



**SUPREME COURT OF CANADA**

**CITATION:** Henry v. British Columbia (Attorney General), 2015  
SCC 24

**DATE:** 20150501  
**DOCKET:** 35745

**BETWEEN:**

**Ivan William Mervin Henry**

Appellant  
and

**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

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

**REASONS FOR JUDGMENT:** Moldaver J. (Abella, Wagner and Gascon JJ. concurring)  
(paras. 1 to 100)

**JOINT REASONS CONCURRING IN** McLachlin C.J. and Karakatsanis JJ.

**THE RESULT:**  
(paras. 101 to 138)

\* LeBel J. took no part in the judgment.

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HENRY v. BRITISH COLUMBIA (ATTORNEY GENERAL)

**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,<sup>1</sup> 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 prosecutors — Wrongful non-disclosure — Malice — Claimant wrongfully convicted and incarcerated for almost 27 years — Claimant bringing civil action alleging breach of Charter rights resulting from Crown counsel’s wrongful non-disclosure of relevant information — Damages under s. 24(1) sought against Crown — Whether s. 24(1) authorizes courts to award damages against Crown for wrongful non-disclosure — Level of fault claimant must establish to meet liability threshold for awarding s. 24(1) damages — Whether malice required — Canadian Charter of Rights and Freedoms, s. 24(1).*

H was convicted in 1983 of 10 sexual offences, declared a dangerous offender, and imprisoned for almost 27 years. In October 2010, the B.C. Court of Appeal quashed all 10 convictions and substituted acquittals for each, finding serious errors in the conduct of the trial and concluding that the guilty verdicts were unreasonable in light of the evidence as a whole. H brought a civil suit against the Attorney General of British

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<sup>1</sup> LeBel J. took no part in the judgment.

Columbia (“AGBC”), seeking damages under s. 24(1) of the *Charter* for harm suffered as a consequence of his wrongful convictions and imprisonment.

H alleges that the Crown failed to make full disclosure of relevant information before, during, and after his trial. H made numerous requests for disclosure of all victim statements as well as medical and forensic reports. The Crown did not disclose any of the requested material before the commencement of trial. At trial, the Crown provided him with several victim statements, but approximately 30 additional statements were not disclosed. These statements revealed inconsistencies that could have been used to attack the already-suspect identification evidence put forward by the Crown. Key forensic evidence was also not disclosed. Furthermore, the Crown failed to disclose the existence of another suspect who had been arrested twice in the vicinity of the attacks.

In his Notice of Civil Claim, H pleaded various causes of action, including negligence, malicious prosecution, and breach of his ss. 7 and 11(d) *Charter* rights. The AGBC moved to strike the causes of action grounded in negligence and the *Charter*. The B.C. Supreme Court struck the negligence claim as inconsistent with this Court’s holding in *Nelles v. Ontario*, [1989] 2 S.C.R. 170, but allowed H’s *Charter* claim to proceed since it was founded on allegations of malicious conduct. The court noted, however, that if H intended to pursue a *Charter* damages claim against the AGBC for conduct falling short of malice, he would have to seek leave to amend his pleadings. H applied for leave to amend his pleadings to claim *Charter* damages against the AGBC for non-malicious conduct. In permitting H to amend his claim accordingly, the application judge found that

a threshold lower than malice should apply and that s. 24(1) damages awards are justified where the Crown's conduct represents a marked and unacceptable departure from the reasonable standards expected of prosecutors. The Court of Appeal unanimously allowed the AGBC's appeal, concluding that H was not entitled to seek *Charter* damages for the non-malicious acts and omissions of Crown counsel.

*Held:* The appeal should be allowed. Section 24(1) of the *Canadian Charter of Rights and Freedoms* authorizes courts of competent jurisdiction to award damages against the Crown for prosecutorial misconduct absent proof of malice.

*Per* Abella, **Moldaver**, Wagner and Gascon JJ.: Where, as here, 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. Only by keeping liability within strict bounds can a reasonable balance be struck between remedying serious rights violations and maintaining the efficient operation of our public prosecution system.

In *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, this Court recognized that s. 24(1) of the *Charter* authorizes damage claims directed against the

state for violations of the claimant's constitutional rights. The Chief Justice outlined a framework to determine the state's liability for *Charter* damages. Under this framework, 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 on countervailing considerations.

The countervailing consideration at issue in this case relates to concerns over good governance. *Ward* recognizes that policy factors may justify restricting the state's exposure to civil liability by establishing a minimum threshold of gravity. 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. Specifically, the spectre of liability may influence the decision-making of prosecutors and make them more "defensive" in their approach. A low threshold would also open up the floodgates of civil liability and force prosecutors to spend undue amounts of time and energy defending their conduct in court.

The AGBC submits that, to attract liability for *Charter* damages, the Crown's conduct must rise to the level of "malice". The malice standard has been extensively canvassed in this Court's malicious prosecution jurisprudence. Under the tort of malicious prosecution, a prosecutor will be liable for the decision to initiate or continue a prosecution against an individual without reasonable and probable cause, provided that

such decision was characterized by malice. Malice requires more than recklessness or gross negligence. 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. The malice standard will only be met in exceptional cases where the plaintiff can prove that a prosecutor's decision was driven by an improper purpose or motive, wholly inconsistent with Crown counsel's role as minister of justice.

There are several reasons why malice does not provide a useful liability threshold for *Charter* damages claims alleging wrongful non-disclosure by prosecutors. First, the malice standard is firmly rooted in the tort of malicious prosecution, which has a distinctive history and purpose. Second, malice requires an inquiry into whether the prosecutor was motivated by an improper purpose. Such an 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. However, the decision to disclose relevant information is not discretionary. It is a constitutional obligation which must be properly discharged by the Crown in accordance with an accused's *Charter* right to make full answer and defence. As such, the motives of the prosecutor in withholding information are immaterial. Third, unlike the decision to initiate or continue a prosecution, disclosure decisions do not fall within the core of prosecutorial discretion, and therefore do not warrant such an onerous threshold to insulate them from judicial scrutiny. Finally, a purposive approach to s. 24(1) militates against the malice standard.

While the malice standard is not directly applicable, the compelling good governance concerns raised in our malicious prosecution jurisprudence must be taken into account in determining the appropriate liability threshold for cases of wrongful non-disclosure. 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. Moreover, a widespread “chilling effect” on the behaviour of prosecutors must be avoided. Therefore, the threshold must allow for strong claims to be heard on their merits, while guarding against a proliferation of marginal cases.

Good governance concerns mandate a high threshold that substantially limits the scope of liability. The standard adopted by the application judge, which is akin to gross negligence, does not provide sufficient limits. H submits that an even lower threshold — a simple breach of the *Charter* without any additional element of fault — should apply in this context. This approach fails to address the compelling policy and practical concerns that justify limiting prosecutorial liability. H alleges very serious instances of wrongful non-disclosure that demonstrate a shocking disregard for his *Charter* rights. His claim as pleaded meets the liability threshold established here. However, H’s exceptional case should not be used to justify a substantial expansion of prosecutorial liability.

Whether considered at the pleadings stage or at trial, the same formulation of the test applies. At trial, a claimant must convince the fact-finder on a balance of probabilities that (1) the prosecutor intentionally withheld information; (2) the prosecutor

knew or ought reasonably to have known that the information was material to the defence and that the failure to disclose would likely impinge on his or her ability to make full answer and defence; (3) withholding the information violated his or her *Charter* rights; and (4) he or she suffered harm as a result. To withstand a motion to strike, a claimant would only need to plead facts which, taken as true, would be sufficient to support a finding on each of these elements.

The liability threshold focuses on two key elements: the prosecutor's intent, and his or her actual or imputed knowledge. The purpose of these elements is not to shield prosecutors from liability by placing an undue burden on claimants to prove subjective mental states. Rather, they are designed to set a sufficiently high threshold to address good governance concerns while preserving a cause of action for serious instances of wrongful non-disclosure.

The consequences of setting a lower threshold in this context — simple negligence, or even the gross negligence standard adopted by the application judge — would be serious. This type of threshold implicates a duty of care paradigm that ignores the basic realities of conducting a criminal prosecution. The problems with a negligence-based standard are even more apparent when considering how this lower threshold would operate at the pleadings stage. It would be far too easy for a claimant with a weak claim to plead facts disclosing a cause of action for negligence and thus drive prosecutors into civil court. Bringing a *Charter* damages claim for prosecutorial misconduct should not be a mere exercise in artful pleading.

In addition to establishing a *Charter* breach and the requisite intent and knowledge, a claimant must prove that, as a result of the wrongful non-disclosure, he or she suffered a legally cognizable harm. Liability attaches to the Crown only upon a finding of “but for” causation. Regardless of the nature of the harm suffered, a claimant would have to prove, on a balance of probabilities, that “but for” the wrongful non-disclosure he or she would not have suffered that harm. The “but for” causation test may, however, be modified in situations involving multiple alleged wrongdoers.

H may seek to amend his pleadings to include a claim for *Charter* damages alleging that the Crown, in breach of its constitutional obligations, caused him harm by intentionally withholding information when it knew, or should reasonably have known, that the information was material to his defence and that the failure to disclose would likely impinge on his ability to make full answer and defence.

*Per McLachlin C.J. and Karakatsanis J.:* H need not allege that the Crown breached its constitutional obligation intentionally, or with malice, in order to access *Charter* damages. Applying the principles from *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, to this case, H must plead facts that, if true, establish a breach of his *Charter* rights and that damages constitute an appropriate and just remedy to advance the purposes of compensation, vindication or deterrence. If proven at trial, the facts alleged by H would indisputably establish a breach of H’s disclosure rights under s. 7 of the *Charter*, which had a direct and serious impact on the fairness of his trial. In these circumstances, an award of *Charter* damages under s. 24(1) may provide some

compensation for the hardships H has endured and may also help publicly vindicate such a serious violation of the *Charter* rights the Crown is alleged to have breached. The objective of deterrence may also be served by an award of damages that highlights the need for the state to remain vigilant in meeting its constitutional obligations.

At step three of the *Ward* analysis, the government has an opportunity to advance any countervailing considerations that would make it inappropriate or unjust to award damages under s. 24(1). At the current stage of proceedings in this case, it is far from clear that there is an alternative remedy that will fulfill the functional objectives of *Charter* damages. As to good governance concerns, the second set of countervailing considerations discussed in *Ward*, those raised by the Attorney General of British Columbia are misplaced in this case. H's case does not involve the exercise of prosecutorial discretion in the usual sense of the term. The discretion to commence and pursue a prosecution is vital to the effective prosecution of criminal cases and claims can only be brought against prosecutors for misuse of this discretion if malice can be shown. The legal duty on the Crown to disclose relevant evidence, however, is not a discretionary function but a legal obligation. This obligation is absolute. The only discretion left to the prosecutor is a limited operational discretion relating to timing, relevance in borderline cases, privilege and protection of witness identity. An action for failure to disclose relevant evidence to the defence is different from an action for misuse of prosecutorial discretion in bringing or pursuing a prosecution. It is not an action for abuse of discretion, but an action for breach of a legal duty imposed on the state by the *Charter*. Recognizing H's claim will not chill the exercise of prosecutorial discretion, nor

will it change the high standard of malice for tort actions for misuse of prosecutorial discretion, or divert prosecutors from their day-to-day work.

H should be allowed to amend his pleadings to include a claim for *Charter* damages based on a breach by the Crown of its constitutional obligation to disclose relevant information. On the facts as pleaded, *Charter* damages would be an appropriate and just remedy, serving one or more of the functions of compensation, vindication and deterrence.

### **Cases Cited**

By Moldaver J.

**Referred to:** *Nelles v. Ontario*, [1989] 2 S.C.R. 170; *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *Proulx v. Quebec (Attorney General)*, 2001 SCC 66, [2001] 3 S.C.R. 9; *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167; *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372; *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309; *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Mills*, [1999] 3 S.C.R. 668; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Elguzouli-Daf v. Commissioner of Police of the Metropolis*, [1995] Q.B. 335; *R. v.*

*Walle*, 2012 SCC 41, [2012] 2 S.C.R. 438; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66; *R. v. B. (L.)* (1997), 35 O.R. (3d) 35; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129; *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181.

By McLachlin C.J. and Karakatsanis J.

**Applied:** *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28;  
**referred to:** *R. v. Gamble*, [1988] 2 S.C.R. 595; *Mills v. The Queen*, [1986] 1 S.C.R. 863;  
*Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405;  
*Nelles v. Ontario*, [1989] 2 S.C.R. 170; *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4.

### **Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 7, 11(d), 24(1).

*Constitution Act, 1982*, s. 52.

*International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, art. 14(6).

### **Authors Cited**

Roach, Kent. "A Promising Late Spring for Charter Damages: *Ward v. Vancouver*" (2011), 29 *N.J.C.L.* 135.

APPEAL from a judgment of the British Columbia Court of Appeal (Hall, MacKenzie and Stromberg-Stein JJ.A.), 2014 BCCA 15, 53 B.C.L.R. (5th) 262, 349 B.C.A.C. 175, 596 W.A.C. 175, 370 D.L.R. (4th) 742, 6 C.C.L.T. (4th) 175, 299 C.R.R. (2d) 35, 8 C.R. (7th) 108, [2014] 3 W.W.R. 231, [2014] B.C.J. No. 71 (QL), 2014 CarswellBC 100 (WL Can.), setting aside a decision of Goepel J., 2013 BCSC 665, 47 B.C.L.R. (5th) 335, 359 D.L.R. (4th) 171, 100 C.C.L.T. (3d) 298, 281 C.R.R. (2d) 24, [2013] 8 W.W.R. 518, [2013] B.C.J. No. 769 (QL), 2013 CarswellBC 990 (WL Can.).  
Appeal allowed.

*Joseph J. Arvay, Q.C., Alison Latimer, Marilyn Sandford and Cameron Ward*, for the appellant.

*Peter Juk, Q.C., Karen A. Horsman and E. W. (Heidi) Hughes*, for the respondent Her Majesty The Queen in Right of the Province of British Columbia as represented by the Attorney General of British Columbia.

*Mitchell R. Taylor, Q.C., and Diba B. Majzub*, for the respondent the Attorney General of Canada.

*Hart Schwartz and Matthew Horner*, for the intervener the Attorney General of Ontario.

*Michel Déom and Amélie Dion*, for the intervener the Attorney General of Quebec.

*James A. Gumpert, Q.C.*, for the intervener the Attorney General of Nova Scotia.

*Gaétan Migneault* and *Kathryn Gregory*, for the intervener the Attorney General of New Brunswick.

*Michael Conner* and *Denis Guénette*, for the intervener the Attorney General of Manitoba.

*Graeme Mitchell, Q.C.*, for the intervener the Attorney General for Saskatchewan.

*Jolaine Antonio* and *Kate Bridgett*, for the intervener the Attorney General of Alberta.

*Frances Knickle* and *Philip Osborne*, for the intervener the Attorney General of Newfoundland and Labrador.

*Sean Dewart* and *Tim Gleason*, for the intervener the Association in Defence of the Wrongly Convicted.

*Marlys A. Edwardh* and *Frances Mahon*, for the interveners the David Asper Centre for Constitutional Rights and the British Columbia Civil Liberties Association.

*Bradley E. Berg, Erin Hoult and Nickolas Tzoulas*, for the intervener the Canadian Civil Liberties Association.

*Richard Macklin, Breese Davies and Neil G. Wilson*, for the intervener the Criminal Lawyers' Association.

Written submissions only by *Paul J. J. Cavalluzzo and Adrienne Telford*, for the intervener the Canadian Association of Crown Counsel.

The judgment of Abella, Moldaver, Wagner and Gascon JJ. was delivered by

MOLDAVER J. —

## I. Overview

[1] Ivan Henry was convicted in March 1983 of 10 sexual offences involving 8 different complainants. He was declared a dangerous offender and sentenced to an indefinite period of incarceration. He remained imprisoned for almost 27 years. In October 2010, the British Columbia Court of Appeal quashed all 10 convictions and substituted acquittals for each, finding serious errors in the conduct of the trial and concluding that the guilty verdicts were unreasonable in light of the evidence as a whole: *R. v. Henry*, 2010 BCCA 462, 294 B.C.A.C. 96 (“*Henry No. 1*”), at para. 154.

[2] Mr. Henry brought a civil suit against the City of Vancouver (“City”), the Attorney General of British Columbia (“AGBC”), and the Attorney General of Canada (“AGC”), seeking damages for his wrongful convictions and imprisonment. The claims against the City and the AGC are not at issue in this appeal. We are concerned only with the claim against the AGBC for damages under s. 24(1) of the *Canadian Charter of Rights and Freedoms*. Specifically, Mr. Henry alleges that the provincial Crown should be held liable for its failure — before, during, and after his criminal trial — to meet its disclosure obligations under the *Charter*. The sole question before us is the level of fault that Mr. Henry must establish to sustain a cause of action against the AGBC in these circumstances.

## II. Factual Background

[3] This appeal arises from proposed amendments to the pleadings in Mr. Henry’s civil case. Because this case is at the pleadings stage, the allegations of prosecutorial misconduct made by Mr. Henry — including those recited in this factual background — must be accepted as true.

### A. *Mr. Henry’s 1983 Convictions*

[4] From November 1980 to June 1982, a series of sexual assaults occurred in Vancouver. The perpetrator of each assault used a similar *modus operandi*: he targeted female victims who were alone at night in certain neighbourhoods, threatening them with a knife and covering their heads with a pillow or pillowcase. In many of the cases, the

perpetrator told the victim that he had been “ripped off” and was owed money by someone who supposedly lived at the victim’s residence: *Henry No. 1*, at para. 11. After investigation, Vancouver Police concluded that a single perpetrator was responsible for the attacks.

[5] Donald McRae lived in Mount Pleasant, one of the Vancouver neighbourhoods in which the assaults took place. In the spring of 1981, Mr. McRae was placed under police surveillance as a suspect, but was not arrested in connection with the attacks. In March 1982, Mr. Henry moved to a house in the same city block as Mr. McRae.

[6] Police came to regard Mr. Henry as a suspect, and he was arrested in May 1982. He was taken to the police station and forced to participate against his will in an identification line-up. When Mr. Henry refused to cooperate, an officer held him in a headlock to keep his head up so it could be seen by the complainants viewing the line-up. Some of the victims identified Mr. Henry as the perpetrator, but others did not, and the police decided to release him after these inconclusive results.

[7] Five days after Mr. Henry’s arrest and release, Mr. McRae was arrested and charged with trespass by night for prowling outside a residence several blocks away from the locations of two of the previous assaults. Two months later, Mr. McRae was again arrested and charged with breaking and entering and theft at a residence six blocks away from one of the previous sexual assaults.

[8] Mr. Henry was re-arrested in July 1982, after the victim of a June attack made an identification from an array of photographs shown to her by the police. The photograph of Mr. Henry pictured him standing in front of a jail cell, with the arm of a uniformed officer visible in front of him. None of the six “foils” were photographed in this manner, and all six differed significantly from Mr. Henry in terms of age, hair style, and facial hair.

[9] Mr. Henry was charged with 17 offences, although only 10 of these ultimately proceeded to trial. He initially had legal representation, and made numerous requests for disclosure of all victim statements as well as medical and forensic reports. Despite these requests, the Crown did not disclose any of the requested material before the commencement of trial.

[10] Mr. Henry represented himself at trial. There was no reliable out-of-court identification suggesting he was the perpetrator, no evidence linking him to any of the victims, and no physical evidence placing him at any of the crime scenes. The Crown’s entire case rested on in-court identifications of Mr. Henry by the complainants.

[11] At the outset of his trial, Mr. Henry again requested disclosure of all victim statements. The Crown provided him with 11 statements made by the 8 trial complainants. However, approximately 30 additional statements made by the complainants were not disclosed, including those contained in the notes of the original crime scene investigators. These statements revealed inconsistencies that could have been used to attack the already-suspect identification evidence put forward by the Crown.

[12] Furthermore, key forensic evidence was not disclosed. Investigators had recovered sperm from several of the crime scenes that could have been used to include or exclude a suspect based on blood type, yet this evidence was never brought to Mr. Henry's attention. The Crown also failed to disclose that Mr. McRae had been considered a suspect, and had been arrested twice in the vicinity of the attacks.

[13] At the conclusion of his trial, a jury convicted Mr. Henry on all 10 charges. He was declared a dangerous offender and sentenced to an indefinite period of incarceration.

B. *Mr. Henry's Initial Appeal Efforts*

[14] Mr. Henry's initial appeal to the British Columbia Court of Appeal was dismissed for want of prosecution because of his failure to file trial transcripts and appeal books. His application for leave to appeal to this Court was denied, [1984] 1 S.C.R. viii, as were several subsequent *habeas corpus* applications and a 1997 application to appoint counsel and reopen his appeal.

[15] In total, between 1984 and 2006, Mr. Henry filed more than 50 applications in different courts and with the federal Crown seeking to have his convictions reviewed, while continuing to seek disclosure relating to his case.

C. *Project Smallman and the Unsolved Sexual Assaults*

[16] Between November 1982 and July 1988, more than 25 sexual assaults occurred in close geographic proximity to the assaults for which Mr. Henry was convicted. These additional assaults bore similar hallmarks to those attributed to Mr. Henry. However, he could not have been the perpetrator, as he was in custody during this period. These ongoing assaults were not disclosed to him.

[17] In 2002, as part of an effort designated “Project Smallman”, Vancouver Police reopened investigations into a number of unsolved sexual assaults committed between 1983 and 1988 that they believed were carried out by a single perpetrator. DNA evidence linked Mr. McRae to three of the assaults, and he pleaded guilty to these offences in May 2005.

[18] The similarity in both geography and *modus operandi* between these subsequent assaults and the assaults for which Mr. Henry was convicted led the provincial Crown to appoint an independent investigator to review Mr. Henry’s convictions. On the recommendation of this investigator, the provincial Crown provided full disclosure to Mr. Henry, including information gathered during the initial police investigation that should have been disclosed at trial and information subsequently discovered during Project Smallman. Mr. Henry successfully applied to reopen his appeal and was released on bail pending a hearing on the merits. The application was unopposed by the Crown, based on the recommendation of the independent investigator.

D. *Mr. Henry’s Appeal and Acquittals*

[19] In *Henry No. 1*, the British Columbia Court of Appeal considered Mr. Henry's appeal on the merits for the first time. In October 2010, Low J.A., for a unanimous court, found significant errors in the trial judge's jury instructions. He also found that the charges should have been severed, and a mistrial declared, after the Crown abandoned its submission that the evidence on each count should be treated as similar fact evidence. These errors would have been sufficient for Low J.A. to order a new trial. However, he also held that the evidence as a whole was incapable of proving identification, and the verdicts were therefore unreasonable. As a result, he substituted acquittals for each of Mr. Henry's 10 convictions.

E. *Mr. Henry's Civil Claims*

[20] Mr. Henry filed a civil action in June 2011, seeking damages against the City, the AGBC, and the AGC for harm suffered as a consequence of his wrongful convictions and incarceration. His claim against the City relates to the investigation of the crimes for which he was convicted, and the failure of the Vancouver Police to inform Crown counsel of the subsequent offences that were later re-investigated as part of Project Smallman. His claim against the AGC relates to the denial of his various applications for review of his convictions. As indicated, these claims are not at issue in this appeal.

[21] Mr. Henry's claim against the AGBC alleges that the Crown failed to make full disclosure of relevant information before and during his trial, and in subsequent proceedings. In his Notice of Civil Claim, he pleaded various causes of action:

negligence, malicious prosecution, misfeasance in public office, abuse of process, and breach of his ss. 7 and 11(d) *Charter* rights. The AGBC moved to strike Mr. Henry's causes of action grounded in negligence and the *Charter*. In September 2012, Goepel J. of the British Columbia Supreme Court struck the negligence claim as inconsistent with this Court's holding in *Nelles v. Ontario*, [1989] 2 S.C.R. 170: *Henry v. British Columbia (Attorney General)*, 2012 BCSC 1401 ("*Henry No. 2*"), at paras. 43-60. Goepel J. allowed Mr. Henry's *Charter* claim to proceed since it was founded on allegations of malicious conduct. However, he noted that, if Mr. Henry intended to pursue a *Charter* damages claim against the AGBC for conduct falling short of malice, he would have to seek leave to amend his pleadings (paras. 61-72).

### III. Judgments Below

#### A. *British Columbia Supreme Court, 2013 BCSC 665, 47 B.C.L.R. (5th) 335 (Goepel J.)*

[22] Following the decision in *Henry No. 2*, Mr. Henry applied to amend his pleadings to claim *Charter* damages against the AGBC for non-malicious conduct. The AGBC opposed this application, arguing that a claim for *Charter* damages grounded in alleged prosecutorial misconduct requires proof of malice. The application judge rejected this submission.

[23] Goepel J. held that the case law on malicious prosecution is not dispositive of the required threshold. Relying on this Court's seminal decision on *Charter* damages in

*Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, he observed that s. 24(1) affords courts a broad discretion to craft appropriate remedies, and that this discretion should not be limited “by casting it in a strait-jacket of judicially prescribed conditions” (para. 28, quoting *Ward*, at para. 18). However, he recognized that it may be necessary, as a matter of policy, for courts to mandate a minimum threshold of liability for a successful *Charter* damages claim.

[24] In Mr. Henry’s case, Goepel J. found that there were competing policy considerations that must be weighed in arriving at the appropriate threshold. He determined that a threshold lower than malice should apply — namely, the standard for awarding costs in criminal proceedings for *Charter* breaches. Referring to this Court’s decision in *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 (“*Dunedin*”), he noted that costs awards made under s. 24(1) in criminal proceedings are only justified in limited circumstances where the Crown’s conduct represents a marked and unacceptable departure from the reasonable standards expected of prosecutors. Goepel J. thus permitted Mr. Henry to amend his Notice of Civil Claim in accordance with this threshold.

B. *British Columbia Court of Appeal, 2014 BCCA 15, 53 B.C.L.R. (5th) 262 (Hall J.A., MacKenzie and Stromberg-Stein J.J.A., Concurring)*

[25] The Court of Appeal unanimously allowed the AGBC’s appeal, concluding that Mr. Henry was not entitled to seek *Charter* damages for the non-malicious acts and omissions of Crown counsel.

[26] Speaking for the court, Hall J.A. relied heavily on this Court’s “trilogy” of malicious prosecution cases — *Nelles, Proulx v. Quebec (Attorney General)*, 2001 SCC 66, [2001] 3 S.C.R. 9, and *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339. He noted that, in *Nelles*, this Court rejected an absolute immunity for Crown counsel, and preserved a right to pursue civil damages against a prosecutor who acts intentionally to subvert justice. Referring to *Proulx*, he observed that “malicious prosecution can be an efficacious remedy to one harmed by prosecutorial misconduct” (para. 23).

[27] In the same vein, Hall J.A. determined that making *Charter* damages available to compensate for malicious acts and omissions of prosecutors would offer plaintiffs an effective recourse for *Charter* violations, but he was not prepared to go further. In his view, the application judge erred in adopting the lower standard of fault developed in criminal cases where costs were awarded. That standard — a marked and unacceptable departure from the reasonable standards expected of Crown counsel — was akin to gross negligence and would result in “a new head of liability against prosecutors” (para. 20).

[28] Hall J.A. rejected the view that *Ward* altered the parameters of civil liability for prosecutors. He underscored the fact that, in *Ward*, this Court recognized that good governance considerations can militate against *Charter* damages awards, and that existing causes of action in private law may provide the appropriate liability threshold in a particular context.

[29] Hall J.A. concluded that he was bound by this Court's jurisprudence on the scope of civil liability for prosecutors, and therefore the malice threshold was applicable. In his view, "it would be an unwarranted extension of the language in *Ward* to find that the Supreme Court of Canada was altering the principles set forth in *Nelles* and *Miazga*" (para. 29). To the extent that prosecutorial liability ought to be expanded to include claims of 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.

#### IV. Analysis

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

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

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?

[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.

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

[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.

#### B. *Ward Provides the Governing Legal Framework*

[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 individual as a public law action directed against the state for violations of the claimant's constitutional rights.

[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.

[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:

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]

[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 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).

[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.

[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.]

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.

[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.

[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.

[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”, no cause of action for *Charter* damages will lie in these circumstances (para. 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.

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

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

[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.

(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, and 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)

[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 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.

[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.

[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 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, or even gross negligence" 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 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)

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.

[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.

[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.

[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: *Miazga*, 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 *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 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.

...

. . . [T]hese 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 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]

[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.

[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).

[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.

(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*:

. . . [t]here 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.

[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 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 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 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.

[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.

[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.

[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 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.

[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.

[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.

D. *Applying the Charter Damages Threshold for Wrongful Non-disclosure by Prosecutors*

[82] As discussed, a cause of action for *Charter* damages 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. I now turn to how this standard will operate in practice.

(1) Policy Concerns May Still Be Considered on a Case-by-Case Basis

[83] In setting a heightened *per se* threshold, I should not be taken as saying that there are no additional good governance concerns that could negate a claim for *Charter* damages in the wrongful non-disclosure context. There may be case-specific policy concerns that militate against an award, even if the claimant has made out the heightened *per se* threshold. For example, the claimant may have an adequate alternative remedy under the *Charter* or in private law. Where a case-specific policy concern tips the balance against a *Charter* damages award, this remedy may properly be denied.

(2) What a Claimant Must Show to Meet the Liability Threshold in Cases of Wrongful Non-disclosure

[84] The liability threshold is tailored to the wrongful non-disclosure context. There is no inquiry into the Crown's motive or purpose, which are concepts better-suited to cases where the exercise of core prosecutorial discretion is challenged. Rather, the focus is on two key elements: the prosecutor's intent, and his or her actual or imputed

knowledge. Specifically, a cause of action will lie against the state — subject to proof of causation — where a prosecutor breaches an accused's *Charter* rights by intentionally withholding information when he or she 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.

[85] Whether considered at the pleadings stage or at trial, the same formulation of the test applies. At trial, a claimant would have to convince the fact finder on a balance of probabilities that (1) the prosecutor intentionally withheld information; (2) the prosecutor knew or ought reasonably to have known that the information was material to the defence and that the failure to disclose would likely impinge on his or her ability to make full answer and defence; (3) withholding the information violated his or her *Charter* rights; and (4) he or she suffered harm as a result. To withstand a motion to strike, a claimant would only need to plead facts which, taken as true, would be sufficient to support a finding on each of these elements.

[86] Nothing in the formulation of this test alters the methods by which finders of fact assess intent. The common sense inference that individuals intend the natural and probable consequences of their actions applies: *R. v. Walle*, 2012 SCC 41, [2012] 2 S.C.R. 438, at paras. 58-63, citing *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523. As a result, the evidentiary burden on the claimant is not a high one. To demonstrate that the Crown intentionally withheld information, a claimant need only prove that prosecutors were actually in possession of the information and failed to disclose it. Alternatively, a

claimant could show that prosecutors were put on notice of the existence of the information and failed to obtain possession of it, in contravention of their disclosure obligations: see *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, at para. 49. In both of these circumstances, the intention to withhold may be inferred. This inference is available to the finder of fact, but is not mandatory. Furthermore, it is always open to the Crown to lead rebuttal evidence to show that the withholding was not intentional.

[87] The next element of the test relates to the Crown's knowledge of the materiality of the information and the consequences of withholding it. Under this element, to be *material*, the information must be relevant and "directed at a matter in issue in the case": *R. v. B.(L.)* (1997), 35 O.R. (3d) 35, at p. 44. That said, the mere fact that information is material to the defence does not necessarily mean that the failure to disclose it will likely impinge on the accused's ability to make full answer and defence. While related, the two concepts are distinct, and each must be established.

[88] Knowledge of the materiality of the information and the consequences of a failure to disclose can be imputed based on what a reasonable prosecutor would know in the circumstances. Once it is found that information was intentionally withheld which any prosecutor, acting reasonably, should have disclosed, I see no reason why an accused who has suffered harm should be denied a cause of action. I stress, however, that by incorporating a reasonableness aspect into the knowledge element, I am not endorsing a negligence-based standard as the applicable liability threshold. Taken together, the two elements I have described — intent, and actual or imputed knowledge — rise above a

purely objective “reasonableness” or “marked departure” standard grounded in a duty of care paradigm.

[89] The purpose of the intent and knowledge elements is not to shield prosecutors from liability by placing an undue burden on claimants to prove subjective mental states. Rather, these elements are designed to set a sufficiently high threshold to address good governance concerns, while preserving a cause of action for serious instances of wrongful non-disclosure. As pleaded, the facts of Mr. Henry’s case would meet this threshold.

[90] One final point on the liability threshold bears mentioning. It is not uncommon in the course of a criminal prosecution for disclosure decisions to be challenged, and for a court to determine the lawfulness of the Crown withholding certain information. If a court rules that information sought by the defence need not be disclosed, then the Crown’s failure to disclose will have the benefit of a judicial imprimatur. It would not be accurate to say, in these circumstances, that the Crown intentionally “withheld” information from the accused. Even if the judicial determination is later overturned, no liability for *Charter* damages will lie for non-disclosure.

### (3) Policy Implications of the Liability Threshold

[91] It may seem harsh to deny *Charter* damages for cases of wrongful non-disclosure which, while less serious, still result in a violation of an accused’s *Charter* rights. However, it is a reality that wrongful non-disclosures will cover a spectrum of blameworthiness, ranging from the good faith error, quickly rectified, to the rare cases of

egregious failures to disclose exculpatory evidence. Given the policy concerns associated with exposing prosecutors to civil liability, it is necessary that the liability threshold be set near the high end of the blameworthiness spectrum. In reaching this conclusion, I do not purport to create silos of *Charter* violations, classifying some as worthy of concern and others as inconsequential. Courts should endeavour, as much as possible, to rectify *Charter* breaches with appropriate and just remedies. Nevertheless, when it comes to awarding *Charter* damages, courts must be careful not to extend their availability too far.

[92] Indeed, the consequences of setting a lower threshold in this context — simple negligence, or even the gross negligence standard adopted by the application judge — would be serious. This type of threshold implicates a duty of care paradigm that ignores the basic realities of conducting a criminal prosecution. Mr. Henry’s case illustrates the fact that the information ultimately disclosed to an accused is not simply a product of what prosecutors decide to disclose on their own initiative. Rather, disclosure depends on the interplay of a number of factors, including the rigour of the police investigation, the forthrightness of the police in communicating information to prosecutors, and the disclosure decisions taken by the Crown.

[93] A duty of care paradigm risks opening up a Pandora’s box of potential liability theories. For example, if prosecutors were subject to a duty of care, a claimant could allege that they failed to probe the police forcefully enough to ensure that relevant information was not being suppressed. Such an approach would effectively impose an obligation on prosecutors to “police” the police. In my view, widening the Crown’s

exposure to liability in this way would be unwarranted. If police act improperly, then a civil claim can and should lie against them: see *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129.

[94] The problems with a negligence-based standard are even more apparent when considering how this lower threshold would operate at the pleadings stage. The lower the threshold, the greater the number of claims that would have to be defended. The mere fact of having to respond to an onslaught of litigation, even if ultimately unsuccessful, would chill the actions of prosecutors and divert them from their proper functions. It would be far too easy for a claimant with a weak claim to plead facts disclosing a cause of action for negligence — *simpliciter* or gross — and thus drive prosecutors into civil court. Bringing a *Charter* damages claim for prosecutorial misconduct should not be a mere exercise in artful pleading. In contrast, the threshold I have outlined ensures that many unmeritorious claims will be weeded out at an early stage, either on a motion to strike or on a motion for summary judgment.

#### (4) The Causation Requirement

[95] In addition to establishing a *Charter* breach and the requisite intent and knowledge, a claimant must prove that, as a result of the wrongful non-disclosure, he or she suffered a legally cognizable harm. Liability attaches to the Crown only upon a finding of “but for” causation. In cases involving wrongful convictions, this “but for” test avoids the thorny issue of whether or not factual innocence is required — that is, proof that the accused did not in fact commit the crimes alleged. Instead, the focus of the

inquiry is on the proceedings that occurred at the time of the intentional failure to disclose. That said, without deciding the issue, I would not foreclose the possibility that evidence of factual innocence or guilt could go to the quantum of damages.

[96] Harm can be shown by the claimant in different ways. I do not propose an exhaustive list, but offer several examples. A historical wrongful conviction would certainly qualify. *Charter* damages would also be available where the wrongful non-disclosure led to a conviction at trial that was later overturned on appeal, and ultimately replaced by an acquittal — either entered directly on appeal or following a new trial. Even if the claimant was acquitted at trial, a *Charter* damages award would be available where it could be shown that the charges would have been dismissed or withdrawn at an earlier stage of proceedings had proper disclosure been made. In such a case, damages might serve to compensate for time wrongfully spent in custody and any consequential harm suffered as a result of the criminal proceedings.

[97] Regardless of the nature of the harm suffered, a claimant would have to prove, on a balance of probabilities, that “but for” the wrongful non-disclosure he or she would not have suffered that harm. This guarantees that liability is restricted to cases where the intentional failure to disclose was actually the cause of the harm to the accused.

[98] The “but for” causation test may, however, be modified in situations involving multiple alleged wrongdoers. For example, where the claimant alleges that a wrongful conviction was caused in part by the failure of police to provide material information to prosecutors, and in part by the Crown’s failure to disclose, then a showing

of “but for” causation will not be necessary. In this scenario, the causation requirement will be satisfied if the claimant can prove that the prosecutorial misconduct materially contributed to the harm suffered: *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181.

## V. Conclusion

[99] I would allow the appeal. Proof of malice is not required to make out a cause of action for *Charter* damages against the provincial Crown in this case. Mr. Henry may seek to amend his pleadings to include a claim for *Charter* damages against the AGBC alleging that the Crown, in breach of its constitutional obligations, caused him harm by intentionally withholding information when it knew, or should reasonably have known, that the information was material to his defence and that the failure to disclose would likely impinge on his ability to make full answer and defence.

[100] As success is divided in this appeal, I would order costs in the cause throughout.

The following are the reasons delivered by

THE CHIEF JUSTICE AND KARAKATSANIS J. —

## I. Introduction

[101] This case raises questions about the availability of damages under s. 24(1) of the *Canadian Charter of Rights and Freedoms* as a remedy for the breach of the Crown's constitutional disclosure obligations.

[102] The notice of civil claim in this case alleges egregious violations of an accused's right to disclosure, with devastating consequences. In 1983, Mr. Henry was convicted of 10 counts of sexual assault, declared a dangerous offender, and sentenced to an indefinite period of incarceration. Before, during, and in the many years after his trial, Mr. Henry repeatedly sought disclosure of exculpatory evidence held by the police and prosecution, to no avail. In 2002, police began re-investigating a series of unsolved sexual assaults. Ultimately, a Special Prosecutor was appointed to review Mr. Henry's convictions, leading to the 2008 disclosure of substantial police file materials. In 2010, the British Columbia Court of Appeal acquitted Mr. Henry on all counts, on the basis that the evidence as a whole was incapable of proving the element of identification: 2010 BCCA 462, 294 B.C.A.C. 96. He served nearly 27 years in prison. He now seeks an award of damages under s. 24(1) of the *Charter*, for the breach of the Crown's constitutional disclosure obligations.

[103] This appeal asks: What facts must Mr. Henry plead in order be able to advance such a claim in court? In particular, must he allege malice or fault on the part of state officials who violated his rights?

[104] The Attorney General of British Columbia argues that claims for damages resulting from prosecutorial misconduct require, at a minimum, that the claimant

establish malice. In our view, the Attorney General's argument is misplaced. Imposing a fault requirement for *Charter* damages, where the Crown has breached its duty to disclose, is inconsistent with the purpose of s. 24(1) and with the principled framework established in *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, for assessing whether an award of damages would be appropriate and just in the circumstances of a particular case.

## II. The Purpose of Section 24(1) and the *Ward* Framework

[105] The *Charter* guarantee of rights and freedoms is meaningful only to the extent that breaches are appropriately remedied. To this end, s. 52 of the *Constitution Act, 1982* provides for the nullification of laws which are inconsistent with the Constitution, including the *Charter*. It is complemented by s. 24 which authorizes courts to grant remedies where an individual's *Charter* rights have been infringed by state action. These remedial provisions, like all *Charter* provisions, should be given a generous and purposive interpretation: *R. v. Gamble*, [1988] 2 S.C.R. 595.

[106] In *Ward*, this Court examined the broad grant of powers provided in s. 24(1) of the *Charter*, which empowers courts of competent jurisdiction to grant remedies that are "appropriate and just in the circumstances". Quoting *Mills v. The Queen*, [1986] 1 S.C.R. 863, the Court observed that "[i]t is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion": *Ward*, at para. 18, citing *Mills*, at p. 965. While the court's discretion is not unfettered, "[w]hat is appropriate and

just will depend on the facts and circumstances of the particular case”: *Ward*, at para. 19. To determine whether damages are an appropriate and just remedy, a court must be empowered to look at and balance all relevant considerations arising in a given case.

[107] *Ward* provides a framework for evaluating these competing considerations. The *Ward* test for an award of damages under s. 24(1) of the *Charter* consists of four steps:

- (1) The applicant must establish a *Charter* breach by the state;
- (2) The applicant must establish that damages would serve at least one of the functions of compensation, vindication or deterrence;
- (3) If (1) and (2) are established, the onus shifts to the state to show that there are countervailing considerations (such as alternative remedies or good governance concerns) that would make *Charter* damages inappropriate or unjust;
- (4) Finally, if the government fails to establish that countervailing considerations make *Charter* damages inappropriate or unjust, the last step in the *Ward* analysis is to determine the quantum of damages.

[108] Applying these principles to this case, Mr. Henry must plead facts that, if true, establish (1) a breach of his *Charter* rights and (2) that damages constitute an appropriate and just remedy to advance the purposes of compensation, vindication or deterrence. It is for the state to plead facts on the third step of countervailing factors, should it choose to do so.

### III. Application of the *Ward* Framework to This Case

#### A. *Step One: Breach of Charter Rights*

[109] The first step in the *Ward* analysis requires that the claimant establish a breach of his or her *Charter* rights. Mr. Henry makes a number of specific allegations about the failure of the Crown to disclose evidence before, during and after his criminal trial on sexual assault charges. These allegations, if true, amount to blatant violations of his right to full disclosure, as protected under s. 7 of the *Charter*.

[110] For instance, according to Mr. Henry, the Crown withheld a large number of victim statements despite repeated defence requests for full disclosure of these statements. No victim statements, police reports or forensic reports were disclosed prior to the commencement of trial. Many victim statements remained undisclosed throughout the trial and, according to Mr. Henry, contain material inconsistencies that would have been helpful for his defence. Mr. Henry also alleges that forensic evidence relating to the perpetrator's spermatozoa remained undisclosed throughout the trial, again despite repeated specific requests. On the contrary, the Crown adduced evidence to the effect

that no forensic evidence was located at any of the crime scenes that could be used to help identify the perpetrator. Further, police reports relating to another suspect were not disclosed. The sole issue at trial was the identity of the perpetrator and the Crown's case rested on victim identifications.

[111] If proven at trial, these facts would indisputably establish a breach of Mr. Henry's disclosure rights under s. 7 of the *Charter*. The government does not appear to dispute the violation of Mr. Henry's *Charter* rights.

B. *Step Two: A Functional Justification of Damages*

[112] The second step in the *Ward* analysis requires that the claimant establish that an award of *Charter* damages would serve one or more of the objectives of compensation, vindication, and deterrence. Compensation is about remedying personal loss (para. 25). Vindication is about remedying the harm the infringement causes society (para. 28). Deterrence is forward-looking and serves a preventative function (para. 29).

[113] By any measure, the facts alleged by Mr. Henry are egregious. The Crown allegedly withheld highly relevant and exculpatory evidence, despite repeated and specific defence requests for disclosure. The impact on Mr. Henry's ability to make full answer and defence is obvious. Mr. Henry was convicted on all charges at trial, was declared a dangerous offender, and spent 27 years behind bars. Following his convictions in 1983, Mr. Henry continued to proclaim his innocence and seek review of his case. His pleas were finally heard after the police reopened its investigation into a

string of unsolved sexual assaults similar to those for which Mr. Henry was convicted. This investigation resulted in the conviction of a man who had been a suspect in Mr. Henry's case. As a result, a Special Prosecutor was appointed to review Mr. Henry's convictions, leading to the 2008 disclosure of substantial police file materials. In 2010 he was finally acquitted on all counts by the British Columbia Court of Appeal. The court held that no properly instructed jury, acting reasonably, could have rendered a guilty verdict on any of the counts: para. 142.

[114] Mr. Henry was wrongfully convicted and imprisoned by the state for 27 years. On the facts alleged, the fairness of his trial was directly and seriously compromised by the breach of his s. 7 right to full disclosure. In these circumstances, an award of *Charter* damages under s. 24(1) may provide some compensation for the hardships Mr. Henry has endured. Obviously, no amount of money can restore to him the decades he has spent behind bars. However, a monetary award may offer some compensation for this long period of wrongful imprisonment and the many lost life opportunities it entails.

[115] An award of *Charter* damages may also help vindicate the *Charter* rights that the Crown is alleged to have breached in Mr. Henry's case. As explained in *Ward*, vindication in this context refers to repairing the damage done to the public through the state's violation of *Charter* rights. There are few scenarios that can shake the public's confidence in the justice system more deeply than those alleged by Mr. Henry. According to the allegations, state action in breach of the *Charter* seriously undermined

the fairness of Mr. Henry's trial and the state subsequently imprisoned him for nearly three decades. In these circumstances, an award of *Charter* damages may help to publicly vindicate such a serious violation of *Charter* rights. Such an award would recognize the state's responsibility for the miscarriage of justice that occurred in Mr. Henry's case, and the importance of respecting *Charter* rights in order to guarantee trial fairness.

[116] Finally, in the context of *Charter* damages under s. 24(1), “[d]eterrence seeks to regulate government behaviour, generally, in order to achieve compliance with the Constitution”: *Ward*, at para. 29. An award of *Charter* damages might also serve the objective of “influencing government behaviour in order to secure state compliance with the *Charter* in the future”: *ibid.* Proper disclosure of Crown evidence is obviously a matter under the control of the state and its agents, primarily Crown prosecutors. The objective of deterrence may be served by an award of damages that highlights the need for the state to remain vigilant in meeting its constitutional obligations.

[117] Step two of *Ward* establishes a functional approach to determining whether *Charter* damages would constitute, in the language of s. 24(1), an “appropriate and just” remedy for a given *Charter* breach: *Ward*, at paras. 24-31. Moreover, *Ward* holds explicitly that damages may be appropriate and just even where no causal connection is established between a *Charter* breach and harm suffered by the claimant: “. . . the fact that the claimant has not suffered personal loss does not preclude damages where the objectives of vindication or deterrence clearly call for an award” (para. 30).

[118] The objective of compensation, however, requires a causal connection between the *Charter* breach and the loss suffered by the claimant; this objective aims “to compensate the claimant for the loss caused by the *Charter* breach”: *Ward*, at para. 27. As the issue of causation was neither addressed in the decisions below nor argued before us, we prefer to leave any detailed discussion for another day. This said, we are not convinced that the “but for” test proposed by Moldaver J. is appropriate here.

C. *Step Three: Countervailing Considerations – Has the Government Shown That Damages Are Inappropriate or Unjust?*

[119] At step three of the *Ward* analysis, the government has an opportunity to advance any countervailing considerations that would make it inappropriate or unjust to award damages under s. 24(1).

[120] The first countervailing consideration discussed at the third stage of the *Ward* test is whether there are remedies other than s. 24(1) that “adequately meet the need for compensation, vindication and/or deterrence” (para. 34) in the particular case before the court. This is an individualized inquiry, not an abstract one. The question is not whether the law in the abstract provides a remedy for the wrong, but whether it is available in the particular case:

The claimant must establish basic functionality having regard to the objects of constitutional damages. The evidentiary burden then shifts to the state to show that the engaged functions can be fulfilled through other remedies. The claimant need not show that she has exhausted all other recourses. Rather, it is for the state to show that other remedies are available

in the particular case that will sufficiently address the breach. [Emphasis added, para. 35.]

[121] The Court in *Ward* went on to state:

. . . it is conceivable that another *Charter* remedy may, in a particular case, fulfill the function of *Charter* damages. [Emphasis added; para. 35.]

[122] At the current stage of proceedings in this case, it is far from clear that there is an alternative remedy that will fulfill the functional objectives of *Charter* damages. The alleged wrong occurred decades ago. The lead prosecutor is dead. An action for damages under s. 24(1) may ultimately be the only remedy that will function to provide compensation, vindication or deterrence.

[123] The second set of countervailing considerations discussed in *Ward* — and the set relied on by the Attorney General of British Columbia — concerns good governance.

*Ward* states:

In some situations, however, 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. [para. 39]

[124] By way of example, the Court in *Ward* opined that a claim for damages under s. 24(1) ought not to be permitted for the state's enforcement of a law until it is declared invalid, unless the state conduct under the law was "clearly wrong, in bad faith or an

abuse of power”: para. 39, citing *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, at para. 78. This elevated fault threshold is justified because “[t]he rule of law would be undermined if governments were deterred from enforcing the law by the possibility of future damage awards in the event the law was, at some future date, to be declared invalid” (para. 39).

[125] The Attorney General of British Columbia argues that permitting Mr. Henry’s s. 24(1) claim to proceed (1) will inappropriately interfere with prosecutorial discretion; (2) will inappropriately lower the standard for prosecutorial liability; and (3) will divert prosecutors from their day-to-day work by involving them in claims in the courts for prosecutorial misfeasance. The Attorney General says that these countervailing considerations mean that claims such as Mr. Henry’s should be completely barred; or alternatively that a high fault threshold should be set.

[126] *Ward* recognizes that there may be a need for limited immunity from s. 24(1) damages for a *Charter* breach that arises from the exercise of discretion. This is “because the law does not wish to chill the exercise of policy-making discretion” (para. 40). In this context, *Ward* mentions malice as a possible threshold for exercise of prosecutorial discretion. Our colleague, Moldaver J., in a variation on this, would reduce the threshold for s. 24(1) damages in this case to intentional conduct.

[127] In our view, however, the countervailing concerns raised by the Attorney General of British Columbia are misplaced in this case. Mr. Henry’s case does not involve the exercise of prosecutorial discretion in the usual sense of the term or as it was

discussed in cases such as *Nelles v. Ontario*, [1989] 2 S.C.R. 170, and *Miazga v. Kvello Estate*, 2009 SCC 51, [2009], 3 S.C.R. 339. The discretion at issue in those cases is the discretion to commence and pursue a prosecution. This is a wide discretion long acknowledged by the law. It is as difficult to exercise as it is vital to the effective prosecution of criminal cases. The common law has struck a balance that reflects these complex concerns by allowing claims to be brought against prosecutors for misuse of this discretion, but only if malice can be shown: *Miazga*, at para. 7.

[128] However, none of this applies to the prosecution's disclosure obligation. The legal duty on the Crown to disclose relevant evidence does not involve prosecutorial discretion in the sense discussed in *Nelles* and *Miazga*. This duty is not a discretionary function but a legal obligation: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, at p. 333; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, at paras. 17-18. This obligation is absolute, not discretionary, and it is one that Crown prosecutors take seriously. The only discretion left to the prosecutor is a limited operational discretion relating to timing, relevance in borderline cases, privilege and protection of witness identity. *Stinchcombe* states that matters falling within this limited discretion are to be resolved by the trial judge. In other words, prosecutorial discretion with respect to the disclosure of evidence is limited in scope (to operational issues) and duration (the judge, not the prosecutor will make the final decision). It may be helpful to quote the relevant passages from *Stinchcombe*:

The prosecutor must retain a degree of discretion in respect of these matters. The discretion, which will be subject to review, should extend to such matters as excluding what is clearly irrelevant, withholding the identity of persons to protect them from harassment or injury, or to enforce the privilege

relating to informers. The discretion would also extend to the timing of disclosure in order to complete an investigation. . .

. . .

The discretion of Crown counsel is . . . reviewable by the trial judge. Counsel for the defence can initiate a review when an issue arises with respect to the exercise of the Crown's discretion. On a review the Crown must justify its refusal to disclose. Inasmuch as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule. [pp. 335-36 and 340]

[129] Thus any prosecutorial discretion in the process is both limited and judicially controlled. An action for failure to disclose relevant evidence to the defence is different from an action for misuse of prosecutorial discretion in bringing or pursuing a prosecution. It is not an action for abuse of discretion, but an action for breach of a legal duty imposed by the *Charter*. Where this *Charter* duty is breached, it is the state and not the individual prosecutor who faces liability: *Ward*, at para. 22. The focus is accordingly not on the fault of any particular individual, but on the failure to disclose. Where breaches of the duty to disclose occur, *Charter* liability flows from the constitutionally entrenched mechanisms that permit individuals to hold the state to account. This is distinct from tort liability, which imposes conduct-based thresholds to regulate tortious conduct as between individuals. Good governance is strengthened, not undermined, by holding the state to account where it fails to meet its *Charter* obligations. As Kent Roach has noted, "routine arguments that *Charter* damage awards adversely affect good governance discount the fact both deterrence and compliance with the *Charter* 'is a foundation principle of good governance'": "A Promising Late Spring for Charter

Damages: *Ward v. Vancouver*” (2011), 29 *N.J.C.L.* 135, at p. 150, quoting *Ward*, at para. 38.

[130] Against this background, we return to the arguments of the Attorneys General of British Columbia and Canada that to allow damages for failure to disclose will chill the exercise of prosecutorial discretion, undermine the high threshold of malice for actions against prosecutors, and divert prosecutors from their proper functions by requiring them to participate in s. 24(1) actions. We conclude it would not.

[131] The concerns raised by the Attorneys General are all based on the assumption that disclosure is a matter of prosecutorial discretion as discussed in *Nelles* and *Miazga* — the discretion to commence and pursue a prosecution. But, as just discussed, this assumption is false. Prosecutors do not have discretion as to whether to disclose relevant evidence — they have a *legal duty* to disclose it. Their only discretion concerns peripheral matters relating to the timing of disclosure, privilege and whether a particular document is relevant — matters which are promptly resolved by trial judges.

[132] Recognizing Mr. Henry’s claim will not chill the exercise of prosecutorial discretion. Nor will it change the high standard of malice for tort actions for misuse of prosecutorial discretion, since those actions are concerned with true exercises of prosecutorial discretion. And there is no reason to suppose that recognizing Mr. Henry’s claim will divert prosecutors from their day-to-day work. Most issues of disclosure are settled at trial. In the rare case, like this one, where they arise after conviction, the prosecutor, if alive, may be called on to testify. The involvement of prosecutors is

nonetheless likely to be limited. Since the prosecution is under a *legal duty* to disclose all relevant documents, the focus would be on the existence and relevance of the documents, not on the more complex questions of how discretion should have or could have been exercised.

[133] In summary, we are not persuaded that recognizing the right of Mr. Henry to claim damages for failure to disclose relevant documents will interfere with prosecutorial discretion, imperil the high threshold for suing prosecutors in cases like *Nelles* or *Miazga*, or divert prosecutors from their day-to-day work. The Attorney General of British Columbia's contention that these concerns constitute a countervailing consideration that should prevent Mr. Henry from bringing his action for *Charter* damages must, in our view, be rejected. There is thus no principled basis for imposing any threshold of fault or intention on Mr. Henry's claim for *Charter* damages, as our colleague Moldaver J. proposes to do.

[134] In our view, this is the right result in law and justice. Mr. Henry has suffered egregiously as a result, he alleges, of the state's breach of its legal obligation under the *Charter* to disclose all relevant documents to him when it should have. If he is denied the right to bring a claim for damages under s. 24(1) of the *Charter*, he may be denied any remedy. The legally desirable goals of compensation for wrong, vindication and deterrence elaborated in *Ward* will be unrealized.

[135] This result also upholds Canada's international obligations. Canada has committed itself internationally to compensating those who have been wrongfully

convicted. Canada has ratified the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (“*ICCPR*”), which provides, at art. 14(6):

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

[136] Parliament has not passed legislation to implement this obligation domestically. The obligation expressed in the *ICCPR* is therefore not directly enforceable in Canadian courts. However, our Court has stated many times that the *Charter* should be interpreted consistently with Canada’s international obligations. This was reaffirmed most recently in *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, at para. 64:

LeBel J. confirmed in *R. v. Hape*, [2007] 2 S.C.R. 292, that in interpreting the *Charter*, the Court “has sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada’s international obligations and the relevant principles of international law, on the other”: para. 55. And this Court reaffirmed in *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] 3 S.C.R. 157, at para. 23, “the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified”.

[137] Canada has committed itself to providing compensation to those who have been wrongfully convicted, as expressed in art. 14(6) of the *ICCPR*. Mr. Henry alleges that he was wrongfully convicted following a trial that was rendered unfair through

violation of his right to disclosure. Section 24(1) authorizes the courts to award damages to compensate Mr. Henry for the harm suffered as a result of this *Charter* breach. It would be inconsistent with the international obligation undertaken by Canada through art. 14(6) of the *ICCPR* to predicate an award of damages under s. 24(1) on Mr. Henry's ability to establish an intentional violation of his *Charter* rights. To require proof of intention would be to lower *Charter* protection below the level of protection found in an international human rights instrument that Canada has ratified. The commitment embodied in art. 14(6) thus further supports our conclusion that Mr. Henry need not establish fault to justify an award of damages under s. 24(1).

#### IV. Conclusion

[138] We would allow Mr. Henry's appeal and grant his application to amend his pleadings to include a claim for *Charter* damages against the Attorney General of British Columbia in accordance with these reasons. It is sufficient for Mr. Henry to allege that the Crown breached its constitutional obligation to disclose relevant information and that *Charter* damages would be an appropriate and just remedy, serving one or more of the functions of compensation, vindication and deterrence. Mr. Henry need not allege that the Crown breached its constitutional obligation intentionally, or with malice, in order to access *Charter* damages. His pleadings allege that significant non-disclosure resulted in wrongful convictions and 27 years of incarceration. There can be little doubt that, if these allegations are proven, damages would be "appropriate and just" under s. 24(1) of the *Charter*.

*Appeal allowed with costs.*

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