

The Police Discipline Process –

What Have We Achieved, and Where Do We Go From Here?

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I – INTRODUCTION

An annual gathering of complaint oversight bodies and other police governors is an especially suitable occasion to pause and reflect upon the condition of the police discipline process in the various Canadian jurisdictions. That reflection should pose, and answer, at least two questions: what have we achieved, and where should we go from here?

Any reflection, of course, is coloured in some fashion by the background of the observer, and my biography has been circulated. With that caveat, I will proceed to examine what we have achieved, and where we should go from here.

II – LOOKING BACK

The first task – assessing what we have achieved – principally involves describing the evolution of the police discipline process, and does not easily lend itself to a short essay. This is so primarily because the development of the discipline process has varied considerably among jurisdictions. As a general rule, however, the evolution has occurred in four stages.²

The first stage involved a police discipline process that was rigid and legally quite primitive,³ and had a much more prominent military flavour than is the case today. It certainly contained no

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²See generally P. Ceysens, *Legal Aspects of Policing*, at §7.2.

³See, for example, the archaic imprisonment provision in s. 418(1) of the *Railway Act*, R.S.C. 1985, c. R-3, which provided for “imprisonment, with or without hard labour, for a term not exceeding two months” where a railway constable appointed under the *Act* was guilty of neglect or breach of duty in his office. This provision was finally repealed in 1996 (S.C. 1996, c. 10, s. 185(1)).

substantive mechanism to address complaints from members of the public respecting police conduct. Police discipline was very much “internal” police discipline.

The second stage in the development of the police discipline process retained its “internal” emphasis and its military flavour, but saw the development of a body of jurisprudence from courts of law and administrative tribunals that explored both discipline procedure (particularly involving the entitlement of respondent police officers to procedural fairness)⁴ and police discipline offences.⁵ As well, this stage in the process saw the emergence of a distinct process to capture allegations of misconduct that originated outside of the police force (“public” complaints), although that process in its infancy relied heavily on policy-based responses among individual police forces and was for that reason erratic in its application and in its effect. Ultimately, even the best complaint policy was not open to independent public scrutiny.

The third stage in the development of the police discipline process was characterized principally by the introduction of a statute-based “public” complaint process that involved a measurable level of independent public oversight and corresponding separation from the constabulary. The emergence of a formal statutory public complaint schemes arose largely because of the concern that the process would never be fully effective if the police controlled all stages of the process. Almost universally, however, police legislation fixated on the question of *where* an allegation of misconduct arose: allegations of misconduct originating from within the workplace were treated differently, sometimes radically differently, from allegations of misconduct that originated through the vehicle of a “public” complaint. In the result, an identical allegation would typically entail different processes, different tribunals and sometimes quite different results, depending on whether a member of the public or a member of the police force initiated the process.

This third stage of the evolution of the police discipline process began in most jurisdictions in the 1980s. In Ontario, for example, the legislature enacted the *Metropolitan Toronto Police Force Complaints Project Act, 1981*⁶ after various reports that examined police behaviour in Toronto in the late 1970s strongly urged the creation of a formal “public” complaint process.⁷ This statute established a three-year pilot project that had several important elements. A public complaints commissioner monitored the processing of complaints. While police would investigate complaints,

⁴See *Turbucz and Wallaceburg Police* (1976), 1 O.P.R. 283 at 287 (O.P.C.), where the Ontario Police Commission offered the view that the disciplinary framework is protective rather than punitive, since a police officer could otherwise be dismissed at pleasure; and *White v. Dartmouth (City)* (1991), 106 N.S.R. (2d) 45 at 51 (T.D.), in which the Nova Scotia Supreme Court referred to “protection of police officers from unwarranted disciplinary action” as one of the purposes of the Nova Scotia discipline scheme.

⁵As to police discipline offences, see P. Ceysens, *Legal Aspects of Policing*, at §7.2.

⁶S.O. 1981, c. 43.

⁷See, for example, C.E. Lewis, *et al.*, “Public Complaints Against Police in Metropolitan Toronto – The History and Operation of the Office of the Public Complaints Commissioner” (1986-87) 29 *Crim. L.Q.* 115.

a dissatisfied complainant could obtain a review of the findings by the commissioner. The commissioner had authority to constitute an independent public board of inquiry to hear the complaint, and the board was empowered to impose (as opposed to recommend) discipline. The 1981 *Act* also permitted the commissioner to make recommendations respecting issues arising from complaints. The *Metropolitan Toronto Police Force Complaints Act, 1984*⁸ retained the principles of the 1981 *Act*, and made a number of amendments. One of the most persistent criticisms of the 1984 *Act* concerned its limited application: only one police agency (the Metropolitan Toronto Police Force) was bound by its provisions. The Ontario government responded in 1990⁹ by extending the jurisdiction of the commissioner to all municipal police forces and the Ontario Provincial Police.

The fourth stage in the evolution of the police discipline process involves the enhancing of legislative schemes to reflect judicial decisions, development of policy, and practical experience with the process. The fourth stage has seen notable improvements, and most jurisdictions now have a relatively sophisticated level of both public accountability and procedural fairness for respondent police officers.

One such improvement is the confluence, in some jurisdictions, of the “public” complaint and “internal” discipline streams, on the basis that “like conduct should be treated in like manner”, and that no public policy justification exists for subjecting allegations of misconduct to different processes purely on the basis of whether the allegation happened to originate from outside the police force or within it. In Alberta, for example, all complaints, whether made by a “member of the public” or the chief of police, are processed generally in accordance with the same process.¹⁰ The British Columbia *Police Act* has also largely abandoned the distinction between internal discipline and “public” complaints, and now distinguishes complaints on the basis of their substantive character: the principal distinction is between matters that involve public trust and those that do not.¹¹ Some jurisdictions, however, have legislatively retained the artificial distinction between internally generated and externally generated complaints. Under the Manitoba *Law Enforcement Review Act*, for example, s. 38 provides that the legislation “does not apply to matters of internal police discipline which do not involve members of the public”. The *Royal Canadian Mounted Police Act* also has widely divergent

⁸S.O. 1984, c. 63.

⁹*Police Services Act, 1990*, S.O. 1990, c. 10 (now the *Police Services Act*, R.S.O. 1990, c. P.15).

¹⁰Alberta adopted this approach with the *Police Act* (1988), R.S.A. 1980, c. P-12.01. Under the Ontario *Police Services Act*, s. 56(1) authorizes a member of the public to register a complaint, and s. 56(2) authorizes a chief of police to register a complaint.

¹¹A third category of complaint – service or policy complaint – also exists. See s. 46(1) (definitions of “public trust complaint”; “internal discipline complaint” and “service or policy complaint”), and s. 52.1(1)(a) (obligation of the recipient of a record of complaint to characterize the complaint as one or more of a public trust complaint; an internal discipline complaint; and service or policy complaint).

processes, depending upon whether an allegation arises internally¹² or from a “member of the public”.¹³

The fourth stage in the evolution of the police discipline process has seen other important improvements. Some legislation now allows complaints against not only police officers, but former officers and other law enforcement functionaries such as special constables.¹⁴ Some schemes permit complaints about not only individual police officer conduct, but also police policies and services.¹⁵ Effective informal resolution mechanisms have also become more common.¹⁶ Finally, some schemes endorse broader objectives such as recommendations addressing policy matters or organizational deficiency within the constabulary.¹⁷

The latter two stages of the evolutionary process described above have occurred since the early 1980s, depending on the jurisdiction. Some tension remains between the third and fourth steps in the evolution of the police discipline process.¹⁸ The police discipline process has certainly become more nuanced and responsive, albeit sometimes incrementally and reluctantly so, but many concerns remain. Many of these concerns relate to timeliness, cost and the combative nature of the process. Where a complaint requires years of commitment and prohibitive cost to the parties and the system itself, and even the parties who “win” feel beleaguered by the end of the journey, the need for further

¹²Parts IV and V.

¹³Parts VI and VII.

¹⁴In *Blair v. Soltys* (1999), 141 Man. R. (2d) 319 (Q.B.), for example, the Manitoba Court of Queen’s Bench considered the issue in a case in which a police officer facing proceedings arising from a public complaint argued that no jurisdiction existed for formal legal proceedings, since he had resigned from the police force after the complaint was registered. In the course of rejecting this argument, the court set out the purposes of the *Law Enforcement Review Act*. The court concluded that the *Act* was “more than a disciplinary statute”, and its processes could result in recommendations for systemic changes as well as the discipline of the respondent police officer. Ultimately, the complainant, the respondent police officer, the police force, and the province “all have an interest”: “From the individual police officer’s perspective, the *Act* may appear to be purely disciplinary in nature, but it has a much broader public purpose as well. It is designed to promote both respect for the police and respect for the individual” (141 Man. R. (2d) at 320). The application of the police discipline process to former police officers is discussed further in *Legal Aspects of Policing*, at §7.2(d)(vi).

¹⁵See, for example, Part 9, Division 5, of the B.C. *Police Act*.

¹⁶This issue is discussed further in *Legal Aspects of Policing*, at §7.2(g).

¹⁷See ss. 50(3)(c) and (e), for example.

¹⁸See, for example, *Royal Newfoundland Constabulary Public Complaints Commission v. McGrath* (2002), 220 Nfld. & P.E.I.R. 282 (Nfld. C.A.), which emphasized the distinction between “internal” police discipline and “public” complaints in interpreting whether particular technical provisions should be interpreted as mandatory or merely directory.

improvement is clear. Confidence among members of the public, complainants and respondent police officers is not high.¹⁹

III – LOOKING FORWARD

The second task – assessing where we go from here – is more difficult. The evolution of the police discipline process will likely see developments such as further dismantling of the artificial distinction between “internal” discipline and “public” complaints, and more improvements in process design. Quality of investigation will receive much more attention.²⁰ However, the area offering greatest potential for significant improvement is prevention.

Much of what has evolved so far has a distinct reactive flavour. In other words, most of the focus has been on addressing how the legal process should properly respond to an allegation that a police officer *has committed* an act of professional misconduct. Much effort has been dedicated towards perfecting various stages of the process – reception, investigation, independent review, hearing, appeal, for example. None of what follows should be taken as saying that we should not undertake these improvements, or hold formal hearings. Of course we should. However, these improvements are all improvements to a system that engages only after an allegation arises. To date, comparatively little effort has been dedicated to improvements that speak to preventing allegations from arising to begin with. The idea that prevention should attract greater emphasis is now new,²¹ but actual results have been modest.

A refined procedure governing the recruitment and appointment of applicants for police employment is likely the most effective risk reduction mechanism available. Various studies have established that only a very few police officers are responsible for the large majority of a police employer’s risk exposure. Police employers should make every effort to avoid hiring applicants who

¹⁹J. Griffiths, *Performance Audit – The Public Complaints Process, Toronto Police Service* (Toronto: Toronto Audit Services, 2002), at 29 *et seq.*; T. Landau, “When Police Investigate Police: A View from Complainants” (1996) 38 Can. J. Crim. 291; T. Landau, *Public Complaints Against the Police: A View from Complainants* (Toronto: Centre of Criminology, University of Toronto, 1994).

²⁰See, for example, *Bainard v. Metropolitan Toronto Police Services Board*, [2002] O.J. No. 2765 (QL) (S.C.), which recognized that a police employer may be civilly liable for negligent investigation in the context of police discipline. The court found no civil liability on the particular facts of this case. This judgment should nonetheless be instructive to the police and invite review of various practices in professional standards branches, including the selection of investigators and the necessity for adequate formal training of new investigators.

²¹P.J. Knoll, Q.C., “A Focus on Internal Affairs - International Perspective: Report to Commission D’enquête Sur La Sureté du Québec” (1999) 1 P.L.R. 70 at 108 *et seq.* As well, there has been some discussion of an increased emphasis on institutional issues within the constabulary (as distinct from the focus on the behaviour of individual police officers). See the discussion of the purposes of the complaint process in *Blair v. Soltys* (1999), 141 Man. R. (2d) 319 at 320 (Q.B.): “... the Act may appear to be purely disciplinary in nature, but it has a much broader public purpose as well”. The court made particular reference to recommendations for systemic changes arising out of the complaint process.

would likely fall within that small minority. Due diligence requires an extremely thorough background check, together with psychological assessment, of all candidates. Proper psychological assessment includes standard testing (MMPI, 16PF), together with a one-hour clinical (in-person) interview by a psychologist qualified to assess the suitability of applicants for police employment. One of the effects of the recent increase in competition for police recruits is that police officers who resign after establishing a notorious employment history are sometimes hired immediately by other police forces, and our firm has seen numerous examples of this practice.²² We have also seen many examples of our clients rejecting an applicant as profoundly unsuitable, only to see that applicant quickly receive an offer of from another police employer. Such practices, which have been increasingly common as competition for police recruits increases, undermine basic risk management, among other considerations.

Second, given the pace and extent of change in the legal environment of policing, thorough training in the law is an obvious component of risk prevention. Legal training of recruit police officers rarely ventures far beyond basic criminal law principles. Many areas of the law that continue to produce litigation for the police are not taught in detail, and sometimes are not taught at all, during the initial period of training. As well, continuing legal education in most police forces is sporadic. Police are regularly criticized by the judiciary and oversight bodies for their failure to provide adequate legal training on an ongoing basis,²³ and police require annual “refresher” courses that address legislative and judicial developments that have occurred since the previous such course, not only in criminal law but in other areas of the legal regulation of the police as well. One senior Ontario Crown attorney recent remarked at a public lecture that many police forces in that province take three years to properly communicate judgments of the Supreme Court of Canada. That three year period is an unnecessary assumption of significant risk, and the failure to educate practicing police officers in important developments in the law could, and does, result in needless exposure to complaints, civil actions, and other forms of legal redress, all of which engage various risk management considerations – the quality of service delivery; avoiding financial costs arising from disputes; avoiding negative effects on organization arising from disputes (“organizational disruption”); avoiding negative effects on individuals arising from disputes; and avoiding damage to reputation of the constabulary generally.

²²See J. Middleton-Hope, “‘Gypsy’ Cops Can Bring Unwanted Baggage” *Blue Line*, August/September 2003, at 57.

²³See, for example, the following comments by the R.C.M.P. Public Complaints Commission (Annual Report, 1997-98, p. 21): “RCMP officers need to keep up to date on developments in criminal law, especially those that affect the use of police powers, acceptable methods of gathering evidence, and the rights of accused persons. In reviewing complaints, the Commission frequently concludes that the police officer in question was unaware of an important element of the law he or she was attempting to enforce. This shortcoming is not confined to junior officers of the Force; some supervisors have given unsound advice to police under their command because they failed to consider all relevant provisions of a law. The commission notes that policing is becoming more complex as case law increases the detail of the legal regime that governs the rights of the accused and the admissibility of evidence. The Commission is concerned that resources be committed so that RCMP officers may be provided with regular opportunities to train and, thus, keep pace with the growth in complexity.”

Other preventive tools are available. The police can benefit from specialized legal advice, especially advice that is proactive instead of merely reactive;²⁴ early warning mechanisms; the strategic use of apology;²⁵ carefully researched, drafted and instructed policy; and careful records management. Increased attention to the operation of professional standards branches is also an essential preventive tool.²⁶

The maturing of the police discipline process is occurring at a time when the level of judicial scrutiny of police conduct in Canada has reached a historical high.²⁷ In the past approximately fifteen years, the trends in police civil liability, for example, have changed quite noticeably. Thus, more civil proceedings are being commenced against the police, more novel causes of action are being raised, police are losing many important cases, courts are making more large awards of damages.²⁸ A review of the trends suggests that the broadest exposure to the risk of litigation for the police involves investigative quality²⁹ (including investigative quality issues in the police discipline process³⁰) and care of persons in custody.³¹ However, other issues have attracted particular judicial attention, including

²⁴See C.S. MacMillan, “The Legal Advice Gap in Policing” (1997) *The Advocate* 845.

²⁵The R.C.M.P. Public Complaints Commission has also emphasized the value of an apology in appropriate circumstances: “A sincere apology offered in person early in the complaint process will often satisfy the complainant and permit a file to be closed. The review of a complaint may include a recommendation that an apology be made to the complainant. The Commission believes that such apologies are most effective when made by the RCMP officer involved; sometimes a simple acknowledgment by the officer that a misunderstanding took place will satisfy a complainant.” (Annual Report, 1997-98, p. 21).

²⁶P.J. Knoll, Q.C., “A Focus on Internal Affairs - International Perspective: Report to Commission D’enquête Sur La Sureté du Québec” (1999) 1 P.L.R. 70; P.J. Knoll, Q.C., “Building Strategic Integrity into Policing” (2001) 2 P.L.R. 211.

²⁷The same can be said for scrutiny of police conduct by administrative tribunals, such as human rights commissions.

²⁸A discussion of the trends appears in S. Childs and P. Ceysens, “*Doe v. Metropolitan Toronto Board of Commissioners of Police* and the Status of Public Oversight of the Police in Canada” (1998) 36 *Alta. L. Rev.* 1000.

²⁹*Beckstead v. Ottawa (City)* (1997), 155 D.L.R. (4th) 382 (Ont. C.A.) (negligent investigation); *McTaggart v. Ontario*, [2000] O.J. No. 4716 (QL) (S.C.) (*Charter*-based civil actions); *Dix v. Canada (Attorney General)*, [2002] A.J. No. 784 (QL) (Q.B.). The same issues arise in the police discipline process: see *Maloney v. Royal Newfoundland Constabulary Public Complaints Commission*, [2002] N.J. No. 203 (QL) (S.C.), for example.

³⁰*Bainard v. Metropolitan Toronto Police Services Board*, [2002] O.J. No. 2765 (QL) (S.C.).

³¹*Fortey v. British Columbia (Attorney-General)* (1997), 45 B.C.L.R. (3d) 264 (S.C.), *aff’d* (1999), 63 B.C.L.R. (3d) 185 (C.A.) (medical care - refusal by prisoner); *Roy v. Canada (Attorney General)*, [2002] B.C.J. No. 1587 (QL) (questionable consciousness); *Kirby v. British Columbia (Attorney-General)* (1997), 41 B.C.L.R.

use of force;³² duty to victims of crime;³³ workplace discrimination and harassment;³⁴ liability for improper supervision³⁵ and training;³⁶ and even issues such as statements to the media.³⁷ This paper does not permit a proper examination of human rights complaints, but this forum has also seen similar trends: increased numbers of complaints, novel issues, decisions against the police in significant cases and some large awards of damages.³⁸

(3d) 45 (S.C.) (placing an intoxicated person into custody); *Lipcsei v. Central Saanich (District)*, [1995] 7 W.W.R. 582 (B.C. S.C.) (providing medical care); *Orange v. Chief Constable of West Yorkshire*, Eng. C.A., 1 May 2001 (whether police ought to have known that prisoner was suicidal); *Smith v. British Columbia (Attorney General)* (1988), 30 B.C.L.R. (2d) 356 (C.A.) (protection of intoxicated prisoners from other prisoners); *Euteneier v. Lee*, [2000] O.J. No. 4533 at para. 51 (QL) (S.C.) (contrived suicide attempts; awaiting Ontario Court of Appeal judgment); *Socha (Public Trustee of) v. Millar* (1994), 48 A.C.W.S. (3d) 879 (Ont. Gen. Div.), aff'd, [1998] O.J. No. 2006 (QL) (C.A.): “[t]o the intoxicated inmate the duty is to exercise the greatest care”; *Reeves v. Commissioner of Police of the Metropolis*, [2000] 1 A.C. 360 (police 50% responsible for the death of a suicidal prisoner who pushed his shirt through a small open “wicket hatch” in his cell door and attaching the shirt to the door, hanging himself); *Kirkham v. Chief Constable of the Greater Manchester Police*, [1990] 2 Q.B. 283 (C.A.) (transfer of a suicidal prisoner to another institution); *Wilson v. Chief Constable, Lothian and Borders Constabulary* (1986), 1989 S.L.T. 97 (O.H.) (release of prisoners)

³²**Use of Pepper Spray:** *Christopherson v. Saanich (District)* (1994), 2 B.C.L.R. (3d) 218 (S.C.), *Harty v. Kroeker* (1998), 6 A.L.E.R.B.J. 247 (Alta. L.E.R.B.) (complaint case); **Use of Police Dogs:** *Robinow v. Vancouver (City)*, [2003] B.C.J. No. 989 (QL) (S.C.), *C. (T.L.) v. Vancouver (City)* (1995), 9 B.C.L.R. (3d) 201 (S.C.), *Arnault v. Prince Albert Board of Police Commissioners* (1995), 136 Sask. R. 49 (Q.B.); **Use of Police Baton:** *Allarie v. Victoria (City)*, [1995] 1 W.W.R. 655 (B.C. S.C.); **Use of Full Nelson Hold:** *Green v. Lawrence* (1998), 163 D.L.R. (4th) 115 (Man. C.A.); **Use of Arwen Anti-Riot Weapon:** *Berntt v. Vancouver (City)* (numerous); **Incident Command:** *Rabideau v. Maddocks* (1992), 37 A.C.W.S.(3d) 754 (Ont. Gen. Div.), *Vukelic v. The Queen* (1997), 29 B.C.L.R. (3d) 288 (C.A.); **Weapons of Opportunity:** *Nault v. Tremblay* (1995), 2 P.L.R. 51 (B.C. S.C.), *Marshall v. Monpetit*, Ont. C.A., 4 April 1997; **Weaponless Defence:** *R. v. Yum* (2000), 277 A.R. 238 (C.A.) (kicks), *R. v. Bolianatz*, [2002] A.J. No. 554 (QL) (Q.B.) (kicks); **Carotid Restraint:** *Re Cooper* (1991), 1 P.L.R. 256 (R.C.M.P. P.C.C.) (complaint case).

³³*Doe v. Metropolitan Toronto Board of Commissioners of Police* (1998), 160 D.L.R. (4th) 697 (Ont. Gen. Div.).

³⁴*Clark v. The Queen*, [1994] 3 F.C. 323 (T.D.).

³⁵*Clark v. The Queen*, [1994] 3 F.C. 323 (T.D.).

³⁶*Berntt v. Vancouver (City)* (1997), 28 B.C.L.R. (3d) 203 at 253-61 (S.C.), rev'd (1999), 63 B.C.L.R. (3d) 233 (C.A.). The trial judgment in this case provides a useful example of the scrutiny with which courts of law will examine an allegation of negligent training. This aspect of the claim was dismissed, but not before police conduct was exhaustively examined.

³⁷*Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General)* (2001), 198 D.L.R. (4th) 577 (Man. C.A.).

³⁸See, for example, *R. v. Brown*, [2003] O.J. 1251 (QL) (C.A.) (profiling). This judgment arose in the criminal law process, but has obvious implications for litigation against the police in other forums, such as the police

The prevention tools available in the police discipline process apply to prevention and general risk management in the civil law and human rights law, and other legal processes that regulate police conduct. Prevention should receive the careful attention of both the constabulary and police governing bodies in addressing both how the police discipline process should be enhanced, and how best to respond to legal risk generally.

discipline process and the human rights process.