S.C.C. File No. 38687

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

BETWEEN:

ATTORNEY GENERAL OF ONTARIO

Appellant
(Respondent)

- and -

JAMIE CLARK, DONALD BELANGER and STEVEN WATTS

Respondents
(Appellants)

- and -

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

Interveners

FACTUM of the INTERVENER,
ATTORNEY GENERAL FOR SASKATCHEWAN
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

MINISTRY OF JUSTICE AND ATTORNEY GENERAL FOR SASKATCHEWAN
Civil Law Branch
900 – 1874 Scarth Street
Regina, SK S4P 4B3

Michael J. Morris, Q.C.
Kyle McCreary
Tel: (306) 787-7444
Fax: (306) 787-0581
Email: michael.morris@gov.sk.ca
kyle.mccreary@gov.sk.ca

Counsel for the Intervener,
Attorney General for Saskatchewan

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

D. Lynne Watt

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

Ottawa Agent for Counsel for the
Intervener, Attorney General for Saskatchewan

MINISTRY OF THE ATTORNEY GENERAL OF ONTARIO
Crown Law Office - Civil
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9

Ananthan Sinnardurai
Sunil Mathai
Tel: (416) 326-4148
Fax: (416) 326-4181
Email: ananthan.sinnadurai@ontario.ca
Sunil.mathai@ontario.ca

Counsel for the Appellant

BORDEN LADNER GERVAIS LLP
1300-100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron
Tel: (613) 369-4795
Fax: (613) 230-8842
Email: kperron@blg.com

Ottawa Agent for Counsel for the Appellant

BRAUTI THORNING LLP
161 Bay Street, Suite 2900
Toronto, ON M5J 2S1

Lorne Honickman
Michael Lacy
Tel: (416) 360-2786
Fax: (416) 362-8410
Email: lhonickman@btlegal.ca

Counsel for the Respondents

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Respondents

ATTORNEY GENERAL OF NEW BRUNSWICK
Public Prosecutions Branch
Carleton Place, P.O. Box 6000
Fredericton, New Brunswick
E3C 5H1

Kathryn Gregory, Q.C.
Patrick McGuinty
Tel: 506.453.2784
Fax: 506.453.5364
Email: kathryn.gregory@gnb.ca

Counsel for the Intervener, Attorney General of New Brunswick

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa ON, K1P 1C3

D. Lynne Watt
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

ATTORNEY GENERAL OF MANITOBA
5th Flr., Criminal Prosecutions Division
405 Broadway
Winnipeg, Manitoba R3C 3L6

Amiram Kotler
Tel: 204.945.2852
Fax: 204.945.1260
Email: ami.kotler@gov.mb.ca

Counsel for the Intervener, Attorney General of Manitoba

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa ON, K1P 1C3

D. Lynne Watt
Tel: 613.786.8695
Fax: 613.788.3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Attorney General of Manitoba

ATTORNEY GENERAL OF BRITISH COLUMBIA
1301-865 Hornby Street
Vancouver, British Columbia V6Z 2G3

Tara Callan
Tel: 604.660.0163
Fax: 604.660.3567
Email: tara.callan@gov.bc.ca

Counsel for the Intervener, Attorney General of British Columbia

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa ON, K1P 1C3

Robert E. Houston, Q.C.
Tel: 613.783.8817
Fax: 613.788.3500
Email: Robert.houston@gowlingwlg.com

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

ATTORNEY GENERAL OF ALBERTA
3rd Floor, Centrium Place 300 - 332 6 Avenue, S.W.
Calgary, Alberta T2P 0B2

Christine Rideout, Q.C.
Tel: 403.297.6005
Fax: 403.297.3453
Email: christine.rideout@gov.ab.ca

Counsel for the Intervener, Attorney General of Alberta

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa ON, K1P 1C3

D. Lynne Watt
Tel: 613.786.8695
Fax: 613.788.3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Attorney General of Alberta

LERNERS LLP
130 Adelaide Street W. Suite 2400
Toronto, ON M5H 3P5

Earl A. Cherniak, Q.C.
Tel: 416.601.2350
Fax: 416. 867.2402
Email: echerniak@lerners.ca

Cynthia B. Kuehl
Tel: 416.601.2363
Fax: 416.867.2433
Email: ckuehl@lerners.ca

Counsel for the Intervener, Toronto Police Chief Mark Saunders

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa ON, K1P 1C3

Jeffrey W. Beedell
Tel: 613.786.0171
Fax: 613.788.3587
Email: jeff.beedell@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Toronto Police Chief Mark Saunders

ROYAL NEWFOUNDLAND CONSTABULARY
Legal Services Unit
1 Fort Townshend
St. John's, Newfoundland & Labrador A1C 2G2

Rachel Huntsman, Q.C.
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

PERLEY-ROBERTSON, HILL & MCDOUGALL
1400 - 340 Albert Street
Ottawa, Ontario K1R 0A5

Lynda A. Bordeleau
Tel: 613.238.2022
Fax: 613.238.8775
Email: lbordeleau@perlaw.ca

Ottawa Agent for Counsel for the Intervener, Canadian Association of Chiefs of Police

CAVALLUZZO SHILTON MCINTYRE CORNISH LLP
300 - 474 Bathurst Street
Toronto, Ontario M5T 2S6

Paul J.J. Cavalluzzo
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

NELLIGAN O'BRIEN PAYNE LLP
50 O'Connor Street, Suite 300
Ottawa, Ontario K1PL2

Christopher Rootham
Tel: 613.231.8311
Fax: 613.788.3667
Email: Christopher.rootham@nelliganlaw.ca

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

TABLE OF CONTENTS

PART I: OVERVIEW

1. The common law immunity from suit afforded to Crown prosecutors is for the benefit of the public, and is aimed at furthering the proper administration of criminal justice. It is rooted in the same public policy considerations which ground immunity from suit for judicial and other quasi-judicial decision-makers. Fundamentally, the immunity serves to protect a prosecutor's constitutionally-entrenched independence and impartiality, and to prevent them from being diverted or distracted from their prosecutorial duties.

2. Prosecutors are already subject to more processes to prevent, remedy and censure misconduct than judicial or other quasi-judicial decision-makers. Affirming the misfeasance claim in this case would signal the Court's acceptance that prosecutors are not protected by the judicial proceeding participant immunity ordinarily accorded to witnesses, counsel, and judges in spite of prosecutors' quasi-judicial role in the criminal justice system.

3. Malicious prosecution is a carefully contoured tort designed to safeguard the proper administration of criminal justice. In contrast, misfeasance claims by accused persons raise issues of collateral attack. Further, the potential for misfeasance claims by non-parties to a prosecution threatens an accused's right to be tried by a prosecutor acting independently of partisan concerns. It also encourages "defensive prosecuting" to ward off potential claims by non-parties, thereby threatening an accused's right to be tried within a reasonable time.

PART II: POSITION OF THE ATTORNEY GENERAL FOR SASKATCHEWAN [AGS]

4. The appeal raises three issues for the Court's consideration. This factum addresses issues one and two. The AGS' position with respect to issue one is that Crown prosecutors should be immune from claims by non-parties to a prosecution. The AGS' position with respect to issue two is that Crown prosecutors' common law liability to an accused person should not be expanded beyond the tort of malicious prosecution.

PART III: STATEMENT OF ARGUMENT

A. A prosecutor's quasi-judicial role militates against erosion of her common law immunity from suit.

5. The common law immunity afforded to prosecutors is rooted in the same fundamental principle which affords immunity from suit to superior court judges and quasi-judicial decision makers: Protection from the normal operation of the law is necessary to promote the public interest in the proper discharge of judicial and quasi-judicial functions.

6. Like judges, prosecutors play a unique role in the criminal justice system, exercising quasi-judicial functions and considerable discretion. As stated by Rand J. in *Boucher v The Queen*, [1955] SCR 16 [*Boucher*] at 24, a prosecutor's "function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility" and that "[i]t is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings." More recently, in *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 SCR 214 [*Henry*] at para 73, Moldaver J. affirmed the public interest in the proper exercise of the Crown's role as a quasi-judicial officer.

7. In *Morier v Rivard*, [1985] 2 SCR 716 [*Morier*] at 745, this Court affirmed that superior court judges have absolute immunity at common law from suits based on acts or omissions in their judicial capacity. At 737-38, the Court quoted from *Fray v Blackburn* in describing the reasons for the immunity: "The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the Judges, and prevent their being harassed by vexatious actions."

8. More recently, in *Ernst v Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 SCR 3 [*Ernst*] at para 57, the majority stated: "As Lord Denning M.R. held, to be truly free in thought, judges should not be "plagued with allegations of malice or ill-will or bias or anything of the kind": …"

9. The majority in *Ernst* explained at para 51 that the immunity is based on two inter-related rationales, which <u>also</u> apply to quasi-judicial decision makers: (1) immunity permits decision-makers to fairly and effectively make decisions by ensuring freedom from interference, which is

necessary for their independence and impartiality, and (2) immunity protects the capacity of decision-makers to fulfill their functions without the distraction of time-consuming litigation.

10. In a concurring judgment, Abella J. stated at para 116 that "[i]mmunizing… judicial and quasi-judicial adjudicators from personal damages claims is grounded in attempts to protect their independence and impartiality, and to facilitate the proper and efficient administration of justice." Regarding the Alberta Energy Regulator's [AER] statutory immunity clause, Abella J. noted at para 120 that "extra caution should be exercised before this Court nibbles away at [it]", and that "[t]here are profound and obvious implications for *all* judges and tribunals from such a decision…"

11. Finally, in concluding that the AER could never be sued for *Charter* damages even in the absence of its statutory immunity clause (*Ernst*, para 24), the majority noted at para 41 that the ability to judicially review AER decisions weighed against allowing an action against it for damages.

12. Regarding the role played by Crown prosecutors, this Court has consistently emphasized their quasi-judicial role in the criminal justice system, and the need to protect their independence and impartiality.

13. In *Nelles v Ontario*, [1989] 2 SCR 170 [*Nelles*] at 191, the Court noted that "Traditionally, the Crown Attorney has been described as a "minister of justice" and "ought to regard himself as part of the Court rather than as an advocate". …"

14. In *Miazga v Kvello Estate*, 2009 SCC 51, [2009] 3 SCR 339 [*Miazga*] at para 46, the Court stated "The independence of the Attorney General is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched." And at para 47: "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."

15. In *R v Anderson*, 2014 SCC 41, [2014] 2 SCR 167 [*Anderson*] at paras 45, 48 and 55, the Court held that "[p]rosecutorial discretion applies to a wide range of prosecutorial decision making", is only reviewable for abuse of process, and that Crown prosecutors "… are not bound

to provide reasons for their decisions, absent evidence of bad faith or improper motives" (emphasis in original).

16. In *Miazga*, the Court concluded at para 51: "[t]he public law doctrine of abuse of process and the tort of malicious prosecution may be seen as two sides of the same coin: both provide remedies when a Crown prosecutor's actions are so egregious that they take the prosecutor outside his or her proper role as minister of justice, such that the general rule of judicial non-intervention with Crown discretion is no longer justified".

17. Having consistently affirmed the constitutionally-entrenched and quasi-judicial role of Crown prosecutors, this Court should affirm that the two inter-related rationales identified by the majority in *Ernst* favour immunizing prosecutors from claims other than malicious prosecution, rather than expanding prosecutors' liability at common law.

18. The following table illustrates that, in comparison to superior court judges and quasi-judicial decision makers such as the AER, prosecutors are already subject to more processes to prevent, remedy and censure misconduct in the course of judicial or quasi-judicial proceedings:

	Superior court judges	**AER**	**Crown prosecutors**
Damages claims	No.	No.	Yes.
Judicial review	No, but decisions may be subject to appeal.	Yes.	Yes.
Professional discipline	Yes.	No.	Yes.

19. Of the three 'putative defendants', only prosecutors are subject to damages claims (in malicious prosecution). Both prosecutors and judges may be compelled to appear before

professional disciplinary tribunals to answer to allegations of misconduct. This circumstance does not apply to the AER.

20. While the ability to judicially review a prosecutor's decision-making is admittedly more limited than the ability to review a decision of the AER, the type of conduct meant to be addressed in a misfeasance claim - conduct in bad faith or for improper motives – is still reviewable and remediable in appropriate exceptional cases. Lower courts have held they have jurisdiction to sit in review of decisions to not prosecute, for example: *Kostuch v Alberta*, 1995 CanLII 6244, 128 DLR (4th) 440 (ABCA); *Heffernan v Alberta*, 2018 ABQB 13; *Jackson v Ontario*, 2017 ONCA 812. Courts may also intervene mid-proceeding with respect to Crown tactics or conduct before the court to prevent trial unfairness to the accused: *R v Jolivet*, 2000 SCC 29, [2000] 1 SCR 751.

21. Finally, in spite of already being subject to more oversight than others exercising judicial or quasi-judicial powers, if the cause of action alleged in this case is permitted to proceed, Crown prosecutors will be subject to a broader form of civil liability than their advocate peers.

22. Under long-recognized judicial proceeding participant immunity, no advocate not otherwise owing a duty of care to a particular client may be sued on the basis of their conduct of court proceedings: *Halls v Mitchell*, [1928] SCR 125; *Love v Bell ExpressVu Limited Partnership*, 2006 MBCA 92 at paras 10-16; *Amato v Welsh*, 2013 ONCA 258 at para 54; *Lefebvre v Durakovic*, 2018 BCCA 201 at paras 18-23; *Duncan v Lessing*, 2018 BCCA 9 at paras 44-54 and 69-74. Placing greater liability on Crown prosecutors - particularly given their constitutionally-entrenched quasi-judicial role - would run contrary not only to this Court's jurisprudence since *Boucher*, but also against the substantial body of jurisprudence concerning judicial proceeding participant immunity.

B. Malicious prosecution as a cause of action will be superseded by claims alleging misfeasance in public office.

23. The elements of the tort of malicious prosecution strike a delicate balance between the public interest and private rights in allowing claims against Crown prosecutors in certain limited circumstances. In contrast, the tort of misfeasance in public office has "emerged from obscurity"[1] and "can essentially be made out whenever a public authority's unlawful actions cause material damage to the plaintiff" according to Dean Erika Chamberlain.[2]

24. Dean Chamberlain has opined that "even if the plaintiff would not be successful at trial, the claim may persist long enough to encourage the defendant to settle"[3] and "[p]erhaps the only thing that can be said with some certainty is that misfeasance in a public office will be pleaded on an increasingly frequent basis in the Canadian courts."[4] A review of reported case law, and this very claim, can confirm her prophecy from 2010.

25. Given the broad range of prosecutorial conduct which can potentially ground a claim in misfeasance in public office and the tort's lack of certain elements – most notably, that criminal proceedings terminate in favour of the accused - it is very likely that the tort of malicious prosecution will be superseded by misfeasance claims against Crown prosecutors, if allowed.

26. Requiring malicious prosecution actions to only be brought if proceedings terminate in favour of an accused achieves an important objective. As stated in *Miazga* at para 54: "This requirement precludes a collateral attack on a conviction properly rendered by a criminal court, and thus avoids conflict between civil and criminal justice." Since the tort of misfeasance is not similarly constrained, it would allow an accused to engage in collateral attack in civil proceedings at any stage of a prosecution: upon being charged, upon being denied bail, upon being committed for trial, or upon being convicted. Moreover, the mere issuance of a "nuisance" claim has a reasonable likelihood of adversely affecting a Crown prosecutor's ability to carry out her functions. As stated by Dean Chamberlain, "[e]ven where the plaintiff has little support for its

---

[1] Erika Chamberlain, "What is the role of Misfeasance in Public Office in Modern Canadian Tort Law?", (2009) Vol. 88 Canadian Bar Review 575 [Chamberlain] at 578.
[2] Chamberlain, at 600.
[3] Chamberlain, at 597.
[4] Chamberlain, at 601.

allegations of malicious intent, the rules of civil procedure will rarely allow for early termination of the claim."[5]

27. The problems with parallel criminal and civil proceedings exist whether the plaintiff suing in misfeasance is the accused, a complainant, a police officer, or another type of witness. The overarching issue is the potential for bringing the administration of criminal justice into disrepute.

C. The specter of misfeasance claims by non-parties to a criminal proceeding threatens an accused's *Charter* rights to trial by a prosecutor acting independently of partisan concerns or improper motives and trial within a reasonable time.

28. In *R v Cawthorne*, 2016 SCC 32, [2016] 1 SCR 983 at para 24, this Court stated that a prosecutor has a constitutional obligation to act independently of partisan concerns and other improper motives. An accused has a related right to be tried by an independent, non-partisan prosecutor as a principle of fundamental justice guaranteed by s. 7 of the *Charter*. The Court's malicious prosecution jurisprudence supports this principle. Expanding prosecutors' potential civil liability to non-accused, such as complainants, police officers or other witnesses, does not.

29. A prosecutor should not be placed in a position similar to that described by Lord Denning M.R. in *Sirros v Moore*, [1975] 1 QB 118 (Eng CA), and quoted in *Morier* at p 739: "He should not have to turn the pages of his books with trembling fingers, asking himself: "If I do this, shall I be liable in damages?"". Expanding prosecutorial liability beyond malicious prosecution threatens to do exactly this, and risks incentivizing prosecutors to act for improper motives – to keep from being sued, rather than performing their public duties in accordance with the principles stated in *Boucher*. This serves to undermine the administration of justice. As stated by Moldaver J. in *Henry* at para 73: "The public interest is undermined when prosecutorial decision-making is influenced by considerations extraneous to the Crown's role as a quasi-judicial officer".

30. A corollary to expanding prosecutors' potential liability to non-parties to a prosecution will be an increase in allegations of abuse of process, misfeasance and/or malicious prosecution by accused persons. For example, a prosecutor who continues a prosecution in the absence of

[5] Chamberlain, at 597.

probable cause out of fear of being sued by a complainant will have satisfied the third and fourth elements of the tort of malicious prosecution, and will have breached the accused's s. 7 *Charter* rights.

31. Expanding a prosecutor's potential civil liability may also have a pronounced effect on an accused's s. 11(b) right to a trial within a reasonable time, as guaranteed by *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631 [*Jordan*]. Fomenting a culture of fear and defensive prosecuting will result in "unnecessary procedures and adjournments" and "inefficient practices" which exacerbate the culture of "complacency towards delay" identified in *Jordan*, at para 40. To borrow phrases from *Jordan* (at para 40), a culture of defensive prosecuting "rewards the wrong behavior", "frustrates the well-intentioned", and "causes great harm to public confidence in the justice system".

32. There is no commonality of interest between the *Charter* rights of accused persons and the reputational or other rights of non-parties to ensure that conflicting duties are not imposed on prosecutors with limited time and resources. In determining whether it is in the public interest to recognize misfeasance claims by non-parties to a prosecution, the protection of the accused's constitutionally-entrenched rights to an impartial prosecution and trial within a reasonable time must prevail over ensuring that an aggrieved non-party to a prosecution has a remedy. As stated by Moldaver J. in *Henry*, at para 81: "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".

PART IV: COSTS

33. The AGS requests no costs and that no costs be ordered against him.

PART V: REQUEST FOR ORDER

34. The AGS intends to make oral argument as permitted by the June 19, 2020 order of Mr. Justice Kasirer. No other orders are requested.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of August, 2020.

As agent for:

Michael J. Morris, Q.C. and
Kyle T. McCreary,
Counsel for the Intervener,
Attorney General for Saskatchewan

PART VI: AUTHORITIES

CASES	**Paragraph(s)**
Amato v Welsh, 2013 ONCA 258	22
Boucher v The Queen, [1955] SCR 16	6
Duncan v Lessing, 2018 BCCA 9	22
Ernst v Alberta Energy Regulator, 2017 SCC 1, [2017] 1 SCR 3	8, 9, 10, 11
Halls v Mitchell, [1928] SCR 125	22
Heffernan v Alberta, 2018 ABQB 13	20
Henry v British Columbia (Attorney General), 2015 SCC 24, [2015] 2 SCR 214	6, 29, 32
Jackson v Ontario, 2017 ONCA 812	20
Kostuch v Alberta, 1995 CanLII 6244, 128 DLR (4th) 440 (ABCA)	20
Lefebvre v Durakovic, 2018 BCCA 201	22
Love v Bell ExpressVu Limited Partnership, 2006 MBCA 92	22
Miazga v Kvello Estate, 2009 SCC 51, [2009] 3 SCR 339	14, 16, 26
Morier v Rivard, [1985] 2 SCR 716	7, 29
Nelles v Ontario, [1989] 2 SCR 170	13
R v Anderson, 2014 SCC 41, [2014] 2 SCR 167	15
R v Cawthorne, 2016 SCC 32, [2016] 1 SCR 983	28
R v Jolivet, 2000 SCC 29, [2000] 1 SCR 751	20