

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)

**REPLY OF THE APPLICANT,
ATTORNEY GENERAL OF ONTARIO**

(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

Attorney General for Ontario

Crown Law Office - Civil
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9

Sunil S. Mathai

Ananthan Sinnadurai

Tel: 416.910.8789

Fax: 416.326.4656

Email: sunil.mathai@ontario.ca

ananthan.sinnadurai@ontario.ca

Counsel for the Applicant,
Attorney General of Ontario

Borden Ladner Gervais LLP

World Exchange Plaza
1300 –100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron

Tel: 613.369.4795

Fax: 613.230.8842

Email: kperron@blg.com

Ottawa Agent for the Applicant,
Attorney General of Ontario

ORIGINAL TO: **Registrar**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPY TO:

Brauti Thorning LLP
161 Bay Street, Suite 2900,
Toronto, ON M5J 2S1

Lorne Honickman
Michael Lacy
Tel.: 416.360.2786
Fax: 416.362.8410
Email: lhonickman@btlegal.ca
mlacy@btlegal.ca

Counsel for the Respondents,
Jamie Clark, Donald Belanger and Steven
Watts

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

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

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

Table of Contents

MEMORANDUM OF ARGUMENT	1
A. The issues raised by the Applicant are of significant public importance.....	1
B. Malice alone does not justify piercing prosecutorial immunity.....	1
C. Good governance concerns must inform the liability threshold	3
PART VI: TABLE OF AUTHORITIES	7
PART VII: STATUTES, LEGISLATION, RULES, ETC.	8

MEMORANDUM OF ARGUMENT

A. The issues raised by the Applicant are of significant public importance

1. The only issue in this application is whether the Court of Appeal for Ontario's ("OCA") unprecedented expansion of prosecutorial liability raises issues of sufficient public importance. The Respondents have not addressed this issue and have not challenged the Applicant's position that the issues raised in the proposed appeal are of such public importance that they ought to be decided by this Court. As this Court's decisions in the malicious prosecution trilogy¹ and *Henry*² demonstrate, efforts to expand civil liability for prosecutorial misconduct raise good governance concerns directly impact the effectiveness of the criminal justice system. These issues are of inherent and significant public importance.³

2. Instead of addressing the test for leave to appeal, the Respondents assert that there are "no compelling practical nor policy reasons to limit the liability of the Crown only to criminal defendants who were the subject of a prosecution".⁴ As set out in the Application for Leave, there are a number of policy concerns which favour limiting civil liability for prosecutorial misconduct to claims that include an allegation of bad faith commenced by subjects of prosecutions.⁵ If leave is granted, this Court will determine if they justify the limitations proposed by the Applicant.

B. Malice alone does not justify piercing prosecutorial immunity

3. Contrary to the Respondents' submission, there is no general exception to prosecutorial immunity for claims alleging malice.⁶ Instead, the jurisprudence reveals that this Court has taken great care to preserve and safeguard prosecutorial immunity, even where malice or an improper purpose are alleged. This Court's jurisprudence reflects this restrained approach: just two narrowly-defined exceptions to prosecutorial immunity have been recognized by this Court in the last three decades. In both cases, the recognized cause of action may only be advanced by the subject of a prosecution. While the deliberate abuse of authority is common to both exceptions,

¹ *Nelles v. Ontario*, [1989] 2 SCR 170 ("*Nelles*"); *Miazga v. Kvello Estate*, [2009] 3 SCR 339 ("*Miazga*"); *Proulx v. Quebec (Attorney General)*, [2001] 3 SCR 9 ("*Proulx*")

² 2015 SCC 24 ("*Henry*")

³ *Henry* at paras. 39-41, 73, 77, 81; *Miazga* at paras. 47, 50 and 52; *Proulx* para.4

⁴ Response at para. 13

⁵ Applicant's Memorandum of Argument at paras. 49 - 55

⁶ Response at para. 1

the Court's willingness to recognize them turns on the imposition of additional requirements that restrict their availability and make establishing liability more onerous. These requirements serve to ameliorate the good governance concerns that arise when prosecutorial immunity is pierced.⁷

4. In *Nelles*, this Court recognized an exception for malicious prosecution claims but in doing so made liability contingent on stringent requirements. In addition to establishing malicious intent, a plaintiff must prove that the defendant initiated the prosecution; the prosecution terminated in the plaintiff's favour; and the prosecution was continued without objective reasonable and probable cause. Similarly, in *Henry*, this Court recognized that *Charter* damages may be available in cases of intentional non-disclosure. However, in addition to establishing that a prosecutor intentionally withheld information, the plaintiff must also prove that the prosecutor knew or ought reasonably to have known that the information was material to the defence and that the failure to disclose would likely impinge on the plaintiff's ability to make full answer and defence; withholding the information violated the claimant's *Charter* rights; and the plaintiff suffered harm as a result.⁸ Where a plaintiff establishes all of these elements, *Charter* damages may still be refused based on other case-specific good governance concerns.⁹

5. As made clear in *Nelles* and *Miazga*, the "inherent difficulty" of proving a claim of malicious prosecution was an intentional choice by this Court designed to preserve the appropriate balance between the rights of individual citizens to be free from groundless prosecutions and the public interest in the effective prosecution of criminal wrongdoing.¹⁰ Malice is just one of the four elements of malicious prosecution that serve to maintain this balance.

6. The OCA's holding that a bald pleading of an improper purpose is in and of itself sufficient to establish an exception to prosecutorial immunity for misfeasance is directly at odds with this Court's guarded approach. Indeed, the OCA's decision establishes a lower threshold for liability for non-parties to a criminal proceeding suing in misfeasance than it does for a former accused person suing for malicious prosecution. As noted by the OCA in its decision in *Smith*, released

⁷ See, for example: *Nelles* at para. 52; *Henry* at para. 89; See also: *Smith* at para. 109

⁸ *Henry* at para. 85

⁹ *Henry* at para. 83

¹⁰ *Miazga* at para. 52; *Nelles* at para. 56

today, “there is no basis to privilege the interests of police officers over ordinary citizens by establishing a lower liability threshold for the former than the latter”.¹¹

C. Good governance concerns must inform the liability threshold

7. The Respondents urge this Court to reject the good governance concerns raised by the OCA’s decision on the basis that they were deemed “unpersuasive” in *Nelles*.¹² This argument ignores essential context. In *Nelles*, the majority found the good governance concerns “unpersuasive” after reviewing the “built-in deterrents” to bringing a malicious prosecution claim, including the additional elements a claimant is required to prove.¹³ In light of all four elements required to establish malicious prosecution, this Court found that the good governance concerns were adequately addressed and, as a result, civil liability was appropriate in order to protect “society’s interest in the effective administration of criminal justice and *the need to compensate individuals who have been wrongly prosecuted*”.¹⁴ [emphasis added]

8. Importantly, this Court’s most recent decision on prosecutorial immunity reaffirms the importance of circumscribing the circumstances in which civil liability may arise from prosecutorial conduct in recognition of the risks to good governance. Writing on behalf of the majority in *Henry*, Moldaver J. emphasised the importance of the good governance concerns, finding that they “mandate a threshold that substantially limits the scope of liability...”¹⁵ The OCA’s decision fails to strike the appropriate balance this Court has strived for because, unlike malicious prosecution, it did not impose any restrictions on misfeasance claims arising from alleged prosecutorial misconduct.

9. For example, unlike a claim for malicious prosecution, the adjudication of a misfeasance claim against a prosecutor will not involve an objective assessment of whether the alleged unlawful conduct was reasonable. In order to succeed in a claim for malicious prosecution, a plaintiff must establish that the prosecutor initiated or continued the prosecution without reasonable and probable cause.¹⁶ Even in the exceedingly rare situation where a prosecutor acts with an improper purpose,

¹¹ *Smith v. Attorney General of Ontario*, 2019 ONCA 651 (“*Smith*”) at paras. 107 and 109

¹² Response at paras. 2 and 17

¹³ *Nelles* at para. 52

¹⁴ *Miazga* at para. 52; See also: *Smith* at para. 97

¹⁵ *Henry* at para. 74

¹⁶ *Miazga* at paras. 70 and 71

liability will not be found where objective reasonable and probable cause exists.¹⁷ This element incorporates an objective assessment of the legitimacy of the prosecution into the analysis, recognizing the broader systemic issues where a party seeks to impugn a criminal prosecution.

10. The OCA did not impose any similar consideration in permitting misfeasance claims against prosecutors: liability will be established even where the prosecutor's conduct was objectively lawful and reasonable, so long as the plaintiff establishes that the prosecutor acted with an improper motive and knowledge that their conduct would harm the plaintiff.

11. The Respondents' claim demonstrates the risks of this overly permissive approach. With respect to the Appeal Crown, the misfeasance claim relates to the decision not to file an application to adduce fresh evidence or advise the Court of Appeal, absent such an application, of alleged "exculpatory evidence". The Appeal Crown's decisions were supported by the applicable rules of conduct governing appellate Crowns. Even if this evidence was "reasonably capable of belief", it would not have been admissible as the Trial Crown expressly declined to litigate whether a *Charter* breach occurred and the police officers' reputation was an issue extraneous to the appeal.

12. Despite this reasonable exercise of discretion, the Respondents impugn the Appeal Crown's decision by pleading a bald allegation that she acted with an improper purpose. If this allegation – which the Applicant firmly denies – is proven at trial, liability will be imposed despite the fact that the Appeal Crown's decisions were objectively reasonable, legally correct, and consistent with her obligation to prosecute the accused fairly.¹⁸ In effect, the Respondents' allege that the Appeal Crown should have acted with partiality, favouring the reputational interests of the officers instead of exercising her discretion based on sound legal analysis. Permitting liability in these circumstances establishes an impermissibly low threshold that does not adequately address the good governance concerns.

13. The ease of pleading misfeasance gives rise to another good governance concern not addressed by the OCA. The Respondents' claim, which survived a pleadings motion, exemplifies the very real risk that prosecutors will be diverted from their duties to defend against claims premised on the assertion of specious legal obligations (which, in this case, conflict with Crown

¹⁷ *Miazga* at para. 73

¹⁸ Applicant's Memorandum of Argument at paras. 67 and 68

prosecutors' common law and statutory obligations)¹⁹ and bald allegations of misconduct. If the action is permitted to proceed, it is likely that it will be adjudicated through a motion for summary judgment or trial, requiring significant time and energy from multiple Crown prosecutors.

14. Superficially pled claims of misfeasance distract prosecutors from their important functions, putting them in the difficult position of having to focus on prosecuting crime while under the cloud of outstanding allegations of unlawful conduct, however spurious. Further, in dozens of cases each day, prosecutors are required to exercise their discretion in difficult circumstances and in relation to a broad and diverse array of people with varying interests. This discretion must be exercised based on sound criminal law principles and in a manner that is consistent with a prosecutor's duties. The low threshold for liability permitted by the OCA will undoubtedly result in prosecutorial discretion being influenced by the fear of civil litigation commenced by third party witnesses who feels that their reputational interests were not adequately protected. Such a result should be unacceptable to a criminal justice system that holds prosecutorial independence as sacrosanct. Further, as noted by the OCA in *Smith*, imposing liability to the police will "damage" the mutually independent and cooperative relationship between police and prosecutors that is essential to the proper administration of justice.²⁰

15. Finally, the adjudication of misfeasance claims against prosecutors will inevitably raise *res judicata* concerns. While a plaintiff claiming malicious prosecution must establish that the prosecution terminated in her favour, precluding a collateral attack on the criminal court's decision and conflicting criminal and civil rulings, the OCA did not place any similar onus on a plaintiff suing for misfeasance.²¹ The Respondents' claim demonstrates the consequences of this approach: they seek a declaration that is directly at odds with the findings of the Superior Court and OCA that they assaulted the accused.

16. In recognizing an exception to prosecutorial immunity for misfeasance, the OCA declined to impose "built-in deterrents" that strike the right balance between ensuring the effective operation of the criminal justice system and safeguarding the right of individuals to be free from groundless prosecutions. The Applicant seeks to correct this error in the proposed appeal.

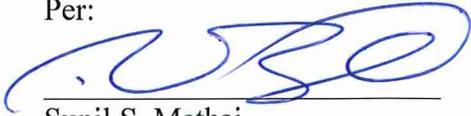
¹⁹ *Ibid.*; See also: *Smith* at paras. 100 - 102

²⁰ *Smith* at paras. 85,103 and 134

²¹ *Miazga* at para. 54

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of August 2019

Per:



Sunil S. Mathai
Ananthan Sinnadurai

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

Sunil S. Mathai
Ananthan Sinnadurai
Tel.: 416.910.8789
Fax: 416.326.4656
Email: sunil.mathai@ontario.ca
ananthan.sinnadurai@ontario.ca

Counsel for the Applicant,
Attorney General of Ontario

Per:



Karen Perron

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

Karen Perron
Tel: 613.369.4795
Fax: 613.230.8842
Email: kperron@blg.com

Ottawa Agent for the Applicant,
Attorney General of Ontario

PART VI: TABLE OF AUTHORITIES

	Authority	Paragraph Referenced
1.	<i>Henry v. British Columbia (Attorney General)</i> , [2015] 2 SCR 214	1, 4, 8
2.	<i>Miazga v. Kvello Estate</i> , [2009] 3 SCR 339	1, 5, 7, 9, 15
3.	<i>Nelles v. Ontario</i> , [1989] 2 SCR 170	1, 3,4, 5, 7
4.	<i>Proulx v. Quebec (Attorney General)</i> , [2001] 3 SCR 9	2
5.	<i>Smith v. Attorney General of Ontario</i> , 2019 ONCA 651	3, 6, 7, 13, 14

PART VII: STATUTES, LEGISLATION, RULES, ETC.

	Statute, Legislation, Rule, Etc.	Section, Rule No., etc.
1.	<i>The Constitution Act</i> , 1982, Schedule B to the <i>Canada Act</i> 1982 (UK), 1982, c. 11, Part I, Canadian Charter of Rights and Freedoms	
	<i>Lois constitutionnelle</i> de 1982, Annexe B de la Loi de 1982 <i>sur le Canada</i> (R-U), 1982, Partie I, Charte Canadienne des Droits et Libertés	