SCC File No. 38687

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

B E T W E E N:

ATTORNEY GENERAL OF ONTARIO

APPLICANT
(Appellant)

- and –

JAMIE CLARK, DONALD BELANGER and STEVEN WATTS

RESPONDENTS
(Respondents)

RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
(JAMIE CLARK, DONALD BELANGER and STEVEN WATTS)
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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PART I – STATEMENT OF FACTS

A. OVERVIEW OF RESPONDENT'S POSITION

1. Crown Attorneys acting within the scope of their quasi-judicial role are immune from civil liability subject to one important and recognized caveat: immunity will give way where the Crown has acted maliciously or for an improper purpose. The tort of malicious prosecution allows an aggrieved criminal defendant to claim that the Crown prosecuted him or her in bad faith[1]. The rationale for removing the cloak of immunity for a Crown in that circumstance is that the individual has "misused and abused" his or her position and the Office of the Crown. In effect, when acting with *mala fides*, the prosecutor is no longer acting *qua* Crown. Therefore, the immunity that attaches to acting in the capacity of a Crown should not, as a matter of policy, apply. The Court has also recognized that civil liability can arise where a Crown prosecutor intentionally withholds disclosure that the Crown knew or ought reasonably to know (even in the absence of malice) was necessary to make full answer and defence[2]. But liability is not (and should not be) limited to claims made by aggrieved accused. If a Crown acts outside the bounds of his or her office by abusing that very position and causes injury, as for any other public official, immunity is lifted for the same policy reason. In this situation, the tort is framed not as a malicious prosecution or deliberate non-disclosure, but as misfeasance in a public office[3]. This is what the Respondents claimed here and the Court of Appeal for Ontario was correct in not striking out their claim.

2. The suggestion of the Applicant that this case provides a first opportunity to address an issue of "fundamental importance to the ability of Crown Attorneys to carry out their constitutional duty to prosecute crime" is reminiscent of the issue as framed by the Ontario Crown in *Nelles v. Ontario*[4]. In that case, the Applicant made the claim that exposing Crown Attorneys to the tort of malicious prosecution would interfere with prosecutorial discretion, have a chilling effect on Crown conduct and open the litigation floodgates. The Court properly

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[1] *Nelles v. Ontario* [1989] 2.S.C.R. 170; *Miazga v. Kvello Estate*, 2009 SCC 51.
[2] *Henry v. British Columbia (Attorney General)* 2015 SCC 24
[3] *Report on the Liability of the Crown*, Ontario Law Reform Commission, 1989, p.13 "Misfeasance in a Public Office"
[4] *Supra* footnote 1.

rejected those arguments as "unpersuasive". The Court should do so again in the context of this application by refusing leave to appeal the decision of the Court of Appeal for Ontario.

3. If the Crown, deliberately and in bad faith, acts outside of his or her role as a Crown and causes damages, there is no good policy or other reason to limit civil liability. Doing so would provide no mechanism for third parties affected by bad faith decisions. The high threshold of "bad faith" or "misfeasance" acts to regulate and limit such claims while at the same time providing an appropriate mechanism to right tortious wrongs. There should be no prosecutorial immunity from being held accountable.

B. RESPONDENT'S SUMMARY OF THE FACTS

4. The Respondent generally accepts the summary of the facts outlined by the Applicant save and except where that summary includes unnecessary and impermissible argument.

5. The Court of Appeal for Ontario accurately summarized the key facts pleaded in the statement of claim in the judgment below as follows:

> [21] The trial against Mr. Singh proceeded on November 28, 2011. Counsel for Mr. Singh brought an application to stay the proceedings. Mr. Singh testified that Sgt. Clark assaulted him while Det. Sgt. Watts stood by. Mr. Maharaj testified that he was assaulted by Det. Sgt. Belanger and Sgt. Clark. Ms. Cressman did not call any evidence to challenge the assault allegations.
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> [22] The officers expected to testify and would have testified in a manner consistent with the evidence they gave at the preliminary hearing. Although Ms. Cressman had assured the officers that they would be called as witnesses, at the end of the first day of the hearing she advised Det. Sgt. Watts that their evidence would not be required. Det. Sgt. Watts expressed concern about the impact this decision would have on the officers, but Ms. Cressman did not change her position.
>
> [23] A jury convicted Mr. Singh of armed robbery and forcible confinement. Justice Thorburn ultimately dismissed his stay application, but nonetheless reduced his sentence in light of the uncontradicted evidence of assault: *R. v. Singh*, 2012 ONSC 4429 (CanLII), rev'd 2013 ONCA 750(CanLII), 118 O.R. (3d) 253. She described the officers' conduct as "reprehensible" and characterized the case as one of "police brutality". Her decision and findings were widely reported in the mainstream media and on the Internet, and discussed in internal communications among Crown attorneys, criminal defence lawyers and the judiciary.

[24] Mr. Singh appealed both his conviction and sentence. Before the appeal hearing, the Crown Law Office - Criminal advised the Toronto Chief of Police of its concern about the officers' conduct. The Special Investigations Unit was notified and invoked its mandate. On July 4, 2012, however, the Special Investigations Unit withdrew its mandate after Mr. Maharaj declined to participate in the investigation.

[25] After the Special Investigations Unit withdrew its mandate, the Toronto Police Service Professional Standards Unit reviewed the misconduct allegations and conducted an extensive investigation. On October 31, 2012, the TPS Unit completed its investigation, concluding that the allegations of use of excessive force could not be substantiated.

[26] On October 18, 2013, this court heard Mr. Singh's appeal. Before the hearing, the Crown Attorney handling the appeal, Amy Alyea, met with Det. Sgt. Watts, who advised her of what the officers had learned about Ms. Cressman's conduct. Ms. Alyea took no further steps to investigate, did nothing to repair the damage to the officers' reputation, and did not file a fresh evidence application on appeal. During the appeal hearing, Doherty J.A. asked Ms. Alyea about what had occurred, but she did not inform him or this court about Ms. Cressman's conduct and the supposed "exculpatory findings" regarding the officers' conduct.

[27] On December 12, 2013, the Court of Appeal set aside Mr. Singh's convictions and entered a stay: *R. v. Singh*, 2013 ONCA 750 (CanLII), 118 O.R. (3d) 253. Blair J.A. described the officers' conduct as "egregious", writing at para. 43 that:

> What occurred here was the administration of a calculated, prolonged and skillfully choreographed investigative technique developed by these officers to secure evidence. This technique involved the deliberate and repeated use of intimidation, threats and violence, coupled with what can only be described as a systematic breach of the constitutional rights of detained persons…

[28] Following the appeal, the Toronto Special Investigations Unit re-opened its investigation, interviewed Mr. Maharaj, and reviewed all records. It ultimately determined that the rib injury post-dated the arrest and concluded that the allegations were not substantiated by the evidence.

[29] On May 26, 2014, the Toronto Chief of Police asked the Ontario Provincial Police to conduct an independent review of the TPS Professional Standards Unit's work. The Ontario Provincial Police investigator concluded in a final report dated April 9, 2015 that the Unit's investigation was thorough and there was no reason to refute its conclusion that the allegations could not be substantiated.[5]

[5] Reasons of the Court of Appeal for Ontario, Applicant's Application Record, Tab 4

6. As it related to the trial Crown (Ms. Cressman), the Respondents pleaded the following facts to support their allegations of misfeasance:

(a) never asked Dr. Moss to review the videotaped statement, in which Maharaj is seen making various movements with his arms that were incompatible with having a fresh rib injury;

(b) never asked Dr. Moss further questions regarding other potential time periods in which the injury could have occurred;

(c) never made inquiries of staff at Maplehurst Detention Centre where Maharaj was incarcerated during his trial, about Maharaj, even though she was in possession of Maharaj's medical records from the facility that showed no complaints about a rib injury any time after his arrest;

(d) did not properly review the transcripts of the bail hearing to understand the inconsistent injuries reported then as opposed to those reported at the time of the stay application; and

(e) did not seek further advice or comment from the Officers who had testified at the preliminary hearing and adamantly denied assaulting Maharaj.[6]

7. As it related to the appeal Crown, the Respondents pleaded the following facts to support their allegations of misfeasance:

(a) purposefully took no steps to investigate further,

(b) deliberately did not take any steps to rectify and repair the damage that had been done to the Officers' reputations,

(c) did not take any steps to prepare and file an application to introduce fresh evidence before the Court of Appeal, and

[6] Statement of Claim issued June 22, 2016, CV-16-555292, Applicant's Application Record, Tab *7*

(d) during oral arguments in the appeal, the Court asked several questions about the Officers' behaviour, never adequately advised the Court of the new material facts the Crown had learned or of the exculpatory findings regarding the Officers' conduct. The Crown "never advised" the Court of these developments and that in doing so the Crown either negligently "or deliberately attempted to protect its own agents conduct, rather than respecting their duty of care and responsibility to the officers and the administration of justice."[7]

8. In the pleadings (para 47), the Respondents noted that the Crown "committed the tort of misfeasance in public office by engaging in deliberate and unlawful conduct in their capacity as Crown attorneys, clearly in contravention of their sworn duty" and that it was "deliberate and unlawful conduct"[8] in that the Crown deliberately suppressed the exonerating information.

9. At its core, the Respondent police officers plead in their statement of claim that the Ontario Crown acted in bad faith in the conduct of a *Charter* application brought by two criminals whom the officers had investigated and charged. For the purpose of trying to extricate themselves from serious criminal offences, those accused alleged that the Respondent officers committed various criminal offences including unlawfully assaulting them during the course of the investigation. The Court of Appeal described the conduct as tantamount to "torture." Rather than properly investigating and responding to those claims as required by statutory and common law duties, the trial Crown deliberately conceded the unlawful unconstitutional conduct knowing the harm it would bring to the Respondents. When it was later discovered that the accused had concocted their story, the appeal Crown failed to correct the record even when given the explicit opportunity to do so. Instead, the appeal Crown allowed the Court of Appeal for Ontario to believe that the allegations, which the Crown had conceded at trial, were in fact true for the purposes of the appeal.[9]

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[7] Statement of Claim issued June 22, 2016, CV-16-555292, Applicant's Application Record, Tab 7

[8] Statement of Claim issued June 22, 2016, CV-16-555292, Applicant's Application Record, Tab 7

[9] Statement of Claim issued June 22, 2016, CV-16-555292, Applicant's Application Record, Tab 7

PART II – QUESTIONS IN ISSUE

10. The questions in issue have been framed by the Applicant as follows:

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?

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) Crown agents are absolutely immune from civil liability in Ontario in respect of any claimant

11. In Ontario, Crown agents are immune in their personal capacities from being sued for tortious conduct. Section 8 of the *Ministry of the Attorney General Act*[10] provides absolute immunity to Crown Attorneys in their personal capacities for acts done in the performance of or "purported performance" of their duties. A Crown Attorney who purports to be acting in accordance with his or her duties in the context of a criminal proceeding is thereby granted immunity even for tortious acts committed in bad faith. The Court of Appeal for Ontario decision below did not suggest or hold otherwise. Instead, the appeal below focused on two questions: (1) Whether the Crown was responsible for the actions of their agents only where there was a malicious prosecution or deliberate non-disclosure as the Applicant argued in that Court; and (2) Whether the Crown, as prosecutor, could only be sued by a defendant in a criminal proceeding that was prosecuted by the Crown.

12. As it relates to the first question, the Applicant does not appear to be seeking leave to appeal the lower court's determination that misfeasance in a public office is an available tort against the Crown generally. As the Court of Appeal for Ontario properly concluded, Crown liability can extend beyond the torts of malicious prosecution and deliberate withholding of disclosure to torts that are similar in kind, such as the tort of misfeasance in a public office.

[10] *Ministry of the Attorney General Act*, R.S.O. 1990, C.M.17

Misfeasance in a public office is within the same class as the torts recognized in *Nelles* and in *Henry*:

> [109] We conclude that Crown attorneys are not immune from claims of liability for misfeasance in public office. The trigger for liability provides the functional Page: 39 equivalent of the "high liability threshold" Moldaver J. set in Henry for liability for Charter damages for wrongful disclosure.
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> [110] The nerve of the Supreme Court's decisions in the trilogy and in Henry is the deliberate abuse of authority by Crown attorneys. See Nelles, at paras. 55-56, per Lamer J.; and Proulx, at para. 35, per Iacobucci and Binnie JJ. In Miazga, Charron J. said, at para. 51: Thus, the public law doctrine of abuse of process and the tort of malicious prosecution may be seen as two sides of the same coin: both provide remedies when a Crown prosecutor's actions are so egregious that they take the prosecutor outside his or her proper role as minister of justice, such that the general rule of judicial non intervention with Crown discretion is no longer justified. Both abuse of process and malicious prosecution have been narrowly crafted, employing stringent tests, to ensure that liability will attach in only the most exceptional circumstances, so that Crown discretion remains intact.
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> …
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> [113] Drawing on *Henry*, there are "compelling good governance" concerns that require a "high liability threshold" in order for the tort of misfeasance in public office to be a tenable cause of action against Crown attorneys. That "high liability threshold" is satisfied by the requirement of the tort of misfeasance in public office set out in Odhavji that the claimants show the presence of bad faith or improper motives. We also note Moldaver J.'s qualification, at para. 83 of Henry, that "there may be case-specific policy concerns that militate against an award, even if the appellant has made out the heightened per se threshold." This qualification applies equally to the tort of misfeasance in public office, but requires cogent evidence to substantiate it.[11]

13. As it relates to the second issue (which is a question in issue raised by the Applicant here), there are no compelling practical nor policy reasons to limit the liability of the Crown only to criminal defendants who were the subject of the prosecution.

(ii) Crown liability in tort for bad faith acts should not be limited to claimants who were the subject of prosecution

14. The tort of misfeasance in a public office is governed by this Court's decision in *Odhavji*

[11] Reasons of the Court of Appeal for Ontario, Applicant's Application Record, Tab 4

Estate v. Woodhouse.[12] The relevant elements of the tort of misfeasance in a public office are[13]:

i. The public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer; and

ii. The public officer was aware that his or her conduct was unlawful and that it was likely to harm the plaintiff(s).

The following legal principles apply to the tort of misfeasance in a public office[14]:

i. If there is a legal duty on the public officer to act, and the public officer decides not to act or fails to act in breach of the duty, that omission can amount to misfeasance;

ii. Reckless indifference or wilful blindness to the illegality of his or her act satisfies the "deliberate and unlawful" conduct of the first element of the tort[15];

iii. Reckless indifference or wilful blindness as to the probable consequences of the unlawful act satisfies the second element of the tort; and

iv. The tort requires an element of bad faith or dishonesty, such that the public officer exercised his or her powers for an improper or ulterior purpose, or engaged in conduct that he or she knew to be inconsistent with the obligations of the office.

15. Importantly, unlike malicious prosecution, the tort of misfeasance in a public office is not defined or only available to a particular class of claimant. Anyone who is harmed by the bad faith conduct of a public officer is entitled to seek damages provided the claimant can otherwise satisfy the elements of the tort. There are no compelling policy reasons to limit the tort, in the context of a criminal prosecution, to the subject of the prosecution.

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[12] [2003] 3 S.C.R. 263.
[13] *Ibid* at para 23
[14] *Ibid* at paras 24, 28 and 38
[15] Subject to the discussion below.

16. At its core, the tort of misfeasance alleges an abuse of a publicly held office. In the context of a Crown Attorney, misfeasance claims that rather than acting in the good faith discharge of statutory or common law duties, the Crown Attorney acted deliberately and used that office to injure another person. As Iacobucci J. noted for the Court in *Odhavji Estate v. Woodhouse*, at p.278 the tort is "broadly based on unlawful conduct in the exercise of public functions generally" and is grounded in "a broad range of misconduct."[16] The tort of misfeasance in a public office does not have a proximity requirement like the tort of negligence. Instead, it requires only a cause/effect nexus between the public official's tortious conduct and the injury sustained. As Iacobucci J. further explained:

> Liability does not attach to each officer who blatantly disregards his or her official duty, but only to a public officer who, in addition, demonstrates a conscious disregard for the interests of those who will be affected by the misconduct in question. This requirement establishes the required nexus between the parties.

17. The Applicant's claim that Crown Attorneys should be exempted from tortious liability for acting abusively in a way that harms anyone other than the criminal defendants is unpersuasive. First, why would there be prosecutorial immunity for acting abusively towards witnesses, complainants or other persons who a prosecutor interacts with during the course of their employment? If the prosecutor is acting in a manner that would trigger the application of the tort, they are not acting in a manner consistent with the public office that they hold. This will not interfere with good faith exercise of prosecutorial discretion. Rather, it will promote the same and serve to remind the Crown that bad faith decisions undertaken by prosecutors which cause injuries to others beyond a criminal defendant may be subject to civil liability.

18. Take for example a Crown Attorney who deliberately throws a criminal trial involving a sexual assault allegation. The prosecutor improperly invites an acquittal or withdraws a criminal charge because he or she holds the view that all racialized victims are not credible, or that because the victim was married to the accused there could be no sexual assault. It is clear that the decision was made in bad faith without regard to the role and duties of the prosecutor (at common law or otherwise). The decision was deliberate; it is a decision made in a manner that is inconsistent with the role of the Crown and the victim is consequently harmed by the Crown's

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[16] *Ibid at* 280, 282, 285-6.

conduct. The Applicant would have it that that the Crown would be immune from civil liability for the prosecutor's conduct. There is no good policy reason for favouring such a result. As Lord Bingham in *Watkins v. Home Office*[17] noted:

> There is great force in the respondent's submission that if a public officer knowingly and deliberately acts in breach of his lawful duty he should be amenable to civil action at the suit of anyone who suffers at his hands. There is an obvious public interest in bringing public servants guilty of outrageous conduct to book. Those who act in such a way should not be free to do so with impunity.

19. The suggestion by the Applicant that not providing prosecutorial immunity in these circumstances will inevitably lead to Crown prosecutors being "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" (para 64) is no more compelling a claim now than it was in the malicious prosecution context. Prosecutors always face the prospect that the misguided or misinformed accused who is successful in their criminal case may file a civil claim for malicious prosecution. What *Nelles* recognized was that such claims will routinely fail and properly be struck out unless there is evidence of bad faith or malice on the part of the prosecutor. As the majority of the Court noted "this burden on the plaintiff amounts to a requirement that the Attorney General or Crown Attorney perpetrated a fraud on the process of criminal justice and in doing so has perverted or abused his office and the process of criminal justice."[18]

20. In rejecting the policy argument in favour of absolute immunity in that context, the Court explained the important policy rationale for recognizing liability:

> It is said by those in favour of absolute immunity that the rule encourages public trust and confidence in the impartiality of prosecutors. However, it seems to me that public confidence in the office of a public prosecutor suffers greatly when the person who is in a position of knowledge in respect of the constitutional and legal impact of his conduct is shielded from civil liability when he abuses the process through a malicious prosecution. The existence of an absolute immunity strikes at the very principle of equality under the law and is especially alarming when the wrong has been committed by a person who should be held to the highest standards of conduct in exercising a public trust.

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[17] [2006] UK HL 17
[18] *Nelles v. Ontario, supra*

The same reasoning applies to the Applicant's policy arguments challenging the Court of Appeal for Ontario's decision in the court below. Crown prosecutors, like others that hold a public office, must be held accountable for the decisions that they make, which cause harm and they are not acting in "good faith". When prosecutors behave this way, they are no longer acting in accordance with the terms of their office. Further, they are no longer exercising discretion in a manner that needs to be protected by the Courts. Instead, they are acting maliciously and causing damage to others, and accordingly, are properly held accountable for the same[19].

21. The Applicant acknowledges at footnote 21 of its Memorandum that there have been other cases where someone other than the aggrieved accused has brought a claim against the Crown. In *Driskell v. Dangerfield et al.*[20], it was accepted that the mother of an accused person who was wrongfully convicted could pursue a claim against the Crown for misfeasance in a public office. As the motion judge concluded "there is no reason why [the mother] cannot claim damages for conspiracy and misfeasance in public office if she is a direct victim of the torts"[21] although the ultimate ability to prove the tort might be difficult.

22. At this stage of the proceedings, the Court of Appeal for Ontario was required to take the pleadings as true. For the purpose of this leave application, those facts also need to be taken as

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[19] On May 29, 2019 the Ontario legislature passed the *Crown Liability and Proceedings Act* S.O. 2019, c 7, Sch 17 thereby repealing the *Proceedings Against the Crown Act* that was in place at the time of the Crown action here. The intention of the Legislature was to restrict civil claims that can be brought against the Crown. Notably, the *Act* only exempts Crown actions undertaken in "good faith" from civil liability. Additionally, the new *Act* does not limit the class of claimants that can bring actions against Crowns. Section 9(2) of the *Act* provides that:

> (2) Nothing in this Act subjects the Crown to a proceeding in respect of,
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> (a) anything done in good faith in the enforcement of the criminal law or of the penal provisions of an Act; or
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> (b) anything done or omitted to be done by a person while discharging or purporting to discharge responsibilities of a judicial nature vested in the person or responsibilities that the person has in connection with the execution of judicial process.

[20] 2007 MBQB 142
[21] At para 25.

true. The Applicants have not filed a statement of defence. Based on the contents of the statement of claim the conduct of the Crown agents in this case was done in a deliberate manner that obstructed the course of justice and led both the trial Court and the appellate Court to believe in a state of affairs that was not true and caused damages to the plaintiffs. The various answers that the Applicant posits for the conduct (paras 66 to 71) are issues that are not resolvable in the context of an application to strike a claim.[22]

23. The tort of misfeasance in a public office is a recognized tort in Canada. It was properly pleaded. The elements of the tort are set out in the statement of claim. There is no good policy or other reason to grant the Crown absolute immunity in relation to the tortious actions of their agents in the context of criminal prosecutions where other parties are harmed. At the very least, at this stage of the proceedings, if the law is unclear or unsettled on this issue, the Respondents should be entitled to pursue the claim. Either way, given the preliminary stage of this matter, this is not an appropriate case for the Court to grant leave to appeal the lower court's decision.

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

24. This issue does not arise on the record and, arguably, does not arise in Canadian law in the manner suggested by the Applicant.

25. The Respondent *only* pleaded that the Crown prosecutors engaged in ***deliberate*** misconduct knowing that it would likely harm the plaintiffs. It was never suggested nor pleaded that the misfeasance could arise from anything less than this type of intentional conduct on the part of the Crown agents. Any suggestion in the claim that the conduct of the Applicants was tortious on a lesser standard was in relation to a negligence claim that was struck out by the motions judge and affirmed on appeal to the Court of Appeal for Ontario (and is not the subject of an application for leave to appeal).

26. Additionally, and importantly, notwithstanding arguably confusing language from the House of Lords, nothing less than deliberate bad faith conduct can give rise to the tort in Canada. Wilful blindness and subjective recklessness in the misfeasance context involves "bad faith in

[22] Reasons of the Court of Appeal for Ontario, Applicant's Application Record, Tab 4

that the officer does not have an honest belief in the lawfulness of her actions."[23] More importantly, this Court made it clear in *Odhavji Estate v. Woodhouse* that "misfeasance in a public office is not directed at a public officer who inadvertently or negligently fails adequately to discharge the obligations of his or her office."[24] And that:

> The requirement that the defendant ***must have been aware that his or her conduct was unlawful*** reflects the well-established principle that misfeasance in a public office ***requires an element of "bad faith" or "dishonesty"***. In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. ***In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office***.[25]
>
> [emphasis added]

27. The suggestion of the respondent at para 76 that "[i]t is thus possible that the Respondents may seek to establish their misfeasance claim based on recklessness or wilful blindness stands if the Claim is adjudicated" and hold the Applicants responsible on the basis of what they "ought to have known" is without merit. The Respondents will be bound by this Court's jurisprudence. They will seek to have their claim adjudicated on the basis of the deliberate bad faith conduct of the Crown prosecutions in a manner that was inconsistent with their office.

28. There is no basis to grant leave to appeal to this Court.

PART IV – COSTS

29. The Respondent requests costs of responding to this application.

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[23] E. Chamberlain, "What is the role of misfeasance in a public office in modern Canadian tort law" [2009] 88 Can. Bar Rev. 579 at 584

[24] At para 26.

[25] *Ibid* at para 28. See also *Rain Coast Water Corp. v. British Columbia* [2019] B.C.J. No. 1011 (C.A.).

PART V – ORDER SOUGHT

30. The Application should be dismissed with costs to the respondent. Alternatively, if leave is granted, the Respondent requests that costs be fixed in the result.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 31st day of July 2019

Michael Lacy
Lorne Honickman

Counsel for the Respondent

PART VI – TABLE OF AUTHORITIES

AUTHORITY	PARAGRAPHS REFERENCED
Nelles v. Ontario [1989] 2.S.C.R. 170	1, 2, 12, 19
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	STATUTE	PARAGRAPHS REFERENCED
	Ministry of the Attorney General Act, R.S.O. 1990, C.M.17, s. 8 *Loi sur le Ministère du Procureur général,* LRO 1990, c M.17, s. 8	11
	Crown Liability and Proceedings Act S.O. 2019, c 7, Sch 17, s. 9(2) *Loi de 2019 sur la responsabilité de la Couronne et les instances l'intéressant,* LO 2019, c 7, ann 17, s. 9(2)	22