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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:

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, ASSOCIATION IN DEFENCE OF THE WRONGLY CONVICTED, DAVID ASPEN CENTRE FOR CONSTITUTIONAL RIGHTS, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION, CRIMINAL LAWYERS' ASSOCIATION, and CANADIAN ASSOCIATION OF CROWN COUNSEL

Interveners

REPLY FACTUM OF THE RESPONDENT, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA as represented by the ATTORNEY GENERAL OF BRITISH COLUMBIA

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1. British Columbia makes the following points in reply to the submissions of the Canadian Civil Liberties Association ("CCLA"), the Association in Defence of the Wrongly Convicted ("AIDWC"), the Criminal Lawyers' Association ("CLA"), and the David Asper Centre for Constitutional Rights and the British Columbia Civil Liberties Association ("DACCR/BCCLA"), (collectively the "Interveners").

The analogy to *Hill*[1] (AIDWC at paras. 21-30; CLA at para. 7)

2. The Interveners rely on *Hill* in which this Court first recognized the tort of negligent police investigation. By analogy to *Hill*, the Interveners argue that the Court should now recognize a cause of action against criminal prosecutors for non-malicious conduct. The Interveners, like the Appellant, do not offer a consistent theory as to what liability threshold, short of malice, should apply.

3. The reliance on *Hill* is misplaced for at least two reasons. First, the establishment of the tort of negligent investigation in *Hill* was derived in part from recognition of deficiencies in the existing remedies for wrongful prosecution and conviction, one of which was the tort of malicious prosecution. The new tort of negligent police investigation "complete[d] the arsenal" of common law and statutory remedies. In seeking to use *Hill* as authority for the untrammelled expansion of civil remedies against Crown prosecutors the Interveners ignore the actual reasoning in that case.

4. Second, in *Hill* this Court emphasized the clear distinction between the judicial or *quasi*-judicial duties of prosecutors and the investigative duties of police officers in explaining why police should be subject to liability in negligence while prosecutors are protected by a qualified immunity.[2]

5. Finally, it bears emphasis that in seeking to rely on *Hill*, the Interveners are doing exactly what they criticize the Attorneys General for doing: using common law tort principles to inform the analysis of claims for s. 24(1) *Charter* damages.

6. The reliance on tort law is unavoidable. Starting with *Nelles*[3] and in the 25 years following, the Supreme Court of Canada has constructed a balanced framework to determine the

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[1] *Hill v. Hamilton-Wentworth Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 ("*Hill*").
[2] *Hill*, at para. 49.
[3] *Nelles v. Ontario*, [1989] 2 S.C.R. 170 ("*Nelles*").

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availability of a civil remedy in damages to a plaintiff who has suffered harm as a consequence of a criminal proceeding that ultimately ended in the plaintiff's favour. The development of tort liability thresholds has not, as the Interveners insist, occurred without regard to *Charter* values. On the contrary, the fact that a plaintiff's *Charter* rights are inevitably at stake in a criminal investigation or prosecution has expressly influenced the tort liability principles. Among the reasons cited in *Nelles* for the rejection of absolute immunity for Crown prosecutors was that an absolute immunity would bar a remedy under s. 24(1) of the *Charter*.[4] Similarly, in *Hill* the Court found that recognizing a duty of care by police officers to suspects under investigation would enhance *Charter* values.[5]

7. The Interveners' reliance on *Hill* at least reveals the true implications of the Appellant's arguments. In *Hill*, the Court had to consider for the first time whether police should owe a duty of care in negligence to a suspect. In the present case, there are no less than three Supreme Court of Canada judgments, the most recent decided only five years ago, which have clearly held that Crown prosecutors cannot be sued for negligence. The argument advanced by the Interveners would require nothing less than the reversal of 25 years of consistent jurisprudence from this Court that prosecutorial misconduct, short of malice, is not actionable.

Step 1 and Step 3 of *Ward*[6] (DACCR/BCCLA at paras. 6-8; CCLA at paras. 8-14)

8. The Interveners appear to misunderstand British Columbia's arguments in suggesting that British Columbia is proposing the introduction of a fault requirement at step 1 of the *Ward* test. British Columbia agrees that the constitutional question posed by the Court presupposes a *Charter* violation (DACCR/BCCLA at para 6). The question on appeal is whether as a matter of law the qualified immunity rule applies to a claim for s. 24(1) *Charter* damages as well as to claims for tort damages which are based on the same alleged misconduct by a prosecutor.

9. The issue of whether there is a liability threshold for s. 24(1) damages in this context falls to be determined at the third stage of the *Ward* test. The Interveners are incorrect in asserting that motive is irrelevant at both the first and the third stage of the *Ward* test when damages are sought as a remedy under s. 24(1). *Ward* expressly holds otherwise. The continued existence of the *Mackin* immunity (a countervailing policy consideration at the third step of the *Ward* test)

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[4] *Nelles*, at pp. 195-196.
[5] *Hill*, at para. 38.
[6] *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28 ("*Ward*").

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itself undermines the submissions of the Interveners in this respect. Fault is plainly relevant to the question of whether s. 24(1) *Charter* damages are available in conjunction with a s. 52(1) declaration of invalidity, and bad faith is the liability threshold. The *Mackin* principle presumes a breach of *Charter* rights – with legislation having been declared invalid because of the breach – but determines liability in damages on the basis of the state of mind of government actors.

10. The submission of the Interveners that countervailing policy considerations in the third step of the *Ward* test should only be assessed on an evidentiary record at trial (CCLA at paras. 5 and 24; ADWC at para. 12) is inconsistent with *Ward* and also with the policy rationale for qualified immunity. The purpose of the immunity is not simply to shield Crown prosecutors from an award of damages, but also to shield them from being dragged into frequent civil re-trials of criminal trials, with all aspects of their conduct in the course of a criminal prosecution subject, *post facto*, to scrutiny through the trial and pre-trial discovery processes. A full civil trial is not necessary to decide the legal question of whether Crown prosecutors should receive qualified immunity from civil suit for non-malicious conduct. An *ad hoc,* case-by-case approach means there is no qualified immunity.

11. The CCLA misconceives the process in arguing that the position of the Attorneys General would oblige a plaintiff to prove malice before discovery and trial (CCLA, at para. 11). A plaintiff is not required to *prove* malice in advance of trial, but he or she should be required to *plead* malice through material facts that inform the defendants of the case to be met. In this case, the Appellant had originally pleaded ("inartfully" according to the Chambers Judge) a claim for *Charter* damages for malicious conduct by Crown counsel that withstood British Columbia's initial motion to strike. The Appellant was not content with that plea and sought to expand the case by applying to amend his pleadings, claiming an entitlement to *Charter* damages for a variety of conduct falling well below the threshold of malice. This appeal is the result.

<u>The difficulty in proving malice</u> (DACCR/BCCLA at para. 31; CLA at para. 10)

12. The Interveners cite the difficulty of proving malice (a standard described as "incapable" or "impossible" of proof) as a reason why qualified immunity should not extend to *Charter* damages claims.

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13. The same complaint was made by the plaintiffs in *Miazga*[7] in advancing the argument that it should be open to a claimant to prove malice by way of inference from the absence of reasonable and probable grounds for a prosecution. In rejecting this argument, the Court in *Miazga* noted that the inherent difficulty in proving a case of malicious prosecution was an "intentional choice" of the Court, designed to preserve the balance between an individual's right to be free from groundless criminal prosecutions and the public's interest in the effective and uninhibited prosecution of criminal wrongdoing.[8] The fact that malice is difficult to prove reflects the policy that animates the qualified immunity. It is not a reason to discard it.

14. Furthermore, the Interveners overstate the difficulty of proving malicious conduct by a prosecutor. As noted by the British Columbia Court of Appeal in the judgment under appeal, *Proulx*[9] provides an example of the effectiveness of malicious prosecution as a remedy for prosecutorial misconduct. In *Proulx*, the plaintiff secured a substantial damage award through proof that a prosecutor had acted with "tunnel vision", and in "flagrant disregard for the rights of the appellant, fuelled by motives that are entirely improper".[10] This confirms that when a prosecutor steps outside his or her role as a 'minister of justice', malice is established and liability will result.[11]

Core/Non-Core Discretion (DACCR/BCCLA at paras. 9-15; CLA at para. 10; CCLA at para. 16)

15. The Interveners reiterate the Appellant's submission that qualified immunity should exempt actions that fall outside of the core of prosecutorial discretion, including an alleged failure to disclose evidence. The Interveners, like the Appellant, do not address the fact that carving out an exception for non-core functions is contrary to the test for immunity established in *Nelles,* which expressly rejected a functional approach. No reasons are offered as to why *Nelles* should be overruled.

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[7] *Miagza v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339 ("*Miazga*").
[8] *Miazga* at para. 52.
[9] *Proulx v. Quebec (Attorney General)*, 2001 SCC 66, [2001] 3 S.C.R. 9 ("*Proulx*").
[10] *Proulx*, at paras. 44.
[11] The CLA argues that Category B liability in the tort of misfeasance in public office offers more "flexibility" in a malice standard, a submission that is presumably directed at offering an alternative and less rigorous liability threshold (CLA at paras. 16-18). Whether there is any principled distinction between misfeasance in the tort of misfeasance in public office and malice in the tort of malicious prosecution is a debatable question. The more important point for present purposes is that the Appellant had pleaded a claim for misfeasance in public office, and then abandoned it. If a more flexible remedy was lost as a consequence, that was entirely at the Appellant's unilateral option.

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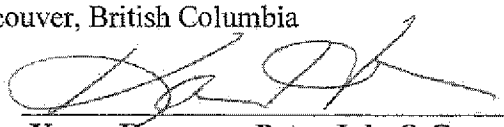
16. The core/non-core distinction argument also ignores the facts of *Proulx* and *Miazga*. *Proulx* did involve a breach of the plaintiff's *Charter* rights. At Proulx's criminal trial, the prosecutor tendered a surreptitiously recorded conversation in evidence when it would have been apparent (according to the majority in *Proulx*) that the taped conversation was a breach of Proulx's s. 8 *Charter* rights and not properly admissible. This was a factor cited by the majority in *Proulx* as evidence of malice; the *Charter* breach was not cited as a reason why the qualified immunity rule should not apply.

17. The trial judge's findings of malice in *Miazga* were based not simply on the decision to initiate a prosecution, but also on the conduct and tactics of the Crown prosecutor throughout the criminal trial that led the trial judge to infer that the prosecutor was determined to secure a conviction.[12] The trial judge's findings were overturned because the indicators of malice the trial judge found in the prosecutor's trial tactics were equally consistent with recklessness or bad judgment. The pleaded claims in *Miagza* included a claim for damages for breach of the plaintiffs' *Charter* rights. For reasons of policy, all "collateral causes of action" (as they were characterized by the trial judge) were found to be subsumed in the tort of malicious prosecution.

18. The primary distinction between the Appellant's claims against Crown prosecutors in the present case and those advanced in *Nelles, Proulx* and *Miazga* is that the Appellant has served a lengthy custodial sentence. To the extent that the Interveners rely on this fact as the distinguishing feature, they must be taken to join in the Appellant's call for a form of no fault compensation for wrongful conviction plaintiffs who have spent some undefined period of time in jail. Whether no fault compensation should be provided in these circumstances invokes policy questions that are divorced from any principled legal analysis of liability in damages for prosecutorial misconduct.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated November 5, 2014 at Vancouver, British Columbia



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the Province of British Columbia

[12] *Miazga* at paras. 33, 36.

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TABLE OF AUTHORITIES

Case Law		Paragraph Nos.
1.	*Hill v. Hamilton-Wentworth Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129	2, 3, 4, 5, 6, 7
2.	*Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405	9
3.	*Miagza v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339	13, 16, 17, 18
4.	*Nelles v. Ontario*, [1989] 2 S.C.R. 170	6, 15, 18
5.	*Proulx v. Quebec (Attorney General)*, 2001 SCC 66, [2001] 3 S.C.R. 9	14, 16, 18
6.	*Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28	8, 9, 10

Legislation		Paragraph Nos.
7.	*Constitution Act, 1982*, ss. 8, 24(1) and 52	5, 6, 8, 9, 11, 12, 16, 17