Court File No. 33959

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

BETWEEN:

WAYNE PENNER

Appellant
(Appellant/Plaintiff)

- and -

REGIONAL MUNICIPALITY OF NIAGARA REGIONAL POLICE SERVICES BOARD, GARY E. NICHOLLS, NATHAN PARKER, PAUL KOSCINSKI and ROY FEDERKOW

Respondents
(Respondents/Defendants)

- and -

URBAN ALLIANCE ON RACE RELATIONS, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN POLICE ASSOCIATION, ATTORNEY GENERAL OF ONTARIO and CANADIAN CIVIL LIBERTIES ASSOCIATION

Interveners

FACTUM OF THE INTERVENER CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

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

SACK GOLDBLATT MITCHELL LLP
Barristers and Solicitors
1100 – 20 Dundas Street West
Toronto, ON M5G 2G8

Louis Sokolov
Daniel Iny
Tel: 416-979-6970
Fax: 416-591-7333
E-mail: lsokolov@sgmlaw.com

Solicitors for Criminal Lawyers' Association (Ontario)

SACK GOLDBLATT MITCHELL LLP
Barristers and Solicitors
500 – 30 Metcalfe Street
Ottawa, ON K1P 1C3

Colleen Bauman

Tel: 613-482-2463
Fax: 613-235-3041
Email: cbauman@sgmlaw.com

Ottawa Agent for the Criminal Lawyers' Association (Ontario)

ORIGINAL TO: **The Registrar**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

FALCONER CHARNEY LLP
Barristers and Solicitors
8 Prince Arthur Avenue
Toronto, ON M5R 1A9

Julian N. Falconer
Julian K. Roy
Sunil S. Mathai
Tel: 416-964-3408
Fax: 416-929-8179
Email:
falconerj@falconercharney.com

Counsel for the Appellant

GOWLING LAFLEUR HENDERSON LLP
Barristers and Solicitors
2600-160 Elgin St.
PO Box 466, Stn. D
Ottawa, ON K1P 1C3

Brian A. Crane, Q.C.
Tel: 613-232-7171
Fax: 613-788-3500
Email: brian.crane@gowlings.com

Ottawa Agent for the Appellant

AND TO:

BLANEY MCMURTRY LLP
Barristers and Solicitors
1500 – 2 Queen Street
Toronto, ON M5C 3G5

Eugene G. Mazzuca
Tel: 416-593-3946
Fax: 416-593-5437
Email: emazzuca@blaney.com

Counsel for the Respondents

MCMILLAN LLP
Barristers and Solicitors
300 – 50 O'Connor Street
Ottawa, ON K1P 6L2

Eugene Meehan, Q.C.
Tel: 613-232-7171
Fax: 613-231-3191
Email: eugene.meehan@mcmillan.ca

Ottawa Agent for the Respondents

AND TO: STEVENSONS LLP
Barristers
15 Toronto Street, Suite 202
Toronto, ON M5C 2E3

Maureen Whelton
J. Daniel McConville
Tel: 416-599-7900
Fax: 416-599-7910
Email:
mwhelton@stevensonlaw.net

Counsel for the Intervener, Urban Alliance on Race Relations

GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
Box 466 Station D
Ottawa, ON K1P 1C3

Guy Regimbald
Tel: 613-786-0197
Fax: 613-563-9869
Email: guy.regimbald@gowlings.com

Ottawa Agent for the Intervener, Urban Alliance on Race Relations

AND TO: HOLMES & KING
1300-1111 West Georgia Street
Vancouver, BC V6E 4M2

Robert D. Holmes
Tel: 604-681-1310
Fax: 604-681-1307
Email: rdholmes@mhklaw.com

Counsel for the Intervener, British Columbia Civil Liberties Association

NELLIGAN O'BRIEN PAYNE LLP
1500 – 50 O'Connor Street
Ottawa, ON K1P 6L2

Pamela J. MacEachern
Tel: 613-231-8276
Fax: 613-788-3681
Email: pam.maceachern@nelligan.ca

Ottawa Agent for the Intervener, British Columbia Civil Liberties Association

AND TO: PALIARE, ROLAND, ROSENBERG, ROTHSTEIN LLP
250 University Avenue, Suite 501
Toronto, ON M5H 3E5

Ian J. Roland
Michael Fenrick
Tel: 416-646-4319
Fax: 416-646-4301
Email:
ian.roland@paliareroland.com

Counsel for the Intervener, Canadian Police Association

GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
Box 466, Station D
Ottawa, ON K1P 1C3

Brian A. Crane, Q.C.
Tel: 613-233-1781
Fax: 613-563-9869
Email: brian.crane@gowlings.com

Ottawa Agent for the Intervener, Canadian Police Association

AND TO: DEWART GLEASON LLP
102 – 366 Adelaide Street West
Toronto, ON M5V 1R9

Sean Dewart
Tim Gleason
Tel: 416-971-8000
Fax: 416-971-8001
Email: sdewart@dgllp.ca

Counsel for the Intervener, Canadian Civil Liberties Association

GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
Box 466 Station D
Ottawa, ON K1P 1C3

Guy Regimbald
Tel: 613-786-0197
Fax: 613-563-9869
Email: guy.regimbald@gowlings.com

Ottawa Agent for the Intervener, Canadian Civil Liberties Association

AND TO: MINISTRY OF THE ATTORNEY GENERAL
Crown Law Office – Civil
8th Floor, 720 Bay Street
Toronto, ON M7A 2S9

Dennis W. Brown, Q.C.
Malliha Wilson
Christopher P. Thompson
Tel: 416-326-4156
Fax: 416-326-4181
Email: dennis.brown@ontario.ca

Counsel for the Intervener, Attorney General for Ontario

BURKE-ROBERTSON
Barristers & Solicitors
70 Gloucester Street
Ottawa, ON K2P 0A2

Robert E. Houston, Q.C.
Tel: 613-236-9665
Fax: 613-233-4195 or 613-235-4430
Email: rhouston@burkerobertson.com

Ottawa Agent for the Intervener, Attorney General for Ontario

TABLE OF CONTENTS

PAGE

PART I - OVERVIEW OF INTERVENER'S POSITION AND STATEMENT OF FACTS

1. The Criminal Lawyers' Association (Ontario) ("CLA") submits that the Court of Appeal for Ontario erred in applying the doctrine of issue estoppel to findings made by a retired police superintendent so as to prohibit the Appellant from pursuing a civil claim for alleged police misconduct. The Court's decision ignored the fundamentally different purposes and characteristics of discipline proceedings and civil lawsuits and disregarded the critical function that the civil justice system plays in guarding against abuse of police power and maintaining the rule of law.

2. The CLA accepts and adopts the facts as set out in the Appellant's factum.

PART II - QUESTION IN ISSUE

3. The question in issue in this appeal is whether the Court of Appeal for Ontario erred in law in applying issue estoppel so as to bar the Appellant's civil claims.

PART III - STATEMENT OF ARGUMENT

A. Police Disciplinary Proceedings and Civil Actions Share Different Purposes

i) The Inherent Public Interest in Lawsuits against the Police

4. The civil justice system plays an essential role in deterring abuse of police power, separate and apart from police discipline processes, which, as described further below, are ineffective and lack public confidence. This Court recognized in *Hill* v. *Hamilton-Wentworth Regional Police Services Board* that, in the context of litigation against police, tort law is more than simply a means to compensate victims of police misconduct; it acts as a check

against police powers.[1] Accordingly, there is an inherent public interest in lawsuits aimed at addressing the misuse of state power,[2] which the Court of Appeal failed to recognize. As Professor Hoyano has explained:

> In Canada, civil litigation against the police has helped to reinforce recognition of the need for greater public accountability, and for enhanced access of police officers to formal legal training and to use legal advice with regard to specific investigations. Canadian plaintiffs are using tort law as a mechanism to bring suspected deficiencies in police investigations fairly promptly under judicial scrutiny. . . .
>
> ...
>
> It should be remembered that not just the uncompensated victim, but also the public at large, will pay the price of a breach of accepted investigatory standards by the police."[3]

ii) The Police Disciplinary Process does not Contain a "Reparation" or "Vindicatory" Role to the Complainant

5. A civil claim alleging misuse of police power has different purposes than the police discipline process.

6. "Reparation" is the most obvious function to a civil action against the police.[4] The payment of damages by the police "is supposed to reimburse the claimant for the economic

---

[1] [2007] 3 S.C.R. 129 at para. 36, Appellant's Book of Authorities, Tab 15.

[2] *Ibid.* at para. 41.

[3] Laura C.H. Hoyano, "Policing Flawed Policing Investigations: Unravelling the Blanket" (1999) 62 Mod. L. Rev. 912 at 931, 933.

[4] Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law*, 8th ed. (Markham: LexixNexis Butterworths, 2006) at 4.

and psychic damages suffered at the hands of the [police] defendant."[5] As Professor Klar writes:

> Tort law operates as an important part of Canadian society's civil *justice* system. Its theoretical underpinning – that a wrongdoer who injures another ought to be required to repair the damage and restore the victim – is clearly an integral part of our system of values [emphasis in original].[6]

7. Damages against the police in a civil claim can also assume a "vindicatory" purpose. Lord Scott, in the House of Lord's judgment in *Ashley* v. *Chief Constable of Sussex*[7], stated as follows:

> But the purposes for which damages could have been awarded to the deceased Mr Ashley himself, if he had not died as a result of the shooting, are not confined to a compensatory purpose but include also, in my opinion, a vindicatory purpose. In *Chester v Afshar* [2005] 1 AC 134, para 87 Lord Hope of Craighead remarked that "The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached" and that unless an infringed right were met with an adequate remedy, the duty would become "a hollow one, stripped of all practical force and devoid of all content". So, too, would the right. [. . . .] Although the principal aim of an award of compensatory damages is to compensate the claimant for loss suffered, there is no reason in principle why an award of compensatory damages should not also fulfil a vindicatory purpose.[8]

8. Under the vindicatory rationale, "the issue is not quantum, but the *purpose* of the damages awarded" to a plaintiff.[9] In other words, as this Court affirmed in *Vancouver (City)*

---

[5] *Ibid.*

[6] Lewis N. Klar, *Tort Law*, (Toronto: Carswell, 1991) at 11.

[7] [2008] UKHL 25.

[8] *Ibid.* at para. 22.

[9] Phil Palmer and Jenny Steele, "Police Shootings and the Role of Tort", (2008) 71(5) Mod. L. Rev. 801 at 810.

v. *Ward*[10] in the context of constitutional remedies for breaches under the *Charter*, the vindicatory model of damages is linked to the notion that *Charter* rights "cannot be allowed to be whittled away by attrition".[11] Vindication has a "societal purpose" and "support[s] the compensatory function" (and indeed, vindication can be a significant enough principle that damages may flow even where a claimant has not otherwise suffered a personal loss).[12]

9. By contrast, the police discipline procedure in Ontario does not contain a parallel theoretical underpinning which puts the focus squarely on reparation and restoration to the complainant.

10. Finally, there can be a "psychological function" to a civil claim against the police. Given that a complainant in a police discipline hearing has no control over the course of an investigation leading up to the hearing, this psychological function is either absent from a complainant's perspective in the police discipline process or far less pronounced. As Justice Linden and Professor Feldthusen write:

> Tort law may perform certain psychological functions. [....] It gives some psychological comfort to the injured. It can be said that tort law helps to keep the peace by providing a legal method of quenching the thirst for revenge. [....] The tort trial is an institution that displays great concern for the individual, especially if there is a jury. The parties have the undivided attention of everyone in the court – judge, jury, counsel, witnesses, spectators, and occasionally, the press and the public. The award of damages for pain and suffering clearly manifests "fellow feelings". [....] Tort law, despite its manifold inadequacies, provides a forum for

[10] [2010] 2 S.C.R. 28, Appellant's Book of Authorities, Tab 35.

[11] *Ibid.* at para. 25.

[12] *Ibid.* at paras. 28 to 30.

this symbolic quest for human justice.[13]

11. The Respondents, at paragraphs 45 and 46 of their factum, assert that this Court should not give "overwhelming weight" to the starkly different purposes of police discipline proceedings and civil actions. Rather, the Respondents, relying on a string of authorities (including this Court's decision in *R.* v. *Gridic*),[14] ask this Court to conclude that as long as the three technical requirements of issue estoppel have been met, "the nature and purpose of the venues in which the issue is considered should not be determinative". In short, the Respondents propose that this Court should apply the same narrow and technical analysis as the Court below.

12. The CLA respectfully submits that this is inappropriate. As a preliminary point, neither *Gridic* (nor any of the authorities relied upon at paragraph 46 of the Respondents' factum) involved claims alleging police misconduct, i.e. lawsuits with an inherent public interest aimed at addressing the misuse of state powers.

13. More fundamentally, it is unsound policy to divorce the "issue" being litigated from the context and the forum in which that issue is being litigated, as the Respondents would have this Court do.

---

[13] Linden and Feldthusen, *Canadian Tort Law, supra* note 4 at 16 to 19.

[14] [1985] 1 S.C.R. 810, Respondents' Book of Authorities, Tab 25.

B. A Police Disciplinary Hearing does not Contain "all the hallmarks of an ordinary civil trial"

14. The Court of Appeal's finding that the "disciplinary proceeding against the two officers had all the hallmarks of an ordinary civil trial"[15] was at odds with reality. The hearing officer in this case was a retired police officer investigating another police officer. At the very least, this presents an appearance of bias.

15. Further, a complainant's circumscribed participation in a discipline hearing (and lack of any meaningful ability to control the steps leading up to the hearing as compared to a plaintiff in a civil claim) represents a marked departure from an ordinary civil trial. The CLA accepts and adopts the Appellant's written submissions at paragraphs 37 to 54 of the Appellant's factum on these points, and adds the following.

16. The Court of Appeal, in the judgment below, noted that the appellant "could have had counsel [in the disciplinary proceeding] had he wanted one."[16] However, with the greatest of respect, what the Court of Appeal describes is a fantasy. It defies reality to conclude that complainants in police discipline matters will pay thousands of dollars to retain separate counsel when there is no possibility of financial recovery at the end of the day.

C. Lack of Public Confidence in the Police Discipline Procedure

17. The very notion of the 'police investigating police' is inherently problematic.[17]

---

[15] Decision of the Court of Appeal for Ontario dated September 27, 2010. at para. 48.

[16] *Ibid.*

[17] For example, in one study examining the level of satisfaction experienced by complainants who filed police complaints in the 1990s, 57% of complainants polled stated that, at the time they filed their complaint, they did not know that the police would make the first decision in response to their complaint. 73% of that group did not believe that it was "good" that the police would make the first decision in response to their complaint. Only 14% of complainants who experienced the entire complaint process (i.e. after the preliminary decision) felt that their

18. There exists a pervasive lack of confidence in the ability of the police to effectively and fairly process discipline matters. In Ontario, for example, Justice LeSage found, as part of his comprehensive report released in 2005, that, in 1996, the Police Complaints Commissioner in Ontario (as it was then in operation) conducted only 24 investigations out of 3459 complaints filed with the police. There was "widespread agreement" that the "system for dealing with public complaints [about the police] requires improvement". Justice LeSage also concluded that many feel that the police disciplinary process is "inherently difficult to navigate" and subject to various barriers discouraging the filing of complaints. The LeSage Report concluded *inter alia* that "significant systemic changes" and a "new model of civilian participation and oversight" were necessary to the police complaints process in Ontario.[18]

19. Similar deficiencies have been noted in British Columbia. In a report prepared for B.C.'s Minister of Public Safety and Solicitor General, Josiah Wood, Q.C found that the "culture of policing" has been recognized as an important factor which tends to influence the outcome of police disciplinary investigations. The investigative audit, conducted as part of the Wood Report, found that there were investigative deficiencies in 123 of the 294 audit files

---

complaint received a "fair investigation", and 35% believed that the police investigation was biased. The author of the study took from this two conclusions: (1) there was a "general lack of accurate and consistent knowledge about the handling of complaints", even among those within the study who previously had greater degrees of experience with the process; and (2) many participants in the study expressed "considerable dissatisfaction with the internal nature of the [police] investigation." See Tammy Landau, "When police investigate police: a view from complainants", Canadian Journal of Criminology 38.3 (1996): 291 at 305 and 306, Appellant's Book of Authorities, Tab 39.

[18] See the Honourable Patrick J. LeSage Q.C., *Report on the Police Complaints System in Ontario*, April 22, 2005 at pages 22, 35, 37, 58, and 59, Appellant's Book of Authorities, Tab 44.

reviewed, and of these 123 files, the deficiencies were material to the outcome of the investigation in 48 of the files.[19]

20. The effectiveness of the police discipline process in the United Kingdom has also been called into scrutiny. As Professor Hoyano writes:

> The effectiveness of the police disciplinary process operated by the Police Complaints Authority in calling individual officers to account is also controversial, due to the perceived lack of independence of its inquiries and procedures which are conducted with or through other police forces, the standard of proof beyond reasonable doubt applicable to disciplinary charges, and the ease with which sanctions have been evaded by officers taking early retirement, often on full pension. Although changes announced by the Home Secretary to address the latter two problems may improve the situation, it is unlikely to cure the scepticism about the independence of the Authority endemic in the communities most likely to suffer discriminatory treatment. **In any event, only the tort system makes even a pretence at full compensation of the victims of police misconduct** (emphasis added).[20]

21. Similar complaints have been noted in Australia.[21]

22. In 2002, auditors of the police complaints process in Toronto concluded that neither members of the public nor complainants viewed the police complainant process as "impartial

---

[19] See Josiah Wood, Q.C., *Report on the Review of the Police Complaint Process in British Columbia*, (Vancouver: Police Services Division, British Columbia Ministry of Public Safety and Solicitor General, 2007) ("Wood Report") at paras. 26 and 174.

[20] See Hoyano, *supra* note 3 at 933 and 934.

[21] In Australia, a study conducted in 2010 focused on the level of satisfaction experienced by individuals who filed complainants to the Victoria Police Ethical Standards Department. The study found that approximately 58% of complainants were dissatisfied with the ensuing disciplinary investigation, and 62% were dissatisfied with the outcome. Before lodging their complainants, nearly two-thirds of the complainants reported some level of confidence in the complaints system. By the end of the complaints process, nearly 15% of the complainants reported a "little less confidence" in the Victoria Police complaints system, and 50% reported "much less confidence". See Tim Prenzler, Troy Allard, Steven Curry, and Stuart Macintyre, "Complaints Against Police: the Complainants' Experience", (2010) 1 Journal of Criminal Justice Research 1 at 11).

or fair".[22] A group of lawyers interviewed in New South Wales went a step further and described the state of the formal police complaints system and police internal investigations there as being "completely inadequate", "useless", "hopeless", and "a waste of time".[23]

23. Put simply, people do not trust that the police investigation and discipline process is fair. The question of whether the doctrine of issue estoppel should apply to findings of fact made in police discipline hearings should be informed by this stark lack of confidence in the police discipline procedure and process.

24. Applying issue estoppel to findings made in a police discipline hearing leads to a perverse outcome from a policy perspective. There is a utilitarian benefit to a practice which encourages and facilitates the filing of complaints aimed at regulating police misconduct. Further, that practice is in accordance with values we seek to protect such as state accountability and transparency.

25. The CLA respectfully submits that the Court of Appeal's decision will discourage complainants from engaging the police complaints process, for fear of prejudicing their rights to pursue civil claims and will restrict the ability of those who do pursue such complaints to obtain redress in the civil justice system.

26. There is no good reason to restrict access to the courts in this manner. There has been no "flood" of litigation. To the contrary, "police misconduct coupled with distrust of formal

---

[22] City of Toronto, Audit Services, *Performance Audit: The Public Complaints Process Toronto Police Service*, Jeffrey Griffiths (Toronto: Audit Services, City of Toronto: August 2002) at pages 29 and 30, Appellant's Book of Authorities, Tab 41.

[23] Jude McCulloch and Darren Palmer, "Civil litigation by citizens against Australian police between 1994 and 2002", Report to the Criminology Research Council, Crc Grant No. 19/01-02 at page 90.

complaints systems, are major precursors to civil litigation."[24] In other words, by facilitating, rather than discouraging, the filing of complaints, there is reason to believe that there will be less, not more, litigation. In any event, there is no shortage of tools available to the courts to weed out meritless claims.

PART IV - SUBMISSIONS CONCERNING COSTS

27. The CLA does not seek costs against any party in this appeal and asks that costs not be awarded against it.

PART V - ORDER SOUGHT

28. The CLA takes no position on the disposition of the appeal. Rather, the CLA respectfully submits that the principles identified herein inform this Court's decision in the case at bar.

29. The CLA seeks leave to make oral submissions of not longer than 10 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of December, 2011.

Louis Sokolov
Daniel Iny
Sack Goldblatt Mitchell LLP

Solicitors for Criminal Lawyers' Association (Ontario)

[24] Janet Ransley, Jessica Anderson and Tim Prenzler, "Civil Litigation Against Police in Australia: Exploring its Extent, Nature and Implications for Accountability", The Australian & New Zealand Journal of Criminology, Vol. 40 No. 2 2007 143 at page 149.

PART VI - SCHEDULE "A"
LIST OF AUTHORITIES

Case Cited	Paragraph Reference in Factum
Hill v. *Hamilton-Wentworth Regional Police Services Board,* [2007] 3 S.C.R. 129	4
Ashley v. *Chief Constable of Sussex,* [2008] UKHL 25	7
Vancouver (City) v. *Ward,* [2010] 2 S.C.R. 28	8
R. v. *Gridic,* [1985] 1 S.C.R. 810	11, 12

Books / Articles / Reports Cited	Paragraph Reference in Factum
Laura C.H. Hoyano, "Policing Flawed Policing Investigations: Unravelling the Blanket" (1999) 62 Mod. L. Rev. 912	4, 20
Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law*, 8th ed. (Markham: LexisNexis Butterworths, 2006)	6, 10
Lewis N. Klar, *Tort Law*, (Toronto: Carswell, 1991)	6
Phil Palmer and Jenny Steele, "Police Shootings and the Role of Tort", (2008), 71(5) Mod. L. Rev. 801	8
Tammy Landau, "When police investigate police: a view from complainants", Canadian Journal of Criminology 38.3 (1996): 291	17
The Honourable Patrick J. LeSage Q.C., *Report on the Police Complaints System in Ontario*, April 22, 2005	18
Josiah Wood, Q.C., *Report on the Review of the Police Complaint Process in British Columbia,* (Vancouver: Police Services Division, British Columbia Ministry of Public Safety and Solicitor General, 2007)	19
Tim Prenzler, Troy Allard, Steven Curry, and Stuart Macintyre, "Complaints Against Police: the Complainants' Experience" (2010), 1 Journal of Criminal Justice Research, 1	21

Books / Articles / Reports Cited	Paragraph Reference in Factum
City of Toronto, Audit Services, *Performance Audit: The Public Complaints Process Toronto Police Service*, Jeffrey Griffiths (Toronto: Audit Services, City of Toronto: August 2002)	22
Jude McCulloch and Darren Palmer, "Civil litigation by citizens against Australian police between 1994 and 2002", Report to the Criminology Research Council, Crc Grant No. 19/01-02	22
Janet Ransley, Jessica Anderson and Tim Prenzler, "Civil Litigation Against Police in Australia: Exploring its Extent, Nature and Implications for Accountability", The Australian & New Zealand Journal of Criminology, Vol. 40 No. 2 2007 143.	26

PART VII - SCHEDULE "B"
STATUTES AND REGULATIONS