



SUPREME COURT OF CANADA

CITATION: Ontario (Attorney General) v. Clark, 2021 SCC 18

APPEAL HEARD: October 15, 2020

JUDGMENT RENDERED: April 30, 2021

DOCKET: 38687

BETWEEN:

Attorney General of Ontario
Appellant

and

Jamie Clark, Donald Belanger and Steven Watts
Respondents

- and -

Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Toronto Police Chief James Ramer, Canadian Association of Chiefs of Police, Canadian Association of Crown Counsel and Ontario Crown Attorneys' Association
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 62)

Abella J. (Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin and Kasirer JJ. concurring)

DISSENTING REASONS:
(paras. 63 to 173)

Côté J.

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ONTARIO (A.G.) v. CLARK

Attorney General of Ontario

Appellant

v.

**Jamie Clark,
Donald Belanger and
Steven Watts**

Respondents

and

**Attorney General of New Brunswick,
Attorney General of Manitoba,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Attorney General of Alberta,
Toronto Police Chief James Ramer,
Canadian Association of Chiefs of Police,
Canadian Association of Crown Counsel and
Ontario Crown Attorneys' Association**

Interveners

Indexed as: Ontario (Attorney General) v. Clark

2021 SCC 18

File No.: 38687.

2020: October 15; 2021: April 30.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Crown law — Prosecutorial immunity — Misfeasance in public office — Police officers commencing misfeasance claim against Attorney General on basis of Crown prosecutors' failure in conduct of criminal trials to challenge accused's claims of assault by police officers during arrest — Officers alleging that they suffered reputational harm and seeking damages — Whether prosecutorial immunity precludes misfeasance claims by police officers against Crown prosecutors for decisions made in exercise of public duties — Whether claim should be struck.

In June 2009, three officers with the Toronto Police Service arrested M and S in connection with a complaint of armed robbery and forcible confinement. Both men were charged and committed to stand trial. Prior to trial, M brought an application to stay the proceedings against him and to exclude the evidence of a confession he made on the day of the arrest based on his claim that the police beat him during the arrest and caused him a serious rib injury. The Assistant Crown Attorney and a senior Crown Attorney agreed that M's confession would not be admissible, and the charges against M were stayed. The jury trial against S proceeded and he was convicted. After his conviction, S filed a stay application alleging that the officers assaulted him and M during their arrest. M and S both testified on the stay application. The Assistant Crown Attorney did not call the officers to give evidence and conceded that the assaults

occurred. The judge accepted the evidence and reduced S's sentence. Her reasons described the assaults in detail and described the officers' conduct as "police brutality". Those findings were reported in the media. The Special Investigations Unit ("SIU") and the Toronto Police Service Professional Standards Unit ("PSU") then conducted reviews of the allegations of misconduct against the officers. The SIU discontinued its proceedings when M declined to participate; the PSU concluded that the alleged misconduct could not be substantiated.

S appealed the decision not to stay the proceedings. The Court of Appeal allowed S's appeal and entered a stay of proceedings, noting that the appeal Crown did not contest the evidence of the assaults. It strongly criticized the officers' conduct. Its findings were reported in the media. After the appeal, the SIU reopened its investigation and concluded that M's rib injury post-dated the arrest and that the allegations against the police were not substantiated by the evidence. An Ontario Provincial Police review concluded that the PSU investigation was thorough and that there was no reason to refute its conclusions.

The officers sued the Attorney General for negligence and misfeasance committed by the Assistant Crown Attorney, the senior Crown Attorney and the appeal Crown Attorney. They sought general damages for negligence and misfeasance, plus aggravated, exemplary and punitive damages. They claimed to have suffered irreparable harm to their reputations and credibility. The Attorney General moved to strike the claim for failing to disclose a cause of action. The motions judge struck the

negligence claim but allowed the misfeasance claim to proceed, and this decision was upheld on appeal. Only the decision as to the misfeasance claim is appealed to the Court.

Held (Côté J. dissenting): The appeal should be allowed and the misfeasance claim struck.

Per Wagner C.J. and **Abella**, Moldaver, Karakatsanis, Brown, Rowe, Martin and Kasirer JJ.: Prosecutors do not owe specific legal duties to the police with respect to how they carry out a prosecution, and misfeasance cannot be used to get around this reality. Piercing the immunity of Crown prosecutors to make them accountable to police officers would put Crown prosecutors in perpetual potential conflict with their transcendent public duties of objectivity, independence and integrity in pursuit of ensuring a fair trial for the accused and maintaining public confidence in the administration of justice. This means that the officers' misfeasance claim would not succeed.

Prosecutorial immunity advances the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their quasi-judicial roles as ministers of justice. The principles underlying immunity are the prosecutor's constitutionally protected independence, the risks to objective decision-making, and a concern about diverting prosecutors from their public interest duties. The jurisprudence has recognized that exposing prosecutors to civil liability may create

a chilling effect, encouraging decision-making motivated by a desire to ward off the spectre of liability and obfuscating the prosecutor's core duties to act objectively and independently in the interests of the integrity of the system and the rights of the accused.

The need to safeguard and vindicate the rights of the accused, who is uniquely vulnerable to the misuse of prosecutorial power, is crucial. Allowing police officers to sue the Crown in misfeasance for decisions prosecutors make in the course of criminal proceedings would raise profound risks to the rights of the accused and to prosecutorial independence and objectivity, and it would undermine the integrity of the criminal justice system. It would also be fundamentally incompatible with the mutually independent relationship between the police and the prosecutor: the police's role is to investigate crime; the Crown prosecutor's role is to assess whether a prosecution is in the public interest and, if so, to carry out that prosecution in accordance with the prosecutor's duties to the administration of justice and the accused.

For prosecutors to be at risk of civil liability for reputational harm to police officers means considering irrelevant considerations and risking independence and objectivity, the core of the prosecutor's role. Police suing prosecutors for decisions they make in the course of a criminal prosecution is a recipe for putting prosecutors in conflict with their duty to protect the integrity of the process and the rights of the accused. Beyond the risk of actual conflict, the appearance of such a conflict would be equally damaging to the integrity of the administration of justice. Permitting police lawsuits against Crown prosecutors would suggest to the public and to accused persons

that police were policing prosecutions through the use of private law, imperiling public confidence in the independent and objective ability of prosecutors to conduct fair trials. The police have a legitimate expectation and interest in their reputations not being unfairly impaired, but the solution cannot be to make prosecutors accountable to them in a way that obliterates the independence between police and prosecutors and is inconsistent with the Crown's core public duties to the administration of justice and to the accused.

Per Côté J. (dissenting): The appeal should be dismissed. Prosecutorial immunity should not apply to claims for misfeasance in public office brought by police officers who suffered harm as a result of deliberate and unlawful conduct by prosecutors in connection with serious criminal allegations of police misconduct.

The rule of law requires equality before the law, and is incompatible with absolute immunities. The Court has recognized two exceptions to prosecutorial immunity in favour of accused persons: the torts of malicious prosecution and wrongful non-disclosure. Although the protection of prosecutorial independence is constitutionally entrenched in s. 7 of the *Charter*, the scope of prosecutorial immunity is a matter of policy. Prosecutorial independence translates into two policy concerns which are meant to gauge the risk of undue interference with the ability of prosecutors to freely carry out their duties in furtherance of the administration of justice: the risk of creating a chilling effect on the exercise of prosecutorial discretion and the risk of diverting prosecutors from their public duties. These concerns must not be invoked like

a mantra to justify the application of prosecutorial immunity in every situation not falling within the exceptions recognized for the benefit of accused persons; rather, they should be considered in light of the particular liability threshold applicable to the tort at issue. A two-step analysis should be used to decide whether prosecutorial immunity should be applied in a particular situation: the first step requires determining whether there are cogent policy reasons for piercing the immunity, and the second step requires determining whether the liability threshold for the tort at issue is high enough to tamp down the twin policy concerns and to safeguard prosecutorial independence.

With respect to the first step, four policy reasons justify not applying prosecutorial immunity in cases where police officers suffered serious damages arising from unlawful and deliberate prosecutorial misconduct: (1) the tactical nature of the decisions involved; (2) the significance of the interests at stake; (3) the lack of meaningful alternative remedies and accountability mechanisms; and (4) public confidence in the office of prosecutor and in the police.

First, the principle of prosecutorial independence does not apply to decisions pertaining to the handling of allegations of police brutality because they are, in general, tactical decisions falling outside the core of prosecutorial discretion. The principle of prosecutorial independence seeks to protect first and foremost the core of prosecutorial discretion, including decisions about the nature and extent of the prosecution (decisions to press charges, to enter a stay of proceedings, to enter into a plea bargain, to withdraw from proceedings and to take control of a private

prosecution). Decisions that do not pertain to the nature and extent of the prosecution, such as tactical decisions, fall outside the scope of core prosecutorial discretion, so interfering with them does not implicate prosecutorial independence to the same extent. In any event, any conduct amounting to bad faith or malice falls outside the core and does not engage prosecutorial independence.

Second, just as the significance of the interests of accused persons may prevent the application of prosecutorial immunity, the significance of the interests at stake for the police officers weighs in favour of a conclusion that prosecutorial immunity does not apply. Findings of police brutality can have a profound impact on the officers' dignity, professional life, reputation and mental health. Those findings could also leave the officers open to professional discipline, or to civil and criminal liability. In addition, they would make the burden of proving the reasonableness of the use of force or self-defence in subsequent proceedings much more difficult.

Third, the available alternative remedies are unable to make the victims whole again. Disciplinary proceedings against the prosecutors before the Law Society or administrative sanctions from their employer carry little weight in comparison with prior judicial determinations of police brutality and torture made by a criminal court. Only exculpatory findings made by a civil court which had the benefit of all the evidence and did a thorough analysis can clear police officers' names once and for all. However, this remedy is contingent on an accused person's decision to bring a civil suit against the police; if the accused person decides not to sue the police, the officers

are unable to challenge the findings of police brutality in a court of law because prosecutorial immunity deprives them of an autonomous access to the civil courts. If the immunity is displaced and the officers are able to bring their own action against the prosecutors to take issue with the mishandling of the allegations of police brutality, the officers will be in a position to actively vindicate their reputations.

Finally, not applying prosecutorial immunity in such cases reinforces public confidence in both the office of prosecutor and the police. Public confidence in the office of prosecutor is better served when prosecutors are made accountable than when they are absolved from any misconduct. Protecting prosecutors who act unlawfully in a deliberate manner erodes public confidence in the office of Crown prosecutor. Prosecutorial immunity also undermines public confidence in the police. Where police officers are unable to redress their records before another court, their damaged reputation impedes the police's capacity to investigate and protect and hampers the prosecution of crime. It also makes them vulnerable to the defence's attacks when they testify, weakening the Crown's case as a result and potentially allowing some guilty accused persons to unduly avoid convictions.

With respect to the second step, the liability threshold for the tort of misfeasance in public office places the bar high enough to mitigate the twin policy concerns and to safeguard prosecutorial independence: a plaintiff must establish deliberate misconduct that demonstrates bad faith or dishonesty; inadvertent or negligent action of public officers are not enough. This high threshold must be

considered in the context of the class of potential claimants and the prosecutorial activity at issue. The class of potential claimants — police officers facing allegations of serious misconduct in a criminal case — is very narrow, and the prosecutors’ conduct at issue here does not fall within the core of prosecutorial discretion. When considered in this specific context, the high threshold provided by the elements of misfeasance in public office adequately protects against a chilling effect on the exercise of prosecutorial discretion, interference with prosecutorial independence, and the diversion of prosecutors from their duties. Finally, although permitting police officers to bring misfeasance claims may result in contradictory decisions, relitigation is necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole when the first proceeding is tainted by fraud or dishonesty, when fresh, new evidence, previously unavailable, conclusively impeaches the original results, or when fairness dictates that the original result should not be binding in the new context.

In the instant case, the officers have adequately pleaded the four essential elements of misfeasance in public office. Accordingly, their misfeasance claim should be allowed to continue.

Cases Cited

By Abella J.

Considered: *Nelles v. Ontario*, [1989] 2 S.C.R. 170; **referred to:** *R. v. Singh*, 2012 ONSC 2028; *R. v. Singh*, 2012 ONSC 4429; *R. v. Singh*, 2013 ONCA 750,

118 O.R. (3d) 253; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263; *Powder Mountain Resorts Ltd. v. British Columbia*, 2001 BCCA 619, 94 B.C.L.R. (3d) 14; *Three Rivers District Council v. Bank of England (No. 3)* (2000), [2003] 2 A.C. 1; *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339; *Proulx v. Quebec (Attorney General)*, 2001 SCC 66, [2001] 3 S.C.R. 9; *Smith v. Ontario (Attorney General)*, 2019 ONCA 651, 147 O.R. (3d) 305; *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Boucher v. The Queen*, [1955] S.C.R. 16; *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983; *R. v. Power*, [1994] 1 S.C.R. 601; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190.

By Côté J. (dissenting)

Roncarelli v. Duplessis, [1959] S.C.R. 121; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *R. v. Singh*, 2012 ONSC 2028; *R. v. Singh*, 2012 ONSC 4429; *R. v. Singh*, 2013 ONCA 750, 118 O.R. (3d) 253; *Nelles v. Ontario*, [1989] 2 S.C.R. 170; *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372; *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167; *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, [2011] 1 S.C.R. 657; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214; *Botiuk v. Toronto Free Press Publications*

Ltd., [1995] 3 S.C.R. 3; *Bent v. Platnick*, 2020 SCC 23; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *Day v. Woodburn*, 2019 ABQB 356, 96 Alta. L.R. (6th) 302; *Nelles v. The Queen in right of Ontario* (1985), 51 O.R. (2d) 513; *Bosada v. Pinos* (1984), 44 O.R. (2d) 789; *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; *Watkins v. Secretary of State for the Home Department*, [2006] UKHL 17, [2006] 2 A.C. 395; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66; *Three Rivers District Council v. Bank of England (No. 3)* (2000), [2003] 2 A.C. 1; *Alberta (Minister of Public Works, Supply & Services) v. Nilsson*, 1999 ABQB 440, 246 A.R. 201, aff'd 2002 ABCA 283, 320 A.R. 88; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77.

Statutes and Regulations Cited

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Criminal Code, R.S.C. 1985, c. C-46, ss. 25, 34, 269.1(2).

Crown Attorneys Act, R.S.O. 1990, c. C.49, ss. 6(5), 8.

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Rosenberg, Marc. “The Attorney General and the Administration of Criminal Justice” (2009), 34 *Queen’s L.J.* 813.

Sterling, Lori, and Heather Mackay. “Constitutional Recognition of the Role of the Attorney General in Criminal Prosecutions: *Krieger v. Law Society of Alberta*” (2003), 20 *S.C.L.R.* (2d) 169.

APPEAL from a judgment of the Ontario Court of Appeal (Lauwers, Huscroft and Trotter J.J.A.), 2019 ONCA 311, 56 C.C.L.T. (4th) 1, [2019] O.J. No. 2027 (QL), 2019 CarswellOnt 5941 (WL Can.), affirming a decision of Stinson J., 2017 ONSC 3683, [2017] O.J. No. 3236 (QL), 2017 CarswellOnt 9706 (WL Can.).
Appeal allowed, Côté J. dissenting.

Sunil Mathai and *Ananthan Sinnadurai*, for the appellant.

Lorne Honickman and *Michael Lacy*, for the respondents.

Patrick McGuinty, for the intervener the Attorney General of New Brunswick.

Amiram Kotler, for the intervener the Attorney General of Manitoba.

Tara Callan, for the intervener the Attorney General of British Columbia.

Michael J. Morris, for the intervener the Attorney General of Saskatchewan.

Christine Rideout, Q.C., for the intervener the Attorney General of Alberta.

Earl A. Cherniak, Q.C., for the intervener Toronto Police Chief James Ramer.

Rachel Huntsman, Q.C., for the intervener the Canadian Association of Chiefs of Police.

Paul J.J. Cavalluzzo, for the interveners the Canadian Association of Crown Counsel and the Ontario Crown Attorneys' Association.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Brown, Rowe, Martin and Kasirer JJ. was delivered by

ABELLA J. —

[1] The issue in this appeal is whether prosecutorial immunity precludes misfeasance claims by police officers against Crown prosecutors for decisions they make in the exercise of their public duties.

Background

[2] Three officers with the Toronto Police Service, Jamie Clark, Donald Belanger and Steven Watts, sued the Attorney General of Ontario for negligence and misfeasance in public office. Their claim is based on the alleged misconduct of Crown prosecutors in the way they dealt with stay applications brought by two accused persons who claimed that the police officers assaulted them during an arrest.

[3] This appeal arises from the Attorney General's motion to strike the claim pursuant to Rule 21 of Ontario's *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. In the proceedings leading up to this appeal, the courts struck the negligence claim but allowed the misfeasance claim to proceed. Only the misfeasance claim is before this Court.

[4] In June 2009, the officers arrested Randy Maharaj and Neil Singh in connection with a complaint of armed robbery and forcible confinement. Both men were charged and committed to stand trial.

[5] Assistant Crown Attorney Sheila Cressman was assigned carriage of the prosecutions. Prior to trial, Mr. Maharaj brought an application to stay the proceedings

against him and to exclude the evidence of a confession he made on the day of the arrest based on his claim that the police beat him during the arrest and caused him a serious rib injury.

[6] Ms. Cressman consulted with a senior Crown attorney, Frank Armstrong, who agreed that Mr. Maharaj's confession would not be admissible. The charges against Mr. Maharaj were stayed.

[7] The jury trial against Mr. Singh proceeded and he was convicted. After his conviction, Mr. Singh filed a stay application alleging that the officers assaulted him and Mr. Maharaj during their arrest. Mr. Maharaj and Mr. Singh both testified on the stay application. Ms. Cressman did not call the officers to give evidence.

[8] Ms. Cressman conceded at the stay hearing that the assaults occurred, but argued that the appropriate remedy for Mr. Singh was a reduced sentence. The judge accepted the evidence that the officers assaulted Mr. Singh and Mr. Maharaj. She did not order a stay, finding that a reduced sentence would be a more appropriate remedy. In her reasons, dated March 28, 2012, she described the assaults in detail and, in her reasons for sentence dated July 27, 2012, she described the officers' conduct as "police brutality" (2012 ONSC 2028; 2012 ONSC 4429). Those findings were reported in the media.

[9] The Special Investigations Unit (SIU) was notified of the officers' conduct, but Mr. Maharaj declined to participate in the SIU investigation. As a result, the SIU

did not continue its proceedings. The Toronto Police Service Professional Standards Unit (PSU) then conducted its own review of the allegations of misconduct against the officers, and concluded in a report issued in October 2012, that “[b]ased on the available evidence and analysis conducted, misconduct on the part of the subject officers cannot be substantiated”.

[10] Mr. Singh appealed the decision not to stay the proceedings. The appeal was heard on October 18, 2013, after the PSU had issued its report. The judges at the hearing asked the Crown on the appeal, Amy Alyea, whether disciplinary action or criminal proceedings were initiated against the officers. The officers claim that she did not inform the court of the exculpatory PSU findings or make a fresh evidence application to put those findings before the court.

[11] The Court of Appeal allowed Mr. Singh’s appeal and entered a stay of proceedings on December 12, 2013 (118 O.R. (3d) 253). In its reasons, the court noted that the Crown did not “contest [the evidence of the assaults] on appeal”, and strongly criticized the officers’ conduct. Its findings were reported in the media.

[12] After the appeal, the SIU reopened its investigation, interviewed Mr. Maharaj and reviewed the records. In May 2014, it concluded that the rib injury post-dated the arrest and that the allegations against the police were not substantiated by the evidence. The Ontario Provincial Police subsequently conducted its own review of the PSU investigation, concluding on April 9, 2015 that the investigation was thorough and that there was no reason to refute its conclusions.

[13] On June 22, 2016, the police officers sued the Attorney General for negligence and misfeasance committed by Ms. Cressman, Mr. Armstrong and Ms. Alyea. They sought general damages in the amount of \$500,000 for negligence and misfeasance, in addition to \$250,000 in aggravated, exemplary and punitive damages for each plaintiff. They claimed to have suffered irreparable harm, including “damage to their reputations and credibility among members of the judiciary, the Attorney General’s office, the criminal defence bar and the public at large”.

[14] The negligence pleading was based on Ms. Cressman, Mr. Armstrong and Ms. Alyea’s breaches of an alleged duty of care owed by Crown prosecutors to investigating police officers with respect to the conduct of a prosecution.

[15] The misfeasance pleading was based on the claim that the prosecutors’ conduct was deliberately unlawful and committed with knowledge that it would result in reputational harm to the officers. Against Ms. Cressman, the pleading stated that her unlawful conduct included her failure to properly ascertain the veracity of the assault allegations, her failure to call the police as witnesses to refute what the officers described as false and defamatory claims, and her ignoring or being wilfully blind to facts that exculpated the officers.

[16] Against Ms. Alyea, it was also claimed that she had acted for the improper purpose of protecting Ms. Cressman in not informing the Court of Appeal of the results of the PSU report, which exculpated the officers. The officers also claim that

Mr. Armstrong acted unlawfully in breach of his duties, but the claim against him is not particularized.

[17] The Attorney General moved to strike the claim for failing to disclose a cause of action, arguing that the negligence and misfeasance claims were barred by prosecutorial immunity.

[18] The motions judge struck the negligence claim but allowed the misfeasance claim to proceed (2017 ONSC 3683). He found that overriding policy concerns precluded the recognition of a duty of care owed by Crown attorneys to investigating police officers. On the other hand, he found that it was not “plain and obvious” that prosecutors were immune to misfeasance claims brought by police officers.

[19] The Attorney General appealed the decision to allow the misfeasance claim to go to trial, and the officers appealed the decision to strike the negligence claim. The Court of Appeal for Ontario dismissed both appeals (2019 ONCA 311, 56 C.C.L.T. (4th) 1).

[20] The Court of Appeal agreed with the motions judge’s decision to strike the negligence claim. It found that “based on Crown immunity principles, no claim lies against the Crown in negligence, whether it be simple or gross negligence”. Citing the Supreme Court’s “steadfast” rejection of negligence-based claims against Crown attorneys even in the context of claims brought by accused persons, it concluded that

there is no reason to privilege claims brought by police officers. But it allowed the misfeasance claim to go to trial, finding that Crown attorneys are not immune from civil liability for misfeasance in public office.

[21] The Attorney General appealed to this Court on the misfeasance issue. The officers did not cross-appeal the striking of the negligence claim.

Analysis

[22] The elements and proper scope of the tort of misfeasance are not disputed in this appeal. A successful misfeasance claim requires the plaintiff to establish that the public official engaged in deliberate and unlawful conduct in his or her capacity as a public official, and that the official was aware that the conduct was unlawful and likely to harm the plaintiff (*Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, at para. 23, per Iacobucci J.).

[23] The unlawful conduct anchoring a misfeasance claim typically falls into one of three categories, namely an act in excess of the public official's powers, an exercise of a power for an improper purpose, or a breach of a statutory duty (*Odhavji*, at para. 24). The minimum requirement of subjective awareness has been described as "subjective recklessness" or "conscious disregard" for the lawfulness of the conduct and the consequences to the plaintiff (*Odhavji*, at paras. 25 and 29; *Powder Mountain Resorts Ltd. v. British Columbia* (2001), 94 B.C.L.R. (3d) 14 (C.A.), at para. 7; *Three*

Rivers District Council v. Bank of England (No. 3) (2000), [2003] 2 A.C. 1 (H.L.), at pp. 194-95, per Lord Steyn).

[24] In this case, the misfeasance claim consists of two key allegations. The first is against Ms. Cressman for failing to take sufficient steps to investigate and rebut the claims of police brutality made by the accused in their stay applications. The officers plead that Ms. Cressman acted in deliberate disregard of her oath of office, incorporated in s. 8 of the *Crown Attorneys Act*, R.S.O. 1990, c. C.49, to act “without favour or affection to any party”. The second is that Ms. Alyea, the Crown in Mr. Singh’s appeal, failed to inform the Court of Appeal of the results of the PSU report, thereby acting for the improper purpose of protecting Ms. Cressman.

[25] This is the first opportunity this Court has had to consider prosecutorial immunity in the context of claims against the Crown brought by police officers for prosecutorial conduct in the course of a criminal proceeding. Until *Nelles v. Ontario*, [1989] 2 S.C.R. 170, it was generally accepted that Crown prosecutors in Canada had absolute immunity from civil liability (see *Miazga v. Kvello Estate*, [2009] 3 S.C.R. 339, at para. 43, per Charron J.; *Proulx v. Quebec (Attorney General)*, [2001] 3 S.C.R. 9, at para. 104, per L’Heureux-Dubé J., dissenting; J. M. Law, “A Tale of Two Immunities: Judicial and Prosecutorial Immunities in Canada” (1990), 28 *Alta. L. Rev.* 468, at p. 505; Lori Sterling and Heather Mackay, “Constitutional Recognition of the Role of the Attorney General in Criminal Prosecutions: *Krieger v. Law Society of Alberta*” (2003), 20 *S.C.L.R.* (2d) 169, at p. 183, fn. 51).

[26] Since *Nelles*, our judgments on prosecutorial liability have been underscored by a careful balancing between the policy consequences of exposing prosecutors to liability, versus the need to safeguard and vindicate the rights of the accused, who is uniquely vulnerable to the misuse of prosecutorial power.

[27] To date, the rights of accused persons to a fair trial have been critical in that balancing. In *Smith v. Ontario (Attorney General)* (2019), 147 O.R. (3d) 305 (C.A.), Tulloch J.A. reviewed our immunity jurisprudence and aptly captured the critical considerations running through the cases — the importance of vindicating the rights of the accused, and the use of high liability thresholds to militate against the policy consequences of liability:

The strong countervailing interest of the importance of providing the subject of a prosecution with an effective remedy led the Supreme Court to establish exceptions to prosecutorial immunity. . . .

However, this powerful countervailing interest did not lead the Supreme Court to accept a negligence-based standard of liability, even for *Charter* breaches. [paras. 97-98]

[28] As Charron J. explained in *Miazga*, immunity advances “the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their *quasi*-judicial role as ‘ministers of justice’” (para. 47). The principles underlying immunity are the prosecutor’s constitutionally protected independence, the related risks to objective decision-making and a concern about diverting prosecutors from their public interest duties.

[29] Independence has been held to be “so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched” (*Miazga*, at para. 46). In *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, Iacobucci and Major JJ. explained:

It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions. . . .

This side of the Attorney General’s independence finds further form in the principle that courts will not interfere with his exercise of executive authority, as reflected in the prosecutorial decision-making process. . . .

. . . The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict. [paras. 30-32]

[30] In *Miazga*, Charron J. observed that “well-established public law principles relating to Crown independence and prosecutorial discretion” cannot be ignored in the context of private law prosecutorial liability (para. 5). The principle of independence is tied to the prosecutor’s obligation to make objective and fair decisions. That is why the jurisprudence has recognized that exposing prosecutors to civil liability may create a “chilling effect”, encouraging decision-making motivated by a desire to ward off the spectre of liability and obfuscating the prosecutor’s core duties to act objectively and independently in the interests of the integrity of the system and the rights of the accused.

[31] As LeBel J. explained in *R. v. Regan*, [2002] 1 S.C.R. 297, at para. 65, the “seminal concept of the Crown as ‘Minister of Justice’” derives from *Boucher v. The Queen*, [1955] S.C.R. 16, in which Rand J. said:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. . . . The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. [pp. 23-24]

[32] This means that the responsibility of the Crown includes the obligation to act objectively, independently and fairly toward the accused. These imperatives are “not confined to the courtroom and attac[h] to the Crown Attorney in all dealings in relation to an accused” more generally (*Regan*, at paras. 155-56, per Binnie J., dissenting). In *R. v. Cawthorne*, [2016] 1 S.C.R. 983, this Court recognized that an accused person has a constitutional right, as a principle of fundamental justice under s. 7 of the *Charter*, to be tried by a prosecutor who acts independently of improper purposes (paras. 23-26, per McLachlin C.J.).

[33] The Attorney General and its agents are also required to act as protectors of the public interest in the discharge of their prosecutorial functions (*Cawthorne*, at para. 27). They act in “the interest of the community to see that justice is properly done” (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616, per L’Heureux-Dubé J.). Their ultimate task “is to see that the public interest is served, in so far as it can be, through the use, or non-use, of the criminal courts” (*Regan*, at para. 159, per Binnie J., dissenting in the

result, quoting *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (1993) (“Martin Report”), at p. 117 (emphasis deleted)).

[34] In *Nelles*, in the course of reviewing the common law authorities in favour of absolute immunity, Lamer J. explained that immunity “encourages public trust in the fairness and impartiality of those who act and exercise discretion in the bringing and conducting of criminal prosecution” and avoids a “chilling effect on the prosecutor’s exercise of discretion” arising from “the threat of personal liability for tortious conduct” (pp. 178-79, see also p. 199; *Henry v. British Columbia (Attorney General)*, [2015] 2 S.C.R. 214, at paras. 71 and 73, per Moldaver J.).

[35] *Nelles* was also the first case from this Court to acknowledge that prosecutorial immunity was not absolute, and could not protect the Crown from claims of malicious prosecution brought by an accused. Lamer J. expanded on the importance of allowing a wrongfully and maliciously accused person to advance a cause of action. Malicious prosecution requires the plaintiff to establish that the prosecutor acted with a demonstrable improper motive or purpose and that reasonable and probable grounds were objectively lacking (pp. 192-93). Absolute immunity would deprive a falsely accused person not only of a private right of action but also of the ability to seek a remedy for unconstitutional deprivations of liberty and security of the person (pp. 195-96). It would be a “threat to the individual rights of citizens who have been wrongly and maliciously prosecuted” (p. 199). Moreover, public confidence in the

administration of justice would suffer if “the person who is in a position of knowledge in respect of the constitutional and legal impact of his conduct is shielded from civil liability when he abuses the process through a malicious prosecution” (p. 195).

[36] This Court’s subsequent decisions on malicious prosecution in *Proulx* and *Miazga* affirmed the policy considerations at play in *Nelles*. In *Proulx*, Iacobucci and Binnie JJ. stressed that:

Under our criminal justice system, prosecutors are vested with extensive discretion and decision-making authority to carry out their functions. Given the importance of this role to the administration of justice, courts should be very slow indeed to second-guess a prosecutor’s judgment calls when assessing Crown liability for prosecutorial misconduct. *Nelles* affirmed unequivocally the public interest in setting the threshold for such liability very high, so as to deter all but the most serious claims against the prosecuting authorities, and to ensure that Crown liability is engaged in only the most exceptional circumstances. Against these vital considerations is the principle that the Ministry of the Attorney General and its prosecutors are not above the law and must be held accountable. Individuals caught up in the justice system must be protected from abuses of power. In part, this accountability is achieved through the availability of a civil action for malicious prosecution. [citation omitted; para. 4]

[37] Charron J., in *Miazga*, confirmed that the test for malicious prosecution strikes a “careful balancing” between the “right of individual citizens to be free from groundless criminal prosecutions and the public interest in the effective and uninhibited prosecution of criminal wrongdoing” (para. 52). She also emphasized the importance of proving a demonstrable improper purpose or motive, which cannot be inferred from an absence of reasonable and probable grounds alone. The plaintiff must demonstrate “that the prosecutor deliberately intended to subvert or abuse the office of the Attorney

General or the process of criminal justice” (para. 89). Finally, Charron J. confirmed that the inquiry into reasonable and probable grounds is purely objective. If “objective reasonable grounds did in fact exist at the relevant time, it cannot be said that the criminal process was wrongfully invoked”, regardless of the prosecutor’s subjective belief (para. 73). This serves as a basis on which meritless claims can be struck before trial (*Miazga*, at para. 74; *Nelles*, at p. 197).

[38] This Court’s most recent opportunity to consider the limits of prosecutorial immunity arose in *Henry*, where it affirmed that immunity could not protect a prosecutor from claims of wrongful non-disclosure by an accused. Ivan Henry had been convicted of sexual offences and imprisoned for nearly 27 years before the British Columbia Court of Appeal quashed his convictions and acquitted him of all charges. He brought a civil suit against the Attorney General for *Charter* damages arising from the Crown prosecutor’s failure to disclose exculpatory evidence. The importance of displacing immunity to allow for an accused to vindicate his *Charter* rights was uncontested, and the question turned exclusively on the threshold to be applied. Moldaver J. held that liability will be triggered when 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. [para. 31]

As in claims of malicious prosecution, the rights of the accused were central.

[39] As this brief history of this Court’s evolutionary approach to prosecutorial immunity demonstrates, the overriding and compelling justification for restricting immunity is based on fairness to the accused, leading to a greater willingness on the part of courts to scrutinize prosecutorial decisions affecting the rights of the accused (The Honourable Marc Rosenberg, “The Attorney General and the Administration of Criminal Justice” (2009), 34 *Queen’s L.J.* 813; see also Michael Code, “Judicial Review of Prosecutorial Decisions: A Short History of Costs and Benefits, in Response to Justice Rosenberg” (2009), 34 *Queen’s L.J.* 863).

[40] The question before us, then, in light of the accused-centered policy thread woven through the authorities, is whether we should further encroach on prosecutorial immunity to allow police officers to sue the Crown in misfeasance for decisions prosecutors make in the course of criminal proceedings. In my view, allowing police officers to initiate such causes of action would raise profound risks to the rights of the accused and to prosecutorial independence and objectivity, and it would undermine the integrity of the criminal justice system.

[41] One of the critical dimensions of a prosecutor’s independence that is protected by immunity is, in fact, independence from the police. The police role is to investigate crime. The Crown prosecutor’s role, on the other hand, is to assess whether a prosecution is in the public interest and, if so, to carry out that prosecution in accordance with the prosecutor’s duties to the administration of justice and the accused. Police and Crown prosecutors are expected to “act according to their distinct roles in

the process, investigating allegations of criminal behaviour, and assessing the public interest in prosecuting, respectively” (*Regan*, at para. 87; see also *Smith*, at para. 72).

[42] In *Regan*, this Court emphasized the importance to the administration of justice of prosecutorial independence *from* the police. The issue in *Regan* concerned prosecutorial involvement in the pre-charge stage of an investigation. Ultimately, LeBel J. held for the majority that Crown involvement in pre-charge interviews did not constitute a *per se* abuse of process. He observed, however, that the “need for a separation between police and Crown functions has been reiterated in reports inquiring into miscarriages of justice which have sent innocent men to jail” (para. 66).

[43] Most pertinently, he concluded that “Crown objectivity and the separation of Crown from police functions are elements of the judicial process which must be safeguarded” (para. 70). This sentiment was echoed by Binnie J., when he said:

. . . Crown prosecutors must retain objectivity in their review of charges laid by the police, or their pre-charge involvement, and retain both the substance and appearance of even-handed independence from the police investigative role. This is the Crown Attorney’s “Minister of Justice” function and its high standards are amply supported in the cases. . . . [para. 137, dissenting on other grounds]

[44] The importance of prosecutorial objectivity in the review of charges laid by the police is driven by the fact that “prosecutors provide the initial checks and balances to the power of the police”. They act as a “buffer between the police and the citizen” in deciding how to proceed once a charge has been laid (paras. 159-60, per

Binnie J.). Independent prosecutorial review of the police's investigative process and decisions helps "ensure that both investigations and prosecutions are conducted more thoroughly, and thus more fairly" (para. 160, per Binnie J., quoting the Martin Report, at p. 39).

[45] In *R. v. Beaudry*, [2007] 1 S.C.R. 190, the Court made it clear that prosecutorial independence from police is not a one way street. The police "have a particular role to play in the criminal justice system . . . and it is important that they remain independent of the executive branch". Accordingly, the relationship between prosecutors and the police is not a "hierarchical" one. In discharging their respective duties, both the police and the prosecutor have a "discretion that must be exercised independently of any outside influence" (para. 48). Cooperation is encouraged, but independence is mandatory.

[46] In *Smith*, Tulloch J.A. characterized the relationship between the prosecutor and the police as one of "mutual independence", which "provides a safeguard against the misuse of both investigative and prosecutorial powers and can ensure that both investigations and prosecutions are conducted more thoroughly and fairly" (para. 86, citing the Martin Report, at p. 39).

[47] Making prosecutors liable to police officers for misfeasance is fundamentally incompatible with this "mutually independent" relationship. Prosecutors do not owe specific legal duties to the police with respect to how they carry out a prosecution. To use misfeasance to get around this reality would be to permit a police

officer to take a prosecutor to court to challenge the prosecutor's compliance with his or her *public* duties (*Odhavji*, at para. 29). Such a relationship of legal accountability between the prosecutor and the police is irreconcilable with their critically "separate and distinct" roles (*Smith*, at para. 65).

[48] The problem is not merely theoretical. As previously noted, the courts' increased willingness to take a more active role in scrutinizing decisions of the Attorney General and its agents, including through the exceptions to prosecutorial immunity, has been driven by the realization that failing to provide appropriate checks and balances on Crown conduct, including the relationship with the police, can lead to gross injustices, including wrongful convictions.

[49] We have seen deplorable examples of injustice when the roles are integrated. The Report of the Royal Commission on the Donald Marshall Jr. Prosecution concluded that a distinct boundary between the function of the police and the Crown is essential to the proper administration of justice (*Regan*, at para. 66, citing *Royal Commission on the Donald Marshall, Jr., Prosecution*, vol. 1, *Findings and Recommendations* (1989), at p. 232). And in the 1998 Report of the Commission on Proceedings Involving Guy Paul Morin, the Commissioner concluded that the Crown's failure to maintain objectivity throughout the process, which contributed to Morin's wrongful conviction, was caused in part by too close contact with the police:

The prosecutors showed little or no introspection about these contaminating influences upon witnesses for two reasons: one, the evidence favoured the prosecution; this coloured their objectivity; two,

their relationship with the police which, at times, blinded them, and prevented them from objectively and accurately assessing the reliability of the police officers who testified for the prosecution.

(The Commission on Proceedings Involving Guy Paul Morin: Report (1998), vol. 2, at p. 911, cited in Regan, at para. 69.)

[50] This reality was reinforced by the Court of Appeal in this case in its duty of care analysis rejecting the officers' negligence claim. The court recognized that imposing a duty of care on Crown prosecutors toward investigating police officers could interfere with the prosecutors' ability to act independently of police interests. It would "encourage Crown attorneys to focus on extraneous factors during the course of a prosecution" and "have a deleterious effect on the administration of justice by undermining the public's faith in the integrity of independent Crown decision-making" (paras. 87-88).

[51] It would "tend to distort principled decision-making", which the court explained as follows:

The decision of Crown attorneys to initiate, continue, or terminate a prosecution should be based on whether there is a reasonable prospect of conviction and whether the prosecution is in the public interest. The possibility of civil claims by the police would distort these venerable twin duties. It would have a deleterious effect on the administration of justice by undermining the public's faith in the integrity of independent Crown decision-making. Moreover, exposing Crown attorneys to negligence claims by the police may result in prolonged court proceedings in which Crown attorneys make untenable prosecutorial decisions on *Charter* motions for fear of being sued. It would encourage the litigation of collateral issues, which does not sit well with the realities of finite criminal justice resources and the pressures of firm constitutional time constraints. [citation omitted; para. 88]

[52] The motions judge similarly recognized the risks to the prosecutors' integrity and independence if they were exposed to negligence claims from police officers:

An expansion of the responsibilities of Crown Attorneys to include such a duty could result in cases proceeding to trial merely to resolve the concerns of the police. It would alter what should be a co-operative relationship between the police and Crown Attorneys into a potentially adversarial one, in which police would become not just investigators and witnesses, but also litigants with a stake in the outcome, as well as potential claimants against the Crown Attorneys. The potential for conflict and disruption to the relationship is apparent. [para. 135]

[53] These policy concerns are no less critical when considering whether prosecutorial immunity should yield to misfeasance claims against a prosecutor by investigating police officers. Being at risk of civil liability for reputational harm to police officers means considering irrelevant considerations and risking independence and objectivity, the core of the prosecutor's role. Police suing prosecutors for decisions they make in the course of a criminal prosecution is a recipe for putting prosecutors in conflict with their duty to protect the integrity of the process and the rights of the accused.

[54] In this case, for example, after consulting with a senior Crown attorney, the trial Crown exercised her professional judgment not to call any evidence on the hearing of Mr. Singh's stay application, and to concede the assault allegations made by Mr. Maharaj. Requiring her to take into account the concerns of the police officers would have improperly incorporated policing objectives into her decision making,

changing the dynamic and focus of the prosecution. The accused's constitutionally protected rights and the public interest in the efficient administration of justice could potentially be made to defer to prosecutorial anxiety over whether police interests have been sufficiently taken into account.

[55] With respect to the appeal Crown, the main concern of the officers was that she wrongfully “suppressed” the PSU report from the Court of Appeal in order to protect Ms. Cressman. The transcript of the appeal hearing, however, reveals no suppression. In response to a question from the bench, Ms. Alyea did tell the court that a review was conducted by the Toronto Police Services and that she was not aware of any resulting disciplinary action against the police officers. She offered to provide the court with a copy of the report, but the court did not feel that it was necessary to do so. It is hard to see how this could be characterized as wrongdoing, or even an error in professional judgment.

[56] Beyond the risk of actual conflict between the prosecutors' core duties and their risk of liability to the police, the appearance of such a conflict would be equally damaging to the integrity of the administration of justice. As the joint interveners the Canadian Association of Crown Counsel and the Ontario Crown Attorneys' Association put it, permitting police lawsuits against Crown prosecutors would suggest to the public and to accused persons that police were “policing prosecutions” through the use of private law, imperiling public confidence in the independent and objective ability of prosecutors to conduct fair trials.

[57] This stands in stark contrast to the public interest in making prosecutors accountable for malicious prosecution, such as in *Nelles*, where Lamer J. recognized that public confidence in the system would be damaged if a prosecutor, “in a position of knowledge in respect of the constitutional and legal impact of his conduct”, were shielded from liability *to the accused* when he “abuses the process through a malicious prosecution” (p. 195). Here, the public interest argues against, not in favour of piercing prosecutorial immunity.

[58] Claims brought by the police against prosecutors risk not only the independence and objectivity of the prosecutor, but the accused person’s fair trial rights. Those obligations to the accused are jeopardized by accountability to the police whose interests are adverse to those of the accused. As Moldaver J. noted in *Henry*:

The public interest is undermined when prosecutorial decision-making is influenced by considerations extraneous to the Crown’s role as a quasi-judicial officer. [para. 73]

[59] The police certainly have a legitimate expectation and interest in their reputations not being unfairly impaired. But the solution cannot be to make prosecutors accountable to them in a way that obliterates the independence between the police and prosecutors and is inconsistent with the Crown’s core public duties to the administration of justice and to the accused.

[60] The same holds true for third parties in general. Liability to third parties can be expected to raise the “chilling” concerns for prosecutors and distracting them

from their public duty to promote the administration of justice. On the other hand, as previously noted, our immunity cases have recognized the particular need for remedies to protect accused persons, a concern that is lessened for third parties. In almost all cases of third-party claimants, the balance of these factors will tilt toward immunity.

[61] Piercing the immunity of Crown prosecutors to make them accountable to police officers puts them in perpetual potential conflict with their transcendent public duties of objectivity, independence and integrity in pursuit of ensuring a fair trial for the accused and maintaining public confidence in the administration of justice. Since prosecutorial immunity is preserved in these circumstances, it is “plain and obvious” that the officers’ misfeasance claim would not succeed.

[62] I would allow the appeal and grant the Attorney General’s motion to strike the officers’ claim, with costs.

The following are the reasons delivered by

CÔTÉ J. —

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I. <u>Overview</u>	

[63] The rule of law requires equality before the law. In the seminal case of *Roncarelli v. Duplessis*, [1959] S.C.R. 121, our Court enforced this principle against the head of a provincial government — a premier. The Court held him liable for damages, his conduct having been characterized as malicious by Justice Rand in his leading opinion in that case (p. 141). *Roncarelli* is emblematic of a conception of the rule of law that is incompatible with absolute immunities. As this conception of the rule of law took hold in the second half of the 20th century, judges and legislators began to view absolute immunities with suspicion and to gradually erode them. Prosecutorial immunity is one example of this. So far, this Court has recognized two exceptions to

prosecutorial immunity in favour of accused persons: the torts of malicious prosecution and wrongful non-disclosure. Yet to this day, prosecutors still have absolute immunity from claims brought by third parties to criminal proceedings.

[64] The respondent police officers submit that this immunity does not apply to their claims for misfeasance in public office and that their claims should be allowed to go forward. They allege that they have suffered harm to their careers, reputations and mental health as a result of prosecutorial misconduct, which led to judicial findings of police brutality and torture being made against them. Their case cries out for a remedy. After having a hand in this wreck, the judiciary cannot stand idly by and tell the respondents to seek vindication elsewhere. To do so would bring the administration of justice into disrepute.

[65] Like the courts below, I am of the view that prosecutorial immunity does not apply in this case. Policy considerations such as the tactical nature of the decisions involved, the significance of the interests at stake, the lack of meaningful alternative remedies and accountability mechanisms, and public confidence in the office of prosecutor and in the police all weigh in favour of piercing the immunity, although in a limited way. Most importantly, police officers who, like the respondents, face findings of police brutality or torture as third parties to a criminal proceeding, are in a position similar to that of accused persons. Although not formally charged, such police officers are, in essence, convicted of serious criminal offences without having had their day in court. Such serious findings may thus have a deleterious effect on their right to

liberty and security, their right to dignity and a good reputation, and their mental health — just like criminal charges may have on an accused person.

[66] Thus, prosecutorial immunity does not apply to claims for misfeasance in public office brought by police officers who suffered harm as a result of deliberate and unlawful conduct by prosecutors in connection with serious criminal allegations of police misconduct. The liability threshold for misfeasance in public office is high enough to avoid a chilling effect on the exercise of prosecutorial discretion. It is also high enough to avoid diverting prosecutors away from their public duties so that they can respond to lawsuits concerning their exercise of discretion. However, in accordance with the cautionary note sounded by Moldaver J. in *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214, at para. 33, that “the prudent course of action is to address new situations in future cases as they arise”, these reasons should not be read as displacing the immunity whenever a litigant brings a claim for misfeasance in public office. Not all victims of prosecutorial misconduct are in a position equivalent to that of an accused person, as the respondent police officers are.

[67] For the following reasons, I would dismiss the appeal. Prosecutorial immunity does not apply to the police officers’ claim for misfeasance in public office, and the officers plead all the essential elements of the tort in their statement of claim.

II. Context

[68] This appeal concerns a motion to strike filed by the Crown. The test on a motion to strike is well established (*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980). This Court must assume that the facts alleged by the respondent police officers in their statement of claim are true. Our task is to determine whether, on that basis, it is plain and obvious that the statement of claim discloses no reasonable cause of action and should be struck out as a result. Neither the unique nature of the facts underlying the respondents' action nor the strength of the Crown's defence is sufficient reason for refusing to allow their claims to move forward (*Hunt*, at p. 980). Their claim can be struck out only if it is certain to fail.

[69] Given that the allegations made by the police officers must be taken to be true, some of the following facts are based on their statement of claim. Those allegations will have to be proved at trial if the officers are to succeed. Some other facts have already been established in previous criminal proceedings.

[70] Randy Maharaj ("Maharaj") and Neil Singh ("Singh") were charged with having committed very serious crimes, i.e., armed robbery and forcible confinement, at a company called Crane Supply on February 9, 2009.

[71] Singh held a position of trust at Crane Supply. He was an employee of the company and had a close relationship with his supervisor, Mohammed Sheikh.

[72] On the night of the robbery, Mr. Sheikh was the night supervisor at Crane Supply. Singh was working in the yard that night. He punched out at 10:22 p.m. and

left the premises. Singh knew that his supervisor was working alone late that night, and he deliberately took advantage of the vulnerable position his supervisor was in. Minutes later, Singh came back to the yard with his accomplice — not to work, but to rob his employer at gunpoint. He had in his line of sight a shipment of copper pipes valued at almost \$350,000.

[73] While doing paperwork in his office, Mr. Sheikh heard a loud bang and his office door was kicked open hard. A masked man pointed a black handgun at him and ordered him to get on his knees. Mr. Sheikh's hands and legs were then zip-tied, and his eyes were covered with duct tape. This man, who suffered from a heart condition, was left bound and blindfolded on the floor of his office.

[74] Meanwhile, the robbers searched his office and loaded the shipment of copper pipes worth almost \$350,000 onto a large truck. This was a sophisticated robbery. The robbers needed to know how to operate the forklift which had a special attachment designed for Crane Supply and how to mobilize a truck large enough to transport the copper pipes. They also had to know the warehouse security system inside out and the whereabouts of the employees working that night.

[75] After the robbers left, Mr. Sheikh managed to untie himself and call the police. These events had a profound impact on Mr. Sheikh. Because of the trauma he suffered, he was unable to remain in his supervisory position and was transferred to a position in the warehouse.

[76] In June 2009, the respondent police officers — Sergeant Jamie Clark, Detective Sergeant Donald Belanger and Detective Sergeant Steven Watts — arrested Maharaj and Singh for armed robbery and forcible confinement. At the time of the arrest, they were members of the Hold Up Squad of the Toronto Police Service. They are experienced police officers with over 70 cumulative years of experience, and they have held various positions in other specialized units.

[77] The police officers found evidence that Singh and Maharaj had been in close communication on the night of the robbery. Maharaj had texted the words “Zip ties” to Singh 15 minutes before Mr. Sheikh called the police, and Maharaj had been in the vicinity of the Crane Supply yard on that particular night. Singh provided an exculpatory video statement that has been shown to be false; Maharaj provided a video statement inculpatory of himself and Singh. The falsity of Singh’s exculpatory statement has been demonstrated. Singh was convicted, and the application judge analyzed the reduction in sentence on the basis of Singh’s false exculpatory statement.

[78] Following their arrest, Maharaj and Singh were remanded in custody. During their bail hearing, counsel for Maharaj asked the court to put on the record the injuries his client had allegedly suffered during the arrest. He indicated to the court that Maharaj had “visible bumps and scratches” under his ear. However, according to the police officers, no suggestion was made that Maharaj had suffered any serious *rib injury* as a result of an assault committed by them *during his interrogation*.

[79] After the bail hearing, Maharaj was detained at the Maplehurst Detention Centre. While at Maplehurst, Maharaj never complained of any rib injury. The officers submit that only *bruises to his upper arm* were noted in his medical records at Maplehurst. The medical practitioners at Maplehurst are adamant that if Maharaj had complained about a rib injury, they would have recorded it in the context of their routine medical examination of any new inmate.

[80] Between July and November 2010, the two accused had their preliminary inquiry. The Crown Attorney at the preliminary inquiry called the three police officers as witnesses. According to the police officers, counsel for Maharaj questioned them about their potential involvement in an assault on his client *during the arrest*, but he did not otherwise challenge the voluntariness of his client's inculpatory video statement. The officers state that, under oath, they vehemently denied the allegations. Maharaj and Singh were committed to stand trial. Crown Attorney Sheila Cressman ("Trial Crown") was assigned the carriage of the prosecution.

[81] In advance of the trial, Maharaj's counsel brought an application to stay the proceedings against his client and to exclude his client's confession. Maharaj accused the police officers of having committed a criminal offence by brutally assaulting him to extract an inculpatory statement. The police officers contend that Maharaj's allegations were false. More specifically, Maharaj alleged that, during the interrogation, Sgt. Clark "grabbed him out of his chair and dragged him to an intermediary room and threw him on the ground" (*R. v. Singh*, 2012 ONSC 2028

(“decision on Singh’s stay application”), at para. 32 (CanLII)). Then, Sgt. Clark allegedly “came down on top of him and pinned him down on the ground and began punching him in the ribs for what Maharaj said felt like a lifetime” (para. 32). To add to the brutality, Det. Sgt. Watts supposedly tried to step on Maharaj’s testicles while he was on the ground being punched by Sgt. Clark. Maharaj claimed that he had provided an inculpatory statement to make the assault stop.

[82] To support Maharaj’s version of the events, his counsel provided the Trial Crown with his medical record from Maplehurst documenting bruises to his upper arm, an X-ray showing an acute fracture of his ribs, and the bail hearing transcript. The police officers argue that this was the first time — on the eve of the trial and more than two years after the events — that Maharaj alleged that he had suffered a serious *rib injury* as the result of an assault by the officers *during his interrogation*. At the bail hearing and the preliminary inquiry, Maharaj had previously alleged only that he had suffered *bumps and scratches during the arrest*.

[83] The officers add that the Trial Crown then consulted Dr. Moss, who had viewed the X-ray. Dr. Moss confirmed the existence of a rib fracture but told the Trial Crown, in no uncertain terms, that a patient with such a rib fracture would experience excruciating pain if he or she made any movements with the upper body or arms. Allegedly, Dr. Moss opined that it was *possible* that the injuries could have occurred on the day of the arrest, but the Trial Crown did not ask him any further questions to determine if the injury could have occurred at another time. The Trial Crown also

apparently did not ask him to review Maharaj's videotaped statement from the day of the arrest, which clearly showed that Maharaj had no difficulty lifting his arms and moving his upper body.

[84] The Trial Crown consulted with a senior Crown Attorney, Frank Armstrong ("Senior Crown"). They agreed that Maharaj's inculpatory statement would be inadmissible because the Crown would be unable to prove beyond a reasonable doubt that it was voluntary in view of the assault allegations. Accordingly, the Senior Crown stayed the charges against Maharaj. However, no stay of proceedings was entered in respect of Singh. The latter was subsequently found guilty at trial.

[85] Following the stay of the proceedings against Maharaj, Singh filed an application under the *Canadian Charter of Rights and Freedoms* seeking a stay of his conviction, as well. Had Singh not sought a stay, he would be facing a mandatory minimum five-year sentence for the armed robbery of which he had been convicted. The respondent police officers maintain that the allegations of police brutality made by Singh in support of his *Charter* application were false, as were those made by Maharaj. In his affidavit and testimony, Singh alleged that he, too, had been a victim of police brutality. He claimed that Sgt. Clark had assaulted him three times in the presence of Det. Sgt. Watts during his interrogation. Singh alleged that Sgt. Clark had struck him behind his head, put a knee into his ribs, strangled him, slammed his head against the wall and hit his back with a closed fist. Singh added that the assaults had left him breathless, on the verge of a blackout and with the inside of his lower lip bleeding. The

attack was allegedly so brutal that Singh implored Sgt. Clark to “[j]ust kill me man” (decision on Singh’s stay application, at para. 23; *R. v. Singh*, 2012 ONSC 4429 (“Singh’s sentencing decision”), at para. 61 (CanLII)). Nevertheless, Singh supposedly exhibited strength and resilience and refused to provide the inculpatory statement the police officers were trying to extract from him.

[86] Before Singh’s *Charter* application was heard, the Trial Crown had allegedly assured Det. Sgt. Watts that all three officers would be called as witnesses to deny the allegations, as they had had the opportunity to do at the preliminary inquiry. However, at the last minute, the Trial Crown decided not to adduce any evidence to contradict Maharaj’s and Singh’s testimony, despite the seriousness of the criminal allegations made against the police officers. Det. Sgt. Watts says that he urged her to change her position but she would not budge. She ignored the officers’ concerns about how it would adversely affect them and airily conceded the existence of the assaults and the *Charter* breach. The Trial Crown thus limited herself to cross-examining Maharaj and Singh and arguing in favour of a reduction in Singh’s sentence as the appropriate *Charter* remedy, instead of a stay.

[87] During the hearing of the *Charter* application, Thorburn J. expressed her surprise and discomfort at the absence of the police officers as witnesses. The Trial Crown was quite dismissive when asked what motivated her decision not to call them:

THE COURT: What do I do with the fact that none of these officers testified?

...

... I have Mr. Singh's ... testimony, and maybe I believe him and maybe I don't, but ... if there were some officers who said, "Well, we know nothing, I'm sorry, I tapped him on the shoulder, I should never have tapped him on the shoulder, and gosh, darn, look at this, this is terrible," nobody showed up.

[THE TRIAL CROWN]: Well, the Crown didn't call anyone.

THE COURT: Well, yes.

[THE TRIAL CROWN]: And what that means is that the evidence is uncontradicted other than Your Honour of course in accepting that evidence is required to look at internal and external consistencies. So, that's what I'm going to be focusing on. [Emphasis added.]

(A.R., vol. III, at p. 342)

[88] Earlier, Thorburn J. had specifically asked the Trial Crown whether "there [was] any sort of suggestion that [the injuries] may have come about in some other way" than at the hands of the police (A.R., vol. III, at p. 297). She responded straightforwardly: "There is no evidence that it occurred in any other way" (p. 297 (emphasis added)). Further, she confirmed that the assault had primarily been Sgt. Clark's doing.

[89] Ultimately, Thorburn J. had no choice but to conclude that the police officers had indeed assaulted Maharaj and Singh, given the Crown's decision to adduce no contradictory evidence and to concede the allegations. However, she refused to order a stay of the proceedings against Singh and preferred instead to reduce his sentence by one year as a remedy for the "police brutality" he had suffered (decision on Singh's stay application, at para. 49).

[90] Thorburn J. characterized the police officers' behaviour as "thoroughly reprehensible" and as "police brutality" (decision on Singh's stay application, at paras. 49-50). She also vigorously condemned that behaviour:

This significant reduction in sentence is necessary to reflect my very deep concern and condemnation of those who, being selected to uphold the law and preserve justice, assault those entrusted to their care and control. This reduction in Singh's sentence does not and should not serve as a substitute for further investigation into and punishment of those involved in this reprehensible conduct. [Emphasis added.]

(Singh's sentencing decision, at para. 64)

[91] The police officers submit that those findings had a dramatic impact on them. In her reasons, Thorburn J. urged the Crown, on two separate occasions, to ensure that there would be a thorough investigation into the police brutality (decision on Singh's stay application, at para. 52; Singh's sentencing decision, at para. 64). This triggered additional inquiries by the Special Investigations Unit ("SIU") and the internal Toronto Police Service Professional Standards Unit ("TPSPS Unit"). Thorburn J.'s findings of assault were also widely reported in the media, which allegedly caused serious harm to the police officers' reputations and mental health.

[92] The SIU did not complete its investigation of the alleged assaults. Since Maharaj refused to cooperate, the SIU withdrew its mandate and terminated its investigation without reaching a definitive conclusion. However, the TPSPS Unit continued its investigation despite the refusal of Maharaj and Singh to cooperate.

[93] After Thorburn J. released her sentencing decision, internal investigators for the TPSPS Unit provided Dr. Moss with a copy of Maharaj’s videotaped statement showing him raising and moving his arms. This being inconsistent with an acute rib injury, Dr. Moss opined that the injury must have been suffered *before* the day of the arrest and had already healed in the meantime. In light of that revelation and following a thorough investigation of the evidence available, the TPSPS Unit concluded that the allegations “cannot be substantiated” (A.R., vol. III, at p. 421).

[94] The Trial Crown’s decision to concede the allegations of assault is particularly striking. From the transcripts, it is quite obvious that neither Thorburn J. nor the Trial Crown found Singh or Maharaj to be credible witnesses. Moreover, the police officers emphasize that there was little other convincing evidence supporting their testimony.

[95] Indeed, the Trial Crown said that she had “some serious reservations” about Singh’s “credibility in terms of the extent of the assault” (A.R., vol. III, at p. 299). She suggested that Singh was “embellish[ing] things” and “seriously exaggerating” (pp. 350 and 353). In the same vein, Thorburn J. was quick to underline that Maharaj was not a credible witness because his testimony was tainted by lies and evasiveness:

THE COURT: What do I do about Mr. Maharaj and some of the evidence that he gave that was really not very credible. I mean, he’s admitted that he lied before.

. . . He was either lying today or he was lying before, because what he said was different than what he said in the prior occasion . . .

. . .

. . . And then his comment about “Oh, I have no idea about zip ties. It depends on what happened before.”

. . .

. . . Well, there was no message before. So what I am suppose[d] to take from that? “Oh, well, just, you know, I always send messages saying zip ties,” come on, I mean . . .

. . .

. . . So how credible? What do I do with the fact that he’s not the most credible witness? [Emphasis added.]

(A.R., vol. III, at p. 318)

[96] Some other aspects of their testimony were also hardly believable, if not grotesque. For example, shortly after he was arrested, Singh told Det. Sgt. Watts that he did not know Maharaj, but he later testified, in support of his *Charter* application, that he knew him and socialized regularly with him while having drinks. He claimed not to have lied to the police. He said that Det. Sgt. Watts’ “question was asked in the context of whether he knew another Crane Supply employee, so he replied that he did not know Maharaj as there was no employee named Maharaj” (decision on Singh’s stay application, at para. 17).

[97] As demonstrated above, Singh is a person who did not hesitate to abuse the trust placed in him by his former employer for his own benefit, so his testimony had to be analyzed very carefully as well as his motives for bringing his *Charter* application.

Allegations of assault, if believed, would enable him to avoid going to prison for a minimum of five years. Conceding the allegations, as the Trial Crown did, can certainly be alleged by a plaintiff as evidence of deliberate and unlawful conduct, including an utter lack of the rigour and critical thinking expected from prosecutors and a breach of their duty to act without favour or affection to any party pursuant to s. 6(5) of the *Crown Attorneys Act*, R.S.O. 1990, c. C.49.

[98] In addition to the issue of credibility, the police officers argue that the evidence in the Trial Crown's hands clearly showed that the allegations of assault made by Maharaj and Singh were false.

[99] With respect to Maharaj, the bail hearing transcript and the medical records from Maplehurst made no mention whatsoever of a rib injury. In light of the opinion expressed by Dr. Moss, it could certainly be alleged that it was clear from the videotaped statement that the rib injury had occurred *before* the day of the arrest. The fact that Maharaj did not allege that he had suffered a *rib injury during his interrogation* until one week before trial also cast doubt on his version of the events.

[100] As for Singh, the videotaped statement he gave to the police revealed no "bruising, swelling or other apparent injuries" (decision on Singh's stay application, at para. 27; Singh's sentencing decision, at para. 62). Moreover, while in custody awaiting his bail hearing, Singh never complained about the "assaults", nor did he seek any medical treatment. It was not until one month after the alleged events and 10 days after his release from custody that he visited his doctor for a supposed sore throat.

[101] In spite of all this, Singh appealed his conviction and sentence. Crown Attorney Amy Alyea (“Appeal Crown”) was designated to argue the appeal for the Crown.

[102] The police officers allege that, by the time Singh’s appeal was heard, the Crown Law Office was well aware of their position that the allegations of assault were fabricated and had been mishandled by the Trial Crown. Det. Sgt. Watts says that, prior to the hearing, he met with the Appeal Crown to explain the situation. Nonetheless, the Appeal Crown made no attempts to investigate further and to rectify the findings of assault before the Court of Appeal.

[103] During the hearing of Singh’s appeal, the Court of Appeal asked the Appeal Crown questions about what had occurred. According to the police officers, the Appeal Crown did not inform the court about the Trial Crown’s mishandling of the prosecution, the exculpatory findings contained in the TPSPS Unit’s report, and the likelihood that the allegations were fabricated. The officers allege that the Appeal Crown instead suppressed the evidence in a deliberate attempt to protect her colleagues. As such, they argue that she disregarded the duties attached to the public office she held and acted on the basis of an improper purpose.

[104] My colleague Justice Abella concludes that the “transcript of the appeal hearing, however, reveals no suppression”, and she adds:

In response to a question from the bench, Ms. Alyea did tell the court that a review was conducted by the Toronto Police Services and that she was not aware of any resulting disciplinary action against the police officers. She offered to provide the court with a copy of the report, but the court did not feel that it was necessary to do so. It is hard to see how this could be characterized as wrongdoing, or even an error in professional judgment. [para. 55]

With respect, this is not how I read the transcript. Although the Appeal Crown offered to provide a copy of the report, one may conclude that the way she presented it distorted its content. She correctly stated that no criminal or disciplinary charges had flowed from that report (see A.R., vol. III, at pp. 428, 450-51 and 489-90). However, she did not provide the following nuance: no action had been taken against the police officers as a result of the report, not because the Toronto Police Service had refused to punish their misconduct, but rather because the TPSPS Unit had concluded that the allegations of assault could not be substantiated. The Appeal Crown did not specify why no action had been taken. In other words, one may certainly conclude that this supports the officers' claim that the Appeal Crown suppressed the exculpatory nature of the TPSPS Unit's report. Because the Court of Appeal was deprived of the knowledge of this important distinction, it is not plain and obvious that it was not misled into thinking that the Toronto Police Service had sat idly by and remained silent in the face of police brutality:

Nor does it appear that these officers have been called to account in any meaningful way, although the trial judge made it plain that, in her view, they should be. We were told that an internal investigation was undertaken by the police but that it ceased when the victims, not surprisingly, were unwilling to cooperate. Crown counsel was not able to advise of any

charges, disciplinary measures or other consequences flowing from the investigation.

Yet the police had provided no response to the testimony of the appellant and Maharaj on the stay hearing. Indeed, they have not done so to this day. The absence of any meaningful disciplinary measures is telling, in my view, because the inability or refusal of the police to muster a pointed response in the face of such unchallenged allegations of serious criminal conduct by state actors during a criminal investigation makes the case for a stay under the residual category all the more compelling. [Emphasis added.]

(*R. v. Singh*, 2013 ONCA 750, 118 O.R. (3d) 253 (“Singh’s sentencing appeal”), at paras. 45-46)

[105] The Court of Appeal allowed the appeal and stayed Singh’s convictions. In its reasons, the court made some comments about the “misconduct” of the police officers that are even harsher than those made by Thorburn J. It wrote:

What occurred here was not a momentary overreaction by a police officer caught up in the moment of a difficult interrogation. What occurred here was the administration of a calculated, prolonged and skillfully choreographed investigative technique developed by these officers to secure evidence. This technique involved the deliberate and repeated use of intimidation, threats and violence, coupled with what can only be described as a systematic breach of the constitutional rights of detained persons — including the denial of their rights to counsel. [Indeed, the conduct in this case might well be characterized as “torture” as that term is defined in s. 269.1(2) of the *Criminal Code*, R.S.C. 1985, c. C-46.] It would be naïve to suppose that this type of egregious conduct, on the part of these officers, would be confined to an isolated incident.

The courts must not condone such an approach to interrogation. Real life in the police services is not a television drama. What took place here sullies the reputations of the many good officers in our country, whose work is integral to the safety and security of our society. [Emphasis added; paras. 43-44.]

[106] Here again, these unfounded findings of torture and police brutality were widely reported in the media. They also triggered additional investigations. The SIU reopened its investigation and the Ontario Provincial Police undertook an administrative review. However, like the TPSPS Unit, both concluded that the allegations of assault could not be substantiated.

[107] The police officers commenced an action against the Attorney General of Ontario for the alleged misconduct of his prosecutors. They alleged that they had suffered psychological harm and irreparable damage to their reputations as a result of that misconduct. They sought a declaration that they had not assaulted Maharaj and Singh, \$500,000 in general damages for negligence and misfeasance in public office, and \$250,000 in punitive damages for each of them.

[108] The Attorney General of Ontario filed a motion to strike their statement of claim, arguing that prosecutorial immunity protects prosecutors against claims for negligence and misfeasance in public office and claims brought by third parties to a criminal prosecution. (The Superior Court's decision to strike out the negligence claim brought by the police officers was upheld by the Court of Appeal. However, the officers are not appealing that decision to this Court.)

III. Decisions Below

A. *Ontario Superior Court of Justice, 2017 ONSC 3683 (Stinson J.)*

[109] Stinson J. struck out the police officers' negligence claim on the ground that there was no duty of care, but he allowed the claim for misfeasance in public office to continue. After reviewing the existing case law on prosecutorial immunity, he held that it was not plain and obvious that it definitively barred all claims by all persons against Crown attorneys other than claims by former accused persons for malicious prosecution or wrongful non-disclosure. Therefore, it was not plain and obvious that the officers' claim for misfeasance was barred by the immunity.

[110] Stinson J. found that the respondent police officers had "pleaded the essential elements of the tort of misfeasance in public office by asserting knowing, deliberate, and unlawful disregard of official duty coupled with knowledge that the misconduct [was] likely to injure the plaintiffs" (para. 149 (CanLII)). Thus, he refused to strike out their misfeasance claim.

B. *Court of Appeal for Ontario, 2019 ONCA 311, 56 C.C.L.T. (4th) 1 (Lauwers, Huscroft and Trotter J.J.A.)*

[111] The Court of Appeal upheld the decision rendered by Stinson J. It also concluded that prosecutorial immunity does not extend to misfeasance in public office. In the court's view, the liability threshold for misfeasance is high enough, as it requires claimants to show the presence of bad faith or improper motives. Thus, the policy considerations relating to diversion from public duties and the risk of a chilling effect on Crown prosecutors are not an impediment to displacing the immunity.

[112] The Court of Appeal also agreed with Stinson J. that the officers had pleaded all the essential elements of misfeasance.

IV. Issues

[113] This appeal raises two issues:

- a) whether prosecutorial immunity applies in this case;
- b) if the immunity does not apply, whether the respondent police officers have pleaded all the essential elements of misfeasance in public office.

V. Analysis

A. *Introduction*

[114] Historically, the position in common law provinces regarding prosecutorial immunity “rang[ed] from a strong assertion of absolute immunity in Ontario to an acceptance of the possibility of suing” prosecutors acting in bad faith or with malice in Nova Scotia and Alberta (*Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 181). In *Nelles*, this Court refused to grant an absolute immunity to prosecutors and qualified the immunity by acknowledging the existence of one exception: the tort of malicious prosecution. In *Henry*, this Court then added a second exception: wrongful non-disclosure. Those two exceptions allow only accused persons to bring claims against

prosecutors. The question before us is whether the immunity applies to claims for misfeasance in public office brought by police officers.

[115] The Court of Appeal was of the view that prosecutorial immunity bars negligence claims but not claims for misfeasance in public office brought by police officers. The Attorney General of Ontario asks this Court to reverse that conclusion and to confirm that the immunity bars all claims except claims for malicious prosecution and wrongful non-disclosure made by *accused persons*. Therefore, third parties to a prosecution would be absolutely barred from bringing any claims. Among other things, the Attorney General of Ontario argues that the tort of misfeasance in public office “lacks a sufficiently high liability threshold and other safeguards this Court has found are required before prosecutorial immunity can be displaced” (A.F., at para. 43).

[116] As for the respondent police officers, they argue that the immunity does not bar *third parties such as police officers* from bringing claims for misfeasance in public office against prosecutors. In their view, the liability threshold for misfeasance is sufficiently high to prevent the policy rationale for the immunity from being undermined.

[117] The scope of prosecutorial immunity is a matter of policy (*Nelles*, at p. 199; *Henry*, at para. 32). The protection of prosecutorial independence is the cornerstone of this principle and is constitutionally entrenched in s. 7 of the *Charter* (*Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, at paras. 32 and 46; *R. v.*

Cawthorne, 2016 SCC 32, [2016] 1 S.C.R. 983, at para. 26). I acknowledge that this principle seeks to protect the public office of prosecutor by preventing undue interference in the discharge of prosecutorial functions. Prosecutorial independence translates into two policy concerns which are meant to gauge the “risk of undue interference with the ability of prosecutors to freely carry out their duties in furtherance of the administration of justice” (*Henry*, at para. 76). These twin policy concerns, when engaged, weigh against expanding the scope of prosecutorial liability.

[118] The first concern is the risk of creating a chilling effect on the exercise of prosecutorial discretion. Fear of civil liability may lead to defensive lawyering by prosecutors, with the result that their decisions will be “motivated less by legal principle than by a calculated effort to ward off the spectre of liability” (*Henry*, at para. 73). This undermines the objectiveness of prosecutorial decision-making by introducing considerations extraneous to their public duties (para. 73).

[119] The second concern is the risk of diverting prosecutors from their public duties. Expansion of prosecutorial liability risks forcing prosecutors to “spen[d] much of their limited time and energy responding to lawsuits rather than doing their jobs” (*Henry*, at para. 72). The rationale underlying the diversion concern is that “[t]he 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” (para. 72).

[120] Although the policy concerns with respect to the chilling effect and diversion are real, they must not be invoked like a mantra to justify the application of prosecutorial immunity in every situation not falling within the exceptions recognized for the benefit of accused persons. These policy concerns should not be considered in the abstract, but rather in light of the particular liability threshold applicable to the tort at issue. A high liability threshold attenuates considerably the risks of creating a chilling effect on the exercise of prosecutorial discretion and of diverting prosecutors from their public duties in order to defend against civil actions, because a high threshold limits the risk of a flood of cases. The lower the number of cases, the less chilled the exercise of prosecutorial discretion will be and the less diverted prosecutors will be from their duties. Thus, a high threshold mitigates to a large extent the policy concerns in favour of a wide immunity.

[121] Because the twin policy concerns can be accommodated through a high threshold, the analysis should not be overly centred on them. Instead, a two-step analysis should be used to decide whether prosecutorial immunity should be applied in other situations. The first step requires determining whether there are cogent policy reasons for piercing the immunity. Once this is established, the second step requires determining whether the liability threshold for the tort at issue is high enough to tamp down the twin policy concerns and to safeguard prosecutorial independence.

[122] First, I will demonstrate that there are cogent policy reasons for not applying the immunity in a case where police officers suffered serious damage arising

from unlawful and deliberate prosecutorial misconduct. It is not plain and obvious that the alleged prosecutorial misconduct in this case is anything less than shocking. It put the police officers unfairly at risk of disciplinary, civil and criminal liability, and it allegedly caused them severe psychological and reputational harm for which they had no meaningful remedy. This case cries out for a remedy. Public confidence in the administration of justice requires nothing less than that prosecutors be held accountable for their misconduct. In my view, the immunity does not apply in this case and the police officers should be allowed to vindicate their reputations. Common law courts must be responsive to obvious injustice and must make the rules evolve within the constraints of precedent.

[123] Second, I will explain that the liability threshold for misfeasance in public office, as defined in *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, places the bar high enough to mitigate the twin policy concerns and preserve prosecutorial independence.

[124] Finally, I will apply this legal reasoning to the facts alleged in the statement of claim filed by the respondent police officers.

B. *Policy Considerations*

[125] In my opinion, there are four policy reasons that justify not applying prosecutorial immunity in this case: (1) the tactical nature of the decisions involved; (2) the significance of the interests at stake; (3) the lack of meaningful alternative

remedies and accountability mechanisms; and (4) public confidence in the office of prosecutor and in the police.

(1) Core Prosecutorial Discretion

[126] First of all, the principle of prosecutorial independence does not apply to decisions pertaining to the handling of allegations of police brutality, because they are, in general, tactical decisions falling outside the core of prosecutorial discretion. Therefore, this principle does not lead to the conclusion that the prosecutors are immunized in this case.

[127] The principle of prosecutorial independence seeks to protect first and foremost the core of prosecutorial discretion. This core includes decisions about the “nature and extent of the prosecution” (*Krieger*, at para. 47; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 40). For example, decisions (1) to press charges, (2) to enter a stay of proceedings, (3) to enter into a plea bargain, (4) to withdraw from proceedings and (5) to take control of a private prosecution are all core prosecutorial decisions (*Krieger*, at para. 46; see also *Anderson*, at paras. 40 and 44). Only such core decisions are protected from improper influence; they deserve deference, unless they amount to an abuse of process or malicious conduct (*Krieger*, at paras. 43, 45 and 49; *Anderson*, at paras. 46-48).

[128] It is important to distinguish prosecutorial discretion protected by the Constitution from tactical decisions made by prosecutors and their conduct before the

court (*Krieger*, at para. 50; *Anderson*, at para. 35). In contrast, decisions that do not pertain to the nature and extent of the prosecution, such as tactical decisions, fall outside the scope of core prosecutorial discretion (*Krieger*, at para. 47). As a result, such decisions are subject to the court's inherent power to control its own processes and do not deserve the same level of deference as core prosecutorial decisions (*Anderson*, at paras. 57 and 61). Therefore, interfering with tactical decisions does not implicate prosecutorial independence to the same extent, and liability for such decisions is not constitutionally problematic.

[129] Misconduct in the handling of allegations of police brutality does not touch upon the core of prosecutorial discretion. The decisions made by prosecutors in dealing with such allegations are, in general, purely tactical — they do not pertain to the nature and extent of the prosecution. In this case, the prosecutors' decisions that are the subject of the respondent police officers' claims are indeed of a tactical nature. The police officers' alleged harm is the result of two things. First, they allegedly suffered harm because of the tactical choice made by the Trial Crown and the Senior Crown not to fully investigate the allegations of assault and to concede the allegations made by Singh in support of his *Charter* application. Second, the police officers take issue with the Appeal Crown's alleged decision to suppress evidence before the Court of Appeal. Those tactical choices led Thorburn J. to make adverse findings of assault and led the Court of Appeal to uphold those findings. This is the crux of the officers' case. The decision of the Trial Crown and the Senior Crown to enter a stay of proceedings in

Maharaj's case — a core prosecutorial decision — is thus not at issue. That decision in itself had little impact on the officers.

[130] In any event, any conduct amounting to bad faith or malice falls outside the core and does not engage prosecutorial independence (*Krieger*, at paras. 51-52; *Cawthorne*, at paras. 24-26). Such conduct is subject to disciplinary or judicial review in every case. Only good faith decisions enjoy protection.

[131] Thus, the principle of prosecutorial independence is not sufficient in itself to prevent the imposition of liability for such tactical decisions.

(2) Significance of the Interests at Stake

[132] Where important interests are at stake, this may justify not applying prosecutorial immunity. So far, this Court has found that the significance of the interests of accused persons may prevent the application of the immunity. The tort of malicious prosecution was sanctioned in *Nelles* out of a desire to vindicate an accused's rights to liberty, security and a fair trial that can be jeopardized by a prosecutor's misconduct. The cause of action in wrongful non-disclosure developed in *Henry* was designed to vindicate the right of accused persons to full disclosure under s. 7 of the *Charter* by allowing them to bring claims for *Charter* damages against prosecutors. Those two causes of action added layers of protection to those important interests.

[133] In this case, the police officers also had significant interests at stake in terms of their potential disciplinary, civil and criminal liability, their right to liberty and security, their right to dignity and a good reputation, and their mental health. Pursuant to the legal maxim *ubi jus, ibi remedium* — meaning “where there is a right, there is a remedy” — the law of prosecutorial immunity must provide a remedy for the impairment of these interests. The common law cannot sit idly by and remain silent in the face of injustice.

[134] Even though they were not formally charged, the three officers were, in essence, accused of having committed serious criminal offences, namely of having violently assaulted and tortured defenceless suspects. Indeed, the Court of Appeal described their alleged actions as a “deliberate and repeated use of intimidation, threats and violence” and went so far as to characterize them as *torture* within the meaning of s. 269.1(2) of the *Criminal Code*, R.S.C. 1985, c. C-46 (Singh’s sentencing appeal, at para. 43).

[135] The factual findings of assault made by Thorburn J. and subsequently upheld by the Court of Appeal exposed the police officers to disciplinary, civil and criminal liability and jeopardized their professional futures. A judgment in a criminal case is admissible as evidence in other proceedings to prove its findings and conclusions (*British Columbia (Attorney General) v. Malik*, 2011 SCC 18, [2011] 1 S.C.R. 657, at para. 7). The doctrines of comity and abuse of process make courts reluctant to depart from prior judicial determinations, even if they are not conclusive

and binding, for fear of rendering contradictory decisions that may tarnish the reputation of the administration of justice. Therefore, the officers could have been disciplined, sued or prosecuted on the basis of those findings, and they would have faced the difficult task of rebutting findings expressed in such strong language. Thorburn J. in fact urged the Crown on two separate occasions to investigate and punish the officers (decision on Singh's stay application, at para. 52; Singh's sentencing decision, at paras. 2 and 64), and this was reiterated by the Court of Appeal in unequivocal terms during the hearing of Singh's appeal:

THE COURT: So, the state of the bidding is, we have a case where there's evidence led of what could only be described as thuggery, systemic thuggery by the police

. . .

. . . speaking for myself this would be, in terms of the appropriate remedy, it would be a very different case if people, if everybody had been called to account. I'm in favour of prosecuting all criminals, even the ones who are wearing uniforms. [Emphasis added.]

(A.R., vol. III, at pp. 428 and 430)

[136] Thus, the police officers' right to liberty and security may not have been directly at stake during the first criminal proceedings, but subsequent criminal proceedings against them were potentially waiting around the corner, with their right to liberty and security hanging in the balance. In such proceedings, adverse findings of police brutality would, for example, make the officers' burden of proving the reasonableness of the use of force or self-defence much more difficult (*Criminal Code*, ss. 25 and 34).

[137] Moreover, findings of police brutality can have a profound impact on the dignity, professional life, reputation and mental health of police officers. Although the right to a good reputation is not specifically mentioned in the *Charter*, it is reflected in “the innate dignity of the individual, a concept which underlies all the *Charter* rights”, and it is a right that plays a fundamental role in our democratic society (*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 120; see also *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, at para. 18). As Cory J. emphasized, however, reputation is fragile and can easily be shattered irremediably:

Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual’s sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.

(*Hill*, at para. 108; see also *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, at para. 92; and *Bent v. Platnick*, 2020 SCC 23, at para. 1.)

[138] A reputation of trustworthiness and integrity is the cornerstone of many professions and callings, such as that of police officer (*Botiuk*, at para. 92). When police officers see their reputations tarnished by false allegations of serious misconduct, as in this case, it hampers their capacity to fulfill their calling as police officers, which, in turn, damages their “sense of identity, self-worth and emotional well-being” (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 368).

Indeed, a powerful calling like being a police officer is often “one of the defining features of their lives” (*Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 94). Any impact on the police officers’ reputations may cause them significant psychological harm, which the officers allege they have suffered in this case.

[139] In brief, the significance of the interests at stake for the police officers weighs in favour of a conclusion that prosecutorial immunity does not apply.

(3) Lack of Meaningful Alternative Remedies and Accountability Mechanisms

[140] The existence of alternative remedies or accountability mechanisms militates against displacing the immunity (*Nelles*, at p. 198). However, if those alternative remedies or mechanisms are not meaningful or are insufficient to “address the central issue of making the victim whole again”, this indicates that the immunity should not apply (p. 198).

[141] In this case, the available alternatives are unable to make the victims whole again. Only exculpatory findings made by a civil court can restore the police officers’ tarnished reputations, and only damages can truly compensate for the impact on their careers and the reputational and psychological harm they have suffered.

[142] The Attorney General of Ontario identifies, among other things, the prospect of disciplinary proceedings against the Trial Crown, the Senior Crown and the Appeal Crown before the Law Society as well as administrative sanctions from their

employer, the Attorney General, as meaningful alternative accountability mechanisms. However, nothing indicates here that the Attorney General or the Law Society has sanctioned the prosecutors.

[143] And even if such sanctions had been imposed, they would not have made the police officers whole again. Findings of misconduct made by the Attorney General or the Law Society would have provided little remedy for the officers. Findings made by such administrative decision makers carry little weight in comparison with prior judicial determinations of police brutality and torture made by a criminal court. They generally receive little media attention and enjoy little gravitas. In the sphere of public opinion, where reputations are made and destroyed, the decisions of a superior court or a provincial criminal court enjoy wider media coverage.

[144] The TPSPS Unit's report provides a good example. Despite its unambiguous exculpatory findings, it went under the radar and did not prevent the Court of Appeal from upholding Thorburn J.'s findings and declaring that the police officers had tortured and brutalized defenceless suspects. As a result, the police officers claim that those findings are still often brought up when they testify in court, making them subject to ridicule and contempt and endlessly perpetuating their punishment.

[145] In the end, only exculpatory findings made by a civil court which had the benefit of all the evidence and did a thorough analysis can clear the officers' reputations once and for all. In *Day v. Woodburn*, 2019 ABQB 356, 96 Alta. L.R. (6th) 302, the criminal court had found that the police officers committed police brutality during an

arrest. The person arrested sued the officers for damages. The officers were then able to adduce more comprehensive evidence to convince the civil court that they had not used excessive force to arrest him (paras. 279-80 and 349). As a result, their reputations were restored by the civil court's findings.

[146] The problem is, however, that this remedy is contingent on the accused person's decision to bring a civil suit against the police. If, like Maharaj and Singh, the accused person decides not to sue the police, the officers are unable to challenge the findings of police brutality in a court of law because prosecutorial immunity deprives them of an autonomous access to the civil courts. The officers thus have to cross their fingers and hope that the accused person brings an action so that they have an opportunity to reverse the findings and restore their reputations. In contrast, if the immunity is displaced and the officers are able to bring their own action against the prosecutors to take issue with the mishandling of the allegations of police brutality, the officers will be in a position to actively vindicate their reputations.

[147] Exculpatory findings can help a great deal in making victims of false allegations whole again. Nonetheless, only money damages can fully place the police officers in the position they would have been in but for the prosecutorial misconduct. Exculpatory findings do not repair the loss of an officer's job, future promotions, or salary if suspended. Such findings may help officers see the future in a brighter light, but they do not account for the past mental distress, anxiety or depression experienced as a result of damaging findings of assault. Being compared to a criminal when one's

very job is to track and arrest criminals is certain to severely damage a police officer's sense of identity and self-worth.

(4) Public Confidence in the Office of Prosecutor and in the Police

[148] Not applying prosecutorial immunity in a case like this one reinforces public confidence in both the office of prosecutor and the police.

[149] In this appeal, the Crown effectively seeks *absolute immunity* against all claims brought by third parties. Thus, the Crown asks us to reject any compromise that involves accepting a limited form of liability while maintaining strong immunity in most cases, like the compromise reached by the courts below. Absolute immunity is, however, inherently suspicious. As emphasized by this Court, absolute immunity is “troubling”, a “startling proposition”, and “strained and difficult to sustain” (*Nelles*, at p. 195, quoting *Nelles v. The Queen in right of Ontario* (1985), 51 O.R. (2d) 513 (C.A.), at p. 531, and *Bosada v. Pinos* (1984), 44 O.R. (2d) 789 (H.C.J.), at p. 794).

[150] My colleague Abella J. holds that applying the immunity in this case is necessary to preserve public confidence in the justice system. With respect, I am instead of the view that refusing to apply the immunity and thereby increasing accountability actually strengthen the bonds of trust between a public office and members of the public. Public confidence in the office of prosecutor is better served when prosecutors are made accountable than when they are absolved from any misconduct.

[151] Crown prosecutors are not just any kind of public officers. They are “in a position of knowledge in respect of the constitutional and legal impact of [their] conduct” (*Nelles*, at p. 195). Prosecutors also hold important powers in the criminal justice system. Judges or juries are commonly seen as powerful because they make the ultimate decision. However, prosecutors control the gateway to that system. If a prosecutor declines to press charges, the formal powers of judges and juries are of little use. Further, the way prosecutors present their case can have a crucial influence on the outcome of a proceeding. In this case, the decision made by the Trial Crown to concede the assault allegations dictated the outcome of Singh’s *Charter* application, which included findings of assault and police brutality made against the respondents.

[152] Where public officers hold such a high office, the public expects them to “be held to the highest standards of conduct in exercising a public trust” (*Nelles*, at p. 195). Instead, prosecutors are granted a broad immunity that “is akin to . . . a license to subvert individual rights” (p. 195). Prosecutors are thus permitted to trample on the careers, dignity, reputations and mental health of police officers. Supposedly, their office is so important that any spectre of liability would prevent them from discharging their public duties. Police officers also hold important powers, but they are nevertheless subject to a high degree of accountability. Yet no one argues that they are unable to discharge their public duties faithfully because of this spectre of liability.

[153] In reality, only malicious prosecutors will fear liability if prosecutorial immunity is displaced to allow claims based on bad faith or malice. Prosecutors who

discharge their duties faithfully have nothing to be afraid of (see *Nelles*, at pp. 196-97). This holds true even for prosecutors who are reckless, incompetent, lazy, negligent or unprofessional (see *Proulx v. Quebec (Attorney General)*, 2001 SCC 66, [2001] 3 S.C.R. 9, at para. 35; *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, at paras. 8 and 80-81).

[154] One can understand the legitimacy of protecting prosecutors who act in good faith, and even those who are negligent. However, protecting prosecutors who act unlawfully in a deliberate manner erodes public confidence in the office of Crown prosecutor. As underlined by Lord Bingham, “[t]here is an obvious public interest in bringing public servants guilty of outrageous conduct to book. Those who act in such a way should not be free to do so with impunity” (*Watkins v. Secretary of State for the Home Department*, [2006] UKHL 17, [2006] 2 A.C. 395, at para. 8).

[155] Prosecutors who act deliberately and unlawfully should not be allowed to hide behind the veil of absolute immunity from claims brought by police officers. If the Crown’s position is pushed to its logical conclusion, it means that even a malicious prosecutor who accepts a bribe from an accused person to concede allegations of torture and secure a stay, or a reduced sentence for the accused person, will face no civil liability. Oddly enough, such a prosecutor may face criminal penalties and go to prison for his or her conduct, but cannot be forced to pay money damages. Allowing such prosecutors to cause harm without suffering financial consequences undermines public

trust in the office of prosecutor and tarnishes the image of law-abiding and dedicated prosecutors. Courts should be able to sort the bad apples from the good ones.

[156] Also, treating prosecutors so favourably by granting them an overly broad immunity undermines the rule of law — a fundamental principle of our Constitution — by sending the message that prosecutors are above the law and are not held accountable in the same way as ordinary citizens (*Nelles*, at p. 195). In *Roncarelli*, this Court refused to provide blanket immunity to the highest public officer of a province — Premier Duplessis — for his act of targeted malice, because that would have been too great a violation of the rule of law. Arguably, if a malicious premier is equal before the law and can thus be held liable, the same should be true of a Crown prosecutor.

[157] In addition to tarnishing the image of prosecutors, the immunity sought by the Crown undermines public confidence in the police. Where police officers are unable to restore their image by rebutting findings of misconduct, this loosens the bonds of trust between them and the public. Investigating crime and keeping the community safe both require establishing trust with the population. Their effectiveness is thus negatively affected by such allegations.

[158] A damaged reputation not only impedes the police's capacity to investigate and protect, but also hampers the prosecution of crime. Prosecuting crime in the criminal courts is impossible without the contribution of the police in terms of investigations and gathering evidence. Police witnesses often occupy the centre stage

in criminal trials. Pursuant to this Court's decision in *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, the disciplinary records of the officers involved must be disclosed to accused persons, who can then rely on those records to undermine the officers' credibility and raise a reasonable doubt in order to escape conviction. Therefore, where police officers such as the respondents are unable to redress their records before another court, it makes them vulnerable to the defence's attacks in the courtroom when they testify. In fact, the respondents state that the reasons of Thorburn J. and the Court of Appeal are often brought up by defence counsel when they are called to testify. The Crown's case is weakened as a result, and some guilty accused persons may unduly avoid convictions.

C. *Liability Threshold for Misfeasance in Public Office*

[159] There being strong policy reasons not to apply prosecutorial immunity in this case, the next step is to determine whether the liability threshold for the tort of misfeasance in public office is high enough to satisfy the twin policy concerns and to safeguard prosecutorial independence. The tort of misfeasance in public office provides a remedy to somebody who has been injured by a public officer's unlawful and deliberate misconduct. Before assessing whether the elements of misfeasance in public office adequately protect the interests underlying prosecutorial immunity, I wish to emphasize that this assessment must take place in the specific context of the policy considerations identified at the first step. I am not considering misfeasance in public

office, writ large, as “the prudent course of action is to address new situations in future cases as they arise” (*Henry*, at para. 33).

[160] The elements of the tort of misfeasance in public office are:

- (a) the defendant is a public officer;
- (b) the defendant’s conduct was deliberate and unlawful;
- (c) the defendant had knowledge that his or her conduct was unlawful and likely to harm the plaintiff; and
- (d) the defendant’s conduct caused material damage to the plaintiff and such damage is compensable at law.

(See *Odhavji*, at paras. 23 and 32.)

[161] In crafting these elements, courts have already considered many of the issues that prosecutorial immunity is intended to address. Public officers frequently make decisions that have adverse impacts on large numbers of people, not because the officers are at fault, but simply because of the nature of public decision-making (*Odhavji*, at para. 28). This creates a large pool of disgruntled persons who may seek restitution or retribution in the courts. Liability for misfeasance in public office must

thus be narrowly circumscribed in order to prevent both a chilling effect on public decision-making and the diversion of public officers from their duties.

[162] In *Odhavji*, Iacobucci J. stated that the elements of misfeasance in public office create a high threshold that protects public officers from these risks (E. Chamberlain, *Misfeasance in a Public Office* (2016), at p. 4; *Odhavji*, at paras. 28-30). A plaintiff must establish *deliberate* misconduct that demonstrates *bad faith* or *dishonesty*. Inadvertent or negligent actions of public officers are not enough (*Odhavji*, at para. 26). There must be an intentional abuse of power (para. 30).

[163] This high threshold must be considered in the context of the class of potential claimants and the prosecutorial activity at issue in this case. Here, the class of potential claimants is very narrow: police officers facing allegations of serious misconduct in a criminal case. This limited class means that there will be less of an effect on prosecutorial independence than suggested by my colleague Abella J. (paras. 41-47). For instance, police officers cannot bring claims against a prosecutor for failure to prosecute a case, or for failure to do so to their liking. The scope of claims is specifically limited to police officers subjected to allegations of serious misconduct because it is only in that particular instance that police officers are in a position akin to that of an accused person.

[164] The nature of the prosecutorial discretion at issue is also important. As in *Henry*, the prosecutors' conduct at issue here does not fall within the core of prosecutorial discretion. This means that their actions regarding the allegations of

police misconduct “will not necessarily warrant the same level of protection from judicial scrutiny as the decision to initiate or continue a prosecution” (para. 63).

[165] When considered in this specific context, the high threshold provided by the elements of misfeasance in public office adequately protects against a chilling effect on the exercise of prosecutorial discretion, interference with prosecutorial independence, and the diversion of prosecutors from their duties. So long as a court is satisfied that the defendant prosecutor was acting deliberately and unlawfully, and was fully aware that the conduct was unlawful and likely to harm the plaintiff, then the liability threshold is “near the high end of the blameworthiness spectrum” (*Henry*, at para. 91). The prosecutor’s subjective knowledge of both unlawfulness and likely harm are key elements. Therefore, to the extent that other courts have concluded that knowledge includes not only actual knowledge but also recklessness, those decisions should not govern (*Chamberlain*, at p. 139; K. Horsman and G. Morley, eds., *Government Liability: Law and Practice* (loose-leaf), at paras. 7.20.30(2)(a) and (b), citing *Three Rivers District Council v. Bank of England (No. 3)* (2000), [2003] 2 A.C. 1 (H.L.), at p. 192, and *Alberta (Minister of Public Works, Supply & Services) v. Nilsson*, 1999 ABQB 440, 246 A.R. 201, at para. 108, *aff’d* 2002 ABCA 283, 320 A.R. 88, at paras. 95-104). The standard must be as Iacobucci J. laid out in *Odhavji*, subjective knowledge.

[166] Finally, although permitting police officers to bring misfeasance claims may result in contradictory decisions, there are some circumstances in which

“relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole” (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 52). Situations where relitigation enhances the administration of justice include “when the first proceeding is tainted by fraud or dishonesty”, “when fresh, new evidence, previously unavailable, conclusively impeaches the original results”, or “when fairness dictates that the original result should not be binding in the new context” (para. 52). In cases where prosecutors acted unlawfully and deliberately, the first proceeding is tainted by fraud and unfairness. This is amplified where judges issue severe condemnations of a police officer. It will thus enhance the administration of justice for the judiciary to give the officer the opportunity to establish that those findings were incorrect.

D. *Application*

[167] In my view, the respondent police officers have adequately pleaded the four essential elements of misfeasance in public office, as established in *Odhavji*. Therefore, I agree with the courts below that their misfeasance claim should be allowed to continue.

[168] In their statement of claim, the police officers plead that the Trial Crown, the Senior Crown and the Appeal Crown “committed the tort of misfeasance in a public office, by engaging in deliberate and unlawful conduct in their capacity as crown attorneys, clearly in contravention of their sworn statutory duty” (A.R., vol. II, at p. 131). This allegation of misfeasance is supported by particulars.

[169] First, there is no doubt that prosecutors are public officers.

[170] Second, the police officers plead that the Crown Attorneys' conduct was deliberate and unlawful. With respect to the deliberate element, the officers state three times that the Crown Attorneys' conduct was deliberate (A.R., vol. II, at pp. 131-32). The unlawfulness element is also clearly established. The police officers plead that the Crown Attorneys breached their sworn statutory duty imposed by the *Crown Attorneys Act* (pp. 130-31). Specifically, they allege that the Crown Attorneys did not "truly and faithfully according to their skills and the best of their abilities execute [their] duties" (p. 131). They add that the Crown Attorneys failed to act "without favour or affection to any party" in the discharge of their statutory duties (p. 131 (emphasis deleted)). The officers particularize the breaches of those duties by specifying that the prosecutors failed to properly investigate the allegations of assault, failed to call them as witnesses, ignored key facts, and knew that Maharaj had lied about aspects of his injuries (pp. 131-32). They add that the Appeal Crown suppressed evidence before the Court of Appeal that would have exonerated them (p. 132).

[171] Third, the police officers plead that the Crown Attorneys had knowledge that their conduct was unlawful and likely to harm the officers, and that they were thus acting in bad faith:

Crown attorneys involved in this case deliberately engaged in conduct that they knew to be inconsistent with the obligations of the Crown attorney and they did so in bad faith, with the knowledge that this misconduct was likely to injure the officers.

All of the above conduct, involves a deliberate disregard of the official duty of the Crown Attorney in the Province of Ontario, with the knowledge that this misconduct would most likely injure the police officers. [Emphasis added.]

(A.R., vol. II, at p. 132)

[172] Fourth, the police officers plead that the Crown Attorneys' conduct caused them material damage compensable at law. In *Odhavji*, this Court stated that “[a]t the pleadings stage, it is sufficient that the statement of claim alleges that the plaintiffs have suffered mental distress, anger, depression and anxiety as a consequence of the alleged misconduct” (para. 41). In this case, the officers plead, among other things, that they “have suffered significant depression”, “emotional trauma”, “loss of enjoyment of life”, “anxiety” and “mental distress” as a result of the alleged prosecutorial misconduct (A.R., vol. II, at p. 133).

VI. Conclusion

[173] For the foregoing reasons, I would dismiss the appeal.

Appeal allowed with costs, CÔTÉ J. dissenting.

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Solicitors for the respondents: Brauti Thorning, Toronto.

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