

**IN THE SUPREME COURT OF CANADA**  
(On Appeal from the Ontario Court of Appeal)

**BETWEEN:**

ATTORNEY GENERAL OF ONTARIO

Appellant

and

JAMIE CLARK, DONALD BELANGER and STEVEN WATTS

Respondents

and

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ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF  
MANITOBA, CANADIAN ASSOCIATION OF CROWN COUNSEL, ONTARIO  
CROWN ATTORNEY'S ASSOCIATION, THE CHIEF OF THE TORONTO  
POLICE SERVICE and THE CANADIAN ASSOCIATION OF CHIEFS OF  
POLICE

Interveners

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**FACTUM OF THE INTERVENER**  
**CANADIAN ASSOCIATION OF CHIEFS OF POLICE**

Pursuant to Rule 37(1) of the *Rules of the Supreme Court of Canada*,  
*S.O.R./2002-156*

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## TABLE OF CONTENTS

PART I: OVERVIEW.....	1
PART II: STATEMENT OF FACTS .....	3
PART III: POINTS IN ISSUE.....	3
PART IV: ARGUMENT .....	3
Policy Analysis .....	3
(i) The importance of prosecutorial discretion .....	3
(ii) Chilling effect on prosecutorial decision-making .....	6
(iii) Opening the Floodgates .....	7
(iv) Damages Suffered by the Police Officer .....	7
Conclusion .....	8
PART IV: SUBMISSIONS ON COSTS .....	9
PART V: ORDER REQUESTED .....	9
PART VI: TABLE OF AUTHORITIES.....	10

**PART I: OVERVIEW**

1. The Appellant, the Attorney General of Ontario, appeals from the decision of the Ontario Court of Appeal in this present case, in which the Court ruled that Crown prosecutors are not immune from claims of misfeasance in public office.

*Clark v. Ontario (AG)*, 2019 ONCA 311

2. The Ontario Court of Appeal considered the good governance concerns argued by the Attorney General - the diversion of Crown Attorneys from their primary duties and the chilling effect on Crown Attorneys' exercise of discretion - but dismissed the appeal and allowed the Respondents' claim of misfeasance in public office to proceed. The court held that the good governance concerns raised by the Attorney General could be addressed by requiring a "high liability" threshold.

*Clark, supra* at paragraph 113

3. The Intervener, the Canadian Association of Chiefs of Police (hereinafter referred to as the CACP), is an organization founded in 1905 representing Chiefs, Deputy Chiefs, Directors and Executive Directors from police agencies across Canada, including municipal and provincial forces and the RCMP. One of the CACP's core objectives is to promote and maintain a high standard of ethics, integrity, honour and conduct in the profession of law enforcement. The CACP recognizes that when a police officer's integrity and reputation is sullied, it impacts not only their own reputation and career but the agency under which they serve, the public's trust and confidence in policing, and the administration of justice as a whole.

4. In order to maintain the public's trust and confidence in policing, police officers are necessarily held to a high level of accountability. This includes the duty of the police to disclose a police officer's "McNeil" disciplinary record to the Crown in criminal proceedings, and the

corresponding duty on the Crown to disclose it to the accused. In the case of *R v. McNeil*, 2009 SCC 3, this Court ruled that findings of misconduct by a police officer involved in the investigation against the accused fall within the scope of “first party” disclosure. The “McNeil” record is subject to disclosure to the Court, the accused and the public at large.

5. The ruling in *McNeil*, *supra* is a recognition by this Court of the police’s unique role in the administration of justice – no other professional witness’s disciplinary record is subject to “first party” disclosure. In rendering its decision, the Court, at paragraph 23, recognized that police officers stand apart from other witnesses by reason of their statutory duty to cooperate and participate in prosecutions.

6. The Crown prosecutor also has a unique role in a criminal prosecution. As stated by Charron J. at paragraph 49 of *McNeil*, *supra*: “*The Crown is not an ordinary litigant. As a Minister of Justice, the Crown’s undivided loyalty is to the proper administration of justice*”. It is the position of the CACP that when a Crown prosecutor steps outside of their role as a “Minister of Justice” by unlawfully damaging a police officer’s reputation and credibility, the police officer should be able to seek damages against the Crown through the tort of misfeasance in public office.

7. The good governance concerns raised by the Appellant in exposing the Crown prosecutor to civil liability can be addressed through the imposition of a high liability threshold. The following comments of the Court of Appeal at paragraphs 112-114 of *Clark*, *supra* are relevant:

*The need to establish abuse of authority was noted by Moldaver J. in Henry, at para. 49, which we repeat for convenience:*

*It is a bedrock principle that the exercise of core prosecutorial discretion is immune from judicial review, subject only to the doctrine of abuse of process. The presence of bad faith and improper motives may indicate this type of conduct. [Citations omitted.]*

*Drawing on Henry, there are “compelling good governance” concerns that require a “high liability threshold” in order for the tort of misfeasance in public office to*

*be a tenable cause of action against Crown attorneys. That “high liability threshold” is satisfied by the requirement of the tort of misfeasance in public office set out in Odhavji that the claimants show the presence of bad faith or improper motives. We also note Moldaver J.’s qualification, at para. 83 of Henry, that “there may be case-specific policy concerns that militate against an award, even if the appellant has made out the heightened per se threshold.” This qualification applies equally to the tort of misfeasance in public office, but requires cogent evidence to substantiate it.*

*We agree with the motion judge’s conclusion that the pleading of misfeasance in public office was adequate and that Crown attorneys are not immune from claims of liability for misfeasance in public office.*

8. The CACP agrees with the decision of the Court of Appeal in the previous paragraph. The “high threshold” balances the need for accountability with the need for Crown prosecutors to be able to act objectively and independently in order to properly perform their role.

## **PART II: STATEMENT OF FACTS**

9. The CACP takes no position on the facts of this case.

## **PART III: POINTS IN ISSUE**

10. The CACP’s intervention will focus on the policy concerns to be considered by this Court when deciding if and when a Crown prosecutor can be held liable for the tort of misfeasance in public office.

## **PART IV: ARGUMENT**

### **Policy Analysis**

#### **(i) The importance of prosecutorial discretion**

11. The Appellant argues that prosecutorial immunity from civil claims by third parties is an essential component of prosecutorial independence; prosecutorial independence must be preserved so that Crown attorneys can exercise their discretion without being influenced by the threat of civil claims filed by parties other than the subject of the prosecution. The Appellant further argues that



harm caused from an act of misfeasance committed by a Crown prosecutor against a police officer is not sufficient to justify inviting the risks to good governance that such an action would create. Simply put, the Appellant argues that claims against the Crown should remain restricted to civil actions for malicious prosecution and non-disclosure in breach of the Crown's *Charter* obligations.

12. The CACP agrees with the Appellant and the Respondents that the importance of prosecutorial independence in the exercise of Crown discretion is not at issue in this appeal. It has been consistently confirmed by this Court.

13. In *R. v. Anderson*, 2014 SCC 41, Moldaver J. stated at paragraph 37:

*This Court has repeatedly affirmed that prosecutorial discretion is a necessary part of a properly functioning criminal justice system: Beare, at p. 410; R. v. T. (V.), 1992 CanLII 88 (SCC), [1992] 1 S.C.R. 749, at pp. 758-62; R. v. Cook, 1997 CanLII 392 (SCC), [1997] 1 S.C.R. 1113, at para. 19. In Miazga v. Kvello Estate, 2009 SCC 51, [2009] 3 S.C.R. 339, at para. 47, the fundamental importance of prosecutorial discretion was said to lie, “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, thus fulfilling their quasi-judicial role as ‘ministers of justice’”. More recently, in Sriskandarajah v. United States of America, 2012 SCC 70, [2012] 3 S.C.R. 609, at para. 27, this Court observed that “[n]ot only does prosecutorial discretion accord with the principles of fundamental justice — it constitutes an indispensable device for the effective enforcement of the criminal law”.*

14. The proper exercise of discretion within the criminal justice system is not unique to the Crown prosecutor. In *R. v. Beare*, [1988] 2 SCR 387, La Forest J. held at paragraph 51: “*Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid.*”

15. La Forest held further at paragraph 52:

*The Criminal Code provides no guidelines for the exercise of discretion in any of these areas. The day to day operation of law enforcement and the criminal justice system nonetheless depends upon the exercise of that discretion.*

16. In *R. v. Beaudry*, 2007 SCC 5, Charron J. reviewed the police exercise of discretion within the context of the criminal charge of obstruction of justice and held at paragraph 48:

*...In my opinion, the proper functioning of the criminal justice system requires that all actors involved be able to exercise their judgment in performing their respective duties, even though one person's discretion may overlap with that of another person. The police have a particular role to play in the criminal justice system, one that was initially founded in the common law, and it is important that they remain independent of the executive branch: R. v. Campbell, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565, at paras. 27 to 36, and R. v. Regan, [2002] 1 S.C.R. 297, 2002 SCC 12. Doyon J.A.'s hierarchical vision according to which a police officer's discretion is limited by the discretion of the Crown prosecutor should therefore be rejected. In discharging their respective duties, ...*

17. A police officer's exercise of discretion is subject to scrutiny through a number of processes including judicial review, the tort of negligent investigation, the *McNeil* disciplinary disclosure regime, internal police disciplinary processes, and criminal charges. The public's trust and confidence in policing is strengthened by the high level of accountability that exists through these various processes. There is no evidence that this ability of police to perform their primary functions has been adversely affected.

18. The Appellant argues that a Crown prosecutor can be held accountable when they engage in deliberate and unlawful conduct, but argues that accountability can be achieved without undermining good governance through other mechanisms, such as employer sanction, disciplinary action by a law society or, in the most serious of cases, criminal charges. These other procedures can lead to termination of employment, disbarment and in the most serious of cases, if criminal charges are laid, to a fine, imprisonment, a probation order and a restitution order. Considering that the grounds for laying the criminal charge of breach of trust by a public official are comparable

to the elements for the tort of misfeasance in a public office, the CACP queries how the threat of civil action for this tort would interfere with the Crown's ability to exercise their discretion.

**(ii) Chilling effect on prosecutorial decision-making**

19. The Appellant fears that exposing Crown prosecutors to the threat of civil action will have a "chilling effect" on prosecutorial decision-making and lead to an erosion in the public's trust in the fairness and integrity of the criminal justice system.

20. The tort of misfeasance in public office is an intentional tort, consisting of an unlawful act that the Crown knows to be unlawful, with knowledge that the impugned conduct could harm the plaintiff. The tort is not founded on negligence or inadvertence; it does not involve a second guessing of a Crown's judgment; Crowns may make honest mistakes. In *Miazga v. Kvello Estate*, 2009 SCC 51, Charron J. held that a demonstrable "improper purpose" is the key to striking the balance between the competing policy concerns when considering absolute immunity for Crown prosecutors for the tort of malicious prosecution, holding at paragraph 81;

*... 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. ...*

21. The "chilling effect" argued by the Appellant should not dissuade this Court from allowing a police officer to proceed against the Crown in the tort of misfeasance in public office. A Crown prosecutor who engages in the deliberate and improper use of the office of the Attorney General, as is alleged in the pleadings herein, is not acting in accordance with their role as a "Minister of Justice".

22. The public's trust in the fairness and integrity of the criminal justice system is more likely to be eroded if Crown prosecutors can be shielded from civil liability when they commit improper

acts with improper purposes against a police officer involved in the investigation and prosecution of a criminal case – a witness who has their own separate and distinct role to play in the administration of justice, as recognized by this Court in *McNeil, supra*. Such conduct goes to the heart of the integrity of the administration of justice as a whole. The public’s confidence in the administration of justice would be shaken, knowing that a Crown prosecutor could commit such an act against police officers who have a statutory duty to participate and cooperate in prosecutions.

**(iii) Opening the Floodgates**

23. The Appellant argues that by allowing this claim to proceed, “the floodgates” will open and Crown prosecutors will be diverted away from their primary duties by having to participate in the defence of meritless claims brought against them by disgruntled individuals who do not understand the role of the Crown in the criminal justice system.

24. As to the potential for harm caused by this good governance concern, the CACP agrees with decision of the Court of Appeal in the decision under appeal where, at paragraphs 113 to 114, the court held that the good governance concern can be addressed through the setting of a high liability threshold to ensure that meritless and frivolous claims cannot proceed.

25. Considering the other means by which a Crown prosecutor can be held accountable, discussed in paragraph 18 above, this good governance concern is largely speculative; there is no evidence in support of the proposition that civil liability, in itself, will compromise the fair and impartial discharge of a Crown prosecutor’s functions.

**(iv) Damages Suffered by the Police Officer**

26. The Respondents claim damages for the psychological harm and reputational damage resulting from alleged prosecutorial misconduct amounting to misfeasance in public office. In

cases such as this, harm can extend well beyond the individual harm claimed by the Respondents as argued by the Intervener the Chief of the Toronto Police Service.

27. The CACP adds that a police officer affected by such misfeasance can also suffer financial loss. Serious allegations against a police officer can result in a suspension with or without pay before the charge is adjudicated. A police officer's suspension may also result in changes to the promotional roster. While an officer may be reinstated and financially compensated if exonerated, the financial loss can extend well beyond compensation for loss of wages. In such a case, the police officer should have recourse to the civil courts to vindicate their rights.

### **Conclusion**

28. Public confidence in the administration of justice is strengthened by a system that operates fairly for all. The Crown prosecutor acting as a "Minister of Justice" has a duty to ensure that every prosecution is carried out in a manner consistent with the public interest.

29. While the administration of justice requires that the police and the Crown prosecutor maintain separate and distinct roles, their relationship is one that is founded on trust and cooperation. The police officer, who investigates and swears the Information against the accused, trusts that the Crown prosecutor will conduct the prosecution with integrity and in a way that ensures that justice is done. This is the very foundation of the Canadian criminal justice system.

30. Given the long-standing relationship between the police and the Crown Prosecutor, it is not just speculative but highly doubtful that the "flood gates" will open and that we will see a proliferation of claims of misfeasance made by the police against the Crown prosecutor. The tort of misfeasance in public office will not have a "chilling effect" on the Crown prosecutor who is dedicated to enhancing public safety and promoting the rule of law. The availability of this tort will, however, enhance the public's confidence in the administration of justice when the public

know that a Crown prosecutor can be held accountable if they commit an act of misfeasance against a police officer that is so serious so as to strike at heart of the administration of justice.

**PART IV: SUBMISSIONS ON COSTS**

31. The CACP seeks no costs and asks that no costs be awarded against it.

**PART V: ORDER REQUESTED**

32. The CACP is not requesting any further orders.

**ALL OF WHICH is respectfully submitted this 30th day of July, 2020.**

  
per Lynda A. Bordeleau  
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**PART VI: TABLE OF AUTHORITIES**

*Clark v. Ontario (AG)*, 2019 ONCA 311: <http://canlii.ca/t/hzvpp>

*Miazga v. Kvello Estate*, 2009 SCC 51: <http://canlii.ca/t/26g27>

*R. v. Anderson*, 2014 SCC 41: <http://canlii.ca/t/g784t>

*R. v. Beare*, [1988] 2 SCR 387: <http://canlii.ca/t/1jbbw>

*R. v. Beaudry*, 2007 SCC 5: <http://canlii.ca/t/1qbk6>

*R v. McNeil*, 2009 SCC 3: <http://canlii.ca/t/2254d>