Court 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

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 OF BRITISH COLUMBIA

(Pursuant to Rule 37 & 42 of *Rules of the Supreme Court of Canada, S.O.R./2002-156*)

Ministry of Attorney General
Legal Services Branch
1301-865 Hornby Street
Vancouver, BC V6Z 2G3

Tara Callan, David Layton QC, Stephanie Lacusta
Tel.: (604) 660-3093
Fax.: (604) 660-3833
Email: tara.callan@gov.bc.ca

Counsel for the Intervener, Attorney General of British Columbia

Gowlings WLG (Canada) LLP
2600-160 Elgin Street
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 the Intervener, Attorney General of British Columbia

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

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

Counsel for the Appellant, Attorney General of Ontario

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

Nadia Effendi
Tel.: (613) 787-3562
Fax.: (613) 230-8842
Email: neffendi@blg.com

Ottawa Agent for the Appellant, Attorney General of Ontario

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
mlacy@btlegal.ca

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

Marie-France Major
Tel.: 613.695.8855
Fax.: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

Counsel for the Respondent, Jamie Clark, Donald Belander and Steven Watts

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

Michael J. Morris
Tel.: (306) 787-7444
Fax.: (306) 787-0581
Email: Michael.morris@gov.sk.ca

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

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

Counsel for the Intervener, Attorney General of Saskatchewan

Ottawa Agent for the Intervener, Attorney General of Saskatchewan

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

Kathryn Gregory
Tel.: (506) 453-2784
Fax.: (506) 453-5364
Email: Kathryn.gregory@gnb.ca

Counsel for the Intervener, Attorney General of New Brunswick

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

Earl A. Cherniak, Q.C., Cynthia B. Kuehl
Tel.: (416) 601-2350
Fax.: (416) 867-2402
Email: echerniak@lerners.ca

Counsel for the Intervener, Mark Saunders

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

Christine Rideout, Q.C.
Tel.: (403) 297-6005
Fax.: (403) 297-3453
Emil: Christine.rideout@gov.ab.ca

Counsel for Intervener, Attorney General of Alberta

Attorney General of Manitoba
5th flr., Criminal Prosecutions Division
405 Broadway
Winnipeg, MB R3C 3L6

Amiram Kotler
Tel.: (204) 945-2852

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 the Intervener, Attorney General of New Brunswick

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

Jeffery W. Beedell
Tel.: (613) 786-0171
Fax.: (613) 788-3587
Email: jeff.beedell@gowlingwlg.com

Ottawa Agent for the Intervener, Mark Saunders

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 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

Fax.: (204) 945-1260
Email: ami.kotler@gov.mb.ca

Counsel for Intervener Attorney General of Manitoba

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

Rachel Huntsman, Q.C.
Tel.: (709) 729-8739
Fax.: (729-8217
Email: Rachel.huntsman@rnc.gov.nl.ca

Counsel for Intervener, Canadian Association of Chiefs of Police

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

Paul J.J. Cavalluzzo
Tel.: (416) 964-1115
Fax.: (416) 964-5895
Email: pcavalluzzo@cavalluzzo.com

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

Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the Intervener, Attorney General of Manitoba

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

Lynda A. Bordeleau
Tel.: (613) 238-2022
Fax.: (613) 238-8775
Email.: lbordeleau@perlaw.ca

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

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

Christopher Rootham
Tel.: (613) 231-8311
Fax.: (613) 788-3667
Email: Christopher.rootham@nellinganlaw.ca

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

TABLE OF CONTENTS

PART 1 - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal raises the important question of whether the qualified immunity from civil liability afforded to Crown prosecutors should be modified so that, rather than being restricted to malicious prosecution and *Charter* damages claims brought by the subject of a concluded prosecution, Crown prosecutors may, in addition, face civil actions for misfeasance in a public office brought by *any* person and regarding *any* decision made in carrying out their duties.

2. This question should be answered in the negative. Crown prosecutors should be immune from civil liability to third parties, such as police, complainants, witnesses and victims' family members, because the unique vulnerability that justifies permitting an accused to sue for malicious prosecution or for *Charter* damages is not replicated for third parties. Opening up liability to *any* person, and for *any* prosecutorial decision, will significantly increase claims against prosecutors and thereby harm the administration of criminal justice by undermining prosecutorial independence and diverting prosecutors from their primary criminal law duties to allow them to participate in defending civil actions.

3. The Attorney General of British Columbia (the "AGBC") intervenes to provide submissions on two discrete points regarding the adverse consequences that will arise if Crown prosecutors may be sued civilly by any person for claims of misfeasance in a public office.

4. First, if the police are able to sue Crown prosecutors for misfeasance in a public office, there is a real and significant risk that prosecutors will consciously or unconsciously perform their duties to minimize exposure to civil liability to the police. This chilling effect on prosecutorial decision-making will erode Crown independence *vis-à-vis* the police and thus weaken the constitutionally mandated system of checks and balances that are essential to a fair, reliable and efficient criminal justice system. In short,

there will be an adverse impact on the police-prosecutor relationship and the administration of criminal justice more generally.

5. Second, liability for misfeasance in public office as against a prosecutor should not be available for in-court conduct, which is an occasion of absolute privilege.

B. Statement of Facts

6. The AGBC adopts the facts as set out in the appellant's factum.

PART II – QUESTION IN ISSUE

7. The AGBC's position is that prosecutorial immunity should not be displaced in to permit claims of misfeasance in a public office.

PART III – ARGUMENT

Adverse Impact on Police-Prosecutor Relationship

8. Permitting individual police officers to bring claims of misfeasance in a public office against Crown prosecutors creates a serious risk of skewing the relationship between prosecutors and the police, with harmful repercussions on prosecutorial independence and the system of checks and balances that ensures a fair, reliable and efficient criminal justice system.

9. As described in the appellant's factum,[1] Crown prosecutors have a constitutional obligation to act independently.[2] This principle of independence is crucial to ensuring

[1] Appellant's factum, ¶50-68.

that prosecutorial functions are carried out fairly and impartially. Among other things, it promotes independence from the police.[3] For analogous reasons, constitutional convention holds that, when investigating crime, the police must act independently from the executive branch, which includes Crown prosecutors.[4] Accordingly, in carrying out their duties, "both the police officer and the prosecutor have a discretion that must be exercised independently of any outside influence".[5]

10. This mutual independence of Crown prosecutors and the police is central to the proper operation of the criminal justice system because it is part of a system of checks and balances that protects against the improper use of the investigative and prosecutorial functions, thereby fostering an equitable process and encouraging reliable results.[6] As stated in the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (1993), at p. 39:

> The mutual independence of Crown counsel and the police has many advantages. […] separating the investigative and prosecutorial powers of the state is an important safeguard against the misuse of both. Such separation of power, by inserting a level of independent review between the investigation and any prosecution that may ensue, also helps to ensure that both

---

[2] *R. v. Cawthorne*, 2016 SCC 32, ¶23-24; *Miazga v. Kvello*, 2009 SCC 51, ¶46; *Krieger v. Law Society of Alberta*, 2002 SCC 65, ¶30-32; *R. v. Regan*, 2002 SCC 12, ¶157, per Binnie J. (dissenting on another point) [*Regan*].

[3] *Regan*, ¶66, 70, 137, 152-160; Robert Frater, *Prosecutorial Misconduct*, 2nd ed., (Toronto: Thomson Reuters, 2017) at pp. 11-12; Michael Code, "Judicial Review of Prosecutorial Decisions: A Short History of Costs and Benefits, in Response to Justice Rosenberg" (2009), 34 Queen's L.J. 863, at p. 872.

[4] *R. v. Campbell*, [1999] 1 S.C.R. 565, ¶27, 29, 33 [*Campbell*]; *Regan*, ¶66-71; *R. v. Beaudry*, 2007 SCC 5, ¶48 [*Beaudry*]; *R. v. Bacon*, 2020 BCCA 140, ¶46-49; Ontario. Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions. *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions*, (Toronto: the Committee, 1993) at p. 39 [*Martin Committee Report*]; Marc Rosenberg, "The Attorney General and the Administration of Criminal Justice" (2009), 34 Queen's L.J. 813, at p. 827-828 [Rosenberg].

[5] *Beaudry*, ¶48.

[6] *R. v. Davey*, 2012 SCC 75, ¶37; *Regan*, ¶159-160, per Binnie J. (dissenting on another point); *Smith v. Attorney General of Ontario*, 2019 ONCA 651, ¶65, 70-76, 85-87, 121-125 [*Smith*]; Rosenberg, at p. 830.

> investigations and prosecutions are conducted more thoroughly, and thus more fairly.

11. At the same time, however, Crown prosecutors and police officers "must inevitably work in cooperation to administer and enforce criminal laws effectively",[7] and must do so frequently. Prosecutors advise and assist police in a myriad of matters during investigations, especially in more complex cases.[8] In several jurisdictions, including British Columbia, prosecutors approve charges before they are laid, which necessarily requires interaction with the police.[9] Police officers may also take further investigative steps and provide support to Crown counsel during a prosecution. Cooperation between the police and prosecutors is thus "essential to the proper administration of justice".[10]

12. As the appellant has argued, exposing Crown counsel to the risk of liability to third parties and for misfeasance in a public office would cause real and significant adverse consequences for the criminal justice system.[11] One such consequence is the potential for a chilling effect on prosecutorial decision-making; that is, prosecutors will engage in "defensive lawyering" to avoid the risk of civil liability to third parties, thereby undermining the principle of Crown independence and negatively impacting the administration of criminal justice.[12] The concern regarding a chilling effect on prosecutorial decision-making is especially acute where Crown counsel are exposed to the risk of being found liable to the police for misfeasance in a public office for two reasons.

---

[7] Canada. Public Prosecution Service. *Public Prosecution Service of Canada Deskbook*, Part II, Chapter 2.7 "Relationship Between Crown Counsel and Investigative Agencies", issued March 1, 2014, p. 2 [*PPSC Deskbook*].
[8] See: *ibid*, pp. 4-10, for an extensive list of diverse examples.
[9] *Regan*, ¶72, 76-77; *Crown Counsel Act*, R.S.B.C. 1996, c. 87, s. 4(3)(a); British Columbia Prosecution Service, *Crown Counsel Policy Manual*, Charge Assessment Guidelines (CHA 1), April 16, 2019 [*BCPS Charge Assessment Guidelines*].
[10] *Smith*, ¶69. See also *Regan*, ¶66; *PPSC Deskbook*, p. 2; FPT Heads of Prosecution Committee, *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada*, 2018, p. 23; Michael Code and Patrick Lesage, *Report of the Review of Large and Complex Criminal Case Procedures*, 2008, pp. 25-26; *Martin Committee Report*, p. 36-37, 124-125, 133-135.
[11] Appellant's factum, ¶69-140.
[12] *Henry v. British Columbia*, 2015 SCC 24, ¶73 [*Henry*]; *Smith*, ¶96.

13. First, the Crown and police interact frequently, and in a plethora of ways, during the investigation and prosecution of criminal matters. It follows that there is an especially high risk that Crown independence will be undermined if, in carrying out their duties, prosecutors are influenced by a desire to avoid civil liability to individual police officers, whether consciously or unconsciously. The higher the risk, the greater the potential that prosecutorial decision-making will, in fact, be skewed by inappropriate considerations, with ensuing harm to the criminal justice system.

14. Second, the erosion of Crown independence from the police will destabilize and weaken the system of checks and balances that protects against the misuse of investigative and prosecutorial powers and helps to ensure that criminal investigations and prosecutions are carried out thoroughly and fairly. Prosecutors may also shy away from cooperating with the police in an effort to reduce exposure to civil liability, for instance by limiting legal advice to police, thereby diminishing the police-prosecutor collaboration that is so vital to the proper administration of criminal justice.[13] Either way, the result may be less reliable outcomes, a process lacking in fairness, less efficient and thus lengthier investigations and trials, and a diminishing of public trust in the integrity of the criminal justice system. The nature of the harm that may arise if Crown prosecutors engage in defensive lawyering to avoid the spectre of civil liability to the police is thus especially serious.[14]

15. In sum, the frequency of police-prosecutor contact and the fundamental importance of maintaining their mutual independence strongly favour the absolute immunization of Crown prosecutors from liability for misfeasance in public office.

Absolute Privilege

16. The respondents allege Crown Counsel are liable in misfeasance in public office because Crown Counsel failed to bring to the court's attention certain evidence that rehabilitated the respondents' reputations after making an admission in court that the

[13] *Smith*, ¶104.

accused's *Charter* rights were breached by the respondents' conduct.[15] These allegations as pleaded do not form a reasonable cause of action.

17. It is a long-standing legal principle[16] that no action lies, whether against judges, counsel, jury, witnesses, or parties, for words spoken in the ordinary course of any proceeding because judicial proceedings are an occasion of absolute privilege.[17] All legal counsel, including individual prosecutors and other government lawyers currently enjoy an absolute immunity from liability for in-court statements and conduct.[18]

18. It is in the public interest to provide all counsel including Crown Counsel with an immunity to independent witnesses for in court statements. "It frees lawyers from fear that in advocating their client's cause they will be sued if what they say on behalf of their client is not true."[19]

19. This immunity is justified by the long-standing recognition that, if liability flows from in-court statements, legal counsel's ability to conduct their important role as an officer of court will be irreparably hampered. As stated in *Munster v. Lamb*, cited with approval in *Hamouth v. Edwards & Angell*:[20]

> A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider, whether the facts with which he is dealing are true or false. What he has to do, is to argue as best he can, without degrading himself, in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. ... To my mind it is illogical to argue that the protection of privilege ought not to exist for a counsel, who deliberately and maliciously slanders another person. The reason of the rule is,

---

[14] *Smith*, ¶134; Rosenberg, pp. 829-830.
[15] *Clark v. Ontario (Attorney General)* 2017 ONSC 3683, ¶92.
[16] *Hargreaves v. Bretherton*, [1958] 3 All E.R. 122 (Q.B.).
[17] *Duncan v. Lessing*, 2018 BCCA 9, ¶53; *Elliott v. Insurance Crime Prevention Bureau*, 2005 NSCA 115, ¶114; *Halsbury's Laws of England*, vol. 28 4th ed. (London U.K.: Butterworths, 1997) at ¶97.
[18] *Geyer v. C.C.I. Merritt* (1979), 16 B.C.L.R. 27 (S.C.), aff'd (1980) 26 B.C.L.R. 374 (C.A.).
[19] *Hamouth v. Edwards & Angell*, 2005 BCCA 172, ¶37.
[20] *Munster v. Lamb* (1883), 11 Q.B.D. 588 p. 600 and 604 (C.A), cited with approval in *Hamouth v. Edwards & Angell*, 2005 BCCA 172, ¶37.

> that a counsel, who is not malicious and who is acting bona fide, may not be in danger of having actions brought against him. If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct.

20. Absolute privilege applies equally to in-court statements, decisions regarding which witnesses to call, the choice of questions posed to witnesses, the way in which a question is asked of a witness, and the choice of which documents are tendered into evidence.[21]

21. As a matter of policy, creative derivative[22] pleadings, including pleadings of misfeasance in public office,[23] should not be permitted to defeat the immunity afforded by an occasion of absolute privilege. The public policy imperatives that drive these privileges are as real in the case of all other torts as they are for defamation.[24]

22. All lawyers, including Crown prosecutors and other government lawyers, require considerable latitude in testing the credibility of witnesses and should be able to lead evidence in the way each individual lawyer sees fit in their professional judgment. The law should have allowance for the ardent submissions of the fearless, conscientious lawyer, who must necessarily argue his or her client's cause without fear of civil liability. As a matter of policy, absolute privilege embraces anything that may possibly be pertinent in a judicial proceeding.[25]

---

[21] *Lincoln v. Daniels*, [1961] 3 All E.R. 740 (C.A.), see for example Devlin L.J.'s reasons.

[22] *Guergis v. Novak et al.*, 2013 ONCA 449 ¶84; *Samuel Manu-Tech Inc. v. Redipac Recycling Corp.* (1999), 124 O.A.C. 125, ¶19.

[23] *Hung v. Gardiner*, 2003 BCCA 257, ¶3, 34-37; *Marrinan v. Vibart and Another* [1962] 3 All E.R. 380 (C.A.).

[24] *Teltschik v. Williams and Jensen, PLLC*, 748 F.3d 1285 (D.C. Cir. 2014), ¶5; *Lubarevich v. Nurgitz*, [1996] O.J. No. 1457 (Ct. J. Gen. Div.), ¶16.

[25] *Irwin v. Ashurst*, 158 Or. 61; 74 P. 2d. 1127 (Or. 1938).

Conclusion

23. The claim of misfeasance in public office should not be available against a prosecutor because:

a. extending civil liability for misfeasance to Crown counsel will have an adverse impact on the relationship between police and prosecutors, to the detriment of the administration of criminal justice; and
b. the impugned conduct in this case occurred on an occasion of absolute privilege.

PART IV – SUBMISSIONS ON COSTS

24. The AGBC does not seek costs and asks that no costs be sought against him.

PART V – ORDER SOUGHT

25. The AGBC makes no submissions on the specific outcome of this case.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Tara Callan,
David Layton QC
Stephanie Lacusta
Counsel for the Intervener, the Attorney General of British Columbia

Dated this 4th day of August, 2020

Vancouver, British Columbia

PART VI: TABLE OF AUTHORITIES & LEGISLATION

Tab	Authorities	Para # of Factum
1.	*Clark v. Ontario (Attorney General)*, 2017 ONSC 3683	16
2.	*Duncan v. Lessing*, 2018 BCCA 9	17
3.	*Elliott v. Insurance Crime Prevention Bureau*, 2005 NSCA 115	17
4.	*Geyer v C.C.I. Merritt* (1979), 16 B.C.L.R. 27 (S.C.), aff'd (1980), 26 B.C.L.R. 374 (C.A.)	17
5.	*Guergis v Novak et al.*, 2013 ONCA 449	21
6.	*Hamouth v. Edwards & Angell*, 2005 BCCA 172	18, 20
7.	*Hargreaves v. Bretherton*, [1958] 3 All E.R. 122 (Q.B.)	17
8.	*Henry v. British Columbia*, 2015 SCC 24	12
9.	*Hung v. Gardiner*, 2003 BCCA 257	21
10.	*Irwin v. Ashurst*, 158 Ore 61; 74 P. 2d. 1127 (Or. 1938)	22
11.	*Krieger v. Law Society of Alberta*, 2002 SCC 65	9
12.	*Lincoln v. Daniles*, [1961] 3 All E.R. 740 (C.A.)	20
13.	L*ubarevich v. Nurgitz*, [1996] O.J. No. 1457 (Ct. J. Gen. Div.)	21
14.	*Marrinan v. Vibart and Another* [1962] 3 All E.R. 380 (C.A.)	21
15.	*Miazga v. Kvello*, 2009 SCC 51	9
16.	*Munster v. Lamb* (1883), 11 Q.B. 588 (C.A.)	20
17.	*R. v. Bacon*, 2020 BCCA 140	9
18.	*R. v. Beaudry*, 2007 SCC 5	9
19.	*R. v. Campbell*, [1999] 1 S.C.R. 565	9

34.	*Public Prosecution Service of Canada Deskbook* [*PPSC Deskbook*], Part II, Chapter 2.7 "Relationship Between Crown Counsel and Investigative Agencies, issued March 1, 2014	11
35.	Robert Frater, *Prosecutorial Misconduct*, 2nd ed., (Toronto) Thomson Reuters, 2017	9