

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

BETWEEN:

ATTORNEY GENERAL OF ONTARIO,

**APPELLANT
(Appellant),**

- and -

JAMIE CLARK, DONALD BELANGER and STEVEN WATTS,

**RESPONDENTS
(Respondents),**

- and -

**ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF ALBERTA,
ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF
SASKATCHEWAN, ATTORNEY GENERAL OF BRITISH COLUMBIA, THE
CANADIAN ASSOCIATION OF CHIEFS OF POLICE, MARK SAUNDERS, THE
CANADIAN ASSOCIATION OF CROWN COUNSEL AND THE ONTARIO CROWN
ATTORNEY'S ASSOCIATION,**

INTERVENERS.

**FACTUM OF THE INTERVENER
THE ATTORNEY GENERAL OF MANITOBA**

**AMI KOTLER
DENIS GUENETTE**

D. LYNNE WATT

Manitoba Justice
Prosecution Service
510 - 405 Broadway
Winnipeg, MB R3C 3L6

Gowling WLG (Canada) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Tel: 204-945-2852
Fax: 204-948-1260
Email: ami.kotler@gov.mb.ca
Email: dennis.guenette@gov.mb.ca

Tel: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

Counsel for the Intervener
Attorney General of Manitoba

Ottawa Agent for Counsel for the Intervener
Attorney General of Manitoba

**ANANTHAN SINNADURAI
SUNIL MATHAI**

Ministry of the Attorney General of Ontario
Crown Law Office - Civil
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9

Tel: 416-326-4148
Fax: 416-326-4181
Email: ananthan.sinnadurai@ontario.ca
Email: sunil.mathai@ontario.ca

Counsel for the Appellant

**LORNE HONICKMAN
MICHAEL LACY**

Brauti Thorning LLP
161 Bay Street, Suite 2900
Toronto, ON M5J 2S1

Tel: 416-360-2786
Fax: 416-362-8410
Email: lhonickman@btlegal.ca
Email: mlacy@btlegal.ca

Counsel for the Respondents, Jamie Clark,
Donald Belanger and Steven Watts

MICHAEL J. MORRIS

Attorney General for Saskatchewan
Civil Law Branch, 9th Floor
1874 Scarth Street
Regina, SK S4P 4B3

Tel: 306-787-7444
Fax: 306-787-0581
Email: michael.morris@gov.sk.ca

Counsel for the Intervener
Attorney General of Saskatchewan

NADIA EFFENDI

Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9

Tel: 613-787-3562
Fax: 613-230-8842
Email: neffendi@blg.com

Ottawa Agents for the Appellant

**MARIE-FRANCE MAJOR
EUGENE MEEHAN, Q.C.**

Supreme Advocacy LLP
100 - 340 Gilmour Street
Ottawa, ON K2P 0R3

Tel: 613-695-8855 Ext: 102
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca
Email: emeehan@supremeadvocacy.ca

Ottawa Agent for the Respondents, Jamie Clark,
Donald Belanger and Steven Watts

D. LYNNE WATT

Gowling WLG (Canada) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Tel: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener
Attorney General of Saskatchewan

KATHRYN GREGORY

Attorney General of New Brunswick
Public Prosecution Branch
Carleton Place, P.O. Box 6000
Fredericton, NB E3C 5H1

Tel: 506-453-2784
Fax: 506-453-5364
Email: kathryn.gregory@gnb.ca

Counsel for the Intervener
Attorney General of New Brunswick

EARL A. CHERNIAK, Q.C.
CYNTHIA B. KUEHL

Lerners LLP
130 Adelaide Street West
Suite 2400, P.O. Box 95
Toronto, ON M5H 3P5

Tel: 416-601-2350
Fax: 416-867-2402
Email: echerniak@lerners.ca
Email: ckuehl@lerners.ca

Counsel for the Intervener, Mark Saunders

TARA CALLAN

Attorney General of British Columbia
1301 – 865 Hornby Street
Vancouver, BC V6Z 2G3

Tel: 604-660-0163
Fax: 604-660-3567
Email: tara.callan@gov.bc.ca

Counsel for the Intervener
Attorney General of British Columbia

D. LYNNE WATT

Gowling WLG (Canada) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Tel: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener
Attorney General of New Brunswick

JEFFREY W. BEEDELL

Gowling WLG (Canada) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Tel: 613-786-0171
Fax: 613-788-3587
Email: jeff.beedell@gowlingwlg.com

Agent for Counsel for the Intervener
Mark Saunders

ROBERT E. HOUSTON, Q.C.

Gowling WLG (Canada) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Tel: 613-786-8817
Fax: 613-788-3500
Email: robert.houston@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener
Attorney General of British Columbia

CHRISTINE RIDEOUT, Q.C.

Attorney General of Alberta
3rd Floor, Centrium Place
300 – 332 6 Avenue, S.W.
Calgary, AB T2P 0B2

Tel: 403-297-6005
Fax: 403-297-3453
Email: christine.rideout@gov.ab.ca

Counsel for the Intervener
Attorney General of Alberta

RACHEL HUNTSMAN, Q.C.

Royal Newfoundland Constabulary
Legal Services Unit
1 Fort Townshend
St. John's, NL A1C 2G2

Tel: 709-729-8739
Fax: 709-729-8214
Email: rachel.huntsman@rnc.gov.nl.ca

Counsel for the Intervener
Canadian Association of Chiefs of Police

PAUL J.J. CAVALLUZZO

Cavalluzzo Shilton McIntyre Cornish LLP
300 - 474 Bathurst Street
Toronto, ON M5T 2S6

Tel: 416-964-1115
Fax: 416-964-5895
Email: pcavalluzzo@cavalluzzo.com

Counsel for the Intervener
Canadian Association of Crown Counsel and
Ontario Crown Attorneys' Association

D. LYNNE WATT

Gowling WLG (Canada) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Tel: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener
Attorney General of Alberta

LYNDA A. BORDELEAU

Perley-Robertson, Hill & McDougall
1400-340 Albert Street
Ottawa, ON K1R 0A5

Tel: 613-238-2022
Fax: 613-238-8775
Email: lbordeleau@perlaw.ca

Ottawa Agent for the Intervener
Canadian Association of Chiefs of Police

CHRISTOPHER ROTHAM

Nelligan O'Brien Payne LLP
50 O'Connor Street, Suite 300
Ottawa, ON K1P 6L2

Tel: 613-231-8311
Fax: 613-788-3667
Email: christopher.rootham@nelliganlaw.ca

Ottawa Agent for the Intervener
Canadian Association of Crown Counsel and
Ontario Crown Attorneys' Association

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

BETWEEN:

ATTORNEY GENERAL OF ONTARIO,

**APPELLANT
(Appellant),**

- and -

JAMIE CLARK, DONALD BELANGER and STEVEN WATTS,

**RESPONDENTS
(Respondents),**

- and -

**ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF ALBERTA,
ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF
SASKATCHEWAN, ATTORNEY GENERAL OF BRITISH COLUMBIA, THE
CANADIAN ASSOCIATION OF CHIEFS OF POLICE, MARK SAUNDERS, THE
CANADIAN ASSOCIATION OF CROWN COUNSEL AND THE ONTARIO CROWN
ATTORNEY'S ASSOCIATION,**

INTERVENERS.

**FACTUM OF THE INTERVENER
THE ATTORNEY GENERAL OF MANITOBA**

TABLE OF CONTENTS

<u>TAB</u>		<u>Page No.</u>
PART I.	Overview and Statement of Facts	1
	A. Overview	1
	B. Statement of Facts	2
PART II.	Issues.....	2
PART III.	Argument	2
	A. Claims for Misfeasance in Public Office Will Substantially Expand the Scope of Litigation	2
	B. Prosecutors' Public Duties Make Liability for the Private Interests of All Affected Parties Impracticable	6
	C. The Impact of Misfeasance Claims on the Justice System Will Be Considerable.....	8
	D. The Litigation of Misfeasance Claims Will Affect Innocent Third Parties.....	9
	E. Plaintiffs' Interests Can Be Protected In Other Ways	9
	F. Conclusion	10
PART IV:	Costs.....	10
PART V:	Order Sought	10
PART VI:	Table of Authorities and Legislation.....	11

Part I – Overview and Statement of Facts

A. Overview

1. This appeal is about the basic operation of the criminal justice system. Introducing civil lawsuits for misfeasance in public office will make prosecutors responsible for a large and disparate new pool of potential plaintiffs, including, *inter alia*, complainants, witnesses, jurors, probation officers and members of the public whose names arise in the course of a prosecution. Standing will be limited only by the requirement that the prosecutor have “some awareness” that the plaintiff was likely to be harmed by his or her actions.¹

2. In addition, the scope of actionable conduct will expand to include a virtually limitless set of decisions made in the course of the prosecutor’s work. As Iacobucci J. observed in *Odhavji Estate v. Woodhouse*, “[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.”²

3. The Ontario Court of Appeal suggests that these concerns are addressed by misfeasance’s liability threshold, which “provide[s] the functional equivalent” of that required in cases of alleged malicious prosecution or wrongful non-disclosure to an accused.³ With respect, such an expansion will affect Crown Attorneys’ ability to act in the public interest, whatever liability threshold is ultimately applied. It will also divert criminal proceedings from their essential function of determining guilt and innocence and undermine efforts to guarantee trial within a reasonable time. It will jeopardize the privacy of individuals caught between aggrieved plaintiffs and prosecutors forced to defend their actions. And it is inconsistent with this Court’s repeated cautions against chaotic changes to established legal norms. The Attorney General of Manitoba submits that there are better remedies for those who feel a prosecutor has failed to adequately protect their personal interests.

¹ *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, para. 29.

² *Odhavji Estate*, para. 20, quoting *Northern Territory of Australia v. Mengel* (1995), 129 A.L.R. 1 (H.C.).

³ See Reasons of the Ontario Court of Appeal, paras. 109-113.

B. Statement of Facts

4. The Attorney General of Manitoba accepts the facts alleged by the Respondents as set out in the *facta* of the parties.

Part II – Issues

1. Should prosecutors be subject to private lawsuits alleging misfeasance in public office?

Part III – Argument

A. Claims for Misfeasance in Public Office Will Substantially Expand the Scope of Civil Litigation

5. So far, this Court has restricted tort liability for prosecutorial action to claims of malicious prosecution by individuals wrongfully accused of crimes.⁴ Damages may also be awarded pursuant to *Charter* s. 24(1) in certain cases of intentional non-disclosure that violate an accused’s s. 7 rights.⁵ Other claims are subject to prosecutorial immunity. This reflects the importance of maintaining the efficient administration of justice without the threat of distraction and delay from regular lawsuits targeting the Crown’s conduct. As Moldaver J. confirmed in *Henry*, these concerns are “very real” and provide “compelling reasons” for restricting the availability of claims based on the actions of prosecutors.⁶ The point is not to insulate Crown Attorneys from accountability but to protect the public by ensuring a functional independent justice system.

⁴ See, e.g., *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, para. 7: “A person accused of a criminal offence enjoys a private right of action when a prosecutor acts maliciously[.]” (Emphasis added.)

⁵ See *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214, para. 31: “[A] cause of action will lie where the Crown, in breach of its constitutional obligations, causes harm to the accused by intentionally withholding information[.]” (Emphasis added.)

⁶ *Henry*, para. 41.

6. Adding claims alleging misfeasance in public office would expand the scope of potential liability to an unprecedented degree. As an initial matter, the pool of potential plaintiffs would no longer be limited to accused persons. Per *Odhavji Estate*, anyone whom the defendant had “some awareness” was likely to be affected by his or her actions is a potential claimant:

The requirement that the defendant must have been aware that his or her unlawful conduct would harm the plaintiff further restricts the ambit of the tort. . . This requirement establishes the required nexus between the parties. Unlawful conduct in the exercise of public functions is a public wrong, but absent some awareness of harm, there is no basis on which to conclude that the defendant has breached an obligation that she or he owes to the plaintiff, *as an individual*.

Odhavji Estate, para. 29 (italics in original, underlining added).⁷

7. Examples of this broad approach to standing include, *inter alia*, complainants, witnesses, family members of those involved in a case, court staff, corrections personnel and members of the public whose names arise in the course of a criminal prosecution. Any of these individuals may find themselves suffering harm as a result of a decision or action on the part of a Crown Attorney, particularly the psychological or reputational harm alleged by the Respondents in this case. Criminal prosecution involves taking positions in high-stakes situations where important personal interests are at stake – the likelihood of such harm will rarely come as a surprise to the lawyer handling the file.

8. Moreover, the range of potentially actionable activity would no longer be restricted to the narrow decision to prosecute or withhold information from the defence. Rather, it would expand to include all aspects of a prosecutor’s behaviour and “[a]ny act or omission” carried out in the course of handling a file – or, indeed, in any other area of his or her work.⁸ Again, this would

⁷ See also *Odhavji Estate*, para. 30: “I believe that the underlying purpose of the tort is to protect each citizen’s reasonable expectation that a public officer will not injure a member of the public through deliberate and unlawful conduct in the exercise of public functions.” (Emphasis added.)

⁸ *Odhavji Estate*, para. 20. This may include, *inter alia*, advising police, consulting with colleagues, setting departmental policies and supervising the work of other prosecutors.

represent a significant change to the current law, leading to uncertainty and unpredictable results.⁹

9. The combination of these two expansions gives rise to a virtually limitless list of decisions and situations giving rise to a potential claim. This is especially true where, as in the present case, the “unlawful conduct” alleged is a general failure to act “without favour or affection to any party.”¹⁰ Some of these situations include:

- **Bail – repeat victims.** *An accused originally charged with break and enter and released by consent is re-arrested on similar new charges and seeks release a second time.* Should the prosecutor consent and the accused revisit one of the same locations, the victims may claim – like the Respondents in this case – that the prosecutor acted to protect his or her colleague, knowing that it was likely that the accused would re-offend.
- **Trial – complainant under examination.** *A complainant appearing pursuant to subpoena in a sexual assault case is subjected to difficult and personal questioning.* A complainant who did not want to testify could claim that the prosecutor compelled her evidence for personal benefit (the credit attached to the accused’s conviction) while disregarding the trauma resulting from being forced to re-live her experiences in court. Where the complainant in question is a child, these concerns are intensified and there is the potential for an additional claim in relation to the parents’ own psychological harm.

⁹ In *Henry*, Moldaver J. warned against wholesale changes to prosecutorial immunity, concluding that “the prudent course of action” was to examine causes of action on an individual basis. See *Henry*, para. 33. This Honourable Court has consistently stressed the need for such caution. See, e.g., *Watkins v. Olafson*, [1989] 2 S.C.R. 750, p. 760, 61 D.L.R. (4th) 577: “Over time, the law in any given area may change; but the process of change is a slow and incremental one.” (Emphasis added.)

¹⁰ See Ontario *Crown Attorneys Act*, R.S.O. 1990, c. C.49, ss. 6(5), 8. This highlights an additional issue. Pursuant to *Odhavji Estate*, actions giving rise to a misfeasance claim must be both illegal and done in bad faith or for an improper purpose. *Odhavji Estate*, para. 32. Where the illegality complained of is the failure to act in good faith, these requirements are conflated, contrary to this Court’s clear direction in *Miazga*. See *Miazga*, paras. 79-89. And see Appellant’s Factum, paras. 106-107.

- **Trial – embarrassment of a witness.** *A witness called by the Crown is cross-examined on matters that are of minor relevance but cause significant personal or professional embarrassment. Should the prosecutor not attempt to rebut the suggestions raised in cross-examination, the witness may claim that the prosecutor abandoned him or her in order to move proceedings along and curry personal favour with the judge.*
- **Trial – jurors.** *A juror is required to view graphic and unsettling evidence as part of a murder trial, resulting in post-traumatic stress disorder. Should the accused ultimately be acquitted – e.g., on the basis of identity – the juror may claim that the prosecutor had tried to win at all costs by using the evidence to inflame the jury, notwithstanding the risk to jurors’ mental health.¹¹*
- **Sentencing – named third parties.** *An offender receives a lenient sentence pursuant to a joint recommendation in which the prosecutor accepts the offender’s claims of historical childhood abuse, including sexual abuse.¹² The alleged abusers may claim that by not challenging the offender’s claims, the prosecutor had ignored the resulting damage to their reputations in order to get credit for wrapping up the case.*
- **Sentencing – corrections officials.** *As part of a submission that a non-custodial disposition would not address an offender’s risk to the community, the prosecutor argues that corrections officials had previously failed to provide adequate supervision.¹³ The corrections officials in question may claim that the prosecutor had unfairly targeted them in order to deflect attention from the prosecution’s own failings.*
- **Appeal – Crown delay.** *An accused’s charges are stayed pursuant to Charter s. 11(b). The Crown appeals. Should the appeal be unsuccessful, the accused may claim that the appellate prosecutor’s actions were motivated by an improper attempt to protect his or her colleagues, resulting in stress and financial harm.*

10. The Respondents argue that these concerns are unrealistic and addressed by the requirement that a plaintiff plead the presence of bad faith or improper motive. With respect, the intensity of criminal proceedings and attractiveness of litigation against a deep-pocketed

¹¹ See *Proulx v. Quebec (Attorney General)*, 2001 SCC 66, [2001] 3 S.C.R. 9, para. 41. See also *Boucher v. the Queen*, [1955] S.C.R. 16, p. 24.

¹² As this Court has observed, such claims are hardly uncommon. *R. v. Friesen*, 2020 SCC 9, paras. 46, 70.

¹³ This is not a purely hypothetical situation. See *R. v. I.R.N.*, 2011 MBCA 31, 275 C.C.C. (3d) 319, paras. 4, 24.

defendant belie such optimism. Given a new and virtually unrestricted list of litigable actions and decisions, aggrieved plaintiffs can be expected to try their hand. Artful pleaders will allege that a prosecutor has acted in bad faith, *e.g.*, in order to protect colleagues or improve his or her personal standing. The more serious the case, the easier it is to make such allegations and the harder it is to dismiss them prior to discovery or even trial.¹⁴ More fundamentally, as discussed below, these concerns touch on both prosecutors' ability to do their jobs and the ability of the Court to meet its constitutional obligations.

B. Prosecutors' Public Duties Make Liability for the Private Interests of All Affected Parties Impracticable

11. Prosecutors exercise authority subject to statutory and constitutional obligations and a duty to act in the public interest. In determining whether to subject them to misfeasance claims, it is critical that the public interest not become conflated with the personal interests of various members of the public affected by a particular case. As this Court has observed, determining where the public interest lies in a given situation is often a difficult exercise in judgment involving many competing interests and principles.¹⁵ This process simply cannot be reconciled with responsibility for protecting the personal interests of every party involved or affected by the decision. Approaching a case that way would be impossible, even if the prosecutor tried – someone is invariably left unhappy. More importantly, the results would have little to do with the public interest, which is determined according to law and principle, not the personal interests of the parties. Such interests are relevant considerations, but they are not the point of the process or the focus of a prosecutor's work. The Crown's role is not to protect anyone's individual

¹⁴ See discussion at Appellant's Factum, paras. 132-140. This is not to minimize the importance of requiring bad faith: doing so ensures that prosecutors are not ultimately held liable for honest mistakes. *Miazga*, para. 80. But it is not a magic wand. On its own, it does not address the concerns raised by this Court's prior jurisprudence, particularly given the expansion of potential liability proposed by the Respondents. See, *e.g.*, *Nelles v. Ontario*, [1989] 2 S.C.R. 170, 69 O.R. (2d) 448, para. 52.

¹⁵ See, *e.g.*, *Henry*, para. 80.

interest, but to act in the best interests of the community.¹⁶ This role is central to the administration of justice and must be protected:

The public interest is undermined when prosecutorial decision-making is influenced by considerations extraneous to the Crown's role as a quasi-judicial officer.

Henry, para. 73.

12. Over and above the risks of “chilling” prosecutorial conduct and diverting prosecutors’ attention to defending lawsuits,¹⁷ a paradigm that makes them responsible for an indeterminate set of competing personal interests is thus inherently problematic. Even a focused and fearless prosecutor would find it impossible to pursue – or even determine – the public interest while simultaneously trying to protect everyone who might be affected by a case.

13. That said, those risks, discussed at length in the Appellant’s Factum, are also substantial.¹⁸ One of the examples given above involved a prosecutor who argued Corrections staff had failed to supervise a young person who then killed someone while fleeing police in a stolen car. As the Manitoba Court of Appeal observed, this was important information in determining whether to release the offender to again be supervised by Corrections.¹⁹ One can imagine the potential impact on proceedings had the prosecutor been served with a lawyer’s letter prior to court threatening him with a lawsuit should he proceed with his allegations. At best, proceedings would have been significantly delayed while the issue was debated and/or adjudicated. At worst, the prosecutor would have acceded to the threat and the sentencing judge would have been deprived of this important information.

14. It should also be noted that the risks of chilling and diversion are not alternative – they build on each other. It is easy to see how a prosecutor, once having been forced to spend months

¹⁶ *Boucher*, p. 24. See also *Miazga*, para. 73.

¹⁷ See *Henry*, paras. 71-73, *Miazga*, paras. 46-47.

¹⁸ See Appellant’s Factum, paras. 57-63, 75-77.

¹⁹ *I.R.N.*, paras. 3-4, 24.

defending a misfeasance claim, might be influenced in future decisions – even subconsciously – by the desire to avoid having to go through the process again. Preventing such claims is not about protecting prosecutors themselves; it is about ensuring the uncompromised prosecutorial function vital to the administration of justice.

C. The Impact of Misfeasance Claims on the Justice System Will Be Considerable

15. The threat of an entirely new category of litigation will force prosecutors to weigh their own potential liability before making decisions that could give rise to a lawsuit. Depending on the circumstances, this may involve consulting counsel, seeking waivers or releases from potential plaintiffs (who may themselves then wish to consult counsel) or even attempting to secure judicial pre-authorization. All of this will take time, delaying proceedings and impeding the efficient operation of the criminal justice system mandated by this Court²⁰ and pursued by courts and governments across the country.

16. Where claims are actually filed, the impact will be even more severe. The Respondents suggest that a high liability threshold will allow the vast majority of cases to be dealt with through motions to strike or *via* summary judgment. As an initial matter, as the Appellants observe, this is not necessarily true. The lack of objective elements makes misfeasance an easy tort to plead and a difficult one to quickly disprove. But even if it is true, the court will still have to deal with all these dismissal and summary judgment motions, diverting Justices from criminal matters they could otherwise be hearing and adding to judicial backlogs.²¹ And where misfeasance claims proceed to trial, the disruption will be even more significant, requiring prolonged attention from both the court and the prosecutors defending the claim.

²⁰ *R. v. Jordan*, 2016 SCC 27, [2016], 1 S.C.R. 631; *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659.

²¹ In many provinces, including Manitoba, civil and criminal matters are heard by the same superior court Justices. The more civil cases these Justices have to adjudicate – even by motion – the less time they have to devote to pending criminal matters. For that matter, the less time they have for more promising civil claims.

D. The Litigation of Misfeasance Claims Will Affect Innocent Third Parties

17. In order to defend their exercise of discretion, prosecutors may be forced to disclose information regarding innocent third parties that would otherwise have remained private. A prosecutor sued by a complainant for staying a charge may have to describe his or her concerns about the reliability of certain witnesses, *e.g.*, because of information received from police regarding their substance issues or past criminal conduct. This risks significant interference with the privacy of these third parties, who did not ask to be involved in either the original prosecution or the subsequent litigation. Again, the broad scope of the tort increases the likelihood of such collateral impact.

E. Plaintiffs' Interests Can Be Protected In Other Ways

18. As the Appellant notes, there are alternative means to hold rogue prosecutors accountable for deliberate misconduct.²² There are also other ways to protect the interests of parties unhappy with the handling of an issue. Where, for example, police are concerned about decisions being made by a prosecutor, they can seek review by a director, supervisor or senior Crown Attorney. The hierarchical structure of government helps prevent actions based on a single individual's bad faith and ensure that decisions are consistent with institutional principles and policy.²³

19. Moreover, where plaintiffs allege that the Crown has suppressed information and left the public with the wrong impression, they can often simply release it themselves. The judicial record is not the only way to bring information to the attention of the public or correct misapprehensions that affect plaintiffs' reputations. Combining these steps with the remedies identified by the Appellant, many of a lawsuit's goals can be achieved without its costly side effects.

²² Appellant's Factum, para. 89.

²³ The Respondents argue that allowing misfeasance claims against prosecutors "serves an ombudsman function for tort law." Respondents' Factum, para. 27. With respect, governments have actual ombudsmen – there is no need to seek out a surrogate in the civil courts.

F. Conclusion

20. To paraphrase Moldaver J.'s comments in *Henry*, it is important to consider not only the “few strong claims” that suing prosecutors for misfeasance would allow to proceed, but also the “scores of meritless [ones]” carrying significant implications for the prosecution of offences and the timely administration of justice, no matter what test for liability is ultimately applied. As he observed, “[t]he collective interest of Canadians is best served when Crown counsel are able to focus on their primary responsibility – the fair and effective prosecution of crime.”²⁴

Part IV – Costs

21. The Intervener takes no position on costs.

Part V – Order Sought

22. The Intervener takes no position on the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Ami Kotler

**Counsel for the Intervener, Ami Kotler
The Attorney General for Manitoba**

Ami Kotler for:

**Counsel for the Intervener, Denis Guenette
The Attorney General for Manitoba**

²⁴ *Henry*, para. 72.

Part VI – Table of Authorities and Legislation

<u>Authorities</u>	Cited at Paragraph No.	Tab No. (if applicable)
<i>Boucher v. The Queen</i>, [1955] S.C.R. 16	9, 11	
<i>R. v. Cody</i>, 2017 SCC 31, [2017] 1. S.C.R. 659	15	
<i>R. v. Friesen</i>, 2020 SCC 9	9	
<i>Henry v. British Columbia (Attorney General)</i>, 2015 SCC 24, [2015] 2 S.C.R. 214	5, 8, 11, 12, 20	
<i>R. v. Jordan</i>, 2016 SCC 27, [2016] 1.S.C.R. 631	15	
<i>Miazga v. Kvello Estate</i>, 2009 SCC 51, [2009] 3 S.C.R. 339	5, 9, 10, 11, 12	
<i>Nelles v. Ontario</i>, [1989] 2 S.C.R. 170	10	
<i>R. v. I.R.N.</i>, 2011 MBCA 31, 275 C.C.C. (3d) 319	9, 13	
<i>Odhavji Estate v. Woodhouse</i>, 2003 SCC 69, [2003] 3 S.C.R. 263	1, 2, 6, 8, 9	
<i>Proulx v. Quebec (Attorney General)</i>, 2001 SCC 66, [2001] 3 S.C.R. 9	9	
<i>Watkins v. Olafson</i>, [1989] 2 S.C.R. 750	8	

<u>Legislation</u>	<u>Cited at Paragraph No.</u>
<i>The Canadian Charter of Rights and Freedoms</i> s. 24(1) <i>La Charte canadienne des droits et libertés</i> s. 24(1)	5
<i>The Canadian Charter of Rights and Freedoms</i> s. 11(b) <i>La Charte canadienne des droits et libertés</i> s. 11(b)	9