S.C.C. 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

RESPONDENT
(Respondent)

[style of cause continued on next page]

APPELLANT'S REPLY FACTUM RE INTERVENER FACTUMS

(IVAN WILLIAM MERVIN HENRY, APPELLANT)

(Pursuant to the Order of Justice Wagner dated October 20, 2014)

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APPELLANT'S REPLY FACTUM RE INTERVENER FACTUMS

1. **Role of the Crown**: Many interveners argue the role of Crown prosecutors is inconsistent with allowing wrongfully convicted individuals to obtain *Charter* damages for Crown *Charter* breach leading to wrongful conviction absent proof of prosecutorial malice.[1] These interveners point to various considerations in support of this contention: (a) the importance of Crown independence[2] and, relatedly, (b) the need to "curtail nuisance suits,"[3] (c) the need to avoid a diversion of Crown from public duties,[4] (d) the need to avoid a so-called "chill" on Crown fulfillment of duties,[5] (e) the need to prevent the erosion of public trust and confidence in Crown prosecutors and the administration of justice.[6] These considerations do not mandate a malice standard.

2. With respect to independence, this Court has recognized the importance of the independence of the Bar as a whole, and not just of the Crown.[7] Nevertheless, the private bar, including criminal defence lawyers, are subject to liability for mere negligence in the course of their duties. Despite this liability, there has been no flood of nuisance suits against defence lawyers, they have not been unduly diverted from their primary duties defending criminally accused individuals, nor has their willingness and ability to courageously and independently act for their clients been "chilled." Public trust in Crown prosecutors and the administration of justice is only enhanced by ensuring a remedy of *Charter* damages as in the present case.

3. **Disclosure Obligations at Issue Were Not Complex**: Some interveners raise the complexity inherent in some disclosure decisions to suggest they are discretionary or not easily reviewable.[8] These submissions are completely divorced from the actual facts of this case. The

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[1] See e.g. CACC, ¶¶2-12; AGM, ¶¶2, 18; AGNB, ¶¶18-19; AGNS, ¶¶7, 15, 17-19; AGS, ¶¶4, 43, 46
[2] CACC, ¶1l; AGNS, ¶15, 18-19
[3] AGA, ¶3; AGM, ¶3, 50. There is no merit to AGNB's suggestion that a suit for *Charter* damages is a collateral attack or otherwise precluded by res judicata: AGNB, ¶39
[4] CACC, ¶13; AGM, ¶3; AGO, ¶3
[5] CACC, ¶¶11, 13; AGM, ¶12; AGNB, ¶48; AGNS, ¶¶8, 12, 22; AGO, ¶3; AGS, ¶¶3, 18. There is also no merit to AGNS's concern that Crown might be personally liable for damages for *Charter* breach: AGNS, ¶14.
[6] CACC, ¶13; AGNB, ¶48
[7] *A.G. Can. v. Law Society of B.C.*, [1982] 2 S.C.R. 307. This Court held: "[t]he independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law" (pp. 335-36).
[8] See e.g. AGO, ¶¶13-23; AGQ, ¶¶51-59, 62

non-disclosed materials here did not raise complex questions of relevance, privilege, national defence or security, sensitive third party records, police officer conduct, youth criminal justice considerations, discretion to delay or withhold, implied undertaking, illegal or contraband material, personal privacy interests, material outside the investigative file, *Garofoli* applications, police occurrence reports concerning the same witnesses, or confidential informants.[9] Rather, the non-disclosed materials were core materials that would have to be disclosed in every case: victim statements, police reports; medical and forensic reports;[10] evidence of the police investigations of other suspects; materials that disclosed that sexual assaults that displayed the same *modus operandi* as that employed in the sexual assaults for which the appellant stood charged continued after his arrest in the same neighbourhoods.[11]

4. Further, the purported difficulty in review of Crown disclosure decisions generally flies in the face of 30 years of *Charter* jurisprudence in criminal cases, in which such decisions are routinely reviewed by the Courts.

5. **Historical Aspect of Case**: Some interveners dismiss the significance of the breach of disclosure in this case arguing disclosure practices have evolved such that either the *Charter* only narrowly applies, or there is no longer any need to deter the non-disclosure that occurred in this case, or it is an open question whether the non-disclosure at issue was required by law at the time of the trial.[12] Some of these are issues of fact and law to be resolved at the appellant's trial. It is noteworthy, however, that the Special Prosecutor who acted in the appellant's criminal appeal conceded that the complainants' statements ought to have been disclosed in 1983 and that the non-disclosure could have materially affected the result at trial. Notwithstanding those concessions, the BCCA chose not to deal with the disclosure issue in its decision overturning the appellant's convictions.

6. These submissions furthermore ignore the fact that the Crown also failed in its continuing *Charter* disclosure obligations post-trial between 1983 and 2008, after the appellant's conviction and despite his repeated requests for disclosure and/or to have his convictions reviewed.[13] It was

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[9] See e.g. AGO, ¶¶13-23
[10] Second Amended Notice of Civil Claim ("Amended NOCC"), ¶¶46, 49-53, 58, 79, 85-86
[11] Amended NOCC, ¶¶64-68, 84
[12] See e.g. AGA, ¶¶9-13, 28; AGS, ¶33; AGQ, ¶56
[13] Amended NOCC, ¶¶81-87

not until June 2008, after another individual was convicted of sexual assaults with the same *modus operandi*, that proper disclosure of the witness statements, forensic evidence, and information concerning the other suspect was finally made to the appellant.[14]

7. The failure to disclose in this case is thus not merely an historical peculiarity. It persisted up until the recent past. Disclosure breaches continue to occur today as this Court has observed in *Dunedin* – a state of affairs which should be deterred.

8. **No Adequate Alternative Remedy**: Many interveners argue that the existence of robust remedies for *Charter* breaches during the course of a criminal trial and on appeal, and the existence of other remedies are adequate.[15]

9. While disclosure orders, adjournments and criminal costs may be sufficient to remedy a *Charter* breach discovered during the course of a criminal proceeding, they can hardly be said to be sufficient when the breach is discovered 27 years after a wrongful conviction. The remaining "existing remedies" include torts against other state actors (for other wrongs), the tort of malicious prosecution (which was addressed in the appellant's factum), or the possibility of professional disciplinary proceedings. None of these existing remedies provides a meaningful remedy for the harms alleged under the *Charter* breach in this case. The deficiency in existing remedies for this wrong is fairly universally acknowledged by scholarly authors.[16]

10. Nor are *ex gratia* payments an adequate remedy for the wrongs at issue here. First an *ex gratia* payment cannot fulfil the functions of *Charter* damages. It is not an acknowledgement of the wrong done and the process is not transparent.[17] It is therefore unlikely to have any deterrent effect or to vindicate the claimant.

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[14] Amended NOCC, ¶91

[15] See e.g. AGA, ¶¶14-27, 29, 41-42 ; CACC, ¶16; AGM, ¶¶4, 13-14, 21-37, 49; AGNB, ¶¶3, 20-30, 34; AGO, ¶41; AGQ, ¶60; AGS, ¶¶35-38

[16] See e.g. AGBC BoA, Tab 35, p. 403 (US); Tab 36, p. 73 (US); Tab 37, pp. 2-3 (Aus); Tab 39, p. 97 (Canada).

[17] An *ex gratia* payment is a "payment of money made or given as a concession without compulsion" and the term "literally means 'out of grace' rather than as a debt of justice": AGBC BoA, Tab 37, p. 2. Leaving payment for wrongful conviction to the federal government is problematic because, as Professor Kent Roach has observed, historical review of Parliamentary action in respect of wrongful conviction suggests that Parliament may be relatively unconcerned with the risk of wrongful conviction and has been resistant to implement recommendations to prevent them and have been content to leave the development of the law to the courts: Kent Roach, "The Protection of Innocence Under Section 7 of the Charter" (2006) 34 S.C.L.R. (2d) 249 at 269, 277, 281; Kent Roach, "Wrongful Conviction in Canada" (2012) 80 University of Cincinnati Law Review 1465 [Wrongful Conviction in Canada] at 1466

11. Second, the decision to make or refuse a payment is not reviewable and may be influenced by irrelevant political considerations. No such payment has been made to the appellant in the four years since he was acquitted, and it is clear from the tenor of AGBC's argument that no such *ex gratia* payment will be forthcoming in this case. To the extent that *ex gratia* payments arise through application of the *Federal/Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons* (the "*Guidelines*"), a review of the terms demonstrates that the appellant would not meet the eligibility criteria to apply given his acquittal was not the result of a free pardon, an acquittal following a referral made by the Minister of Justice, or an investigation by AGBC determining factual innocence.[18]

12. **No Floodgate**: Some interveners raise the specter of this appeal opening a floodgate of claims for *Charter* damages.[19] These arguments have no basis in experience.

13. The noted existence of remedies for *Charter* breaches during the course of a trial and appeal and of other remedies which might well be adequate to mitigate any claim for damages in other fact scenarios, is one reason why there is virtually no possibility of any "flood" of claims for *Charter* damages. Indeed since this Court's decision in *Ward*, there have been very few judgments awarding *Charter* damages, despite the predicted flood when *Ward* was decided.[20]

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[18] AGBC BoA, Tab 39, pp. 152-53. We note that courts have no jurisdiction to make findings of factual innocence: *R. v. Mullins-Johnson* (2007), 87 O.R. (3d) 425 (ONCA), ¶¶22-27. See also Wrongful Conviction in Canada, at 1471-74. Many wrongfully convicted accused individuals, e.g., Donald Marshall Jr., Stephen Truscott and Romeo Phillion, would be unable to meet the requirement of showing factual innocence: Kent Roach "An Independent Commission to Review Claims of Wrongful Convictions: Lessons from North Carolina" (2012) 58 Criminal Law Quarterly 283 at 300. The requirement itself is objectionable: see AGBC BoA, Tab 43, pp. 24-25; AGBC BoA, Tab 39, p. 139. It would impose an unfair burden on a claimant such as Mr. Henry acquitted several decades after conviction when the efluxion of time has resulted in problems of proof: Amended NOCC, ¶93. It should be sufficient that no "properly instructed jury acting judicially could reasonably have rendered" a verdict of guilt in this case: *R. v. Henry*, 2010 BCCA 462, ¶142, ABoA Tab 28. To find otherwise introduces a third verdict of "not proved" or "still culpable," offends the presumption of innocence contrary to the *Charter*, perpetuates the stigmatization and prejudice to which many wrongfully convicted people remain subject even after their exoneration, and evinces the kind of tunnel vision that has been instrumental in many wrongful conviction cases: AGBC BoA, Tab 37, p. 4; AGBC BoA, Tab 39, p. 139. Further, *ex gratia* payments are arbitrary. While the *Guidelines* contain some criteria to guide the discretion, the *Guidelines* are not binding legislation and have not been treated as such. Even if the appellant did fit within the eligibility criteria of the *Guidelines*, many if not most of the awards of compensation that have been made in the last 20 years have departed in some manner from the terms of the *Guidelines*: AGBC BoA, Tab 43, pp. 20-21; see also AGBC BoA, Tab 39, p. 121 and Wrongful Conviction in Canada, at 1522. Finally, while a concern for "factual innocence" is often required by states making *ex gratia* payments, or payments under compensation statues, this is because these forms of payment stem from a <u>*moral*</u> rather than a <u>*legal*</u> demand: AGBC BoA, Tab 41, p. 95; AGBC BoA, Tab 43, p. 18.

[19] AGM, ¶¶37-46; AGS, ¶¶11-13

[20] As counsel for the Ministry of Justice, BC, Bryant Mackey recently opined: "since the release of the decision in *Ward*, there has been remarkably modest development of the law of constitutional damages in Canada" and "for the

14. *Charter* damages for *Charter* breach causing wrongful conviction would be very rare. It would certainly not arise every time prosecutors breached the *Charter*, as it is reasonable to expect that in almost all cases the trial and appellate courts will identify breaches before they lead to the egregious consequence of a wrongful conviction.

15. More fundamentally, *Charter* damages are designed to remedy the harm actually done. This harm is all but ignored in the submissions of the intervening Attorneys General. In this case, as the pleadings disclose, that harm was the incarceration for 27 years of a man whose conviction was caused by the acts and omissions of the Crown and all the harms corollary to that wrongful incarceration.[21] The ranks of the "wrongly convicted" do not include those whose *Charter* rights have been breached by Crown but have had the benefit of the usual trial or appellate remedies.[22] It is confined to those unusual cases, such as this, where an erroneous conviction is not caught by the usual appellate process, but rather the miscarriage of justice is discovered post-appeal and then only when there is a sufficient causal connection between the breach of the accused *Charter* rights by the Crown and his or her conviction.[23] There have been perhaps twenty five established wrongful convictions in all of Canadian history, and only a few of that group can be attributed to Crown breach of *Charter* rights. With *Charter* damages serving the function of deterring future *Charter* breaches, wrongful conviction will hopefully become rarer yet.

16. **Issues Not Arising on this Appeal**: The appellant objects to the raising of new issues by interveners in this appeal such as: limitation periods,[24] causation[25] and whether the appellant will ultimately be able to establish a breach of his s. 7 rights.[26]

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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moment it appears that *Ward* has provided *chilling* clarity and guidance" to such claims: Bryant A. Mackey, "Recent Developments in the Law of Constitutional Damage Awards in Canada" (Paper delivered at the CLE BC conference Suing and Defending the Government, 2013 Update, November 2013) [unpublished].

[21] Amended NOCC, ¶¶97-98

[22] See e.g. AGA, ¶¶14-27, 29, 41-42 ; CACC, ¶16; AGM, ¶¶4, 13-14, 21-37, 49; AGNB, ¶¶3, 20-30, 34; AGO, ¶41; AGQ, ¶ 60; AGS, ¶¶35-38

[23] Appellant's Factum in Chief, ¶3. In this case, the appellant's acquittal was as a result of the Court of Appeal exercising its rarely-utilized power, in the interests of justice, to re-open an appeal that had never been heard on the merits: *R. v. Henry*, 2009 BCCA 12.

[24] See e.g. CACC, footnote 33; AGNB, ¶12

[25] See e.g. AGNB, ¶¶31-32; AGS, ¶45

[26] See e.g. AGS, ¶¶30-31

Dated: November 5, 2014

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