RECENT APPEAL DECISIONS IMPACTING ON POLICE LIABILITY

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I. INTRODUCTION

Police liability is a unique area of law for its breadth. Unlike many other fields that may focus on one or two particular narrow legal issue(s), cases involving police liability are impacted by not only tort, but also by administrative, criminal, and constitutional law considerations. All of these fields can overlap. For example, the disposition in the criminal context may determine whether that accused has a viable civil claim in negligent investigation or malicious prosecution.[1] Both the Court of Appeal for Ontario and the Supreme Court of Canada recently released decisions that touch on the interrelationship between these areas of law in the context of police liability.

In *Penner v. Niagara (Regional Police Services Board*), [2013] S.C.J. No. 19, the Supreme Court of Canada considered the impact police discipline proceedings may have on subsequent civil actions against police. In *Wellington v. Ontario*, [2011] O.J. No. 1615 (C.A.), the Court of Appeal for Ontario defined the limits of the duty of care owed by police and the Special Investigations Unit to victims of crime and their families. Most recently, in *Wood v. Schaeffer*, [2013] S.C.J. No. 71, the Supreme Court of Canada considered the right of police officers to consult with counsel prior to preparing their duty book notes for investigation by the Special Investigations Unit.

II. *Penner v. Niagara (Regional Police Services Board)*

In *Penner v. Niagara (Regional Police Services Board)*, the Supreme Court of Canada considered whether police discipline proceedings initiated under Part V of the *Police Services Act* could bar subsequent civil actions against police with the doctrine of issue estoppel. In a 4-3 decision, a deeply divided Court determined that the application of issue estoppel would work an injustice to Mr. Penner and allowed his civil action to proceed. The majority took a step back from analyzing the unique circumstances of Mr. Penner's case in favour of a more general analysis of the characteristics of the tribunal proceedings below. In doing so, the majority adopted a more "nuanced" approach to fairness and determined that it would be unfair to

[1] See, for example: *Romanic v. Johnson*, [2012] O.J. No. 2642 (S.C.J.); aff'd [2013] O.J. No. 229 (C.A.)

Mr. Penner to apply issue estoppel in the circumstances, even though the police discipline proceeding below was conducted fairly. A strong dissent co-authored by Justices LeBel and Abella placed the focus on fairness *of* finality to litigation and analyzed the specific circumstances of Mr. Penner's case through that lens. The dissenting Justices favoured dismissing Mr. Penner's appeal, noting that the hearing officer made clear findings against Mr. Penner. The dissent ultimately opined that allowing the action to proceed would result in a duplicative proceeding that "would inevitably yield the same result."

Underlying Facts and Judicial Treatment

The facts in *Penner* are important to understand the context in which the court reached its decision. In September 2002, Mr. Penner attended his wife's trial over a minor traffic infraction. He sat in the back of the courtroom wearing sunglasses, chewing gum, and disrupting proceedings with a running commentary. The presiding judge asked Mr. Penner to stop. He did not. The court officer then asked him to stop. He did not. When his behavior became more disruptive and defiant, he was placed under arrest and was removed from the courtroom. He resisted the arrest and a struggle ensued.

Following his arrest, Mr. Penner filed a complaint under the *Police Services Act* and started a civil action against the arresting officers. In both cases, Mr. Penner claimed that he was the victim of excessive force, unlawful arrest, false imprisonment, and malicious prosecution. The parties agreed to await the outcome of the discipline proceeding before continuing with the litigation.

The discipline hearing spanned a number of days and included evidence from 13 witnesses, including several independent eyewitnesses. There were 32 exhibits, including audio and video recordings. Legal arguments were made by all parties, including Mr. Penner. Upon hearing all the evidence and submissions, the hearing officer cleared the officers of any wrongdoing. In the process, significant credibility findings were made unflattering to Mr. Penner.

Mr. Penner appealed the hearing result to the Ontario Civilian Commission on Police Services, where the presiding members concluded that the officers did not have the authority to arrest

Mr. Penner inside the courtroom. Absent this authority, any use of force was deemed excessive. Judicial review to the Divisional Court on this discrete point of law was successful. The three-judge panel unanimously found that the officers had the jurisdiction to arrest Mr. Penner in the courtroom and affirmed the hearing officer's finding that there was no misconduct. The Divisional Court's decision was not appealed.

With the police discipline proceedings completed in their favour, the officers brought a Rule 21 motion to dismiss the civil action on the basis that all the issues had been decided by the hearing officer and affirmed by the Divisional Court. The motion judge applied the two part test for the application of issue estoppel. In the first part, the motion judge held that the three preconditions to the application of issue estoppel were met: the same question was considered in both the police discipline hearing and the civil action, the same parties were involved in both cases, and the conclusion of the police discipline hearing was final. The motion judge also found that the second part of the test, whether the application of issue estoppel would not work an injustice on the facts of this particular case, was met. The civil action was dismissed. Mr. Penner appealed.

The Court of Appeal for Ontario also held that the three preconditions of issue estoppel were met but determined that the motion judge erred by failing to perform an analysis of whether the application of issue estoppel would work an injustice. However, upon performing its own analysis, the Court determined that the application of issue estoppel would not work an injustice. The appeal was dismissed. Again, Mr. Penner appealed.

The sole issue before the Supreme Court of Canada was whether the Court of Appeal properly exercised its discretion to apply issue estoppel. In a sharply split decision, the Court allowed the appeal, holding that it would be unfair to apply the decision from the police discipline proceeding to the subsequent civil action.

The Majority Decision

A majority of four judges led by Justices Karakatsanis and Cromwell agreed that the three preconditions to issue estoppel were met. At issue was the manner in which the discretionary analysis was performed in deciding whether the application of issue estoppel would work an

injustice. Most of the factors commonly considered in exercising this discretion focused on the fairness of the prior proceeding: whether there were procedural safeguards, the availability of an appeal, the expertise of the hearing officer, and the procedural fairness afforded the complainant/plaintiff. There was no question that the police discipline proceeding was conducted fairly. However, according to the majority, it is not enough to look at whether the prior proceedings were fair. Courts must now also undertake the "much more nuanced enquiry" of looking at whether it is fair to use the results of the prior proceedings to bar the subsequent action. Even if the prior proceeding was conducted fairly, it may still be unfair to apply prior results to the subsequent proceeding. According to the majority, this can occur where there is a *significant* difference between the purposes, processes, or stakes involved in the two proceedings. The Court of Appeal, according to the majority, erred in failing to perform this analysis.

In undertaking their own fairness analysis, the majority looked at Mr. Penner's reasonable expectations as they were shaped by the nature of the police discipline proceeding. First, it was noted that the *Police Services Act* did not expressly foreclose the possibility of a civil action co-existing with the police discipline hearing. Second, the majority noted that Mr. Penner had no remedy available to him from the police disciplinary hearing, which related exclusively to employment-related discipline. Third, the majority noted that the prosecution in a police discipline proceeding had a higher burden of proof, which did not necessarily mean that Mr. Penner would not meet the lower burden in the civil action. Based on this, it was concluded that Mr. Penner could not have reasonably expected that issue estoppel would be applied in this case.

In addition to reasonable expectations, the majority cited general policy concerns applicable to all administrative tribunals as another reason not to apply issue estoppel. They were weary of the risk that the police discipline proceeding would become a proxy for the subsequent civil action by placing undue weight on the hearing results. This risked adding complexity and length to the tribunal's hearing.

Lastly, the majority was troubled by the structure of police discipline hearings. Under Part V of the *Police Services Act*, the Chief of Police (or his/her designate) had the official role of

appointing an investigator, prosecutor, and adjudicator. Although previous case law suggested this was an acceptable system, the majority called this a "serious affront to basic principles of fairness". The concern was that the Chief of Police could potentially be adjudicating a civil action in which he/she may be a named Defendant through the police discipline hearing. Of note, Mr. Penner did not challenge this or raise any procedural fairness/natural justice concerns or issues of bias during the administrative hearing, or any of the appeals of the administrative decision. Nor did he raise any such issues on the Rule 21 motion or on his appeal to the Court of Appeal. The first time this issue was raised was at the ultimate appeal to the Supreme Court of Canada.

The Dissent

A sharp dissent was co-authored by Justices LeBel and Abella in favour of applying issue estoppel. The theme of the dissenting reasons was the preservation of finality between parties through the application of issue estoppel.

According to Justices LeBel and Abella, the majority adopted an approach to issue estoppel that was expressly rejected by the Supreme Court of Canada a few years prior in *British Columbia (Workers' Compensation Board) v. Figliola*.[2] According to *Figliola*, the goal of issue estoppel was not to balance fairness and finality as competing and distinct values but to preserve the fairness of finality. The Court in that case determined that the discretionary analysis of whether to apply issue estoppel "should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of … relitigation." Guided by this framework as established by the Supreme Court's prior decision on issue estoppel, the dissenting judges responded to the majority decision then applied their own discretionary analysis that would have lead to the dismissal of Mr. Penner's appeal.

The dissent held that the discretionary analysis proposed by the majority would have negative consequences for administrative tribunals in general. First, administrative tribunals by their very nature have different purposes, processes, and procedures from courts. It could almost always be

[2] [2011] S.C.J. No. 52

said that a tribunal has a different purpose than a court. Placing these differences at the forefront of a fairness analysis will almost always lead to the exclusion of the application of issue estoppel when the earlier decision comes from a tribunal. Second, the majority decision undermines the integrity of administrative tribunals. Permitting the application of issue estoppel with administrative decisions in appropriate circumstances furthers the policy objectives of issue estoppel, including the avoidance of duplicative litigation, inconsistent results, undue costs, and inconclusive proceedings. The third consequence of the majority's approach is that it denies administrative tribunals the deference to which they are entitled with judicial review. Now, if a party is displeased with a particular administrative proceeding, they may simply turn to a new forum, the court system, rather than seek the appropriate remedies through judicial review. To use Justice Binnie's words from the *Danyluk v. Ainsworth Technologies Inc.*[3] decision, they would be entitled to a second bite at the cherry.

The dissent next responded to each of the majority's concerns in the fairness analysis and concluded that the operation of issue estoppel would not work an injustice on the unique facts of this case. First, it was noted that Mr. Penner's hearing was conducted in an independent, fair, accountable, and binding process as designed by the *Police Services Act* and the *Statutory Powers Procedure Act*. Second, the dissent agreed with the Court of Appeal that Mr. Penner derived a financial benefit from the discipline proceeding. Had the hearing officer made a finding of police misconduct, the practical result would have been that the civil action amounted to an assessment of damages. Third, the dissent noted that the *Police Services Act* did not bar the application of issue estoppel to subsequent civil actions like other statutes have done. Preventing the application of issue estoppel meant that the tribunal's decisions were no longer final or binding, but open to re-litigation if the complainant was unhappy with the result. Fourth, the dissent determined that the method used to appoint the hearing officer is not a consideration to defeat the application of issue estoppel in this case because any concerns of partiality and conflict of interest had already been addressed by the legislation setting out the appointment process. Lastly, it was noted that the differing burdens of proof between the two proceedings were immaterial in this case in light of the findings that there was "no…evidence whatsoever" to

[3] [2001] S.C.R. 460

support Mr. Penner's claims. In other words, it did not matter which burden of proof was applied; Mr. Penner would not succeed. As a result, the dissent saw "no reason to circumvent the clear findings of the hearing officer and put the parties through a duplicative proceeding, which, in this case, would inevitably yield the same result."

What is the Impact of the Penner Decision?

The *Penner* decision is likely to have limited consequences on civil actions against police. Even if the Court of Appeal's decision had been upheld, issue estoppel would have seldom applied to cases where the police discipline proceeding ended in the officer's favour. *Penner* presented unique factual circumstances favouring the officers that are rarely replicated in other contexts, meaning that the application of issue estoppel outside the confines of similar circumstances would be rare. Conversely, *Penner* leaves the question unanswered of whether issue estoppel is available to a plaintiff where their complaint is found substantiated in a police discipline proceeding. Subject to any unusual fact scenario or questions over the issue estoppel preconditions, it is possible, perhaps likely, that issue estoppel would apply. This question, however, is unlikely to come before the courts any time soon because liability is less an issue in civil actions where there is a previous finding of misconduct. Although it is too soon to tell, the real impact of the *Penner* decision is a potential increase in police discipline complaints by plaintiffs seeking a relatively risk-free and inexpensive determination of liability issues even before the civil action starts. In turn, this will place a heavier burden on police forces responsible for investigating and adjudicating the complaints.

In addition to civil claims, the *Penner* decision appears to have now opened the door to police forces facing duplicitous tribunal proceedings on the same issues in both the context of public complaints and human rights complaints.[4]

The decision has created a significant buzz among the administrative law community as the decision marks a significant departure from the deference the Court has given to specialized

[4] *Claybourn v. Toronto Police Services Board*, [2013] HRTO 1298

tribunal decisions in *Figliola* and *Danyluk*. The net result is that it will be much more difficult for counsel to advise their clients on whether issue estoppel would apply in their particular case.

III. *Wellington v. Ontario*

The Special Investigations Unit is a civilian law enforcement agency that conducts investigations of incidents involving the police where there has been death, serious injury, or sexual assault. The SIU is empowered under s. 113 of the *Police Services Act* to cause criminal charges to be laid against police officers where warranted on the basis of evidence gathered during an investigation. In *Wellington v. Ontario* the Court of Appeal for Ontario addressed the issue of whether the SIU owed a duty of care to victims or their families.

On June 20, 2006, two police officers pursued a van driven by the plaintiffs' 15-year-old son and brother. The pursuit led to a confrontation that concluded with the son being fatally shot as he attempted to drive away. The incident was investigated by the SIU, who concluded that the police officers acted lawfully and that no charges should be laid as against them. Subsequently, the plaintiffs brought a civil claim against the SIU and the Director of the SIU. It was alleged that the investigation was negligently conducted because the SIU failed to interview one of the involved officers and failed to ask key questions of the other officer. It was further alleged that the SIU negligently allowed the officers to keep their firearms for several hours after the shooting and that it closed the investigation before receiving the pathologist's report. The plaintiffs maintained that a proper investigation would have led to criminal charges as against the officers.

The defendants brought a Rule 21 motion to strike the plaintiffs' claim on the grounds that it disclosed no reasonable cause of action. The motion judge dismissed the motion on the basis that it was not plain and obvious that the claim could not succeed, stating that the matter should be determined with a full evidentiary record because the case presented a novel question of law.[5] The defendants appealed to the Divisional Court.

[5] [2009] O.J. No. 2975 (S.C.J.)

The Divisional Court considered the question of whether a police investigation can give rise to a private law duty of care owed to the victim(s) and/or their family. The majority of the three judge panel upheld the motion judge and found that it was not plain and obvious that the relationship between the parties could not give rise to a *prima facie* duty of care.[6] The Court noted that this was an example of the type of case that should be permitted to proceed to trial so that the important issues that it raises can be carefully examined on the basis of a more thorough factual analysis. The Court identified the following factual issues that required further examination: the foreseeability of the particular types of harm alleged by the family, the causal connection between the alleged inadequacies in the investigation and harm to the plaintiffs, the expectations of the family in respect of the SIU, and the nature and extent of the contact between the family and the SIU.

The defendants further appealed to the Court of Appeal. Justices Moldaver, Sharpe, and Armstrong allowed the appeal and dismissed the plaintiffs' action on the basis that the Statement of Claim did not give rise to a private law duty of care or a claim in negligence against the SIU.[7] While the police owe a duty to a particular suspect under investigation[8] and a narrow and distinct group of potential victims of a specific threat[9], there is a long list of decisions rejecting the proposition that the police owe the victims of crime and their families a private law duty of care in relation to the investigation of alleged crimes. The Court stated that the situation of a suspect was distinguishable from the situation of a victim or his or her family; while victims and their families may have a "keen interest" in the conduct of an investigation, their interests do not ordinarily attract legal protection. The Court affirmed that a victim of an identifiable threat can maintain a negligence action against the police if the pleadings support a special relationship of proximity. In this case, they did not.

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[6] [2010] O.J. No. 2433 (Div. Ct.)

[7] 2011 ONCA 274.

[8] See: *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129

[9] *Jane Doe v. Toronto (Metropolitan) Commissioners of Police*, [1998] O.J. No. 2681 (H.C.J.)

Having established that there was no existing special relationship between the SIU and victims of crime and their families, the Court next undertook the two-stage *Cooper-Anns* test to determine whether a duty of care existed.

The Court determined that the plaintiffs failed to meet the first part of the test by establishing a foreseeability of harm and proximity between the parties. The Court determined that when the SIU investigates allegations of criminal misconduct by the police, its duties are overwhelmingly public in nature. In the Court's view the SIU *does not and should not* conduct criminal investigations to advance the private interest of any individual citizen. This would create an inherent tension between the public interest in an impartial and competent investigation and a private individual's interest in a desired outcome of the same investigation. In the course of its reasons, the Court specifically rejected the argument that the victim's family was brought within the circle of the SIU's care by interviewing that person, in this case, the deceased's mother, during the course of the investigation.

The Court, however, was careful to note that refusing to recognize a private law duty of care in relation to police investigations does not leave the families of victims without appropriate and viable legal recourse. The Court suggested that different mechanisms are available for these individuals, including compensation under the *Compensation for Victims of Crime Act*[10]*;* claims against police for wilfully failing to comply with statutory duties[11]; and claims against the perpetrators of crime.

In 2011, the Supreme Court of Canada declined to hear the family's appeal.

With *Wellington*, it appears now that the door has been closed on the existence of the private law duty of care owed by both police and SIU investigators to victims of crime and/or their families in Ontario.

[10] R.S.O. 1990, c. C.24

[11] *Odhavji Estate v. Woodhouse,*[2003] 3 S.C.R. 263

IV. *Wood v. Schaeffer*

> "In short, so long as police officers choose to wear the badge, they must comply with their duties and responsibilities under [the applicable] regulation, even if this means at times having to forgo liberties they would otherwise enjoy as ordinary citizens."

In *Wood v. Schaeffer*, the Supreme Court of Canada dealt with the rights of police officers to consult with counsel prior to preparing their duty book notes for the purposes of SIU investigations. This case arises from an application commenced by the family members of two civilians who were fatally shot by police in separate incidents. In both cases, the police officers involved were instructed by their superiors to consult with legal counsel prior to writing down their recollections of the respective incidents for the purposes of the SIU investigations. The applicants sought declaratory relief that the officers who were the subjects of SIU investigation were not entitled to obtain legal assistance in the preparation of their notes.

Although on the face of it, these issues dealt with the *Charter* rights of police officers being investigated for potential criminal charges, the application involved the interpretation of various provisions of the *Police Services Act* and the *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit* regulation. There were no *Charter* considerations.

The regulation that governs the conduct of SIU investigations provides that all officers involved in an incident triggering an SIU investigation (including "subject officers" and "witness officers") must be segregated from each other, to the extent practicable, until after the SIU has completed its interviews (s. 6(1)). All officers are entitled to "consult" with legal counsel and have counsel "present" during their SIU interviews (s. 7(1)). Both subject and witness officers are required to complete their notes on the incident "in accordance with [their] duty" (ss. 9(1) and 9(3)).

The application judge dismissed the application on the grounds that the applicants lacked standing to sue for declaratory relief and that the issues raised were moot and not justiciable.[12]

[12] [2010] O.J. No. 2770 (S.C.J.)

The family members appealed to the Ontario Court of Appeal, asking for a reversal of that decision and a determination of the application on its merits.

The Ontario Court of Appeal sided with the applicants and concluded that: (1) the applicants had standing to bring their application on the basis of public interest; (2) the issues raised were justiciable, not moot; and, (3) it was appropriate for the court to rule on certain substantive issues.[13] The Court granted a declaration to the effect that police officers involved in an SIU investigation do not enjoy the right to have a lawyer vet their notes or to assist in the preparation of their notes. The Court did find, however, that s. 7(1) of the regulation entitled the officers to basic legal advice with respect to their general rights and obligations.

It is noteworthy that in its decision, the Court of Appeal conducted a very cursory review of the extent to which the right to retain and instruct counsel under s. 10(b) of the *Canadian Charter of Rights and Freedoms* would apply in the context of officers being investigated by the SIU. In particular, Mr. Justice Sharpe, writing for the Court, indicates that although both witness and subject officers are segregated for purposes of being interviewed by the SIU in the context of a criminal investigation, they are neither under arrest nor under detention and, accordingly, in Mr. Justice Sharpe's view, this right would not be available to the officers at the investigation stage. Mr. Justice Sharpe proceeds to conduct a very brief s. 1 analysis under the *Charter* and gives the view that the right conferred by s. 10(b) of the *Charter* would be subject to reasonable limitations which would not need to be explicitly stated in legislation but rather may be limited by implication. His Honour gives as an example the law providing for a roadside breathalyser test on a forthwith basis would, by necessary implication, limit the rights to counsel.

The respondent police officers appealed the decision to the Supreme Court of Canada. However, it is noteworthy that the Court of Appeal's findings in relation to the application of the *Charter* rights to counsel was not appealed. The SIU Director cross-appealed, arguing that the Court of Appeal erred in concluding that police officers were entitled to "basic legal advice" prior to

[13] [2011] O.J. No. 5033 (C.A.)

completing their notes. The Supreme Court released their decision on December 19, 2013 dismissing the appeal and allowing the cross-appeal.[14]

Justice Moldaver, writing for the Court, stated that, "Permitting police officers to consult with counsel before their notes are prepared is anathema to the very transparency that the legislative scheme aims to promote."

The heart of the appeal rested on the Court's interpretation of s. 7(1) of the regulation with respect to the officers' entitlement to counsel, and ss. 9(1) and 9(3) respecting the duty to make notes. At the outset of the analysis, Justice Moldaver made it clear that the *Charter of Rights and Freedoms*, and specifically the right to counsel that exists under s. 10(b) of the *Charter*, was not applicable to this issue as it had only been raised by interveners[15], and not by the parties to the appeal.[16] Thus, it remains a question for another day as to whether the Supreme Court of Canada would have agreed with the Court of Appeal's analysis of why the *Charter* rights to counsel would not apply in the context of officers being investigated by the SIU.

Further, the Court rejected the argument that police officers were free at common law to consult with counsel in the preparation of their notes. Justice Moldaver noted that in the circumstances, "the point of departure is not the common law liberty to consult with counsel. Rather we must begin with the regulation which governs the situations in which comprehensively sets out their rights and duties…" In interpreting the regulation, the Court determined that reading s. 7(1) in its entire context does not provide a freestanding entitlement to consult with counsel at the note making stage. The Court's reasons for this were threefold: first, consultation with counsel at this stage is antithetical to the dominant purpose of the legislative scheme; second, the legislative history demonstrates that this section was never intended to create a freestanding entitlement to consult with counsel at the note making stage; and third, consulting with counsel at the note

[14] [2013], S.C.J. No. 71

[15] Specifically, the issue had been brought up in the factums of the Canadian Civil Liberties Association, and the Canadian Police Association. The SIU Director brought a motion to strike out the paragraphs of the respective interveners' factums that raised this issue on the grounds that it had not been raised by any of the parties on the appeal. The Court allowed the motion to strike.

[16] Justice Moldaver specifically stated that no party has sought to determine whether witness or subject officers are "detained" within the meaning of s.10(b) during SIU investigations.

making stage impinges on the ability of police officers to prepare accurate, detailed and comprehensive notes in accordance with their duties under s. 9 of the Regulation.

The Court was divided in relation to the cross-appeal. Writing for the majority of the Court, Justice Moldaver disagreed with the Ontario Court of Appeal's conclusion that s. 7(1) entitles police officers to "basic legal advice" about the nature of their rights and obligations before they complete their notes. The Court stated that "even the perfunctory consultation contemplated by the Court of Appeal is liable to cause an 'appearances problem.'" Justice Moldaver posited that the loss of public trust would be "a high price to pay" for an initial consultation that achieved no tangible benefit. The Court stated that after submitting their notes, police officers were free to consult with counsel as they wished.

While agreeing with the majority that it is inconsistent with a police officer's duties to complete his or her notes with the benefit of counsel's advice, Justices LeBel, Fish, and Cromwell would have dismissed the SIU's cross-appeal regarding officers' entitlement to consult with counsel regarding their basic rights and obligations prior to drafting their notes . The dissenting judges noted that it was not clear from the regulation that there was indeed a restriction created which ousted the rights that police officers would otherwise enjoy as ordinary citizens. The dissent saw no tension between a police officer's right to consult with counsel regarding basic rights and obligations, and the duty of the officer to write complete and independent notes.

Although Justice Moldaver specifically chose not to address this issue, this case raises an interesting question as to whether or not a provincial regulation has the ability to supersede the *Charter*. Although it remains to be seen how the result of this inquiry could be impacted by a full s.10(b) *Charter* analysis, the Court has implied that police officers, by virtue of their chosen profession, are subject to a different set of protections when it comes to their legal rights. Although the effect of this case very well may be that it assists the SIU in conducting investigations in a more transparent fashion, there are likely those who are concerned about the impact that this decision has on police officers and their ability to enjoy the same fundamental *Charter* rights as other Canadians.

V. Conclusion

The case law canvassed in this article shows the complex interrelationships between tort, criminal, and administrative law in police liability litigation. *Penner* is an obvious example of how an administrative tribunal decision may (or may not) have a direct impact on the outcome of a civil claim. In *Wood v. Schaeffer*, the Supreme Court's decision to deny officer's the opportunity to speak with counsel before their interview with the SIU outlines the scope of an officer's rights in an investigation that could lead to criminal charges. In addition to the potential penal consequences of that investigation, the outcome of those charges will have a direct impact on any subsequent civil action. Lastly, the Court of Appeal in *Wellington* further refined the scope of the duty of care owed by police officers in the civil context. In one way or another, therefore, these three decisions may have an impact on civil actions against police and it is important that counsel be aware of these decisions and their potential implications.