SCC File No. 38687

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

BETWEEN:

ATTORNEY GENERAL OF ONTARIO

Appellant

-and-

JAMIE CLARK, DONALD BELANGER and STEVEN WATTS

Respondents

FACTUM OF THE APPELLANT, ATTORNEY GENERAL OF ONTARIO

(Pursuant to Rule 35(1) of the *Rules of the Supreme Court of Canada,* S.O.R./2002-156)

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I N D E X

PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The principal function of a Crown prosecutor is the prosecution of criminal offences. In carrying out this vital public function, prosecutors exercise their discretion in making countless decisions every day. These decisions are guided by a prosecutor's obligation to act fairly, impartially, and in a manner consistent with her role as a "Minister of Justice".[1] Independence is essential to this role: the effective administration of criminal justice requires a "sphere of unfettered discretion" in which Crown prosecutors are free to fulfil their important responsibilities.

2. To preserve prosecutorial independence, Crown prosecutors are protected by a qualified immunity from civil liability. Prosecutorial immunity ensures that prosecutorial decision-making is not influenced by irrelevant considerations, such as the spectre of civil liability, and that prosecutors are not diverted from their duties to respond to civil claims. In this way, prosecutorial immunity is an essential component of prosecutorial independence that secures the fairness, integrity and efficiency of the criminal justice system.[2]

3. Left to stand, the judgment below would displace prosecutorial immunity to expose Crown prosecutors to civil liability to parties other than the subjects of a prosecution and for claims of misfeasance in public office ("misfeasance"). This would significantly and unjustifiably compromise prosecutorial independence, creating the real risk that the prospect of civil liability will preoccupy prosecutors and influence their decision-making with factors that are inconsistent or in conflict with their public duties.

4. The underlying action, which arises from a criminal prosecution and appeal, aptly demonstrates these risks. The Respondent police officers arrested, interrogated and charged Randy Maharaj and Neil Singh with armed robbery and forcible confinement following an investigation.

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[1] *Nelles v Ontario,* [1989] 2 SCR 170, p. 191 – 192 [***Nelles***].

[2] *R v Anderson,* 2014 SCC 41, paras. 46-48 [***Anderson***]; *Krieger v Law Society of Alberta,* 2002 SCC 65, para 56 [***Krieger***]; *Boucher v The Queen,* [1955] SCR 16, p. 23-24 [***Boucher***]; *R v Regan,* 2002 SCC 12 [***Regan***], para. 166, per Binnie J. in an unrelated dissent; *R v Cawthorne,* 2016 SCC 32, paras. 27-28; R. Frater, *Prosecutorial Misconduct,* 2nd ed (Toronto: Thomson Reuters, 2017), p 4.

Maharaj and Singh subsequently alleged that the Respondents assaulted them during their interrogations.

5. At the Crown's request, Maharaj's charges were stayed before trial on the basis of the assault allegations. While Singh was convicted, the Court of Appeal for Ontario ("OCA") stayed that ruling based on the trial judge's finding that the Respondents assaulted Singh and breached his rights under sections 7 and 12 of the *Charter*, a point conceded by the Crown at trial.

6. The Respondents allege that the assault findings in the criminal prosecution caused them reputational and emotional harm. They allege that the Crown prosecutors involved were negligent and misfeasant because they failed to adequately investigate and rebut the assault allegations. In particular, the Respondents take issue with the conduct of the prosecutor with carriage of Singh's appeal, who they allege committed a "deliberate unlawful act" because she did not bring a fresh evidence application contesting the *Charter* breach that was conceded at trial.

7. The Respondents make this allegation despite the fact that the prosecutor was effectively precluded from bringing the application: the Crown could not relitigate an issue conceded at trial, much less bring a fresh evidence application to introduce evidence the Crown chose not to lead at trial. At its heart, the Respondents' claim is that the prosecutor should have commenced a fresh evidence application to protect their reputations, contrary to the law, her obligations to the accused, and her obligations to the Court.

8. Despite these concerns, the Superior Court and the OCA permitted the misfeasance claim to proceed. In doing so, the courts below made three errors. First, they erred in finding that any person impacted by a prosecutor's exercise of discretion has the requisite interest necessary to displace prosecutorial immunity. To the contrary, only the subject of a wrongful prosecution, whose *Charter* rights are at stake in a prosecution, has an interest that is sufficiently serious to justify displacing prosecutorial immunity in favour of a private law remedy.

9. Second, the courts erred in finding that misfeasance has a sufficiently high liability threshold to justify displacing prosecutorial immunity. Misfeasance does not require a finding of malice or an improper purpose. Instead, it can be anchored in reckless or grossly negligent conduct, which this Court has held cannot give rise to prosecutorial liability. Further, misfeasance lacks any

elements which prevent relitigation or collateral attacks and permit the weeding out of meritless claims on a preliminary basis.

10. Finally, the court erred in finding that the Respondents have adequately pleaded the elements of misfeasance. The Respondents have baldly pleaded deliberate unlawful conduct and causation.

11. Recognition by this Court of an exception to prosecutorial immunity for claims of misfeasance in public office commenced by third parties would constitute a significant and unjustified interference with prosecutorial independence. Left to stand, the decision would expose Crown prosecutors to an unprecedented level of liability: prosecutors would face civil actions by *any* person impacted by *any* decision they make in the course of their public duties. Compromising prosecutorial immunity – and consequently, prosecutorial independence – in this manner would undermine the effective administration of criminal justice. Prosecutorial immunity should be maintained to bar the Respondents' action and avoid this result.

B. Facts alleged in the Statement of Claim

12. The facts set out below are based on the untested allegations in the Statement of Claim (the "Claim").[3] The Attorney General of Ontario maintains that the Crown prosecutors named in the Claim acted lawfully and in accordance with their professional duties at all times and denies the Respondents' assertions to the contrary. However, for the purposes of this appeal this Court is obliged to accept the facts alleged in the Claim as true unless they are manifestly incapable of being proven.[4]

i) Arrest and initial prosecution of Maharaj and Singh

13. The Respondents, Sergeant Jamie Clark, Detective Sergeant Donald Belanger, and Detective Sergeant Steven Watts, were members of the Toronto Police Service's robbery squad, know as the Hold Up Squad, during the events giving rise to the underlying action.[5]

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[3] Statement of Claim, dated June 22, 2016, Appeal Record, Vol. 2, Tab 1 [***Claim***].
[4] *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, para. 22.
[5] Claim, *supra* note 3, paras. 2-4.

14. In June 2009, the Respondents arrested and charged Randy Maharaj and Neil Singh in connection with a robbery at a warehouse. Both men were subsequently interrogated at a police station. In a videotaped statement to Watts and Belanger, Maharaj confessed his and Singh's involvement in the robbery. In a videotaped statement to Watts and Clark, Singh denied involvement in the robbery.[6] The complete interrogations were not videotaped.[7]

15. Maharaj's bail hearing was the following day. During the hearing, Maharaj's lawyer advised the court that Maharaj had suffered injuries during his arrest, including "very visible bumps and scratches" under his ear. The Respondents allege that his lawyer did not specifically indicate that Maharaj had sustained a serious rib injury.[8]

16. The preliminary hearing proceeded in July 2010. The Crown adduced Maharaj's and Singh's video-recorded statements and called the Respondents to testify. In cross-examination, Clark and Belanger denied kicking Maharaj on the side of the head or otherwise assaulting him. Maharaj and Singh were committed to stand trial. Following the preliminary hearing, a new Assistant Crown Attorney (the "Trial Crown") was assigned carriage of the prosecution.[9]

ii) Stay of charges against Maharaj

17. Prior to his trial, Maharaj commenced a *Charter* application to exclude his confession from evidence and to stay the prosecution against him. Maharaj alleged that Clark and Belanger had assaulted him before he confessed, causing him serious bodily harm. In support of this claim,

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[6] *Ibid.*, paras 7 – 9.

[7] ***R v Moore-McFarlane***, [2001] 56 OR (3d) 737 (ONCA), para. 65; ***R v Salmon et al***, 2012 ONSC 1553paras. 107 – 108 (SCJ).

[8] Claim, *supra* note 3, para. 10; Transcript, ***R v Maharaj***, Ontario Court of Justice, June 12, 2009, Exhibit "B" to the Affidavit of Matthew Howe, sworn September 19, 2016 [***Howe Affidavit***], Appeal Record, Vol. 3, Tab 1B, pp. 259, lines 18-25; While not referenced in the Claim, the transcript of the bail hearing indicates that Maharaj's lawyer advised the court that had his client lifted his jacket more injuries would be visible in "certain areas" (pp. 257, lines 25-30).

[9] Claim, *supra* note 3, paras. 11-12.

Maharaj's lawyer provided the Trial Crown with the transcript of Maharaj's bail hearing and an X-Ray of Maharaj's ribs.[10]

18. The Trial Crown consulted Dr. Moss, a physician at the hospital where the X-Ray was taken. Dr. Moss confirmed that Maharaj had suffered a rib fracture and advised the Trial Crown that it was possible the injury had been suffered on the day of his arrest. The Trial Crown also obtained Maharaj's medical records from his pre-trial detention facility. Those records did not show any complaints by Maharaj of a rib injury.[11]

19. The Trial Crown consulted with a senior Assistant Crown Attorney (the "Senior Crown") and they agreed that Maharaj's inculpatory statement would not be admissible because the Crown would not be able to prove beyond a reasonable doubt that it was voluntary given the assault allegations. Accordingly, the Senior Crown stayed the charges against Maharaj in November 2011.[12]

iii) Singh's conviction and *Charter* application

20. Singh's trial proceeded and he was convicted by a jury of armed robbery and forcible confinement. Singh subsequently brought a *Charter* application for a stay of the convictions, alleging that he had been assaulted during his interrogation.[13]

21. Singh's *Charter* application proceeded before Justice Thorburn of the Superior Court. Both Singh and Maharaj testified at the hearing. Singh testified that Clark had assaulted him during his interrogation while Watts looked on. Maharaj testified that Clark and Belanger had both assaulted him during his interrogation. Following the first day of the hearing, the Trial Crown advised Watts

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[10] *Ibid*., paras 12 – 13.
[11] *Ibid.,* para 17. While not set out in the Claim, Justice Thorburn noted in her reasons in Singh's *Charter* application that Maharaj testified that he told a nurse that his ribs hurt. (*R v Singh*, 2012 ONSC 2028 (SCJ) Appeal Record, Vol. 3, Tab 1D [***Singh Charter Ruling***], p. 371, para. 34.
[12] Claim, *Ibid.*, para 18.
[13] *Ibid.,* paras. 19 and 23.

that she would not be calling the Respondents to testify. The Trial Crown cross-examined both Singh and Maharaj but did not otherwise adduce evidence on the application.[14]

22. The Trial Crown conceded that Singh had satisfied his evidentiary burden in the *Charter* application but argued that a stay of proceedings was not the appropriate remedy.[15] Justice Thorburn accepted this submission and ordered a reduction in sentence instead of a stay.[16] In her sentencing reasons, Justice Thorburn found that the Respondents had assaulted Singh and Maharaj and characterized the assault as police brutality.[17] Singh subsequently appealed his conviction and sentence.[18]

iv) Events after the release of Justice Thorburn's decisions

23. Prior to the hearing of Singh's appeal, the Special Investigations Unit ("SIU") was notified of the alleged assaults and, commenced an investigation. Maharaj and Singh declined to co-operate, and the SIU terminated the investigation.[19] In addition, the Toronto Police Service Professional Standards Unit ("PSU") conducted a review to determine whether the Respondents had used excessive force during the interrogations. The PSU did not interview the Respondents, Maharaj or Singh.[20]

24. The PSU interviewed Dr. Moss and provided him with Maharaj's videotaped statement. Based on Maharaj's arm movements in the video, Dr. Moss opined that while it was possible that Maharaj's injuries occurred on the date of his arrest, he believed the injury pre-dated the arrest.[21]

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[14] *Ibid.*, paras. 19 – 21; While not set out in the Claim, the Toronto Police Service Professional Standards Unit noted in its report that the Trial Crown cross-examined Singh and Maharaj and identified inconsistencies in their testimony (PSU Court Review, dated October 31, 2012, Exhibit F to the Howe Affidavit, Appeal Record, Vol. 3, Tab 1F [***PSU Report***], p. 419).

[15] Claim, *Ibid.*, para. 43(x); Singh Charter Ruling, *supra* note 11, para. 39.

[16] Claim, *Ibid.*, paras. 22 – 23; PSU Report, *supra* note 14, pp. 417 – 418; Singh Charter Ruling, *supra* note 11, para. 51.

[17] Claim, *Ibid.*, paras. 23 and 24; *R v Singh*, 2012 ONSC 4429 (SCJ), Appeal Record, Vol. 3, Tab 1E, p. 385, para. 64 [***Singh Sentencing Ruling***].

[18] Claim, *Ibid.*, para. 31.

[19] *Ibid.*, para. 29; PSU Report, *supra* note 14, p. 394.

[20] PSU Report, *supra* note 14, p. 393.

[21] Claim, *supra* note 3, para. 26.

In its resulting report, the PSU concluded that based on the available evidence the allegations of excessive force could not be substantiated.[22]

v) Singh's appeal

25. In October 2013, the OCA heard Singh's appeal. Before the hearing, Watts met with Crown counsel with carriage of the appeal (the "Appeal Crown") and advised her of the Respondents' concern that the Trial Crown had failed to properly investigate the assault allegations and had failed to lead any rebuttal evidence.[23]

26. The OCA allowed the appeal and stayed Singh's convictions. In its reasons, the OCA criticized the Respondents for "egregious" misconduct, observing in a footnote that "the conduct in this case might well be characterized as 'torture'".[24]

vi) The Respondents' civil action

27. The Respondents commenced an action alleging negligence and misfeasance against the Attorney General of Ontario based on the alleged misconduct of the Trial Crown, the Senior Crown, and the Appeal Crown. The Respondents seek $1.25 million in general and punitive damages, as well as a "declaration that [they] did not assault" Maharaj or Singh.[25]

28. The Respondents' core allegation is that the Crown prosecutors were required to do more to rebut the assault allegations against them. With respect to the Trial Crown, the Respondents allege that she failed to:[26]

i. properly investigate Maharaj's assault allegations because she: (a) made inadequate inquiries of Dr. Moss; (b) did not account for the bail hearing transcript where no

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[22] *Ibid.,* para. 30; The PSU Report indicates that Maharaj and Singh refused to co-operate or provide any evidence so the PSU was limited to conducting a review, rather than a *Police Services Act* investigation (PSU Report, *supra* note 14, pp. 393-394 and 420)

[23] Claim, *Ibid.*, paras. 31-321.
[24] *Ibid.,* para. 35.
[25] *Ibid.,* para. 1.
[26] *Ibid.,* para. 43.

complaint was made of a rib injury; and (c) did not consider records showing that Maharaj did not complain of a rib injury while he was incarcerated[27]; and,

ii. lead any opposing evidence at Singh's *Charter* application, including the Respondents' testimony.

29. With respect to the Senior Crown, the Respondents allege that he was negligent in failing to direct the Trial Crown to "do a more comprehensive analysis" of Maharaj's assault allegation.[28] The Respondents do not particularize any unlawful conduct as it relates to the Senior Crown.[29]

30. With respect to the Appeal Crown, the Respondents allege she failed to:[30]

i. request that the police conduct further investigations into the assault allegations; and

ii. bring a fresh evidence application or advise the OCA of "new material facts", including "exculpatory findings", that disproved the assault allegations.

31. The Claim does not identify the "new material facts" that the Appeal Crown might have used to relitigate the issue of the assault on Singh and Maharaj, assuming that it would have been permissible for the Crown on appeal to relitigate a factual issue that the Trial Crown had conceded at trial. Although not pleaded, it may be that the alleged "new material facts" are contained in some or all of the materials that the Trial Crown possessed at trial (i.e. the pre-trial detention records; the transcript of the bail hearing; and the Respondents' preliminary hearing evidence)[31], and/or materials that were obtained post-trial (i.e. the PSU Report, including Dr. Moss's interview).[32]

32. The Claim also fails to identify the allegedly "exculpatory findings". Presumably, this is a reference to the PSU Report. The Respondent overstates the substance of the PSU report, given that neither the Respondents nor Maharaj and Singh participated in the review.

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[27] While not set out in the Claim, Maharaj testified that after his release he went to emergency and was advised he had a fractured rib (Singh Charter Ruling, *supra* note 11, paras. 35 and 48)

[28] *Ibid.*

[29] *Ibid.*, para. 43(ix).

[30] *Ibid.*, paras. 30, 32-33, 43(xii), 43(xiii) and 47(viii).

[31] *Ibid.*, paras. 17, 28(iii) and (iv), 43(v) and (vi), 47(vi) and (vii).

[32] *Ibid.*, para. 43 (xi) and (xii) and 47 (iv); (v) and (viii).

33. Although it is beyond the scope of this appeal to resolve factual issues arising from the Claim, the Respondents' allegation that the Appeal Crown failed to advise the OCA of the PSU report is demonstrably false. The appeal transcript reveals that at its outset Doherty J.A. asked the Appeal Crown whether there had been "any criminal investigations commenced or any charges laid … or any kind of disciplinary action" taken against the Respondents.[33]

34. In response, the Appeal Crown advised the OCA of her understanding that there had been no SIU investigation in relation to Maharaj, that the Respondents' police service had conducted a "court review" and prepared a report, and that no disciplinary proceedings had stemmed from that report.[34] Doherty J.A. raised this issue again later in the hearing and the Appeal Crown reiterated her understanding that the PSU had prepared a report regarding the Respondents' conduct and stated that she was prepared to provide the report to the court subject to submissions from defence counsel. The OCA decided not to receive the report.[35]

35. The alleged failures identified at paragraphs 28 to 30 above form the basis of the Respondents' claims for both negligence and misfeasance. The "particulars of negligence" set out at paragraph 43 of the Claim are rephrased at paragraph 47 as the "deliberate and unlawful conduct" required for the misfeasance claim.[36] To support the allegation that the conduct was deliberate, the Respondents variously allege that the Crown prosecutors "knew", "ought to have known" or were "wilfully blind" to the implications of not leading the exculpatory findings.[37]

36. The Respondents advance two broader allegations to reframe their negligence claim as a misfeasance claim: (i) that the Crown prosecutors' acts and omissions constitute "unlawful

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[33] Transcript, *R v Singh*, Ontario Court of Appeal File No. C55486, October 18, 2013, Exhibit G to the Howe Affidavit, Appeal Record, Vol. 3, Tab 1G [***Appeal Transcript***], p. 427, lines 4-8: The transcript was before the court below. The Motion Judge denied the Appellant's request to rely on the transcript on a Rule 21.01(b) motion to strike. While the Appellant took issue with this decision at the appeal hearing, it did not formally appeal the point and the OCA did not comment on it in its reasons.

[34] *Ibid.*, p. 427, lines 10-22.
[35] *Ibid.*, p. 449, lines 21-26; p. 488, line 15-p.489, line 15; p. 499, lines 16-18.
[36] Claim, *supra* note 3, para 47.
[37] *Ibid.*, paras 47(iii) to 47 (vii).

conduct" because they violated an obligation to act "without favour or affection to any party" [38]; and (ii) that the Crown prosecutors knew that their conduct was unlawful and that it would likely injure the Respondents.[39]

37. These allegations, which mirror the requisite elements of a misfeasance claim, are almost entirely bald. Only one allegation is pleaded in support of them: that the Appeal Crown was acting to "protect" the Trial Crown, rather than respecting her "duty of care and responsibility to the officers and the administration of justice".[40] The Respondents do not identify what the Appeal Crown was protecting the Trial Crown from.

C. Decisions of the courts below

i) Superior Court of Justice

38. The Appellant moved to strike the Claim and dismiss the action pursuant to rules 21.01(1)(a), 21.01(1)(b) and 25.11 of Ontario's *Rules of Civil Procedure*[41] on the basis that the Claim failed to disclose a reasonable cause of action in either negligence or misfeasance and that the action had been commenced after the expiry of the applicable limitation period.

39. Justice Stinson (the "Motion Judge") dismissed the motion to strike on the misfeasance and limitations issues and granted the motion to strike the negligence claim. With respect to misfeasance, the Motion Judge rejected the Appellant's submission that Crown prosecutors are immune from civil liability for misfeasance. The Motion Judge also rejected the submission that the Respondents failed to adequately plead misfeasance in the Claim.[42]

ii) Court of Appeal for Ontario

40. On appeal, the OCA held that Crown prosecutors are not immune from civil liability for misfeasance. While it confirmed that a "high liability threshold" was required to pierce

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[38] *Ibid*., para 46.
[39] *Ibid*., paras 48 – 49.
[40] *Ibid*., paras 34 and 47(viii).
[41] *Rules of Civil Procedure,* R.R.O. 1990, Reg 194 [***Rules***].
[42] *Clark et al v Attorney General of Ontario,* 2017 ONSC 3683 (SCJ), Appeal Record, Vol. 1, Tab 4 [***Clark v AG Ontario (SCJ)***], para. 137.

prosecutorial immunity, the OCA held that the necessity of proving bad faith or an improper motive in a misfeasance claim established the "functional equivalent" of the required threshold.[43]

41. Observing that the misfeasance allegations focused on the Appeal Crown, the OCA held that the Respondents had adequately pleaded misfeasance. With respect to the Appeal Crown, the OCA held that the claim was "properly particularized" because it alleged that the Appeal Crown did not advise the OCA of the "exculpatory findings" and that she was attempting to protect the Trial Crown by "suppressing evidence". The OCA did not address the adequacy of the misfeasance claim against the Trial Crown or the Senior Crown.[44]

42. The OCA found that the allegation that the Crown prosecutors engaged in "deliberate and unlawful conduct" and acted in "bad faith, with the knowledge that this misconduct was likely to injure the officers" was sufficient to ground the Claim as against all of the Crown prosecutors.[45] The OCA's reasons do not specify how these allegations relate to the conduct of the Trial Crown or the Senior Crown and do not address how these allegations meet the standard of particularity required to allege bad faith pursuant to rule 25.06 (8) of the *Rules of Civil Procedure.*

PART II: QUESTIONS IN ISSUE

43. This appeal raises the following three issues for determination by this Court:

Issue 1: Did the courts below err in holding that prosecutorial immunity can be displaced to permit claims by third parties to a criminal prosecution?

Yes. Only the subject of a wrongful prosecution has the requisite interest necessary to create an exception to prosecutorial immunity.

Issue 2: Did the courts below err in holding that prosecutorial immunity can be displaced to permit claims of misfeasance in public office?

Yes. Misfeasance lacks a sufficiently high liability threshold and other safeguards this Court has found are required before prosecutorial immunity can be displaced.

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[43] *Clark v Ontario (Attorney General)*, 2019 ONCA 311, Appeal Record, Vol. 1, Tab 11, paras. 109 and 113.
[44] *Ibid.*, paras. 102-106.
[45] *Ibid*.

Issue 3: In the alternative, did the courts below err in finding that the Claim adequately pleads misfeasance in public office?

Yes. The Respondents have not supported their allegations of intentional misconduct with particulars and have failed to plead facts which would establish causation.

PART III: STATEMENT OF ARGUMENT

44. Crown prosecutors are protected by a qualified immunity from civil liability. The immunity safeguards the ability of prosecutors to carry out their critical role in the criminal justice system by ensuring their independence. For this reason, the immunity exists for the benefit of the public rather than individual Crown prosecutors.

45. This Court has held that the question of whether prosecutorial immunity should be displaced to permit civil liability in a given circumstance is ultimately one of policy.[46] It has also repeatedly warned that serious consequences will arise where Crown prosecutors face even the threat of civil liability.[47] Owing to this concern, just one private law exception to prosecutorial immunity has been recognized to date: in *Nelles v Ontario*, this Court recognized an exception for malicious prosecution.[48]

46. While this Court has not explicitly identified an analytical framework for determining whether an exception to prosecutorial immunity should be recognized, the decision in *Nelles* provides guidance on the approach that should be taken.

47. The first step is to determine whether there is a sufficiently compelling policy justification for exposing prosecutors to civil liability and inviting the resulting harms to the administration of justice. Where one exists, the court must go on to determine whether the asserted cause of action

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[46] *Nelles, supra* note 1, p. 199; *Proulx v Quebec (Attorney General)*, [2001] 3 SCR 9, para. 98 (SCC) [***Proulx***]; *Miazga v Kvello Estate*, 2009 SCC 51, para. 49 [***Miazga***].

[47] *Nelles*, *Ibid.*; *Miazga*, *Ibid.*, para. 5, 50-52; *Proulx*, *Ibid*, para 4; *Henry v British Columbia (Attorney General)*, 2015 SCC 24 [***Henry***], para. 67-74 and 76.

[48] Note: In *Henry*, *Ibid*, this Court considered similar factors before holding that *Charter* damages may be awarded where a prosecutor intentionally fails to disclose information they knew, or would reasonably be expected to have known, was material to the defence.

includes an "extremely high threshold" for liability[49] and whether the elements of the tort ameliorate the negative consequences to the administration of criminal justice.[50] Prosecutorial immunity must be maintained if the answer to either of these inquiries is negative.

48. Applying this analysis to the case at bar can yield only one result: Crown prosecutors should be immune from civil liability for causes of action advanced by anyone who was not the subject of a prosecution and from all claims for misfeasance.

49. Before addressing the three issues in this appeal, the Appellant will set out the principles that govern this analysis.

Prosecutorial independence and prosecutorial immunity

50. Prosecutorial independence is essential to the integrity and effectiveness of the criminal justice system and is firmly entrenched in Canada's constitutional system.[51] This constitutional principle requires that prosecutors act independently of partisan concerns and that courts not interfere with prosecutorial decision-making. [52] It would accordingly erode the integrity of the criminal justice system if a prosecutor's decisions could be subject to claims in tort by claimants who are not competent to evaluate the diverse considerations that bear on any given decision in a prosecution, and who have a personal interest in the outcome of the prosecution.[53]

51. Prosecutorial immunity is founded on the need to protect prosecutorial independence.[54] The importance of prosecutorial immunity lies "not in protecting the interests of individual Crown attorneys, but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference".[55]

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[49] *Miazga*, *supra* note 46, para. 43.
[50] *Ibid*; *Henry, supra* note 47, para. 66.
[51] *Miazga*, *Ibid.,* para. 46; *Krieger*, *supra* note 2, paras 30 – 32.
[52] Binnie J in *Regan*, *supra* note 2, paras. 157 – 158 (dissenting on another point); *R v Power*, [1994] 1 SCR 601, L'Heureux-Dubé J., pp 621 – 623; *Miazga*, *supra* note 46, para. 46.
[53] *Krieger*, *supra* note 2, paras 30-32.
[54] *Boucher, supra* note 2, pp. 25-26; *Miazga, supra* note 46, para. 46; *Krieger, Ibid.*, para 30.
[55] *Miazga*, *Ibid.,* para.72; *Richman v McMurtry*, [1983] 41 OR (2d) 559, p. 5 [***Richman***].

52. A Crown prosecutor's principal function is the prosecution of criminal offences. In carrying out her responsibilities, a Crown prosecutor "ought to regard himself as part of the Court rather than an advocate".[56] In *Boucher v The Queen*, this Court observed that a Crown prosecutor's function is "a matter of public duty than which in civil life there can be none charged with greater personal responsibility."[57] Crown prosecutors are accountable to the public, the Attorney General, and the courts in carrying out the quasi-judicial responsibilities of their office.[58]

53. Writing for the majority in *Nelles*, Lamer J. observed that prosecutorial immunity prevents Crown prosecutors from being "hindered in the proper execution" of their duties.[59] In his concurring reasons, McIntyre J. noted the "social need to have prosecutors who are charged with the prosecution of criminal cases freed from the threat of civil action, so that they may fearlessly and objectively conduct the prosecutions".[60]

54. These sentiments were echoed by this Court in *Miazga*, where prosecutorial immunity was described as allowing for the "effective and uninhibited prosecution of criminal wrongdoing" and ensuring "society's interest in the effective administration of criminal justice".[61] The Court acknowledged that "the public good is clearly served by the maintenance of a sphere of unfettered discretion within which Crown attorneys can properly pursue their professional goals".[62]

i) Good governance concerns

55. Good governance concerns describe the "very real" consequences to the criminal justice system that arise where prosecutorial immunity is displaced.[63] These concerns justify the preservation of the immunity and underscore that any discrete benefit individual claimants may derive from the displacement of prosecutorial immunity comes at a real and significant cost to the administration of criminal justice.

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[56] *Nelles, supra* note 1, p. 191.
[57] *Boucher, supra* note 2, p. 24.
[58] *Regan, supra* note 2, para. 66.
[59] *Nelles, supra* note 1, p. 199.
[60] *Ibid*, p. 212.
[61] *Miazga, supra* note 46, paras. 52 and 56.
[62] *Ibid.*, para. 47; *Regan, supra* note 2, para. 166, per Binnie J. dissenting on another issue.
[63] *Henry, supra* note 47, paras. 39-41; See also *Vancouver (City) v Ward*, 2010 SCC 27, paras. 38-41.

56. Two good governance concerns relevant to this appeal are (i) the chilling effect the prospect of civil liability has on prosecutorial decision-making; and (ii) the diversion of prosecutors from their public duties to respond to private civil actions.

a) ***Chilling effect on prosecutorial decision-making***

57. Prosecutorial immunity safeguards the ability of Crown prosecutors to carry out their public duties independently and impartially, without having to fear personal consequences. Where the immunity is displaced, there is a "chilling effect" on prosecutorial decision-making.[64] Instead of acting based on their public duties and obligations, Crown prosecutors will be influenced by the potential for civil liability. In *Henry,* Moldaver J. described this consequence in the context of a wrongful non-disclosure action for *Charter* damages:

> Fear of civil liability may lead to defensive lawyering by prosecutors. One consequence of this defensive approach would be disclosure decisions motivated less by legal principle than by a calculated effort to ward off the spectre of liability. The public interest is undermined when prosecutorial decision-making is influenced by considerations extraneous to the Crown's role as a quasi-judicial officer.[65]

58. Chief Judge Learned Hand of the United States' Second Circuit Court of Appeal expressed a similar sentiment in justifying absolute prosecutorial immunity in *Gregoire v Biddle*:

> The justification for [denying liability] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.[66]

59. Where prosecutorial conduct is influenced by the threat of liability, the public's trust in the fairness and integrity of the criminal justice system will be damaged. In *Imbler v Pachtman*, Brennan J. of the United States Supreme Court justified an absolute immunity for prosecutors by warning that "the public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for

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[64] *Henry, Ibid.,* para. 94; See also *Nelles, supra* note 1, pp. 196-197.
[65] *Henry, Ibid.*, paras. 72-73; See also *Owsley v Ontario*, [1983] OJ No 2128, para. 15 (Ont HC); *Richman*, *supra* note 55, p. 5.
[66] *Gregoire v Biddle,* 177 F.2d 579 (1949) (US App, 2nd Cir) at p. 581 [***Gregoire***].

damages".[67] In the same vein, in *Nelles* this Court characterized prosecutorial immunity as "encourag[ing] public trust and confidence in the impartiality of prosecutors".[68]

b) ***Diversion from duties***

60. Prosecutorial immunity maintains the efficiency and effectiveness of the criminal justice system by ensuring that Crown prosecutors can dedicate their limited time and resources to their vital public functions.[69] When prosecutorial immunity is displaced, the "energy and attention" of Crown prosecutors is instead "diverted from the pressing duty of enforcing the criminal law" to participating in the defence of civil actions.[70]

61. Like any defendant in a civil action, a Crown prosecutor's responsibilities in the defence would be significant: in addition to bearing the psychological toll of public allegations of serious misconduct, the prosecutor will need to collect and organize relevant records; review draft pleadings; prepare for and attend examination for discovery; respond to undertakings; swear affidavits and attend examinations in summary judgment or other motions; and potentially prepare for and participate in a civil trial. However, unlike other defendants, when a prosecutor is diverted away from their primary duties, the criminal justice system is negatively impacted.

62. This Court in *Henry* recognized this risk in cautioning that, "if every minor instance of wrongful non-disclosure were to expose prosecutors to liability for *Charter* damages, they would find themselves spending much of their limited time and energy responding to lawsuits rather than doing their jobs."[71] The Court went on to describe some of the procedural consequences, warning that diverting prosecutors from their duties is not in the public interest:

> [Crown prosecutors] "would be constantly enmeshed in an *avalanche of interlocutory civil proceedings and civil trials*", an outcome that "bode[s] ill for the efficiency of [Crown prosecutors] and the quality of our criminal justice system" … That avalanche would no doubt contain a few strong claims of serious wrongful non-disclosure but would invariably bring with it scores of meritless claims, *each of which would have to be defended at the expense of core Crown functions.* The collective interest of Canadians is best served when

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[67] *Imbler v Pachtman*, 424 US 409 (1976) [***Imbler***].
[68] *Nelles, supra* note 1, p. 195.
[69] *Henry, supra* note 47, para. 72; *Anderson, supra* note 2, para. 59.
[70] *Imbler*, *supra* note 67, para. 27; *Nelles*, *supra* note 1, pp. 183; *Henry, Ibid.*, para. 72.
[71] *Henry, Ibid*; *Nelles, Ibid.*

> Crown counsel are able to focus on their primary responsibility — the fair and effective prosecution of crime. [72][emphasis added]

c) ***Good Governance concerns exist when any prosecutorial conduct is challenged***

63. Good governance concerns are not confined to the exercise of core prosecutorial discretion: they are present "wherever there is a risk of undue interference with the ability of prosecutors to freely carry out their duties in furtherance of the administration of justice".[73]

64. This is of particular relevance to the Respondents' Claim, which challenges the exercise of core prosecutorial discretion (e.g. the stay of Maharaj's prosecution) as well as tactical decisions and in-court conduct. Recognizing civil liability for any of this conduct triggers the good governance concerns.

ii) The preferred analytical approach

65. In *Nelles,* Lamer J., writing for the majority, articulated an analytical approach that the Appellant submits should be followed by this Court in deciding whether to recognize an exception to prosecutorial immunity.[74]

66. In the first stage of the analysis, the Court must consider whether the interests which the claimant is seeking to vindicate are sufficient to justify exposing the administration of justice to the good governance concerns described above. If the answer is yes, the Court must then consider whether the constituent elements of the claim at issue establish a sufficiently high threshold for liability and whether they ameliorate the good governance concerns that will arise.

67. In recognizing an exception to prosecutorial immunity for malicious prosecution, Lamer J. answered all of these questions in the affirmative:

> There is no doubt that the policy considerations in favour of absolute immunity have some merit. But in my view those considerations must give way to the right of a private citizen to seek a remedy when the prosecutor acts maliciously in fraud of his duties with the result that he causes damage to the victim. In my view the inherent difficulty in proving a case

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[72] *Henry, Ibid; Elguzouli-Daf v Commissioner of Police of the Metropolis*, [1995] QB 335 (CA), p. 349.
[73] *Henry, Ibid* at para. 76; *Smith v Ontario*, 2019 ONCA 651, paras. 111-112 [***Smith***].
[74] The OCA adopted this analytical framework in *Smith, Ibid.* (see paras. 99–110).

> of malicious prosecution combined with the mechanisms available within the system of civil procedure to weed out meritless claims is sufficient to ensure that the Attorney General and Crown Attorneys will not be hindered in the proper execution of their important public duties. [75]

68. This Court cautioned in *Henry* that a "damages claim for prosecutorial misconduct should not be a mere exercise in artful pleading". Rather, the liability threshold should be sufficiently high to ensure that "unmeritorious claims will be weeded out at an early stage, either on a motion to strike or on a motion for summary judgment".[76] The Court further warned that "[it] is only by keeping liability within strict bounds that we can ensure a reasonable balance between remedying serious rights violations and maintaining the efficient operation of our public prosecution system".[77] It is only by limiting prosecutorial liability to those who face the most serious harm from prosecutorial misconduct that this balance can be maintained.

Issue 1: Crown prosecutors should be immune from civil liability to third parties

69. Until the OCA decision, prosecutorial immunity had only been displaced appellate courts to permit claims by the subject of a prosecution alleging serious prosecutorial misconduct. The unique vulnerability of the accused, whose constitutionally-protected liberty and security interests are at stake in a prosecution, warrants displacing the immunity. Third parties, including the Respondents, do not share this vulnerability. There is thus no justification that warrants displacing prosecutorial immunity to provide them with a mechanism to vindicate purely personal interests through the recovery of damages.

i) The harm faced by an accused justifies civil liability to subjects of prosecutions

70. In *Nelles*, the Court's analysis was animated by the accused's unique relationship to the prosecutor. The analysis turned on the particular and significant impact a malicious prosecution has on the accused.[78] The accused's position in the criminal justice system is unique given the potential deprivation of their liberty; the stigma of criminal charges; the possible long-term and

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[75] *Nelles*, *supra* note 1, pp. 199 – 200; *Miazga*, *supra* note 46, para. 7; *Henry*, *supra* note 47, para. 66.
[76] *Henry, Ibid,* paras. 72, 78 and 94.
[77] *Ibid.,* para 81.
[78] *Nelles, supra* note 1, pp. 195-196.

significant extrinsic consequences of a conviction, including on personal and professional relationships; and the direct adversarial context.

71. The ruling in *Nelles* makes it clear that, on balance, the policy factors favoured recognizing an exception to prosecutorial immunity to permit claims for malicious prosecution because of the very serious consequences faced by an accused who is maliciously prosecuted:

> We must be mindful that an absolute immunity has the effect of negating a private right of action and in some cases may bar a remedy under the *Charter*. As such, the existence of absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted.[79]

72. Similarly, in *Proulx*, a majority of this Court cited the ability of "individuals caught up in the justice system" to be "protected from abuses of power" to illustrate the need to ensure that "prosecutors are not above the law and must be held accountable".[80] This interest, and the policy factors which make it important, do not exist where the claimant was not similarly "caught up" in a prosecution.

73. Where the subject of a prosecution faces serious and intentional prosecutorial misconduct, her liberty interests and *Charter* rights are imperiled and potentially violated. Other claimants do not suffer harm which is serious enough to justify displacing the immunity.[81] For example, the Respondents allege that they suffered psychological harm and reputational damage as a result of prosecutorial misconduct. Without trivializing the Respondents' alleged injuries, this alleged harm pales in comparison to the serious damage faced by the subject of a prosecution. Only the latter's harm justifies displacing prosecutorial immunity and inviting the resulting risks to good governance.

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[79] *Nelles, Ibid.*, p. 199.
[80] *Proulx, supra* note 46, para 4.
[81] See *Smith*, *supra* note 73, where the OCA engaged in the *Nelles* analytical approach and found that police claims for monetary indemnity did not warrant displacing the immunity (paras. 96-109).

ii) The systemic risks of permitting claims by third parties

74. Permitting third parties such as investigating officers, complainants, families of victims, or witnesses to claim against Crown prosecutors would give rise to the good governance concerns which prosecutorial immunity seeks to avoid. The ways in which these risks will manifest are indeterminate and unpredictable, given the broad number of potential complainants and the many different aspects of prosecutorial conduct they may seek to impugn.

75. If Crown prosecutors can be sued by anyone affected by a prosecutorial decision, individual prosecutors will no doubt be influenced by the risk of a civil action. For example, a Crown prosecutor may feel compelled to pursue a prosecution where there is arguably no reasonable prospect of conviction in order to avoid litigation by a dissatisfied complainant.

76. Even less significant decisions might be influenced by the prospect of a civil action. A prosecutor fearing a lawsuit might choose not to pursue a particular line of legitimate but embarrassing questioning of a witness or may decline to impeach a witness's credibility.

77. The underlying action demonstrates the potential consequences: in an effort to stave off civil claims, Crown prosecutors will consider the reputational interests of investigating officers and other third parties when making decisions. Public duties and legal principles may thus give way to the reputational interests of third parties, an irrelevant consideration in the administration of criminal justice.

78. Based on the allegations in the Claim, the Respondents contend that the Trial Crown should have called evidence to rebut the assault allegations, despite her assessment of their merit. In doing so, the Trial Crown would have altered the dynamic of the prosecution, incorporating and privileging the interests of the investigating officers over the constitutionally-enshrined rights of the accused and the public interest in a fair and efficient trial.

79. With respect to the Appeal Crown, the Respondents' contention that she should have brought a fresh evidence application would similarly conflict with her obligations to the accused and to the court and impair the conduct of the appeal. In determining whether to commence such an application, the Appeal Crown should be guided by the governing law and her obligations to

the court. Applying the relevant jurisprudence, there are two obvious reasons why a fresh evidence application would have failed.

80. First, commencing a fresh evidence application would have required the Appeal Crown to resile from the Trial Crown's concession that Singh had established a *Charter* breach and would amount to an attempt to relitigate this issue to his prejudice.[82] The interests of finality in criminal litigation weigh heavily against raising a new issue on appeal. Leave is required when a party seeks to raise a new issue and will not be granted where the new issue cannot be litigated fairly in the appellate court, bearing in mind the limited role appellate courts play in resolving evidentiary disputes.[83]

81. Second, as recognized by the Motion Judge, the "new material facts" would not have been admitted under the *Palmer* test because most of the "evidence" at issue was available at trial.[84] Fresh-evidence is admissible on appeal only if admission is in the interests of justice, bearing in the mind the due diligence of the party seeking to tender fresh evidence, the relevance of the evidence in the sense that it bears upon a decisive or potentially decisive issue in the trial, whether the evidence is credible in the sense that it is reasonably capable of belief, and that it could reasonably, when taken with the other evidence adduced at trial, be expected to affect the result.

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[82] *R v Reid*, 2016 ONCA 524, paras. 37-44; leave refused, [2016] SCCA No 432; See also: *R v Trabulsey*, [1995] OJ No 542 (CA), paras. 25-26; *Wexler v. The King* [1939] SCR 350, p. 353; *R v Tran*, 2016 ONCA 48; *R v Patel*, 2017 ONCA 702, paras. 56-70; *R v Cyr-Langlois*, 2018 SCC 54 (CanLII) at para. 55; *R v Varga*, 18 OR (3d) 784 (CA), paras. 26-27; *R v Barrett*, 2019 SKCA 6, paras. 41-50; *R v Brown*, [1993] 2 SCR 918, per L'Heureux-Dubé J, dissenting; *R v Ahmed*, 2019 SKCA 47 at paras. 15-20; *R v Baker* (2004), 189 OAC 337, paras. 1 and 6.

[83] See eg, *R v Roach*, 2009 ONCA 156; *Brown*, *Ibid per* L'Heureux-Dubé J., dissenting.

[84] *Clark v AG Ontario (SCJ)*, *supra* note 42, para. 93; *Palmer v The Queen*, [1980] 1 SCR 759 [***Palmer***]; The due diligence requirement is relaxed in criminal appeals, but still may be determinative of whether to permit fresh evidence. This is particularly so when the Crown fails the due diligence requirements; See, in particular: *R v Angelillo*, 2006 SCC 55 at para. 16; see also *R v Hogan* (1979), 50 CCC (2d) 439 (NSCA); *R v G.D.B.*, [2000] 1 SCR 520, paras. 17-22; *R v Agozzino*, [1970] 1 OR 480 (CA), para. 5; *R v M.(P.S.)*, 1992 CanLII 2785 (ON CA), paras. 34-35.

82. The only "new material evidence" that was not available at the time of the trial was the PSU report; however, the report was drafted based on evidence available at the time of the trial, without interviewing the subject officers or their alleged victims, and constituted unsworn, inadmissible hearsay. As noted at paragraph 35 above, the Appeal Crown brought the report to the attention of the court; advised the court that the Respondents were not facing disciplinary proceedings; and offered to make further inquiries regarding the substance of the report. The Appeal Crown advised the court of those matters in response to questions from the court and not as part of a fresh evidence application, as the report would not have satisfied the criteria for admissibility of fresh evidence under *Palmer*.[85]

83. In alleging that the Appeal Crown should have led fresh evidence, the Respondents assert that she should have subordinated the public interest and the rights of the accused in favour of the Respondents' reputational interests. The actions that the Respondents alleged should have been taken by the Trial Crown and Appeal Crown would all be in partial or complete conflict with the duties and standards of practice of Crown prosecutors who are directed to carry out those duties and exercise their discretion without regard for "the possible effect on the personal or professional circumstances of anyone connected to the exercise of prosecutorial discretion".[86]

84. In fact, where a Crown prosecutor has exercised their discretion in favour of the reputational interests of investigating officers, this Court has found that to be an improper purpose in a malicious prosecution claim.[87] Civil liability should not be extended so as to place Crown prosecutors in these untenable situations.

85. Crown prosecutors, already tasked with making difficult judgment calls in complex, nuanced circumstances, will naturally and inevitably consider the interests of third parties in their decision-making to avoid the prospect of civil liability. These actions would also result in significant additional delay in the conduct of trials and appeals, monopolizing scarce judicial resources.

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[85] Appeal Transcript, *supra* note 33, p. 427, lines 4-8 and 10-22; p. 449, lines 21-26; p. 488, line 15-p.489, line 15; p. 499, lines 16-18.
[86] Ontario, Ministry of the Attorney General, *Crown Prosecution Manual*, pp. 4 and 17.
[87] *Proulx*, *supra* note 46.

86. Finally, the Respondents' action raises a unique good-governance concern: the claim risks damaging the relationship between prosecutors and the police. The OCA recently relied on this good governance concern, amongst others, in applying prosecutorial immunity to a claim commenced by police officers against Crown prosecutors.

87. In *Smith v Ontario*, the OCA held that prosecutorial immunity barred police officers from cross-claiming against Crown prosecutors for allegedly negligent legal advice given during a criminal investigation.[88] In coming to its decision, the unanimous Court relied on the good governance concerns discussed above, as well as the additional concern that permitting the asserted claim would jeopardize the relationship between the police and Crown prosecutors and risked undermining the constitutionally-mandated independence of both parties.[89] In particular, the Court emphasized that imposing civil liability in this situation could lead to prosecutors directing the police or *vice-versa*.[90]

88. The OCA's concerns in *Smith* apply with equal force to this action. The fear of liability may cause Crown prosecutors to take direction from investigating officers. Not only would this impact the constitutional independence of the prosecutor, but it would also give rise to a perception that Crown prosecutors are counsel to and take instruction from the police. The public trust in the administration of justice would be harmed by this perception.

iii) Alternate means of accountability

89. Preventing parties other than the accused from suing Crown prosecutors does not mean that Crown prosecutors who engage in deliberate and unlawful conduct will not suffer serious consequences. Accountability can be achieved without undermining good governance. For example, a Crown prosecutor who engages in deliberate unlawful conduct can be subject to

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[88] *Smith*, *supra* note 73.
[89] *Smith, Ibid.*, para. 103; *Regan*, *supra* note 2, paras. 64 and 87; *R v Beaudry*, 2007 SCC 5, para. 45; *R v Riley*, 174 CRR (2d) 288 (SCJ), para. 145; *Re Regina v Atout*, 2013 ONSC 1312 (SCJ), para. 56.
[90] *Smith*, *Ibid.*, paras. 104-105.

sanction in the criminal proceeding; disciplinary action by their Law Society;[91] or consequences from their employer. In very serious cases, they could be subject to criminal prosecution.[92]

Issue 2: Crown prosecutors should be immune from civil liability for misfeasance

90. This Court should not recognize misfeasance as an exception to prosecutorial immunity because doing so will give rise to significant good governance concerns. Misfeasance does not include a sufficiently high liability threshold or any elements which safeguard the integrity of the criminal justice system and render marginal claims amenable to adjudication in preliminary motions. In this regard, the Appellant makes four arguments.

91. First, a claimant does not need to establish malice or an improper purpose to succeed in a misfeasance claim; gross negligence or recklessness can give rise to liability. This Court has repeatedly rejected these lower thresholds given the risks to good governance. A "stringent" liability threshold is required "to ensure that liability will attach in only the most exceptional circumstances".[93]

92. Second, *any* third party may challenge *any* prosecutorial act or omission through a misfeasance claim. Exposing Crown prosecutors to liability for misfeasance radically expands the number of potential claimants and the scope of conduct which may give rise to civil liability. This significant expansion of prosecutorial liability comes with correspondingly significant good governance concerns.

93. Third, the adjudication of misfeasance claims would undermine the integrity of the criminal justice system by requiring the relitigation of factual findings and legal rulings made in prosecutions and by exposing otherwise lawful and appropriate prosecutorial conduct to second-guessing and scrutiny based on hindsight.

94. Finally, misfeasance lacks elements which would permit the dismissal of meritless or marginal claims in preliminary motions and thus reduce the risk that prosecutors will be diverted from their duties. Indeed, because the tort is premised on the allegation of deliberate and unlawful

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[91] *Krieger*, *supra* note 2; *Nelles*, *supra* note 1, p. 198 – 199.
[92] *Nelles*, *Ibid*, p. 198; *Criminal Code*, RSC, 1985, cC-46, s. 122; *R v Boulanger*, 2006 SCC 32 [***Boulanger***].
[93] *Miazga*, *supra* note 46, para. 51.

conduct, as well as knowledge, it is particularly resistant to any gatekeeping process and will aggravate this good governance concern.

i) An overview of misfeasance in public office

95. Misfeasance is a unique cause of action, operating at the nexus of public and private law. Described as a "hybrid of tort law and administrative law",[94] misfeasance has been characterized as "the common law's only truly public law tort".[95] First recognized in Canada in *Roncarelli v Duplessis*,[96] this Court considered misfeasance in depth for the first time in *Odhavji v Woodhouse*.[97]

96. In *Odhavji*, Iacobucci J. observed that a claim for misfeasance is premised on the "deliberate disregard of official duty coupled with knowledge that the conduct is likely to injure the plaintiff", and summarized the tort's essential elements: (i) deliberate unlawful conduct in the exercise of public functions; and (ii), awareness by the public officer that the conduct is unlawful and likely to injure the plaintiff.[98] Claimants must also plead and prove the elements common to all torts, including causation and compensable harm.

97. There are two categories of misfeasance claims. In what Iacobucci J. termed "Category A" misfeasance, the alleged conduct is specifically intended to injure the claimant. In "Category B" misfeasance, a public officer "acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the claimant."[99]

98. While the two elements must be established in both categories, the manner in which they are established differs. In Category A misfeasance, "the fact that the public officer has acted for the express purpose of harming the plaintiff" satisfies both elements, as deliberate harm to a

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[94] Erika Chamberlain, "Fiduciary Aspects of Misfeasance in a Public Office" (2014) 39 Queen's LJ 733, p. 734 (WL).
[95] Mark Aronson, "Misfeasance in Public Office: A Very Peculiar Tort" (2011) 35 Melb U L Rev 1 at pp. 2 – 3 (WL).
[96] *Roncarelli v Duplessis*, [1959] SCR 121.
[97] *Odhavji Estate v Woodhouse*, 2003 SCC 69 [***Odhavji***].
[98] *Ibid*., para 32.
[99] *Ibid*., para 22.

member of the public will always constitute an improper purpose. In Category B misfeasance, the two elements must be proven independently.[100]

99. A claim for misfeasance can arise from "a broad range of misconduct". In support of this point, Iacobucci J. cited with approval the statement of the High Court of Australia in *Northern Territory of Australia v Mengel* that "[a]ny act or omission done or made by a public official in the purported performance of the functions of the office can found an action for misfeasance in public office".[101]

100. The Court in *Odhavji* declined to place any further restrictions on the tort, reasoning that the requisite element of deliberate unlawful conduct created a satisfactory balance between establishing liability and permitting public officers to carry out their duties undisturbed.[102]

101. Claims for misfeasance were uncommon in the decades following *Roncarelli*, "lay[ing] in relative obscurity" until the early 2000s.[103] Since *Odhavji*, misfeasance claims have proliferated. The elements established by Iacobucci J. have been applied with increasing flexibility as the tort "has expanded to fill the ground lost in negligence by the addition of the proximity requirement to the duty of care analysis".[104]

102. As Dean Erika Chamberlain has remarked, a consequence of this expansion has been the relaxation of the previously high threshold mandated by this Court in *Odhavji*:

> … the tort has undergone rapid expansion in recent decades, and threatens to shed its 'exceptional' character if current trends persist. There has been a relaxation of the elements necessary to prove a claim: a watering-down of the requisite malicious state of mind; an erosion of the necessary proximity between the public officer and the plaintiff; and a greater emphasis on the plaintiff's loss. The result is that a public officer can now be sued in misfeasance for a non-vindictive breach of duty that was not directed at anyone in

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[100] *Ibid*., para 23.
[101] *Ibid*., para. 20; *Northern Territory of Australia v Mengel*, (1995) 129 ALR 1 [***Mengel***].
[102] *Odhavji, Ibid.,* para. 28.
[103] *Powder Mountain Resorts v British Columbia*, 2001 BCCA 619, para. 1 [***Powder Mountain***].
[104] Madam Justice Karen Horsman and Gareth Morley, *Government Liability: Law and Practice* (Toronto: Thomson Reuters Canada Limited, 2017, 2019) at s 7.40 [***Horsman***].

particular, by a plaintiff with no legally enforceable right to see the duty performed. This offends the special nature of the tort.[105]

ii) Misfeasance lacks a sufficiently high threshold for liability

103. Misfeasance lacks a sufficiently high liability threshold because it does not require a claimant to establish malice or an improper purpose. Category B misfeasance claims can succeed if a claimant proves that a public officer acted recklessly or in a grossly negligent manner. This Court has repeatedly rejected this lower standard for displacing prosecutorial immunity, ruling that the threshold for liability must be maintained at a higher level given the good governance concerns identified above.[106]

104. Malice or improper purpose has been defined by this Court as acting in spite, ill-will, or a spirit of vengeance, and includes acting for personal gain or a private collateral advantage.[107] Importantly, malice does not include recklessness or gross negligence. Rather, malice exists when the conduct of a prosecutor constitutes "an abuse of prosecutorial power", or the perpetuation of "a fraud on the process of criminal justice".[108] Malice is the “bad faith” required to displace prosecutorial immunity.

105. A claimant suing in misfeasance is not required to plead or establish malice or an improper purpose.[109] The bad faith component of misfeasance arises from the pleading of deliberate unlawful conduct.[110] For example, in a claim for “Category B” misfeasance, the plaintiff only needs to establish that the Crown prosecutor deliberately engaged in unlawful conduct. Deliberate unlawful conduct is a lower liability threshold than malice and is not sufficient to displace prosecutorial immunity.

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[105] Erika Chamberlain, “The need for a ‘Standing’ Rule in Misfeasance in a Public Office (2007) 7:2 OUCLJ, p. 215; see also *Horsman*, *Ibid.*

[106] *Nelles*, *supra* note 1, pp. 194-199; *Proulx*, *supra* note 46, para. 4; *Miazga*, *supra* note 46, paras. 5-8; *Henry*, *supra* note 47, para. 76.

[107] *Nelles*, *Ibid*, pp. 193-194 (emphasis original); *Henry*, *Ibid*, para 46.

[108] *Miazga*, *supra* note 46, para. 8; *Proulx*, *supra* note 46, para. 35 (emphasis added); *Henry*, *Ibid*, para. 47.

[109] Category “A” misfeasance does include an allegation of malice; depending on how it is pled, a Category “B” misfeasance may include an allegation of malice or improper purpose.

[110] *Odhavji*, *supra* note 97, para. 32.

106. This Court's decision in *Miazga* demonstrates that a deliberate breach of a prosecutor's duty is not an adequate substitute for malice and is not sufficient to ground prosecutorial liability. At trial, the judge concluded that the defendant Crown prosecutor did not have a subjective belief in the probable guilt of the accused, but proceeded with the prosecution nonetheless. In a split decision, the Saskatchewan Court of Appeal upheld the trial judge's decision, ruling that "[the Crown prosecutor's] decision to proceed absent reasonable and probable cause was itself sufficient to make out the malice element of *Nelles*"[111] This was an error.

107. In reversing the Court of Appeal, Charron J. held that Crown prosecutors have a duty to proceed with criminal charges *only* where there is reasonable and probable cause on an objective basis. Continuing a prosecution absent a belief that objective reasonable and probable cause exists is a breach of that duty. A deliberate breach of that duty, without more, however, is not sufficient to establish malice. An improper purpose motivating the deliberate unlawful conduct is necessary to establish liability:

> As we have seen, in deciding whether to initiate or continue a prosecution, the prosecutor must assess the legal strength of the case against the accused. *The prosecutor should invoke the criminal process only where he or she believes, based on the existing state of circumstances, that proof beyond a reasonable doubt could be made out in a court of law*. It follows that, if the court concludes that the prosecutor initiated or continued the prosecution based on an *honest*, albeit mistaken, professional belief that reasonable and probable cause did in fact exist, he or she will have acted for the proper purpose of carrying the law into effect and the action must fail.
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> The inverse proposition, however, is not true. The absence of a subjective belief in sufficient grounds, while a relevant factor, does not equate with malice […]
>
> [A] demonstrable "improper purpose" is the key to maintaining the balance struck in *Nelles* between the need to ensure that the Attorney General and Crown prosecutors will not be hindered in the proper execution of their important public duties and the need to provide a remedy to individuals who have been wrongly and maliciously prosecuted. By requiring proof of an improper purpose, the malice element of the tort of malicious prosecution ensures that liability will not be imposed in cases where a prosecutor proceeds, *absent reasonable and probable grounds by reason of incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence, or even gross negligence.* […]

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[111] *Miazga*, *supra* note 46, para. 39.

> While the absence of a subjective belief in reasonable and probable cause is relevant to the malice inquiry, it does not dispense with the requirement of proof of an improper purpose. [Emphasis added] [112]

108. Malice is a necessary condition to displacing immunity because, absent an independent finding of an improper purpose, bad faith or deliberate unlawful conduct can be inferred, and liability established, for errors of judgement, negligence, gross negligence or recklessness. This sets the liability threshold too low.[113]

109. Recent conceptions of bad faith by this Court do not require a finding of malice. In *Finney*, this Court held that bad faith may be established in the absence of an improper purpose in circumstances where the impugned conduct is "reckless" and otherwise "inexplicable".[114] In *Entreprises Sibeca Inc. v Frelighsburg (Municipality)*, the Court described this conception of bad faith in the following terms:

> [….] the concept of bad faith can encompass not only acts committed deliberately with intent to harm, which corresponds to the classical concept of bad faith, *but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude they were performed in good faith*. What appears to be an extension of bad faith is, in a way, no more than the admission in evidence of facts that amount to circumstantial evidence of bad faith where a victim is unable to present direct evidence of it. [115] [emphasis added]

110. Appellate courts have recognized '*Finney* bad faith' as sufficient to establish deliberate unlawful conduct.[116] As this Court confirmed in *Hinse*, *Finney* bad faith is a lower liability threshold than malice:

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[112] *Ibid*., paras 80-81, 88-89 (emphasis added).
[113] *Miazga, Ibid*, para. 81.
[114] *Finney v Barreau du Québec*, 2004 SCC 36, para. 39.
[115] *Entreprises Sibeca v Frelighsburg (Municipalité)*, 2004 SCC 61, para. 26.
[116] See: *Robson v Law Society of Upper Canada*, 2016 ONSC 5579, paras 50-52 and 58; aff'd 2017 ONCA 468; *Conway v Law Society of Upper Canada*, 2016 ONCA 72, paras. 22-25; *Anglehart v Canada*, 2016 FC 1159, para 198, aff'd 2018 FCA 115, paras. 54, leave ref'd 2019 CarswellNat 807; *Ontario v Gratton-Masuy Environmental Technologies (cob as EcoFlo Ontario)*, [2009] OJ No 2677 (Div Ct), paras. 35-36 [***Gratton***]; aff'd 2010 ONCA 501.

> In our opinion, it would be inappropriate to import the malice standard applicable to the liability of Crown prosecutors for malicious prosecution into a case concerning an application for mercy[…]
>
> In sum, decisions of the Minister that are made in bad faith, including those demonstrating serious recklessness — as defined in *Finney* and *Sibeca* — on the Minister's part, fall outside the Crown's qualified immunity. Bad faith can be established by proving that the Minister acted deliberately with the specific intent to harm another person. It can also be established by proof of serious recklessness that reveals a breakdown of the orderly exercise of authority so fundamental that absence of good faith can be deduced and bad faith presumed. It is with this in mind that the duty owed by the Minister when exercising his or her power of mercy must be analyzed.[117]

111. In addition to being a surrogate for bad faith, recklessness can also be a substitute for knowledge. This Court and the House of Lords have recognized that Category B misfeasance claims can be established absent actual knowledge of either unlawful conduct or harm to the plaintiff.[118] Rather, subjective recklessness or wilful blindness can be sufficient.[119] Subsequent to *Odhavji*, this Court noted that subjective recklessness is akin to gross negligence or wilful misconduct and should not be conflated with the distinct concept of intentional fault.[120]

112. This issue is of particular relevance to the misfeasance claim against the Trial Crown. The Claim does not allege that the Trial Crown acted with a specific improper purpose. Reading the Claim generously, it appears to allege that the Trial Crown's conduct was so inconsistent with a prosecutor's duty that amounts to *Finney* bad faith. Such a pleading should not be sufficient to displace prosecutorial immunity as any alleged inconsistency with a prosecutor's duty could be

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[117] *Hinse v Canada (Attorney General)*, 2015 SCC 35, paras 39, 48 – 53.

[118] *Three Rivers DC v Bank of England (No 3)*, [2000] 2 WLR 1220 (UKHL), p.1232 [***Three Rivers***]; *Powder Mountain*, *supra* note 103, para. 7; See also: *Capital Solar Power v Ontario Power Authority*, 2015 ONSC 2116 (SCJ), para 18.

[119] *Odhavji*, *supra* note 97, para. 38; While the Court applied the concept of subjective recklessness to the foreseeability of harm element of the tort, there is no indication that the Court did not also accept subjective recklessness for the unlawful act element. Iacobucci J. noted that subjective recklessness was accepted as sufficient for both elements in *Three Rivers* and *Powder Mountain* and took no issue with this conception of the tort.

[120] *Peracomo Inc. v TELUS Communications Co.*, 2014 SCC 29, paras. 64, 68 – 70.

attributed to simple errors of judgment which are not actionable.[121]

113. Absent a malice requirement, misfeasance does not set a sufficiently high liability threshold to justify displacing prosecutorial immunity.

iii) Misfeasance would significantly expand the scope of potential claims and claimants

114. Recognizing an exception to prosecutorial immunity for misfeasance would represent a sea change in the scope of prosecutorial liability, dramatically expanding the range of conduct which can give rise to liability and the number of claimants who can sue Crown prosecutors.

115. Any conduct "associated with a public office" can found liability in misfeasance.[122] In essence, everything a Crown prosecutor does in her professional capacity may now give rise to civil liability. This includes conduct outside of a prosecution, such as providing advice to investigating officers, as well as any act or omission in the course of a prosecution. This represents a paradigm shift from the approach to date, which only allows for liability arising from a disclosure decision or a decision to commence or continue a prosecution.[123]

116. Recognizing a misfeasance exception to prosecutorial immunity would also significantly increase the number of parties who may sue Crown prosecutors. The ability to sue in misfeasance is not constrained by concepts of standing or proximity. Rather, "[t]he only right that a plaintiff need establish is the right not to be damaged or injured by a deliberate abuse of power by a public officer …" [124] The requirement for damage or injury itself does not significantly narrow the scope of potential claimants: a claimant's injury does not need to meet a particular threshold of

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[121] *Nelles, supra* note 1, p. 197; Proulx, *supra* note 46, para. 44, *Miazga, supra* note 46, para. 38*; Henry, supra* note 47, para. 51.
[122] *Horsman, supra* note 104, 7.20.20; *Mengel, supra* note 101; *Odhavji, supra* note 97.
[123] *Miazga, supra* note 46, para 6; *Henry, supra* note 47.
[124] *Horsman, supra* note 104, 7.20.40; *Three Rivers, supra* note 118 (Lord Steyn), para. 20; A prosecutor may be sued for misfeasance based on a general duty to the public. In this, it is actually easier to sue a Crown prosecutor for misfeasance than negligence, a tort which is not available against Crown prosecutors and which requires a private law duty of care.

seriousness. An allegation that the claimant suffered anger or anxiety would be sufficient to ground a misfeasance claim against a Crown prosecutor.[125]

117. Effectively, if an exception to prosecutorial immunity is recognized for misfeasance, anyone will be permitted to sue a Crown prosecutor so long as they adequately plead the tort's constituent elements. This too represents a paradigm shift from the approach to date, which only allows for liability to the subject of a prosecution. Permitting prosecutorial liability for misfeasance would effectively do away with the barriers which limit the number and nature of claims against Crown prosecutors and would expose Crown prosecutors to a "Pandora's box of potential liability theories".[126] While it is impossible to predict all of their permutations, examples of misfeasance claims Crown prosecutors would face if the immunity is displaced demonstrate the resulting risks to good governance.

118. Consider the hypothetical that during the course of a prosecution, the accused commences a *Charter* application claiming that the right to be tried within reasonable time has been breached. After reviewing the matter, the Crown prosecutor decides to withdraw the charge based on her opinion that the accused's *Charter* rights have been breached.

119. In this scenario, the complainant could commence a claim in misfeasance against the Crown prosecutor. Boot-strapping on the accused's *Charter* rights, the complainant could allege that the prosecutor knowingly[127] breached the accused's *Charter* rights (i.e. deliberate unlawful conduct) and knew that the withdrawal of the charges would cause psychological harm to the complainant. Absent a malice requirement to the tort, which requires full particulars, the claim would survive a motion to strike.[128]

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[125] *Odhavji*, *supra* note 97, para. 41; See also: Erika Chamberlain, "The need for a 'Standing' Rule in Misfeasance in a Public Office (2007) 7:2 OUCLJ p. 232.

[126] *Henry*, *supra* note 47, para. 93.

[127] Pursuant to Rule 25.06 (8) of the *Rules*, a plaintiff can plead, as a fact, that the Crown prosecutor knew that their conduct was unlawful.

[128] Similar boot-strapping was pleaded in *Polsom v Couston*, where a complainant relied on a prosecutor's failure to honour the accused's rights to disclosure and a timely trial as the "deliberate unlawful conduct" required to establish misfeasance (2014 ABQB 43 – Master, para. 2).

120. Displacing prosecutorial immunity to permit misfeasance claims significantly expanded scope of potential liability – in terms of conduct and claimants – and create correspondingly significant good governance concerns. It is difficult to imagine a circumstance more likely to chill prosecutorial conduct and divert Crown prosecutors from their duties than the potential of liability for every act or omission to an unknowable and indeterminate class of potential claimants.

iv) Misfeasance claims would undermine the integrity of the criminal justice system

121. Permitting claims for misfeasance against Crown prosecutors would inevitably result in the relitigation of factual and legal issues decided in criminal proceedings. This risk is specifically addressed in claims for malicious prosecution, where a claimant must establish that the prosecution terminated in her favour.[129] In *Miazga*, Charron J. remarked that this element, "precludes a collateral attack on a conviction properly rendered by a criminal court, and thus avoids conflict between civil and criminal justice."[130]

122. A claim for misfeasance against a Crown prosecutor does not include any similar safeguard. A third party would be free to challenge judicial determinations, including findings of fact and the verdict, from the criminal proceeding in a civil action. This creates a risk of inconsistent and contradictory rulings which undermine the public interest in the integrity and finality of prosecutions, thereby bringing the administration of justice into disrepute.[131]

123. The case at bar exemplifies this risk. The Respondents' allegation that they did not assault Maharaj and Singh is directly at odds with Justice Thorburn's factual findings, which were then upheld by the OCA. The adjudication of this claim on its merits would require a civil court to reconsider and decide issues that have been decided by a criminal trial and appeal court. The result would be that findings and decisions of the Superior Court in a *Charter* application and an appellate

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[129] *Nelles*, *supra* note 1, p. 193; *Miazga*, *supra* note 46, paras. 3 and 54.
[130] *Miazga*, *Ibid.*, para 54; See also: *Henry*, *supra* note 47, para. 90.
[131] *R v Mahalingan*, 2008 SCC 63, para. 106; *Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63, paras. 38 and 51; See also: Donald Lange, *The Doctrine of Res Judicata in Canada*, 4th ed., (Toronto: LexisNexis, 2015) (QL) at Ch. 1, p. 2 and Ch. 4, p. 1.

ruling staying serious criminal charges would be cast into doubt, rendered uncertain by allegations in the civil action.[132]

124. The risks associated with re-litigation are more directly implicated when the subject of a prosecution commences a claim in misfeasance in circumstances where they cannot establish the more onerous elements of malicious prosecution. Specifically, an exception for misfeasance creates the risk that a claimant will seek to collaterally attack their criminal conviction by commencing a misfeasance action against a Crown prosecutor.

125. The inherent difficulty in proving a case of malicious prosecution was an intentional choice made by this Court designed to preserve the balance between the right of individual citizens to be free from groundless criminal prosecutions and the public interest in the effective prosecution of criminal wrongdoing.[133] Misfeasance should not be used to undermine this balance.

126. Misfeasance also lacks any mechanism which would bar liability for objectively reasonable prosecutorial conduct. Malicious prosecution incorporates such a mechanism by requiring that claimants establish the absence of reasonable and probable cause for the commencement or continuation of the prosecution.[134] This inquiry focuses on the prosecutor's professional assessment of the legal strength of the case, rather than her personal opinion. The Court in *Miazga* held that this element is an "important aspect of the proper administration of justice" [135]:

> Unlike the situation in a purely private dispute, the public interest is engaged in a public prosecution and the Crown attorney is duty-bound to act solely in the public interest in making the decision whether to initiate or continue a prosecution. Consequently, where objective reasonable grounds did in fact exist at the relevant time, it cannot be said that the criminal process was wrongfully invoked. […]
>
> If the court concludes, on the basis of the circumstances known to the prosecutor at the relevant time, that reasonable and probable cause existed to commence or continue a

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[132] The Respondents advance these allegations in their Claim despite having had the right to seek leave to intervene and raise them in Singh's appeal: *Criminal Appeal Rules*, SI/93-169, s. 23(1).

[133] *Miazga*, *supra* note 46, para. 52.
[134] *Ibid*., para. 58; *Nelles*, *supra* note 1, p. 193.
[135] *Miazga*, *Ibid*., paras. 63 and 65.

> criminal prosecution from an objective standpoint, the criminal process was properly employed, and the inquiry need go no further. [citations omitted][136]

127. The Court in *Miazga* went on to explain that the reasonable and probable cause requirement is "intended to weed out those cases where there was a basis for invoking the criminal process".[137] Essentially, a prosecution must be taken as having been properly instituted or continued if reasonable and probable cause existed, regardless of any ill intent by a Crown prosecutor:

> As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceeding in question, the proceeding must be taken to have been properly instituted, regardless of the fact that it ultimately terminated in favour of the accused … [138]

128. In contrast, a plaintiff alleging misfeasance is entitled to take issue with any act or omission of a Crown prosecutor, including the decision to commence or continue a prosecution, regardless of whether the impugned conduct was otherwise appropriate and lawful.

129. The case at bar again provides an apt demonstration of the consequences. The Respondents assert that the Appeal Crown was obligated to bring an application to introduce fresh evidence in the appeal.

130. As discussed at paragraph 84, it is very unlikely that such an application would have been granted. Bringing a meritless application in order to safeguard the Respondents' reputations would have required the Appeal Crown to disregard the constitutional rights of the accused and her obligations to the administration of justice. In effect, the Respondents seek to vindicate their personal interests by alleging that otherwise lawful and appropriate conduct was motivated by an improper purpose.

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[136] *Ibid.*, paras. 73 and 75.

[137] *Ibid.*, para. 68; see also *German v Major*, 1985 ABCA 176, para. 20, where Kerans JA discussed the purpose of the requirement [***German***].

[138] *Miazga*, *supra* note 46, para. 55.

131. In the absence of any mechanism for protecting otherwise lawful and proper prosecutorial conduct, displacing prosecutorial immunity to permit claims for misfeasance would put civil courts in an untenable position that would undermine the integrity of the administration of justice.

v) Marginal misfeasance claims cannot be screened out on a preliminary basis

132. Marginal misfeasance claims are inherently difficult to dismiss on a preliminary basis through motions to strike or for summary judgment. Owing to the tort's elements, where a misfeasance claim is adequately pleaded – which is not onerous – it will require a fulsome adjudication with the active involvement of Crown prosecutors. For this reason, rather than ameliorating the good governance concerns that arise where prosecutorial immunity is displaced, claims for misfeasance will actually exacerbate them.

133. The ability to filter out meritless claims on a preliminary basis is a factor which supports the recognition of an exception to prosecutorial immunity. As Kerans J.A. opined in *German v Major*, an "effective striking-out rule" is preferable to a "stern immunity rule".[139] The Court in *Nelles* cited the ability to screen out marginal malicious prosecution claims through motions to strike or for summary judgment as a factor favouring recognizing an exception to prosecutorial immunity for that tort.[140]

134. Unlike malicious prosecution, misfeasance does not have any elements which could be used to screen out marginal claims. Misfeasance contains no objective assessment akin to the reasonable and probable cause element of a malicious prosecution claim, which can be adjudicated on a motion to strike or a pre-discovery motion for summary judgment.[141]

135. The fact that liability for misfeasance is premised on intentional conduct, as well as knowledge of harm, renders misfeasance claims particularly resistant to motions to strike.[142] In a

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[139] *German*, *supra* note 137, para. 15; See also *Nelles*, *supra* note 1, p. 197; *Henry*, *supra* note 47, paras. 42 – 43; *Ernst v Alberta Energy Regulator*, 2017 SCC 1, paras. 56-57.
[140] *Nelles*, *supra* note 1, p. 197; See also: *Miazga*, *supra* note 46, paras. 52, 68 and 74.
[141] *Nelles*, *Ibid.*
[142] *Miguna v Toronto Police Services Board*, 2008 ONCA 799, para. 32.

motion to strike, where a pleading of intentional conduct and knowledge can be pleaded as a fact and must be accepted as true, specious but adequately pleaded claims will not be struck.[143]

136. As Dean Chamberlain has observed, claimants have learned this lesson. Misfeasance is being appended to claims to overcome motions to strike, to embarrass public officers, and to gain strategic advantages in litigation:

> In Canada, at least, it has become rather commonplace for plaintiffs to plead misfeasance in a public office alongside other torts in actions brought against public authorities. […] To date, it is not clear that adding the misfeasance claim makes it more likely that the plaintiff will succeed in these circumstances. It may, however, have some practical advantages, such as expanding the scope of discovery. […]
>
> Beyond its value in colouring the defendant's actions as abusive, misfeasance in a public office may provide some psychological vindication and public attention for plaintiffs who wish to chastise openly the actions of a public official. […]
>
> Even where the plaintiff has little support for its allegations of malicious intent, the rules of civil procedure will rarely allow for early termination of the claim. […]
>
> The tort of misfeasance in a public office is emerging from obscurity to become a powerful tool against government officials in the twenty-first century. While it overlaps with several established torts, recent Canadian cases indicate that it has unique procedural, substantive, and psychological advantages. The elusive element of malice, along with a degree of doctrinal instability, make misfeasance a potentially difficult claim to strike out at the pleadings stage, thus prolonging litigation and encouraging efforts at settlement.[144]

137. The risks that this state of affairs poses to good governance are extensive. Claimants may append misfeasance claims to their actions against Crown prosecutors by simply asserting reckless conduct giving rise to an inference of bad faith (i.e. *Finney* bad faith). These actions cannot readily be struck. If it is adequately pleaded, a misfeasance claim will survive a motion to strike, thus requiring the examination of evidence and the assessment of credibility either in a summary judgment motion or at trial.

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[143] *Rules,* r. 25.06 (8).

[144] Erika Chamberlain, "What is the Role of Misfeasance in a Public Office in Modern Canadian Tort Law?" (2009) 88 Can. Bar Review 576, pp. 576 – 577; see also: pp. 596-597 and 601 (CanLII).

138. In the context of malicious prosecution claims, this Court has recognized that a summary judgment motion can be used to weed out meritless claims against a Crown prosecutor. In those actions, a summary judgment motion is an effective tool to determine whether the evidence before the Crown prosecutor gave rise to reasonable and probable cause, a purely legal question.[145]

139. Because a prosecutor's subjective belief of reasonable and probable cause is irrelevant to the analysis, a motion for summary judgment can be litigated without requiring a Crown to give evidence. The presence of objectively reasonable grounds is determinative, and fatal to the claim. Meritless claims can be weeded out without diverting Crown prosecutors from their duties.

140. In contrast, summary judgment cannot serve this function in an action for misfeasance. In a "Category A" misfeasance claim against a prosecutor, the Crown prosecutor's motives and knowledge are effectively the only issues. Consequently, a summary judgment motion would require active participation from the Crown, including evidence through affidavits, and cross-examinations outside court and potentially in court.[146]

In this regard, a summary judgment motion would not address the concern of diverting Crown prosecutors from their duties and is not an effective tool to filter out marginal or meritless claims. Summary judgment motions would do nothing to ameliorate the good governance concerns.

Issue 3: In the alternative, the Claim does not adequately plead misfeasance

i) The Respondents have not adequately pleaded bad faith or unlawful conduct against the Trial Crown or the Senior Crown

141. The Respondents have failed to adequately plead that the Trial Crown or Senior Crown, acted in bad faith. Rule 25.06 (8) of Ontario's *Rules of Civil Procedure* requires that where "intent is alleged, the pleading shall contain full particulars".[147] The Respondents are not entitled to rely

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[145] *Nelles*, *supra* note 1, pp. 197 and 199; *Miazga*, *supra* note 46, para. 74.
[146] *Rules*, r. 20.04 (2.2).
[147] *Rules*, r. 25.06 (8); This rule was amended in 1996. In its prior form, the Rule permitted intent to be alleged as a fact without pleading the circumstances from which it could be inferred.

on "broadly cast allegations of bad faith … based solely on assumptions and speculation about the motivations underlying a defendant's conduct".[148]

142. The allegations against the Trial Crown and the Senior Crown sound in negligence: the Respondents allege that they failed to exercise due diligence in investigating the merits of the assault claims and that the Trial Crown failed to adequately contest Singh's *Charter* application.[149] Even if these allegations are assumed to be true, no inference can be drawn from the facts pleaded that this conduct was deliberate, as opposed to simply negligent.[150]

143. The Respondents allege that the unlawful act by the Trial Crown and Senior Crown consisted of the breach of a statutory duty to fulfil their obligations "without favour or affection to any party."[151] While not pleaded, the implication is that the Trial Crown and Senior Crown acted with partiality to Singh and Maharaj. This inference cannot be drawn from the facts alleged.

ii) Causation is not adequately pleaded against the Appeal Crown

144. The facts pleaded in the Claim do not establish that the Appeal Crown's conduct was the factual cause of the harm alleged.[152] The Respondents' injuries flow from Justice Thorburn's and the OCA's acceptance of the assault allegations. The Respondents allege that, had the Crown prosecutors acted in accordance with their duties, these findings would not have been made.[153]

145. The Appeal Crown's allegedly wrongful conduct was not the factual cause of the findings. According to the Claim, her allegedly wrongful conduct was the failure to bring a fresh evidence application before the OCA. Read generously, the Claim implies that had she done so the application would have been granted and the new evidence would have caused the OCA to reverse Justice Thorburn's factual findings.

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[148] *Ontario v Gratton-Masuy*, 2010 ONCA 501, para. 103. See also *Pispidikis v Scroggie*, (2002) 62 OR (3d) 596 (SCJ), paras. 35-40, aff'd (2003) 68 OR (3d) 665, paras. 5-6 (ONCA).
[149] Claim, *supra* note 3, paras. 47(i), (ii), (iii), (iv), (v), (vi), (vii).
[150] *Gratton*, *supra* note 116, paras. 51 – 52; aff'd 2010 ONCA 501; *St. John's Port Authority v Adventure Tours Inc*, 2011 FCA 198, para. 63.
[151] Claim, *supra* note 3, paras. 46 and 47.
[152] *Capital Solar Power Corporation v The Ontario Power Authority*, 2019 ONSC 1137 (SCJ), para. 137; *Rain Coast Water Corp v British Columbia*, 2019 BCCA 201, paras. 114 – 118.
[153] Claim, *supra* note 3, para. 42.

146. The first link in this suggested chain of events cannot be established on the facts pleaded because, as set out above, a fresh evidence application was bound to fail. The Motion Judge held that the Appeal Crown's "apparent" inability to succeed on an application for fresh evidence was fatal to the allegation of causation.[154] Although the Motion Judge's comments were made in relation to the Respondents' negligence claim, the finding applies equally to the misfeasance claim.

CONCLUSION

147. Exposing Crown prosecutors to civil liability to anyone who might be harmed by their conduct, and for misfeasance claims which are easy to plead and difficult to screen, will impair the administration of criminal justice in Canada. The ubiquitous spectre of liability would, as Learned Hand J. warned, "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties".[155] Crown prosecutors defending misfeasance claims will be pulled from the counsel table and placed in the witness box, forced to justify difficult decisions and defend their professional reputations.

148. This action demonstrates these risks. The Appeal Crown's decision not to commence a fresh evidence application was objectively reasonable and consistent with the law. Despite this, the Respondents' misfeasance claim has to date survived the low bar of a motion to strike by simply pleading that the Appeal Crown acted to protect the Trial Crown, without identifying any particulars supporting this motive. If allowed to proceed, the adjudication of this action will force the Appeal Crown away from her duties to defend her conduct and reputation. Further, Crown prosecutors will know that they risk similar consequences if they too decline to advance the private interests of third parties, even where their conduct is legally and ethically justified.

149. Potentially vindicating the narrow private interests of claimants by displacing prosecutorial immunity for third parties and for misfeasance claims should not come at the high public cost of undermining the integrity and efficiency administration of criminal justice. This Court should maintain prosecutorial immunity to safeguard prosecutorial independence and, ultimately, to protect the public interest.

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[154] *Clark v AG Ontario (SCJ)*, *supra* note 42, para. 93.
[155] *Gregoire*, *supra* note 66, p. 581.

PART IV: COSTS

150. The Appellant seeks its costs for this appeal and for the proceedings below.

PART V: ORDER REQUESTED

151. The Appellant requests that this appeal be allowed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of February 2020.

Per:

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PART VI: TABLE OF AUTHORITIES

NO.	AUTHORITY	PARAGRAPH REFERENCED
	JURISPRUDENCE	
1.	*Anglehart v. Canada*, 2016 FC 1159	110
2.	*Boucher v. The Queen*, [1955] SCR 16	2, 51 and 52
3.	*Cannon v Tahche*, [2002] VSCA 84	None
4.	*Capital Solar Power Corporation v. The Ontario Power Authority*, 2015 ONSC 2116	111
5.	*Capital Solar Power Corporation v. The Ontario Power Authority*, 2019 ONSC 1137 (S.C.J.)	144
6.	*Clark v. Ontario (Attorney General)*, 2017 ONSC 3683	39, 81 and 146
7.	*Clark v. Ontario (Attorney General)*, 2019 ONCA 311	40
8.	*Clayton v Currie*, [2018] NZHC 1898	None
9.	*Conway v. Law Society of Upper Canada*, 2016 ONCA 72	110
10.	*Driskell v. Dangerfield et al*, 2007 MBQB 142, varied for unrelated reasons, 2008 MBCA 60	None
11.	*Elguzouli-Daf v. Commissioner of Police of the Metropolis*, [1995] QB 335	62
12.	*Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61	109
13.	*Ernst v. Alberta Energy Regulator*, 2017 SCC 1	133
14.	*Finney v. Barreau du Québec*, 2004 SCC 36	109, 110, 112 and 137
15.	*German v. Major*, 1985 ABCA 176	127 and 133

NO.	AUTHORITY	PARAGRAPH REFERENCED
16.	*Gratton-Masuy Environmental Technologies Inc. v. Ontario*, 2010 ONCA 501 (CanLII)	141
17.	*Gregoire v. Biddle*, 177 F.2d 579 (1949) (US App, 2nd Cir)	58 and 147
18.	*Henry v. British Columbia (Attorney General)*, [2015] 2 SCR 214	45, 47, 55, 57, 60, 62, 63, 67, 68, 103, 104, 112, 115, 117, 121 and 133
19.	*Hinse v. Canada (Attorney General)*, 2015 SCC 35	110
20.	*Imbler v. Pachtman*, 424 U.S. 409 (1976) (S.C.O.T.U.S.)	59 and 60
21.	*Krieger v. Law Society of Alberta*, [2002] 3 SCR 372	2, 50, 51 and 89
22.	*Miazga v. Kvello Estate*, [2009] 3 SCR 339	45, 47, 50, 51, 54, 67, 91, 10, 104, 106, 108, 112, 115, 121, 125, 126, 127, 133 and 138
23.	*Miguna v. Toronto Police Services Board*, 2008 ONCA 799	135
24.	*Milgaard v. Saskatchewan*, 1994 CanLII 4592 (SK CA)	None
25.	*Nelles v. Ontario*, [1989] 2 SCR 170	1, 45, 46, 52, 53, 57, 59, 60, 62, 65, 67, 70, 71, 73, 89, 103, 104, 106, 107, 112, 121, 126, 133, 134 and 138
26.	*Northern Territory v Mengel*, [1995] HCA 65	99 and 115

NO.	AUTHORITY	PARAGRAPH REFERENCED
27.	*Odhavji Estate v. Woodhouse*, [2003] 3 SCR 263	95, 96, 100, 101, 102, 105, 111, 115 and 116
28.	*Ontario v Gratton-Masuy Environmental Technologies (c.o.b. as EcoFlo Ontario)*, [2009] OJ No 2677 (Div Ct)	110
29.	*Owsley v. Ontario*, [1983] OJ No 2128 (On HC)	57
30.	*Palmer v. The Queen*, [1980] 1 SCR 759	81 and 82
31.	*Peracomo Inc. v. TELUS Communications Co.*, 2014 SCC 29	111
32.	*Polsom v. Couston*, 2014 ABQB 43	119
33.	*Powder Mountain Resorts Ltd. v. British Columbia*, 2001 BCCA 619	101 and 111
34.	*Pispidikis v. Scroggie*, 62 OR (3d) 596	141
35.	*Proulx v. Quebec (Attorney General)*, [2001] 3 SCR 9	45, 72, 84, 103, 104 and 112
36.	*R v Agozzino*, [1970] 1 OR 480	81
37.	*R v Ahmed*, 2019 SKCA 47	80
38.	*R v Anderson*, 2014 SCC 41	2 and 60
39.	*R v Angelillo*, 2006 SCC 55	81
40.	*R v Baker*, 189 OAC 337	80
41.	*R v Barrett*, 2019 SKCA 6	80
42.	*R v Beaudry*, 2007 SCC 5	87
43.	*R v Boulanger*, [2006] 2 SCR 49	89
44.	*R v Brown*, [1993] 2 SCR 918	80

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45.	*R v Cawthorne*, 2016 SCC 32	2
46.	*R v Cyr-Langlois*, 2018 SCC 54	80
47.	*R v G.D.B.*, [2000] 1 SCR 520	81
48.	*R v Hogan*, 50 CCC (2d) 439	81
49.	*R v Imperial Tobacco Canada Ltd.*, [2011] 3 SCR 45	12
50.	*R v Mahalingan*, 2008 SCC 63	122
51.	*R v Moore-McFarlane*, 56 OR (3d) 737	14
52.	*R v M.(P.S.)*, 1992 CanLII 2785 (ON CA)	81
53.	*R v Patel*, 2017 ONCA 702	80
54.	*R v Power*, [1994] 1 SCR 601	50
55.	*R v Regan*, 2002 SCC 12	2, 52, 54 and 87
56.	*R v Reid*, 2016 ONCA 524, leave refused, [2016] SCCA No 432	80
57.	*R v Riley*, 174 CRR (2d) 288	87
58.	*R v Roach*, 2009 ONCA 156	80
59.	*R v Salmon et al*, 2012 ONSC 1553	14
60.	*R v Singh*, 2012 ONSC 2028	18, 22 and 28
61.	*R v Singh*, 2012 ONSC 4429	22
62.	*R v Trabulsey*, [1995] OJ No 542 (QL)	80
63.	*R v Tran*, 2016 ONCA 48	80
64.	*R v Varga*, 18 OR (3d) 784	80

NO.	AUTHORITY	PARAGRAPH REFERENCED
65.	*Rain Coast Water Corp. v British Columbia*, 2019 BCCA 201	144
66.	*Re Regina and Atout*, 2013 ONSC 1312	87
67.	*Richman v McMurtry*, [1983] 41 OR (2d) 559	51 and 57
68.	*Robson v Law Society of Upper Canada*, 2016 ONSC 5579	110
69.	*Roncarelli v Duplessis*, [1959] SCR 121	95 and 101
70.	*Smith v Ontario (Attorney General)*, 2019 ONCA 651 (CanLII)	63, 65, 73, 87 and 88
71.	*St. John's Port Authority v Adventure Tours Inc*, 2011 FCA 198	142
72.	*Three Rivers DC v Bank of England (No 3)*, [2000] 2 WLR 1220	111 and 116
73.	*Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63	122
74.	*Vancouver (City) v Ward*, 2010 SCC 27	55
75.	*Wexler v The King*, [1939] SCR 350	80
76.	*Whitehouse v Chief Constable, Police Scotland*, [2019] CSIH 52	None
SECONDARY SOURCES		
77.	Donald Lange, *The Doctrine of Res Judicata in Canada, 4th ed.*, (Toronto: LexisNexis, 2015)	122
78.	Erika Chamberlain, "Fiduciary Aspects of Misfeasance in a Public Office" (2014) 39 Queen's LJ 733	95
79.	Erika Chamberlain, "The need for a 'Standing' Rule in Misfeasance in a Public Office (2007) 7:2 OUCLJ	102 and 116
80.	Erika Chamberlain, "What is the Role of Misfeasance in a Public Office in Modern Canadian Tort Law?" (2009) 88 Canadian Bar Review 576	136

NO.	AUTHORITY	PARAGRAPH REFERENCED
81.	Madam Justice Karen Horsman and Gareth Morley, *Government Liability: Law and Practice* (Toronto: Thomson Reuters Canada Limited, 2017, 2019)	101, 102, 115 and 116
82.	Mark Aronson, "Misfeasance in Public Office: A Very Peculiar Tort" (2011) 35 Melb U L Rev 1	95
83.	Ontario, Ministry of the Attorney General, *Crown Prosecution Manual*	83
84.	Robert J Frater, QC, *Prosecutorial Misconduct*, 2nd ed (Toronto: Thomson Reuters Canada, 2017)	2

PART VII: STATUTES, REGULATIONS, RULES, ETC.

	Statute, Legislation, Rule, Etc.	Section, Rule, etc.
1.	Criminal Code, RSC, 1985, c C-46	s. 122
	Code criminale, LRC 1985, c C-46	s. 122
2.	*Criminal Appeal Rules*, SI/93-169	s. 23(1)
	Règles de procedure de la Cour d'appel en matière criminelle	s. 23(1)
3.	*Ministry of the Attorney General Act*, R.S.O. 1990, c M.17	s. 5 and s. 8
	Loi sur le Ministère du Procureur général, LRO 1990, c M.17	s. 5 and s. 8
4.	*Crown Attorneys Act*, R.S.O. 1990, c C.49	s. 1, s. 2, s. 8 and s. 11
	Loi sur les procureurs de la Couronne, LRO 1990, c C.49	s. 1, s. 2, s. 8 and s. 11
5.	*Rules of Civil Procedure*, R.R.O. 1990, Reg 194	20.04 (2.2), 21.01(1)(a) and (b), 25.06 (8)
	Règles de procédure civile, RRO 1990, Règl 194	20.04 (2.2), 21.01(1)(a) et (b), 25.06 (8)