Caldwell*, [1982] A.C. 341	10
3.	*Finney v Barreau du Quebec*, 2004 SCC 36, [2004] 2 3 S.C.R. 17	23
4.	*Henry v British Columbia (Attorney General)*, 2014 BCCA 15	2
5.	*Hill v Church of Scientology*, [1995] 2 S.C.R. 1130	21
6.	*Hill v Hamilton-Wentworth Regional Police Service*, 2007 SCC 41, [2007] 3 3 S.C.R. 129	7, 22
7.	*Miazga v Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339	8, 10
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9.	*Odhavji Estate v Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263	18, 22
10.	*Ontario v 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575	5, 12
11.	*Proulx v. Québec (Attorney General)*, 2001 SCC 66, [2001] 3 3 S.C.R. 9	3, 8
12.	*R v Corkum*, (1997), 163 N.S.R. (2d) 197 (N.S.S.C.)	26
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14.	*R v Huard*, [2009] O.J. No. 6221 (Ont. Sup. Ct. J.)	26
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16.	*R v Logan*, [2002] O.J. No. 1817 (C.A.)	26
17.	*R v Robinson*, [1999] A.J. No 1469 (C.A.)	25
18.	*R v Zarinchiang*, 2010 ONCA 286	12
19.	*Rookes v Barnard and Others*, 1964 A.C. 1129	19
20.	*Three Rivers DC v Bank of England (No 3)*, [2000] 3 All ER 1	16, 17
21.	*Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 3 S.C.R. 28	5, 7, 14, 22
22.	*Whiten v Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 3 S.C.R. 595	22
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23.	John Sopinka, "Malicious Prosecution: Invasion of Charter interests: Remedies: Nelles v. Ontario: R v. Jedynack: R. v. Simpson." (1995) 74 Can. Bar Rev. 366.	23