SCC File No. 38687

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

B E T W E E N :

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RESPONDENT

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PART I: OVERVIEW AND STATEMENT OF FACTS

1. At issue in this appeal is the law on prosecutorial immunity and more specifically, whether the Attorney General of Ontario can be sued by third parties to a criminal prosecution, such as police officers, for the conduct of Crown Counsel in the course of conducting a criminal trial and appeal. The Intervenors, the Canadian Association of Crown Counsel and the Ontario Crown Attorneys' Association (collectively, the "**Associations**") together represent approximately 6, 400 frontline Crown prosecutors across Canada. The membership of the Associations includes both trial prosecutors and appellate counsel.

2. The Associations agree with the Appellant, the Attorney General of Ontario, that the lower courts erred by concluding that Crown Counsel are not immune from civil liability from police officers for misfeasance in public office.

PART II: POSITION

3. It is the Associations' position that:

   a. There are specific policy reasons, practical difficulties, as well as constitutional principles, such as police and prosecutorial independence and the requirement that the Attorney General act independently of partisan concerns, as to why police officers in particular should not be permitted to sue Crown Counsel for decisions made in the course of conducting criminal trials and appeals; and

   b. The tort of misfeasance in public office is not available on the facts of this case because Crown Counsel do not owe police officers any public duty to protect their reputational or emotional interests when they are making highly discretionary strategic decisions in the course of prosecutions or running criminal trials and

appeals, and that the liability threshold for the tort of misfeasance in public office is inadequate in any event.

PART III: STATEMENT OF ARGUMENT

1. Prosecutorial Immunity and Principle of Police Independence Bar the Claim

A. The Relationship between Police Officers and Crown Counsel

4. Crown Counsel and police officers have a complementary but "a separate and distinct role to play in the administration of justice and the relationship between the two actors is not hierarchical."[1] Maintaining their respective independence is crucial for the proper administration of criminal justice and to protect "against the misuse of both investigative and prosecutorial powers."[2]

5. The Ontario Court of Appeal (the "**ONCA**") recently explored the nature of the relationship between Crown Counsel and police officers in the context of a negligence claim brought by police officers against the Attorney General of Ontario in *Smith v Ontario,* 2019 ONCA 651. Ultimately, the ONCA rejected the idea that Crown Counsel could owe a *prima facie* duty of care to police officer in light of the importance of maintaining the "mutual independence and distinct roles of police" and Crown Counsel for the proper functioning of the criminal justice system.[3]

6. The Associations submit that the following features of the relationship between the police and Crown Counsel, which the ONCA relied on in *Smith v Ontario* to resist imposing a duty of care in circumstances before it, are equally relevant to the present matter:

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[1] *Smith v Ontario (Attorney General),* 2019 ONCA 651 at para 65, *See, e.g. R v Regan,* 2002 SCC 12 at para 64.

[2] *Smith v Ontario,* at para 65.

[3] *Smith v Ontario,* at para 85 – 87 and 119 – 136.

a. Although "cooperation between the police and Crown Attorneys is essential to the proper administration of justice", there is "an important line to be drawn between the cooperation" that is expected between them and "the exercise of their respective discretion in meeting their legal responsibilities";[4]

b. Crown Counsel and police have different roles to play in the administration of justice: "[t]he police role is to investigate allegations of crime, while the Crown's role is to assess whether a prosecution is in the public interest";[5]

c. Crown Counsel and police officers exercise their respective discretion independently "as a matter of law" and in practice;[6]

d. The separation of police and Crown Counsel functions "both safeguard police independence and helps preserve prosecutorial independence" and protects against "the misuse of both investigative and prosecutorial powers and can ensure that both investigations and prosecutions are conducted more thoroughly and fairly";[7]

e. Unlike police officers who are closer to the community when exercising their law enforcement functions, Crown Counsel are expected to "consider the merits of a prosecution in a disinterested manner if and when a charge is laid";[8] and

f. In case of disagreements between police and Crown Counsel, "the principles of police and prosecutorial independence allow for this disagreement to be resolved

[4] *Smith v Ontario,* at paras. 69 - 70.

[5] *Smith v Ontario,* at para. 72.

[6] *Smith v Ontario,* at paras. 83 and 122.

[7] *Smith v Ontario,* at paras. 85 – 86.

[8] *Smith v Ontario,* at paras. 64 and 85.

through a public and transparent process in which each actor exercises its appropriate role."[9]

B. The Importance of Maintaining Prosecutorial Immunity in this Case

7. The Associations submit that maintaining prosecutorial immunity in this case, where police officers are seeking to sue the Attorney General for the manner in which Crown Counsel exercised their discretion with respect to tactical and strategic decisions in the course of a criminal proceeding, is especially important for three reasons.

8. First, it is important from a policy perspective. In particular, permitting the Respondents' claim in this case "would engage the twin policy concerns of diversion from public duties and a chilling effect leading to defensive lawyering that gave rise to prosecutorial immunity."[10] In addition, the policy concern with respect to the "chilling effect" includes "the damage that imposing liability would cause to the relationship between Crown Attorneys and the police and the legal principles that underlie this relationship."[11]

9. Second, civil claims between police officers and Crown Counsel engage important constitutional values. For example, police and Crown counsel are "constitutionally independent" – each must exercise their own discretion independently of each other and independently of political interference.[12]

10. In *Miazga v Kvello Estate,* 2009 SCC 51, this Court explained that "[t]he independence of the Attorney General is so fundamental to the integrity and efficiency of the criminal justice

[9] *Smith v Ontario,* at paras. 63 and 86.

[10] *Smith v Ontario,* at para 2 and *Henry v British Columbia (Attorney General),* 2015 SCC 24 at para 71.

[11] *Smith v Ontario,* at para 2.

[12] *Smith v Ontario,* at para 135 and *Miazga v Kvello Estate,* 2009 SCC 51 at para 47.

system that it is constitutionally entrenched."[13] The principle of prosecutorial independence accordingly requires that the Attorney General "act independently of partisan concerns when supervising prosecutorial decisions".[14]

11. The "fundamental importance" of the principle of prosecutorial independence lies in "advancing the public interest by enabling prosecutors to make discretionary decisions in fulfillment of their professional obligations without fear of judicial or political interference."[15] Furthermore, the role of Crown Counsel "is not only to protect the public, but also to honour and express the community's sense of justice."[16] Accordingly, Crown Counsel fulfill a "quasi-judicial" role as "ministers of justice"."[17]

12. In light of the primacy of the principle of prosecutorial immunity from a policy and constitutional perspective, this Court has only permitted judicial oversight of the prosecutorial function in three circumstances: (1) in an action for malicious prosecution which includes an "extremely high threshold" to prove malice in order to succeed; (2) in an action for *Charter* damages for failure to comply with the constitutional duty of disclosure to the accused which requires the accused to establish that Crown Counsel's failure to disclose was intentional and with knowledge that this failure would interfere with the accused's *Charter* right to make full answer and defence and (3) in a review of prosecutorial discretion for abuse of process which only includes "Crown conduct that is egregious and seriously compromises trial fairness and/or

[13] *Miazga v Kvello Estate,* at para 46.

[14] *Miazga v Kvello Estate,* at para 46, citing *Krieger v Law Society of Alberta,* 2002 SCC 65 at para 30.

[15] *R v Anderson,* 2014 SCC 41 at para 37.

[16] *R v Power,* 1994 CanLII 126 (SCC) at p. 616.

[17] *Miazga v Kvello Estate,* at para 47, *Boucher v The Queen,* 1954 CanLII 3 at p. 25.

the integrity of the justice system".[18] Importantly, the high threshold for judicial interference established in these three scenarios is directly in response to the specific policy and constitutional concerns that arise in such cases and are situations in which Crown Counsel owe a duty to the accused to ensure a fair prosecution and trial.

13. For example, as this Court explained in *Miazga v Kvello Estate,* the requirement of malice in the tort of malicious prosecution "is the key to striking the balance that the tort was designed to maintain: between society's interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect."[19]

14. In contrast, the courts' approach of "judicial non-interference with prosecutorial discretion" is based on "the separation of powers doctrine" "as well as a matter of policy founded on the efficiency of the system of criminal justice."[20] Specifically, the separation of powers doctrine means that Crown Counsel acting within their delegated powers are not "subject to interference by other arms of government," including the judiciary.[21]

15. The Associations submit that permitting police officers to sue Crown prosecutors for misfeasance in public office clearly raise similar policy, governance and constitutional concerns considered by this Court in its jurisprudence relating to prosecutorial immunity.[22] In addition, because of the nature of the special relationship between police and Crown Counsel, as discussed

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[18] *Miazga v Kvello Estate,* at paras. 8, 42, 44, and 46, *Krieger v Law Society of Alberta,* at para. 32, *R v Nixon,* 2011 SCC 34 at para. 31, and *R v Anderson,* 2014 SCC 41 at para 50 and *Henry v British Columbia (Attorney General),* 2015 SCC 24 at paras. 84- 85.

[19] *Miazga v Kvello Estate,* at para 56.

[20] *R v Anderson,* 2014 SCC 41 at para 46, citing *R v Power* at p. 623.

[21] *R v Anderson,* 2014 SCC 41 at para 46 and *Krieger v Law Society of Alberta,* at para 45.

[22] *See, e.g. Nelles v Ontario,* 1989 CanLII 77 at p. 199, *Miazga v Kvello Estate,* at paras. 5, 6, 44, 46, 47, 49, 50, 64 and 80 – 81, and *Henry v British Columbia (Attorney General),* 2015 SCC 24 at paras. 66, 71, 73, 74, and 92 - 94.

in *Smith v Ontario*, piercing prosecutorial immunity to allow claims by police officers raises additional constitutional and policy issues. Specifically, such suits would threaten the "mutual independence and distinct roles of police and Crown Attorneys" that is necessary to maintain in order to prevent harm to the proper functioning of the criminal justice system.[23] An action by a police officer in respect of the manner in which Crown Counsel conducted a prosecution or appeal would suggest to the public that the police were "policing prosecutions" which would violate the fundamental constitutional principles referred to above.

16. Finally, permitting police officers to sue Crown Counsel for their highly discretionary strategic and tactical decisions also pose significant practical difficulties. If police are permitted to sue in this case, then Crown Counsel will be exposed to liability from other third parties, including victims of crimes.

17. The Associations submit that the potential exposure of liability to third parties (apart from the police) is a reasonable concern as Crown Counsel are often required to make very difficult decisions which may not align with a victim's specific wishes. For example, in cases involving intimate partner violence or sexual assault, Crown Counsel are mandated by policy to consider the public interest in combatting partner and sexualized violence.[24] Crown Counsel are required to consider this societal interest even if it conflicts with the specific wishes of the victim.

2. Tort of Misfeasance in Public Office is Not Available in this Case

18. Separate and apart from the policy and constitutional concerns that arise with any litigation between police officers and Crown Counsel identified above, the Associations submits that the tort of misfeasance in public office in particular is not available in the circumstances of this appeal.

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[23] *Smith v Ontario,* at para 134.

[24] *See e.g.,* Crown Prosecution Manual, D. 23: Intimate Partner Violence and D. 33: Sexual Offences against Adults.

The Respondents' claim goes far beyond the nature, scope, and purpose of the tort. The Associations submit that the tort of misfeasance in public office is directed at the abuse of government power to the prejudice of members of the public.

19. Although the tort of misfeasance in public office does not require that a public officer owe a duty of care to the plaintiff, the tort does require that the plaintiff establish that the public official breached a duty that he or she owes to the plaintiff.[25] The question is whether the tort encompasses a duty owed by Crown Counsel to the police when the latter claims that he or she was knowingly injured by the alleged unlawful action or inaction of Crown Counsel in respect of litigation decisions made in the course of a prosecution in which they were both engaged.

20. The Associations submit that the tort is directed at the abuse of government power to the prejudice of members of the public to whom public officers are accountable. It was never intended that the tort would give rise to legal actions between different public actors engaged in the administration of justice in respect of a prosecution in which they were both involved. Such a legal action between these public actors would bring disrepute on the administration of justice which the common law should not countenance as the public's confidence in the integrity of independent Crown Counsel decision-making would be undermined.

21. Indeed, the court below referred to this consequence but only in the context of an action for negligence. However, this important consideration is also relevant in an action by a police officer against Crown Counsel for misfeasance in public office where the manner in which the prosecution is conducted is challenged by the police. If a police officer has a concern with the

[25] *See, e.g. Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 32 and *Cable Assembly Systems Ltd. et al v Ben Barnes et al.*, 2019 ONSC 97 at para 58 (reversed in part on award of punitive damages: *Cable Assembly Systems Ltd. v Barnes*, 2019 ONCA 1013 at para 14).

conduct of Crown Counsel during a trial or an appeal, complaints may be made to their employer and/or professional regulatory body.

22. The availability of the tort *only* to members of the public is made clear in the following comments by Justice Iacobucci in the *Odhavji Estate v Woodhouse,* 2003 SCC 69 decision:

> In sum, I believe that the ***underlying purpose*** of the tort is to protect ***each citizen's reasonable expectation*** that a public officer will not intentionally ***injure a member of the public*** through deliberate and unlawful conduct in the exercise of public functions…
>
> …But there is no principled reason, in my view, why a public officer who wilfully ***injures a member of the public*** through intentional abuse of a statutory power would be liable, but not a public officer who wilfully ***injures a member of the public*** through intentional excess of power or deliberate failure to discharge a statutory duty. In each instance, the alleged misconduct is equally inconsistent with the obligation of a public officer not to intentionally ***injure a member of the public*** through deliberate and unlawful conduct in the exercise of public functions.[26]
> (emphasis added)

23. In the context of a criminal prosecution in which they are engaged, police officers are not members of the public. Rather, they are "one arm" of the criminal justice system and as such they are government actors.[27] Indeed, the reason why police office are required to respect the constitutional rights of the accused in the course of exercising their law enforcement functions is because they are government actors by virtue of section 32 of the *Charter*.

24. The Associations submit that permitting police officers to sue Crown Counsel for misfeasance in public office would impermissibly expand the scope of the tort beyond its purpose and intent. Such legal actions would be antithetical to our constitutional system in which Crown Counsel and police are both accountable to the public, not to each other. As explained above, this separation of their roles is constitutionally mandated. Given the fundamental importance of the constitutional and policy driven principles of police and prosecutorial independence to the

[26] *Odhavji Estate v Woodhouse* at para 30.

[27] *Smith v Ontario* at para 134 and *R v Regan*, 2002 SCC 12 at para 67.

administration of justice, this Court should decline the invitation to expand the scope of the tort to permit police officers to sue the Attorney General for misfeasance in public office. Unlike the tort of malicious prosecution, the tort of misfeasance in public office is not designed to respond to the important constitutional and policy interests at stake when Crown Counsel is sued for the exercise of his or her discretion during the course of a prosecution.

3. The Liability Threshold for the Tort of Misfeasance in Public Office is Inadequate

25. Alternatively, if the tort of misfeasance in public office is available to police officers and other third parties, the Associations adopt the submissions of the Appellant that the liability threshold for the tort is inadequate. In addition, it is submitted that it is unreasonable to suggest than an accused whose constitutional interests and liberty were in issue in a malicious prosecution action against Crown Counsel has a higher legal threshold to meet than a third party plaintiff in a misfeasance in public office action who claims that his or her private interests were prejudiced by the conduct of a Crown Counsel during a criminal trial.

PART IV: SUBMISSIONS REGARDING COSTS

26. The Associations do not seek costs and ask that no costs be awarded against them.

PART V: ORDER SOUGHT

27. Pursuant to the order granting the Associations intervener status, the Associations are granted leave to make five (5) minutes argument. The Associations are not requesting any further orders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4th DAY OF AUGUST, 2020.

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PAUL JJ. CAVALLUZZO / ADRIENNE TELFORD / BALRAJ K. DOSANJH

PART VI: TABLE OF AUTHORITIES

Authority	**Paragraph # of Factum**
Boucher v The Queen, 1954 CanLII 3	11
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