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As a first-year law student at McGill University some years ago I interviewed for a summer position with the Department of Justice in order to get some initial experience in the practice of criminal law. I approached the interview hoping that my experience in helping establish Innocence McGill, a law student clinic devoted to investigating wrongful conviction claims in the province of Quebec, would recommend me to the job. Surely, I thought, my work with Innocence McGill would demonstrate my interest in criminal law and the criminal justice system.

Before I had a chance to trumpet Innocence McGill during the interview, one of the DOJ lawyers interviewing me beat me to it:

LAWYER: Aren’t you playing for the wrong side with this innocence project thing?

ME: [longish pause] Well, I guess the way I see it is that we all have the same optimal outcome in mind—

LAWYER: How’s that?

ME: Well, as Justice Rand explained in *Boucher v. The Queen*, the role of the prosecutor isn’t to “win” but to ensure that justice is done. So I don’t really see any conflict. Defence counsel and prosecutors are equally interested in avoiding wrongful convictions, I would have thought....

Upon returning to Montreal, I told my mentor, Rod Macdonald, the DOJ lawyer’s question and my response. “That’s a home run answer!” Rod reassured me, though he needn’t have bothered - I was already more than a little enamoured of my answer.

I didn’t get the job.

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1 For more information on Innocence McGill, see [https://www.mcgill.ca/innocence/mcgill-innocence-project](https://www.mcgill.ca/innocence/mcgill-innocence-project).

2 That, roughly, was my off-the-cuff paraphrase. Justice Rand put it far more eloquently: “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. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.” *Boucher v. The Queen*, [1955] S.C.R. 16, at p. 24.

3 Nor, for the record, am I bitter about it.
I relate this story by way of introducing the Supreme Court of Canada’s recent decision in *Henry v. British Columbia (Attorney General)*⁴ because it illustrates, I suspect, a lingering misconception about the proper role of Crown Prosecutors in Canada.

It is a misconception, moreover, that is apparently held by a majority of the Supreme Court of Canada. In *Henry*, the question before the Court was what level of fault must a claimant establish to sustain a *Charter* claim against the government for a failure to meet its constitutional disclosure obligations in the context of a criminal proceeding. According to a majority of the Court, claimants must allege that the Crown, in breach of its constitutional obligations, caused the claimant harm by *intentionally* withholding information when the Crown knew, or ought to have known, that the information was material to the claimant’s defence, and that the failure to disclose would *likely* impinge on the claimant’s ability to make full answer and defence to a criminal charge.⁵

### The Exceptional Background Facts in *Henry*

In March of 1983 Ivan Henry was convicted on 10 sexual offences; he was declared a dangerous offender and sentenced to an indefinite period of incarceration, where he remained for nearly 27 years. In October 2010 the British Columbia Court of Appeal quashed all 10 convictions, substituting acquittals for each, because of serious errors committed by the Crown during the conduct of Mr. Henry’s trial.⁶

Between 1980 and 1982 a series of sexual assaults characterized by a similar *modus operandi* occurred in Vancouver. A single perpetrator appeared to be responsible.

Donald McRae lived in one of the Vancouver neighbourhoods in which the assaults took place, and in 1981 the Vancouver police placed him under surveillance as a suspect. He was not arrested, however, and in March 1982 Mr. Henry moved into a house located on the same city block as Mr. McRae’s residence.

Mr. Henry soon became a suspect, and was arrested and subsequently released in connection with the assaults. Five days later, Mr. McRae was arrested and charged with trespass by night for “prowling” outside a residence several blocks away from the location of two of the previous 10 assaults. Two months later, Mr. McRae was once again arrested.

In July 1982, however, Mr. Henry was re-arrested after the victim of a June attack identified him from an array of photographs shown to her by the police. None of the other “foils” shown to the victim were photographed in manner similar as Mr. Henry, and all of the other foils differed significantly from him in terms of age, hair style, and facial hair.

Through his legal counsel, Mr. Henry made numerous pre-trial requests for disclosure of all victim statements as well as medical and forensic reports. The Crown did not disclose any of the requested materials before the commencement of trial. Mr. Henry proceeded at trial *pro se*. There was no reliable out-of-court identification of him as

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⁵ *Id.*, at para. 99 [emphasis added].
the perpetrator. Nor was there any physical evidence linking him to any of the victims. The Crown’s case rested entirely on *in-court identifications* of Mr. Henry by the complainants.

At the beginning of the trial, Mr. Henry once again requested disclosure of all victim statements. The Crown disclosed 11 statements made by the 8 trial complainants, but failed to disclose 30 additional statements made by those complainants, including statements contained in the notes of the original crime scene investigators. These statements, it turns out, contained inconsistencies that could have been used to rebut the questionable identification evidence proffered by the Crown.

The Crown also failed to disclose key forensic evidence, including sperm from several of the crime scenes that could have been used to exclude a suspect based on blood type. The very existence of this evidence was not disclosed to Mr. Henry. Nor did the Crown disclose the fact that Mr. McRae had been considered a suspect and had twice been arrested in the vicinity of the assaults.

Following Mr. Henry’s conviction, he continued to make disclosure requests and applications for appeal. Between 1982 and 1988, more than 25 sexual assaults bearing the same *modus operandi* occurred in the Vancouver vicinity of the assaults for which Mr. Henry had been tried and convicted. These assaults were not disclosed to Mr. Henry.

Eventually, in 2002, as part of an investigation into sexual assaults committed in Vancouver between 1982 and 1988 believed by police to be carried out by a single perpetrator, the police arrested Mr. McRae, having linked him to three such assaults. He pleaded guilty to these offences in 2005.

This investigation prompted the Crown to provide full disclosure to Mr. Henry, who then used the disclosure - including disclosure of the information that should have been disclosed at trial - to reopen his appeal.

In June 2011 Mr. Henry filed a civil action seeking damages against the City of Vancouver, the Attorney General of British Columbia, and the Attorney General of Canada. In the claim before the Supreme Court of Canada, Mr. Henry alleges that the Attorney General of British Columbia failed to make full disclosure of relevant information before, during, and after his trial as part of subsequent proceedings, resulting in a breach of his s. 7 Charter rights.

**The Decisions Below**

The British Columbia Supreme Court, relying on the Supreme Court of Canada’s foundational decision on *Charter* damages in *Vancouver (City) v. Ward*, held that a claimant need not allege malice in order to make out a *Charter* claim for prosecutorial misconduct.

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The British Columbia Court of Appeal unanimously allowed the Attorney General of British Columbia’s appeal, holding that Mr. Henry was not entitled to seek *Charter* damages under s. 24(1) for the “non-malicious acts and omissions of Crown counsel.”

We can only hope, as the majority of the Supreme Court of Canada takes for granted as a matter of faith, that cases of prosecutorial misconduct like Mr. Henry’s are in fact “exceptional.”

**The Majority’s Decision: The Intentional Prosecutorial Misconduct Threshold for Charter Damages**

The question on appeal before the Supreme Court of Canada in *Henry* was stated as follows:

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

A majority of the Court answered this question in the affirmative, subject, however, to an important qualification. According to the majority:

> a cause of action will lie where the Crown, in breach of its constitutional obligations, causes harm to the accused by intentionally withholding information when it knows, or would be reasonably be expected to know, that the information is material to the defence and that the failure to disclose will likely impinge on the accused’s ability to make full answer and defence. This represents a high threshold for a successful *Charter* damages claim, albeit one that is lower than malice.

The majority rejected the malice standard pressed by the Crown because that standard derives from, and is tied to, the tort of malicious prosecution, which has a distinctive history and purpose. Moreover, a malice standard would set the bar too high and fail to respond to the state conduct in issue. Nor is it well suited to obligatory - and not discretionary - Crown disclosure context. The majority concluded that a “threshold specifically tailored to the context is preferable.”

To establish a contextual threshold, the majority turned to the countervailing “good governance” prong of the test set out earlier in *Ward*, explaining that “the liability threshold must ensure that Crown counsel will not be diverted from their important public duties by having to defend against a *litany* of civil claims” and that “the liability threshold must avoid a widespread ‘chilling effect’ on the behaviour of prosecutors.”

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11 *Id.*, at para. 65.
12 *Id.*, at para. 71 [emphasis added].
The majority’s good governance concerns, however, are difficult to reconcile with two significant aspects of the Court’s decision. The first is the majority’s express article of faith that in “the disclosure process, mistakes are the exception rather than the rule.”13

Notwithstanding this unfounded belief (no evidence is cited in support of it), the majority proceeds to invoke rather hyperbolic - if not hysterical - language in support of its high threshold for Charter damages claims for prosecutorial misconduct. The majority worries that, absent such a high threshold of intentional misconduct, prosecutors “would be constantly enmeshed in an avalanche of interlocutory civil proceedings and civil trials,” an “avalanche” that would doubtless contain a few strong claims of serious wrongful non-disclosure but which would “invariably [inevitably?] bring with it scores of meritless claims.”14

Moreover, absent an intentional misconduct threshold, Crown prosecutors might tend toward “defensive lawyering,” whereby disclosure decisions would be motivated less by “legal principle than a calculated effort to ward off the spectre of liability” and an “onslaught of litigation” which will “drive prosecutors into civil court.”15 The majority neglects to define what it means by “defensive lawyering,” but it would appear to map onto the misguided notion identified and rejected by Justice Rand in Boucher v. The Queen of winning versus losing. A narrow focus on prosecutions, in other words, rather than a broader focus on justice.

In response to the dissenting proposal advanced by the Chief Justice and Justice Karakatsanis (discussed below), namely the principled Charter breach approach set out in Ward, Justice Moldaver writes that “I fear that my colleagues’ approach runs the risk of opening the floodgates to scores of marginal claims.”16 “A duty of care paradigm,” argues Justice Moldaver, “risks opening up a Pandora’s box of potential liability theories.”17

Default Disclosure as Ex Ante Good Governance and Charter Compliance

According to the Chief Justice and Justice Karakatsanis, the test dispositive of the issue arising in Henry is straightforward: “It is sufficient for Mr. Henry to allege that the Crown breached its constitutional obligation to disclose relevant information and that Charter damages would be an appropriate and just remedy, serving one or more of the functions of compensation, vindication and deterrence.”18

The dissenting opinion in Henry is compelling for a number of reasons. First, it comports with the purposive approach to s. 24(1) of the Charter and the generous interpretation it, like all other Charter provisions, is to be given.19 Second, it comports with the principled approach to Charter damages claims set out by Ward and avoids “casting it in a strait-jacket of judicially prescribed conditions.”20 Third, it turns the

13 Id., at para. 72 [emphasis added].
14 Id., citations to other decisions omitted [emphasis added].
15 Id., at paras. 73, 94 [emphasis added].
16 Id., at para. 78 [emphasis added].
17 Id., at para. 93.
18 Id., at para. 138.
20 Ward, supra, at para. 18.
majority’s “good governance” concern on its head: “Good governance is strengthened, not undermined, by holding the state to account where it fails to meet its Charter obligations.” As Professor Kent Roach has argued, “routine arguments that Charter damage awards adversely affect good governance discount the fact that deterrence and compliance with the Charter is a foundation principle of good governance.”

This is a strong argument, but there is an arguably even stronger corollary argument to be made – namely, that “defensive lawyering” and a near-default standard of Crown disclosure would not only conduce to good governance, but would also conduce to ex ante Charter compliance. As Dickson J. (as he then was) explained in the foundational case of Hunter v. Southam regarding the purpose of s. 8 of the Charter, “[t]hat purpose is, as I have said, to protect individuals from unjustified state intrusions upon their privacy. That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of prior authorization, not one of subsequent validation.”

This principle of ex ante constitutional protection is in no way particular or limited to s. 8 of the Charter. Arguably, it is the foundational principle of Charter interpretation, albeit one that is directly cited less and less. It runs directly counter to the majority’s preference in Henry of resolving allegations of prosecutorial misconduct “in future cases as they arise”.

It is also a principle anticipated by and inherent in Justice Rand’s pronouncement in Boucher v. The Queen of the paramount importance of the core public duty of the state – including its Crown prosecutors – to set aside notions of winning versus losing, of offensive versus defensive lawyering, and ensure that justice is done in the first instance, not long after the fact.

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