

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

B E T W E E N

ATTORNEY GENERAL OF ONTARIO

Appellant  
(Appellant)

- and -

JAMIE CLARK, DONALD BELANGER and STEVEN WATTS

Respondents  
(Respondents)

- and -

ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL  
OF ALBERTA, ATTORNEY GENERAL OF NEW BRUNSWICK,  
ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL  
OF BRITISH COLUMBIA, CANADIAN ASSOCIATION OF  
CHIEFS OF POLICE, MARK SAUNDERS, CANADIAN ASSOCIATION  
OF CROWN COUNSEL AND ONTARIO CROWN ATTORNEYS' ASSOCIATION

Interveners

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**FACTUM OF THE INTERVENER,  
TORONTO POLICE CHIEF MARK SAUNDERS**

*(Pursuant to Rule 42 of the Rules of the Supreme Court of Canada)*

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**LERNERS LLP**

130 Adelaide Street West  
Suite 2400  
Toronto, ON M5H 3P5

**Earl A. Cherniak, Q.C.**

Tel: 416.601.2350  
Fax: 416. 867.2402  
Email: echerniak@lerners.ca

**Cynthia B. Kuehl**

Tel: 416.601.2363  
Fax: 416.867.2433  
Email: ckuehl@lerners.ca

Counsel for the Intervener, Toronto Police  
Chief Mark Saunders

**GOWLING WLG (CANADA) LLP**

160 Elgin Street  
Suite 2600  
Ottawa ON, K1P 1C3

**Jeffrey W. Beedell**

Tel: 613.786.0171  
Fax: 613.788.3587  
Email: jeff.beedell@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener,  
Toronto Police Chief Mark Saunders

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

**AND TO:**

**ATTORNEY GENERAL OF ONTARIO**  
Crown Law Office - Civil  
720 Bay Street, 8<sup>th</sup> Floor  
Toronto, ON M7A 2S9

**Sunil S. Mathai**  
**Ananthan Sinnadurai**  
Tel: 416.605.2298  
Fax: 416.326.4181  
Email: sunil.mathai@ontario.ca  
          ananthan.sinnadurai@ontario.ca

Counsel for the Appellant, Attorney General  
of Ontario

**BRAUTI THORNING LLP**  
161 Bay Street, Suite 2900,  
Toronto, ON M5J 2S1

**Lorne Honickman**  
**Michael Lacy**  
Tel.: 416.360.2786  
Fax: 416.362.8410  
Email: lhonickman@btlegal.ca  
          mlacy@btlegal.ca

Counsel for the Respondents, Jamie Clark,  
Donald Belanger and Steven Watts

**BORDEN LADNER GERVAIS LLP**  
World Exchange Plaza  
1300 –100 Queen Street  
Ottawa, ON K1P 1J9

**Nadia Effendi**  
Tel: 613.369.4795  
Fax: 613.230.8842  
Email: neffendi@blg.com

Ottawa Agent for Counsel for the Appellant,  
Attorney General of Ontario

**SUPREME ADVOCACY LLP**  
340 Gilmour Street  
Ottawa, ON K2P 0R3

**Eugene Meehan, Q.C.**  
**Marie-France Major**  
Tel: 613.695.8855  
Fax: 613.695.8580  
Email: emeehan@supremeadvocacy.ca  
          mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the  
Respondents, Jamie Clark, Donald Belanger  
and Steven Watts

**ATTORNEY GENERAL OF  
SASKATCHEWAN**

Civil Law Branch, 9th Floor  
1874 Scarth Street  
Regina, Saskatchewan  
S4P 4B3

**Michael J. Morris**

Tel: 306.787.7444  
Fax: 306.787.0581  
Email: michael.morris@gov.sk.ca

Counsel for the Intervener, Attorney General of  
Saskatchewan

**ATTORNEY GENERAL OF NEW  
BRUNSWICK**

Public Prosecutions Branch  
Carleton Place, P.O. Box 6000  
Fredericton, New Brunswick  
E3C 5H1

**Kathryn Gregory**

Tel: 506.453.2784  
Fax: 506.453.5364  
Email: kathryn.gregory@gnb.ca

Counsel for the Intervener, Attorney General of  
New Brunswick

**ATTORNEY GENERAL OF BRITISH  
COLUMBIA**

1301-865 Hornby Street  
Vancouver, British Columbia  
V6Z 2G3

**Tara Callan**

Tel: 604.660.0163  
Fax: 604.660.3567  
Email: tara.callan@gov.bc.ca

Counsel for the Intervener, Attorney General of  
British Columbia

**GOWLING WLG (CANADA) LLP**

160 Elgin Street  
Suite 2600  
Ottawa ON, K1P 1C3

**D. Lynne Watt**

Tel: 613.786.8695  
Fax: 613.788.3509  
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the  
Intervener, Attorney General of  
Saskatchewan

**GOWLING WLG (CANADA) LLP**

160 Elgin Street  
Suite 2600  
Ottawa ON, K1P 1C3

**D. Lynne Watt**

Tel: 613.786.8695  
Fax: 613.788.3509  
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the  
Intervener, Attorney General of New  
Brunswick

**GOWLING WLG (CANADA) LLP**

160 Elgin Street  
Suite 2600  
Ottawa ON, K1P 1C3

**Robert E. Houston, Q.C.**

Tel: 613.783.8817  
Fax: 613.788.3500  
Email: Robert.houston@gowlingwlg.com

Ottawa Agent for Counsel for the  
Intervener, Attorney General of British  
Columbia

**ATTORNEY GENERAL OF ALBERTA**

3rd Floor, Centrium Place  
300 - 332 6 Avenue, S.W.  
Calgary, Alberta  
T2P 0B2

**Christine Rideout, Q.C.**

Tel: 403.297.6005  
Fax: 403.297.3453  
Email: christine.rideout@gov.ab.ca

Counsel for the Intervener, Attorney General of  
Alberta

**ATTORNEY GENERAL OF MANITOBA**

5th Flr., Criminal Prosecutions Division  
405 Broadway  
Winnipeg, Manitoba  
R3C 3L6

**Amiram Kotler**

Tel: 204.945.2852  
Fax: 204.945.1260  
Email: ami.kotler@gov.mb.ca

Counsel for the Intervener, Attorney General of  
Manitoba

**ROYAL NEWFOUNDLAND CONSTABULARY**

Legal Services Unit  
1 Fort Townshend  
St. John's, Newfoundland & Labrador  
A1C 2G2

**Rachel Huntsman, Q.C.**

Tel: 709.729.8739  
Fax: 709.729.8214  
Email: rachel.huntsman@rnc.gov.nl.ca

Counsel for the Intervener, Canadian Association of  
Chiefs of Police

**GOWLING WLG (CANADA) LLP**

160 Elgin Street  
Suite 2600  
Ottawa ON, K1P 1C3

**D. Lynne Watt**

Tel: 613.786.8695  
Fax: 613.788.3509  
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the  
Intervener, Attorney General of Alberta

**GOWLING WLG (CANADA) LLP**

160 Elgin Street  
Suite 2600  
Ottawa ON, K1P 1C3

**D. Lynne Watt**

Tel: 613.786.8695  
Fax: 613.788.3509  
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the  
Intervener, Attorney General of Manitoba

**PERLEY-ROBERTSON, HILL &  
MCDOUGALL**

1400 - 340 Albert Street  
Ottawa, Ontario  
K1R 0A5

**Lynda A. Bordeleau**

Tel: 613.238.2022  
Fax: 613.238.8775  
Email: lbordeleau@perlaw.ca

Ottawa Agent for Counsel for the  
Intervener, Canadian Association of Chiefs  
of Police

**CAVALLUZZO SHILTON MCINTYRE  
CORNISH LLP**

300 - 474 Bathurst Street  
Toronto, Ontario  
M5T 2S6

**Paul J.J. Cavalluzzo**

Tel: 416.964.1115  
Fax: 416.964.5895  
Email: pcavalluzzo@cavalluzzo.com

Counsel for the Intervener, Canadian Association of  
Crown Counsel and Ontario Crown Attorneys'  
Association

**NELLIGAN O'BRIEN PAYNE LLP**

50 O'Connor Street  
Suite 300  
Ottawa, Ontario  
K1P 6L2

**Christopher Rootham**

Tel: 613.231.8311  
Fax: 613.788.3667  
Email: christopher.rootham@nelliganlaw.ca

Ottawa Agent for Counsel for the  
Intervener, Canadian Association of Crown  
Counsel and Ontario Crown Attorneys'  
Association

**TABLE OF CONTENTS**

PART I: OVERVIEW.....1

    A. Overview .....1

    B. Facts .....2

PART II: QUESTION IN ISSUE .....4

PART III: STATEMENT OF ARGUMENT.....5

    Considerations for an exception to prosecutorial immunity.....5

    The special role of police in the criminal justice system .....6

    The important relationship between the community and the police .....8

PART IV: SUBMISSIONS REGARDING COSTS.....10

PART V: ORDER SOUGHT .....10

PART VI: TABLE OF AUTHORITIES.....11

## PART I: OVERVIEW

### A. Overview

1. Police officers differ from other justice system participants.<sup>1</sup> Their statutory duties require them to investigate crime, protect the communities they serve, comfort and assist victims and other vulnerable persons, and participate in prosecutions as witnesses and resources.<sup>2</sup> With those duties comes accountability, and the fulfillment of the obligations requires public trust. Courts rely on the integrity of police officers, their investigations and their evidence. Police officers therefore serve important, indeed essential, functions in the criminal justice system and community policing; functions that require community trust in the police, and the court's confidence in individual officers.

2. This appeal raises the important issue as to whether the Crown is immune from claims of misfeasance in public office where such claims are brought by police officers whose reputations, on which the criminal justice system relies, have been unfairly and inappropriately tarnished by the conduct of crown attorneys.

3. Prosecutorial immunity is not absolute. In developing exceptions to it, this Court has recognized that various policy considerations must be carefully considered and balanced. In the circumstances of this case, these policy considerations must encompass the role of police officers within the criminal justice system and take into account the broader societal harm that would result when the role and reputation of police services and individual police officers is unjustly undermined, particularly by crown attorneys with whom the police officers have a special relationship. In this case, it is pleaded that the crown attorneys permitted the courts to believe that the police officers had beaten two accused while in their custody, leading to devastating findings of fact against the officers notwithstanding that these beliefs, upon investigation, were demonstrably false.

4. The effect of such conduct goes beyond the individual officer, and creates societal harm and damage to the criminal justice system. Police officers are required to participate in

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<sup>1</sup> *Criminal Code*, RSC 1985, c. C – 46, s. 2 defines “justice system participants” to include “peace officers”.

<sup>2</sup> *Police Services Act*, R.S.O. 1990, c. P.15, s. 42(1) [PSA]

prosecutions. Their evidence, assistance and integrity are an essential part of the process. As a result, the harm occasioned from the impugned conduct of the crown attorneys is perpetuated not only in the individual case, but also in every case in which that officer is subsequently involved, whether as investigator or witness, with significant and detrimental effect on future prosecutions, affecting the police force and the community at large. In light of the special and unique role of police officers in the criminal justice system, on balance, policy considerations warrant an exception for claims for misfeasance in public office by police officers against the Crown such as those made in this case.

## **B. Facts**

5. The Chief of the Toronto Police Services (the “Chief”) accepts the record put forward by the parties and makes the following points based on that record.

6. In their claim against the appellant, the Attorney General of Ontario (the “AGO”), the respondents, Jamie Clark, Donald Belanger and Steven Watts (collectively “the police officers”) pleaded that various crown attorneys employed by the AGO committed misfeasance in public office when they chose, in a manner that was outside the scope of their duty as crown attorneys, not to question, but rather to rely upon serious allegations made by the accused persons of assault and abuse by the police officers.<sup>3</sup> Their factual allegations must be accepted as true for the purpose of the underlying motion and this appeal.

7. According to the facts pleaded, the crown attorneys chose to believe the very serious allegations of assault made against the police officers by two persons accused and charged with robbery, and failed to undertake appropriate steps to ascertain whether those allegations were true. The crown attorneys ignored key facts and failed to review information which, had they done, would have clearly exonerated the police officers.<sup>4</sup> These pleaded facts were confirmed by subsequent police reviews which found that the allegations of assault, when properly considered, could not be substantiated.<sup>5</sup> According to one subsequent review, the crown attorneys chose not

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<sup>3</sup> Appellant’s Record, (“A.R.”), Vol. II, Tab 1, pp. 115-117, Statement of Claim issued June 22, 2016, paras. 18-22; 47-49.

<sup>4</sup> A.R., Vol. II, Tab 1, pp. 127-132, Statement of Claim, paras. 43, 47-48.

<sup>5</sup> A.R., Vol. III, Tab 1F, p. 421, Affidavit of Matthew Howe sworn September 19, 2016, Exhibit “F”, Toronto Police Service Professional Standards Unit dated October 31, 2012; A.R., Vol. I,



to provide the police officers with an opportunity to answer the serious allegations in the Ontario Superior Court because the crown attorneys assumed that the police officers had or would have perjured themselves.<sup>6</sup>

8. The police officers further plead that the facts that exonerated them were known by the crown attorneys, but not provided to the Ontario Court of Appeal, even after the court made inquiries about possible discipline of the police officers.<sup>7</sup> Having not received that information, the Court of Appeal in *R v. Singh* referred to the conduct of the police officers as meeting the definition of “torture”<sup>8</sup> and specifically noted that the evidence of assault against them was not contradicted or contested by the Crown.<sup>9</sup>

9. The Court of Appeal in *Singh* recognized that allegations and findings of police misconduct had implications far beyond a particular case or officer. It said that the impact of the findings of assault by the police officers “sullies the reputations of the many good officers in our country, whose work is integral to the safety and security of our society.”<sup>10</sup> The court also noted and was critical of the fact that the officers had not been “called to account in any meaningful way”<sup>11</sup> and was critical of the absence of evidence of any meaningful disciplinary measures.<sup>12</sup>

10. Despite their exoneration by subsequent police reviews, the police officers plead that the ensuing negative and highly public findings by the Superior Court of Justice (and later, the Court

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Tab 11, p. 76, Reasons of the Ontario Court of Appeal dated April 18, 2019 in Court File Nos. C64373, C65142 & C65143 [*Clark v. Ontario (Attorney General)*, 2019 ONCA 311], (“Reasons of the Ontario Court of Appeal, April 18, 2019”), paras. 28-29; A.R., Vol. II, Tab 1, pp. 125-126, Statement of Claim, paras. 38-39.

<sup>6</sup> A.R., Vol. III, Tab 1F, p. 403, Affidavit of Matthew Howe sworn September 19, 2016, (“Howe Affidavit”), Exhibit “F”, Toronto Police Service Professional Standards Unit dated October 31, 2012. The crown attorney later stated that her concern was that the judge would find that the police officers had committed perjury. See A.R., Vol. III, Tab 1F, p. 405.

<sup>7</sup> A.R., Vol. II, Tab 1, pp. 122-123, Statement of Claim, paras. 31-34; A.R., Vol. III, tab 1G, pp. 428-431 and pp. 449-451, Howe Affidavit, Exhibit “G”, Transcript, *R v Singh* (Court of Appeal), dated October 18, 2013.

<sup>8</sup> *R. v. Singh*, 2013 ONCA 750 (CanLII), para. 43, footnote 2 [*Singh ONCA*].

<sup>9</sup> *Singh ONCA*, paras. 11 and 32.

<sup>10</sup> *Singh ONCA*, para. 44.

<sup>11</sup> *Singh ONCA*, para. 45.

<sup>12</sup> *Singh ONCA*, para. 46.

of Appeal) resulted in significant reputational harm to them. Importantly, they plead that these findings of fact are brought forward many times when they are required to testify in court, and they will face this prejudice for the remainder of their careers.<sup>13</sup>

11. The AGO's motion under Rule 21 to have the claim for misfeasance in public office dismissed was rejected at first instance by the motion court, and again by the Court of Appeal.<sup>14</sup> On this appeal, the AGO argues that no exception from prosecutorial immunity exists for misfeasance in public office and further that only accused persons should be allowed to make claims against the Crown arising from the conduct of crown attorneys.<sup>15</sup> The AGO argues, *inter alia*, that policy considerations justify maintaining prosecutorial immunity in the circumstances of this case, including the impact on the public interest and the risk that the "public's trust in the fairness and integrity of the criminal justice system will be damaged" if there is a potential risk to crown attorneys of the threat of liability.<sup>16</sup> The Chief's submissions are intended to assist this Court in coming to a full understanding of the policy considerations relevant to the public interest and the criminal justice system.

## **PART II: QUESTION IN ISSUE**

12. The Chief's submissions are directed only to the policy considerations that ought to animate the consideration of an exception to prosecutorial immunity for claims by police officers of misfeasance in public office by crown attorneys. These include consideration of the unique role of police officers within the justice system, particularly as prosecution witnesses. The impact on the broader community when the reputation of police officers is damaged is significant; police officers (and the Crown) rely on their individual and police service reputation for integrity to investigate crime, provide evidence to the courts, and keep the community safe. Undermining the reputation of police officers, either through unwarranted and unchallenged allegations of police brutality or claims of perjured evidence (particularly when made by crown attorneys), has a negative impact on the public interest and community safety, the morale of the

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<sup>13</sup> A.R., Vol. II, Tab 1, p. 133, Statement of Claim, para. 51d.

<sup>14</sup> A.R., Vol. I, Tab 4, pp. 43-44, Reasons for Decision on the Misfeasance and striking the Negligence Claim dated June 13, 2017 [*Clark v. Ontario (Attorney General)*, 2017 ONSC 3683], para. 152; A.R., Vol. I, Tab 11, p. 106, Reasons of the Ontario Court of Appeal, April 18, 2019, para. 114.

<sup>15</sup> Factum of the Appellant, paras. 47-48, 69-73.

<sup>16</sup> Factum of the Appellant, para. 59.

police service and its officers, the prevention and solving of crime and ensuring fair prosecutions.

13. The Chief takes no position on the other issues raised in this appeal, including whether misfeasance in public office requires an element of malice, or whether the tort was properly pleaded.

### **PART III: STATEMENT OF ARGUMENT**

#### **Considerations for an exception to prosecutorial immunity**

14. In *Nelles*, this Court rejected the notion of absolute immunity for prosecutors or crown attorneys. Justice Lamer, as he then was, concluded that the issue of immunity is really a question of policy.<sup>17</sup> In that case, the policy reasons favoured only qualified immunity for prosecutors such that claims for malicious prosecution by accused persons were permitted to proceed. This Court noted, in particular, the unique situation of accused persons who, but for the availability of the tort, may not have an adequate means to redress the wrong done to them, which wrong may include the breach of their *Charter* rights.<sup>18</sup>

15. More recently, this Court in *Henry* found that qualifications to prosecutorial immunity were not limited to the tort of malicious prosecution. Applying a policy-based analysis, this Court determined that claims under s. 24(1) of the *Charter* could proceed when based on allegations that the Crown intentionally withheld information material to the defence in breach of its constitutional obligations. Proof of malice is not required.<sup>19</sup> Rather, the Court looked to establishing an appropriate threshold taking into account all the relevant policy considerations.

16. In establishing that threshold, this Court has never expressly limited prosecutorial immunity to claims advanced by accused persons. While claims by accused persons do give rise to particular and important policy considerations which justified the exceptions in *Nelles* and *Henry*, the analytical framework established by this Court in those cases can and should be applied in the consideration of other exceptions. While police officers are not like accused

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<sup>17</sup> *Nelles v. Ontario*, 1989 CanLII 77 (SCC), [1989] 2 SCR 170, p. 199 [*Nelles*].

<sup>18</sup> *Nelles*, pp. 198-199.

<sup>19</sup> *Henry v. British Columbia (Attorney General)*, 2015 SCC 24 (CanLII), [2015] 2 SCR 214, para. 31 [*Henry*]

persons, their role differs from any other witness or participant in the criminal justice system. The serious potential for broader harm to public safety and to the public interest when the role of the police service and the reputation of individual officers is maligned is an appropriate policy concern for this Court to consider and supports an exception for claims by police officers against crown attorneys for misfeasance in public office.

### **The special role of police in the criminal justice system**

17. Police officers hold a special status as investigators and witnesses in the criminal justice system. Unlike members of the public, they have a statutory duty to investigate crime and participate in prosecutions pursuant to the *Police Services Act*,<sup>20</sup> and courts rely on their investigations and evidence to ensure the functioning of the criminal justice system. Thus, police officers are uniquely situated in the criminal justice system on two bases that are salient to this appeal.

18. First, there is a significant level of required and expected cooperation between police officers and crown attorneys. The Ontario Court of Appeal in *Smith*<sup>21</sup> noted that previous reports and commissions, including, *inter alia*, the Marshall Commission and the Martin Report, have encouraged cooperation and “recognized that cooperation between the police and Crown Attorneys is essential to the administration of justice”.<sup>22</sup> *A priori*, conduct that erodes that relationship and undermines the necessary level of cooperation will have a negative impact on the proper functioning of the justice system.

19. This special relationship has practical effects for accused persons. In *McNeil*,<sup>23</sup> this Court held that accused persons were entitled, as part of disclosure, to disciplinary records regarding serious misconduct by police officers involved in the investigation, as a corollary to the Crown’s obligations to disclose. Thus, this Court held that “for the purpose of fulfilling this corollary obligation, the investigating police force, although distinct and independent from the Crown at law, is not a third party. Rather, it acts on the same first party footing as the Crown.”<sup>24</sup>

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<sup>20</sup> *PSA*, s. 42(1)(d).

<sup>21</sup> *Smith v. Ontario (Attorney General)*, 2019 ONCA 651 [*Smith*].

<sup>22</sup> *Smith*, para. 69.

<sup>23</sup> *R. v. McNeil*, 2009 SCC 3 (CanLII), [2009] 1 SCR 66 [*McNeil*].

<sup>24</sup> *McNeil*, paras. 14, 23.

20. This obligation to participate in crown prosecutions emphasizes the unique role that police officers have in the functioning of the criminal justice system. In addition to a statutory duty to participate in prosecutions, police officers have had a legal duty since prior to *Stinchcombe*<sup>25</sup> to facilitate and participate in the Crown's obligation of disclosure,<sup>26</sup> which is itself an essential element of trial fairness to the accused. These duties affect the relationship that police officers have with crown attorneys, and has practical impacts and burdens on the officers' daily work not felt by civilian witnesses who participate in criminal law proceedings.

21. Second, the Crown's obligation to disclose police disciplinary records as first party disclosure<sup>27</sup> arises from the recognition that evidence regarding police misconduct may have relevance to the defence of accused persons and, in particular, the right to make full answer and defence. Citing the *Ferguson Report* which recognized that it was "neither efficient nor justified"<sup>28</sup> to treat police misconduct records as third party disclosure and recommended automatic disclosure in certain circumstances, this Court expressly recognized that misconduct records may be relevant to the credibility of an officer's evidence. Implicit in this is a recognition that a police officer's credibility and reputation is important to his or her participation in the criminal justice system.

22. This was exemplified in *Singh*, the case in which the allegations of assault by the respondent police officers were accepted by the crown attorneys. The Ontario Court of Appeal commented that "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."<sup>29</sup> The court assumed that this was not a single incident, but part of a pattern of misconduct. It is evident from this statement that future courts will also review the evidence of these police officers with a jaundiced eye; that their reputations will precede them with detrimental effects on the prosecution of crime and the public interest. It is also reasonable to assume that future allegations of police misconduct by these officers by other accused will be given more weight.

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<sup>25</sup> *R. v. Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 SCR 326.

<sup>26</sup> *McNeil*, para. 23.

<sup>27</sup> *McNeil*, para. 53.

<sup>28</sup> *Ferguson Report* as cited in *McNeil*, para. 57.

<sup>29</sup> *Singh ONCA*, para. 43.

23. Thus, allegations of wrongdoing that affect the integrity and reputation of individual police officers have implications well beyond a single prosecution and have long-lasting impacts on future prosecutions involving those officers. In this case, the impact on future prosecutions is not hypothetical. The police officers expressly plead that these impacts are real; notwithstanding their exoneration by police reviews, the findings in *Singh* are regularly brought up in cross-examination by defence counsel as a means to undermine their evidence. Not only is this unfair to the individual officers, it has an impact on that prosecution and the administration of the criminal justice system. Those impacts, which arise from and are directly related to the alleged misfeasance in public office by crown attorneys, are relevant policy considerations that support an exception to prosecutorial immunity.

24. Further, when such allegations are tacitly or expressly accepted by crown attorneys, leading to negative publicity, the impact goes far beyond the reputation of any individual officer. As noted by the Court of Appeal in *Singh*, findings of misconduct by police officers “sullies the reputations of the many good officers in our country, whose work is integral to the safety and security of our society.”<sup>30</sup> This Court can take judicial notice of the often tense relationship between police officers and the community they serve. As discussed below, efforts to improve relations between the police and the community are essential to community safety and the investigation of crime. Yet, conduct by crown attorneys which amounts to misfeasance in public office affecting the reputation of individual officers and the police service serves to greatly undermine those efforts and harms the public interest.

### **The important relationship between the community and the police**

25. Ensuring the safety and security of society requires members of a police service to have a positive relationship with the community that they serve. This is recognized by statute, in that the duties of a police chief, such as the Chief, include ensuring community-oriented policing.<sup>31</sup>

26. The relationship between the police and the community was cited by the Ontario Court of Appeal in *Smith* as a justification for police independence from crown attorneys. Referencing the Martin Report, the court observed that the fact that police officers make the decision to lay

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<sup>30</sup> *Singh ONCA* at para. 44.

<sup>31</sup> *PSA*, s. 41(1)(c).

charges, and not crown attorneys, may be reassuring to the community, because police officers “are in their midst’ and are expected to respond to community concerns.”<sup>32</sup>

27. The ability to effectively respond to community concerns can be affected by the level of public trust in the police service. It is well recognized that, particularly among some populations, there is mistrust of the police. This can be reflected in a reluctance of the community to report crime to the police or participate in an investigation, once started. Public safety, and the public interest in preventing and solving crimes, is negatively impacted when there is a lack of community participation and skepticism towards, or fear of police officers. Allegations of police misconduct, particularly when unchallenged (or supported) by crown attorneys, reinforce myths and stereotypes about police officers and serve to undermine the foundation of public trust necessary for effective policing.

28. The police officers in this case, through the Toronto Police Services investment in their development and training and their 15 years of experience, acquired the expertise necessary to work in the specialized, high risk Hold-Up Squad, including participation in investigations and prosecutions.

29. The Hold-Up Squad investigates crimes of violence, like the robbery that occurred in the underlying prosecution in this case. The victims of those violent crimes, and the public, expect the police to assist them, to investigate appropriately, and to participate as required by the *Police Services Act* in the fair prosecution of crimes. Those are reasonable expectations. The confidence that police officers can and will meet those obligations is undermined where crown attorneys conduct themselves outside of their duties by engaging in misfeasance in public office directed at police officers. The erosion of the public trust and the trust placed in police officers by judges and other participants in the criminal justice system has negative consequences to their ability to function effectively in the community and in the justice system, to the detriment of public safety. These are relevant policy considerations within the analytical framework established by this Court in *Nelles* and *Henry*, and support an exception to prosecutorial immunity for misfeasance in public office by crown attorneys.

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<sup>32</sup> *Smith*, para. 64.

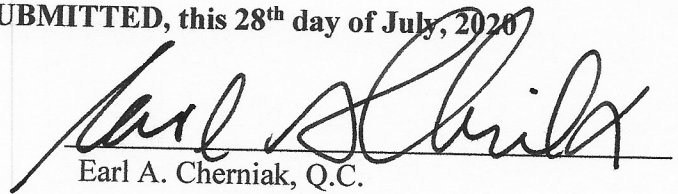
**PART IV: SUBMISSIONS REGARDING COSTS**

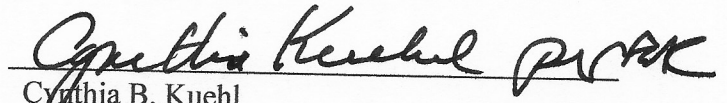
30. The Chief does not seek costs and asks that no costs be awarded against him.

**PART V: ORDER SOUGHT**

31. The Chief requests the Court's permission to make oral submissions of no more than five (5) minutes in length at the hearing of this appeal.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 28<sup>th</sup> day of July, 2020**

  
Earl A. Cherniak, Q.C.

  
Cynthia B. Kuehl  
**Lerners LLP**  
Counsel for the Intervener, Toronto Police  
Chief Mark Saunders



**PART VI: TABLE OF AUTHORITIES**

	<b>PARAS.</b>
<i>Henry v. British Columbia (Attorney General)</i> , 2015 SCC 24 (CanLII), [2015] 2 SCR 214 .....	15, 16, 29
<i>Nelles v. Ontario</i> , 1989 CanLII 77 (SCC), [1989] 2 SCR 170.....	14, 29
<i>R. v. McNeil</i> , 2009 SCC 3 (CanLII), [2009] 1 SCR 66.....	19, 20, 21
<i>R. v. Singh</i> , 2013 ONCA 750 (CanLII).....	8, 9, 22, 23, 24
<i>R. v. Stinchcombe</i> , 1991 CanLII 45 (SCC), [1991] 3 SCR 326.....	20
<i>Smith v. Ontario (Attorney General)</i> , 2019 ONCA 651 .....	18, 26

**STATUTORY PROVISIONS:**

*Criminal Code*, RSC 1985, c. C – 46, s. 2

*Code criminale*, LRC 1985, c C-46, art. 2

*Police Services Act*, R.S.O. 1990, c. P.15, s. 41(1)(c), s. 42(1), s. 42(1)(d)

*Loi sur les services policiers*, L.R.O. 1990, chap. P.15, art. 41(1)(c), art. 42(1), art. 42(1)(d)