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 OF SASKATCHEWAN, MARK SAUNDERS, CANADIAN ASSOCIATION OF CHIEFS OF POLICE, CANADIAN ASSOCIATION OF CROWN COUNSEL AND ONTARIO CROWN ATTORNEYS' ASSOCIATION

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FACTUM of the INTERVENER, ATTORNEY GENERAL OF NEW BRUNSWICK

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

PART I: OVERVIEW AND FACTS

Overview

1. What is a Crown prosecutor to do in an active prosecution when an accused claims (not infrequently[1]) physical abuse by police officers? Depending on the outcome of this appeal, the answer may be: flip a coin.
2. In the limited time prosecutors have to consider such claims of physical abuse, a prosecutor will be expected to quickly weigh the personal and public ramifications of a possible lawsuit by police officers[2] versus the personal and public ramifications of a possible judicial finding that the prosecutor shirked their constitutional obligations and improperly aligned themselves with the police.[3]
3. This is an untenable choice for Crown prosecutors working necessarily alongside police officers in the daily and often relentless grind of prosecution work.
4. This should not be taken as an advocation for absolute prosecutorial immunity outside of malicious prosecution. We are, after all, well beyond the early "sacred cow" days of total prosecutorial immunity.[4] While we cannot envision all future possibilities, this case, on these facts, calls for a rejection of a new tort of malicious misfeasance against prosecutors.
5. The Ontario Court of Appeal decision allowing the misfeasance claim to proceed on the facts at bar suggests that while the "protection" provided by a malice threshold may well suffice in theory, it does not do so in practice. Should prosecutorial immunity shrink yet again to allow misfeasance claims against Crown prosecutors, the high threshold of malice in theory when applied by the courts below is really no protection at all.

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[1] This is not an uncommon claim that all front-line Crown prosecutors have encountered. Consider that the Ontario Special Investigations Unit, responsible for investigating all reported complaints of serious injury, deaths, and complaints of sexual assault involving police officers, opened 314 investigations in 2019. Since 2012 there have been in excess of 300 investigations opened each year: https://www.siu.on.ca/pdfs/2019_annual_report_english.pdf

[2] *Clark v. Ontario*, 2017 ONSC 3683

[3] *R. v. Tran*, 2010 ONCA 471 and *R. v. Ahluwalia*, 149 C.C.C. (3d) 193 (ONCA)

[4] *Nelles v. Ontario*, [1989] 2 S.C.R. 170 and *Henry v. British Columbia*, 2015 SCC 24, at para. 8

Facts

6. The Intervener takes no position on the facts of this case.

PART II: INTERVENER POSITION

7. The Attorney General of New Brunswick is primarily concerned with the practical impact of a further shrinking of prosecutorial immunity on the least resource-rich provinces in Canada, and more particularly on New Brunswick as a pre-charge screening province.[5] We highlight three practical concerns in particular:

> A) how do prosecutors maintain their independence from police officers in the exercise of their prosecutorial discretion if they are obliged to consider the reputational interests of the officers with whom they must necessarily interact from the pre-charge stage to the conclusion of proceedings?
>
> B) what is the impact on the administration of justice if the prosecutor's duty to make further enquiries into matters impacting the fair trial of the accused is expanded to include a duty to make further enquiries to protect the reputational interests of police officers?
>
> C) what is the impact on the administration of justice and on the independent role of the Crown of holding a prosecutor responsible for the factual findings made by a judge?

PART III: LEGAL ARGUMENT

8. Based on past decisions of this Court,[6] it is not surprising that the Ontario Court of Appeal allowed a claim of misfeasance to proceed against a Crown prosecutor on a malice

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[5] Policy 11 - *New Brunswick Public Prosecution Services Operational Manual* https://www2.gnb.ca/content/dam/gnb/Departments/ag-g/PDF/en/PublicProsecutionOperationalManual/Policies/Pre-chargeScreening.pdf

[6] *Nelles, supra*

threshold.[7] After all, in the context of malicious prosecution, this threshold is deemed sufficient protection for the prosecutor against a liability claim while nonetheless preserving an individual's right to legal redress.[8] The Attorney General of New Brunswick argues, however, that a malice threshold, while superficially attractive in theory, is insufficient to protect the independence of the Crown in practice. The detrimental practical effects of such a development are inevitable and are as detailed below.

9. "Malice" borders on "criminal conduct" on the part of a prosecutor; it is "a fraud on the criminal justice system."[9] However, the Ontario Court of Appeal would have this lawsuit proceed without such a showing of that hidden, malicious *animus* on the part of the Crown prosecutors involved. The protection intended in theory, failed here in practice.

A) Maintaining Independence from Police in the Exercise of Prosecutorial Discretion

10. Crown prosecutors exercise discretion throughout their carriage of a prosecution file from its pre-charge status to its conclusion. This discretion is said to be an absolute necessity; the justice system would be unworkable without it.[10] It may vary from the more judicial or ministerial exercise of discretion to the more administrative,[11] but no matter the form, discretion requires an unwavering commitment to the independent role of the Crown.

Impact on the Prosecutor's Ministerial Discretion to Initiate, Continue or to Terminate a Prosecution

11. The exercise of prosecutorial discretion with respect to the initiation, continuation or termination of a prosecution involves the exercise of judgment, based on the law and experience. The judicious operation of the legal system relies on a prosecutor's ability to remain independent and immune from the influence of interests that detract from a prosecutor's loyalty to the administration of justice.[12]

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[7] *Clark v. Ontario*, 2019 ONCA 311
[8] *Nelles, supra* at paras. 55-56
[9] *Nelles, supra* at para. 45
[10] *R. v. Anderson*, 2014 SCC 41, at para. 37
[11] *Henry, supra* at para.76
[12] *R. v. Power*, [1994] 1 S.C.R. 601, at paras. 33-47

12. A duty to consider the reputational interests of police officers could unduly impact a prosecutor's willingness to initiate, continue or to terminate a prosecution. Should a prosecutor be concerned that the reputational interests of police officers may suffer if a prosecution is initiated, continued or terminated, their core decision-making in this regard becomes suspect, potentially qualifying as an abuse of process in particular circumstances.

Impact on the Prosecutor's Administrative Discretion in the Conduct of the Case and the Calling of Witnesses

13. In the case at bar, the Respondents argue that a prosecutor has a duty to police officers to call them as witnesses when their personal and reputational interests may be at stake in a prosecution. The reputational interests of an individual are of significance. Though not mentioned specifically in the *Charter*, this Court describes the interests as being "tied to the rights protected by the *Canadian Charter*. Reputation is a fundamental feature of personality that makes it possible for an individual to develop in society. It is therefore essential to do everything possible to safeguard a person's reputation, since a tarnished reputation can seldom regain its former luster (*Hill*, at para. 108)."[13]
14. This being so, it has nonetheless long been settled since 1997 in this Court's decision in *R. v. Cook,*[14] that to interfere with a prosecutor's discretion to call witnesses is to strike at "…the very heart of the adversarial process."[15] In *Cook*, the failed argument was that the right to fair trial of the accused imposed a mandatory duty on the Crown to call certain witnesses of an alleged crime. This Court found that such a duty would improperly compel a prosecutor to call a witness regardless of "…their truthfulness, desire to testify, or of their ultimate effect on the trial."[16]
15. The Respondents would have this Court impose such a duty not for fair trial considerations but for reputational considerations in the midst of a prosecution focusing on the guilt or innocence of an accused. This could place a prosecutor in direct conflict between the rights of the accused and the rights of a witness. Should such considerations or the anticipation

[13] *Bou Malhab c. Diffusion Métromédia CMR Inc.*, 2011 SCC 9, at para. 18-19 and 28; see also *R. v. Lucas*, [1998] 1 S.C.R. 439, at paras. 48, 49 and 94
[14] *R. v. Cook,* [1997] 1 S.C.R. 1113 and *R. c. Jolivet,* 2000 SCC 29 at paras. 16-17
[15] *Cook, supra* at para. 19
[16] *Cook, supra* at para. 19

of such considerations come into play in a prosecution, an accused would rightfully be expected to claim a conflict of interest, or the appearance thereof, on the part of the prosecutor.

16. In addition to this inherent conflict, this Court has made clear that prosecutors must act efficiently in the exercise of their prosecutorial discretion.[17] A duty to safeguard the reputational interests of police officers conflicts and flies in the face of this requirement.

Concern for Reputational Interests Is Incompatible with R. v. Jordan Interests

17. Subsequent to *Jordan*, this Court reiterates the importance of ensuring that all justice system participants operate and conduct themselves in a manner that is efficient and devoid of complacency.[18] This reiteration was most recently pronounced in *R v Thanabalasingham*.[19] In particular, the Court states that there is an obligation on Crown counsel to ensure that court time is used efficiently[20] and that any delay resulting from Crown prosecutorial discretion must conform to the accused's section 11(b) right.[21]
18. But how then can Crown prosecutors operate in a *Jordan*-compliant manner if they are forced to engage in defensive lawyering (recognized by this Court as a consequence of the fear of civil liability[22]) by calling witnesses for the sole purpose of protecting themselves from civil liability? The conflict is blatant. It will adversely affect a prosecutor's ability to abide by the *Jordan* principles and will similarly raise resource issue concerns.
19. The *Report on the Review of Large and Complex Criminal Case Procedures* prepared for the Ontario Ministry of the Attorney General in 2008,[23] canvassed some of the reasons that trials have become much lengthier than in previous decades, which, of course, leads to increased delays in the justice system. The Report acknowledges that one of the reasons

[17] *R. v. Jordan*, 2016 SCC 27; *R. v. Thanabalasingham*, 2020 SCC 18
[18] *R v Cody*, 2017 SCC 31
[19] *R v Thanabalasingham* 2020 SCC 18
[20] *Thanabalasingham, supra* at para. 9, citing *Jordan, supra* at para. 138
[21] *Thanabalasingham, supra* at para. 5, citing *Jordan, supra* at para. 79
[22] *Henry*, supra at para. 73
[23] https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lesage_code/chapter_1.php

for lengthier criminal proceedings is because judges and lawyers have become "afraid" of making errors and, as such, proceed in "an overly cautious manner":[24]

> It is hardly surprising that errors are made in this new legal environment. In addition, we observe that judges and **lawyers seem to be afraid of these kinds of errors and so they proceed in an overly cautious manner, calling more evidence than they need to, including marginally useful evidence,** listening to more argument than they need to, disclosing more information than they need to, taking too long to rule and then ruling in the most protective way, out of undue concern for appellate review. All of these trends contribute to overly long trials.

20. While the Report does not address the fear of civil liability specifically, the same concern arises in this appeal. Allowing the Respondents' claim to proceed will inject fear into the minds of prosecutors. They will begin to engage in defensive lawyering as a cautious approach to avoid incurring even the *potential* for civil liability. This gives rise to unnecessary delay. The result is clear: *Jordan*-compliant behaviour is incompatible with defensive lawyering. That is the very inherent conflict this claim *will* give rise to if allowed.
21. As this Court recently acknowledged, *Jordan*-compliant conduct does not merely benefit an accused. It benefits the accused, victims and society as a whole.[25] Placing Crown prosecutors in this position therefore deprives accused persons, victims and society as a whole from conduct that is *essential* to the proper functioning of the justice system.

Prosecutor's Duty to Treat a Court with Fairness, Candour, Courtesy and Respect

22. Justice Rand famously explained that the duty of a Crown prosecutor is one that is to be "efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."[26] In addition, Canadian law societies require prosecutors to act for the public and the administration of justice resolutely and honourably, "while

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[24] http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lesage_code/chapter_2.php [emphasis added]
[25] *Thanabalasingham, supra* at para 9
[26] *Boucher v. R.*, [1955] S.C.R. 16 at para. 26

treating the tribunal with candour, fairness, courtesy and respect."[27] While these rules form part of various *Codes of Conduct*, they are inherent in the role of the prosecutor.

23. Treating a court with candour, fairness, courtesy and respect undoubtedly includes a prosecutor's duty not to call evidence with no evidentiary value. It similarly includes a duty not to call evidence where the prosecutor sincerely and reasonably doubts the truthfulness of that evidence. Prosecutors have a duty to *only* call evidence they consider *credible*.[28] In *Jolivet*, the prosecutor refused to call a witness because the prosecutor doubted the truthfulness of that witness' evidence. This Court explained that by not calling a witness due to concerns about the witness' truthfulness, the prosecutor was "acting to protect the integrity of the judicial system, not to compromise it".[29]
24. By maintaining their ethical obligations, prosecutors will face possible civil claims. The awareness of this possible claim will work to delay criminal proceedings by placing prosecutors in the impossible dilemma of meeting their ethical obligations in the criminal law context while exposing themselves to personal liability in the civil law context.
25. It appears that in the case at bar the Ontario Crown prosecutor made a judgment call and disbelieved Mr. Clark's denial that he engaged in police misconduct. Should this claim proceed as a permissible challenge to that judgment call, the impact will be to place all prosecutors between rocks and hard places. They will have their duty to the Court not to call untruthful evidence on one side and a desire to protect themselves from potential liability for the harm to police reputation caused by a trial judge's possible findings of fact on the other. A prosecutor must always act to "protect the integrity of the judicial system",[30] no properly functioning judicial system should make the job of doing so *so* difficult to navigate.

B) The Impact on the Administration of Justice of an Expanded Duty to Enquire

26. There is no dispute that a duty exists for a prosecutor to make further enquiries into matters impacting the interests of a fair trial. It bears repeating: "The Crown is not an ordinary

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[27] For example, see: *Law Society of New Brunswick Code of Professional Conduct* Rule 5.1-3; *Law Society of Ontario Rules of Professional Conduct* 5.1-3
[28] *Boucher, supra* at para 26
[29] *Jolivet, supra* at para 19
[30] *Jolivet, supra* at para 19

litigant. As a minister of justice, the Crown's undivided loyalty is to the proper administration of justice. As such, Crown counsel who is put on notice of the existence of relevant information cannot simply disregard the matter."[31]

27. Of course, this affirmation of the Crown duty to enquire refers to the Crown obligation to enquire further into the existence of information relating, for example, to the credibility and reliability of witnesses as it may impact upon the accused and the justice system generally: "[t]he Crown and the defence are not adverse in interest in discovering the existence of an unreliable or unethical police officer."[32]

28. However, the Respondents would have this Court interpret this duty not as one requiring inquiry, disclosure and the application of prosecutorial judgment in the interests of justice but as one requiring a prosecutor to refrain from making a judgment call on the information obtained; instead placing the issue of possible police misconduct before the court for a full airing as its own discreet issue separate from the guilt or innocence of the accused. While the Respondents claim this to be in the interests of justice, their true concern is a personal one.

29. As stated above, the Attorney General of New Brunswick does not dispute that reputational interests are important and deserving of protection but contests that the appropriate method of safeguarding them is to impose that duty of care on the Crown prosecutor. A practical solution in cases where reputational interests are implicated in a *Charter* application is to have a police officer request standing in an application where such interests may be implicated.[33] This will add to delay there is no doubt, exceptional though it be,[34] and appropriate limitations on the scope of such standing would have to be considered, but this is preferable to interfering with the prosecutor's independent role in the justice system.

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[31] *R. v. McNeil*, 2009 SCC 3, at para. 49

[32] *McNeil, supra* at para. 50

[33] Consider a complainant in a sexual assault case whose personal interests can be protected through the process contemplated in s. 276 and s. 278.94 of the *Criminal Code*

[34] This would appear to qualify as an "exceptional circumstance" pursuant to *Jordan, supra* and *Cody, supra* at paras. 44-48

C) The Responsibility of a Prosecutor for the Factual Findings of a Judge

30. It is now beyond dispute that determining what evidence to call falls squarely within the realm of prosecutorial decision making.[35] Put simply, a prosecutor exercises their judgment, based on their experience and prosecutorial duties, to determine what evidence to call in a criminal trial.
31. Allowing the Respondent's claim, however, shifts these fundamental principles and risks eroding the Crown's ability to use their judgment and determine what evidence to call. In essence, this Court's decision in *Cook* would no longer carry the force and effect it was intended to have. As this Court acknowledged in *Jolivet* "[i]mposition of a duty to call particular witnesses would unnecessarily constrain the exercise of prosecutorial discretion".[36] If the Respondent's claim is allowed, the message will be loud and clear: by law, prosecutors are now *required* to call evidence necessary to protect the interests of third parties, not the interests of justice.
32. In addition to undercutting this Court's decision in *Cook*, allowing the Respondent's claim implicitly makes Crown prosecutor's responsible for a judge's findings of fact. As indicated, it is the Crown's responsibility to place before the Court evidence which it sincerely considers to be *credible*.[37] This, of course, is a judgment call.
33. If the Crown exercises its judgment to not call evidence because it does not consider that evidence to be credible and, as a result, unfavourable reputational findings of fact are made, the fault cannot lay with the Crown. It is the judge who ultimately determines the impact on reputations, not the prosecutor.
34. If fault is to lay with the prosecutor, this means that prosecutors now have a duty to introduce evidence with the goal of influencing a judge's findings of fact with a particular outcome in mind. That, in and of itself, is in complete contradiction with the prosecutor's well-established role of presenting the court with credible evidence and then letting the court determine the *facts*. Put bluntly, a prosecutor's role is to present credible evidence. It is not to have a reputational horse in the race. Nor is it to try and control or inappropriately

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[35] *Cook, supra* at para 55; *Jolivet, supra* at paras. 16-17
[36] *Jolivet, supra* at para 16
[37] *Boucher, supra* at para 26

influence the outcome of the race. That is because, in a criminal trial, someone's life is at stake. Prosecutors need to act accordingly.

D) Conclusion

35. The practical implications and costs of allowing the Respondent's claim to proceed are clear. The mere fact that the Ontario Court of Appeal allowed this claim to proceed, on the bare facts alleged, is concrete evidence that no matter what threshold is imposed, there is no protection to prosecutors in practice.
36. Creating such a new tort in these circumstances indicates that, *in practice*, there is no protection afforded to prosecutors from civil liability for any conduct that impacts the reputational interests of a witness. As a result, prosecutors will be required to fundamentally alter their conduct, not for the good of society as a whole, but for the interests of a witness.

PART IV: SUBMISSION ON COSTS

37. The Intervener makes no submission with respect to costs.

PART V: ORDER SOUGHT

38. The Intervener takes no position with respect to the outcome of this appeal.

Dated this 4th day of August 2020 at the City of Fredericton, in the Province of New Brunswick.

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PART VI: AUTHORITIES

CASES	**Paragraph(s)**
Bou Malhab c. Diffusion Métromédia CMR Inc., 2011 SCC 9	13
Clark v. Ontario, 2017 ONSC 3683	2
Clark v. Ontario, 2019 ONCA 311	8
Boucher v The Queen, [1955] SCR 16	25, 26, 35
Henry v British Columbia (Attorney General), 2015 SCC 24	4, 10, 18
Nelles v Ontario, [1989] 2 SCR 170	4, 8, 9
R. v. Ahluwalia, 149 C.C.C. (3d) 193 (ONCA)	2
R. v. Anderson, 2014 SCC 41	10
R v Cody, 2017 SCC 31	17, 29
R. v. Cook, [1997] 1 S.C.R. 1113	14, 30-32
R v Jolivet, 2000 SCC 29	14, 23, 25, 30-31
R v Jordan, 2016 SCC 27	17-21
R. v. Lucas, [1998] 1 S.C.R. 439	13
R. v. McNeil, 2009 SCC 3	26-27
R. v. Power, [1994] 1 S.C.R. 601	11
R. v. Thanabalasingham, 2020 SCC 18	16-17, 21
R. v. Tran, 2010 ONCA 471	2

LEGISLATION	
Criminal Code, R.S.C., 1985, c. C-46, s. 276 *Code criminel*, L.R.C. (1985), ch. C-46, s. 276	29
Criminal Code, R.S.C., 1985, c. C-46, s. 278.94 *Code criminel*, L.R.C. (1985), ch. C-46, s. 278.94	29
OTHER AUTHORITIES	**Paragraph(s)**
Law Society of New Brunswick Code of Professional Conduct Rule 5.1-3	22
Law Society of Ontario Rules of Professional Conduct 5.1-3 Barreau de L'Ontario Code de déontologie 5.1-3	22
Policy 11 - New Brunswick Public Prosecution Services Operational Manual, effective date November 21, 2017	7
Ontario Ministry of the Attorney General, *Report on the Review of Large and Complex Criminal Case Procedures*, ch. 1 and ch. 2, 2008	19
Special Investigations Unit, *Annual Report 2019*.	1