Court File No. 36167

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

BETWEEN:

JESSICA ERNST

APPELLANT

AND

ALBERTA ENERGY REGULATOR

RESPONDENT

AND

ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL FOR SASKATCHEWAN, ATTORNEY GENERAL OF QUEBEC, CANADIAN CIVIL LIBERTIES ASSOCIATION, AND BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

INTERVENERS

BOOK OF AUTHORITIES OF THE INTERVENER THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, UNIVERSITY OF TORONTO FACULTY OF LAW

(Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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The British Columbia Human Rights Commission, the Commissioner of Investigation and Mediation, the British Columbia Human Rights Tribunal and Andrea Willis *Appellants*

v.

Robin Blencoe *Respondent*

and

Irene Schell *Intervener*

and

The Attorney General for Ontario, the Attorney General of British Columbia, the Saskatchewan Human Rights Commission, the Ontario Human Rights Commission, the Nova Scotia Human Rights Commission, the Manitoba Human Rights Commission, the Canadian Human Rights Commission, the Commission des droits de la personne et des droits de la jeunesse, the British Columbia Human Rights Coalition and the Women's Legal Education and Action Fund *Interveners*

La British Columbia Human Rights Commission, le Commissioner of Investigation and Mediation, le British Columbia Human Rights Tribunal et Andrea Willis *Appelants*

c.

Robin Blencoe *Intimé*

et

Irene Schell *Intervenante*

et

Le procureur général de l'Ontario, le procureur général de la Colombie-Britannique, la Saskatchewan Human Rights Commission, la Commission ontarienne des droits de la personne, la Nova Scotia Human Rights Commission, la Commission des droits de la personne du Manitoba, la Commission canadienne des droits de la personne, la Commission des droits de la personne et des droits de la jeunesse, la British Columbia Human Rights Coalition et le Fonds d'action et d'éducation juridiques pour les femmes *Intervenants*

INDEXED AS: BLENCOE *v.* BRITISH COLUMBIA (HUMAN RIGHTS COMMISSION)

Neutral citation: 2000 SCC 44.

File No.: 26789.

2000: January 24; 2000: October 5.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL

Constitutional law — Charter of Rights — Application — Human Rights Commission — Commission implementing specific governmental program and exercising statutory authority — Commission independent

RÉPERTORIÉ: BLENCOE *c.* COLOMBIE-BRITANNIQUE (HUMAN RIGHTS COMMISSION)

Référence neutre: 2000 CSC 44.

N° du greffe: 26789.

2000: 24 janvier; 2000: 5 octobre.

Présents: Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Charte des droits — Application — Commission des droits de la personne — Commission mettant en œuvre un programme gouvernemental particulier et exerçant un pouvoir conféré par la loi

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

It is clear that both the federal Parliament and provincial legislatures are bound by the *Charter*. However, one threshold issue which has been raised in this case is whether the Commission and the Tribunal are agents of government pursuant to s. 32 of the *Charter*. The following three factors have been put forth to support the argument that these bodies are not bound by the *Charter*: (i) the organizations in question are required to be independent of government; (ii) the challenge in this case is not to any statutory provisions that might be said to be within the legislative sphere; and (iii) the organizations in question must act judicially since their functions are analogous to those exercised by courts of law.

33 For the reasons I address below, these claims are misguided with respect to their approach to the application of the *Charter*. Furthermore, for the purposes of this appeal, it is only necessary to address the *Charter*'s applicability to the actions of the Commission since the prejudice suffered by the respondent is alleged to have resulted from unreasonable delay in the actions of the Commission.

34 The mere fact that a body is independent of government is not determinative of the *Charter*'s application, nor is the fact that a statutory provision is not impugned. Being autonomous or independent from government is not a conclusive basis upon which to hold that the *Charter* does not apply.

35 Bodies exercising statutory authority are bound by the *Charter* even though they may be independent of government. This was confirmed by

32. (1) La présente charte s'applique:

a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;

b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

Il est clair que le Parlement du Canada et les législatures provinciales sont assujettis à la *Charte*. Cependant, une question préliminaire que soulève la présente affaire est de savoir si la Commission et le Tribunal sont des mandataires du gouvernement aux fins de l'art. 32 de la *Charte*. Les trois facteurs suivants ont été avancés à l'appui de l'argument voulant que ces organismes ne soient pas assujettis à la *Charte*: (i) les organismes en cause doivent être indépendants du gouvernement, (ii) la contestation en l'espèce ne vise pas une disposition dont on pourrait dire qu'elle ressortit au pouvoir législatif et (iii) les organismes en question doivent agir d'une manière judiciaire, étant donné que leurs fonctions sont analogues à celles d'une cour de justice.

Pour les raisons exposées ci-après, ces prétentions s'appuient sur une façon erronée d'aborder l'application de la *Charte*. De plus, aux fins du présent pourvoi, il est seulement nécessaire d'examiner l'applicabilité de la *Charte* aux actes de la Commission, étant donné que le préjudice subi par l'intimé serait imputable au fait que la Commission n'a pas agi dans un délai raisonnable.

Le seul fait qu'un organisme soit indépendant du gouvernement n'est pas décisif en ce qui concerne l'application de la *Charte*, pas plus que ne l'est le fait qu'aucune disposition législative n'est contestée. L'autonomie ou l'indépendance vis-à-vis du gouvernement ne permet pas de conclure à l'inapplication de la *Charte*.

L'organisme qui exerce un pouvoir conféré par une loi est assujetti à la *Charte* même s'il peut être indépendant du gouvernement. Le juge La Forest

La Forest J., speaking for a unanimous Court in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 21:

There is no doubt, however, that the *Charter* also applies to action taken under statutory authority. The rationale for this rule flows inexorably from the logical structure of s. 32. As Professor Hogg explains in his *Constitutional Law of Canada* (3rd ed. 1992 (loose-leaf)), vol. 1, at pp. 34-8.3 and 34-9:

> Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.

There is no doubt that the Commission is created by statute and that all of its actions are taken pursuant to statutory authority.

One distinctive feature of actions taken under statutory authority is that they involve a power of compulsion not possessed by private individuals (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 34-12). Clearly the Commission possesses more extensive powers than a natural person. The Commission's authority is not derived from the consent of the parties. The *Human Rights Code* grants various powers to the Commission to both investigate complaints and decide how to deal with such complaints. Section 24 of the Code specifically allows the Commissioner to compel the production of documents. The relevant portions of this section state:

24 (1) For the purpose of investigating a complaint, the commissioner of investigation and mediation or a human rights officer may

l'a confirmé en rendant l'arrêt unanime de notre Cour *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624, au par. 21:

Toutefois, il ne fait aucun doute que la *Charte* s'applique aussi aux actes accomplis en vertu de pouvoirs conférés par la loi. La justification de cette règle découle inexorablement de la structure logique de l'art. 32. Comme l'explique le professeur Hogg dans *Constitutional Law of Canada* (3e éd. 1992 (feuilles mobiles)), vol. 1, aux pp. 34-8.3 et 34-9:

> [TRADUCTION] Les mesures prises en vertu d'un pouvoir statutaire ne sont valides que si elles se situent à l'intérieur de la portée de ce pouvoir. Puisque ni le Parlement ni une législature ne peuvent eux-mêmes adopter une loi qui contrevient à la Charte, ni l'un ni l'autre ne peuvent autoriser des mesures qui contreviendraient à la Charte. Ainsi, les limites que la Charte impose à un pouvoir statutaire s'étendront à la famille des autres pouvoirs statutaires et s'appliqueront aux règlements, aux statuts, aux ordonnances, aux décisions et à toutes les autres mesures (législatives, administratives ou judiciaires) dont la validité dépend d'un pouvoir statutaire.

Il ne fait aucun doute que la Commission a été créée par une loi et qu'elle accomplit tous ses actes en vertu du pouvoir que lui confère la loi en cause.

L'un des traits distinctifs des actes accomplis en vertu d'un pouvoir conféré par la loi est qu'ils comportent un pouvoir de contrainte que n'ont pas les particuliers (P. W. Hogg, *Constitutional Law of Canada* (éd. feuilles mobiles), vol. 2, à la p. 34-12). Il est clair que les pouvoirs de la Commission sont plus étendus que ceux d'une personne physique. Sa compétence ne découle pas du consentement des parties. Le *Human Rights Code* habilite, de diverses manières, la Commission à enquêter sur des plaintes et à décider de la façon de les traiter. L'article 24 du Code permet expressément au commissaire d'exiger la production de documents. En voici les extraits pertinents: 36

[TRADUCTION]

24 (1) Lorsqu'il l'enquête relative à une plainte, le commissaire aux enquêtes et à la médiation ou un agent des droits de la personne peut

(a) require the production of books, documents, correspondence or other records that relate or may relate to the complaint, and

(b) make any inquiry relating to the complaint of any person, in writing or orally.

(2) If a person refuses to

(a) comply with a demand under subsection (1) (a) for the production of books, documents, correspondence or other records, or

(b) respond to an inquiry made under subsection (1) (b),

the commissioner of investigation and mediation or a human rights officer may apply to the Supreme Court for an order requiring the person to comply with the demand or respond to the inquiry.

. . .

(4) For the purpose of investigating a complaint, the commissioner of investigation and mediation or a human rights officer may, with the consent of the owner or occupier, enter and inspect any premises that in the opinion of that commissioner or the human rights officer may provide information relating to the complaint.

a) exiger la production de livres, documents, lettres ou autres dossiers qui se rapportent ou peuvent se rapporter à la plainte, et

b) poser des questions par écrit ou de vive voix relativement à la plainte.

(2) Si une personne refuse

a) d'obtempérer à une demande de production de livres, documents, lettres ou autres dossiers, fondée sur l'alinéa (1)a), ou

b) de répondre à une question posée en vertu de l'alinéa (1)b),

le commissaire aux enquêtes et à la médiation ou un agent des droits de la personne peut demander à la Cour suprême d'ordonner à la personne en cause d'obtempérer à la demande ou de répondre à la question.

. . .

(4) Lorsqu'il enquête sur une plainte, le commissaire aux enquêtes et à la médiation ou un agent des droits de la personne peut, avec le consentement du propriétaire ou de l'occupant, inspecter des locaux si, à son avis, cette inspection peut permettre d'obtenir des renseignements concernant la plainte.

37 The Commission in this case cannot therefore escape *Charter* scrutiny merely because it is not part of government or controlled by government. In *Eldridge*, a unanimous Court concluded that a hospital was bound by the *Charter* since it was implementing a specific government policy or program. The Commission in this case is both implementing a specific government program and exercising powers of statutory compulsion.

En l'espèce, la Commission ne peut pas échapper à un examen fondé sur la *Charte* du seul fait qu'elle ne fait pas partie du gouvernement ou qu'elle n'est pas sous son contrôle. Dans l'arrêt *Eldridge*, notre Cour a conclu à l'unanimité qu'un hôpital était assujetti à la *Charte* parce qu'il mettait en œuvre une politique ou un programme gouvernemental particulier. La commission dont il est question en l'espèce met en œuvre un programme gouvernemental particulier et exerce des pouvoirs de contrainte émanant de la loi.

38 With respect to the claim that the Commission exercises judicial functions and is thereby not subject to the *Charter*, the decision of this Court in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, is conclusive. Lamer J. (as he then was), in partial dissent but speaking for a unanimous Court on this point, held that the *Charter* applies to the orders of a statutorily appointed labour arbitrator. This determination was not open

L'arrêt de notre Cour *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, est concluant en ce qui concerne la prétention que la Commission exerce des fonctions judiciaires et n'est donc pas assujettie à la *Charte*. Le juge Lamer (plus tard Juge en chef), dissident en partie, mais s'exprimant au nom de toute la Cour sur ce point, a décidé que la *Charte* s'applique aux ordonnances d'un arbitre en matière de relations to challenge, as expressed by Lamer J., at pp. 1077-78:

du travail désigné en application d'une loi. Cette décision était incontestable, comme l'a dit le juge Lamer à la p. 1077:

> The fact that the *Charter* applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. [Emphasis added.]

> Le fait que la *Charte* s'applique à l'ordonnance rendue par l'arbitre en l'espèce ne fait, à mon avis, aucun doute. L'arbitre est en effet une créature de la loi; il est nommé en vertu d'une disposition législative et tire tous ses pouvoirs de la loi. [Je souligne.]

The facts in *Slaight* and the case at bar share at least one salient feature: the labour arbitrator (in *Slaight*) and the Commission (in the case at bar) each exercise governmental powers conferred upon them by a legislative body. The ultimate source of authority in each of these cases is government. All of the Commission's powers are derived from the statute. The Commission is carrying out the legislative scheme of the *Human Rights Code*. It is putting into place a government program or a specific statutory scheme established by government to implement government policy (see *Eldridge*, *supra*, at paras. 37 and 44, and *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, at p. 584). The Commission must act within the limits of its enabling statute. There is clearly a "governmental quality" to the functions of a human rights commission which is created by government to promote equality in society generally.

Les faits de l'affaire *Slaight* et ceux de la présente affaire ont au moins une caractéristique commune prédominante: l'arbitre en matière de relations du travail (dans *Slaight*) et la Commission (en l'espèce) exercent tous les deux des pouvoirs gouvernementaux conférés par un corps législatif. Dans chaque cas, l'origine du pouvoir accordé est en fin de compte le gouvernement. La Commission tire tous ses pouvoirs de la loi. Elle applique le régime législatif du *Human Rights Code*. Elle met en œuvre un programme gouvernemental ou un régime législatif particulier établi par le gouvernement pour l'application de sa politique (voir *Eldridge*, précité, aux par. 37 et 44, et *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570, à la p. 584). La Commission doit agir dans les limites de sa loi habilitante. Les fonctions d'une commission des droits de la personne créée par le gouvernement pour promouvoir l'égalité dans la société en général sont clairement de «nature gouvernementale». 39

Thus, notwithstanding that the Commission may have adjudicatory characteristics, it is a statutory creature and its actions fall under the authority of the *Human Rights Code*. The state has instituted an administrative structure, through a legislative scheme, to effectuate a governmental program to provide redress against discrimination. It is the administration of a governmental program that calls for *Charter* scrutiny. Once a complaint is brought before the Commission, the subsequent administrative proceedings must comply with the *Charter*. These entities are subject to *Charter* scrutiny in the performance of their functions just as government would be in like circumstances. To hold otherwise would allow the legislative branch to circumvent the *Charter* by establishing statutory

Donc, même si elle peut avoir certaines caractéristiques d'un tribunal, la Commission est une créature de la loi et ses actes sont assujettis au *Human Rights Code*. L'État a créé par voie législative un organisme administratif chargé de mettre en œuvre un programme gouvernemental destiné à remédier à la discrimination. C'est l'application d'un programme gouvernemental qui commande l'examen fondé sur la *Charte*. Une fois la Commission saisie d'une plainte, les procédures administratives qui suivent doivent respecter la *Charte*. L'exercice des fonctions de telles entités peut faire l'objet d'un examen fondé sur la *Charte* tout comme pourrait le faire l'exercice des fonctions d'un gouvernement dans les mêmes circonstances. Conclure le contraire permettrait au pouvoir légis- 40 bodies that are immune to *Charter* scrutiny. The above analysis leads inexorably to the conclusion that the *Charter* applies to the actions of the Commission.

B. *Have the Respondent's Section 7 Rights to Liberty and Security of the Person Been Violated by State-caused Delay in Human Rights Proceedings?*

(a) Court of Appeal Decisions on This Issue

41 Four appellate courts have dealt with the issue of whether s. 7 of the *Charter* applies in circumstances similar to the case at bar, including the decision under appeal. The majority of the Court of Appeal in *Blencoe* followed the decision in *Saskatchewan Human Rights Commission v. Kodellas* (1989), 60 D.L.R. (4th) 143 (Sask. C.A.), to hold that s. 7 of the *Charter* was violated. However, the Manitoba Court of Appeal in *Nisbett v. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744, and the Federal Court of Appeal in *Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*, [1996] 1 F.C. 638, refused to follow *Kodellas*, holding that s. 7 cannot be applied to the consequences of delays in human rights proceedings.

42 In *Kodellas*, between the date of the first complaint and the date fixed for the hearing, almost four years had elapsed and three years and two months had elapsed with respect to the second complaint. Bayda C.J.S., dissenting in part with respect to the appropriate remedy, held that the delay violated Mr. Kodellas's s. 7 security of the person. In reaching this conclusion, Bayda C.J.S. referred to the dissenting judgment of Lamer J. in *Mills v. The Queen*, [1986] 1 S.C.R. 863 (hereinafter "*Mills* (1986)"), at p. 919, and reiterated in *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 605, where, in the context of s. 11(*b*) of the *Charter*, security of the person encompasses protection against

latif de contourner la *Charte* en créant des organismes qui ne peuvent pas faire l'objet d'un tel examen. L'analyse qui précède mène inexorablement à la conclusion que la *Charte* s'applique aux actes de la Commission.

B. *Le retard imputable à l'État dans les procédures en matière de droits de la personne a-t-il porté atteinte aux droits de l'intimé à la liberté et à la sécurité de sa personne garantis par l'art. 7?*

a) La jurisprudence des cours d'appel sur ce point

Quatre cours d'appel ont statué sur la question de savoir si l'art. 7 de la *Charte* s'applique dans des circonstances semblables à celles de la présente affaire, y compris la cour d'appel dans l'arrêt qui fait l'objet du présent pourvoi. Dans l'affaire *Blencoe*, les juges majoritaires de la Cour d'appel ont suivi l'arrêt *Saskatchewan Human Rights Commission c. Kodellas* (1989), 60 D.L.R. (4th) 143 (C.A. Sask.), et ont conclu qu'il y avait violation de l'art. 7 de la *Charte*. Toutefois, la Cour d'appel du Manitoba dans *Nisbett c. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744, et la Cour d'appel fédérale dans *Lignes aériennes Canadien International Ltée c. Canada (Commission des droits de la personne)*, [1996] 1 C.F. 638, ont refusé de suivre l'arrêt *Kodellas* et ont conclu que l'art. 7 ne peut pas s'appliquer aux conséquences d'un délai dans des procédures en matière de droits de la personne.

Dans l'affaire *Kodellas*, près de quatre années s'étaient écoulées entre le dépôt de la première plainte et la date fixée pour la tenue de l'audience, alors que trois années et deux mois s'étaient écoulées dans le cas de la deuxième plainte. Le juge en chef Bayda, dissident en partie au sujet de la réparation appropriée, a conclu que le délai écoulé portait atteinte au droit de M. Kodellas à la sécurité de sa personne garanti par l'art. 7. En tirant cette conclusion, le juge en chef Bayda a mentionné les motifs dissidents du juge Lamer dans *Mills c. La Reine*, [1986] 1 R.C.S. 863 (ci-après l'«arrêt *Mills* de 1986»), à la p. 919, repris dans *R. c. Rahey*, [1987] 1 R.C.S. 588, à la p. 605, selon lesquels la

TAB 2

Godbout *v*. Longueuil (City), [1997] 3 S.C.R. 844

City of Longueuil *Appellant/Respondent on cross-appeal*

v.

Michèle Godbout *Respondent/Appellant on cross-appeal*

and

Attorney General of Quebec *Mis en cause*

Indexed as: Godbout *v.* Longueuil (City)

File No.: 24990.

1997: May 28; 1997: October 31.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for quebec

Civil rights -- Right to privacy -- Residence requirement -- Municipality adopting resolution requiring all new permanent employees to reside within its territorial limits -- Whether right to choose where to establish one's home falls within scope of right to privacy -- Whether residence requirement infringes employee's right

<u>activities</u> they perform, even if the entities themselves cannot accurately be described as "governmental" *per se*; see, e.g., *Re Klein and Law Society of Upper Canada* (1985), 50 O.R. (2d) 118 (Div. Ct.), at p. 157, where Callaghan J. held for the majority that even though the Law Society of Upper Canada is not itself governmental in nature, it may nevertheless be subject to the *Charter* in performing what amount to governmental functions. Rather, it is simply to say that where an entity <u>can</u> accurately be described as "governmental in nature", it will be subject in its activities to *Charter* review. Thus, the *Charter* applied to Douglas College (in *Douglas*) and to the Council of Regents (in *Lavigne*) because those bodies were wholly controlled by government and were, in essence, emanations of the provincial legislatures that created them. Since the same could not be said of the institutions under examination in *McKinney*, *Harrison* and *Stoffman* (and since none of those institutions was implementing a specific government policy or programme in adopting its mandatory retirement regulations), the *Charter* did not apply in those cases.

48 The possibility that the Canadian *Charter* might apply to entities other than Parliament, the provincial legislatures and the federal or provincial governments is, of course, explicitly contemplated by the language of s. 32(1) inasmuch as entities that are controlled by government or that perform truly governmental functions are themselves "matters within the authority" of the particular legislative body that created them. Moreover, interpreting s. 32 as including governmental entities other than those explicitly listed therein is entirely sensible from a practical perspective. Were the *Charter* to apply only to those bodies that are institutionally part of government but not to those that are -- as a simple matter of fact -- governmental in nature (or performing a governmental act), the federal government and the provinces could easily shirk their *Charter* obligations by conferring certain of their powers on other entities and having those entities carry out what are, in reality, governmental activities or policies. In other

words, Parliament, the provincial legislatures and the federal and provincial executives could simply create bodies distinct from themselves, vest those bodies with the power to perform governmental functions and, thereby, avoid the constraints imposed upon their activities through the operation of the *Charter*. Clearly, this course of action would indirectly narrow the ambit of protection afforded by the *Charter* in a manner that could hardly have been intended and with consequences that are, to say the least, undesirable. Indeed, in view of their fundamental importance, *Charter* rights must be safeguarded from possible attempts to narrow their scope unduly or to circumvent altogether the obligations they engender.

49 I pause here to reiterate an important observation made in the cases discussed earlier concerning how the notion of "government" is to be understood. The mere fact that an entity performs what may loosely be termed a "public function" will not by itself mean that the body under examination is "governmental" in nature. Thus, with specific reference to the distinction between the applicability of the *Charter*, on the one hand, and the susceptibility of public bodies to judicial review, on the other, I stated as follows, at p. 268 of *McKinney*:

> It was not disputed that the universities are statutory bodies performing a public service. As such, they may be subjected to the judicial review of certain decisions, <u>but this does not in itself make them part of government within the meaning of s. 32 of the *Charter*</u>. . . . In a word, the basis of the exercise of supervisory jurisdiction by the courts is not that the universities are government, but that they are public decision-makers. [Emphasis added.]

In order for the Canadian *Charter* to apply to institutions other than Parliament, the provincial legislatures and the federal and provincial governments, then, an entity must truly be acting in what can accurately be described as a "governmental" -- as opposed to a merely "public" -- capacity. The factors that might serve to ground a finding that

TAB 3

Ivan William Mervin Henry *Appellant*

v.

Her Majesty The Queen in Right of the Province of British Columbia as represented by the Attorney General of British Columbia and Attorney General of Canada *Respondents*

and

Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General for Saskatchewan, Attorney General of Alberta, Attorney General of Newfoundland and Labrador, Association in Defence of the Wrongly Convicted, David Asper Centre for Constitutional Rights, British Columbia Civil Liberties Association, Canadian Civil Liberties Association, Criminal Lawyers' Association and Canadian Association of Crown Counsel *Interveners*

INDEXED AS: HENRY *v.* BRITISH COLUMBIA (ATTORNEY GENERAL)

2015 SCC 24

File No.: 35745.

2014: November 13; 2015: May 1.

Present: McLachlin C.J. and LeBel,* Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Remedies — Damages — Civil action — Prosecutorial misconduct in criminal proceedings — Disclosure obligations of

* LeBel J. took no part in the judgment.

Ivan William Mervin Henry *Appelant*

c.

Sa Majesté la Reine du chef de la province de la Colombie-Britannique représentée par le procureur général de la Colombie-Britannique et procureur général du Canada *Intimés*

et

Procureur général de l'Ontario, procureure générale du Québec, procureur général de la Nouvelle-Écosse, procureur général du Nouveau-Brunswick, procureur général du Manitoba, procureur général de la Saskatchewan, procureur général de l'Alberta, procureur général de Terre-Neuve-et-Labrador, Association in Defence of the Wrongly Convicted, David Asper Centre for Constitutional Rights, Association des libertés civiles de la Colombie-Britannique, Association canadienne des libertés civiles, Criminal Lawyers' Association et Association canadienne des juristes de l'État *Intervenants*

RÉPERTORIÉ : HENRY *c.* COLOMBIE-BRITANNIQUE (PROCUREUR GÉNÉRAL)

2015 CSC 24

N° du greffe : 35745.

2014 : 13 novembre; 2015 : 1er mai.

Présents : La juge en chef McLachlin et les juges LeBel*, Abella, Moldaver, Karakatsanis, Wagner et Gascon.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Charte des droits — Réparation — Dommages-intérêts — Action civile — Conduite répréhensible du poursuivant dans des poursuites

* Le juge LeBel n'a pas participé au jugement.

negligence, it should be done by the legislature or a court of last resort. Accordingly, Hall J.A. allowed the appeal and dismissed Mr. Henry's application to amend his pleadings.

Selon lui, si la responsabilité du poursuivant doit être élargie de manière à englober les réclamations fondées sur la négligence, cette initiative doit venir du législateur ou d'une juridiction de dernier ressort. Par conséquent, le juge Hall a accueilli l'appel et rejeté la demande de M. Henry en vue d'être autorisé à modifier ses actes de procédure.

IV. Analysis

IV. Analyse

A. *Overview of the Charter Damages Threshold for Wrongful Non-disclosure by Prosecutors*

A. *Aperçu du seuil applicable à l'attribution de dommages-intérêts en vertu de la Charte dans les cas de défaut injustifié des poursuivants de communiquer des renseignements*

[30] A constitutional question is posed in this case:

[30] Une question constitutionnelle est posée dans la présente affaire :

> 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?

> 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?

[31] In the context of Mr. Henry's claims, I would answer this question in the affirmative. Where a claimant seeks *Charter* damages based on allegations that the Crown's failure to disclose violated his or her *Charter* rights, proof of malice is not required. Instead, a cause of action will lie where the Crown, in breach of its constitutional obligations, causes harm to the accused by intentionally withholding information when it knows, or would reasonably be expected to know, that the information is material to the defence and that the failure to disclose will likely impinge on the accused's ability to make full answer and defence. This represents a high threshold for a successful *Charter* damages claim, albeit one that is lower than malice.

[31] Dans le contexte des demandes de M. Henry, je répondrais à cette question par l'affirmative. Lorsqu'un demandeur réclame des dommages-intérêts en vertu de la *Charte* en alléguant que le défaut du ministère public de lui communiquer des éléments de preuve a eu pour effet de violer les droits que lui garantit la *Charte*, la preuve de la malveillance n'est pas requise. L'accusé dispose plutôt d'un droit d'action lorsqu'en violation de ses obligations constitutionnelles, le ministère public lui a causé un préjudice en retenant délibérément des renseignements alors qu'il savait, ou qu'il aurait raisonnablement dû savoir, que ces renseignements étaient importants pour la défense et que le défaut de les communiquer pourrait porter atteinte à la possibilité, pour l'accusé, de présenter une défense pleine et entière. Cette norme représente un seuil élevé pour qu'une demande de dommages-intérêts fondée sur la *Charte* soit accueillie, mais elle est moins exigeante que la norme de la malveillance.

[32] I will discuss the legal basis and precise scope of this threshold in greater detail below. Briefly, it

[32] Je vais préciser davantage plus loin le fondement juridique et la portée exacte de ce seuil. En

recognizes that while malice does not provide a useful or workable framework for dealing with allegations of wrongful non-disclosure by prosecutors, the policy underpinnings of this Court's malicious prosecution jurisprudence inform the proper scope of Crown liability for *Charter* damages in this context.

résumé, celui-ci reconnaît que, bien que la malveillance n'offre pas un cadre d'analyse utile ou pratique pour répondre aux allégations de défaut injustifié des avocats du ministère public de communiquer des renseignements, les considérations d'ordre public sur lesquelles repose la jurisprudence de notre Cour en matière de poursuites abusives servent de base pour déterminer, dans le présent contexte, la véritable portée de la responsabilité du ministère public en matière de dommages-intérêts fondés sur la *Charte*.

[33] I emphasize "this context" because, in my view, it is neither prudent nor necessary to decide whether a similar threshold would apply in circumstances not involving wrongful non-disclosure. Mr. Henry's claim against the AGBC is rooted in allegations that Crown counsel failed to disclose certain relevant information. It would be unwise to speculate about other types of prosecutorial misconduct that might violate the *Charter*, or to fix a blanket threshold that governs all such claims against the Crown. The threshold established in this case may well offer guidance in setting the applicable threshold for other types of misconduct, but the prudent course of action is to address new situations in future cases as they arise, with the benefit of a factual record and submissions.

[33] J'insiste sur l'expression « le présent contexte » parce qu'à mon avis, il n'est ni prudent ni nécessaire de décider si un seuil semblable s'appliquerait dans des circonstances où le défaut injustifié de communiquer des renseignements n'est pas en cause. La demande formulée par M. Henry contre le PGCB est fondée sur ses allégations suivant lesquelles l'avocat du ministère public a omis de lui communiquer certains renseignements pertinents. Il ne serait pas sage de spéculer sur d'autres types de conduite répréhensible du poursuivant qui pourrait contrevenir à la *Charte*, ou de fixer un seuil général applicable à toutes les demandes de ce genre contre le ministère public. Le seuil fixé en l'espèce peut fort bien servir de guide pour établir le seuil applicable à d'autres types de conduite répréhensible, mais la façon d'agir prudente consiste à aborder au fur et à mesure les situations qui se présenteront à l'avenir en tenant compte du dossier factuel et des arguments qui seront soumis.

B. *Ward Provides the Governing Legal Framework*

B. *L'arrêt Ward fournit le cadre juridique applicable*

[34] Under s. 24(1) of the *Charter*,

> [a]nyone whose rights or freedoms . . . 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.

In *Ward*, this Court recognized that the language of s. 24(1) is broad enough to encompass damage claims for *Charter* breaches. Such claims are brought by an

[34] Aux termes du par. 24(1) de la *Charte*,

> [t]oute personne, victime de violation ou de négation [de ses] droits ou libertés [. . .] peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

Dans l'arrêt *Ward*, notre Cour a reconnu que le libellé du par. 24(1) est suffisamment large pour englober les demandes de dommages-intérêts pour individual as a public law action directed against the state for violations of the claimant's constitutional rights.

violation de la *Charte*. Ces demandes sont présentées par une personne dans le cadre d'une action de droit public dirigée contre l'État pour violation des droits constitutionnels garantis à cette personne.

[35] *Charter* damages are a powerful tool that can provide a meaningful response to rights violations. They also represent an evolving area of the law that must be allowed to "develop incrementally": *Ward*, at para. 21. When defining the circumstances in which a *Charter* damages award would be appropriate and just, courts must therefore be careful not to stifle the emergence and development of this important remedy.

[35] Les dommages-intérêts accordés en vertu de la *Charte* constituent un outil puissant qui peut s'avérer une réponse concrète aux atteintes portées à des droits. Ils représentent également un domaine du droit qui évolue et qu'il faut laisser « se développer graduellement » : *Ward*, par. 21. Au moment de préciser les circonstances dans lesquelles l'attribution de dommages-intérêts en vertu de la *Charte* constituerait une réparation convenable et juste, les tribunaux doivent donc se garder de freiner l'émergence et le développement de cette importante réparation.

[36] However, *Charter* damages are not a silver bullet. They are just one of many remedies that may be available to individuals whose *Charter* rights have been breached, and their availability is not without limit. In *Ward*, the Chief Justice outlined a four-step framework to determine the state's liability for *Charter* damages:

[36] L'attribution de dommages-intérêts en vertu de la *Charte* ne constitue cependant pas une solution magique. Il ne s'agit que d'une des nombreuses réparations qui s'offrent aux victimes d'une violation des droits garantis par la *Charte*, et les cas d'ouverture à cette réparation ne sont pas illimités. Dans l'arrêt *Ward*, la Juge en chef propose un cadre d'analyse en quatre étapes pour déterminer la responsabilité de l'État en dommages-intérêts pour violation de la *Charte* :

> The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages. [para. 4]

> À la première étape de l'analyse, il doit être établi qu'un droit garanti par la *Charte* a été enfreint. À la deuxième, il faut démontrer pourquoi les dommages-intérêts constituent une réparation convenable et juste, selon qu'ils peuvent remplir au moins une des fonctions interreliées suivantes : l'indemnisation, la défense du droit en cause et la dissuasion contre toute nouvelle violation. À la troisième, l'État a la possibilité de démontrer, le cas échéant, que des facteurs faisant contrepoids l'emportent sur les considérations fonctionnelles favorables à l'octroi de dommages-intérêts, de sorte que ces derniers ne seraient ni convenables ni justes. La dernière étape consiste à fixer le montant des dommages-intérêts. [par. 4]

[37] Under this framework, the claimant bears the initial burden of making out a *prima facie* case. The claimant must demonstrate that the state has breached one of his or her *Charter* rights and that an award of damages would serve a compensation, vindication, or deterrence function. Once that burden is met, the onus shifts to the state to rebut the claimant's case based

[37] Selon ce cadre d'analyse, le demandeur a le fardeau initial d'établir une preuve *prima facie*. Il doit démontrer que l'État a violé l'un des droits que lui garantit la *Charte* et que l'attribution de dommages-intérêts remplirait une des fonctions que sont l'indemnisation, la défense du droit en cause et la dissuasion. Une fois qu'il s'est acquitté de ce fardeau,

on countervailing considerations. The Chief Justice identified two important countervailing considerations, while maintaining that a "complete catalogue" of such considerations would be elaborated over time: *Ward*, at para. 33.

il revient à l'État de réfuter la preuve du demandeur en faisant valoir des facteurs qui font contrepoids. La Juge en chef a signalé deux importantes considérations pouvant faire contrepoids, tout en maintenant qu'une « liste exhaustive » de ces considérations serait établie au fil du temps : *Ward*, par. 33.

[38] The first countervailing consideration is the existence of alternative remedies. Section 24(1) is a broad remedial provision that provides a range of responses to *Charter* violations beyond a monetary award. In addition, there may be substantial overlap between private law and s. 24(1) actions against the government. Where the state can show that another remedy is available to effectively address a *Charter* breach — whether under the *Charter* or in private law — a damages claim may be defeated at the third step of *Ward*. For instance, if a declaration of a *Charter* breach would adequately achieve the objectives that would otherwise be served by a damages award, then granting damages as well as a declaration would be superfluous, and therefore inappropriate and unjust in the circumstances: *Ward*, at para. 37.

[38] L'existence d'autres recours constitue la première considération faisant contrepoids. Le paragraphe 24(1) est une vaste disposition réparatrice qui prévoit une panoplie de réponses aux violations de la *Charte*, en plus des réparations pécuniaires. En outre, il peut y avoir un chevauchement important entre les actions intentées contre l'État en vertu du droit privé et celles intentées en vertu du par. 24(1). Lorsque l'État peut démontrer l'existence d'un autre recours permettant de répondre efficacement à une violation de la *Charte* — sous le régime de la *Charte* ou en droit privé —, une demande de dommages-intérêts peut être rejetée à la troisième étape du cadre d'analyse de l'arrêt *Ward*. Par exemple, si un jugement déclarant qu'il y a eu violation de la *Charte* permettait d'atteindre les objectifs que réaliserait autrement l'attribution de dommages-intérêts, une condamnation à des dommages-intérêts en sus d'un jugement déclaratoire serait superflue et, partant, ne serait pas convenable et juste dans les circonstances : *Ward*, par. 37.

[39] The second countervailing consideration — and the one at issue in this case — relates to concerns over good governance. *Ward* does not define the phrase "[g]ood governance concerns" (para. 38), but it serves as a compendious term for the policy factors that will justify restricting the state's exposure to civil liability. As the Chief Justice observed:

> In some situations, . . . 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. [Emphasis added; para. 39.]

[39] La seconde considération qui fait contrepoids — et celle en cause dans la présente affaire — a trait aux préoccupations relatives au bon gouvernement. L'arrêt *Ward* ne définit pas l'expression « préoccupations relatives au bon gouvernement » (par. 38), mais cette expression sert de formule succincte pour désigner les facteurs de principe justifiant que l'on restreigne les possibilités de recours en responsabilité civile contre l'État. Ainsi que la Juge en chef l'a fait observer :

> . . . dans certaines situations, l'État pourrait démontrer que l'octroi de dommages-intérêts en vertu de la *Charte* nuirait au bon gouvernement et devrait être limité aux cas où la conduite de l'État atteint un seuil minimal de gravité. [Je souligne; par. 39.]

This is precisely what the AGBC, the AGC, and the numerous intervening Attorneys General argue in this case. There is a common theme driving their submissions: if the threshold of gravity is set too low for a *Charter* damages claim alleging Crown misconduct, the ability of prosecutors to discharge their important public duties will be undermined, with adverse consequences for the administration of justice.

C'est précisément l'argument que font valoir en l'espèce le PGCB, le PGC ainsi que les nombreux procureurs généraux qui sont intervenus à l'instance. Un thème commun se dégage de leur argumentation : si l'on fixe trop bas le seuil minimal de gravité dans le cas d'une demande de dommages-intérêts fondée sur la *Charte* qui allègue une conduite répréhensible du ministère public, la possibilité pour les avocats du ministère public de s'acquitter de leurs importantes fonctions publiques s'en trouvera compromise et l'administration de la justice en souffrira.

[40] This theme finds expression in a number of specific policy concerns. For example, the Attorneys General argue that the spectre of liability may influence the decision-making of prosecutors and make them more "defensive" in their approach. The public interest is not well served when Crown counsel are motivated by fear of civil liability, rather than their sworn duty to fairly and effectively prosecute crime. By the same token, the Attorneys General suggest that a low threshold would open up the floodgates of civil liability and force prosecutors to spend undue amounts of time and energy defending their conduct in court instead of performing their duties.

[40] Ce thème commun trouve son expression dans un certain nombre de préoccupations de principe précises. Par exemple, les procureurs généraux soutiennent que le spectre de la responsabilité peut influencer la prise de décision des poursuivants et les mettre davantage « sur la défensive ». L'intérêt public est mal servi lorsque les avocats du ministère public sont animés par la crainte de poursuites civiles plutôt que par leur serment de poursuivre les criminels de façon équitable et efficace. Dans la même veine, les procureurs généraux prétendent qu'un seuil peu élevé déclencherait une avalanche de poursuites civiles et obligerait les poursuivants à consacrer trop de temps et d'énergie à justifier leur conduite devant le tribunal au lieu d'exercer leurs fonctions.

[41] As I will explain, these concerns are very real, and they provide compelling reasons why the availability of *Charter* damages should be circumscribed through the establishment of a high threshold.

[41] J'expliquerai plus loin que ces préoccupations sont très concrètes et démontrent de manière convaincante la nécessité d'établir un seuil élevé afin de limiter la possibilité de recours en dommages-intérêts en vertu de la *Charte*.

[42] *Ward* provides an example of a prior case where a heightened *per se* liability threshold was justified by policy reasons. In *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, this Court held that *Charter* damages were unavailable for state action taken pursuant to a law, considered valid at the time but later declared invalid, unless the state action was "clearly wrong, in bad faith or an abuse of power" (para. 78). In other words, state actors were afforded a limited immunity for actions taken in good faith under a law they believed to be valid. Citing *Mackin*, the Chief Justice in *Ward* noted that, "absent threshold misconduct",

[42] L'arrêt *Ward* offre un exemple d'une décision dans laquelle des raisons de politique générale justifiaient l'application d'un seuil de responsabilité plus élevé. Dans l'arrêt *Mackin c. Nouveau-Brunswick (Ministre des Finances)*, 2002 CSC 13, [2002] 1 R.C.S. 405, notre Cour a refusé d'accorder des dommages-intérêts en vertu de la *Charte* dans le cas d'une mesure prise par l'État conformément à une loi tenue pour valide à l'époque, mais subséquemment déclarée invalide, en l'absence d'un comportement de l'État « clairement fautif, [entaché] de mauvaise foi ou d'abus de pouvoir » (par. 78). En d'autres mots, la Cour a reconnu aux agents de l'État

no cause of action for *Charter* damages will lie in these circumstances (para. 39).

une immunité restreinte à l'égard de mesures prises de bonne foi en vertu d'une loi que l'on croyait valide. Citant l'arrêt *Mackin*, la Juge en chef a fait remarquer dans *Ward* que, « sauf en cas de conduite atteignant le seuil minimal », aucune cause d'action en dommages-intérêts fondée sur la *Charte* n'est retenue en pareilles circonstances (par. 39).

[43] When a heightened *per se* liability threshold has been imposed, this will have consequences at the pleadings stage. To survive a motion to strike, a claimant must plead sufficient facts to disclose a reasonable cause of action: see *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45. If the alleged *Charter* violation occurs in a context where courts have imposed a heightened *per se* liability threshold, the claimant must particularize facts that, if proven, would be sufficient to establish that the state conduct met the required threshold of gravity. The failure to do so will be fatal to the claim. With these principles in mind, I turn to the applicable threshold for wrongful non-disclosure by prosecutors.

[43] L'imposition d'un seuil de responsabilité plus élevé aura des conséquences à l'étape des actes de procédure. Pour résister à une requête en radiation, le demandeur doit alléguer des faits suffisants pour révéler une cause d'action raisonnable : voir *R. c. Imperial Tobacco Canada Ltée*, 2011 CSC 42, [2011] 3 R.C.S. 45. Si la prétendue violation de la *Charte* survient dans un contexte où les tribunaux ont imposé un seuil de responsabilité plus élevé, le demandeur doit préciser des faits qui, s'ils étaient prouvés, seraient suffisants pour établir que la conduite de l'État atteint le seuil de gravité requis. L'omission de préciser de tels faits sera fatale à la demande. Ayant ces principes à l'esprit, je passe au seuil applicable au défaut injustifié des poursuivants de communiquer des renseignements.

C. *Establishing the Charter Damages Threshold for Wrongful Non-disclosure by Prosecutors*

C. *Établissement du seuil d'attribution de dommages-intérêts en vertu de la Charte pour défaut injustifié des poursuivants de communiquer des renseignements*

(1) "Malice" Does Not Offer a Useful Liability Threshold for Wrongful Non-disclosure by Prosecutors

(1) La « malveillance » n'offre pas un seuil de responsabilité utile dans les cas de défaut injustifié des poursuivants de communiquer des renseignements

[44] The AGBC, the AGC, and the intervening Attorneys General unanimously submit that the Crown's conduct must rise to the level of "malice" — as defined in the tort of malicious prosecution — to attract liability for *Charter* damages. I do not agree. As I will explain, the malice standard is ill suited to the task of adjudicating allegations of wrongful non-disclosure.

[44] Le PGCB, le PGC ainsi que les procureurs généraux intervenants affirment tous que la conduite du ministère public doit constituer de la « malveillance » — au sens du délit de poursuite abusive — pour engager la responsabilité ouvrant droit à des dommages-intérêts en vertu de la *Charte*. Je ne suis pas de cet avis. Comme je l'expliquerai, la norme de la malveillance se prête mal à la tâche de statuer sur des allégations de défaut injustifié de communiquer des renseignements.

(a) *The Malice Standard Articulated in the Malicious Prosecution Jurisprudence*

[45] The malice standard has been extensively canvassed in this Court's malicious prosecution trilogy — *Nelles*, *Proulx*, and *Miazga*. In *Nelles*, the Court ruled that Crown prosecutors do not enjoy absolute immunity from civil claims. Lamer J. (as he then was) held that policy considerations favour only a qualified immunity, and that Crown prosecutors are not shielded from claims of malicious prosecution. He outlined the four necessary elements of the malicious prosecution tort as follows: (1) legal proceedings "must have been initiated by the defendant"; (2) those proceedings "must have terminated in favour of the plaintiff"; (3) the defendant did not have "reasonable and probable cause" to initiate the proceedings; and (4) the defendant's conduct was characterized by "malice, or a primary purpose other than that of carrying the law into effect" (pp. 192-93).

[46] This final element was described by Lamer J. in the following terms:

> The required element of malice is for all intents, the equivalent of "improper purpose". It has . . . a "wider meaning than spite, ill-will, or a spirit of vengeance, and includes any other improper purpose, such as to gain a private collateral advantage" . . . . To succeed in an action for malicious prosecution against the Attorney General or Crown Attorney, the plaintiff would have to prove both the absence of reasonable and probable cause in commencing the prosecution, <u>and</u> malice in the form of a deliberate and improper use of the office of the Attorney General or Crown Attorney, a use inconsistent with the status of "minister of justice". In my view 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. [Emphasis in original; citation omitted.]

(*Nelles*, at pp. 193-94)

a) *La norme de la malveillance formulée dans la jurisprudence relative aux poursuites abusives*

[45] La norme de la malveillance a été examinée à fond dans la trilogie de notre Cour sur les poursuites abusives : les arrêts *Nelles*, *Proulx* et *Miazga*. Dans *Nelles*, la Cour a jugé que les procureurs de la Couronne ne jouissent pas d'une immunité absolue contre les réclamations civiles. Le juge Lamer (plus tard Juge en chef) a estimé que des considérations de principe militent uniquement en faveur d'une immunité restreinte, et que les procureurs de la Couronne ne sont pas à l'abri des réclamations pour poursuite abusive. Il a énoncé comme suit les quatre éléments constitutifs du délit civil de poursuite abusive : (1) les procédures « ont été engagées par le défendeur »; (2) le tribunal « a rendu une décision favorable au demandeur »; (3) le défendeur n'avait pas « de motif raisonnable et probable » d'engager les procédures; et (4) la conduite du défendeur était caractérisée par une « intention malveillante ou un objectif principal autre que celui de l'application de la loi » (p. 192-193).

[46] C'est en ces termes que le juge Lamer a décrit le dernier élément :

> L'élément obligatoire de malveillance équivaut en réalité à un « but illégitime ». [. . .] [L]a malveillance [TRADUCTION] « veut dire davantage que la rancune, le mauvais vouloir ou un esprit de vengeance, et comprend tout autre but illégitime, par exemple, celui de se ménager accessoirement un avantage personnel » [. . .] Pour avoir gain de cause dans une action pour poursuites abusives intentée contre le procureur général ou un procureur de la Couronne, le demandeur doit prouver à la fois l'absence de motif raisonnable et probable pour engager les poursuites <u>et</u> la malveillance prenant la forme d'un exercice délibéré et illégitime des pouvoirs de procureur général ou de procureur de la Couronne, et donc incompatible avec sa qualité de « représentant de la justice ». À mon avis, ce fardeau incombant au demandeur revient à exiger que le procureur général ou le procureur de la Couronne ait commis une fraude dans le processus de justice criminelle et que, dans la perpétration de cette fraude, il ait abusé de ses pouvoirs et perverti le processus de justice criminelle. [Souligné dans l'original; référence omise.]

(*Nelles*, p. 193-194)

[47] In *Proulx*, the Court applied this standard in the Quebec civil law context. Iacobucci and Binnie JJ. affirmed that malice requires "more than recklessness or gross negligence" (para. 35). Rather, the plaintiff must demonstrate "a willful and intentional effort on the Crown's part to abuse or distort its proper role within the criminal justice system" (*ibid.*). *Proulx* was a case where the plaintiff was successful in proving malice on "highly exceptional" facts (para. 44). Iacobucci and Binnie JJ. found that the Crown made "an active effort to obtain a conviction at any price" by misleading the court, and thus stepped out of its proper role as minister of justice (paras. 41 and 45). Furthermore, the prosecutor's actions were motivated by an improper purpose since he allowed his office to be used to the ends of a private individual. Given these circumstances, his conduct amounted to "an abuse of prosecutorial power" that crossed the boundary set out in *Nelles* (paras. 44-45).

[48] *Miazga* is this Court's most recent decision involving the tort of malicious prosecution, in which Charron J. reiterated that "malice in the form of improper purpose is the key to proving malicious prosecution" (para. 8). This high standard was, in her view, justified by the need to give prosecutors a sphere of independence from judicial scrutiny:

> It is readily apparent from its constituent elements that the tort of malicious prosecution targets the decision to initiate or continue with a criminal prosecution. When taken by a Crown prosecutor, this decision is one of the "core elements" of prosecutorial discretion, thus lying "beyond the legitimate reach of the court" under the constitutionally entrenched principle of independence . . . . [Citation omitted; para. 6.]

[49] It is a bedrock principle that the exercise of core prosecutorial discretion is immune from judicial review, subject only to the doctrine of abuse of process: see *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 48; *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, at para. 32. Abuse of process may be found where the Crown's

[47] Dans *Proulx*, la Cour a appliqué cette norme dans le contexte du droit civil québécois. Les juges Iacobucci et Binnie ont confirmé que la malveillance exige « plus que l'insouciance ou la négligence grave » (par. 35). Le demandeur doit plutôt démontrer « un effort délibéré de la part du ministère public pour abuser de son propre rôle ou de le dénaturer dans le cadre du système de justice pénale » (*ibid.*). Dans l'affaire *Proulx*, le demandeur était parvenu à établir la malveillance sur la base de faits « très exceptionnels » (par. 44). Selon les juges Iacobucci et Binnie, le ministère public avait fait « un effort conscient en vue d'obtenir une déclaration de culpabilité à tout prix » en trompant le tribunal, et a ainsi outrepassé son rôle de représentant de la justice (par. 41 et 45). En outre, les actes du poursuivant étaient motivés par un but illégitime, car il a permis que sa fonction serve les desseins d'un particulier. Vu ces circonstances, sa conduite représentait « un usage illégitime du pouvoir de poursuivre » qui a franchi la limite fixée dans *Nelles* (par. 44-45).

[48] *Miazga* est l'arrêt le plus récent de notre Cour portant sur le délit civil de poursuite abusive. La juge Charron y a rappelé que « l'élément de la malveillance sous forme de but illégitime est la clé pour prouver le caractère abusif des poursuites » (par. 8). Cette norme élevée lui semblait justifiée par le besoin d'accorder aux poursuivants une certaine indépendance vis-à-vis du contrôle judiciaire :

> D'emblée, il appert de ses éléments constitutifs que le délit civil de poursuites abusives vise la décision d'engager ou de continuer une poursuite criminelle. Prise par un procureur de la Couronne, cette décision constitue l'un des éléments essentiels du pouvoir discrétionnaire en matière de poursuites, de sorte qu'elle « ne relève pas de la compétence légitime du tribunal » suivant le principe de l'indépendance du ministère public consacré par la Constitution . . . [Référence omise; par. 6.]

[49] Un principe fondamental veut que l'exercice du pouvoir discrétionnaire essentiel en matière de poursuites échappe au contrôle judiciaire, sous réserve uniquement de la règle de l'abus de procédure : voir *R. c. Anderson*, 2014 CSC 41, [2014] 2 R.C.S. 167, par. 48; *Krieger c. Law Society of Alberta*, 2002 CSC 65, [2002] 3 R.C.S. 372, par. 32. Il

conduct "shocks the community's conscience" or "offends its sense of fair play and decency": *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 41. The presence of bad faith and improper motives may indicate this type of conduct: see *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566, at para. 68; *Anderson*, at para. 49.

est possible de conclure à l'existence d'un abus de procédure lorsque la conduite du ministère public « choque la conscience de la communauté ou heurte son sens du franc-jeu et de la décence » : *R. c. Babos*, 2014 CSC 16, [2014] 1 R.C.S. 309, par. 41. La présence de mauvaise foi et de motifs illégitimes peut signaler une conduite de ce genre : voir *R. c. Nixon*, 2011 CSC 34, [2011] 2 R.C.S. 566, par. 68; *Anderson*, par. 49.

[50] Seen in this light, the malice standard under the tort of malicious prosecution generally operates as an analogue in private law to the doctrine of abuse of process. The link between these two standards was made clear in *Miazga*:

> Where an accused is wrongly prosecuted as a result of the prosecutor's abusive actions, he or she may bring an action in malicious prosecution. Like the test for abuse of process, however, there is a stringent standard that must be met before a finding of liability will be made, in order to ensure that courts do not simply engage in the second-guessing of decisions made pursuant to a Crown's prosecutorial discretion. [Emphasis added; para. 49.]

In highlighting this link, I should be clear that malice and abuse of process are distinct standards that have their respective areas of application in private and public law. That said, they have a similar purpose: they are high standards *deliberately designed* to capture only very serious conduct that undermines the integrity of the judicial process. By preserving this high bar for judicial intervention, the exercise of prosecutorial discretion can be properly protected.

[50] Vue sous cet angle, la norme de la malveillance visée par le délit civil de poursuite abusive s'applique généralement comme pendant, en droit privé, de la règle de l'abus de procédure. La Cour a clairement établi le lien entre ces deux normes dans *Miazga* :

> L'accusé poursuivi à tort au pénal par suite du comportement abusif du procureur de la Couronne dispose d'un recours au civil. Toutefois, comme dans le cas de l'abus de procédure, il doit satisfaire à des conditions strictes de façon que le tribunal ne mette pas simplement en doute rétrospectivement la décision prise à l'issue de l'exercice du pouvoir discrétionnaire du ministère public en matière de poursuites. [Je souligne; par. 49.]

En soulignant ce lien, je dois affirmer clairement que la malveillance et l'abus de procédure sont des normes distinctes ayant chacune son propre champ d'application en droit privé et en droit public. Cela dit, ils partagent le même objet : il s'agit de normes rigoureuses *conçues délibérément* pour s'appliquer uniquement dans les cas de comportement très grave qui mine l'intégrité du processus judiciaire. En préservant ce critère exigeant d'intervention judiciaire, on peut protéger convenablement l'exercice du pouvoir discrétionnaire en matière de poursuites.

[51] It is evident that the malice standard will only be met in exceptional cases where the plaintiff can prove, on a balance of probabilities, that a prosecutor's decision to initiate or continue a prosecution was driven by an improper purpose or motive. To be improper, that purpose or motive must be wholly inconsistent with Crown counsel's role as minister of justice. *Miazga* makes this point abundantly clear. As Charron J. observed, "[m]alice requires a plaintiff to prove that the prosecutor *wilfully* perverted

[51] De toute évidence, le demandeur ne satisfera à la norme de la malveillance que dans les cas exceptionnels où il peut établir, selon la prépondérance des probabilités, que la décision du poursuivant d'engager ou de continuer une poursuite était motivée par un but ou un motif illégitime. Ce but ou motif illégitime doit être tout à fait incompatible avec le rôle de l'avocat du ministère public en tant que représentant de la justice. C'est ce que précise clairement l'arrêt *Miazga*. Comme l'a fait

or abused the office of the Attorney General or the process of criminal justice" (para. 80 (emphasis in original)). She went on to emphasize that conduct merely reflecting "incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence, <u>or even gross negligence</u>" will necessarily fall short (para. 81 (emphasis added)).

(b) *The Malice Standard is Not Applicable to Claims for Charter Damages Alleging Wrongful Non-disclosure*

[52] The Attorneys General advance several arguments in favour of imposing malice as the liability threshold necessary to sustain a *Charter* damages award in this case. These arguments effectively boil down to a single core submission: the balancing of policy factors in *Nelles* — which led this Court to establish a qualified immunity shielding prosecutors from tort liability absent a showing of malice — is also dispositive here. Indeed, the heart of the AGBC's submission is that "the specific cause of action alleged is immaterial to the policy rationale which underlies the immunity" (R.F., at para. 38). In other words, it is irrelevant that the claim at issue is brought under s. 24(1) of the *Charter*. If the qualified immunity in *Nelles* is to be effective, it must be treated as a general principle of law that applies equally to a claim for *Charter* damages as it does to an action in tort (*ibid.*, at paras. 69-71).

[53] The AGBC makes a number of points in support of this submission. First, it argues that *Nelles* "assumed that an immunity rule would equally apply to a claim for *Charter* damages", and that "this was

observer la juge Charron, « [p]our établir la malveillance, le demandeur doit prouver que le poursuivant a *délibérément* abusé des pouvoirs du procureur général ou qu'il a perverti le processus de justice criminelle » (par. 80 (en italique dans l'original)). Elle a poursuivi en signalant que la conduite qui témoigne simplement de l'« incompétence, [l']inexpérience, [du] manque de discernement ou de professionnalisme, de [la] paresse, de [l']insouciance, [d'une] erreur de bonne foi, de [la] négligence <u>ou même de [la] négligence grave</u> » n'atteindra nécessairement pas le seuil de la malveillance (par. 81 (je souligne)).

b) *La norme de la malveillance ne s'applique pas aux demandes de dommages-intérêts en vertu de la Charte pour défaut injustifié de communiquer des renseignements*

[52] Les procureurs généraux invoquent plusieurs arguments favorables à l'imposition de la malveillance comme seuil de responsabilité à atteindre pour justifier l'attribution de dommages-intérêts en vertu de la *Charte* en l'espèce. Ces arguments se résument en fait à une seule thèse fondamentale : la mise en balance des considérations de principe retenues dans *Nelles* — qui a amené notre Cour à établir une immunité restreinte protégeant les poursuivants contre toute responsabilité délictuelle en l'absence d'une démonstration de malveillance — tranche également la présente affaire. En fait, le PGCB soutient essentiellement que [TRADUCTION] « la cause d'action précise alléguée n'a rien à voir avec la raison de principe qui sous-tend l'immunité » (m.i., par. 38). Autrement dit, il importe peu que la demande en cause soit présentée en vertu du par. 24(1) de la *Charte*. Pour que l'immunité restreinte établie dans *Nelles* soit efficace, il faut la considérer comme un principe général de droit qui s'applique autant à une demande de dommages-intérêts fondée sur la *Charte* qu'à une action en responsabilité délictuelle (*ibid.*, par. 69-71).

[53] Le PGCB fait valoir un certain nombre d'éléments à l'appui de cette thèse. Premièrement, il soutient que, dans *Nelles*, la Cour [TRADUCTION] « a tenu pour acquis qu'une règle d'immunité s'appliquerait

one of the considerations that led the Court to reject absolute immunity" in favour of a qualified immunity based on malice (R.F., at para. 60). In support of this assertion, it cites the following passage from *Nelles*:

> Granting an absolute immunity to prosecutors is akin to granting a license to subvert individual rights. Not only does absolute immunity negate a private right of action, but in addition, it seems to me, it may be that it would effectively bar the seeking of a remedy pursuant to s. 24(1) of the *Charter*. [p. 195]

According to the AGBC, the choice of a qualified rather than absolute immunity was meant to preserve the availability of damages in tort *and* under the *Charter*, and it is therefore implicit in *Nelles* that the liability threshold required in relation to tort actions would necessarily extend to s. 24(1) claims.

[54] Second, the AGBC emphasizes that *Ward* expressly connected the availability of *Charter* damages for prosecutorial misconduct to the tort of malicious prosecution:

> 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 . . . . 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.

(*Ward*, at para. 43)

tout autant à une demande de dommages-intérêts fondée sur la *Charte* » et que « cette considération figurait parmi celles qui avaient amené la Cour à écarter l'immunité absolue » en faveur d'une immunité restreinte fondée sur la malveillance (m.i., par. 60). Pour appuyer cette affirmation, il cite le passage suivant de *Nelles* :

> Accorder aux poursuivants une immunité absolue revient à leur donner toute latitude pour léser les droits individuels. Non seulement l'immunité absolue réduit à néant le droit des particuliers d'intenter des actions, mais en outre, me semble-t-il, il se peut qu'elle rende impossible l'exercice d'un recours en vertu du par. 24(1) de la *Charte*. [p. 195]

Selon le PGCB, on a opté pour une immunité restreinte plutôt que l'immunité absolue afin de conserver la possibilité d'obtenir des dommages-intérêts en responsabilité délictuelle *et* en vertu de la *Charte*, et la Cour indique donc implicitement dans *Nelles* que le seuil de responsabilité à atteindre dans le cas des actions en responsabilité délictuelle s'appliquerait nécessairement aux demandes fondées sur le par. 24(1).

[54] Deuxièmement, le PGCB souligne que l'arrêt *Ward* fait expressément le lien entre la possibilité d'obtenir des dommages-intérêts en vertu de la *Charte* pour inconduite du poursuivant et le délit civil de poursuite abusive :

> Différentes situations appelleront sans doute différents seuils, comme c'est le cas en droit privé. Par exemple, pour qu'une poursuite soit jugée abusive, il faut prouver une « intention malveillante », vu le pouvoir éminemment discrétionnaire et le rôle quasi judiciaire des procureurs [. . .] Dans certains cas pertinents, les seuils et les moyens de défense issus du droit privé peuvent aider à déterminer si l'octroi de dommages-intérêts en vertu du par. 24(1) est « convenable et juste ». Certes, le seuil de responsabilité applicable sous le régime de la *Charte* est distinct et indépendant de celui établi en droit privé, mais les causes d'action existantes contre les représentants de l'État recèlent une certaine « sagesse pratique » à l'égard du genre de situations où il serait convenable ou non de contraindre l'État à verser des dommages-intérêts.

(*Ward*, par. 43)

The AGBC argues that the malice standard established in *Nelles* and elaborated in *Proulx* and *Miazga* has withstood the test of time, and is a sound and workable standard for civil claims against prosecutors. It embodies "practical wisdom" and represents a "careful balance" of competing concerns — on the one hand, "the need to ensure that the common law is responsive to claims of wrongful prosecution", and on the other, the "the powerful policy considerations that support the existence of a qualified immunity" (R.F., at para. 72). In the AGBC's view, there is no reason to depart from this careful balance when a claim alleging prosecutorial misconduct is framed as a claim for *Charter* damages under s. 24(1). While liability thresholds developed under the *Charter* are intended to be distinct from those in private law, it does not follow that common law immunities should simply be abandoned in the face of a *Charter* damages claim.

Selon le PGCB, la norme de la malveillance établie dans *Nelles* puis explicitée dans *Proulx* et *Miazga* a résisté à l'épreuve du temps et constitue une norme solide et pratique pour les poursuites civiles engagées contre les poursuivants. Elle recèle une « sagesse pratique » et représente un « juste équilibre » entre des préoccupations opposées — d'une part, [TRADUCTION] « la nécessité de veiller à ce que la common law soit adaptée aux réclamations pour poursuite abusive » et, d'autre part, « les considérations de principe puissantes qui appuient l'existence d'une immunité restreinte » (m.i., par. 72). De l'avis du PGCB, il n'y a aucune raison d'écarter ce juste équilibre lorsqu'une demande pour inconduite du poursuivant prend la forme d'une demande de dommages-intérêts fondée sur le par. 24(1) de la *Charte*. Bien que les seuils de responsabilité élaborés sous le régime de la *Charte* soient censés être distincts de ceux en droit privé, les immunités de common law ne devraient pas pour autant être simplement abandonnées en présence d'une demande de dommages-intérêts fondée sur la *Charte*.

[55] Third, the AGBC argues that exempting s. 24(1) claims from the malice standard would have adverse consequences. If a claimant can prevail on a lower liability threshold in a *Charter* damages claim than under a related common law tort, the qualified immunity will lose much of its force and the careful balance of policy factors struck in *Nelles* will be destabilized.

[55] Troisièmement, le PGCB soutient que le fait de soustraire les demandes fondées sur le par. 24(1) à la norme de la malveillance aurait des conséquences néfastes. Si un demandeur peut avoir gain de cause grâce à l'application, à une demande de dommages-intérêts fondée sur la *Charte*, d'un seuil de responsabilité moins élevé que le seuil applicable à un délit civil connexe en common law, l'immunité restreinte perdra une bonne partie de sa force et le juste équilibre des considérations de principe établi dans *Nelles* s'en trouvera ébranlé.

[56] With respect, I do not find these points persuasive. In my view, *Nelles* and its progeny are not dispositive in this case, and malice does not provide a useful liability threshold for *Charter* damages claims alleging wrongful non-disclosure by prosecutors. I come to this conclusion for several reasons.

[56] Soit dit en tout respect, j'estime que ces éléments ne sont pas convaincants. À mon sens, l'arrêt *Nelles* et ceux rendus dans sa foulée ne permettent pas de trancher la présente affaire, et la malveillance ne fournit pas un seuil de responsabilité utile dans le cas des demandes de dommages-intérêts fondées sur la *Charte* dans lesquelles on allègue le défaut injustifié des poursuivants de communiquer des renseignements. J'arrive à cette conclusion pour plusieurs raisons.

[57] First, the malice standard is firmly rooted in the tort of malicious prosecution, which has a distinctive history and purpose. The tort is a judicial creation of the 18th century, when prosecutions were carried out by private litigants: *Miagza*, at para. 42. This historical peculiarity should give us pause when we are called upon to transplant elements of this tort into new contexts far beyond those envisioned at the time of its creation. As Charron J. warned in *Miazga*:

> Given that the tort of malicious prosecution predates the development of our contemporary system of public prosecutions, courts must take care not to simply transpose the principles established in suits between private parties to cases involving Crown defendants without necessary modification. [para. 44]

[58] Second, the purpose of the malicious prosecution tort must be kept in mind in determining whether to expand the reach of the malice standard. Recall that the wrongdoing targeted by this tort is the decision to initiate or continue an improperly motivated prosecution. In contrast, the alleged wrongdoing at issue in this case is markedly different — the Crown's failure to discharge its constitutional obligations to disclose relevant information to Mr. Henry.

[59] The malice standard translates awkwardly into cases where the alleged misconduct is wrongful non-disclosure. Malice requires a showing of improper purpose on the part of the prosecutor. This "improper purpose" inquiry is apt when the impugned conduct is a highly discretionary decision such as the decision to initiate or continue a prosecution, because discretionary decision-making can best be evaluated by reference to the decision-maker's motives. Unlike the decision to initiate or continue a prosecution, the decision to disclose relevant information is not discretionary. Rather, disclosure is a constitutional obligation which must be properly discharged by the Crown in accordance with an accused's right to make full answer and defence, as guaranteed under ss. 7 and 11(*d*) of the *Charter*: see

[57] En premier lieu, la norme de la malveillance est fermement enracinée dans le délit de poursuite abusive, qui a son propre historique et son propre objet. Le délit civil a été créé par les tribunaux au XVIII^e siècle, à une époque où les poursuites pénales étaient le fait de particuliers : *Miazga*, par. 42. Cette particularité de l'histoire devrait nous donner matière à réflexion lorsque nous sommes appelés à transposer des éléments de ce délit dans de nouveaux contextes qui vont bien au-delà de ceux envisagés au moment de sa création. La juge Charron a fait la mise en garde suivante dans *Miazga* :

> Étant donné que le délit de poursuites abusives est antérieur à notre système actuel de poursuites pénales publiques, les tribunaux doivent se garder de simplement appliquer les principes issus d'affaires opposant des personnes privées aux litiges dans lesquels le ministère public est partie défenderesse, sans faire les adaptations nécessaires. [par. 44]

[58] En deuxième lieu, il faut garder à l'esprit l'objet du délit de poursuite abusive lorsqu'on décide s'il y a lieu d'élargir la portée de la norme de la malveillance. Rappelons que la faute visée par ce délit est la décision d'engager ou de continuer une poursuite au motif illégitime. Par contre, la faute reprochée en l'espèce est nettement différente — le défaut du ministère public de s'acquitter de son obligation constitutionnelle de communiquer à M. Henry des renseignements pertinents.

[59] La norme de la malveillance s'applique mal dans les affaires où l'inconduite alléguée est le défaut de communiquer des renseignements. Pour établir la malveillance, il faut démontrer que le poursuivant avait un but illégitime. Cet examen du « but illégitime » est approprié lorsque la conduite reprochée est une décision hautement discrétionnaire comme celle d'engager ou de continuer une poursuite, parce que la meilleure façon d'évaluer la prise d'une décision discrétionnaire est de le faire en fonction des motifs du décideur. Contrairement à la décision d'engager ou de continuer une poursuite, la décision de communiquer des renseignements pertinents n'est pas de nature discrétionnaire. La communication des renseignements est plutôt une obligation constitutionnelle dont doit s'acquitter convenablement

R. v. Stinchcombe, [1991] 3 S.C.R. 326, at p. 336; *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 5.

[60] I readily acknowledge that disclosure decisions often involve difficult judgment calls. As the intervener Attorney General of Ontario observes, disclosure decisions may require consideration of numerous factors, such as whether the information is subject to special protections for sexual assault complainants, special considerations concerning highly sensitive material, or one of the various privileges that attach to information obtained in the course of a criminal prosecution. Even the basic question of relevance may be difficult to assess before the Crown is made aware of the defence theory of the case, and where disclosure requests are not explained or particularized. Furthermore, disclosure obligations are ongoing, which requires prosecutors to continuously evaluate the information in their possession.

[61] However, while I recognize that disclosure decisions pose challenges for prosecutors, they do not implicate the high degree of discretion involved in the decision to initiate or continue a prosecution. As described in Crown policy manuals throughout the country, the decision to lay charges is governed by two primary factors: first, whether there is a reasonable prospect of conviction and second, whether the prosecution would be in the public interest. Manifestly, the "public interest" factor puts substantial discretion in the hands of Crown counsel. That discretion gives prosecutors such a high degree of latitude that the only plausible way to contest it is to assess the underlying motives. No such discretion exists in the disclosure context, and it is therefore unhelpful to require proof of an improper purpose in an action alleging wrongful non-disclosure. Given that disclosure decisions are not a matter of discretion, the

le ministère public, en harmonie avec le droit d'un accusé de présenter une défense pleine et entière que garantissent l'art. 7 et l'al. 11*d*) de la *Charte* : voir *R. c. Stinchcombe*, [1991] 3 R.C.S. 326, p. 336; *R. c. Mills*, [1999] 3 R.C.S. 668, par. 5.

[60] Je reconnais volontiers que les décisions en matière de communication de renseignements sont souvent le fruit d'une réflexion ardue. Comme le fait remarquer l'intervenant le procureur général de l'Ontario, ces décisions peuvent exiger la prise en considération de nombreux facteurs, tels que la question de savoir si les renseignements font l'objet de protections particulières accordées aux plaignants dans des affaires d'agression sexuelle, des considérations particulières relatives à des documents très délicats, ou l'un des divers privilèges qui s'appliquent aux renseignements recueillis au cours d'une poursuite pénale. Même la question élémentaire de la pertinence peut être difficile à résoudre avant que le ministère public ne soit informé de la thèse de la défense et lorsque les demandes de communication ne sont ni expliquées, ni précisées. En outre, l'obligation de communication est constante, ce qui oblige les poursuivants à évaluer sans arrêt les renseignements en leur possession.

[61] Toutefois, bien que je reconnaisse que les décisions en matière de communication de renseignements posent des défis pour les poursuivants, elles n'ont pas le caractère hautement discrétionnaire de la décision d'engager ou de continuer une poursuite. Comme l'indiquent les guides en matière de poursuites partout au Canada, la décision de porter des accusations est régie par deux facteurs principaux : premièrement, l'existence d'une possibilité raisonnable d'obtenir une déclaration de culpabilité et, deuxièmement, l'opportunité de la poursuite eu égard à l'intérêt public. De toute évidence, le facteur de « l'intérêt public » confère un pouvoir discrétionnaire considérable aux avocats du ministère public. Ce pouvoir discrétionnaire leur donne une telle latitude que la seule façon plausible de le contester consiste à évaluer les motifs sous-jacents. Il n'y a aucun pouvoir discrétionnaire de ce genre dans le

motives of the prosecutor in withholding certain information from the accused are immaterial.

[62] Third, the decision to initiate or continue a prosecution falls within the core of prosecutorial discretion, whereas disclosure decisions do not. Whether in private or public law, the threshold to intrude upon that core discretion must be onerous, since it squarely implicates the independence of prosecutors. As this Court held in *Krieger*:

> Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.
>
> . . .
>
> . . . these powers emanate from the office holder's role as legal advisor of and officer to the Crown. In our theory of government, it is the sovereign who holds the power to prosecute his or her subjects. A decision of the Attorney General, or of his or her agents, within the authority delegated to him or her by the sovereign is not subject to interference by other arms of government. An exercise of prosecutorial discretion will, therefore, be treated with deference by the courts . . . . [paras. 43 and 45]

Both malice and abuse of process therefore represent very high thresholds deliberately chosen to insulate core prosecutorial functions from judicial scrutiny. In contrast, disclosure decisions are not part of core prosecutorial discretion:

> In *Stinchcombe*, . . . the Court held that the Crown has an obligation to disclose all relevant information to the

contexte de la communication des renseignements, et il est donc inutile d'exiger la preuve d'un but illégitime dans le cadre d'une action pour défaut injustifié de communiquer des renseignements. Puisque les décisions en matière de communication des renseignements ne sont pas de nature discrétionnaire, les motifs du poursuivant qui ne dévoile pas certains renseignements à l'accusé n'ont aucune importance.

[62] Troisièmement, la décision d'engager ou de continuer une poursuite est prise dans l'exercice du pouvoir discrétionnaire essentiel du poursuivant alors que ce n'est pas le cas des décisions en matière de communication. Que ce soit en droit privé ou en droit public, le seuil à atteindre pour s'immiscer dans l'exercice de ce pouvoir discrétionnaire essentiel doit être élevé, car il met nettement en jeu l'indépendance des poursuivants. Comme l'a conclu notre Cour dans *Krieger* :

> [L'expression « pouvoir discrétionnaire en matière de poursuites »] [. . .] vise l'exercice des pouvoirs qui sont au cœur de la charge de procureur général et que le principe de l'indépendance protège contre l'influence de considérations politiques inappropriées et d'autres vices.
>
> . . .
>
> . . . ces pouvoirs émanent du rôle du titulaire de la charge à titre de conseiller juridique et de représentant de l'État. Dans notre système gouvernemental, c'est le souverain qui a le pouvoir de poursuivre ses sujets. Les autres organes du gouvernement ne peuvent pas modifier une décision que le procureur général ou l'un de ses mandataires a prise dans l'exercice du pouvoir que le souverain lui a délégué. Par conséquent, les tribunaux [. . .] font preuve de retenue à l'égard de l'exercice du pouvoir discrétionnaire en matière de poursuites. [par. 43 et 45]

La malveillance et l'abus de procédure constituent donc tous deux des seuils très élevés qui ont été délibérément retenus pour soustraire les fonctions essentielles du poursuivant au contrôle judiciaire. Par contre, les décisions en matière de communication de renseignements ne ressortissent pas à son pouvoir discrétionnaire essentiel :

> Dans l'arrêt *Stinchcombe*, [. . .] notre Cour a conclu que le ministère public est tenu de communiquer à la

defence. While the Crown Attorney retains the discretion not to disclose irrelevant information, disclosure of relevant evidence is not . . . a matter of prosecutorial discretion but, rather, is a prosecutorial duty. [*ibid.*, at para. 54]

défense tous les renseignements pertinents. [. . .] [B]ien que le procureur du ministère public conserve le pouvoir discrétionnaire de ne pas communiquer des renseignements non pertinents, la communication d'éléments de preuve pertinents est affaire non pas de pouvoir discrétionnaire, mais plutôt d'obligation de sa part. [*ibid.*, par. 54]

[63] In *Anderson*, this Court held that "the Crown possesses no discretion to breach the *Charter* rights of an accused", and that "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" (para. 45). This suggests that disclosure decisions will not necessarily warrant the same level of protection from judicial scrutiny as the decision to initiate or continue a prosecution. Indeed, in the course of criminal trials, disclosure is routinely subject to judicial review. This review is not predicated on a showing of abuse of process. Likewise, in an action for *Charter* damages, a threshold lower than malice is justified when a court is asked to determine whether the Crown is liable for wrongful non-disclosure.

[63] Dans *Anderson*, notre Cour a déclaré que « le ministère public n'a pas le pouvoir discrétionnaire de porter atteinte aux droits que la *Charte* garantit à un accusé », et que « le pouvoir discrétionnaire en matière de poursuites ne protège aucunement le procureur du ministère public qui ne s'est pas acquitté de ses obligations constitutionnelles, par exemple celle de communiquer adéquatement la preuve à la défense » (par. 45). Il faut croire que les décisions en matière de communication de la preuve ne bénéficient pas nécessairement de la même protection contre le contrôle judiciaire que la décision d'engager ou de continuer une poursuite. D'ailleurs, la communication des renseignements fait couramment l'objet d'un contrôle judiciaire lors des procès criminels. Ce contrôle ne dépend pas de la démonstration d'un abus de procédure. De même, dans une action en dommages-intérêts fondée sur la *Charte*, un seuil inférieur à la malveillance est justifié lorsque le tribunal est appelé à décider si le ministère public doit être tenu responsable d'un défaut injustifié de communiquer des renseignements.

[64] Finally, a purposive approach to s. 24(1) militates against the malice standard. As this Court held in *Dunedin*, "s. 24(1), like all *Charter* provisions, commands a broad and purposive interpretation" and "must be construed generously, in a manner that best ensures the attainment of its objects" (para. 18). Section 24(1) guarantees that rights are upheld by granting "effective remedies" to claimants, and is crucial to the overall structure of the *Charter* because "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach" (*ibid.*, at paras. 19-20).

[64] Enfin, une interprétation téléologique du par. 24(1) milite à l'encontre de la norme de la malveillance. Notre Cour a conclu dans *Dunedin* que, « comme toutes les autres dispositions de la *Charte*, le par. 24(1) commande une interprétation large et téléologique [. . .] et doit être interprété de la manière la plus généreuse qui soit compatible avec la réalisation de son objet » (par. 18). En accordant aux demandeurs des « réparations efficaces », le par. 24(1) garantit la protection des droits et il est crucial pour la structure globale de la *Charte* parce qu'« un droit, aussi étendu soit-il en théorie, est aussi efficace que la réparation prévue en cas de violation, sans plus » (*ibid.*, par. 19-20).

[65] In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, Iacobucci and Arbour JJ. stressed the importance of a purposive approach to remedies under s. 24(1):

> 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. [Emphasis in original; para. 25.]

In my view, restricting the availability of *Charter* damages for wrongful non-disclosure to cases where the Crown acted with malice would offer neither a responsive nor effective remedy to claimants. A malice standard grounded in "improper purpose" sets too high a bar, and fails to respond adequately to the state conduct at issue. It is also not well suited to the disclosure context. A threshold specifically tailored to that context is preferable.

[66] For these reasons, I reject the application of the malice standard. In doing so, I do not in any way seek to undercut this Court's malicious prosecution jurisprudence. The qualified immunity established in *Nelles* continues to govern tort actions for malicious prosecution. Furthermore, as I will explain, while the malice standard is not directly applicable, the policy factors outlined in *Nelles* inform the liability threshold in this case.

[65] Dans *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3, les juges Iacobucci et Arbour ont souligné l'importance de donner une interprétation téléologique aux réparations fondées sur le par. 24(1) :

> L'interprétation téléologique des réparations dans le contexte de la *Charte* actualise l'ancienne maxime *ubi jus, ibi remedium*, là où il y a un droit, il y a un recours. Plus particulièrement, cette interprétation comporte au moins deux exigences, à savoir, premièrement, favoriser la réalisation de l'objet du droit garanti (les tribunaux sont tenus d'accorder des réparations adaptées à la situation), et deuxièmement, favoriser la réalisation de l'objet des dispositions réparatrices (les tribunaux sont tenus d'accorder des réparations efficaces). [Souligné dans l'original; par. 25.]

Selon moi, le fait de restreindre aux cas où le ministère public a agi avec malveillance la possibilité d'obtenir des dommages-intérêts en vertu de la *Charte* pour défaut injustifié de communiquer des renseignements offrirait aux demandeurs une réparation qui n'est ni adaptée à la situation, ni efficace. Une norme de malveillance fondée sur un « but illégitime » place la barre trop haut et ne constitue pas une réponse adéquate à la conduite en cause de l'État. De même, elle ne convient pas dans le contexte de la communication de renseignements. Il est préférable d'appliquer un seuil adapté spécifiquement à ce contexte.

[66] Pour ces motifs, je rejette l'application de la norme de la malveillance. Ce faisant, je ne cherche aucunement à miner la jurisprudence de notre Cour sur les poursuites abusives. L'immunité restreinte établie dans *Nelles* régit toujours les actions en responsabilité délictuelle pour poursuite abusive. De plus, comme je l'expliquerai, bien que la norme de la malveillance ne s'applique pas directement, les considérations de principe énoncées dans *Nelles* éclairent le seuil de responsabilité applicable en l'espèce.

(2) Policy Concerns Informing the Liability Threshold for Wrongful Non-disclosure

[67] Disclosure is one of the Crown's fundamental obligations in a criminal prosecution. The Crown is duty-bound to disclose relevant information to the defence, and this obligation is a continuing one. This stringent and, at times, heavy burden on the Crown guarantees an accused's ability to make full answer and defence. Indeed, this was precisely the reason that the Court affirmed a *constitutional* right to disclosure more than two decades ago in *Stinchcombe*:

> . . . there is [an] overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. This common law right has acquired new vigour by virtue of its inclusion in s. 7 of the *Canadian Charter of Rights and Freedoms* as one of the principles of fundamental justice. . . . The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. [Citation omitted; p. 336.]

[68] Canadians thus rightly expect that the Crown will fulfill its disclosure obligations with diligence and rigour. By and large, Crown attorneys working on the front lines of our criminal justice system exceed these expectations on a daily basis. I pause here to note that Mr. Henry's allegations of non-disclosure arise, in the main, from events that occurred during the pre-*Stinchcombe* era, when Crown disclosure practices were not as robust as they are today. Nevertheless, our system remains imperfect, and wrongful failure to disclose is not a mere hypothetical — it can, and does, happen, sometimes taking an extraordinary human toll and resulting in serious harm to the administration of justice.

(2) Les préoccupations de principe qui appuient le seuil de responsabilité applicable en cas de défaut injustifié de communiquer des renseignements

[67] La communication de la preuve est l'une des obligations fondamentales incombant au ministère public dans une poursuite pénale. Le ministère public a le devoir de communiquer à la défense les renseignements pertinents et cette obligation est constante. Ce fardeau rigoureux et parfois lourd qui incombe au ministère public garantit la possibilité pour l'accusé de présenter une défense pleine et entière. D'ailleurs, c'est précisément la raison pour laquelle, il y a plus de 20 ans, la Cour a confirmé dans *Stinchcombe* le droit *constitutionnel* à la communication des renseignements :

> . . . il y a surtout [une] crainte prépondérante que la non-divulgation n'empêche l'accusé de présenter une défense pleine et entière. Ce droit reconnu par la common law a acquis une nouvelle vigueur par suite de son inclusion parmi les principes de justice fondamentale visés à l'art. 7 de la *Charte canadienne des droits et libertés*. [. . .] Le droit de présenter une défense pleine et entière constitue un des piliers de la justice criminelle, sur lequel nous comptons grandement pour assurer que les innocents ne soient pas déclarés coupables. [Référence omise; p. 336.]

[68] Les Canadiens et les Canadiennes s'attendent donc, à juste titre, à ce que le ministère public s'acquitte de ses obligations de communication avec diligence et rigueur. Dans l'ensemble, les procureurs du ministère public qui œuvrent en première ligne de notre système de justice pénale dépassent chaque jour ces attentes. Je m'arrête ici pour souligner que les allégations de défaut de communiquer des renseignements formulées par M. Henry découlent principalement d'événements survenus avant l'arrêt *Stinchcombe*, à une époque où les pratiques du ministère public en matière de communication de renseignements étaient moins rigoureuses qu'elles ne le sont aujourd'hui. Néanmoins, notre système demeure imparfait et le défaut injustifié de communiquer des renseignements n'est pas qu'une simple hypothèse : il peut se produire et se produit effectivement, occasionnant parfois des coûts humains énormes et portant gravement atteinte à l'administration de la justice.

[69] At the same time, all failures to disclose are not made equal. Highly blameworthy conduct, such as the intentional suppression of crucial evidence to obtain a conviction at all costs, sits at one end of the spectrum. At the other, one finds good faith errors in judgment about the relevance of certain tangential information. Both scenarios constitute a breach of an accused's *Charter* rights. Yet, manifestly, these scenarios do not possess the same persuasive force in terms of justifying a *Charter* damages award under s. 24(1).

[70] Given the complex nature of many disclosure decisions, courts should be exceedingly wary of setting a liability threshold that would award *Charter* damages for even minor instances of wrongful non-disclosure. Crown counsel will, from time to time, make good faith errors. Exposing prosecutors to potential liability every time such errors are made would, in my view, interfere with the proper execution of prosecutorial functions. Setting the liability threshold too low would also pose a considerable risk that baseless damages claims against the Crown would proliferate.

[71] These compelling good governance concerns — raised in *Nelles* and its progeny — must be taken into account in determining the appropriate liability threshold for cases of wrongful non-disclosure. As the Chief Justice held in *Ward*, "the underlying policy considerations that are engaged when awarding private law damages against state actors may be relevant when awarding public law damages directly against the state" (para. 22). There are two policy considerations from the malicious prosecution trilogy that I wish to emphasize. First, the liability threshold must ensure that Crown counsel will not be diverted from their important public duties by having to defend against a litany of civil claims. Second, the liability threshold must avoid

[69] Par ailleurs, tous les manquements à la communication des renseignements n'ont pas la même gravité. Une conduite hautement blâmable, telle la suppression délibérée d'éléments de preuve cruciaux en vue de l'obtention d'une déclaration de culpabilité à tout prix, se situe à une extrémité du spectre. On trouve à l'autre extrémité les erreurs de jugement commises de bonne foi quant à la pertinence de certains renseignements indirects. Ces deux scénarios constituent des atteintes aux droits que la *Charte* garantit à l'accusé. Pourtant, ces scénarios n'ont manifestement pas la même force persuasive pour ce qui est de justifier l'attribution de dommages-intérêts en vertu du par. 24(1) de la *Charte*.

[70] Vu la complexité de nombreuses décisions en matière de communication de la preuve, les tribunaux doivent être excessivement réticents à fixer un seuil de responsabilité qui donnerait lieu à l'attribution de dommages-intérêts en vertu de la *Charte* même dans des cas mineurs de défaut injustifié de communiquer des renseignements. Les avocats du ministère public font parfois des erreurs de bonne foi. À mon avis, exposer les poursuivants au risque que leur responsabilité soit engagée chaque fois que pareilles erreurs sont commises nuirait au bon exercice de leurs fonctions. Fixer un seuil de responsabilité trop bas risquerait grandement d'entraîner la multiplication des poursuites en dommages-intérêts sans fondement contre le ministère public.

[71] Il faut tenir compte de ces préoccupations impérieuses relatives au bon gouvernement — évoquées dans l'arrêt *Nelles* et les jugements rendus dans sa foulée — pour établir le seuil de responsabilité qui convient aux cas de défaut injustifié de communiquer des renseignements. Comme l'a déclaré la Juge en chef dans *Ward*, « les considérations sous-jacentes de politique générale qui interviennent dans la décision d'ordonner à des représentants de l'État de verser des dommages-intérêts de droit privé peuvent être pertinentes lorsqu'il s'agit de contraindre directement l'État à verser des dommages-intérêts de droit public » (par. 22). Je tiens à souligner deux préoccupations de politique générale qui se dégagent de la trilogie sur les poursuites abusives. Premièrement, le

a widespread "chilling effect" on the behaviour of prosecutors.

[72] The first concern — diversion from duties — underscores the need for a high liability threshold. In the disclosure process, mistakes are certainly the exception rather than the rule. That said, if every minor instance of wrongful non-disclosure were to expose prosecutors to liability for *Charter* damages, they would find themselves spending much of their limited time and energy responding to lawsuits rather than doing their jobs. They "would be constantly enmeshed in an avalanche of interlocutory civil proceedings and civil trials", an outcome that "bode[s] ill for the efficiency of [Crown prosecutors] and the quality of our criminal justice system": *Elguzouli-Daf v. Commissioner of Police of the Metropolis*, [1995] Q.B. 335 (C.A.), at p. 349. That avalanche would no doubt contain a few strong claims of serious wrongful non-disclosure, but would invariably bring with it scores of meritless claims, each of which would have to be defended at the expense of core Crown functions. The collective interest of Canadians is best served when Crown counsel are able to focus on their primary responsibility — the fair and effective prosecution of crime. In my view, the liability threshold must allow for strong claims to be heard on their merits, while guarding against a proliferation of marginal cases.

[73] The second policy concern — the chilling effect on Crown counsel — also supports a high liability threshold. Fear of civil liability may lead to defensive lawyering by prosecutors. One consequence of this defensive approach would be disclosure decisions motivated less by legal principle than by a calculated effort to ward off the spectre

seuil de responsabilité doit faire en sorte que les avocats du ministère public ne soient pas détournés de leurs fonctions publiques importantes par l'obligation de se défendre contre une multitude de poursuites civiles. Deuxièmement, ce seuil doit permettre d'éviter un « effet paralysant » généralisé sur le comportement des poursuivants.

[72] La première préoccupation — le détournement des fonctions — fait ressortir la nécessité d'un seuil de responsabilité élevé. Dans le processus de communication de la preuve, les erreurs sont assurément l'exception et non la règle. Cela dit, si chaque cas mineur de défaut injustifié de communiquer des renseignements exposait les poursuivants à la responsabilité à l'égard des dommages-intérêts en vertu de la *Charte*, ils consacreraient beaucoup de leur temps et de leur énergie limités à se défendre contre des poursuites plutôt qu'à faire leur travail. Ils [TRADUCTION] « seraient constamment empêtrés dans une avalanche de procédures civiles interlocutoires et de procès civils », un résultat qui « n'augurerait rien de bon pour le rendement des [procureurs du ministère public] et la qualité de notre système de justice pénale » : *Elguzouli-Daf c. Commissioner of Police of the Metropolis*, [1995] Q.B. 335 (C.A.), p. 349. Cette avalanche comprendrait sans aucun doute quelques réclamations solides pour défaut injustifié de communiquer des renseignements, mais apporterait invariablement son lot de réclamations sans fondement dont chacune devrait être contestée au détriment des fonctions essentielles du ministère public. L'intérêt collectif des Canadiens et Canadiennes est mieux servi lorsque les avocats du ministère public peuvent se concentrer sur leur responsabilité première : la poursuite équitable et efficace des criminels. À mon sens, le seuil de responsabilité doit permettre l'audition sur le fond des demandes solides tout en empêchant une prolifération de demandes marginales.

[73] La deuxième préoccupation de principe — l'effet paralysant sur les avocats du ministère public — milite aussi en faveur d'un seuil de responsabilité élevé. La crainte de la responsabilité civile risque d'amener les poursuivants à adopter une approche défensive. Il en résulterait notamment des décisions en matière de communication de la preuve motivées

of liability. The public interest is undermined when prosecutorial decision-making is influenced by considerations extraneous to the Crown's role as a quasi-judicial officer.

[74] For these reasons, I conclude that good governance concerns mandate a threshold that substantially limits the scope of liability for wrongful non-disclosure. In my view, the standard adopted by the application judge, which is akin to gross negligence, does not provide sufficient limits. As I will explain, a negligence-type standard poses considerable problems, and ought to be rejected.

[75] Mr. Henry submits that an even lower threshold — a simple breach of the *Charter* without any additional element of fault — should apply in this context. The Chief Justice and Karakatsanis J. take this approach. Specifically, they adopt the *Ward* framework without modification and rely on case-by-case policy considerations at step three, rather than a heightened threshold, to limit liability. In my respectful view, this approach fails to address the compelling policy and practical concerns that justify limiting prosecutorial liability.

[76] For more than two decades, this Court has steadfastly affirmed the principle that prosecutorial liability should be carefully circumscribed. My colleagues reject the relevance of *Nelles* and its progeny to this case. In their view, our malicious prosecution jurisprudence has no bearing here, since "[t]he legal duty on the Crown to disclose relevant evidence does not involve prosecutorial discretion in the sense discussed in *Nelles* and *Miazga*" (para. 128). I grant that there are significant distinctions between the Crown's discretionary decision to initiate or continue a prosecution, and its disclosure obligations. However, the policy concerns raised in the malicious prosecution trilogy are not confined to the exercise of core prosecutorial discretion. In my view, those concerns have a broader reach and are implicated

moins par les principes juridiques que par des efforts calculés pour se prémunir contre le spectre de la responsabilité. L'intérêt public est compromis lorsque la prise de décisions en matière de poursuites est influencée par des considérations étrangères au rôle du poursuivant en tant qu'officier quasi judiciaire.

[74] Pour ces motifs, je conclus que les préoccupations relatives au bon gouvernement commandent un seuil qui limite sensiblement la portée de la responsabilité en cas de défaut injustifié de communiquer des renseignements. À mon sens, la norme adoptée par le juge de première instance, laquelle s'apparente à la négligence grave, n'offre pas de limites suffisantes. Comme je l'expliquerai, une norme du type de celle de la négligence pose d'importants problèmes et doit être rejetée.

[75] M. Henry plaide qu'un seuil encore plus bas — une simple violation de la *Charte* sans autre élément de faute — devrait s'appliquer dans ce contexte. C'est la solution que proposent la Juge en chef et la juge Karakatsanis. Plus particulièrement, elles adoptent sans le modifier le cadre retenu dans *Ward* et, pour limiter la responsabilité, elles s'appuient à la troisième étape de l'analyse sur l'examen au cas par cas des considérations de principe, plutôt que sur un seuil de responsabilité plus élevé. J'estime, avec égards, que cette solution ne tient pas compte des préoccupations pratiques et de principe impérieuses qui justifient une limitation de la responsabilité du poursuivant.

[76] Durant plus de deux décennies, notre Cour a fermement affirmé le principe suivant lequel la responsabilité du poursuivant doit être soigneusement circonscrite. Selon mes collègues, l'arrêt *Nelles* et ceux rendus dans sa foulée ne sont pas pertinents à la présente affaire. Elles estiment que notre jurisprudence relative aux poursuites abusives n'a aucune incidence en l'espèce puisque « [l']obligation légale [en matière de communication de la preuve pertinente] qui incombe au ministère public ne fait pas intervenir le même pouvoir discrétionnaire que celui qu'a examiné la Cour dans les affaires *Nelles* et *Miazga* » (par. 128). Je conviens qu'il existe des distinctions importantes entre la décision discrétionnaire du ministère public d'engager ou de continuer une poursuite et ses obligations en matière

wherever there is a risk of undue interference with the ability of prosecutors to freely carry out their duties in furtherance of the administration of justice.

de communication de la preuve. Toutefois, les préoccupations de principe que soulève la trilogie des décisions relatives aux poursuites abusives ne se limitent pas à l'exercice du pouvoir discrétionnaire essentiel en matière de poursuites. Selon moi, ces préoccupations ont une portée plus vaste et elles entrent en jeu dès lors qu'il existe un risque d'entraver indûment la possibilité, pour les poursuivants, d'exercer en toute liberté leurs fonctions dans l'intérêt de l'administration de la justice.

[77] My colleagues' proposal would permit claimants to pursue *Charter* damages based on *any* allegation that the Crown breached its disclosure obligations — whether the wrongful non-disclosure was intentional, negligent, or accidental. In my respectful view, this casts too wide a net, exposing prosecutors to an unprecedented scope of liability that would affect the exercise of their vital public function.

[77] La proposition de mes collègues permettrait aux demandeurs de réclamer des dommages-intérêts en vertu de la *Charte* en se fondant sur *toute* allégation que le ministère public a manqué à ses obligations en matière de communication de la preuve — que le défaut injustifié de communiquer des renseignements soit intentionnel, qu'il soit attribuable à la négligence ou qu'il soit accidentel. Soit dit en tout respect, cette proposition ratisse trop large et expose les poursuivants à une responsabilité d'une portée sans précédent susceptible de gêner l'exercice de leur fonction publique essentielle.

[78] No doubt many cases might be thwarted by countervailing considerations invoked at the third step of *Ward* — and in any event would attract a modest quantum of damages at step four, if the claimant were to succeed at trial. However, given the absence of a liability threshold, a claim alleging a relatively minor breach with minimal harm to the claimant might well survive a motion to strike at the pleadings stage, and could lead to an award of damages. With respect, I fear that my colleagues' approach runs the risk of opening the floodgates to scores of marginal claims.

[78] Je ne doute pas que les considérations pouvant faire contrepoids invoquées à la troisième étape de l'analyse dans *Ward* puissent contrecarrer un bon nombre de demandes — qui n'aboutiraient en fin de compte qu'à des dommages-intérêts modestes à la quatrième étape, si le demandeur devait avoir gain de cause au procès. Toutefois, vu l'absence d'un seuil de responsabilité, une demande fondée sur un manquement relativement mineur qui a causé peu de tort au demandeur pourrait bien résister à une requête en radiation à l'étape des actes de procédure et pourrait mener à l'attribution de dommages-intérêts. Avec égards, je crains que la solution que proposent mes collègues risque de déclencher une avalanche de demandes marginales.

[79] My colleagues suggest that their proposal would not divert Crown counsel from their duties. In their view, since the inquiry would be focused "on the existence and relevance of the [undisclosed] documents, [and] not on the more complex questions of how discretion should have or could have been exercised", the role of the prosecutor in civil proceedings would be limited (para. 132). With

[79] Mes collègues laissent entendre que leur proposition ne détournerait pas les représentants du ministère public de leurs fonctions. Selon elles, puisque l'analyse porterait essentiellement sur « l'existence et la pertinence des documents [non communiqués] et non les questions plus complexes de savoir comment le ministère public aurait dû ou aurait pu exercer son pouvoir discrétionnaire », le rôle du poursuivant dans

respect, I disagree. In my view, a detailed examination of prosecutors' conduct is inevitable. Such an examination would be necessary, for example, to determine whether case-by-case considerations militate against an award of damages or to set the appropriate quantum of damages for a successful claim.

l'instance civile serait limité (par. 132). Avec égards, je ne suis pas d'accord. Selon moi, un examen détaillé de la conduite du poursuivant est inévitable. Un tel examen serait nécessaire, par exemple, pour déterminer si des considérations ponctuelles militent contre l'attribution de dommages-intérêts, ou pour fixer le montant des dommages-intérêts à accorder au demandeur qui a gain de cause.

[80] Similarly, my colleagues imply that their proposal would not have a chilling effect — first, because Crown conduct is already tightly constrained by the obligation to disclose relevant information and second, because "it is the state and not the individual prosecutor who faces liability" (para. 129). With respect, I take a different view. As I have explained, while the obligation to disclose is non-discretionary, there are invariably difficult judgment calls to be made. Those difficult decisions should be motivated by legal principle, not the fear of incurring civil liability. Furthermore, the fact that damages claims lie against the state and not individual prosecutors does not mitigate this concern. Like all lawyers, Crown counsel are professionals who jealously guard their reputations and whose actions are motivated by more than personal financial consequences.

[80] De même, mes collègues laissent entendre que leur solution n'aurait pas d'effet paralysant — premièrement, parce que la conduite du ministère public est déjà strictement encadrée par l'obligation de communiquer les renseignements pertinents, et deuxièmement, parce que « c'est l'État et non le poursuivant à titre individuel qui peut être tenu responsable » (par. 129). Avec égards, ce n'est pas mon avis. Comme je l'ai expliqué, même si l'obligation de communiquer les renseignements n'est pas discrétionnaire, il y a inévitablement des décisions exigeant une réflexion ardue. Ces décisions devraient être motivées par l'application des principes juridiques et non par la crainte de poursuites civiles. De plus, le fait que les demandes de dommages-intérêts soient présentées contre l'État et non contre les poursuivants à titre individuel n'atténue pas cette crainte. Comme tous les avocats, les représentants du ministère public sont des professionnels qui protègent jalousement leur réputation, et la motivation des gestes qu'ils posent ne se limite pas à des conséquences financières personnelles.

[81] I agree with my colleagues that Mr. Henry alleges very serious instances of wrongful non-disclosure that demonstrate a shocking disregard for his *Charter* rights. His claim as pleaded meets the threshold I would establish. However, we should be wary of using Mr. Henry's exceptional case to justify a substantial expansion of prosecutorial liability. It is only by keeping liability within strict bounds that we can ensure a reasonable balance between remedying serious rights violations and maintaining the efficient operation of our public prosecution system.

[81] Je suis d'accord avec mes collègues pour dire que M. Henry allègue des cas très graves de défaut de communiquer des renseignements qui manifestent une indifférence consternante à l'égard des droits que lui garantit la *Charte*. Les allégations de sa demande respectent le seuil de responsabilité que je propose. Toutefois, nous devons nous garder de retenir le cas exceptionnel de M. Henry pour justifier un élargissement important de la responsabilité du poursuivant. Ce n'est qu'en maintenant la responsabilité à l'intérieur de limites strictes que nous pouvons assurer un équilibre raisonnable entre la réparation de violations graves des droits et la préservation du bon fonctionnement de notre système de poursuites pénales.

TAB 4

Federal Court of Appeal — Cour d'appel fédérale

Date: 20000306

Docket: A-20-98

CORAM: **ROBERTSON J.A.**
SEXTON J.A.
EVANS J.A.

BETWEEN:

MICHAEL TAYLOR

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

THE CANADIAN JEWISH CONGRESS

Intervenor

REASONS FOR JUDGMENT

SEXTON J.A.

INTRODUCTION

[1] Judges are human. Judges make mistakes. While a person generally has a right to appeal a decision that the person considers to be wrong, a corresponding right to sue the judge or to complain to the Canadian Human Rights Commission of the judge's conduct raises many difficult issues.

[20] Mr. Taylor's complaint to the Canadian Human Rights Commission was not successful. The Commission decided, pursuant to paragraph 41(1)(c) of the *Canadian Human Rights Act*,[15] not to deal with the complaint because it considered that the complaint was beyond its jurisdiction. It concluded that it did not have jurisdiction because Whealy J. benefited from the common law absolute immunity for judges.

[21] Mr. Taylor sought judicial review of that decision to the Federal Court, Trial Division, which dismissed the application on the basis that Whealy J.'s ruling was made in his capacity as a judge and he was therefore protected by reason of judicial immunity from suit. Mr. Taylor now appeals that decision to this Court. The Canadian Jewish Congress ("CJC") was granted leave to intervene in the appeal.

DECISION UNDER APPEAL

[22] In his decision, Dubé J. relied on *Sirros* v. *Moore*[16] for the proposition that "a judge of a superior court is protected when he is acting in the *bona fide* exercise of his office and under the belief that he has jurisdiction."[17] He held that "it is common ground in the instant case that Judge Whealy acted in the course of duty and, therefore, could not be subjected to an action in damages."[18] He added that s. 5 of the *Canadian Human Rights Act*, which makes it a

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[15] R.S.C. 1985, c. H-6.

[16] [1974] 3 All E.R. 776 (C.A.).

[17] *Ibid.*, p. 781.

[18] *Taylor* v. *Canada (A.G.)* (1997), 155 D.L.R. (4^{th}) 740 (Fed. T.D.) at 745.

discriminatory practice to deny the provision of goods, services, facilities or accommodation customarily available to the public on a prohibited ground of discrimination, "appeared to be directed to commercial premises,"[19] and "could hardly be said to encompass the conduct of a judge in [a] courtroom."[20] Ultimately, he concluded that the Council would be a better forum in which to address Mr. Taylor's complaint. Obviously, Dubé J.'s judgment was released before the Council's final decision summarized above was released.

ISSUE ON APPEAL

Does Mr. Taylor's complaint fall within the jurisdiction of the Commission, or is it barred by common-law judicial immunity?

ANALYSIS

Was Mr. Taylor without a remedy?

[23] The CJC began its submissions with the proposition that the harm complained of by Mr. Taylor has been compounded by the fact that he was left without a traditional right to appeal Whealy J.'s decision. The CJC explains that because Mr. Taylor was not a party to the criminal trial that he sought to attend, Mr. Taylor had no recourse to a right of appeal. Accordingly, the CJC submits that should this Court conclude that the Commission may not review Whealy J.'s conduct, Mr. Taylor will be left without a just and appropriate remedy. This, of course, ignores the remedy of lodging a complaint to the Canadian Judicial Council, a remedy of which Mr.

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[19] *Ibid.*, p. 746.

[20] *Ibid.*

Taylor availed himself.

[24] In any event, it appears that Mr. Taylor could have appealed Whealy J.'s order. In *Dagenais* v. *Canadian Broadcast Corp.*,[21] Lamer C.J.C. considered the method that third parties should adopt to appeal publication bans made under "common law or legislated discretionary authority."[22] He concluded that where a provincial superior court judge issued such a publication ban, the media (and other third parties) could challenge the ban directly to the Supreme Court of Canada by applying for leave to appeal to the Supreme Court, pursuant to s. 40 of the *Supreme Court Act*.[23] Therefore, *Dagenais* demonstrates that Mr. Taylor could have sought to appeal Whealy J.'s order, made pursuant to legislated discretionary authority, directly to the Supreme Court of Canada. Mr. Taylor did not do so.

<u>The ambit of judicial immunity</u>

[25] Litigants turn to courts and judges to resolve difficult problems where all other means of resolving the dispute have failed. Consequently, as the United States Supreme Court held in *Bradley* v. *Fisher*,[24] courts are often asked to decide cases "involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest

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[21] [1994] 3 S.C.R. 835.

[22] *Ibid.*, p. 856.

[23] R.S.C. 1985, c. S-26.

[24] (1872), 13 Wall. 335.

feelings."[25] As that Court also noted, such litigation inevitably produces at least one losing party, who is likely to be disappointed with the result.

[26] Consider what might happen if judges could be regularly sued for decisions that stirred such disappointment. One potential consequence is that a certain end to disputes, one of the primary advantages of resolving disputes by resort to the courts, would never occur. If one action against a judge was dismissed by another judge, the second judge might well be added as a party to the action, and so on, and so on. This consequence was highlighted in *Bradley* v. *Fisher*, where Field J. commented that an appellate judge who decided that a judge of an inferior jurisdiction was protected by judicial immunity "would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party."[26]

[27] Similarly, if judges could be sued by disappointed litigants for damages for allegedly erroneous decisions, every judge would be required to preserve "a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party [...] that he had decided as he did with judicial integrity."[27] If a suit was eventually begun against a judge, much of that judge's time and energy would then be devoted to defending the suit, rather than to his or her judicial work. Already scarce judicial

[25] *Ibid.*, p. 348.

[26] *Ibid.*, p. 349.

[27] *Ibid.*, p. 348.

resources would be lost, and court cases would take even longer to be heard and to be resolved.

[28] Finally, the most serious consequence of permitting judges to be sued for their decisions is that judicial independence would be severely compromised. If judges recognized that they could be brought to account for their decisions, their decisions might not be based on a dispassionate appreciation of the facts and law related to the dispute. Rather, they might be tempered by thoughts of which party would be more likely to bring an action if they were disappointed by the result, or by thoughts of whether a ground-breaking but just approach to a difficult legal problem might be later impugned in an action for damages against that judge, all of which would be raised by the mere threat of litigation. In Lord Denning's words, a judge would "turn the pages of his books with trembling fingers, asking himself: "If I do this, shall I be liable in damages?"[28]

[29] Accordingly, the basis for judicial immunity is rooted in the need to protect the public, not in a need to protect judges. In other words, as Lord Denning explained in *Sirros* v. *Moore*, judicial immunity does not exist because a "judge has any privilege to make mistakes or do wrong."[29] Rather, he held that judges should be free from actions for damages to permit judges to perform their duty "with complete independence and free from fear."[30] Similarly, in *Scott* v.

[28] *Sirros, supra* at 785.

[29] *Ibid.*, p. 782.

[30] *Ibid.*

Stansfield,[31] it was explained that judicial immunity is not meant to protect malicious or corrupt judges, but to protect the public:

> It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences.[32]

The "bad faith" exception to judicial immunity

[30] It has been suggested that there are limits to judicial immunity. For instance, in an extract from *Halsbury's Laws of England*,[33] the authors noted:

> Whenever protection of the exercise of judicial powers applies, it is so absolute that no allegation that the acts or words complained of were done or spoken *mala fide*, maliciously, corruptly, or without reasonable or probable cause suffices to found an action. The protection does not, however, extend to acts purely extra-judicial or alien to the judicial duty of the defendant [...]

[31] Another view is expressed in H. Brun and G. Tremblay's textbook *Droit Constitutionnel*,[34] where the authors state that "absolute immunity is a rule of the common law applicable to superior court judges even where bad faith has been alleged."[35]

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[31] (1868), 3 L.R. Ex. 220.

[32] *Ibid.*, p. 223. See also *Garnett* v. *Ferrand* (1827), 6 B. & C. 611 at 625-626: "This freedom from action and question at the suit of an individual is given by the law to the Judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions they may be free in thought and independent in judgment, as all who are to administer justice ought to be."

[33] 4th ed., vol. 1, 1973, at pp. 197 *et seq.*

[34] H. Brun & G. Tremblay, *Droit Constitutionnel* (Cowansville: Yvon Blais, 1982).

[35] *Ibid.*, p. 514.

[32] In *Sirros* v. *Moore*, Lord Denning held:

> Each [judge] should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. [...] So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in law. What he does may be outside his jurisdiction – in fact or in law – but so long as he honestly believes it to be within his jurisdiction, he should not be liable. Once he honestly entertains this belief, nothing else will make him liable. He is not to be plagued with allegations of malice or ill-will or bias or anything of the kind. Actions based on such allegations have been struck out and will continue to be struck out. Nothing will make him liable except it be shown that he was not acting judicially, knowing that he had no jurisdiction to do it.

[33] In *McC* v. *Mullan*, Lord Bridge said:[36]

> It is, of course, clear that the holder of any judicial officer who acts in bad faith, doing what he knows he has no power to do, is liable in damages. If the Lord Chief Justice himself, on the acquittal of a defendant charged before him with a criminal offence, were to say, "That is a perverse verdict," and thereupon proceed to pass a sentence of imprisonment, he could be sued for trespass. But, as Lord Esher MR said in *Anderson* v. *Gorrie* [1895] 1 Q.B. 668 at 670:
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>> "... the question arises whether there can be an action against a judge of a Court of Record for doing something within his jurisdiction, but doing it maliciously and contrary to good faith. By the common law of England it is the law that no such action will lie."[37]

[34] In *Morier* v. *Rivard*,[38] the Supreme Court of Canada quoted all of the above passages without clearly saying which it agreed with. *Morier* v. *Rivard* was an appeal from the Québec Court of Appeal. In its decision, the Québec Court of Appeal had cited *Sirros* v. *Moore* for the proposition that the action at issue should not be dismissed by reason of judicial immunity, since "judicial attitudes to its scope have evolved."[39] It held that "the immunity does not seem to be

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[36] [1984] 3 All E.R. 908 (H.L.).

[37] *Ibid.*, p. 916.

[38] [1985] 2 S.C.R. 716.

[39] *Ibid.*, p. 723.

absolute but to depend largely on the *ultra vires* of the act committed by the judge and on the knowledge which he has that he lacked jurisdiction."[40]

[35] On appeal to the Supreme Court of Canada, Chouinard J. disagreed with the Québec Court of Appeal. He concluded that "*Sirros* does not support the proposition of the Court of Appeal that the immunity is not absolute."[41] However, later in his judgment, he noted:

> It should be noted that neither Lord Bridge of Harwich nor Lord Denning cited authorities in support of the qualification made by them. In any case, it is not necessary to decide the merits of that for the purposes of this appeal.[42]

[36] Chouinard J. decided it was not necessary in the context of a motion to dismiss, where one must assume that "the facts alleged are true,"[43] to determine whether judicial immunity would not apply where it is shown that a judge "was not acting judicially, knowing that he had no jurisdiction to do it." He arrived at that conclusion despite the fact that one of the allegations in the plaintiff's statement of claim was that the defendants, members of the Commission de police du Québec who benefited from a statutory provision that conferred on its members "the same protection and privileges as are conferred upon judges of the Superior Court, for any act done or

[40] *Ibid.*

[41] *Ibid.*, p. 740.

[42] *Ibid.*, p. 744.

[43] *Ibid.*, p. 745.

omitted in the execution of their duty,"[44] had "knowingly committed a fraud on the law."[45]

[37] Since *Morier* v. *Rivard* was decided, the Québec Court of Appeal has accepted that an exception to judicial immunity indeed exists. In *Royer and Fortier* v. *Mignault*,[46] Rothman J.A. cited *Sirros* v. *Moore*, *McC* v. *Mullan* and *Morier* v. *Rivard*, and concluded:

> [A] superior court judge is protected by absolute immunity from any civil liability for anything he does or says in the performance of his functions as a judge. He will not be liable in damages unless he acts outside of his jurisdiction, knowing that he has no power to do what he does.[47]

[38] Similarly, Professor Friedland in his report "A Place Apart" implicitly supports the notion of a bad faith exception to the absolute immunity rule.[48]

[39] More recently, in *Proulx* v. *Québec (P.G.)*,[49] the Québec Court of Appeal re-iterated its commitment to the *Sirros* v. *Moore* exception to judicial immunity:

> [...] It cannot be clearly inferred from *Morier* that Chouinard J. adopted the reservations expressed by Lord Denning in *Sirros* v. *Moore*, [...] and Lord Bridge of Harwich in *McC* v. *Mullan*, [...] to the effect that the immunity given the members of the superior courts would not stand in the way of an action in damages against "a judge who in bad faith did something which he knew he did not have the jurisdiction to do" or "a judge who was not acting in the course of his judicial duties knowing that he had no jurisdiction to act" [...] This Court acknowledged the limits to immunity contemplated by the English cases in *Royer* v. *Mignault*, [1988] R.J.Q. 670, 50 D.L.R. (4th) 345

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[44] *Ibid.*, p. 722-723.

[45] *Ibid.*, p. 721.

[46] (1988), 32 C.R.R. 1 (Qué. C.A.), leave to appeal to S.C.C. denied [1988] C.S.C.R. No. 218 (S.C.C.).

[47] *Ibid.*, p. 5.

[48] M.L. Friedland, *A place apart: judicial independence and accountability in Canada* (Ottawa: Canadian Judicial Council, 1995) at pp. 35-36.

[49] (1997), 145 D.L.R. (4^{th}) 394 (Qué. C.A.).

(C.A.); *Lachance* v. *Québec*, no. 200-09-000278-942, July 5, 1994.[50]

[40] In oral argument, Mr. Taylor and the CJC submitted that Whealy J.'s conduct falls within the bad faith exception to judicial immunity. They conceded that this argument was being raised for the first time in this Court and that it had not been raised in their written material or before Dubé J. They also conceded that the complaint Mr. Taylor had made to the Commission on October 28, 1994, did not allege that Whealy J. had acted in bad faith.

Conclusion on the "bad faith" exception

[41] While it cannot be said that the Supreme Court of Canada has definitively decided the point, I am inclined to accept the proposition that Lord Denning's exception to judicial immunity is good law in Canada: that is, judicial immunity does not apply where it is shown that a judge knowingly acts beyond his jurisdiction.

Does Judge Whealy's order fall within the "bad faith" exception?

[42] I do not think that Whealy J.'s order falls within the "bad faith" exception to judicial immunity. The exception does not apply because Whealy J. had jurisdiction to make the order he made.

[43] Whealy J.'s order was authorized by s. 486(1) of the *Criminal Code*. In *R.* v. *Laws*, the Ontario Court of Appeal recognized that "the relevant statutory enactment regarding exclusion of

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[50] *Ibid.*, p. 405 and footnote 2.

the public from a courtroom is s. 486(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 [...],"[51] which states:

> 486(1) Any proceedings against an accused shall be held in open court, but where the presiding judge, provincial court judge or justice, as the case may be, is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude all or any members of the public from the court room for all or part of the proceedings, he may so order.

[44] The Ontario Court of Appeal accepted that Whealy J. erred by excluding Mr. Taylor from the courtroom. Nevertheless, s. 486(1) of the *Criminal Code* gave him jurisdiction to make the order, even if it was later determined that he had erred in the exercise of his discretion. Indeed, in its reasons in *Laws*, the Ontario Court of Appeal noted that Whealy J. had made an error "[...] in relation to the exercise of his discretion."[52]

[45] In the reasons offered for his first ruling, Whealy J. held that "it cannot be doubted that a presiding judge not only has the authority but also the duty to oversee the demeanour, solemnity and dignity which must prevail in a superior court of law,"[53] language that parallels s. 486(1) of the *Criminal Code*. It is clear from the following quote that Judge Whealy was making the order because he thought it was necessary to maintain order in the courtroom, one of the purposes of s. 486(1):

> There are, as well, many self-proclaimed and unrecognized forms of religion or cults claiming to

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[51] *R.* v. *Laws, supra* at 505.

[52] *Ibid.*, p. 508.

[53] Appeal Book, p. 60.

> be religious which have occurred not only this year, but throughout history. They come and go. Often, to attract attention and new adherents, bizarre, intrusive or simply impolite attire is worn. These religions may exist and may have limited *Charter* protection, but the *Charter* does not guarantee some right to enter and remain in a courtroom where the result is disruptive.

[46] Accordingly, in my view, Whealy J. did not act outside of his jurisdiction. His actions did not reach the point in the example offered above by Lord Bridge, where jurisdiction was clearly lacking.

[47] In his second ruling, Whealy J. noted that "absolutely no case law was put forward to support any of the submissions made by the accused, whether concerning the court's authority to govern its own process or concerning religious discrimination or any other aspect of the accused's submissions, even though the court specifically enquired if there was to be any."[54] Similarly, in its reasons in *Laws*, the Ontario Court of Appeal noted that any impression of insensitivity created by Whealy J.'s order was inadvertent.[55] Accordingly, in my view, this is not a case where Whealy J. neither believed he was without jurisdiction nor lacked jurisdiction. Rather, he in fact did have jurisdiction by reason of subsection 486(1) of the *Criminal Code*, and he clearly thought he had jurisdiction. Thus, in this case, it is strictly not necessary to decide whether any "bad faith" exception applies to the principle of judicial immunity.

<u>Administrative acts</u>

[48] The CJC submits that this Court should adopt a distinction between administrative acts,

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[54] *Ibid.*, p. 83.

[55] *Laws, supra* at 508.

where no judicial immunity applies, and judicial acts, where judicial immunity does apply. The distinction appears to have been drawn in some U.S. cases.[56] However, none of the U.S. cases were concerned with the maintenance of order and decorum in the courtroom. They were rather concerned with what were clearly administrative acts, not involving the exercise of judicial functions.

[49] I do not agree with the proposition that Whealy J.'s order constituted an administrative act. His order was judicial and was made with jurisdiction, albeit jurisdiction that the Ontario Court of Appeal concluded he had wrongly exercised. This conclusion is supported by the Federal Court of Appeal's judgment in *McCann* v. *The Queen*,[57] where the Court held that it was within the inherent jurisdiction of the Court "to make orders for the control of order and decorum in the Court room during the course of the trial." In that sense, something that is within the inherent jurisdiction of a Court cannot be an administrative act.

<u>Does the *Charter* require that judicial immunity be relaxed?</u>

[50] Mr. Taylor submits that should judicial immunity serve to immunize federally-appointed judges from the *Canadian Human Rights Act*, any such principle should be modified to accord with basic *Charter* values.

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[56] See generally *Forrester* v. *White*, 484 U.S. 219 (1988).

[57] [1975] F.C. 272 (C.A.).

[51] Similarly, the CJC submits that the purpose of judicial immunity is to protect judges from civil suits, not from an administrative human rights proceeding. Like Mr. Taylor, the CJC also submits that judicial immunity has been or ought to be modified to better accord with human rights legislation and the *Charter*. CJC submits that judicial authority would be better served by subjecting federally-appointed judges to a human rights process than it would be if it were not.

[52] I do not agree with these submissions. The primary authority cited for these propositions is the Supreme Court of Canada's decision in *Nelles* v. *Ontario*.[58] In that case, the Supreme Court considered whether several parties, including the Attorney General for Ontario, benefited from a common law absolute immunity from civil liability in a suit for malicious prosecution.

[53] In his reasons, Lamer J. (as he then was) concluded that to provide absolute immunity to prosecutors would strike at equality under the law:

> 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.[59]

[54] Accordingly, he concluded that the Attorney General did not benefit from absolute immunity to claims of malicious prosecution.

[55] In its reasons, the Supreme Court noted that a plaintiff must meet four tests to

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[58] [1989] 2 S.C.R. 170.

[59] *Ibid.*, p. 195.

successfully establish malicious prosecution. One of these tests requires demonstrating that a prosecutor brought proceedings against a person with "malice, or a primary purpose other than that of carrying the law into effect,"[60] something that Lamer J. characterized as having "a wider meaning than spite, ill-will or a spirit of vengeance, and includes any other improper purpose, such as to gain a private collateral advantage."[61]

[56] Firstly, it must be pointed out that the Supreme Court of Canada in *Nelles* was not dealing with "judicial immunity" but rather immunity for prosecutorial officers.

[57] Secondly, I conclude that judicial immunity is not inconsistent with the *Charter*, since judicial immunity itself is a fundamental constitutional principle. In *MacKeigan* v. *Hickman*,[62] McLachlin J. (as she then was) held that "the analysis in *Beauregard* supports the conclusion that judicial immunity is central to the concept of judicial independence."[63]

[58] Lamer C.J. held in *Reference re Provincial Court Judges* that judicial independence is an unwritten constitutional principle, recognized by the preamble to the *Constitution Act, 1867*.[64]

[60] *Ibid.*, p. 193.

[61] *Ibid.*

[62] [1989] 2 S.C.R. 796.

[63] *Ibid.*

[64] See *Reference re Provincial Court Judges*, [1997] 3 S.C.R. 3 at 77-78.

He also said that "judicial independence is valued because it serves important societal goals,"[65] one of which is "the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system."[66]

[59] Accordingly, judicial immunity is itself a constitutional principle, contrary to the proposition submitted by Mr. Taylor and the CJC that judicial immunity is inconsistent with the enactment of the *Charter* and *quasi*-constitutional human rights legislation.

[60] Finally, in my view, the exception to absolute immunity established in *Sirros* v. *Moore* is an extremely narrow one. It will be the rare case indeed where a plaintiff can show that a judge acted with the <u>knowledge</u> that he or she had no jurisdiction. The example cited by Lord Bridge in *McC* v. *Mullan* demonstrates both the need for an exception to the judicial immunity principle, as well as the limited nature of the exception.

[61] *Nelles* also demonstrates just how narrow the exception to judicial immunity is. In *Nelles*, Lamer J. narrowly circumscribed the malicious prosecution exception to prosecutorial immunity. He held that malicious prosecution was not concerned with instances of mere "second-guessing a Crown Attorney's judgment in the prosecution of a case."[67] Rather, he held that malicious prosecution dealt with "allegations of misuse and abuse of the criminal process

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[65] *Ibid.*, p. 34.

[66] *Ibid.*

[67] *Ibid.*, p. 196.

and of the office of the Crown Attorney":[68] something that Lamer J. described as "the deliberate and malicious use of the office for ends that are improper and inconsistent with the traditional prosecutorial function."[69]

[62] Lamer J. held that in the context of a claim for malicious prosecution, "a plaintiff [...] has no easy task."[70] He held that "the burden on the plaintiff is onerous and strict."[71] He added that a claim for malicious prosecution required a plaintiff to demonstrate "improper motive or purpose,"[72] and that "errors in the exercise of discretion and judgment are not actionable."[73] In that sense, *Nelles* is consistent with the proposition that the "bad faith" exception to judicial immunity cannot be engaged merely where a judge errs in the exercise of his or her discretion, as happened in the present case.

[63] In light of the constitutional importance of judicial immunity, I conclude that any "bad faith" exception to judicial immunity that exists is just as narrow, if not more so, than the exception to prosecutorial immunity addressed in *Nelles*.

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[68] *Ibid.*

[69] *Ibid.*, p. 197.

[70] *Ibid.*, p. 194.

[71] *Ibid.*, p. 197.

[72] *Ibid.*

[73] *Ibid.*

[64] I also disagree with the proposition that to recognize any exception to judicial immunity would open the flood-gates to vexatious claims. Lord Denning decided *Sirros* v. *Moore* in 1974, and the flood-gates have not opened.

[65] The flood-gates argument was advanced in *Nelles*, where the Attorney General for Ontario submitted that to provide prosecutors with anything less than absolute immunity "would act as a 'chilling effect' on the Crown Attorney's exercise of discretion" or would raise a "flood-gates" of unmeritorious claims.[74] Lamer J. rejected these arguments, highlighting the strict burden summarized above that plaintiffs must fulfill to establish malicious prosecution. He also noted that frivolous claims could be "struck before trial as a matter of substantive inadequacy,"[75] or that a defendant could "move for summary judgment before a full-fledged trial takes place."[76] He added that "the potential that costs will be awarded to the defendant if an unmeritorious claim is brought acts as financial deterrent to meritless claims."[77] Accordingly, he concluded that "ample mechanisms exist within the system to ensure that frivolous claims are not brought."[78]

[66] Since these same protective mechanisms would apply to claims made in the name of judicial "bad faith," I also conclude that our system provides a sufficient level of protection to

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[74] *Ibid.*, p. 196.

[75] *Ibid.*, p. 197.

[76] *Ibid.*

[77] *Ibid.*

[78] *Ibid.*

guard against totally unmeritorious claims.

Does judicial immunity apply to complaints brought before the Canadian Human Rights Commission?

[67] Mr. Taylor and the CJC rely on the following excerpt from McLachlin J.'s judgment in *MacKeigan* for the proposition that judges may be subject to the provisions of the *Canadian Human Rights Act*:

> I do not say that the power in the courts to control their own administration is absolute, if by absolute what is meant is that in no circumstances can the Legislature or Parliament enact laws relating to the functioning of the courts or enquire into the conduct of particular judges. As noted earlier, Parliament and the Legislatures have long enacted legislation establishing courts and setting guidelines as to how they function. Nor is there any doubt that Parliament may impeach a federally appointed judge for dereliction of duty. To this extent the fundamental principle of judicial independence must leave scope for another cardinal doctrine – the principle of Parliamentary supremacy.[79]

[68] In *MacKeigan*, McLachlin J. concluded that she would "leave to other cases the determination of whether judges might be called on matters such as these before other bodies [...] which possess sufficient safeguards to protect the integrity of the principle of judicial independence."[80] Presumably, the Canadian Judicial Council would qualify as such a "body."

[69] I do not think that the Canadian Human Rights Commission or the Canadian Human Rights Tribunal possess such safeguards. If the Commission were afforded the opportunity to investigate Mr. Taylor's complaint, an investigator could be afforded the power to obtain a

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[79] *MacKeigan, supra* at 832.

[80] *Ibid.*, pp. 833-834.

TAB 5

54

Federal Court of Appeal — Cour d'appel fédérale

03 048 038

Date: 20030203

Docket: A-704-01

Neutral citation: 2003 FCA 55

CORAM: **DÉCARY J.A.**
ROTHSTEIN J.A.
EVANS J.A.

BETWEEN:

MICHAEL TAYLOR

and

ATTORNEY GENERAL OF CANADA

Respondent

and

CANADIAN JUDICIAL COUNCIL

Intervener

Heard at Toronto, Ontario, on October 31, 2002.

Judgment delivered at Ottawa, Ontario, on February 3, 2003.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: DÉCARY J.A.
ROTHSTEIN J.A.

serious enough to warrant removal from the Bench, and accordingly not to refer the matter to a Panel for investigation with a view to the Council's recommending his removal pursuant to paragraph 65(2)(*d*) of the *Judges Act*, but serious enough to be the subject of an expression of disapproval.

[63] The precise nature of the question that the Chairperson had to ask when reviewing the complaint was further elucidated in *Moreau-Bérubé* (at para. 51), where Arbour J. adopted a statement by Gonthier J. in *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3 at para. 147, referring to paras. 80-81 in Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995). In the passage in question, Professor Friedland explained as follows the test prescribed in paragraph 65(2)(*d*):

> ... before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality ... of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office.

[64] Fourth, the manifest impartiality of the judiciary is one of the pillars on which public confidence in the administration of justice rests. In a multicultural society, impartiality in judges includes their ability to take proper account of ethnic, racial and religious diversity in order to ensure that justice is administered to all equally without discrimination, and to appear to reasonable observers to be fair to all who come before them: see *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 95. Protecting the manifest impartiality of judges also requires the assiduous protection of their independence.

TAB 7

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Ward v. City of Vancouver, 2007 BCSC 3

Date: 20070102
Docket: S030038
Registry: Vancouver

Between:

Alan Cameron Ward

Plaintiff

And

City of Vancouver, Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Ministry of Attorney General and Ministry of Public Safety and Solicitor General, Her Majesty in Right of Canada, Attorney General of Canada, Sergeant Kelly, Constable Prasobsin, Constable Fodor, Sergeant Gatto, Constable Cope and other unidentified members of the Vancouver Police Department, Royal Canadian Mounted Police and Jail Staff of the Vancouver Jail

Defendants

Before: The Honourable Mr. Justice Tysoe

Reasons for Judgment

Counsel for the Plaintiff: Brian M. Samuels

Counsel for the Defendants, City of Vancouver, Sergeant Kelly, Constable Prasobsin, Constable Fodor, Sergeant Gatto and Constable Cope: Tomasz M. Zworski

[93] I conclude that Mr. Ward's right under s. 8 of the *Charter* to be secure against unreasonable seizure of his belongings was infringed.

Negligence

[94] In the Statement of Claim, Mr. Ward pleaded negligence against both of the City of Vancouver and the Provincial Government. The plea against the City of Vancouver was that the police officers were grossly negligent. This plea was probably directed at s. 21 of the *Police Act*, R.S.B.C. 1996, c. 367, which I will be discussing in the context of the personal liability of the police officers, but another portion of the Statement of Claim alleged that Mr. Ward suffered loss and damage as a result of the negligence of each of the Defendants. The plea against the Provincial Government is that it failed to adequately train, supervise and instruct the corrections staff at the Jail.

[95] Counsel for Mr. Ward did not make any submissions with respect to the negligence claims and did not react when counsel for the City of Vancouver made the observation that it appeared that Mr. Ward was not pursuing the negligence claims. As the claims were not formally withdrawn, I will deal with them briefly.

[96] The claims of negligence fail for two reasons. First, any duty owed by the City of Vancouver and the Provincial Government was a duty owed to the general public and was not a private law duty owed to Mr. Ward for the purposes of the tort of negligence: see *Ribeiro v. Vancouver (City)*, 2005 BCSC 395. Second, there was no evidence on the applicable standard of care: see *Roy v. British Columbia (Attorney General)*, 2005 BCCA 88.

Personal Liability of Police Officers

[97] The City of Vancouver concedes that it is vicariously liable for any torts committed by the police officers by virtue of s. 20 of the *Police Act*. What is in

dispute is whether any of the police officers are personally liable. Subsection 21(2) and (3) of the *Police Act* read as follows:

> (2) No action for damages lies against a police officer or any other person appointed under this Act for anything said or done or omitted to be said or done by him or her in the performance or intended performance of his or her duty or in the exercise of his or her power or for any alleged neglect or default in the performance or intended performance of his or her duty or exercise of his or her power.
>
> (3) Subsection (2) does not provide a defence if
>
> > (a) the police officer or other person appointed under this Act has, in relation to the conduct that is the subject matter of action, been guilty of dishonesty, gross negligence or malicious or wilful misconduct, or
> >
> > (b) the cause of action is libel or slander.

[98] The only wrongdoing I have found to have been committed by the police officers is false imprisonment as a result of the failure to release Mr. Ward for a period of 3 ½ to 4 hours after the Prime Minister left the opening ceremony for the Millennium Gate. While Sergeant Gatto, as the officer in charge at the Jail, was charged with the responsibility of releasing Mr. Ward at the appropriate time, it was Sergeant Kelly who instructed Sergeant Gatto to continue holding Mr. Ward "pending investigation" after the Prime Minister had left the area.

[99] The only decision referred to me on this point was *Walkey (Guardian ad litem of) v. Canada (Attorney General)*, [1997] B.C.J. No. 599 (QL) (S.C.). In that case, the police unlawfully arrested and imprisoned three girls in order to teach them a lesson. Vickers J. held that the police officers could not avail themselves of the protection afforded by s. 21 because the tort of false arrest and imprisonment by its very nature involved misconduct that is wilful.

[100] In *Walkey*, the police officers knowingly arrested and imprisoned the plaintiffs when they knew that no charge would be laid. They knew that the arrest and imprisonment of the plaintiffs was wrong. Their actions clearly constitute wilful misconduct.

[101] An oft cited passage in relation to the meaning of wilful misconduct is from the decision of *McCulloch v. Murray*, [1942] S.C.R. 141, where Duff C.J.C. said the following at p. 145:

> All these phrases, gross negligence, wilful misconduct, wanton misconduct, imply conduct in which, if there is not a conscious wrong doing, there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves.

[102] In my view, a clearer description of the meaning of wilful misconduct is contained in *R. v. Boulanger*, 2006 SCC 32, a case dealing with the criminal offence of breach of trust by a public officer. The Supreme Court of Canada held that it is necessary to have reference to the common law authorities on misfeasance in public office in considering the offence. In this regard, the Court summarized parts of an English authority, *Attorney General's Reference (No. 3 of 2003)*, [2004] W.L.R. 451 (Eng. C.A), at ¶ 27:

> Wilful misconduct was held to mean "deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it was wrong or not" (para. 28), and recklessness to mean "an awareness of the duty to act or a subjective recklessness as to the existence of the duty" (para. 30). The recklessness test was said to apply to the determination of whether a duty arises in the circumstances, as well as to the conduct of the defendant if it does.

Although the Court did not specifically adopt or approve of these meanings, it did not express any disapproval of them.

[103] In the present case, there is no evidence that either Sergeant Kelly or Sergeant Gatto decided not to release Mr. Ward when they knew that he should have been released. It is not sufficient to establish that their acts constituted the commission of an intentional tort. It must also be established that they committed the tort knowing it to be wrong or with reckless indifference as to whether it was wrong or not.

[104] I find that the neither Sergeant Kelly nor Sergeant Gatto knew that it was wrong to continue imprisoning Mr. Ward after the Prime Minister left the area

and that neither of them continued the imprisonment with reckless indifference in that regard. They were not guilty of wilful misconduct, with the result that neither of them is personally liable for the tort of false imprisonment.

Damages in Addition to Declaration of Charter Breach

[105] Counsel for the Provincial Government argues that, if there was a breach of the *Charter* without the commission of a tort, no damages should be awarded. Counsel relies in this regard on the decision in *Wynberg v. Ontario* (2006), 269 D.L.R. (4th) 435 (Ont. C.A.). In connection with the strip search of Mr. Ward and the seizure of his car, I have found a breach of s. 8 of the *Charter* but that none of the pleaded torts was committed.

[106] Subsection 24(1) of the *Charter* provides that anyone whose rights have been infringed may apply to the court to obtain such remedy as the court considers appropriate and just in the circumstances.

[107] In *Wynberg*, the plaintiffs were autistic children, aged six years of age and older, who were complaining that funded intensive behavioural intervention provided by the Ontario Ministry of Community and Social Services was limited to autistic children between the ages of two and five. The Ontario Court of Appeal held that there was no breach of s. 7 or 15 of the *Charter*, but went on to comment on the decision of the trial judge to award damages as well as granting a declaratory remedy.

[108] The Court quoted at length at ¶ 192 from the decision in *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405, which held that damages should not normally be granted following a declaration that legislation is unconstitutional in the absence of negligence, bad faith or abuse or power. The Court continued as follows at ¶ 193:

> While the rule against combining damages with declaratory relief has been articulated in cases where the declaration of invalidity is sought against