S.C.C. FILE NO. 35745

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

BETWEEN:

IVAN WILLIAM MERVIN HENRY

APPELLANT
(Respondent)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, AS REPRESENTED BY THE ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT
(Appellant)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

- and -

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IVAN WILLIAM MERVIN HENRY

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PART I: OPENING STATEMENT AND STATEMENT OF THE FACTS

OPENING STATEMENT

1. This appeal raises the issue of whether an individual who was wrongfully convicted as a result of the state's breach of his constitutional rights can claim *Charter* damages to compensate him for the wrongful conviction, the lengthy period of incarceration that ensued and the enormous consequential suffering he has endured.

2. There are few wrongs that the state can inflict on its people worse than a wrongful conviction followed by a lengthy period of imprisonment; *a fortiori* when the wrongful conviction was due to the Crown's failure to comply with its *obligation* to disclose relevant evidence. There must be a just and appropriate remedy for such a terrible wrong. Where the wrongfully convicted person has spent almost 27 years in a federal prison, it is fundamentally unjust that there be *no remedy* for the *Charter* breaches and that the convicted person is instead entitled only to the appellate remedy allowed for by the *Criminal Code* - in this case quashing the convictions and entering acquittals. There must be a *Charter* remedy, namely, a substantial compensatory award that recognises the egregious nature of the *Charter* violation.

3. Wrongful conviction, one hopes, is a relatively rare phenomenon: it is confined to those unusual cases where an erroneous conviction is not caught by the usual appellate process, but rather the miscarriage of justice is discovered post-appeal. Justice Hickman, the former chair of the Marshall Inquiry Commission, has defined the term as one "reserved for those situations in which there is a suspected failure or breakdown" of the system so that there "cannot be a fair trial, and neither a trial court nor an appellate court would have before it the facts necessary to remedy the wrong."[1]

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[1] Honourable T. Alexander Hickman, "Wrongful Convictions and Commissions of Inquiry: A Commentary" (2004) 46 Canadian J. Criminology & Crim. Just. 183 at 184, Appellant's Book of Authorities ("ABoA") Tab 41. Other credible definitions of wrongful conviction have been suggested: see e.g. Honourable Edward P. MacCallum, *Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard* (September 2008), p. 365, ABoA Tab 44, referencing the 2007 Federal Ministers Annual Report on Applications for Ministerial Review – Miscarriages of Justice and Kent Roach, 'Report Relating to Paragraph 1(f) of the Order in Council for the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell"; Driskell Inquiry Report, pp. 141-42; Honourable William W. Marshall, "The Bounds of Redress & The Need of Full and Credible Inquiries In Wrongful Convictions" AIDWC Conference June 11, 2005 at p. 3, ABoA Tab 47.

4. When a wrongful conviction arising from breach of an individual's *Charter* rights comes to light, it demands a just and appropriate remedy. Rather than relying on the whim of the state to provide an *ex gratia* payment, the appellant should be entitled to a remedy in damages for such a breach. Such a remedy is properly grounded in s. 24 of the *Charter*, which must be interpreted in a way that achieves its purpose of upholding *Charter* rights by providing full, effective, responsive and meaningful remedies for their breach. That *Charter* damages are an appropriate and just remedy in cases such as this is clear following a proper application of the four-stage test articulated by this Court in *Ward*.[2]

5. This interlocutory appeal arises from the appellant's application to amend his Notice of Civil Claim to include a claim for *Charter* damages for non-disclosure resulting in his wrongful conviction and imprisonment predicated on a number of proposed bases short of malice, including, *inter alia*, simple *Charter* breach that seriously infringed the right to disclosure, fair trial rights and the ability to make full answer and defence; negligent breach of the *Charter*; and *Charter* breach arising from conduct that amounted to a marked and unacceptable departure from the reasonable standards expected of Crown Counsel.

6. In his ruling of April 18, 2013, Goepel J. applied the test for *Charter* damage claims from the leading decision in *Ward*. He held that the claims of the appellant for *Charter* damages against the Crown for non-disclosure required proof that Crown Counsel acted in a manner that was a marked and unacceptable departure from the reasonable standards expected. He ruled that the Notice of Civil Claim could be amended to allow for the *Charter* claims provided this legal threshold was met.[3] Goepel J. appreciated that the appellant's claims were public law constitutional claims arising from non-disclosure that led to *wrongful conviction and lengthy imprisonment*.

7. The BCCA, in contrast, erroneously approached this case as if it were merely a private law tort case for wrongful or "malicious" *prosecution*. It allowed the Crown's appeal and overturned Goepel J.'s ruling on the basis that he had erred in not finding that the appellant had

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[2] *Vancouver (City) v. Ward*, 2010 SCC 27 [***Ward***], ABoA Tab 37

[3] *Henry v. British Columbia (Attorney General)*, 2013 BCSC 665 [***Henry 2013***], ¶¶61-63, Appellant's Record ("AR") v I, 21-22

to demonstrate malicious prosecutorial conduct.[4] The BCCA completely failed to appreciate that this Court's decision in *Ward* had forever changed the legal landscape for constitutional claims against the Crown. It furthermore failed to grasp that claims associated with wrongful conviction have unique historic and legal aspects that require judicial responses that are sensitive to the strong public need to recognize their egregious nature and prevent their occurrence.

8. The appellant submits that breach of the *Charter* (regardless of the mental state of the offending state actor(s)), coupled with the functional considerations of *Ward* ought to be sufficient to attract *Charter* damages in circumstances such as those in the case at bar. In the alternative, the standard should be simple negligence. In the further alternative, the standard should be that determined by Goepel J., a "marked and unacceptable departure from the reasonable standards expected of the Crown counsel."[5]

FACTS

9. The pleaded facts are deemed to be true for the purpose of this appeal and the appellant relies on the Second Amended Notice of Civil Claim[6] in that respect. The appellant will, however, highlight some of the most important facts here.

10. Between November 25, 1980 and June 8, 1982, a series of sexual assaults took place in Vancouver. These assaults (the "Sexual Assaults") were similar with respect to the perpetrator *modus operandi* and with respect to the neighbourhoods in which they occurred. All were investigated by the Vancouver Police Department (the "VPD").[7]

11. In the spring of 1981, one Donald McRae ("McRae") was placed under surveillance by the VPD as a suspect in the Sexual Assaults. He had been residing since before those assaults commenced at an address in the 200 block of East 17th Avenue, Vancouver, British Columbia.[8]

12. In March 1982, the appellant and his family moved to 248 East 17th Avenue, Vancouver, British Columbia, the same block where McRae lived, and the heart of where many of the offences occurred.[9]

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[4] Reasons for Judgment of the Court of Appeal dated January 21, 2014 ("**CA Reasons**"), ¶29, AR v I, 40-41
[5] *Henry 2013*, ¶63, AR v I, 22
[6] Second Amended Notice of Civil Claim filed January 13, 2014 ("**Amended NOCC**"), AR v II, 34-66
[7] Amended NOCC, ¶¶11-12, 14, AR v II, 36
[8] Amended NOCC, ¶20, AR v II, 39

13. On May 12, 1982, the appellant was arrested by the VPD, forcibly dragged by police officers into a line-up room, and compelled to participate against his will in a live line-up viewed by some of the Sexual Assault complainants. He was then released from custody.[10]

14. On May 17, 1982, McRae was arrested by VPD members after he was found prowling late at night outside a residence that was five and seven blocks, respectively, from where two Sexual Assault complainants had been assaulted some months earlier. Both later were complainants at the appellant's criminal trial (the "appellant's trial"). McRae was charged with trespass by night.[11]

15. On July 13, 1982, McRae was arrested by VPD officers, and charged with break and enter and theft of a suite that was six blocks from where one of the Sexual Assault complainants, who later testified at the appellant's trial, had been assaulted five months earlier.[12]

16. On July 27-29, 1982, one of the Sexual Assault complainants was shown a photo line-up that included a photograph of the appellant, who was depicted standing in front of a jail cell with a uniformed VPD member in the foreground. She provided an initially hesitant identification of the appellant as her attacker. Her identification of him became more certain over time.[13]

17. On July 29, 1982, the appellant was arrested and charged with sexual offences relating to 15 victims of the Sexual Assaults. He remained in custody thereafter.[14]

18. Prior to the start of the appellant's trial, he and his counsel made numerous written requests to Crown Counsel for disclosure of all statements made by the victims, whether in a police officer's note or otherwise, including those made to first attending officers on the scenes of the offences, and copies of all medical reports or other reports such as serology and hair and fibre reports. Notwithstanding these repeated requests, no victim statements, police reports or forensic reports were disclosed prior to the commencement of the trial.[15]

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[9] Amended NOCC, ¶¶19, 21, AR v II, 38-39
[10] Amended NOCC, ¶¶24, 27-28, 31, AR v II, 39-40; Affidavit #1 of Kay MacIntosh affirmed November 20, 2012 ("MacIntosh #1"), Ex A, AR v II, 144
[11] Amended NOCC, ¶32, AR v II, 40
[12] Amended NOCC, ¶33, AR v II, 41
[13] Amended NOCC, ¶¶34-35, 37-38, AR v II, 41
[14] Amended NOCC, ¶¶39, 42, AR v II, 42
[15] Amended NOCC, ¶¶45-46, AR v II, 43

19. On February 28, 1983, the appellant's trial commenced in the Supreme Court of British Columbia. While the appellant had been committed for trial on counts involving 15 complainants at the conclusion of his preliminary inquiry, the trial judge ordered severance of counts, and the Crown proceeded on 10 counts involving 8 complainants.[16]

20. At the start of his trial the appellant, who was by then unrepresented, again requested disclosure of complainant witness statements. In response, the prosecutor provided him with approximately 11 witness statements of the 8 trial complainants. Approximately 30 additional statements of the trial complainants remained undisclosed throughout the trial, including all of the victim statements contained in the police notes and reports of the first attending police investigators at the scene of each crime. The undisclosed statements contained many material inconsistencies that would have undermined further the already highly suspect reliability of the complainants' identification evidence at trial.[17]

21. Bedclothes, clothing and/or vaginal swabs from the crime scenes had been submitted for forensic examination and testing following the assaults. The samples yielded the perpetrator's spermatozoa for at least four of the Sexual Assaults. At the time, serology testing of sperm was capable of definitively excluding suspects based on comparison of perpetrator blood type. The medical, lab and police reports which showed that spermatozoa had been located for four of the Sexual Assaults, including the assault of one trial complainant, remained undisclosed throughout the trial. Despite repeated written requests from the appellant and his counsel for disclosure of all forensic reports including medical and serology reports, the Crown prosecutors did not disclose the reports to the appellant, nor the fact that spermatozoa had been located.[18]

22. It was also not disclosed to the appellant prior to or at trial that police reports showed that the VPD considered McRae a suspect in the Sexual Assaults, and that in May and July of 1982 he had been arrested for late-night predatory behaviour in two of the neighbourhoods where these sexual offences were occurring.[19]

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[16] Amended NOCC, ¶¶47-48, AR v II, 43-44
[17] Amended NOCC, ¶¶49-50, AR v II, 44
[18] Amended NOCC, ¶¶17-18, 52, AR v II, 38, 44-45
[19] Amended NOCC, ¶53, AR v II, 45

23. On March 2, 1983, the jury commenced hearing evidence. The case was based entirely on the extraordinarily weak eyewitness identification of the complainants. On March 15, 1983, the jury convicted the appellant of all the offences on the Indictment. The appellant filed an appeal of his convictions on April 6, 1983.[20]

24. After July 29, 1982, the date that the appellant was arrested and detained in custody, sexual assaults continued to occur from November 1982 to November 1983 in very close proximity to where some of the trial complainants had been attacked, and involving the same *modus operandi* as the Sexual Assaults. The new assaults also took place in the same neighbourhood where VPD suspect McRae had been arrested for sexual predatory behaviour on May 17, 1982. The Crown failed to disclose that the November 1982-November 1983 Sexual Assaults had occurred to the appellant.[21]

25. The appellant's sentencing hearing took place November 21-23, 1983, and concluded with him being found to be a Dangerous Offender and sentenced to indefinite incarceration.[22]

26. On February 24, 1984, the BCCA allowed the Crown's application to dismiss the appellant's appeals for want of prosecution, as the appellant had failed to comply with his obligation to procure trial transcripts.[23]

27. After the appellant's appeals had been dismissed, sexual offences continued to occur in the same neighbourhoods where the Sexual Assault had occurred, involving the same *modus operandi*. More than 20 such offences occurred between April 1984 and July 1988. All were investigated by the VPD, and were unsolved. The fact that these ongoing assaults were occurring was not disclosed to the appellant.[24]

28. Between 1984 and 2006, the appellant filed more than 50 applications in a variety of courts and with the Federal Crown seeking to have his convictions reviewed. None were

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[20] Amended NOCC, ¶¶56, 62, 70, AR v II, 45, 47-48; *R. v. Henry*, 2010 BCCA 462 [***Henry 2010***], ABoA Tab 28
[21] Amended NOCC, ¶¶64-68, AR v II, 47
[22] Amended NOCC, ¶¶63, 76, AR v II, 47-48
[23] Amended NOCC, ¶¶77, 79, AR v II, 48-49
[24] Amended NOCC, ¶¶83-84, AR v II, 50

successful. Following his convictions, the appellant continued to seek disclosure including disclosure of the police files, complainants' statements and medical evidence.[25]

29. In 2002, the VPD commenced a re-investigation of a number of unsolved sexual assaults that had occurred between 1983-1988, believed by investigators to have been committed by a sole perpetrator. This investigation included almost all of the sexual assaults that had occurred between November 1982 and 1988 in the same neighbourhoods as those which the appellant had been convicted of, and which involved the same *modus operandi*. The police investigation was called Project Smallman.[26]

30. In the course of Project Smallman, perpetrator spermatozoa was located for only three of the sexual assaults that were the subject of the VPD re-investigation. A DNA profile was obtained for each that matched that of McRae, who had been a police suspect in the crimes for which the appellant had been convicted. McRae pleaded guilty to three of the historic sexual assaults in June 2005 and was sentenced to a period of five years' imprisonment.[27]

31. As a consequence of Project Smallman, in November 2006, the Provincial Crown appointed Leonard T. Doust, Q.C., a senior counsel in private practice, to investigate a potential miscarriage of justice in the appellant's convictions.[28] His report was delivered in March 2008 and recommended that full disclosure be made to the appellant and that the Crown not oppose any application the appellant might bring to reopen his appeal.[29]

32. Following Mr. Doust's recommendations, the Crown appointed a second special prosecutor and disclosure was made, commencing in June 2008, of substantial previously undisclosed police file materials relating to the assaults which the appellant had been convicted of, those he had been a suspect in, and the similar sexual assaults that had occurred after he was detained in custody.[30]

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[25] Amended NOCC, ¶¶80, 85, AR v II, 49-50
[26] Amended NOCC, ¶88, AR v II, 51
[27] Amended NOCC, ¶89, AR v II, 51
[28] Amended NOCC, ¶91, AR v II, 51-52
[29] *Henry 2010*, ¶28, ABoA Tab 28
[30] Amended NOCC, ¶91, AR v II, 51-52

33. On January 13, 2009, the BCCA granted the appellant's unopposed application to reopen his appeal for consideration on its merits. The appellant was granted bail by the BCCA on June 13, 2009. By that time he had been in custody for almost 27 years.[31]

34. On October 27, 2010, the BCCA released its Reasons for Judgment on the appellant's criminal appeal, overturned the convictions on a number of grounds and entered acquittals on all counts.[32] The Court of Appeal did not deal in its decision with the appeal ground relating to non-disclosure although this ground was conceded by the Crown.

35. The Court of Appeal held:

> [140] On each count, the intruder was a stranger to the complainant; the encounter was in poor lighting, the circumstances were extremely stressful, the intruder took steps to obscure his visage and two of the complainants were without their eyewear; the pre-trial identification procedures were seriously flawed and unfair; and there was no evidence independent of the complainant capable of confirming or supporting the identification made in court. In addition, pre-court and in-court identifications were made by the complainants often months after the traumatic event.
>
> [141] The process of identification was polluted so as to render in-court identification of the appellant on each count highly questionable and unreliable on the reasonable doubt standard. I consider the verdicts to be unsafe.
>
> [142] In my opinion, the verdict on each count was not one that a properly instructed jury acting judicially could reasonably have rendered.[33]

PART II: STATEMENT OF QUESTION IN ISSUE

36. The issue on appeal is whether s. 24(1) of the *Canadian Charter of Rights and Freedoms* authorizes a court of competent jurisdiction to award damages against the Crown for prosecutorial misconduct absent proof of malice.

PART III: ARGUMENT

A. Section 24 Provides Wide Discretion to Craft Effective and Responsive Remedies

37. Section 24(1) provides:

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[31] Amended NOCC, ¶94, AR v II, 52
[32] Amended NOCC, ¶96, AR v II, 52-53
[33] *Henry 2010*, ¶¶140-42, ABoA Tab 28

> Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

38. Section 24(1) confers the widest possible discretion on a court to craft remedies for violations of *Charter* rights.[34] It ensures that the *Charter* will be a vibrant and vigorous instrument for the protection of the rights and freedoms of individuals in Canada.[35] It must be interpreted in a way that achieves its purpose of upholding *Charter* rights by providing full, effective, responsive and meaningful remedies for their breach.[36] This right to a remedy is said to be "the foundation stone for effective enforcement of *Charter* rights."[37]

39. Section 24(1) must be given a purposive interpretation. In *Doucet-Boudreau,* this Court explained:

> **25** Purposive interpretation means that remedies provisions must be interpreted in a way that provides "a full, effective and meaningful remedy for *Charter* violations" since "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach" (*Dunedin*, *supra*, at paras. 19-20). A purposive approach to remedies in a *Charter* context gives modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies.[38]

40. This Court held, further, that the s. 24(1) remedial power cannot be strictly contained by statutes or the rules of common law, although they may be helpful to determination of remedy as they express principles relevant to what is appropriate and just.[39] Section 24 should be allowed to evolve to meet the challenges and circumstances of the cases in which it plays a role, and this evolution may require creative features: "tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand."[40]

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[34] *Mills v. The Queen*, [1986] 1 S.C.R. 863, pp. 965-66, ABoA Tab 15
[35] *R. v. 974649 Ontario Inc.*, 2001 SCC 81 [***Dunedin***], ¶19, ABoA Tab 20
[36] *Dunedin*, ¶19, ABoA Tab 20; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, ¶25 [***Doucet-Boudreau***], ABoA Tab 7
[37] *Dunedin*, ¶19, citing *Mills v. The Queen*, [1986] 1 S.C.R. 863, ABoA Tab 20
[38] *Doucet-Boudreau*, ¶25 [emphasis in original], ABoA Tab 7
[39] *Doucet-Boudreau*, ¶51, ABoA Tab 7
[40] *Doucet-Boudreau*, ¶59, ABoA Tab 7

41. In crafting s. 24 remedies, courts search for the proper balance between competing interests.[41] When the question is whether *Charter* damages are appropriate, this balancing takes place within the framework of analysis articulated in *Ward*, the seminal decision in which this Court established a framework for assessment of constitutional damage claims.

42. The BCCA's decision is inconsistent with the *Ward* framework of analysis which requires courts to apply a four-stage test to determine if *Charter* damages are just and appropriate. Under *Ward*, first, the claimant must establish a *Charter* breach; second, the claimant must demonstrate that damages would fulfill one or more of the related functions of compensation, vindication of the right and deterrence of future *Charter* breaches; third, the state may establish that countervailing factors defeat the functional considerations supporting a damage award; and finally, the Court must determine the quantum of damages.[42] The BCCA effectively ignored all but the third stage of this test, and in so doing gave no weight to the appellant's interests or to the public interest in the availability of remedies in situations of Crown *Charter* breach leading to wrongful conviction.

43. Instead, the BCCA considered Crown immunities that have been considered by the Court in other private law contexts as though this was the sole consideration at issue. Rather than deal with the terrible wrong that occurred in the appellant's case, the BCCA seemed to wish to avoid such considerations at all costs, instead relying on *Nelles*, *Proulx* and *Miazga*,[43] cases which did not directly address the constitutional issues.

44. The BCCA's result is wrong, but the manner in which the Court reached that result was also erroneous. The import of this error is that it completely decontextualized the issue which was not merely prosecutorial malice or non-disclosure but rather finding a just and appropriate remedy for an individual whose *Charter* rights were breached resulting in his wrongful conviction, and wrongful incarceration for 27 years. The BCCA's approach effectively gives no weight to this very significant *Charter* breach or its effects, which is a fundamentally flawed analysis. It is an analysis that is completely at odds with the analysis that *Ward* stipulates must be undertaken.

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[41] *R. v. Bjelland*, 2009 SCC 38, ¶18, ABoA Tab 22
[42] *Ward*, ¶¶23-57, ABoA Tab 37
[43] *Nelles v. Ontario*, [1989] 2 S.C.R. 170 [***Nelles***], ABoA Tab 16; *Proulx v. Québec (Attorney General)*, 2001 SCC 66 [***Proulx***], ABoA Tab 19; *Miazga v. Kvello Estate*, 2009 SCC 51 [***Miazga***], ABoA Tab 14

45. We return to these issues below.

B. A *Charter* Breach is Established on the Facts Deemed True

46. Under stage one of the *Ward* analysis, a breach of the appellant's ss. 7 and 11(d) *Charter* rights is established on the facts deemed to be true in this appeal. There is no requirement of malice or any mental state in proving *Charter* breaches by the Crown or her servants or agents.

47. The Crown's failure to disclose in this case was highly egregious. Leading up to and during the trial, 30 witness statements of the eight trial complainants were not disclosed, notwithstanding that the only issue at trial was identity, and the undisclosed statements materially undermined the already very weak trial testimony on that issue. Medical and lab reports disclosing that perpetrator semen had been seized were not disclosed, nor was their existence, notwithstanding that the appellant and his counsel had made repeated requests for this very information, and serology tests at the time were capable of excluding suspects based on blood typing of semen.[44]

48. The obligation of disclosure does not cease with the trial, at least not if the accused is convicted. If information comes into the possession of the Crown after the trial, the Crown's obligation is to disclose "any information in respect of which there is a reasonable possibility that it may assist the appellant in prosecuting an appeal."[45]

49. The Crown's failure to disclose in this case continued after conviction. Subsequent to the appellant's conviction, the witness statements continued to be withheld. Information about another police suspect, who years later pleaded guilty to offences that had occurred in the same neighborhoods and involving the same *modus operandi*, was also not disclosed. Furthermore, the remarkable fact that offences involving the same *modus operandi* continued to occur in the same neighbourhoods after the appellant was detained in custody was not disclosed.[46] All of this information was required disclosure under the standards of the day. Failure to do so constituted a breach of the appellant's s. 7 *Charter* rights.

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[44] Amended NOCC, ¶¶50-53, 113-16, 120, AR v II, 44-45, 59-60
[45] *R. v. McNeil*, 2009 SCC 3, ¶¶14, 17, 29, 45, ABoA Tab 30
[46] Amended NOCC, ¶¶68, 84, 117-22, AR v II, 47, 50, 60-61

50. It was recognized well prior to the enactment of the *Charter* that the Crown's disclosure duty was an essential component of the accused's rights at common law to a fair trial, and his or her ability to make full answer and defence.

51. In *Taillefer*, this Court determined that pre-*Charter* the Courts had acknowledged that the Crown's duty to disclose all relevant evidence to the defence "had already been recognized at common law as a component of the accused's right to a fair trial and to make full answer and defence."[47]

52. The trial in this matter commenced on February 23, 1983, almost a year after the *Charter* came into effect. Thus this common law duty to disclose took on a constitutional dimension as this Court subsequently recognized in *Stinchcombe*. In *Stinchcombe*, this Court held that the common law of a duty to disclose relevant information to an accused was a component of the right to full answer and defence and had been given new vigour by the inclusion of full answer and defence in s. 7 of the *Charter*. This Court described Crown discretion to disclose as existing only with respect to certain specified acts, such as withholding disclosure to protect privilege and informers, delaying disclosure to protect ongoing investigations, or disclosure of clearly irrelevant materials – none of which is apposite in the case at bar.[48] Breach of the duty to disclose was described as a very serious breach of legal ethics.[49]

C. Damages Would Fulfil the Functions Outlined in *Ward*

53. Damages in this case would fulfil the functions outlined by this Court in step two of the *Ward* analysis.

54. Compensation is usually the most prominent of these functions and this case is no different. In *Ward*, this Court held that the claimant should, insofar as this is possible, be placed in the same position as if his *Charter* rights had not been infringed.[50] Thus, *Ward* requires that a

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[47] *R. v. Taillefer; R. v. Duguay*, 2003 SCC 70, ¶64, ABoA Tab 34; *R. v. C. (M.H.)*, [1991] 1 S.C.R. 763, pp. 774-75, ABoA Tab 26; *Lemay v. The King*, [1952] 1 S.C.R. 232, ABoA Tab 13; *Duke v. The Queen*, [1972] S.C.R. 917, ABoA Tab 8; *Caccamo v. The Queen*, [1976] 1 S.C.R. 786, ABoA Tab 3; *Cunliffe v. Law Society of British Columbia* (1984), 11 D.L.R. (4th) 280 (B.C.C.A.), ABoA Tab 5; *R.* v. *Bourget* (1987), 41 D.L.R. (4th) 756 (Sask. C.A.), ABoA Tab 23; *R. v. O'Connor*, [1995] 4 S.C.R. 411, ¶101, ABoA Tab 31; *R.* v. *Burr*, (1985) 43 Sask.R. 183 (Sask. C.A.), ABoA Tab 25

[48] The issue of Crown discretion is addressed below at ¶¶85-94.

[49] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 [***Stinchcombe***], ABoA Tab 33

[50] *Ward*, ¶27, ABoA Tab 37

court consider what actually happened to the claimant. This analysis was completely lacking in the judgment of the BCCA.

55. In this case, the appellant has suffered personal loss which cannot be remedied except by an award of damages. As a result of the breach of his *Charter* rights, the appellant was wrongly convicted of crimes he did not commit and incarcerated for 27 years. The fact that his conviction has been set aside is a woefully inadequate to remedy the 27 years the appellant spent wrongfully imprisoned which resulted in wrongful: (a) loss of liberty; (b) loss of reputation; (c) loss of privacy while in prison; (d) humiliation and disgrace; (e) pain and suffering; (f) loss of enjoyment of life; (g) loss of usual, everyday life experiences; (h) loss of developmental experiences, such as education, social learning through the workplace, civil rights, and social interaction with friends, neighbours, and family; (i) subjugation to prison life, prison discipline, extraordinary punishments and prison diet; (j) physical, emotional and psychological harm; (k) past loss of income; (l) loss of opportunity to earn income, and loss of future income-earning capacity; and (m) lost benefits including pension benefits and government benefits.[51]

56. Finally, the appellant has incurred special damage expenses including expenses associated with psychological treatment, and will continue to incur expense associated with psychological treatment, professional vocational assistance, and other loss and damage.[52]

57. All of these harms require compensation by an award of *Charter d*amag*es*.

58. The appellant's *Charter* rights were not maintained and this also needs to be vindicated. As this Court noted in *Ward*:

> [28] … Vindication focuses on the harm the infringement causes society. As Didcott J. observed in *Fose*, violations of constitutionally protected rights harm not only their particular victims, but society as a whole. This is because they "impair public confidence and diminish public faith in the efficacy of the [constitutional] protection": *Fose*, at para. 82. While one may speak of vindication as underlining the seriousness of the harm done to the claimant, vindication as an object of constitutional damages focuses on the harm the *Charter* breach causes to the state and to society.[53]

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[51] Amended NOCC, ¶98, AR v II, 53
[52] Amended NOCC, ¶99, AR v II, 54
[53] *Ward*, ¶28 [emphasis added], ABoA Tab 37

59. Vindication is a very important factor in this case and, of course, distinguishes this case from private law causes of action such as malicious prosecution because it addresses the harm to the public occasioned by a *Charter* breach. Blackstone's famous adage that it is "better that ten guilty persons escape, than that one innocent party suffer" gives expression to the strong social opprobrium felt in respect of wrongful conviction. This strong social opprobrium is also reflected in the constitutional principle which demands the presumption of innocence. Thus when, as here, a party who ought to have been acquitted suffers as a result of his interaction with the justice system and, in particular, as a result of the Crown's breach of his *Charter* rights, vindication is an important principle safeguarding public confidence in the administration of justice.

60. The Crown also needs to be deterred from engaging in the actions described in the future. In *Hill*, this Court recognized that "even one wrongful conviction is too many, and Canada has had more than one."[54] More recently in *Hart*, this Court once again emphasized the need for courts to be mindful of the "blight" of wrongful convictions when called upon to shape the law.[55] With that in mind, this Court came up with a new common law evidentiary rule relating to admissibility of evidence. A consideration of the need for deterrence should have caused the BCCA to consider historic factors leading to wrongful convictions and the pressing need to deter such action to protect individuals and to preserve public confidence in the justice system.

61. This Court, Canadian Commissions of Inquiry, and academic commentators have all recognized that non-disclosure is a leading factor in historic Canadian cases of wrongful conviction.[56] This Court has emphasized that the impact of wrongful convictions in Canada has been such that the fact of such convictions, and the factors that have contributed to them, must be taken into account when the courts are called upon to develop and shape principles of Canadian

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[54] *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, ¶36 [***Hill***], ABoA Tab 9

[55] *R. v. Hart*, 2014 SCC 52, ¶8, ABoA Tab 27

[56] *Stinchcombe*, pp. 336-37, ABoA Tab 33; *Royal Commission on the Donald Marshall Jr. Prosecution, Digest of Findings and Recommendations* (Nova Scotia, 1989), pp. 1-24, 34-35, ABoA Tab 48; Honourable Patrick LeSage, *Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell* (January 2007) [***Driskell Inquiry***], pp. 98-112, ABoA Tab 43; Honourable Fred Kaufman, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998), pp. 1094-96, 1101, ABoA Tab 42; Federal/Provincial/Territorial Heads of Prosecutions Committee, *Report on the Prevention of Miscarriages of Justice*, Ottawa, Department of Justice (September 2004), ABoA Tab 40; Federal/Provincial/Territorial Heads of Prosecutions Committee, *The Path to Justice: Preventing Wrongful Convictions* (Fall 2011), ABoA Tab 39; Bruce MacFarlane, "Convicting the Innocent: A Triple Failure of the Justice System" (2006) 31 Man. L.J. 403, ABoA Tab 45

law.[57] Thus the history of wrongful convictions in this country, and the fact that non-disclosure has been a factor that has contributed to them, must be taken into account when the courts are called upon to develop and shape principles of Canadian law, including a consideration of whether *Charter* damages are just and appropriate to remedy breach of the duty to disclose. This augurs in favour of *Charter* damages to fulfill the function of deterrence.

62. The *Ward* factors of compensation, vindication and deterrence thus all strongly support the functional justification of an award of damages under step 2 of the *Ward* analysis.

D. No Countervailing Factors Defeat these Functional Considerations

63. It is the third stage of the *Ward* analysis which has been the sole focus of the respondents' arguments at each level of court to date. Considerations properly arising at the third stage of the analysis were also the sole focus of the judgment of the BCCA.

64. Under the third step of the *Ward* test, even if the claimant has established a breach of the *Charter* and that damages are functionally justified under step two, the state is provided an opportunity to establish that countervailing factors defeat the functional considerations that support a damage award, thus rendering damages inappropriate or unjust.

65. Countervailing factors, the Court explained, include both the existence of alternative remedies and effective governance. Thus, it is at this third stage that the Crown's arguments about (a) the availability of damages for malicious prosecution, and also (b) the manner in which common law immunities are dealt with in other circumstances, such as those addressed by the US Supreme Court in *Imbler*[58] and by this Court in *Nelles*, *Proulx* and *Miazga*,[59] fall to be considered. Each concern will be considered in more detail here.

i. Damages for Malicious Prosecution Not Available for this Wrong

66. If a concurrent claim in private law has been brought, then the state may argue that the resulting damages award would adequately address the *Charter* breach and that a *Charter*

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[57] *R. v. Trochym*, 2007 SCC 6, ABoA Tab 35; *United States v. Burns*, 2001 SCC 7, ¶¶96-104, 117, ABoA Tab 36; *R. v. Khela*, 2009 SCC 4, ABoA Tab 29; *R. v. Regan*, 2002 SCC 12, ABoA Tab 32; *R. v. Brooks*, 2000 SCC 11, ABoA Tab 24

[58] *Imbler v. Pachtman*, 424 U.S. 409 (1976), 96 S. Ct. 984 [***Imbler***], ABoA Tab 10

[59] *Nelles*, ABoA Tab 16; *Proulx*, ABoA Tab 19; *Miazga*, ABoA Tab 14

damages award would be duplicative.[60] While the existence of a potential private law tort claim does not bar a claimant from obtaining *Charter* damages, double compensation cannot be obtained through concurrent claims.[61] It is for the state to show that other remedies including private law remedies or another *Charter* remedy are available in the particular case that will sufficiently address the breach.

67. The BCCA properly recognized that in circumstances where existing remedies are incomplete and leave a victim without legal recourse, a cause of action should be recognized.[62] Yet it held that in this case "it is clear that there is the potential remedy of malicious prosecution against the prosecutors" and thus it found there was no lack of an existing remedy.[63]

68. This reasoning fails to appreciate the important distinctions between the tort of malicious prosecution and a *Charter* claim for damages as a result of breach of the *Charter*-protected right to full disclosure leading to wrongful conviction and imprisonment.

69. This Court recognized in *Ward* that while "the term 'damages' conveniently describes the remedy sought" in *Charter* damages claims, "it should always be borne in mind that these *are not* private law damages, but the distinct remedy of constitutional damages" and further that "an action for public law damages 'is not a private law action in the nature of a tort claim for which the state is vicariously liable but [a distinct] public law action directly against the state for which the state is primarily liable'."[64]

70. The gravamen of the conduct complained of in the malicious prosecution claim is the initiation and continuation of the prosecution in the absence of reasonable and probable grounds, with malicious state of mind.[65] Initiation and continuation of a prosecution are core prosecutorial discretionary decisions.[66] The harm arises because the individual has to mount a defence to a prosecution and be otherwise subject to the stress and stigma of being charged with a crime. Malicious prosecution is a claim against an individual Crown attorney although the state is

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[60] *Ward*, ¶35, ABoA Tab 37
[61] *Ward*, ¶36, ABoA Tab 37
[62] CA Reasons, ¶21, AR v I, 36; *Hill*, ¶35, ABoA Tab 9
[63] CA Reasons, ¶22, AR v I, 36-37
[64] *Ward*, ¶22 [emphasis added], ABoA Tab 37
[65] Amended NOCC, ¶122, AR v II, 61
[66] *Krieger v. Law Society of Alberta*, 2002 SCC 65 [***Krieger***], ¶46, ABoA Tab 12

vicariously liable. There is no requirement that the accused be imprisoned for the tort of malicious prosecution to be actionable.

71. In contrast, the gravamen of the *Charter* claim in this case is significant, material non-disclosure of exculpatory information to the defence that breached the appellant's *Charter* rights. This non-disclosure is not an exercise of prosecutorial discretion.[67] In a claim for *Charter* damage such as that at issue in this appeal, the harm arises from the consequences of that breach, which were the appellant's wrongful conviction and incarceration for 27 years. The claim is against the state directly, not against an individual.

72. The *Charter* claim is thus legally and factually distinct from a claim for malicious prosecution. The trial Court in this action may ultimately find that the initiation of the prosecution was done without malice, and that hence there is no sustainable private law claim for malicious prosecution, yet nonetheless find that the appellant's *Charter* right to disclosure was breached and this resulted in his wrongful conviction. The elements of the two claims do not mirror each other. Goepel J. rightly recognized this distinction, noting that the *Charter* claim "does not seek private law damages but the distinct remedy of constitutional damages. It is not a private law action in the nature of a tort claim but a public law action directly against the state for which the state is primarily liable."[68]

ii. Malicious Prosecution Authorities Are Not Binding

73. This Court's decisions in *Nelles*, *Proulx* and *Miazga* did not concern claims for *Charter* damages nor did they address any relevant *Charter* arguments. These cases, then, do not give rise to the doctrine of *stare decisis* in a case which raises the *Charter* issues advanced here.

74. The BCCA's conclusion that all issues concerning the limits of civil liability for prosecutorial misconduct had to be left for the legislature or this Court alone to address in light

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[67] *Krieger*, ¶49, ABoA Tab 12. *Krieger* dealt explicitly with Crown failure to disclose, and this Court held that such non-disclosure was not protected by prosecutorial immunity, as it is breach of a legal duty rather than a discretionary "core" decision for which a qualified immunity pertains. This may be likened to review of non-disclosure in the criminal trial process, where the relevant principles on review are very different from those applied to defence challenges that relate to matters within Crown core discretion: See e.g. *Amato v. Welsh*, 2013 ONCA 258 [***Amato***], ¶¶40-57, ABoA Tab 1. This issue is explored in more detail below.

[68] *Henry 2013*, ¶29, AR v I, 11; see also *Ward*, ¶22, ABoA Tab 37

of the private law malicious prosecution cases of *Nelles*, *Proulx* and *Miazga*[69] was inconsistent with this Court's decision in *Bedford* and with *Ward*. The judgment in *Bedford* makes clear that new *Charter* arguments are not foreclosed by a previous decision of this Court which does not address them.[70] Had the BCCA considered the issue of Crown immunity at the third stage of the *Ward* test as it was required to do, its analysis would have been informed by the first two stages of analysis and for this reason it would have recognized that "the threshold for liability under the *Charter* must be distinct and autonomous from that developed under private law."[71]

75. In *Nelles*, the appellant was charged with the murder of four infants and was discharged on all counts at the conclusion of the preliminary inquiry. She then brought an action in malicious prosecution (not under the *Charter*) against, *inter alia*, the Crown in right of Ontario and the Attorney General for Ontario. The respondents succeeded in having the action dismissed in the Supreme Court of Ontario on the basis that the pleadings disclosed no reasonable cause of action. This judgment was upheld by the ONCA. These courts applied the reasoning of the United States Supreme Court in *Imbler* which held that prosecutors enjoyed an absolute immunity from such claims. This Court was asked to determine "whether the Attorney General and his agents, the Crown Attorneys, are absolutely immune from civil liability in a suit for malicious prosecution."[72]

76. In answering this question, the majority of this Court rejected the reasoning in *Imbler* and determined that in Canada, for policy reasons, there was no such absolute immunity at common law. Although there was no claim for *Charter* damages before it, the majority noted in *obiter dicta*, that an absolute immunity would have the undesirable effect of not only negating all private law actions, but also claims under s. 24(1) of the *Charter*. The majority did not purport to determine the extent to which even a qualified immunity rule would be in accord with s. 24 of the *Charter* and in fact left that question open deciding only that the common law itself does not mandate absolute immunity.[73] Justice La Forest, concurring, held that consideration of Charter implications were better left to another day when it became necessary to deal with them.[74]

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[69] CA Reasons, ¶¶20, 29, AR v I, 35-36, 40-41
[70] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 [***Bedford***], ¶42, ABoA Tab 4
[71] *Ward*, ¶43 [emphasis added], ABoA Tab 37
[72] *Nelles*, p. 178, ABoA Tab 16
[73] *Nelles*, pp. 195-96, ABoA Tab 16
[74] *Nelles*, pp. 218-19, ABoA Tab 16

77. Thus, while the implications of finding that the Crown enjoyed *absolute immunity* on hypothetical future *Charter* cases were considered by the majority in *Nelles*, the issue of whether a separate cause of action could be maintained under the *Charter*, and if so on what standard, *was* not raised or addressed. To the extent that the *Charter* was considered by the majority's *obiter dicta* comments, the majority held that it would not be desirable to preclude a remedy under s. 24.

78. *Proulx* another case relied on by the BCCA, is also distinguishable. In *Proulx*, the prosecutor determined that there were insufficient grounds to charge the appellant with murder and the prosecution file was closed. Five years later, in the midst of a defamation claim launched by the appellant, the prosecutor was advised by the defendants in the defamation case of a new witness, added the defendant police investigator to the Crown team as an investigator and decided to prosecute the appellant on the murder charge. The appellant was convicted at trial and acquitted on appeal. The appellant successfully pursued a claim for damages for malicious prosecution. The issues considered by this Court on appeal related solely to the malicious prosecution claim and did not include any consideration of *Charter* damages.

79. *Miazga* is also no answer to this claim. In *Miazga*, the respondents sued for malicious prosecution. The respondents succeeded at trial and in the court of appeal on the basis that the Crown prosecutor lacked subjective belief in the probable guilt of the respondents and that this lack of subjective belief was sufficient to support a finding of malice. This Court allowed the appeal holding that the analysis of whether reasonable and probable cause existed is an objective assessment. Crown counsel's subjective belief in the reasonable and probable cause is relevant to the malice inquiry but is not determinative. A *Charter* claim for damages played no role in this Court's decision.

80. This Court's decisions in *Nelles*, *Proulx* and *Miazga*, then, are not binding as a matter of *stare decisis*.

iii. No Governance Concerns Requiring Any Minimum State of Mind Threshold

81. Not only are *Nelles*, *Proulx* and *Miazga* not binding as a matter of *stare decisis*, as is explained above, they are also not persuasive as a matter of policy in this case. The appellant submits that breach of the *Charter* leading to a wrongful conviction and imprisonment and a

consideration of the need to compensate the victim, deter such conduct in the future and vindicate the public interest ought to be sufficient to ground a claim for *Charter* damages regardless of whether the *Charter* breaches were done maliciously.

82. At the third stage of the *Ward* analysis, this Court explained that principles and immunities from private law ***may*** give expression to policy concerns for effective governance which may also be a countervailing factor that negates the appropriateness of a s. 24(1) damage award. In such cases, the state may establish that an award of *Charter* damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity.

83. This Court explained this concern in *Ward* as follows:

> [43] Such concerns may find expression, as the law in this area matures, in various defences to s. 24(1) claims. *Mackin* established a defence of immunity for state action under valid statutes subsequently declared invalid, unless the state conduct is "clearly wrong, in bad faith or an abuse of power" (para. 78). If and when other concerns under the rubric of effective governance emerge, these may be expected to give rise to analogous public law defences. By analogy to *Mackin* and the private law, where the state establishes that s. 24(1) damages raise governance concerns, it would seem a minimum threshold, such as clear disregard for the claimant's *Charter* rights, may be appropriate. Different situations may call for different thresholds, as is the case at private law. Malicious prosecution, for example, requires that "malice" be proven because of the highly discretionary and quasi-judicial role of prosecutors (*Miazga v. Kvello Estate* [citation omitted])... When appropriate, private law thresholds and defences may offer guidance in determining whether s. 24(1) damages would be "appropriate and just". While the threshold for liability under the *Charter* must be distinct and autonomous from that developed under private law, the existing causes of action against state actors embody a certain amount of "practical wisdom" concerning the type of situation in which it is or is not appropriate to make an award of damages against the state…[75]

84. However, no such concerns arise in this case.

85. Each of *Nelles, Proulx* and *Miazga* addressed those circumstances in which a court could find the Crown liable in matters which, but for the allegation of malice, would ordinarily be within its discretion. In such circumstances, absent a finding of malice, the Crown enjoys an immunity from civil suit. This immunity is not to serve the private interests of Crown attorneys

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[75] *Ward*, ¶43, ABoA Tab 37

but rather to encourage public trust and confidence in the impartiality of prosecutors and to ensure that there is no chilling effect on the Crown Attorney's exercise of discretion.[76]

86. These considerations point in the opposite direction in this case.

87. First, the failure to disclose at issue in these proceedings was not discretionary and so there is no risk of chilling the exercise of Crown discretion. Prosecutorial immunity does not apply to non-discretionary Crown obligations such as disclosure in the criminal context.

88. This distinction between discretionary and non-discretionary functions of Crown attorneys was explicitly anticipated by the majority in *Nelles* even when considering Crown immunity broadly where the majority held:

> … [T]he Attorney General's immunity from judicial review, based on the exercise of a judicial function, does not equate with immunity from civil suit for damages for wrongful conduct in the performance of prosecutorial functions which do not involve the exercise of a judicial function. Indeed, most of the functions and acts performed by Crown Attorneys, as agents of the Attorney General, would fall into this category…[77]

89. In light of this recognition, the BCCA's decision is troubling as there is no mention of this distinction or of this Court's decision in *Krieger*, which was raised by the parties below and which deals specifically with the failure of a prosecutor to disclose evidence to the defence.[78] In *Krieger*, the issue was whether a Crown prosecutor was subject to law society discipline for failing to disclose exculpatory evidence in the course of a murder trial. Krieger argued that there was no jurisdiction to review his conduct as it was a matter of discretion and thereby immune from review. This Court disagreed, holding that disclosure was a legal duty, transgressions with respect to which amounted to a very serious breach of legal ethics, and was *not* a matter of prosecutorial discretion.[79]

90. This Court in *Krieger* described "core" prosecutorial powers, with respect to which there is a limited immunity from review, as follows:

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[76] *Nelles*, pp. 195-97, ABoA Tab 16
[77] *Nelles*, p. 217, ABoA Tab 16
[78] *Krieger*, ABoA Tab 12, post-dates the trial decision herein. However the undisclosed complainants' statements, undisclosed forensic and medical reports, and undisclosed evidence that McRae was a VPD suspect, were part of standard disclosure required in criminal cases at the time of the appellant's trial: Amended NOCC, ¶55, AR v II, 45.
[79] *Krieger*, ¶54, ABoA Tab 12

> Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 579 and 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether: *R. v. Osborne* (1975), 25 C.C.C. (2d) 405 (N.B.C.A.); and (e) the discretion to take control of a private prosecution: *R. v. Osiowy* (1989), 50 C.C.C. (3d) 189 (Sask. C.A.). While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General.[80]

91. This Court in *Krieger* further held that "[w]ithin the core of prosecutorial discretion, the courts cannot interfere except in such circumstances of flagrant impropriety or in actions for "malicious prosecution": *Nelles*, *supra*. In all such cases, the actions of the Attorney General will be beyond the scope of his office as protected by constitutional principle, and the justification for such deference will have evaporated."[81]

92. *Krieger*, then, dealt explicitly with Crown failure to disclose, and this Court held that such non-disclosure was not protected by prosecutorial immunity, as it is a breach of a legal duty rather than a discretionary "core" decision for which a qualified immunity pertains. The Crown quite simply has no discretion not to disclose relevant information. Thus the failure to disclose in issue in this case was not within the protected discretionary "core" of acts or omissions that are not reviewable in private law absent proof of *mala fides* or flagrant impropriety.

93. The Crown possesses no discretion to breach the *Charter* rights of an accused. As this Court recently held in *Anderson*, prosecutorial discretion provides no shield to a Crown prosecutor who has failed to fulfill his or her constitutional obligations such as the duty to provide proper disclosure to the defence.[82]

94. Given there was no exercise of Crown discretion in this case, the Crown in its failure to disclose was not exercising a "judicial or quasi-judicial function" and thus this case does not raise concerns about Crown constitutional independence.

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[80] *Krieger*, ¶46, ABoA Tab 12
[81] *Krieger*, ¶49, ABoA Tab 12
[82] *R. v. Anderson*, 2014 SCC 41, ¶45, ABoA Tab 21

95. Secondly, the public's trust and confidence in prosecutors and in the administration of justice more broadly would be harmed if Crown failure to comply with its legal duties resulting in a breach of the *Charter*, and leading to a wrongful conviction and a significant period of wrongful incarceration, did not result in an award of damages even if the breaches of the *Charter* were not malicious.

96. Thus, the breach of the *Charter* and a consideration of the need to compensate the victim, deter such conduct in the future and vindicate the public interest, ought to be sufficient to ground a claim for *Charter* damages regardless of the Crown's state of mind in committing the *Charter* breaches.

97. In all the circumstances, the simple breach standard advocated here is appropriate. It is also consistent with the approach developing in France[83] and also with the dissenting judgments of Chief Justice Elias and Justice Anderson of the Supreme Court of New Zealand.[84]

iv. In the Alternative, the Standard Should be Simple Negligence

98. In the alternative, if there are some governance concerns militating against a simply breach standard (and we say there are not), there is no principled reason that the Crown should be held to a lower standard of care than government is in the operational domain of other aspects of government functioning such as, for example, in *Just*[85] or the police in *Hill* or indeed, than defence counsel is held by the common law.[86] And indeed, a benefit of adopting a simple

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[83] Ken Cooper-Stephenson writes that "[t]he plaintiff-oriented movement in France might also argue for strict constitutional liability. There has been a shift from a position very protective of public authorities (*faute lourde* was usually required) to one where some harms are recoverable on a strict liability basis because of the philosophy of "socialization of risks." Strict liability applies to cases of mistaken detention; inherently risky or ultra-hazardous activity, which embraces the use of firearms by police; and breach of equality where the discrimination has caused special or abnormal damage: Ken Cooper-Stephenson, *Constitutional Damages Worldwide* (Toronto: Carswell, 2013) [***Constitutional Damages***], p. 122, ABoA Tab 38. See also B.S. Markesinis, et al. *Tortious Liability of Statutory Bodies: A Comparative and Economic Analysis of Five English Cases* (Oxford: Hart, 1999) at 15-20, ABoA Tab 46.

[84] *Attorney-General v. Chapman*, [2011] NZSC 110, ¶¶1-93 per Elias C.J., ¶¶216-25 per Anderson J., ABoA Tab 2. As this case concerns the extent of judicial immunity not Crown immunity, it is not on all fours with the present case but is nonetheless instructive.

[85] *Just v. British Columbia*, [1989] 2 S.C.R. 1228, ABoA Tab 11

[86] *Amato*, ¶¶40-57, ABoA Tab 1. The policy considerations which have caused the ONCA to maintain that defence counsel may be sued civilly for negligence include: (a) that lawyers should be as accountable as anyone else for their misdeeds; (b) that a person who suffers loss as a result of a lawyer's negligence should be entitled to compensation through the tort system; (c) the potential exposure to negligence claims serves as a deterrent against incompetent representation; and (d) lawyers should not appear to be given favoured treatment which is not extended to other

negligence standard is that the rights and freedoms fundamentally protected by the *Charter* are not shortchanged when compared to those interests and rights protected by ordinary private law.

99. Holding the Crown to the simple negligence standard is arguably consistent with the wording of s. 1 which provides that *Charter* rights are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

100. Such a standard would again be consistent with the functions outlined in *Ward* including compensation, vindication, and also deterrence. The state should be deterred from negligently breaching *Charter* rights especially in the performance of non-discretionary obligations. It is also consistent with the approach developing in India[87] and at the European Court of Human Rights.[88]

v. In the Further Alternative, the Standard Should be "marked and unacceptable departure from the reasonable standards expected of the prosecution"

101. However, if this Court is satisfied that the state has raised sufficient governance concerns to warrant an even higher standard of intent, then in the further alternative, Goepel J.'s approach in this case was a conservative and principled application of the law. In that regard the appellant adopts the reasons of Goepel J.

102. The standard of "marked and unacceptable departure from the reasonable standards expected of the prosecution" is one that has always worked well and not led to floodgates in cases where Crown non-disclosure leads to an award of criminal costs.[89]

103. This standard is consistent with the suggestion of Professor Ken Cooper-Stephenson that:

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professionals who have, arguably, at least as good a claim to immunity from negligence claims as do lawyers: ¶52. As above, these policy concerns resonate with the purposes of *Charter* damages.

[87] In fact, India provides some support for the use of a strict liability standard in *Nilabati Behera v. State of Orissa* (1993), SCR (2) 581 (India S.C.), p. 10, ABoA Tab 17, where the Supreme Court of India noted that "award of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights…" [emphasis added] See also pp. 12-14, 17-18 and *D.K. Basu v. State of West Bengal*, (1997) 1 SCC 416 (India S.C.), ABoA Tab 6. However, in *Constitutional Damages*, at pp. 126-27, that these cases use the notion of strict liability in a different way and there is support for the use of simple negligence. See also *Constitutional Damages*, pp. 140-41, ABoA Tab 38.

[88] See *Constitutional Damages*, p. 138, ABoA Tab 38; *Osman v. United Kingdom* (2000), 29 EHRR 245 (European Ct. Human Rights), ¶116, ABoA Tab 18

[89] See e.g. *Dunedin*, ¶87, ABoA Tab 20

> It is arguable that, absent specific provisions to the contrary, the default minimum state of mind position for constitutional damages claims worldwide ought to be an objective standard of "gross negligence", "heightened negligence", "patent unreasonableness", "serious breach", or *faute lourde* ("gross fault"); or a subjective standard of "recklessness" or "deliberate indifference".... They are more protective of government than mere unreasonableness but do not require intent or malice as a prerequisite for a claim. Such a standard was adopted by the European Court of Justice in *Factortame* for damages under European Community law, and it is a prominent feature of many decisions in the United States following *Harris*.[90]

E. Quantum

104. Finally, under the fourth step of the test in *Ward*, if the claimant establishes breach of his *Charter* rights and shows that an award of damages under s. 24(1) of the *Charter* would serve a functional purpose, and the state fails to negate that the award is "appropriate and just," the court determines the quantum of damages.

105. The quantum of such an award will be a trial issue.

PARTS IV AND V: COSTS SUBMISSION AND ORDER SOUGHT

106. The appellant seeks orders that:

a. the appeal be allowed;

b. the appellant be permitted to amend his Notice of Civil Claim in accordance with the answer to the constitutional question herein; and

c. special (or solicitor-client) costs at all levels of court, in any event of the outcome in recognition of the important public interest nature of this case.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: August 14, 2014

Counsel for the Appellant
Joseph J. Arvay, Q.C., A. Cameron Ward,
Marilyn Sandford and Alison M. Latimer

[90] *Constitutional Damages*, p. 141, ABoA Tab 38. See also pp. 142-49.

PART VI: TABLE OF AUTHORITIES

Paragraph(s)

CASES

Paragraph(s)

SECONDARY SOURCES

Ken Cooper-Stephenson, *Constitutional Damages Worldwide* (Carswell, 2013), pp. 122, 126-27, 138, 140-49	97, 103
Federal/Provincial/Territorial Heads of Prosecutions Committee, *The Path to Justice: Preventing Wrongful Convictions* (Fall 2011)	61
Federal/Provincial/Territorial Heads of Prosecutions Committee, *Report on the Prevention of Miscarriages of Justice*, Ottawa, Department of Justice (September 2004)	61
Honourable T. Alexander Hickman, "Wrongful Convictions and Commissions of Inquiry: A Commentary" (2004) 46 Canadian J. Criminology & Crim. Just. 183 at 184	3
Honourable Fred Kaufman, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998), pp. 1094-96, 1101 [full report available online: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/]	61
Honourable Patrick LeSage, *Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell* (January 2007), pp. 98-112 [full report available online: http://www.driskellinquiry.ca/]	61
Honourable Edward P. MacCallum, *Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard* (September 2008), p. 365 [full report available online: www.milgaardinquiry.ca]	3
Bruce MacFarlane, "Convicting the Innocent: A Triple Failure of the Justice System" (2006) 31 Man. L.J. 403	61
B.S. Markesinis, et al. *Tortious Liability of Statutory Bodies: A Comparative and Economic Analysis of Five English Cases* (Oxford: Hart, 1999) at 15-20	97
Honourable William W. Marshall, "The Bounds of Redress & The Need of Full and Credible Inquiries In Wrongful Convictions" AIDWC Conference June 11, 2005 at p. 3	3
Royal Commission on the Donald Marshall Jr. Prosecution, Digest of Findings and Recommendations (Nova Scotia, 1989), pp. 1-24, 34-35 [available online: http://novascotia.ca/just/marshall_inquiry/]	61

PART VII: STATUTORY PROVISIONS

	Paragraph(s)
Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(d), 24, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11	1, 2, 4-6, 8, 36-42, 44, 46-47, 49-52, 54-55, 57-59, 61, 64, 66, 68-69, 71-79, 81-82, 92, 95-96, 98-100, 104

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***Canadian Charter of Rights and Freedoms*, ss. 1, 7, 11(d), 24, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11**

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

...

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

…

11. Any person charged with an offence has the right

…

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

…

24. (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

***Loi constitutionnelle de 1982*, Annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11**

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

…

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu’en conformité avec les principes de justice fondamentale.

…

11 Tout inculpé a le droit:

…

d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

…

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente *charte*, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente *charte*, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

Appendix A

Supreme Court of Canada | Cour suprême du Canada

June 9, 2014 | le 9 juin 2014

ORDER
MOTION

ORDONNANCE
REQUÊTE

IVAN WILLIAM MERVIN HENRY v. HER MAJESTY THE QUEEN IN RIGHT OF THE PROVICE OF BRITISH COLUMBIA AS REPRESENTED BY THE ATTORNEY GENERAL OF BRITISH COLUMBIA AND ATTORNEY GENERAL OF CANADA
(B.C.) (35745)

THE CHIEF JUSTICE:

UPON APPLICATION by the appellant for an order stating a constitutional question in the above appeal;

AND THE MATERIAL FILED having been read;

IT IS HEREBY ORDERED THAT THE CONSTITUTIONAL QUESTION BE STATED AS FOLLOWS:

1. Does s. 24(1) of the *Canadian Charter of Rights and Freedoms* authorize a court of competent jurisdiction to award damages against the Crown for prosecutorial misconduct absent proof of malice?

Any attorney general who intervenes pursuant to par. 61(4) of the *Rules of the Supreme Court of Canada* shall pay the appellant and respondents the costs of any additional disbursements they incur as a result of the intervention.

IT IS HEREBY FURTHER ORDERED THAT:

1. The appellant's record, factum and book of authorities shall be served and filed on or before August 19, 2014.

2. Any person wishing to intervene in this appeal under Rule 55 of the *Rules of the Supreme Court of Canada* shall serve and file a motion for leave to intervene on or before September 9, 2014.

3. The appellant and respondents shall serve and file their responses, if any, to the motions for leave to intervene on or before September 15, 2014.

4. Replies to the responses, if any, to the motions for leave to intervene shall be served and filed on or before September 17, 2014.

5. The respondents' records, factums and books of authorities shall be served and filed no later than eight (8) weeks after the service of the appellant's materials.

6. Any attorney general wishing to intervene pursuant to par. 61(4) of the *Rules of the Supreme Court of Canada* shall serve and file their factum and book of authorities on or before October 30, 2014.

À LA SUITE DE LA DEMANDE de l'appelant visant à obtenir la formulation d'une question constitutionnelle dans l'appel susmentionné;

ET APRÈS AVOIR LU la documentation déposée,

LA QUESTION CONSTITUTIONNELLE SUIVANTE EST FORMULÉE :

1. Le paragraphe 24(1) de la *Charte canadienne des droits et libertés* autorise-t-il un tribunal compétent à condamner le ministère public au paiement de dommages-intérêts pour la conduite répréhensible du poursuivant lorsque nulle malveillance n'a été prouvée?

Tout procureur général qui interviendra en vertu du par. 61(4) des *Règles de la Cour suprême du Canada* sera tenu de payer à l'appelant et aux intimés les dépens supplémentaires résultant de son intervention.

IL EST EN OUTRE ORDONNÉ CE QUI SUIT :

1. Les dossiers, mémoire et recueil de sources de l'appelant seront signifiés et déposés au plus tard le 19 août 2014.

2. Toute personne qui souhaite intervenir dans le présent appel en vertu de la règle 55 des *Règles de la Cour suprême du Canada* signifiera et déposera une requête en autorisation d'intervenir au plus tard le 9 septembre 2014.

3. L'appelant et les intimées signifieront et déposeront leurs réponses aux demandes d'autorisation d'intervenir, le cas échéant, au plus tard le 15 septembre 2014.

4. Les répliques, le cas échéant, aux réponses aux demandes d'autorisation d'intervenir seront signifiées et déposées au plus tard le 17 septembre 2014.

5. Les dossiers, mémoire et recueil de sources des intimées seront signifiés et déposés au plus tard huit (8) semaines suivant la signification des matériaux de l'appelant.

6. Tout procureur général qui interviendra en vertu du par. 61(4) des *Règles de la Cour suprême du Canada* devra signifier et déposer son mémoire et son recueil de sources au plus tard le 30 octobre 2014.

C.J.C.
J.C.C.