

Innocence Compensation: Vicarious Liability and Indemnification by the State for the Harms Caused by Wrongful Convictions

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Abstract

Civil litigation at its best is a lengthy, onerous, and expensive proposition for a recently exonerated individual to pursue in the hope of recovering compensation for the harms caused by a wrongful conviction. In the event that such an individual can fund an action, the claim will include as party defendants the offending police officer, crown counsel and their employers being some agency of the State. At common law it will be the individual police officer and crown attorney who will be presumptively liable to the plaintiff for financial recovery. Legislation has been enacted in the provinces and territories together with the federal government to implement vicarious liability to the State. That vicarious liability and consequent indemnity however is shaped by the exigencies of collective bargaining agreements, internal policy statements and errors and omissions insurance.

Keywords: Innocence compensation, vicarious liability, state indemnification, wrongful convictions.

Indemnización Inocente: Responsabilidad Vicaria e Indemnización Estatal por los Daños Causados por Condenas Injustas

Resumen

El litigio civil es un proceso largo y oneroso para que un individuo recientemente exonerado intente cobrar una indemnización por los daños causados por una condena injusta. En el caso de que pueda asumir los costos de dicha acción, la demanda deberá incluir como demandados a los agentes de policía, al fiscal y a otros empleados estatales intervinientes en la condena injusta. En el common law, el agente de policía y el fiscal son responsables solamente a título individual. La legislación dictada, tanto a nivel provincial como federal, adopta la responsabilidad vicaria del

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estado. Sin embargo, la responsabilidad vicaria y la consecuente indemnización estatal están limitadas en la práctica por las exigencias de los convenios colectivos de trabajo, normas y políticas internas y los seguros que cubren a los agentes.

Palabras clave: indemnización a inocentes, responsabilidad vicaria, indemnización estatal, condenas erradas.

1. Introduction

Innocence Canada² announced on November 22nd, 2017 that it was developing a campaign to advocate for the creation of an independent conviction integrity tribunal to review cases of prospective wrongful convictions.³ James Lockyer, as a founding director of this organization and counsel of record for many clients who have been successfully exonerated, states that the need for such a body is compelling and long overdue.⁴ Lockyer notes that once the appeal process has failed to set aside a wrongful conviction, the remaining extraordinary remedy of an application for ministerial review has been shown to be a very unsatisfactory process. Additionally, Lockyer makes clear that Canada lacks a system to award compensation for the damages caused by a wrongful conviction. Currently those who have had their convictions overturned must rely upon the goodwill of the government⁵ or they have to launch a civil action – neither of which are good or dependable options. Lockyer explains:

² Formerly known as AIDWYC “The Association in Defence of the Wrongly Convicted”.

³ See: “The Lawyer’s Daily” November 22nd, 2017: Byline – Carolyn Gruske

⁴ The individuals identified on the Innocence Canada website as those who have been assisted in their quest for freedom include Robert Baltovich, Richard Brant, James Driskell, Anthony Hanemaayer, Clayton Johnson, Dinesh Kumar, David Milgaard, Gregory Parsons, Guy Paul Morin, Tammy Marquardt, William Mullins-Johnson, Romeo Phillion, John (Jack) Salmon, Sherry Sherrett-Robinson, Thomas Sophonow, Steven Truscott, Kyle Unger, Erin Walsh, Jack White.

⁵ By means of the *ex gratia* environment as embodied in The Federal, Provincial and Territorial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons (FPT Guidelines). This non-statutory

If the government isn't altruistic, obviously the tort system is a problem because either you have to show negligence on the part of the police or malicious prosecution. Malicious prosecution is almost impossible to prove. It's very rare you will be able to establish it. And it may well be the police have not been negligent in their investigation. They may have simply picked the wrong guy and went on from there. That means absent the altruism of government, they have no compensation... We need a system of compensating people who have been wrongfully convicted.⁶

Of the two avenues of relief referred to by Mr. Lockyer, the option of applying to the government responsible for a wrongful conviction for the altruistic exercise of the prerogative mercy is beyond this paper. The second route, and the one utilized much more frequently⁷ is that of tort and constitutional litigation to be discussed herein. With particular regard to claims against the state for wrongful convictions the seminal decisions of the Supreme Court of Canada⁸ that establish the substantive law in this field are *R v. Nelles*⁹ with respect to the tort of malicious prosecution; *Hill v Hamilton-Wentworth Regional Police Services Board*¹⁰ regarding the tort of

compensation scheme operating at the federal, provincial and territorial levels of Canadian government is a constitutional convention to compensate the wrongfully convicted by means of the exercise of the royal prerogative of mercy. See Ministry of the Attorney General of Ontario, *Entitlement to Compensation – The Legal Framework*, online: The Government of Ontario <www.attorneygeneral.jus.gov.on.ca>.

⁶ *Supra*, at note 2.

⁷ There is no central registry of applications made to the appropriate level of government under the FPT Guidelines. Anecdotal evidence from the Special Advisor to the Minister of Justice tasked with wrongful convictions estimates that no more than one or two applications are submitted each year, and sometimes none. As such, since the implementation of the FPT Guidelines in 1988, a best guess would be a total of twenty-five applications have been made for an *ex gratia* payment. With respect to civil litigation, data are available by searching LexisNexis Quicklaw. Since 1989 and the Court's decision in *Nelles v Ontario* [1989] 2 S.C.R. 170 there have been 389 reported cases for malicious prosecution. Since 2007 and the Court's decision in *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 S.C.R. 129 there have been 381 reported cases for negligent investigation. And since 2010 and the Court's decision in *Vancouver (City) v Ward* [2010] 2 S.C.R. 28 there have been 70 reported cases seeking damages for a breach of a *Charter* right.

⁸ Hereinafter referred to as the "Court" unless indicated otherwise.

⁹ *Nelles v Ontario* [1989] 2 S.C.R. 170, [*Nelles*] together with the additional Court decisions refining *Nelles*, being *Proulx v Québec (AG)* [2001] 3 S.C.R. 9 [*Proulx*]; *Miazga v Kvello Estate* [2009] 3 S.C.R. 339 [*Miazga*].

¹⁰ [2007] 3 S.C.R. 129 [*Hill*].

negligent investigation; and *Vancouver (City) v Ward*¹¹ for breaches of a provision of the *Charter*.¹²

The errors of the criminal justice system that give rise to the systemic causes of wrongful convictions that cause harm embodied in the causes of action for these torts are founded upon the actions of the police in the investigation of crime and of the crown in the prosecution of crime. There are a number of issues that frame the prospect for success in any action against an offending police officer, police service, crown counsel, office of an Attorney General or the Crown directly.¹³

These include the threshold for fault¹⁴ that a plaintiff must prove and the prospect of crown immunity in favour of defendants which forestalls an action's prospect for success at the outset. These have been established at common law and by way of legislation to protect the

¹¹ [2010] 2 S.C.R. 28 [*Ward*].

¹² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11, hereinafter referred to as the *Charter*, unless indicated otherwise. For a comprehensive analysis on all remedies available in the pursuit of compensation for the wrongly convicted see Myles Frederick McLellan, "Innocence Compensation: the Private, Public and Prerogative Remedies (2014) 45 (1) O.L.R. 57.

¹³ The Crown means the State, more particularly being her Majesty the Queen in the right of Canada and her Majesty the Queen in the right of the provinces and territories. Agents and servants of the Crown include the provincial Minister, crown attorneys who have the responsibility to prosecute criminal activity; and police services and officers whose responsibility it is to enforce the criminal law. The term "crown attorney" also includes deputy crown attorney and assistant crown attorney. The term "police service" is one that for most Canadian jurisdictions correctly identifies the police agency operating therein. However, there remain some agencies that still use the rather antiquated term "police force" which was widely used as the descriptor of the police agency until the model of community policing or community-oriented policy became a strategy in the late 1980s and 1990s wherein the purpose of police activity was directed to building ties to the community. For example, New Brunswick police agencies are still "police forces." Another difference is found in British Columbia where the term used is "police department." For the purposes of this paper "police service" is used both literally and generically

¹⁴ Depending upon the nature of the tort, the threshold may well be malice, some variant of negligence or no fault within the regime of strict liability

actions of crown counsel,¹⁵ police officers¹⁶ and Her Majesty the Queen.¹⁷ In the event that a wrongly accused individual in the pursuit of tort relief can fortuitously satisfy the applicable fault threshold and is not barred from proceeding as a function of a crown immunity, this paper will focus on how indemnity is apportioned by way of vicarious liability and otherwise. The question examined is whether a plaintiff will have the deep pockets of the State to indemnify a police officer of crown attorney whose actions have given rise to the claim for compensation or rather must she look solely to the personal worth of the offending individual.

2. Vicarious Liability and Indemnification

a. Crown Counsel

The personal liability of crown servants or agents for torts committed has always been a feature of the common law. As a general rule when a crown servant or agent commits a tort, that servant or agent is personally liable. If the tort is committed in the course of employment, an employer is vicariously liable for a tort committed by its employee.¹⁸ Vicarious liability is a legal term used when the law holds a third party in a two-party transaction responsible for the harm caused by another although the third party is free from personal fault. Liability for the third party is strict. There are only three relationships with the requisite connection between the actual

¹⁵ For example, individual crown counsel in Ontario are immune from personal liability pursuant to s.8(1) of the *Ministry of the Attorney General Act*, R.S.O. 1990, c.M.17.

¹⁶ In Saskatchewan, no action lies against any police officer acting pursuant to her duties done in good faith: *The Police Act*, 1990, S.S. 1990-91, c.P-15.01, s.10.

¹⁷ In *Nelles*, *supra* at note 8, the Court held that the Crown, in that case being the Province of Ontario by virtue of s.5(6) of the *Proceedings Against the Crown Act*, R.S.O. 1990, c.P.27, enjoyed absolute immunity from a suit for malicious prosecution, but that immunity did not extend to the Attorney General for Ontario for the actions conducted by its servants and agents being the crown attorneys as a matter of public policy. The issues of fault and crown immunities in the context of compensation for wrongful convictions has been examined in more depth in Myles Frederick McLellan "Innocence Compensation: Private Law Principles for Public Law Remedies and the Obstacles of Fault and Crown Immunities to Recovery" SSRN: <http://ssrn.com/abstract=278887>.

¹⁸ See: Ontario Law Reform Commission, *Report on the Liability of the Crown* (Toronto: The Commission, 1989)

tortfeasor and the third-party to an action for liability that meet the test for vicarious liability. They are the relationships of master-servant, principle-agent, and employer-independent contractor. When liability lies at the feet of the party who caused the harm, from a corrective justice perspective, that party is presumptively liable. The spreading of liability to other parties vicariously or otherwise is a function of distributive justice. The common law relating to the three relationships which can give rise to vicarious liability remains important in that there are various tests that need to be satisfied in order for someone to be considered a servant, agent, or independent contractor. The principal test at common law is the “control test”¹⁹ which determines whether the facts bring a particular relationship within the general legal concept of service. For our purposes, the question is what is the nature and degree of control that the Crown exercises over its employees. It is safe to say that federal, provincial and territorial crown attorneys who are employed full time follow the instructions given to them by their employer and prosecute crimes in accordance with statutes, regulations, directives and orders provided to them for that purpose. In the event that a solicitor who is not employed by the Crown is retained as an independent contractor to conduct a prosecution there will be vicarious liability if the legislation is broad enough to include independent contractors in its definition of “agents”. In those jurisdictions where an independent contractor is not included in the category of persons entitled to vicarious liability, the question of spreading liability is more difficult. This is most particularly evident at the level of federal prosecutions where the vast majority of crown counsel are appointed by the federal Crown as independent contractors. Federal crown attorneys prosecute crimes that are exclusively within the ambit of federal legislation such as the

¹⁹ *Performing Right Society Ltd. V Mitchell & Booker (Palais de Danse) Ltd.*, [1924] 1 K.B. 762.

Controlled Drugs and Substances Act;²⁰ the *Income Tax Act*;²¹ the *Employment Insurance Act*;²² and the *Fisheries Act*²³ etc. Because there are much fewer of these offences prosecuted on any particular day in any particular courthouse across the country than *Criminal Code* offences prosecuted by provincial crown attorneys, the employment of a full-time federal crown attorney is logically more difficult to fiscally justify.

There is specific legislated vicarious liability for crown counsel in Ontario wherein Section 5 (1) (a) of the *Proceedings Against The Crown Act*²⁴ imposes vicarious liability on the Crown “in respect of a tort committed by any of its servants or agents.”²⁵ However, section 5 (2) provides that no proceedings may be brought against the Crown unless those proceedings in tort could be brought against the individual crown servants or agents. Liability of the Crown is therefore limited by the ambit of liability attributable to the crown servant or agent. Obviously if there are any immunities engaged there will be a serious limitation or negation of vicarious liability. Crown counsel in Ontario are immune for personal liability pursuant to s.8(1) of the *Ministry of the Attorney General Act*.²⁶ There has been case law dealing with this provision since its enactment in 2009 primarily within the context of motions by the Attorney General to strike out claims as disclosing no cause of action²⁷ or being frivolous, vexatious and an abuse of

²⁰ S.C. 1996, c.19.

²¹ R.S.C. 1985, c.1 (5th Supp.).

²² S.C. 1996, c.56.

²³ R.S.C. 1985, c.F-14.

²⁴ R.S.O. 1990, c.P.27.

²⁵ *Ibid.*

²⁶ *Supra*, at note 14.

²⁷ See in Ontario Rule 21.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194. For example, claims have been struck out at the pleadings stage with reference to s.8 of the *Ministry of the Attorney General Act* in *Ciavarella v Schwartz*, 2014 O.N.S.C. 5061 and *Fragomeni v Greater Sudbury Police Service*, 2015 O.N.S.C. 3985. Motions for summary judgment have also become prevalent in claims for innocence compensation as a function of the Court’s decision in *Hryniak v Mauldin* (2014) 1 S.C.R. 87 wherein the Court stated that summary judgment must be granted if there is no genuine issue requiring a trial thereby broadening the powers of a motions judge to bring an end to

process.²⁸ The Ontario Court of Appeal in an action that was discontinued dealing with a claim for malicious prosecution simply reiterated that “[s]ection 8 of the [MAGA] gives individual Crown Attorneys immunity from being named personally in an action or proceeding for damages alleging prosecutorial misconduct, and substitutes the Attorney General as the proper defendant.”²⁹ Likewise in *Ontario (Ministry of the Attorney General) v. John*³⁰ the action was struck out on the basis of personal immunity under s.8. Matheson, J. in *Smith v HMQ in Right of Ontario et al*³¹ clarified that the purpose of this provision is to prevent civil claims against crown attorneys in the discharge of their duties and permits a “plaintiff with a valid cause of action to pursue that claim against the Attorney General.”³² Section 8 is procedural and not substantive. It does not create a new cause of action against the Attorney General.³³ Interestingly s.8(3) states that:

An action or proceeding may only be brought against the Attorney General under subsection (2) if, **but for subsection (1)**, the action or proceeding could have been brought against a person referred to in that subsection (emphasis added).

No comparable proviso as emphasized above is found in subsection 5(2) of the *Proceedings Against the Crown Act*.³⁴ No court has read s. 8 of the *Ministry of the Attorney General Act*³⁵ together with the *Proceedings Against the Crown Act*³⁶ and held that since the

such claims pursuant to Rule 20.04(2) of the Ontario Rules of Civil Procedure, R.R.O. 1990, Reg 194. For example, see most recently: *Sanaee v. Grad*, 2017 ONSC 5991.

²⁸ *Ibid*, Rule 25.11.

²⁹ *Kukemueller v Ontario (Community Safety and Correction Services)* 2016 O.N.C.A. 451 at pa.1.

³⁰ 2016 O.N.S.C. 2529 at pas.20-21.

³¹ 2016 O.N.S.C. 7222.

³² *Ibid* at pa.196.

³³ *Ibid* at pa.198.

³⁴ *Supra* at note 23.

³⁵ *Supra* at note 14.

³⁶ *Supra* at note 23.

individual crown attorneys have personal immunity, liability cannot therefore lie against the Attorney General. If this were done, the combination of common law immunity as set out in *Nelles* together with the statutory immunity as noted would provide absolute immunity for all actions against crown attorneys and vicariously the Attorney General of Ontario and Province of Ontario.

It is also relevant that in Ontario in the definition section of the *Proceedings Against the Crown Act* “agent” when used in relation to the Crown includes an “independent contractor” employed by the Crown.³⁷ In the federal legislation³⁸ there is no such reference to “independent contractor” which has significance for contracted federal crown attorneys³⁹ to be discussed following. However, it is important not to confuse the concepts of immunity and vicarious liability. Her Majesty the Queen in Right of Ontario is the Crown for the tortious acts of crown servants and agents. The definition of “servant” when used in relation to the Crown includes a minister of the Crown⁴⁰ which for crown attorneys is the provincial Attorney General. Therefore, while crown attorneys are servants of the Crown and the Attorney General is responsible for crown attorneys, the Attorney General is also a servant of the Crown. At common law one servant cannot be vicariously liable for the acts of another servant:⁴¹

Rather, it is at the feet of her Majesty the Queen where vicarious liability for acts of servants and agents of the Crown ultimately rests. Therefore, if a crown attorney is negligent in the performance of his or her duties, vicarious liability for that negligence attaches to the person who is ultimately responsible for their actions, that is, her Majesty the Queen. It may be that section 5 (6) can provide immunity to her Majesty for the acts of those crown servants notwithstanding that those acts are tortious. That fact, however,

³⁷ *Ibid* at s.1.

³⁸ *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50.

³⁹ Sometimes referred to as “standing permanent agents”.

⁴⁰ *Supra* at note 37, s.1.

⁴¹ *Leadbeater v the Queen* (2001) CanLII 28341 (O.N.S.C.).

does not change the chain of liability. It simply means that when you reach the end of the chain, the immunity provision of section 5 (6) may come into play.⁴²

As a result, vicarious liability as it applies to private torts committed by crown attorneys, makes clear is that the individual crown attorneys who committed such torts are personally liable. There does not appear to be any statutory immunities for crown attorneys apart from in Ontario, as previously noted, and New Brunswick.⁴³ This does not mean however that liability would remain at the feet of crown attorneys. There are means to spread liability to provide indemnification.

The avenues for relief in this regard are almost as diverse as are the various jurisdictions across the country. Provisions that allow for indemnification and establish the applicable thresholds for such are found in statutes, collective bargaining agreements between associations for crown counsel and their respective Attorneys General,⁴⁴ within the provisions of errors and omissions insurance secured by crown attorneys in their professional capacity, and in human resource and policy documentation. Following is a table setting out the indemnity instruments relied upon to provide protection to crown counsel in each jurisdiction.

Table One: Crown Counsel Indemnity Provision

Jurisdiction	Statute (re: indemnification)	Collective Agreement	Excluded Employee	Policy
Federal Govt		X		
BC	<i>Public Service Act, Financial</i>	X	X (<i>per Collective Agreement</i>)	

⁴² *Ibid* at pa.35.

⁴³ R.S.N.B. 1973, c.P-18.

⁴⁴ A collective agreement, also called a collective bargaining agreement, sets out the terms and conditions of employment for employees in their place of work together with their duties and responsibilities and those of the employer. These agreements are most often the result of collective bargaining between an employer and a trade union representing its members/workers.

	<i>Administration Act</i>			
AB	<i>Public Service Employee Relations Act</i>		X	
SK	<i>The Public Service Act, The Financial Administration Act</i>			X
MB		X		
ON		X		
QC		X		
NB		X		
NS		X		
PEI				X
NFLD				X
NWT	<i>Public Service Act</i>		X	
Yukon	<i>Public Service Act</i>		X	
Nunavut	<i>Public Service Act</i>		X	

In Manitoba the spreading of liability is dictated by a collective agreement between the Province and the Manitoba Association of Crown Attorneys.⁴⁵ At Article 30 relating to civil liability, in an action or proceeding brought against any crown attorney employed by the government for an alleged tort or for any other act or omission by the crown attorney in performance of her duties, the government shall pay any damages or costs or any settlement reached against the crown attorney. This indemnity applies so long as there is no dishonest, fraudulent, or criminal act or omission on the part of counsel. This indemnification shall only apply to the extent that the lawyer is not covered by any professional negligence liability insurance. As such errors and omissions insurance is the first recourse to address the liabilities of crown attorneys, but since *The Legal Profession Act*, CCSM, c.L-107⁴⁶ exempts lawyers

⁴⁵ Agreement between the Province of Manitoba and The Manitoba Association of Crown Attorneys (2010-2014).

⁴⁶ Per s.19(3).

employed by the Government of Manitoba from having to participate in The Law Society of Manitoba Professional Liability Insurance program, liability remains with the employer.⁴⁷

The situation is somewhat similar in New Brunswick where the collective agreement is between the Board of Management and the New Brunswick Crown Counsel Association together with New Brunswick Crown Prosecutors Association.⁴⁸ That particular agreement sets out at Article 44 that where an employee is alleged to have committed a tort, including malicious prosecution, the employer shall defend, negotiate or settle the claim and when necessary pay all loss or damages, costs and expenses. This indemnity is provided so long as the crown attorney has acted in good faith and within the scope of employment. The crown attorney's right to this liability protection is also conditional upon the claim not being covered by a policy of insurance in place for the benefit of counsel. It should be noted that the Province will not seek indemnification from the crown attorney in the event it is required to make a payment under the terms of this agreement.

In British Columbia indemnity protection for crown counsel is taken out of the collective agreement context by virtue of the agreement between the Government of the Province of British Columbia represented by the BC Public Service Agency and the British Columbia Crown Counsel Association. Article 28 therein sets out the indemnity is found in the Letter of Understanding #1 attached thereto which further references the indemnity provided to "excluded management employees" as found in the Province's Public Servants Agency (PSA) "Terms and Conditions for Excluded Employees." Indemnity Coverage protects employees from the cost of

⁴⁷ In Saskatchewan, likewise Rule 605 of the Rules of the Law Society of Saskatchewan exempts members from obtaining insurance coverage who are employed on an exclusive contract with the provincial Department of Justice or employed by the Federal Department of Justice or Public Prosecution Service of Canada. See: *The Legal Professions Act*, 1990, S. Sask. 1991, c.L-10.1.

⁴⁸ Agreement executed January 30th, 2013.

legal proceedings arising from the “good faith exercise of their job duties”⁴⁹ as more particularly stated in *The Excluded Employees Indemnity Protection Regulation*⁵⁰ and *The Excluded Employees (Legal Proceedings) Indemnity Regulation*.⁵¹ Coverage may be available to a party to a civil action arising from conduct in the performance of employment so long as the “employee’s conduct to which the proceeding relates was not dishonest, malicious or otherwise in bad faith.”⁵² Clearly the use of the word “malicious” gives rise to concerns that a successful action against a crown attorney for malicious prosecution might be excluded from indemnity relief. The latter regulation also states that if an employee is eligible for insurance coverage that is substantially the same as that provided in the excluded employees provisions, first recourse is to be had to the insurance. Nonetheless and like the situation in Manitoba, lawyers who are employed full time in a government department are exempt from maintaining insurance pursuant to the *2017 BC Lawyers Compulsory Professional Insurance Policy*.⁵³

In May 2011 the then Attorney General of British Columbia⁵⁴ commissioned a review of government policy concerning the granting of indemnities provided to provincial public servants outside of collective agreements. In October 2011 Professor Stephen Toope⁵⁵ produced his report. Professor Toope stated that he believed the preferred policy for indemnification should be discretionary based upon establish criteria and conditional upon meeting that criteria.⁵⁶ He saw this approach as supporting the underlying goals of indemnification, both from the perspective of

⁴⁹ Appendix 6: Eligibility Matrix.

⁵⁰ B.C. Reg. 72/2012.

⁵¹ B.C. Reg. 62/2012.

⁵² *Ibid* at sections 5 and 6.

⁵³ Policy Number LPL 17-01-01.

⁵⁴ The Honourable Barry Penner, Q.C.

⁵⁵ President and Vice-Chancellor of the University of British Columbia.

⁵⁶ Broadly speaking that criteria determined that indemnity would be provided only to those employees who acted in good faith within the parameters of their employment by the Province.

the individual and the government, which provided “a solid protective net for individual public servants and fairness.”⁵⁷ This approach also supported the legitimate governmental goals of assuring public servants that they were valued and encouraged them to fulfill the requirements of their jobs without fear of litigation.⁵⁸

Collective agreements determine indemnity as well in Ontario, Québec, Nova Scotia and the Federal Government. In Nova Scotia the criteria for indemnification is that duties are carried out within the scope of employment and in good faith.⁵⁹ At section 9.1 of the collective agreement good faith means “duties performed honestly, openly, without malice or ulterior motive” and includes negligence or errors in judgment. Ontario’s provision is the much simpler requirement that the impugned crown counsel was not “deliberately dishonest.”⁶⁰ Insurance is very much a consideration in this jurisdiction in that coverage is compulsory for all Ontario lawyers pursuant to By-Law 6 of the Law Society of Upper Canada promulgated under s.60 of the *Law Society Act*.⁶¹ Although there is eligibility for exemption of payment of levies for this insurance⁶² for crown attorneys, as a matter of policy and practice the Attorney General elects to pay the insurance premium on behalf of its employees and relies upon the available coverage.⁶³ The policy states that said coverage is not available for “any claim arising out of dishonest,

⁵⁷ British Columbia Public Service Indemnity Policy Review (October 2011) at pp. 21, 22.

⁵⁸ In Alberta, the public servant must have acted “honestly and in good faith with a view to the best interests of the public, see “Alberta Corporate Human Relations Directive: Indemnity Protection.”

⁵⁹ Agreement between H.M.Q. in Right of the Province of Nova Scotia represented by the N.S. Public Service Commission and the N.S. Crown Attorneys Association (2015-2019).

⁶⁰ Agreement between the Crown in Right of Ontario represented by the Management Board of Cabinet and the Ontario Crown Attorney’s Association (O.C.A.A.) (2009-2013) – Article 15.1.

⁶¹ R.S.O.1990, c.L-8.

⁶² LawPro 2017 Professional Liability Insurance for Lawyers.

⁶³ Statement by former Vice President of Ontario Crown Counsel Association.

fraudulent, criminal or malicious acts or omissions.”⁶⁴ Once more, concerns for the exclusion for malicious prosecution are troublesome.

There is also a collective agreement for justice counsel who act as federal crown counsel. The agreement is between the Treasury Board Secretariat and the Association of Justice Counsel which, in turn, looks to the “Policy on Legal Assistance and Indemnification” for federal employees. At article 3.1 in the section for “Context” it is stated:

Providing legal assistance and indemnification to crown servants is essential to the protection of the Crown’s interest, the fair treatment of its servants, and the effective management of an organization. Crown servants may be subject to legal claims/actions despite the fact that they are acting in good faith, within the scope of their duties or in the course of their employment. It is therefore necessary that they receive appropriate legal representation and be protected from personal liability as long as they are not acting against the interests of the Crown.

The purpose of this statement reflects two major objectives: serving the public interest of effective government including protecting the Crown from liability; and protecting federal public servants from personal loss. Once again there are conditions that must be met before a public servant can ask for and receive indemnification. The three basic eligibility criteria are that the crown servant acted in good faith, did not act against the interests of the Crown and acted within the scope of their duties.⁶⁵ There is no overlap of considerations to federal crown counsel having errors and omissions insurance that might override this indemnity. Lawyers employed by the Federal Government are responsible for their own compulsory insurance coverage in the jurisdiction in which they are called to the Bar and would be exempt from coverage if so permitted by their site specific provincial or territorial law society. There is nothing in the

⁶⁴ *Ibid*, Part III (a).

⁶⁵ Policy on Legal Assistance and Indemnification, s.6.15.

collective agreement that makes provision for the employer to pay the insurance premiums in this regard.

In other jurisdictions such as the provinces of Saskatchewan, PEI and Newfoundland and Labrador⁶⁶ the prospect of legal assistance for indemnification is found in published statements of policy. In Saskatchewan, there is the requirement that the public servant acted in “good faith” meaning “honestly, openly and without malice or ulterior motive.”⁶⁷ On its face, it would therefore appear again that a finding of malicious prosecution against a Saskatchewan crown attorney would preclude indemnity. Toope makes the point that public servants should not expect indemnification unless they meet the policy objectives as published. The purpose of indemnification is to protect both the Crown and public servant. If the government employee “is acting outside the terms of his or her job, then the Crown should not be vicariously liable and should have no reason to intervene through indemnification.”⁶⁸ Likewise:

A person should not expect to benefit from access to public resources if acting in bad faith; nor are government’s interests in ensuring a strong public service enhanced by indemnifying a public servant who is acting in bad faith.⁶⁹

Occasionally in the provisions of statutes, collective bargaining agreements, contracts, or policies in the definition of employees there is an inclusion for *per diem* crown attorneys. For these crown attorneys who are not defined as employees but are strictly seen as independent contractors, the recourse for a plaintiff and the relief for the crown attorney will be found in the provisions of errors and omissions (E&O) liability insurance carried by the individual crown

⁶⁶ “The Employee Liability Policy” as declared by the N.L. Human Resources Secretariat.

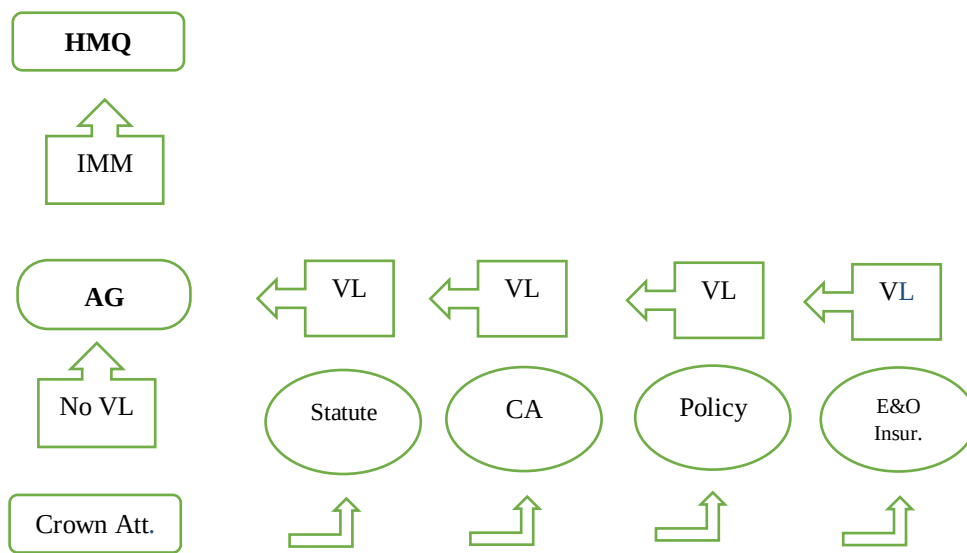
⁶⁷ Saskatchewan Public Service Commission: Human Resources Manual, Section PS813-Employee Indemnity.

⁶⁸ *Toope, supra* at note 56, p.13.

⁶⁹ *Ibid.*

attorney as a function of her professional responsibilities. The vagaries of the extent of liability would be determined by the contractual terms of the insurance policy.

Table Two: Crown Counsel Vicarious Liability Flow Chart ⁷⁰



Sandra McCallum suggests the following with respect to reform of public liability for common-law torts:

The responsibility should not be on the individual to ensure an adequate indemnity or insurance. The fault, if any, should be borne by society as a whole, in a direct manner and thus through direct suit against the government. The fiction of personal liability of a civil servant in these matters should be abolished... To retain personal liability merely to attach a vicarious liability to the Crown which then indemnifies its servant by administrative agreement is to confuse important policy issues and to leave to the courts the resolution of the relationship between governmental liability, public officer liability and citizen compensation.⁷¹

⁷⁰ HMQ = Her Majesty the Queen; IMM = Immunity; AG = Attorney General; VL= Vicarious Liability; CA = Collective Bargaining Agreement; E&O = Errors and Omissions Liability Insurance Policy.

⁷¹ Sandra K. McCallum, "Personal Liability of Public Servants: an Anachronism." (1984) 27 Can. Pub. Adm. 611 at 616.

The most straightforward way in which to hold the Crown directly liable for its conduct of the enterprise of criminal prosecution is by way of section 24 (1) of the *Charter* by reference to section 32. Crafting the action seeking compensation within the parameters of a constitutional tort will eliminate the need to deal with the rather convoluted and impractical access to vicarious liability as it now stands at both the common law and by statute.⁷² Without recourse to the *Charter* the road to recovery by way of private tort law is anachronistic at best.

b. The Police

As serpentine as the law of vicarious liability may seem within the context of the tortious acts of crown attorneys, all crown counsel within each provincial or territorial jurisdiction are subject to the same law. As will be seen with respect to the jurisdictions applicable to the operations of police services in Canada, there are potentially thousands of discrete systems at play with potentially different rules of liability.

Police services in Canada exist at the municipal, provincial, and federal levels of government. Every province has some sort of Police Act⁷³ which provides for the establishment of provincial and independent municipal police services. The provinces of Ontario, Québec and

⁷² “The decision of the Supreme Court in *Vancouver (City) v Ward*, has created a watershed in the promotion of recovery by way of a constitutional tort” per Myles Frederick McLellan, “Innocence Compensation: the Private, Public and Prerogative Remedies” (2014) 45 (1) *Ottawa Law Review* 59. The Court made clear that “granting damages under the *Charter* is a new endeavour” per McLachlin, C.J.C. in *Ward* at para.21. This remedy is not within the realm of private law actions such as malicious prosecution and negligent investigation but is a distinct remedy providing for constitutional damages.

⁷³*Police Act*, R.S.B.C. 1996, c.367; *Police Act*, R.S.A. 2000, c. P-17; *The Police Act*, 1990, S.S. 1990-91, c.P-15.01; *The Police Services Act*, C.C.S.M, c. P94.5; *Police Services Act*, R.S.O. 1990, c.P.15; *Police Act*, C.Q.L.R. c P-13.1; *Police Act*, S.N.B. 1977, c. P-9; *Police Act*, S.N.S. 2004, c.31; *Police Act*, S.P.E.I, c.P-11.1.

Newfoundland and Labrador have standalone provincial police services.⁷⁴ There is federal legislation which creates and governs the operations of the Royal Canadian Mounted Police.⁷⁵ There are also First Nation Police Services across the country. First Nations policing is fundamentally the responsibility of the federal government as a function of jurisdiction established between the federal and provincial governments at the time of Confederation.⁷⁶ In 1991, the government introduced the First Nations Policing Program (FNPP) with allows for the establishment of First Nation administered policing services. These services are negotiated between the federal, provincial and territorial governments and the applicable First Nation. In effect, First Nation communities can be serviced by either a self-administered police service or with a service put in place by the province or territory through the auspices of the RCMP. While an examination on the operation of First Nation policing is beyond the scope of this paper, the importance of this distinct manner of police servicing cannot be underestimated. For example, in Manitoba, the Dakota Ojibway Police Service is the third largest agency in the province behind the Winnipeg Police Service and the Brandon Police Service.⁷⁷

From the municipal perspective, according to Statistics Canada, there exists some 5,162 municipalities across Canada.⁷⁸ There is the potential for each of these municipalities to have

⁷⁴ These are the Ontario Provincial Police (O.P.P.) see the *Police Services Act*, R.S.O. 1990, c. P15; the Sûreté du Québec (S.Q.) see the *Police Act*, C.Q.L.R. c P-13.1 and the Royal Newfoundland Constabulary (R.N.C.) see the *Royal Newfoundland Constabulary Act, 1992*, S.N.L. 1992, c. R-17.

⁷⁵ *The Royal Canadian Mounted Police Act*, R.S.C.1985, c. R-10.

⁷⁶ Section 91(24) of the *British North America Act, 1867*, 30-31 Vict., c. 3 (U.K.), now the *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.) gives the federal government jurisdiction over “Indians, and lands reserved for the Indians.”

⁷⁷ The Dakota Ojibway Police Service (DOPS) was established in 1977 and provides service to six First Nation communities (Birdtail Sioux, Canupawakpa Dakota, Long Plain First Nation, Roseau River, Sandy Bay, Waywayseecappo). Through the federal FNPP, a tripartite agreement has been signed between the federal and provincial governments and the Council of Chiefs of the Dakota Ojibway Tribal Council so that the federal government provides 53% and Manitoba provides 48% of the funding for the DOPS. See: <http://www.dops.org>.

⁷⁸ Statistics Canada, 2016 Census Profile (98-316-X), A Number of Municipalities (census subdivisions) by province, territory and type of region, Canada, 2011-2016.

their own police service. In actuality there are 143 municipalities that have police services that operate independently in the country as a whole.⁷⁹ In Ontario, Québec and Newfoundland and Labrador individual towns and cities have the option for the provincial police service to act as a municipal one. In 2016:

The majority of the municipalities in Ontario are policed by the OPP through a contract under section 10 of the [*Police Services Act*] or through a non-contract arrangement under section 5.1 of the PSA. Section five of the PSA outlines the options municipalities have for the provision of policing services in their communities. The Ontario Provincial Police is responsible for providing policing service to over 320 municipalities throughout Ontario and is obligated to recover the cost of providing those services.⁸⁰

The R.N.C. provides municipal service to three municipalities.⁸¹ In the remaining provinces and territories the R.C.M.P. can be tasked as a provincial, territorial or municipal police service. In 2016, the R.C.M.P. provided municipal services to 150 towns and cities.⁸² As a result:

...the majority of Canadians (about two-thirds) live in regions served by stand-alone municipal police services. Another 11% live in municipalities policed by the R.C.M.P. — a share, however, that is much higher in provinces such as British Columbia (56%) and Alberta (21%), and lower in Manitoba (9%) and Nova Scotia (3%) ... Ontario and Québec, as noted, do not contract municipal policing to the R.C.M.P.⁸³

⁷⁹ Statistics Canada, 2016. Table 254-0004 – Police Personnel and Selected Crime Statistics, Municipal Police Services, Annual, CANSIM (Database), Ottawa (ON). The number of municipal services in each province is: BC – 11; AB – 7; SK – 12; MB – 11; ON – 51; QB – 29; NB – 9; NS – 10; PEI – 3. See Table Three, *infra*.

⁸⁰ Ontario Provincial Police; Municipal Policing: <https://www.opp.ca/index.php>. The services of the OPP to Ontario and the Sûreté du Québec to Québec municipalities are as provincial forces with detachments in individual municipalities.

⁸¹ St. John's, Cornerbrook, Labrador West.

⁸² BC – 63; AB – 44; SK – 8; MB – 22; NB – 7; NS – 6. Unlike other municipal police services which are governed by provincial Police Acts, the members of the R.C.M.P. operating as a municipal service are governed by the *Royal Canadian Mounted Police Act*, R.S.C.1985, c.R-10, to be discussed *infra*.

⁸³ Council of Canadian Academics "Policing Canada in the 21st Century: New Policing for New Challenges" (2014) at p.6.

Therefore, police servicing in Canada is made up of independent municipal services together with contracted municipal services of the R.C.M.P., the O.P.P., S.Q. and the R.N.C.

Table Three: Provision of Police Services in Canada

Jurisdiction	Number of municipalities serviced with independent police services	Provinces serviced by provincial police services	Number of municipalities serviced by RCMP directly	RCMP provides provincial police service	RCMP provides federal police service
BC	11		63	Yes	Yes
AB	7		44	Yes	Yes
SK	12		8	Yes	Yes
MB	11		22	Yes	Yes
ON	51	OPP			Yes
QB	29	SQ			Yes
NB	9		7	Yes	Yes
NS	10		6	Yes	Yes
PEI	3			Yes	Yes
NFLD		RNC		Yes	Yes
TERR				Yes	Yes

It should be noted that the direct governing of police officers within the operations of police services for municipalities, provinces, territories and the federal government falls primarily to police service boards or chiefs of police on behalf of the governmental administration.

The starting point when considering the law pertaining to vicarious liability with respect to the actions of individual police officers as they relate to harm caused to individuals under investigation is that “a police officer investigating a crime is not acting as a government functionary or as an agent of anybody.”⁸⁴ The early decision of the Court in *McCleave v. City of*

⁸⁴ *R v. Campbell* [1999] 1 S.C.R. 565 at pa. 27.

*Moncton*⁸⁵ in a civil action dealing with potential municipal liability for police negligence set out that:

Police officers can in no respect be regarded as agents or officers of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government, but this does not render them liable for their unlawful or negligent acts.⁸⁶

Further, it has also been said that “[a constable’s] authority is original, not delegated, and is exercised at his own discretion by virtue of his office...his relationship to the government is not...that of servant and master.”⁸⁷ Consequently there is no vicarious liability for the tortious acts of police officers that flows upward, at common law, to police service boards for the towns and cities, the O.P.P., the S.Q., the R.N.C. and the R.C.M.P. There would also be no vicarious liability flowing further up the chain to the Solicitors General or Ministers of Public Safety for the provincial, territorial and Canadian governments.⁸⁸

At law therefore the primary and presumptive liability falls at the feet of the individual police officers. However, it would be obviously unfair to both the plaintiff seeking redress from harm caused by an individual police officer and to that officer acting in good faith if there was no spreading of liability to the enterprise responsible for the officer’s actions. The Court in the *McCleave* stands for authority that any vicarious liability for actions of police officers must be by way of statute.

⁸⁵ [1902] 32 S.C.R. 106.

⁸⁶ *Ibid* at pp.108-9.

⁸⁷ *Attorney-General for New South Wales v. Perpetual Trustee Co.*, [1955] A.C. 457 (P.C.) at pp.489-90.

⁸⁸ The negation of vicarious liability in this regard is by virtue of both the independent nature of discretion to police officers and the common law that one servant cannot be vicariously liable for the acts of another servant: *Leadbetter v the Queen*, *supra* at note 40.

In Ontario we have the *Police Services Act*⁸⁹ wherein:

50. (1) The board or the Crown in right of Ontario, as the case may be, is liable in respect of torts committed by members of the police force in the course of their employment.

(2) The board may...indemnify a member of the police force for reasonable legal costs incurred,

- (a) in the defence of a civil action, if the member is not found to be liable;
- (b) in the defence of a criminal prosecution, if the member is found not guilty;
- (c) in respect of any other proceeding in which the member's manner of execution of the duties of his or her employment was an issue, if the member is found to have acted in good faith.

(3) A majority of the members of a police force and the board may, in an agreement made under Part VIII, provide for indemnification for the legal costs of members of the police force, except the legal costs of a member who is found guilty of a criminal offence; if such an agreement exists, the board shall indemnify members in accordance with the agreement and subsection (2) does not apply. (emphasis added)

Quite simply, if a police officer commits a tort in the course of her employment, the police services board or the Province, depending on whether in the capacity of a municipal or provincial police officer, is liable for such torts. With respect to the collateral issue on the payment of legal costs and expenses however, the board has the discretion to indemnify a police officer for reasonable legal costs where the officer is liable so long as the officer acted in good faith. It would seem that this provision makes allowance for costs indemnification where the degree of fault is negligence. Where the degree of fault relates to an intentional tort, resort for indemnification must be had to an agreement made under Part VIII of the Act which means an agreement made pursuant to collective bargaining in the labour relations context.⁹⁰ As such, the vicarious liability of a police officer for a tort committed against an innocent individual starts with an examination of the relevant legislation, followed by more particular provisions in

⁸⁹ R.S.O. 1990, c.P.15.

⁹⁰ Similar provisions are set out in this Act for indemnification for individual officers of the O.P.P.: see Section 50 (5) (6).

collective agreements in place between police associations on behalf of its members and police service boards on behalf of municipalities and provinces across the country. It is important to note that where there is a discrepancy between the indemnity provided in a statute and the provisions in a collective agreement, it is the statutory enactment that prevails. As one author notes “[w]hen police boards and police associations negotiate terms of collective agreements that are outside the limits of their jurisdiction, they risk introducing invalid and unenforceable terms.”⁹¹

For example, in Manitoba, *The Police Services Act*⁹², s.40(1) states that the municipality is jointly and severally liable for torts committed by police officers in the performance of their duties and subsection (2) commands that a municipality must pay the damages and costs in that regard. There is no threshold of fault in place limiting indemnification by the municipality. However in the collective agreement between the City of Winkler and the Boundary Trails Regional Police Association⁹³ the City can refuse to pay legal fees if an officer’s action constitutes a grave disregard or gross neglect.⁹⁴ Similarly in Nova Scotia, the *Police Act*⁹⁵ s.43 states that a municipality is liable for torts committed by members of a police department in performance of their duties and shall pay any damages or costs for torts committed by said members if the tort is committed in performance of duties. But in the collective agreement between The Cape Breton Regional Municipality and The Cape Breton Regional Municipality Board of Police Commissioners and The Nova Scotia Government and General Employees

⁹¹ Neil Robertson, Q.C., Regina Police Service, Regina, Saskatchewan in “Limits to the Scope of Police Collective Bargaining” – a paper presented to the Canadian Department of International Municipal Lawyers Association, 4 June 2009 at p.2. Saskatchewan legislatively provides that any provision in a collective agreement that is contrary to *The Police Act, 1990* is null and void. See: *The Police Act, 1990*, S.S. 1990-91, c.P-15.01, s.40(2).

⁹² C.C.S.M. c. P94.5.

⁹³ Winkler local (2015).

⁹⁴ Article 27.

⁹⁵ S.N.S. 2004, c.31.

Union⁹⁶ at Article 30.01: the employer shall ensure that the employee has a complete defence for civil actions arising in performance of an employee's duties within their scope of employment and per Article 30.03: the employer shall completely indemnify employee for all damages for such actions that are not willfully negligent. This proviso limiting indemnity for willful negligence cannot stand in the face of the Police Act.

While the British Columbia statute does not allow for indemnity for the torts of police officers if their conduct constituted dishonesty, gross negligence or malicious or willful misconduct,⁹⁷ the verbiage used in various collective agreements around the province does not reflect this legislative wording. For example there is no indemnity to police officers in Delta if there was willful neglect or a gross dereliction of duty or a deliberate abuse of police power.⁹⁸ Similar contractual provisions are found in the collective agreements for Nelson,⁹⁹ New

⁹⁶ (2014-2018).

⁹⁷ *Police Act*, R.S.B.C. 1996, c.367 at Section 21(3).

⁹⁸ Agreement between The Delta Police Board and The Delta Police Association (2013-2015) Article 16.8 (c)(i): acts done in performance or attempted performance in good faith of member's duties (g) no indemnity for willful neglect or gross dereliction of duty or deliberate abuse of police power.

⁹⁹ Agreement between The Nelson Police Board and The Nelson Police Association (2008-2012) Article 1.04 (b)(i): acts done in the performance, or attempted performance in good faith of his/her duties as a police officer (vi) no indemnity for willful neglect or gross dereliction or duty or deliberate abuse of police power.

Westminster,¹⁰⁰ Oak Bay,¹⁰¹ Port Moody,¹⁰² Saanich,¹⁰³ Vancouver¹⁰⁴ and Victoria.¹⁰⁵ In Alberta, while the statute provides that the chief of police is liable for torts committed by officers as a master is for a servant¹⁰⁶ and where a civil action is brought as a function of actions arising from an officer's performance of duties, the municipality may indemnify the officer;¹⁰⁷ virtually all accessible collective agreements mandate indemnification with differing thresholds in that regard. In Calgary, the municipality shall indemnify officers where the action arises while in conducting their duties but not if there is a gross disregard or neglect of duties;¹⁰⁸ but differently Lethbridge refers to a gross disregard or gross neglect.¹⁰⁹ Similar thresholds for indemnity are found in most collective agreements in Québec. For example in the Town of Blainville, the municipality will provide full compensation for the torts of an officer, but not in the case of gross

¹⁰⁰ Agreement between The New Westminster Municipal Police Board and The New Westminster Police Officers' Association (2013-2015) Clause 9 (c)(i): acts done in the performance or attempted performance in good faith of the member's duties as police officer (g) no indemnity for willful neglect or a gross dereliction of duty, or deliberate abuse of police power.

¹⁰¹ Agreement between The Oak Bay Police Board and The Oak Bay Police Association (2007-2010) Article 12(9)(c)(i): acts done in the performance or attempted performance in good faith on the member's duties as a police officer (i) no indemnity for willful neglect or a gross dereliction of duty or deliberate abuse of police power.

¹⁰² Agreement between The Port Moody Police Board and The Port Moody, District 43, Police Services Union (2013-2015) Section 9.9 (c)(i): acts done in the performance or attempted performance in good faith of the member's duties as police officer (h) no indemnity for willful neglect or a gross dereliction of duty, or deliberate abuse of police power.

¹⁰³ Agreement between The Saanich Police Board and The Saanich Police Association (2010-2012) Article 1, Section 4, Schedule F, s.2 (a): acts done in the performance or attempted performance in good faith of the member's duties as police officer s.7 no indemnity for willful neglect or a gross dereliction of duty, or deliberate abuse of police power.

¹⁰⁴ Agreement between The Vancouver Police Board and The Vancouver Police Officers' Association (2011-2013); Section 8.9, Schedule E (c)(i): acts done in the performance or attempted performance in good faith of the member's duties as police officer (g) no indemnity for willful neglect or a gross dereliction of duty, or deliberate abuse of police power.

¹⁰⁵ Agreement between The Victoria Police Board and The Victoria City Police Union (2010-2012) Section 8.9, Schedule E (c)(i): acts done in the performance or attempted performance in good faith of the member's duties as police officer (i) no indemnity for willful neglect or a gross dereliction of duty, or deliberate abuse of police power.

¹⁰⁶ *Police Act*, R.S.A. 2000, c.P-17, s.39(2).

¹⁰⁷ *Ibid*, at s.39(8).

¹⁰⁸ Agreement between The Corporation of the City of Calgary and the Calgary Police Association (2016-2018) Article 15.01(a): shall indemnify for action arises while member engaged in his duties and (b) did not constitute gross disregard or neglect of duties.

¹⁰⁹ Agreement between The City of Lethbridge and The Lethbridge Police Association (2013-2015) Article 25.01(a): shall indemnify actions while engaged in duties except if action is gross disregard or gross neglect.

negligence.¹¹⁰ The agreement goes on to define “gross negligence” as misconduct of an exceptionally serious nature with an intention to harm or a complete ignorance of the directives of the police service and the Rules of Professional Conduct.¹¹¹ In the Town of Bromont, the same restriction of gross negligence is in the applicable collective agreement, but there is a further provision to the effect that notwithstanding the concept of gross negligence as set out therein, the parties recognize that certain acts, gestures or omissions of good faith can still be indemnified.¹¹² The Court has given a definition of gross negligence with respect to the conduct of state actors in the laying of a charge. Although the context is the tort of malicious prosecution against crown counsel, the definition is transferrable to the police in the criminal justice process. As such, in *Proulx*, Justice L’Heureux-Dubè, in dissent, adopted the finding of Justice LeBel in the Québec Court of Appeal below, where he said “[a]ccordingly...the absence of reasonable and probable cause when laying a charge amounts to gross negligence...”¹¹³ In *Nelles*, Lamer, J. (as he then was) stated that:

Reasonable and probable cause has been defined as ‘an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed’ (*Hicks v Faulkner* (1878), 8 QBD 167, at p.171, Hawkins, J.).¹¹⁴

¹¹⁰ La convention collective entre La Ville de Blainville et L’Association des Policiers et Policières de Blainville Inc. (2015-2019) Article 43.

¹¹¹ *Ibid*, at Article 43.02.

¹¹² La convention collective entre La Fraternité des Policiers et Policières de Bromont Inc. et La Ville de Bromont (2009-2013) Article 24.

¹¹³ *Proulx*, *supra* at note 8 at pa.65.

¹¹⁴ *Nelles*, *supra* at note 8 at p.193. See also Mr. Justice Cory’s reasoning in *R v. Storrey*, [1990] 1 SCR 241 where he sets out the policy underlying s.495(1) of the *Code* authoring a police officer to arrest any person “where the officer on reasonable and probable grounds believes that a person has committed or is about to commit an indictable offence.” Cory, J. with reference to *Dumbell v Roberts*, [1944] 1 All E.R. 326 (C.A.) states that “[i]t is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist, that is to say, a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and

The use of an honest belief in a “reasonable and probable cause” to prove a negative to avoid gross negligence can be contrasted with the test used to prove the positive of “good faith” which is the overarching threshold for indemnity for the 51 Ontario municipalities with collective agreements. This makes sense, in that, s.50(2) of the *Police Services Act*¹¹⁵ fundamentally limits indemnity with this proviso. There are very few jurisdictions that define what good faith means however. Belleville indicates that there is a presumption of good faith in an officer’s actions and that this is “the exercise of good judgment in doing everything that could reasonably be expected bearing in mind the nature of the incident.”¹¹⁶ A majority of municipalities in this province use the simpler reference to indemnity for costs in a civil action for acts done in the performance, in good faith, of duties.¹¹⁷ There are still some of cities and towns that make reference to restricting indemnity if there is a gross dereliction of duty such as Hamilton¹¹⁸ Peel Region¹¹⁹ and Waterloo Region.¹²⁰ In Sault Ste. Marie there is a specific

probable grounds existed to make the arrest.” This passage was also relied upon in the successful action for damages based upon malice against officers of the Regina Police Service in *Klein v. Sieferling*, [1999] S.J. No 297 (S.K.Q.B.).

¹¹⁵ R.S.O. 1990, c.P-15.

¹¹⁶ Agreement between The Belleville Police Services Board and The Belleville Police Association (2015-2017) Article 18.02(a): Board shall indemnify reasonable legal costs in civil action if member not found liable or (c) if proceeding in which member’s manner of execution of duties is found to be in good faith. (d) presumption of good faith which means “the exercise of good judgment in doing everything that could reasonably be expected bearing in mind the nature of the incident.

¹¹⁷ Twenty-eight jurisdictions do so: Barrie, Brockville, Cobourg, Espanola, Greater Sudbury, Guelph, Halton Region, Kingston, Midland, North Bay, Orangeville, Ottawa, Owen Sound, Peterborough Lakefield, Port Hope, St. Thomas, Sarnia, Saugeen Shores, Sault Ste. Marie, Smith Falls, South Simcoe (Innisfil and Bradford West Gwillimbury), Stratford, Strathroy Caradoc, Thunder Bay, Timmins, Windsor, Woodstock.

¹¹⁸ Agreement between the Hamilton Police Services Board and Hamilton Police Association (2009-2012) Article 29.1(a): Board shall indemnify reasonable legal costs in civil action if members carrying out lawful execution of duties in good faith but not 29.2: if conduct amounted to gross dereliction of duties or deliberate abuse of authority.

¹¹⁹ Agreement between the Regional Municipality of Peel Police Services Board and Peel Regional Police Association (2015-2019) Article 20.02: member shall be indemnified in civil action for necessary and reasonable legal costs for acts done in attempted performance, in good faith, of duties except if 20.03: Board may refuse payment where actions amounted to gross dereliction of duty or abuse of powers.

¹²⁰ Agreement between the Waterloo Regional Police Services Board and The Waterloo Regional Police Association (2012-2014) Article 12.01.1: Board shall indemnify member for reasonable legal costs in course of employment

reference to the amount of insurance coverage in place that limits indemnity, in that, where a law suit seeks damages in excess of the per occurrence amount of coverage by the City, the employer agrees to top up the indemnity to \$25 million per occurrence.¹²¹ There is no other municipality that is so specific as to the terms of insurance coverage.

In Saskatchewan where there appears to be a full indemnity for civil actions provided there is good faith,¹²² the City of Moose Jaw follow suits and incorporates full indemnity into its agreement with the Moose Jaw Police Association.¹²³ Regina however will only pay for a civil action arising out of an officer's duties if there is no wanton disregard or willful or wanton dereliction of duty.¹²⁴ A further twist is found in the collective agreement in Saskatoon where the municipal services board agrees to indemnify claims resulting from the performance of duties except where there is a willful or wanton dereliction of duty and importantly, indemnity shall be restricted to the liability coverage by the policy of insurance purchased by the board.¹²⁵

except if 12.06: Board may refuse payment where action of member amounted to gross dereliction of duty or deliberate abuse of powers.

¹²¹ Agreement between the Sault Ste. Marie Police Services Board and Sault Ste. Marie Police Association (2011-2014) Article 30.02: member shall be indemnified in civil action for necessary and reasonable legal costs for acts done in performance, in good faith, of duties: Note. S.30.01: where law suit seeks damages in excess of per occurrence amount of insurance coverage by City of Sault Ste. Marie, employer agrees to indemnify up to \$25 million per occurrence.

¹²² *The Police Act*, 1990, S.S. 1990-91, c.P-15.01, ss.10: no action lies against a member acting pursuant to Act or common law for any loss of damage suffered by reason of anything done in good faith and s.32: where civil action instituted against member for act while in scope of employment, the employer shall pay for damages and costs.

¹²³ The Agreement between The Moose Jaw Police Association and The Board of Commissioners of Police for the Corporation of the City of Moose Jaw (2014-2016) Section 44.1: act committed in scope of employment in civil action, Board shall pay damages and costs.

¹²⁴ Agreement between The Regina Police Association, Inc. and The Board of Police Commissioners of the Corporation of the City of Regina (2015-2017) Article 8(a): Board will pay civil action arising while engaged in duties as employee except actions of willful or wanton disregard or willful or wanton dereliction of duty. As noted *supra*, where the collective agreement differs from the statutory provision, the statute prevails.

¹²⁵ Agreement between the Saskatoon Police Association and The Board of Police Commissioners for the City of Saskatoon (2013-2016) Article 33(a): Board agrees to indemnify claim resulting from performance of duties except actions of willful or wanton dereliction of duty and (b) indemnity shall be restricted to liability covered by policy of insurance purchased by Board.

In Prince Edward Island where the Police Act provides indemnity for all actions of police officers undertaken in good faith in the performance or intended performance of their duties,¹²⁶ quite logically there is no provision for indemnity in civil actions referenced in the collective agreements for the police services in Charlottetown¹²⁷ and Summerside.¹²⁸

For the purposes of research for this paper, an effort was made to review all collective agreements governing the provision of police services in the country. Some police services provide a link to such agreements online. In some provinces such as British Columbia, Québec, Manitoba and Nova Scotia, labour relations boards provide ways to access agreements. In all municipalities where these options did not yield a copy of a collective agreement, individual requests were made by way of direct email contact or completion of an Access to Information form. Table Three below identifies the municipalities where a collective bargaining agreement was retrievable and subject to review. Of the 143 cities and towns with municipal police services, 121 collective agreements were retrieved representing an 84.7% success rate.¹²⁹

Table Four: Canadian Federal, Provincial, Municipal Police Services

Jurisdiction	Number	Name
Federal	1	R.C.M.P.
Provincial	3	O.P.P., SQ, R.N.C.
Municipal	143	
BC	11	Abbotsford Police Department, Delta Police department, Nelson Police Department, New Westminster Police Service, Oak Bay Police Department, Port Moody Police Department,

¹²⁶ *Police Act*, S.P.E.I., c.P-11.1, s.15(4): no action for damages lies against a police officer for anything done in good faith in performance or intended performance of duty or for any neglect or default in performance or exercise in good faith of duty.

¹²⁷ Agreement between The City of Charlottetown and Charlottetown Police Association, Local 301 of The Atlantic Police Association (2013-2016).

¹²⁸ Agreement between the City of Summerside and C.U.P.E. local 1174 "Police and Fire" (2015-2020).

¹²⁹ It should be noted that every effort was made to retrieve the current operating collective agreement. In some cases, the most recent collective agreement was retrieved but had expired. In such cases, the police service would be operating under the old agreement pending the negotiation of a new one. In other cases, the only agreement retrievable was clearly out of date but access to a more current agreement was unavailable.

		Saanich Police Department, Vancouver Police Department, Victoria Police Department, West Vancouver Police Department [No collective agreement accessible for Central Saanich]
AB	7	Calgary Police Service, Camrose Police Service, Edmonton Police Service, Lacombe Police Service, Lethbridge Regional Police Service, Medicine Hat Police Service, Taber Police Service
SK	12	Moose Jaw Police Service, Regina Police Service, Saskatoon Police Service [No collective agreement accessible for Caronport, Corman Park, Dalmeny, Estevan, Luseland, Prince Albert, Vanscoy, Weyburn, RM of Wilton]
MB	11	Brandon Police Service, Morden Police Service, Winkler, Winnipeg Police Service [No collective agreement accessible for Altona, Riverdale (Rivers), Ste. Anne, Victoria Beach, Springfield, RM Cornwallis, RM Whitehead]
ON	51	Amherstburg Police Service, Aylmer Police, Barrie Police Service, Belleville Police Service, Brantford Police Service, Brockville Police Service, Chatham-Kent Police Service, Cobourg Police Service, Cornwall Community Police Service, Deep River Police Service, Dryden Police Service, Durham Regional Police Service, Espanola Police Service, Gananoque Police Service, Greater Sudbury Police Service, Guelph Police Service, Halton Regional Police Service, Hamilton Police Service, Hanover Police Service, Kawartha Lakes Police Service, Kingston Police, LaSalle Police Service, London Police Service, Midland Police Service, Niagara Regional Police Service, Niagara Parks Police, North Bay Police Service, Orangeville Police Service, Ottawa Police Service, Owen Sound Police Service, Peel Regional Police, Peterborough Police Service, Port Hope Police Service, St. Thomas Police Service, Sarnia Police Service, Saugeen Shores Police Service, Sault Ste. Marie Police Service, Shelburne Police Service, Smiths Falls Police Service, South Simcoe Police Service, Stratford Police Service, Strathroy-Caradoc Police Service, Thunder Bay Police Service, Timmins Police Service, Toronto Police Service, Waterloo Regional Police Service, West Grey Police Service, West Nipissing Police Service,

		Windsor Police Service, Wingham Police Service, York Regional Police Service
QB	29	Ville de Montreal, Ville de Québec, Ville de Gatineau, Ville de Laval, L'agglomération de Longueuil, Ville de Blainville, Châteauguay, Régionale de Deux-Montagnes, L'Assomption/St-Sulpice, Ville de Lévis, Ville de Mascouche, de Mirabel, La MRC des Collines-de-l'Outaouais, Ville de Repentigny, Régie intermunicipale de Richelieu-Saint-Laurent, Régie intermunicipale de Roussillon, Ville de Saguenay, Ville de Saint-Eustache, Ville de Sherbrooke, Ville de Terrebonne, Régie intermunicipale de Thérèse-de-Blainville, Ville de Trois-Rivières, Ville de Bromont, Ville de Granby, Régie de Memphrémagog, Ville de Mont-Tremblant, Ville de Saint-Jean-sur-Richelieu, Ville de Saint-Jérôme, Ville de Thetford Mines
NB	9	Bathurst Police, Beresford, Nigadoo, Petit-Rocher and Pointe-Verte Regional Police (B.N.P.P. Regional Police), Edmundston Police, Fredericton Police, Rothesay (Kennebecasis Regional Force), Saint John Police. [No collective agreement accessible for Grand Falls, Mirimachi, Woodstock]
NS	10	Amherst Police, Annapolis Royal Police, Bridgewater Police, Cape Breton Regional Police, Halifax Regional Police, Kentville Police, New Glasgow Regional Police, Stellarton Police, Truro Police [No collective agreement accessible for Westville]
PEI	3	Charlottetown Police, Summerside Police [no collective agreement accessible for Kensington]

Indemnification for torts for the provincial service in Ontario as provided by the O.P.P. is by virtue of *Police Act*,¹³⁰ s.50(1) wherein the Ontario government is liable for torts committed by members in the course of their employment. When acting as a member of the provincial force,¹³¹ the Minister of Finance may indemnify a member for reasonable legal costs in defence

¹³⁰ R.S.O.1990, c.P-15.

¹³¹ *Ibid*, s.50(5)(a).

of a civil action if not found liable or if the member acted in good faith.¹³² If there is no good faith,¹³³ the Ontario Provincial Police Association and Crown may enter into collective agreement to provide for indemnity, which is found in the terms and conditions of the agreement between Her Majesty the Queen in Right of the Province of Ontario and the Ontario Provincial Police Association (O.P.P.A).¹³⁴ At Article 34.01(e): where an employee is a defendant in a civil action for acts done in good faith in performance of her duties and a government lawyer or insurance counsel does not act, the employee shall be indemnified for necessary and reasonable legal costs if not found liable.

In Québec, pursuant to the *Police Act*,¹³⁵ s.49 states that for purpose of determining civil liability a police officer acting as a municipal police officer is deemed to be an agent of the Minister of Public Security. In Newfoundland and Labrador we have the *Royal Newfoundland Constabulary Act*,¹³⁶ which has no provision providing indemnity but does provide in the agreement between Her Majesty the Queen in Right of Newfoundland and Labrador and The Royal Newfoundland Constabulary Association¹³⁷ at Article 21.01(f): the employer shall indemnify the members for reasonable legal costs in defence of a civil action provided the acts performed were in the normal course of duties.

Lastly there is the *Royal Canadian Mounted Police Act*¹³⁸ which has no provision for indemnity for torts by its members. There is currently no collective agreement in place between members of the R.C.M.P. and the federal government. Up until 2015, it was unlawful for these

¹³² *Ibid*, s.50(5) (c).

¹³³ *Ibid*, s.50(6).

¹³⁴ (2009-2011).

¹³⁵ C.Q.L.R., c.P-13.1.

¹³⁶ 1992, S.N.L. 1992, c.R-17.

¹³⁷ (2013-2016).

¹³⁸ R.S.C.1985, c.R-10.

police officers to be unionized. On January 16th, 2015 the Supreme Court of Canada ruled that members of the R.C.M.P. had the right to form a union as a function of the right of association under s.2(1) of the *Charter*. The federal government was given one year to put the mechanism in place for the union, but has not yet done so.¹³⁹

With respect to the RCMP providing officers to serve as a provincial police service or as a municipal service, RCMP contract policing is provided through Police Service Agreements (P.S.A.) which are negotiated between the federal government and provinces, territories and municipalities. The current agreements expire on March 31st, 2032.¹⁴⁰ The Ministry of Public Safety and Emergency Preparedness of Canada enters into Police Service Agreements with the “Minister” of the provinces and territories.¹⁴¹ Pursuant to these agreements, if a member of a provincial or territorial police service, which the RCMP becomes under said agreements, received the benefit of a statutory defence such as in British Columbia under the *Police Act*¹⁴² to any claim in connection with the cost of any civil action, compensation claim, *ex gratia* payment or associated legal fees, per s.11.8 (a) of the PSA, Canada will indemnify and hold harmless the Province. With respect to municipal police units (M.P.U.), per Article 11.3 of the Province of British Columbia Municipal Service Agreement, the cost of each M.P.U. will not include the cost of any civil action, compensation claim, *ex gratia* payment or associated legal fees. Again, in the event any member employed by a M.P.U. receives the benefit of any statutory defence such as that provided by the *Police Act* to any claim, Canada will indemnify and hold harmless the

¹³⁹ *Mounted Police Association of Ontario v. Canada*, 2015 S.C.C. 1.

¹⁴⁰ The Agreements may be terminated on March 31st in any year by either party, being the government of Canada or any province, territory or municipality, however, the parties must give the notice of termination twenty-four months prior to the date of the intended termination.

¹⁴¹ The “Minister” will be whatever minister has jurisdiction over policing by virtue of the provincial and territorial responsibility for the administration of justice.

¹⁴² R.S.B.C. 1996, c.367.

Province. The Court of Appeal for British Columbia in *Amezcuca v Taylor*¹⁴³ made clear that for the purposes of a statutory defence as referenced in the P.S.A. and the Police Act, the provision that the “Minister” per s.11 of the *Police Act*¹⁴⁴ is to be held jointly and severally liable for torts committed in the course of employment by officers is sufficient. Virtually every provincial Police Act has some provision for vicarious liability. As such, no matter what level of service is being provided by members of the R.C.M.P., any action against them should invariably be against the Attorney General of Canada on behalf of Her Majesty the Queen in Right of Canada. Pursuant to s.36 of the *Crown Liability and Proceedings Act*,¹⁴⁵ for the purposes “of determining liability in any proceedings by or against the Crown, a person who was at any time a member...of the Royal Canadian Mounted Police shall be deemed to have been at that time a servant of the Crown.”¹⁴⁶ The federal Department of Justice will then be vested with carriage of the defence.

Taking into account the myriad of diverse means for the indemnification of police services responsible for torts committed against innocent individuals, it is hardly principled from the perspective of a plaintiff or a police officer doing her job in the course of her employment for the threshold for same to be as much a factor of geography as it is to the merits of a claim. As is the case with crown attorneys, direct liability of the Crown for the torts committed by individual police officers would appear to be a much fairer proposition for the plaintiff and defendant if the claim can be framed as a constitutional tort for a breach of the *Charter* pursuant to s.24(1).

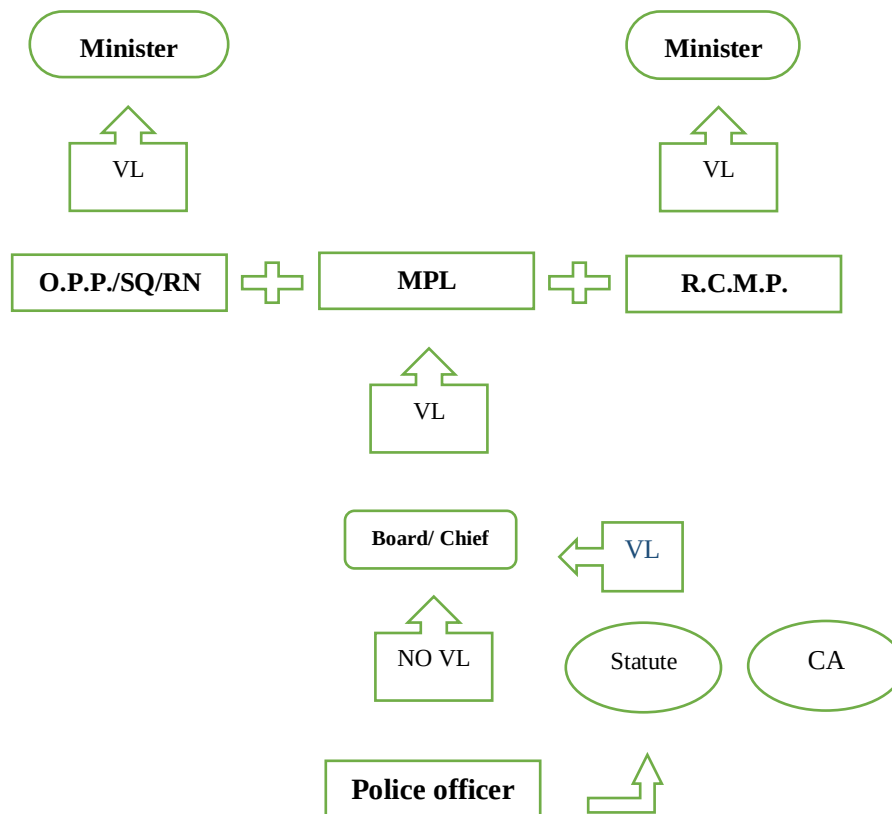
¹⁴³ 2010 B.C.C.A. 128.

¹⁴⁴ R.S.B.C. 1996, c.367.

¹⁴⁵ *Supra* at note 37.

¹⁴⁶ *Ibid.*

Table Five: Police Service Vicarious Liability Flow Chart¹⁴⁷



3. Conclusion

Civil litigation at its best is a lengthy, onerous, and expensive proposition for a recently exonerated individual to pursue in the hope of recovering compensation for the harms caused by a wrongful conviction. In the event that such an individual can fund an action, the claim will include as party defendants the offending police officer, crown counsel and their employers being some agency of the State. At common law it will be the individual police officer and

¹⁴⁷ Minister = Solicitor General, Minister of Public Safety; VL= Vicarious Liability; MPL = Municipality; CA = Collective Bargaining Agreement.

crown attorney who will be presumptively liable to the plaintiff for financial recovery.

Legislation has been enacted in the provinces and territories together with the federal government to implement vicarious liability to the State. That vicarious liability and consequent indemnity however is shaped by the exigencies of collective bargaining agreements, internal policy statements and errors and omissions insurance. With respect to crown counsel, liability flows upward from the prosecutor to the office of the Attorney General, however the intent of a crown counsel's malice often limits the indemnification for that liability. Likewise, while the misfeasance of police officers is grounded vicariously to their governing police service boards or respective chiefs of police, indemnity most often will only be provided in the event of good faith conduct within the scope of employment. These limitations prospectively translate into a very shallow pool for financial recovery by a plaintiff if it is the individual officer or lawyer who bears the burden of providing redress. Clearly these limitations to the provision of financial satisfaction by police services and crown counsel for the damage caused by systemic errors in the criminal justice process are unfair and unprincipled. It is the State that controls the enterprise of investigating and prosecuting crime for the benefit of its citizenry and it should therefore be the State primarily that is responsible for the harm caused when that enterprise goes wrong. The State should in all events be directly liable by framing the errors caused by the police or crown counsel in the investigation and prosecution of crime as a breach of the *Charter's* section 7 right to life, liberty, and security of the person in accordance with the principles of fundamental justice.