SCC File No.:*

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

BETWEEN:

ATTORNEY GENERAL OF ONTARIO

Applicant
(Appellant)

-and-

JAMIE CLARK, DONALD BELANGER and STEVEN WATTS

Respondents
(Respondents)

MEMORANDUM OF ARGUMENT OF THE APPLICANT, ATTORNEY GENERAL OF ONTARIO

(Pursuant to Rule 25 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The proposed appeal affords this Court its first opportunity to address a legal question that is of fundamental importance to the ability of Crown Attorneys to carry out their constitutional duty to prosecute crime: *Are Crown Attorneys absolutely immune from civil liability to claimants who are not and were not the subject of a prosecution?*

2. The Applicant, the Attorney General of Ontario, submits that the Attorney General and Crown Attorneys are absolutely immune from civil liability for private law claims commenced by claimants who are not and were not the subject of a prosecution.

3. This Court has repeatedly expressed the concern that imposing civil liability on Crown prosecutors risks diverting them away from their important duties in the criminal justice system to defend claims in the civil courts and risks chilling prosecutorial conduct by introducing the spectre of civil liability, an inappropriate consideration, into their decision-making.[1] The purpose of the common law prosecutorial immunity is to protect the integrity of the criminal justice system by eliminating these risks and protecting against any undue interference in the work of Crown prosecutors.[2] Given its fundamental importance to the criminal justice system, this Court has recognized just one private law exception to prosecutorial immunity, the tort of malicious prosecution.

4. Whether an exception to prosecutorial immunity should be recognized is, ultimately, a policy question.[3] This Court's approach to assessing civil claims against prosecutors arising from allegations of prosecutorial misconduct involves the careful identification, assessment and balancing of numerous policy factors. In *Nelles,* the matter in which this Court recognized the malicious prosecution exception, the status of the plaintiff as the subject of a prosecution was central to the Court's analysis and ruling. Writing for the majority, Lamer J., emphasized the important purpose served by prosecutorial immunity in balancing that purpose against the policy

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[1] *Nelles v. Ontario,* [1989] 2 SCR 170 ("***Nelles***") at paras.8, 48 - 52; *Henry v. British Columbia (Attorney General),* [2015] 2 SCR 214 ("***Henry***") at para. 71

[2] *Henry, Ibid.* at paras. 50, 70 and 76; *Miazga v. Kvello Estate,* [2009] 3 SCR 339 ("***Miazga***") at paras. 46 – 47.

[3] *Nelles, supra* note 1 at para. 55

concerns raised when "citizens who [have] been wrongly and maliciously prosecuted" are left without a remedy.[4]

5. In particular, Lamer J. held that a prosecutor who engages in a malicious prosecution "depriv[es] an individual of the right to liberty and security of the person in a manner that does not accord with the principles of fundamental justice" and that the application of an absolute immunity in such a scenario would leave a citizen without a remedy to a serious *Charter* violation.[5] Having recognized a compelling policy basis for displacing prosecutorial immunity, the Court held that the difficulty of proving malicious prosecution mitigated the policy concerns that arise when Crown prosecutors are subject to civil liability.[6]

6. The *Nelles* decision provides the framework for recognizing an exception to prosecutorial immunity. Prosecutorial immunity is displaced if there is a compelling policy justification for exposing Crown prosecutors to civil liability and triggering the attendant risks to the administration of justice. Where such a policy justification exists, a court must then establish a high liability threshold to ensure that Crown prosecutors are not unduly impacted by the imposition of civil liability.[7]

7. In this application, the Attorney General seeks leave to appeal from a decision of the Ontario Court of Appeal ("**OCA**") which permits a party other than the subject of a prosecution to sue a Crown prosecutor in misfeasance in public office.

8. In the proceedings below, the Applicant brought a motion to strike the Respondents' Statement of Claim ("**Claim**") alleging negligence and misfeasance against the Attorney General for the conduct of Crown prosecutors in a criminal trial and in a subsequent appeal. The Respondents allege that Crown prosecutors failed to adequately investigate and rebut assault allegations by the accused, resulting in findings by the trial and appeal courts accepting those allegations as true. The Respondents claim that these findings caused them reputational harm.

9. In permitting the misfeasance claim to proceed, the OCA held that an exception to prosecutorial immunity was warranted because misfeasance has a high liability threshold, requiring

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[4] *Ibid*. at para. 55
[5] *Ibid.* at para. 50
[6] *Ibid.* at para. 52
[7] *Ibid.*; See also: *Proulx v. Quebec (Attorney General),* [2001] 3 SCR 9 ("***Proulx***") at para. 4; *Henry, supra* note 1 at paras. 41, 70 and 71

a plaintiff to establish that a public officer engaged in unlawful conduct or acted with an improper motive that is inconsistent with their duties.

10. In arriving at this decision, the OCA failed to identify, as this Court did in *Nelles*, any compelling policy justification in favour of displacing prosecutorial immunity to permit the Respondents' misfeasance claim. Rather, the OCA placed the Respondents, investigating officers in a criminal proceeding, on equal footing with the subjects of a wrongful prosecution. This was an error that warrants correction by this Court.

11. The OCA's decision opens the door to civil liability by Crown prosecutors to an unlimited class of potential claimants. Permitting claims by investigating officers, complainants, witnesses, the families of victims, and the families of accused persons will have serious implications for the conduct of prosecutions. The decisions of Crown prosecutors will be chilled by extraneous considerations: the prospect of civil claims by any party with an interest in a prosecution will result in Crown prosecutors making decisions intended to insulate themselves from civil liability. Crown prosecutors will also be diverted from their functions to respond to and defend these civil actions. Rather than dedicating their limited time to the considerable work of prosecuting crime, they will be required to take on the taxing role of the defendant, responding to claimants' second-guessing their professional judgement.

12. The only viable exception to prosecutorial immunity is for claims brought by persons who are or were the subject of a prosecution. The balancing of interests described by Lamer J. in *Nelles* only weighs in favour of recognizing an exception to prosecutorial immunity where there is a "threat to the individual rights of citizens who have been wrongly and maliciously prosecuted".[8] Where no such threat exists, the policy factors supporting prosecutorial immunity outweigh any interests that might be served by allowing a claim to proceed.

13. Prosecutorial immunity exists to protect the public interest in the proper operation of the criminal justice system. This Court has recognized that any exception to the scope of prosecutorial immunity hinders the administration of justice and thus harms the public interest.[9] The OCA's ruling is the first appellate decision in Canada permitting claims against prosecutors by parties other than the subject of a prosecution. The displacement of prosecutorial immunity in favour of a

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[8] *Nelles, Ibid.* at para. 55

[9] *Ibid.* at para. 56*; Henry, Supra* note 1 at paras. 40 – 41; *Proulx, supra* note 7 at para. 4; *Miazga, supra* note 2 at paras. 47, 52 and 81

new and unrestricted class of claimants will frustrate the proper administration of justice and, accordingly, is an issue of public and national importance. Given this public and national importance, the guidance of this Court on this unprecedented expansion of prosecutorial liability is critical.

B. Facts as pleaded in the Statement of Claim

14. For the purposes of this application, as was the case in the motion and appeal below, the factual allegations in the underlying Claim must be assumed to be true unless they are manifestly incapable of being proven.[10] The Attorney General vigorously denies the allegations of prosecutorial misconduct pled in the Claim.

i. The criminal investigation and prosecution

15. The Respondents, Jamie Clark, Donald Belanger, and Steven Watts, are detectives with the Toronto Police Service. On June 11, 2009, they arrested Randy Maharaj and Neil Singh in connection with an armed robbery. The officers interviewed Mr. Maharaj and Mr. Singh on the same day and both provided videotaped statements. Mr. Singh provided an exculpatory statement, while Mr. Maharaj confessed his and Mr. Singh's involvement in the robbery.

16. On June 12, 2009, during Mr. Maharaj's bail hearing, his lawyer advised the court that Mr. Maharaj had suffered injuries during his interrogation, including visible bumps and scratches under his ear. No further injuries were noted. On July 16, 2010, the preliminary inquiry commenced. The videotaped statements of Mr. Singh and Mr. Maharaj were admitted into evidence. The officers were called as witnesses and denied suggestions they had assaulted Mr. Maharaj. Mr. Maharaj and Mr. Singh were committed to stand trial.

ii. The stay of the charges against Mr. Maharaj

17. On the eve of trial, Mr. Maharaj commenced a *Charter* application to stay his prosecution and to exclude his inculpatory statement on the ground that the police had assaulted him, causing serious bodily harm. His lawyer provided the Assistant Crown Attorney with carriage of the trial (the "**Trial Crown**") with material to support this allegation, including X-Rays of his ribs and a transcript from the bail hearing.

18. After consulting with Mr. Maharaj's treating physician and obtaining his medical records from a pre-trial detention facility, the Trial Crown consulted with a senior Crown Attorney about

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[10] *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 SCR 45 at para. 22

the stay application. Based on the information they had at the time, the senior Crown Attorney and the Trial Crown concluded that Mr. Maharaj's statement could not be proven as voluntary and would thus not likely be admissible. Based on this assessment, they decided to stay the charges against Mr. Maharaj. The stay was entered in November 2011.

iii. Mr. Singh's conviction and appeal

19. Mr. Singh's trial proceeded and he was convicted of armed robbery and forcible confinement by a jury in December 2011. Mr. Singh subsequently brought a *Charter* application to stay his convictions. At the application hearing, Mr. Singh testified that during his interrogation, Sgt. Clark assaulted him while Det. Sgt. Watts observed. Mr. Maharaj also testified and alleged that he was assaulted by Det. Sgt. Belanger and Sgt. Clark. The Trial Crown did not call the Respondents to deny the assault allegations.

20. The presiding judge, Justice Thorburn, dismissed Mr. Singh's request for a stay. Instead, Justice Thorburn ruled that a sentence reduction was the appropriate remedy in light of the uncontested evidence of assault, which she characterized as police brutality. Mr. Singh appealed from his conviction and sentence.

21. Before the appeal hearing, the Ministry of the Attorney General advised the Chief of the Toronto Police Service of its concern about the officers' conduct. The Special Investigations Unit ("**SIU**") was notified and invoked its mandate. On July 4, 2012, the SIU withdrew its mandate after Mr. Maharaj declined to participate in the investigation. The Toronto Police Service Professional Standards Unit ("**TPS PSU**") subsequently reviewed the misconduct allegations and prepared a report concluding that the allegations that the Respondents used excessive force could not be substantiated.

22. On October 18, 2013, the OCA heard Mr. Singh's appeal. Before the hearing, the Crown Attorney with carriage of the appeal (the "**Appeal Crown**"), met with Det. Sgt. Watts and was advised of the Respondents' concerns with what they characterized as the Trial Crown's investigation of the abuse allegations.

23. At paragraph 33 of their Claim, the Respondents allege that the Appeal Crown did not advise the Court of what is described as "…the exculpatory findings with respect to the conduct of the police officers". To the contrary, the transcript of the appeal hearing reveals that the Appeal Crown advised the Court of the existence of the TPS PSU report and offered to file the report with

the Court, stating that "I'm loath to provide fresh evidence to the court just orally, but if it is relevant I would ask for the opportunity subject to submissions from my friend to potentially file that or additional materials if the court deems it relevant." The Court declined her offer.[11]

24. The transcript reflects the Appeal Crown's approach to this issue:

> THE COURT: And I understand that you're prepared to give us this report that was generated and to have us consider it, or do I misunderstand that?
>
> [APPEAL CROWN]: If are no concerns on the part of counsel I would be prepared to file it. I know it is fresh evidence but as well, I'm aware that it may not provide the entire picture and that if the court is concerned about what steps have been taken that perhaps I should make inquiries and provide that fuller information. If I can just confer with my friend for one moment? I mean, my friend has been provided with that report but he notes that they didn't interview the officers involved...
>
> THE COURT: Well I don't know whether we want to see it or not.
>
> [APPEAL CROWN]: . . .and I don't know if he has any objections.
>
> THE COURT: I don't know whether we want to see it or not. All I'm trying to figure out right now is where you stand and I think I've got it. There was an internal investigation. Victims didn't participate. Report was prepared. To your knowledge, no criminal charges, no discipline charges, flowed from that report and if the defence is agreeable you're prepared to share them, to put the court, to put the report before the court.
>
> [APPEAL CROWN]: That's correct.
>
> THE COURT: All right. I think I understand that, thank you.[12]

25. On December 12, 2013, the OCA allowed the appeal and stayed Mr. Singh's convictions. In its decision, the Court severely criticized the Respondents for what it characterized as egregious police misconduct".

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[11] Transcript, *R v. Singh*, Ontario Court of Appeal, dated December 13, 2013, Tab 8 at pg. 23; **Note**: The transcript was before both the Motion Judge and the OCA. The Motion Judge denied the Applicant's attempt to rely on the transcript on a Rule 21.01(b) motion to strike. While the Applicant took issue with this decision at the hearing of the appeal, it did not formally appeal the point and the OCA did not comment on it in its reasons.

[12] *Ibid.* at pg. 62 – 63

iv. The civil action against the Attorney General

26. On June 22, 2016, the Respondents commenced the underlying civil action in negligence and misfeasance against the Attorney General based on the alleged misconduct of the Trial Crown, Senior Crown and Appeal Crown. The Respondents seek $1.25 million in general and punitive damages, along with a "declaration that the [Respondents] did not assault [Mr. Maharaj] and [Mr. Singh]".[13]

27. The Claim is anchored on the assertion that the Crown prosecutors were required to do more on the Respondents' behalf in response to the assault allegations. With respect to the Trial Crown, the Respondents allege that she was negligent in failing to, among other things, adequately investigate the allegations of assault; review and call contradictory evidence; and call the Respondents to provide testimony refuting the allegations. With respect to the Appeal Crown, the Respondents allege she was negligent in, among other things, failing to bring a fresh evidence application and failing to advise the OCA of "compelling evidence to suggest that the allegations of assault" were false.[14]

28. While the core allegations sound in negligence, the Respondents also "dress up" these allegations and advance them separately as a misfeasance claim. While none of the above-noted conduct is, on its face, unlawful conduct, the Respondents baldly allege that the otherwise lawful conduct of the Crown prosecutors was rendered unlawful because it violated the prosecutorial duty to "act without favour or affection". The only particularization of "partiality" is an allegation that the Appeal Crown acted to shield the Trial Crown's conduct from review. As a result of this pleading, the OCA held that the misfeasance claim was "focused" on the Appeal Crown's conduct. The Respondents plead that the Crown prosecutors knew or ought to have known that their conduct was unlawful.

v. The Attorney General's motion to strike

29. The Attorney General moved to strike the Respondents' claim pursuant to Rules 21.01(1)(a) and (b) of Ontario's *Rules of Civil Procedure*[15]on the grounds that the action was commenced after the expiry of the applicable limitation period and that the Claim failed to disclose a reasonable cause of action in negligence or misfeasance.

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[13] Statement of Claim, Tab 7 at para. 1
[14] *Ibid.* at para. 43(xiii)
[15] *Rules of Civil Procedure*, R.R.O. 1990, Reg 194

C. Decisions of the courts below

i. Superior Court of Justice

30. In rulings released January 4, 2017 and June 13, 2017, Stinson J. ("**the Motion Judge**") dismissed the Attorney General's motion to strike the Claim on the limitations issue and partially granted the motion to strike the Claim for failing to disclose a reasonable cause of action.

31. In dismissing the motion to strike the Claim on limitations grounds, the Motion Judge held that in the circumstances of this case the complete factual context was required before the issue could be determined and thus it was not appropriate to decide the issue in a pleadings motion.[16]

32. With respect to the negligence claim, the Motion Judge held that this Court's jurisprudence on prosecutorial immunity did not conclusively establish that investigating officers could not sue Crown prosecutors in negligence. Nevertheless, the Motion Judge struck the negligence claim on the basis that residual policy concerns negated a *prima facie* duty of care owed by the Trial and Appeal Crown to the Respondents.[17]

33. Finally, the Motion Judge rejected the Attorney General's submission that the there is no exception to prosecutorial immunity that permits investigating officers to claim against Crown prosecutors in misfeasance. The Motion Judge held that the Respondents adequately pleaded the elements of misfeasance and, as a result, refused to strike the misfeasance claim.[18]

34. The Attorney General appealed the Motion Judge's misfeasance and limitations rulings. The Respondents appealed the dismissal of their negligence claim. The three appeals were heard together by the OCA in October 2018.

ii. Court of Appeal for Ontario

35. On April 18, 2019, the OCA dismissed the three appeals. In dismissing the misfeasance appeal, the Court rejected the Attorney General`s submission that there is no recognized exception to prosecutorial immunity that allows for civil liability by Crown prosecutors to investigating officers for misfeasance.

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[16] *Clark v. Ontario (Attorney General)*, 2017 ONSC 43 (S.C.J.) at para. 21
[17] *Clark v. Ontario (Attorney General)*, 2017 ONSC 3683 (S.C.J.) at para. 137
[18] *Ibid.* at paras. 149 – 150

36. The Court observed that the "deliberate abuse of authority" is "the nerve" of this Court's jurisprudence governing the liability of prosecutors.[19] The Court held that the policy factors that justify restricting exposure to civil liability necessitated a "high liability threshold" for any cause of action against a Crown prosecutor and that misfeasance meets this threshold because a claimant must establish unlawful conduct to succeed.[20]

37. As detailed above, the OCA did not identify any compelling policy basis for permitting an exception to prosecutorial immunity for misfeasance claims commenced by investigating officers. In addition, the OCA's decision does not set out a principled basis for limiting the availability of the misfeasance exception to two categories of claimants: the subject of the prosecution and investigating officers. As a result, the OCA has opened the door for *any* claimant to commence an action in misfeasance against a Crown prosecutor, including complainants, families of victims, and witnesses in a criminal trial.

38. The OCA held that the Claim adequately pleads the elements of misfeasance. In arriving at this conclusion, the OCA did not seek to reconcile the Respondents' allegations with the proper conduct of a criminal prosecution and appeal. In particular, with respect to the conduct of the Appeal Crown, the OCA did not address the clear conflict between the steps the Respondents allege the Appeal Crown was required to take and, among other things, the rules of professional conduct (including the specific rules as set out in the Crown Prosecution Manual); the rules governing the introduction of fresh evidence; the propriety of litigating new issues on appeal; and the propriety of revisiting issues on appeal that were conceded by the Crown at trial.

PART II: QUESTIONS IN ISSUE

39. The Attorney General only seeks leave to appeal the OCA's misfeasance decision. The proposed appeal raises the following issues of public and national importance that warrant a decision by this Court:

A. Are the Attorney General and its agents, Crown Attorneys, absolutely immune from civil liability to claimants who are not and were not the subject of a prosecution?

B. Should misfeasance claims against Crown prosecutors based on allegations of recklessness or wilful blindness be prohibited?

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[19] *Clark v. Ontario (Attorney General)*, 2019 ONCA 311 at paras. 109 – 110
[20] *Ibid.* at para. 113

PART III: ARGUMENT

A. Are the Attorney General and its agents, Crown Attorneys, absolutely immune from civil liability to claimants who are not and were not the subject of a prosecution?

i. This issue is one of national and public importance

40. The OCA's decision marks the first time an appellate court in Canada has ruled that a Crown prosecutor may be civilly liable to a claimant who is not and was not the subject of a prosecution.[21] The decision represents a significant expansion of the scope of prosecutorial liability in Ontario and, unless this Court intervenes, it will have significant and far-reaching implications for Crown prosecutors and the criminal justice system.

41. The risks associated with trenching on prosecutorial immunity are well known. The prospect of civil liability risks diverting Crown prosecutors from their duties, requiring them to dedicate limited time and resources to responding to civil claims challenging their conduct. In addition, prosecutorial decision-making risks being chilled where civil liability looms: decisions may be made based on extraneous factors and interests, rather than the proper conduct of the prosecution.[22] These risks conspire to impair the proper functioning of the criminal justice system and reduce public confidence in the administration of justice. Thus, this issue is inherently one of tremendous public importance.

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[21] The issue of whether a party other than the subject of a prosecution is permitted to claim against a Crown prosecutor does not appear to have received judicial consideration. There are at least two lower court decisions in which an action against a Crown prosecutor by a claimant who was not the subject of a prosecution survived pleadings motions: In *Polsom v Couston*, 2014 ABQB 43 (Master), the plaintiff was the complainant. In *Driskell v. Dangerfield et al*, 2007 MBQB 142, varied for unrelated reasons, 2008 MBCA 60, the plaintiff was the accused's mother. In *Smith v. Ontario*, 2018 ONSC 993 (Div. Ct.) the Divisional Court struck a negligence claim by police officers against Crown prosecutors on the basis of prosecutorial immunity. **Note**: The OCA has ruled on two previous occasions that the subject of a prosecution could not sue a Crown prosecutor in misfeasance. The OCA's decision does not refer to these decisions (*Abernethy v. Canada*, 2017 ONCA 340 at para. 5 and *Brummell v. Ontario*, 2014 ONCA 828)

[22] *Nelles, supra* note 1 at paras. 17 and 48 – 52; *Henry*, s*upra* note 1 at paras. 71 – 73

42. If this Court does not intercede to clarify the scope of prosecutorial immunity, the OCA's approach may be adopted in other provinces. The prospect of having to defend against civil claims by any and all third parties in a criminal prosecution, and not just the subject of a prosecution, will give rise to the very real risk that Crown prosecutors across Canada will be diverted from their duties to defend their conduct in the civil courts and that their prosecutorial decisions will be influenced by factors extraneous to the proper conduct of the prosecution. This risk renders this issue one of national importance.

ii. The central importance of prosecutorial immunity

43. Prosecutorial immunity is closely guarded in Canada: the central importance of the prosecutorial function in our society and the risks posed by even the prospect of interference with that function have resulted in Courts exercising a great deal of care and restraint in response to efforts to expand the scope of the civil liability of Crown prosecutors.

44. The principal function of the Attorney General and its agents, Crown Attorneys, in the criminal justice system is the prosecution of offenders.[23] In carrying out this role, this Court has noted that a Crown Attorney "ought to regard himself as part of the Court rather than an advocate".[24] In *Boucher v. The Queen*, this Court observed that a Crown prosecutor's function is "a matter of public duty than which in civil life there can be none charged with greater personal responsibility."[25]

45. Prosecutorial immunity is founded on the fundamental need to ensure that the Attorney General and Crown Attorneys are able to act independently in carrying out their quasi-judicial roles as "ministers of justice".[26] Writing for the majority in *Nelles v. Ontario,* Lamer J. held that prosecutorial immunity prevents Crown Attorneys from being "hindered in the proper execution" of their duties.[27] In his concurring reasons, McIntyre J. noted the "social need to have prosecutors

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[23] *Nelles, Supra* note 1 at para. 38
[24] *Ibid.* at para. 39
[25] *Boucher v. The Queen*, [1955] S.C.R. 16 at pg. 24
[26] *Boucher, Ibid.* at pg. 25 – 26 ; *Miazga, supra* note 2 at para. 46; *Krieger v. Law Society of Alberta,* [2002] 3 S.C.R. 372 at para. 30
[27] *Nelles, supra* note 1 at para. 56 and 60

who are charged with the prosecution of criminal cases freed from the threat of civil action, so that they may fearlessly and objectively conduct the prosecutions".[28]

46. These sentiments were echoed by this Court in *Miazga v Kvello Estate*, where prosecutorial immunity was described as allowing for the "effective and uninhibited prosecution of criminal wrongdoing" and ensuring "society's interest in the effective administration of criminal justice".[29]

iii. The limited exception to prosecutorial immunity recognized by this Court

47. In *Nelles*, this Court held that Crown prosecutors may be liable for malicious prosecution.[30] Importantly, a claim in malicious prosecution may only be brought by the subject of a prosecution.[31] In *Henry v. British Columbia (Attorney General),* 2015 SCC 24 ("***Henry***"), this Court held that the Crown may also be liable for damages under the *Charter* where a Crown prosecutor intentionally failed to disclose information they knew, or would reasonably be expected to have known, was material to the defence.[32]

48. While *Henry* addressed the question of when *Charter* damages would be appropriate, and not the issue of whether prosecutorial immunity applies to bar a *Charter* claim, the Court carried out the same analysis and applied the same principles it has used in its decisions on prosecutorial immunity. As in *Nelles*, this cause of action may only be advanced by the subject of a prosecution.

iv. The policy factors which must inform the analysis

49. In *Nelles*, this Court observed that the decision whether or not to recognize an exception to prosecutorial immunity "ultimately boils down to a question of policy".[33] The exception to liability identified in *Nelles* was carefully and narrowly crafted by the Court after it identified, assessed, and balanced the important purposes of prosecutorial immunity against the compelling factors supporting the recognition of the exemption.[34]

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[28] *Ibid.* at para. 72
[29] *Miazga, supra* note 2 at paras 52 and 56.
[30] *Nelles, supra* note 1 at para. 56
[31] *Ibid.* at para. 42
[32] *Henry, supra* note 1 at para. 31
[33] *Nelles, supra* note 1 at para. 55
[34] The principles underlying the Court's decision in *Nelles* were restated and affirmed by this Court in 2001 in *Proulx, supra* note 7, and in 2009 in *Miazga, supra* note 2

50. In *Henry*, the Court used the term "good governance concerns" to describe the policy factors which justify the preservation of prosecutorial immunity.[35] The term was adopted from this Court's decision in *Vancouver (City) v. Ward,* 2010 SCC 27, where it was used to describe the considerations militating against the award of *Charter* damages.[36]

51. In the context of prosecutorial immunity, good governance concerns are engaged "wherever there is a risk of undue interference with the ability of prosecutors to freely carry out their duties in furtherance of the administration of justice".[37] These concerns are not limited to circumstances where Crown prosecutors exercise of particular functions or where a prosecutor is exercising core prosecutorial discretion.

52. The risk of diverting prosecutors from their duties is one good governance concern considered by courts in this context. The Court in *Henry* described this concern as it applied to the claim before it: "if every minor instance of wrongful non-disclosure were to expose prosecutors to liability for *Charter* damages, they would find themselves spending much of their limited time and energy responding to lawsuits rather than doing their jobs."[38]

53. The Court warned that creating an unduly permissive exception to prosecutorial immunity would not serve the public interest:

> [Crown prosecutors] "would be constantly enmeshed in an **avalanche of interlocutory civil proceedings and civil trials**", an outcome that "bode[s] ill for the efficiency of [Crown prosecutors] and the quality of our criminal justice system" … That avalanche would no doubt contain a few strong claims of serious wrongful non-disclosure but would invariably bring with it scores of meritless claims, **each of which would have to be defended at the expense of core Crown functions**. The 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. [39][emphasis added]

54. Another good governance factor identified by the courts is the potential that civil liability will have a chilling effect on prosecutorial conduct, resulting in decisions made in response to concerns about civil liability rather than the exercise of sound legal judgement and the proper conduct of prosecutions. In *Henry*, the court warned that the "mere fact of having to respond to an

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[35] *Henry, supra* note 1 at para. 39
[36] *Vancouver (City) v. Ward,* 2010 SCC 27 at paras. 38 – 41
[37] *Henry, supra* note 1 at para. 76
[38] *Ibid.* at 72; *Nelles, supra* note 1 at paras. 17 and 52
[39] *Henry, supra* note 1 at para. 72

onslaught of litigation" would chill the actions of prosecutors.[40] The chilling effect would result in prosecutorial decisions made for extraneous reasons:

> Fear of civil liability may lead to defensive lawyering by prosecutors. One consequence of this defensive approach would be disclosure decisions motivated less by legal principle than by a calculated effort to ward off the spectre of liability. **The public interest is undermined when prosecutorial decision-making is influenced by considerations extraneous to the Crown's role as a quasi-judicial officer**.[41] [emphasis added]

55. These chilling effects erode societal trust and confidence in prosecutors and the criminal justice system more broadly. In *Imbler v Pachtman*, 424 U.S. 409 (1976), cited by this Court in *Nelles*, the U.S. Supreme Court described this concern: "[t]he public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages". [42] The Court in *Nelles* characterized prosecutorial immunity as "encourag[ing] public trust and confidence in the impartiality of prosecutors".[43]

v. The proper scope of prosecutorial immunity excludes liability to claimants who are not and were not the subject of a prosecution

56. Properly construed, prosecutorial immunity should operate to immunize the Attorney General and Crown prosecutors from liability for civil claims, including misfeasance claims, by parties who are not and were not the subject of a prosecution. The potential consequences faced by third parties who are barred from suing Crown prosecutors are not serious enough to justify the interference and disruption to the criminal justice system that will arise if prosecutorial immunity is pierced to permit their claims.

57. This approach is guided by this Court's advice in *Henry* that "[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".[44]

58. Restricting the scope of prosecutorial liability to the subject of a prosecution is consistent with this Court's rulings in *Nelles* and *Henry*, both of which provided for causes of action by the subject of a prosecution alone in recognition of the fact that prosecutorial immunity must be safeguarded to avoid interference with the work of Crown prosecutors.

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[40] *Ibid.* at para. 94; See *Nelles, supra* note 1 at paras. 51 – 52
[41] *Henry, Ibid.* at para. 73
[42] *Imbler v Pachtman,* 424 U.S. 409 (1976) (S.C.O.T.U.S.) at 424
[43] *Nelles, supra* note 1 at para. 49
[44] *Henry, supra* note 1 at para. 81

59. In *Henry*, the Court's analysis demonstrated that prosecutorial immunity should only be pierced in order to safeguard the integrity of the judicial process. The Court drew an analogy between malice, which must be established to succeed in a claim for malicious prosecution, and abuse of process, which must be established to justify judicial review of a core prosecutorial decision. While taking care to note that the two standards are distinct, the Court observed that:

> … they have a similar purpose: they are high standards *deliberately designed* to capture only very serious conduct that undermines the integrity of the judicial process. By preserving the high bar for judicial intervention, the exercise of prosecutorial discretion can be properly protected".[45]

60. In *Nelles*, the Court discussed the impact of prosecutorial immunity on the victim of a malicious prosecution as a compelling policy factor in favour of creating an exemption. Importantly, the analysis turns on the particular and significant impact a malicious prosecution has on the accused.[46] Similarly, in *Proulx*, a majority of this Court cited the ability of "individuals caught up in the justice system" to be "protected from abuses of power" to illustrate the need to ensure that "prosecutors are not above the law and must be held accountable".[47] This interest, and the policy factors which make it important, do not exist where the litigants are not "caught up in the justice system".

61. The ruling in *Nelles* makes it clear that, on balance, the policy factors favour establishing an exception to prosecutorial immunity to permit civil liability for malicious prosecution because of the very serious consequences faced by an accused who is maliciously prosecuted:

> "We must be mindful that an absolute immunity has the effect of negating a private right of action and in some cases may bar a remedy under the *Charter*. As such, the existence of absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted."[48]

62. Where the subject of a prosecution is faced with intentional prosecutorial misconduct, her liberty interests and *Charter* rights are placed at risk. The consequences faced by other participants do not rise to this level of seriousness. For example, the reputational harm the Respondents' claim resulted from the alleged misconduct of the Crown prosecutors in this case does not rise to a level of seriousness which would justify an exception to prosecutorial immunity to permit their claim.

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[45] *Ibid.* at 50
[46] *Nelles*, *supra* note 1 at para. 50
[47] *Proulx*, *supra* note 7 at para. 4
[48] *Nelles*, *supra* note 1 at para. 55

63. Permitting third parties such as investigating officers, complainants, families of victims, or witnesses to claim against Crown prosecutors gives rise to the significant and systemic consequences that prosecutorial immunity seeks to avoid. The ways in which these risks will be manifested are infinitely varied, given the broad number of potential complainants and the many different aspects to a criminal prosecution they may seek to impugn.

64. It is inevitable that Crown prosecutors will be influenced by extraneous considerations given the potential that they may face a civil claim by any person with an interest in a prosecution who is dissatisfied with their conduct. The looming threat of civil liability will inevitably influence their decision-making and conduct. For example, a Crown prosecutor may feel compelled to pursue a prosecution where there is no reasonable prospect of conviction in order to avoid litigation by a dissatisfied complainant. A Crown prosecutor wary of a civil claim may seek to adjourn a trial to allow for allegations such as those raised in this action to be investigated by a third party, such as the SIU.

65. The underlying Claim illustrates this risk: if the OCA's decision is permitted to stand, Crown prosecutors would be obligated to consider the reputational interests of investigating officers and other third parties when making decisions in a trial and on appeal. Considering and acting upon this irrelevant consideration will give rise to serious risks and conflicts.

66. These risks and conflicts are myriad. Based on the allegations in the Claim, the Respondents contend that the Trial Crown should have called evidence to rebut the assault allegations, despite her assessment of their merit. In doing so, the Trial Crown would have been required to alter the dynamic of the prosecution, incorporating and privileging the interests of the investigating officers and displacing, if not subordinating, the rights of the accused. Any attempt to introduce evidence that is potentially inadmissible and in any event not relevant to whether the presumption of innocence of the accused can be rebutted would distract from and prolong the prosecution.

67. With respect to the Appeal Crown, the Respondents' contention that she should have brought a fresh evidence motion would similarly conflict with her obligations and impair the conduct of the appeal. The allegedly exculpatory evidence itself would arguably not be admitted under the *Palmer* test. The first consideration under the *Palmer* test is whether the evidence available by the exercise of due diligence and, if so, is there a satisfactory explanation for the failure

to produce the evidence at trial.[49] Here, the bulk of the evidence was available at trial and the Crown expressly decline to litigate the issue.

68. In this case, pursuing the fresh evidence application would have placed the Appeal Crown in the untenable position of having to argue an issue that the Trial Crown declined to litigate at trial. In doing so, the Appeal Crown would have to repudiate the position of the Trial Crown, despite this Court's clear direction against this practice and despite the risks of implicating the fairness of the trial.[50] Once again, the interests and rights of the accused, which should be primary, would be displaced in favour of those of the Respondents.

69. Commencing a fresh evidence motion would have been tantamount to arguing an entirely new issue on appeal (i.e. contesting whether the Respondents assaulted Mr. Singh). As this Court is well aware, there is a general prohibition on the Crown arguing entirely new positions on a criminal appeal because, amongst other things, the unfairness to accused who may have litigated the trial in a different manner.[51]

70. The actions that the Respondents alleged should have been taken by the Trial Crown and Appeal Crown would all be in partial or complete conflict with the core duties and standards of practice of Crown prosecutors who are directed to exercise their duties and discretion without regard to "the possible effect on the personal or professional circumstances of anyone connected to the exercise of prosecutorial discretion".[52] In fact, where a Crown prosecutor has exercised their discretion in favour of the reputational interests of investigating officers, this Court has found that to be an improper purpose or motive in a malicious prosecution claim.

71. These actions would also result in significant additional delay in the conduct of trials and appeals, monopolizing scarce judicial resources. Crown prosecutors, already tasked with making difficult judgment calls in complex, nuanced circumstances, will naturally and inevitably consider the interests of third parties in their decision-making to avoid the prospect of civil liability. The allegations in the Claim, accepted on their face, aptly illustrate just how extreme the consequences of this new paradigm will be.

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[49] *Palmer v. The Queen*, [1980] 1 SCR 759; *R. v. M.(P.S.),* 1992 CanLII 2785 (O.N.C.A.)
[50] *R. v. Trabulsey,* [1995] O.J. No. 542 (C.A.) at paras. 17 – 18; *R. v. Patel,* 2017 ONCA 702 at paras. 56 – 64
[51] *R. v. Reid,* 2016 ONCA 524, leave refused, [2016] SCCA No 432, at paras. 37 – 44
[52] Ontario, Ministry of the Attorney General, *Crown Prosecution Manual,* at pg. 4 and 17

72. Granting an exception to prosecutorial immunity for individuals who were not the subject of a prosecution will also divert prosecutors away from their criminal justice duties toward defending their conduct in civil actions. Given the ease with which even intentional claims such as misfeasance can be pled, as exemplified by this Claim, such an exception will undoubtedly result in an increased number of claims commenced against Crown prosecutors. Even where a claim is addressed through a motion for summary judgment, the Crown prosecutor's time and energy will be consumed with the process of preparing an affidavit and being cross-examined, among other tasks, instead of prosecuting crime.

73. The question of whether these outcomes are warranted when balanced against the interest in providing claimants who were not the subject of a prosecution with civil recourse where they are dissatisfied with the conduct of a Crown prosecutor is one of broad public importance. The consequences of exposing Crown prosecutors to civil liability to the Respondents and claimants like them are significant. This Court should decide whether those consequences are justified.

B. Should misfeasance claims against Crown prosecutors based on allegations of recklessness or wilful blindness be prohibited?

74. The OCA's ruling establishes an exception to prosecutorial immunity for misfeasance claims based on the high threshold to establish liability for the tort. However, the OCA failed to account for misfeasance claims based on allegations of recklessness or wilful blindness. Given the prospect of Crown prosecutors having to defend and facing claims based on unintentional misconduct, this is an issue of public importance and requires this Court's consideration.

75. A claim in misfeasance is based on the allegation that a public officer: a) exercised her authority for an ulterior and improper purpose and b) that the public officer was aware that her conduct was likely to injure the plaintiff.[53] Both elements of the tort may be established by proving that the public officer was "subjectively reckless" or "wilfully blind".[54]

76. In the misfeasance section of the Claim, the Respondents assert that the Trial Crown and Appeal Crown deliberately engaged in unlawful conduct with the knowledge that it was likely to harm them. However, in the negligence section of the Claim the Respondents plead that the Crown

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[53] *Odhavji Estate v. Woodhouse*, [2003] 3 SCR 263 at para. 32

[54] *Ibid.* at para 38; *Capital Solar Power v Ontario Power Authority*, 2015 ONSC 2116 (S.C.J.) at para 18; *Powder Mountain Resorts Ltd. v. British Columbia*, 2001 BCCA 619 at para. 7

prosecutors "ought to have known" that the alleged misconduct would cause them injury.[55] It is thus possible that the Respondents may seek to establish their misfeasance claim based on a recklessness or wilful blindness standard if the Claim is adjudicated.

77. This lower standard cannot be reconciled with this Court's jurisprudence on prosecutorial immunity. In *Proulx*, the majority expressly rejected a recklessness standard, holding that a malicious prosecution claim "[m]ust be based on more than recklessness or gross negligence. Rather, it requires evidence that reveals a willful and intentional effort on the Crown's part to abuse or distort its proper role within the criminal justice system"[56]

78. This holding was affirmed in *Miazga*, where Charron J. held that "[i]n the context of a case against a Crown prosecutor, malice does not include recklessness, gross negligence or poor judgment".[57] The reliance on the malice standard and the difficulty of proving malice or intent is an "intentional choice" of this Court, intended to preserve the careful balance between the right of individual citizens to be free from prosecutorial misconduct and the public interest in the effective, uninhibited prosecution of criminal wrongdoing.[58]

79. A lower threshold for prosecutorial liability contradicts this Court's clearly stated approach to exceptions for prosecutorial immunity. The lower threshold also creates the very real prospect of Crown prosecutors facing civil liability for unintentional conduct. The risk of civil liability may result in overly cautious lawyering and responding to claims will divert Crown prosecutors from their duties. These consequences make this issue one of public importance and this Court should have an opportunity to consider and decide it.

CONCLUSION

80. If leave is granted, the Attorney General will argue that only the subject of a prosecution should be entitled to sue a Crown prosecutor. In their Claim, the Respondents have recharacterized a negligence claim that would otherwise be prohibited by prosecutorial immunity as a claim in misfeasance by appending a brief and bald allegation of intentional misconduct to it. In advancing this secondary argument, the Respondents have raised a spectre of civil liability that risks significant consequences: conflicted prosecutors, dysfunctional prosecutions, and, ultimately, a

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[55] Statement of Claim, Tab 7 at para 44
[56] *Proulx*, *supra* note 7 at 35; *Miazga*, *supra* note 2 at paras. 8 and 81
[57] *Miazga*, *Ibid.* at para. 8
[58] *Ibid.* at para. 52

compromised criminal justice system. Where the claimant is or was the subject a prosecution, the relatively limited number of potential claims and the policy interest in protecting their rights renders this an acceptable trade-off. However, other claimants lack any interest that warrants displacing the immunity. Given the scale of potential claims and the risks associated with exposing Crown prosecutors to civil liability, parties other than the subject of a prosecution should not be entitled to pierce prosecutorial immunity.

81. Where a misfeasance claim is commenced by the subject of a prosecution, the Attorney General will submit that it must be based on allegations of intentional misconduct and not the lower standards of subjective recklessness or wilful blindness. Actual knowledge of unlawful conduct and likely harm is necessary in order to ensure the high liability threshold required to mitigate the risks associated with exposing Crown prosecutors to civil liability.

PART IV: COSTS

82. The Attorney General of Ontario seeks its costs for this application.

PART V: ORDER SOUGHT

83. The Attorney General of Ontario respectfully requests that leave to appeal be granted from the decision of the Court of Appeal dated April 18, 2019, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of June 2019.

Per: _____

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PART VI: TABLE OF AUTHORITIES

	Authority	Paragraph Referenced
	Jurisprudence	
1.	*Abernethy v. Canada*, 2017 ONCA 340	40
2.	*Brummell v. Ontario*, 2014 ONCA 828	40
3.	*Boucher v. The Queen*, [1955] S.C.R. 16	44, 45
4.	*Capital Solar Power v Ontario Power Authority*, 2015 ONSC 2116 (S.C.J.)	75
5.	*Clark v. Ontario (Attorney General)*, 2017 ONSC 43 (S.C.J.)	31
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8.	*Driskell v. Dangerfield et al*, 2007 MBQB 142, varied for unrelated reasons, 2008 MBCA 60	40
9.	*Henry v. British Columbia (Attorney General)*, [2015] 2 SCR 214	3, 6, 13, 41, 47 – 54, 57, 59
10.	*Imbler v. Pachtman*, 424 U.S. 409 (1976) (S.C.O.T.U.S.)	55
11.	*Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372	45
12.	*Miazga v. Kvello Estate*, [2009] 3 SCR 339	3, 13, 45, 46, 49, 77, 78
13.	*Nelles v. Ontario*, [1989] 2 SCR 170	3 – 6, 12, 13, 41, 44, 45, 47, 49, 52, 54, 55, 58, 60, 61
14.	*Odhavji Estate v. Woodhouse*, [2003] 3 SCR 263	75
15.	*Palmer v. The Queen*, [1980] 1 SCR 759	67
16.	*Polsom v. Couston*, 2014 ABQB 43 (Master),	40
17.	*Powder Mountain Resorts Ltd. v. British Columbia*, 2001 BCCA 619	75
18.	*Proulx v. Quebec (Attorney General)*, [2001] 3 SCR 9	6, 13, 49, 60, 77
19.	*R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 SCR 45	14
20.	*R. v. M.(P.S.)*, 1992 CanLII 2785 (O.N.C.A.)	67

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21.	*R. v. Patel*, 2017 ONCA 702	68
22.	*R. v. Reid*, 2016 ONCA 524, leave refused, [2016] SCCA No 432	69
23.	*R. v. Trabulsey*, [1995] O.J. No. 542 (C.A.)	68
24.	*Smith v. Ontario*, 2018 ONSC 993 (Div. Ct.)	40
25.	*Vancouver (City) v. Ward*, 2010 SCC 27	50
Secondary Sources		
26.	Ontario, Ministry of the Attorney General, *Crown Prosecution Manual*	38, 70

PART VII: STATUTES, LEGISLATION, RULES, ETC.

	Statute, Legislation, Rule, Etc.	**Section, Rule No., etc.**
1.	*Ministry of the Attorney General Act*, R.S.O. 1990, c M.17	s. 5 and s. 8.
	Loi sur le Ministère du Procureur général, LRO 1990, c M.17	s. 5 and s. 8
2.	*Crown Attorneys Act*, R.S.O. 1990, c C.49	s. 1, s. 2, s. 8 and s. 11
	Loi sur les procureurs de la Couronne, LRO 1990, c C.49	s. 1, s. 2, s. 8 and s. 11
3.	*Rules of Civil Procedure*, R.R.O. 1990, Reg 194	21.01(1)(a) and (b)

***Rules of Civil Procedure*, R.R.O. 1990, Reg 194, R. 21.01(1)(a) and (b)**	**Règles de Procédure Civile, RRO 1990, Règl 194, R. 21.01(1)(a) and (b)**
To Any Party on a Question of Law	***À toutes les parties sur une question de droit***
21.01 (1) A party may move before a judge,	**21.01** (1) Une partie peut demander à un juge, par voie de motion :
(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or	a) soit, qu'une question de droit soulevée par un acte de procédure dans une action soit décidée avant l'instruction, si la décision de la question est susceptible de régler la totalité ou une partie de l'action, d'abréger considérablement l'instruction ou de réduire considérablement les dépens;
(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,	b) soit, qu'un acte de procédure soit radié parce qu'il ne révèle aucune cause d'action ou de défense fondée.

***Rules of Civil Procedure*, R.R.O. 1990, Reg 194, R. 21.01(1)(a) and (b)**	**Règles de Procédure Civile, RRO 1990, Règl 194, R. 21.01(1)(a) and (b)**
and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).	Le juge peut rendre une ordonnance ou un jugement en conséquence. R.R.O. 1990, Règl. 194, par. 21.01 (1).