Conference Draft

DRAFT

June 21, 2004

DO NOT CITE OR QUOTE

Legal Sites of Executive-Police Relations: Core Principles in a Canadian Context

Dianne L. Martin

Osgoode Hall Law School

I. Introduction:

There is little dispute concerning the general proposition that police in a democratic society must be bound by the rule of law, accountable to civilian authority, and the 'tool' of no political master.[1] That is so regardless of whether one interprets this principle to support close civilian supervision, leaving only a narrowly and specifically circumscribed sphere of independence for police action; or whether one opts to leave the residual discretion in the hands of the police (in support of their independence) and thus closely circumscribing the scope of civilian supervision and review.[2] How and when and whether one opts for one of these positions, or a position along either spectrum, is a matter constructed from many strands - legal, constitutional, political, social, international and more. This paper, although mindful of the broader context, will consider the

[1] Jerome H. Skolnick, *Justice Without Trial*, 2d, (New York: MacMillan, 1975). But note that the extension of the doctrine of constabulary independence, which places the police 'above' politics is much less well supported.

[2] See Roach, Stenning, etc these papers, for a related typology of civilian oversight/police independence dichotomy.

legal 'strand' - the role of law in the regulation of police conduct and practice. It will provide an overview of the multiple legal sites where the governance of police in a democratic society is negotiated, with examples and solutions drawn from policy documents, public inquiries, legislation, and case law. The paper will also offer a case study of one particular instance of conflict between civilian authorities and police over the ways that two specific cases of police misconduct by officers of the Toronto police service were handled, and look at the long term consequences of the conflict.

A discussion of the role of law in police governance inevitably focuses on the ways that law serves (or fails to serve) as a *limit* on police practice and as *curb* to police misconduct, as this is the context which produces the accessible record of law's role in governance, from decided cases to legislation and regulations and legally constituted commissions of inquiry. However, it is important to remember the limits on an analysis of legal rules and interventions. Perhaps most importantly, for police, the criminal law is their "tool".[3] That said, a close examination of the multiple sites where law serves (or claims to serve) to regulate police behaviour and to hold police individually and collectively accountable both to the rule of law and to democratic principles may be helpful in

[3] Richard Ericson notes that the criminal law is the police officers *tool* in reproducing order, it is a resource, not a restraint. This function of "law" as it relates to lawyers has been analyzed frequently by students of both law and sociology, "Police Use of Criminal Rules" in Clifford D. Shearing, *Organizational Police Deviance*; "Its Structure and Control", (Toronto, Butterworths, 1981) ,pp 83-110 at p 101 And See: Roger Cotterell, "Professional Guardianship of Law", *The Sociology of Law: An Introduction*,(London, Butterworths, 1984.) At the

determining best practices and approaches for negotiating, generally, the relationship(s) between government (however constituted) and police.

Multiple factors bear on the ways that this intricately structured relationship is worked out in day to day situations, and indeed there are multiple relevant relationships. The central argument of this paper is that these relationships have evolved in various ways into mutually reinforcing but not always amicable partnerships, negotiated daily at various sites within the legal and constitutional systems. Many of these negotiations take place informally and out of public view while others are managed by the courts in individual cases. This relationship only occasionally surfaces as a matter of public concern which is usually presented and perceived as an aberration or crisis. These crises can be identified in individual contexts, for example in Charter motions in criminal cases, or in civil law suits against the police, and in institutional settings, often precipitated by media controversy. The minority generate sufficient challenge to legitimacy that special responses evolve or are called upon: such as Public Inquiries, often driven by community and media pressures and legislative change and new modes of civilian review. In all cases, it will be argued, better outcomes would be achieved if both police actors and judicial and political decision makers were better informed about the history of the relationship and the reasons for doctrines.

---

same time, the rule of law is taken for granted as the formal standard against which 'deviance' should be measured and judged.

II Sites of regulation:

It is not at all unusual for public dissatisfaction in response to police scandals to grow and for demands to be made for more and more effective accountability,[4] at the same time that police officers complain that they are an over regulated occupation relative to others, and thus, by inference, justified in resisting efforts to increase or improve regulation and governance.[5] Conflict over and between these two positions has marked policing history for the past thirty years at least.[6] Where does the truth lie? There is no easy answer and much of the answer that is available is unhelpfully found in one's perspective on the issue. To the individual (or community) who has

[4] Cal Millar, John Duncanson and Nicholaas Van Rijn "Police unit faces internal probe" *The Toronto Star* (17 April 2004) A4; Christie Blatchford "Police probe corruption as union boss steps down" *The Globe and Mail* (19 April 2004) A1, A9; John Duncanson "Betting scandal rocks police force" *The Toronto Star* (20 April 2004) A1; Nick Pron and John Duncanson "6 may face betting probe charges" *The Toronto Star* (21 April 2004) A1, A16; John Barber "Enough with the few 'bad apples'" *The Globe and Mail* (24 April 2004) M1; John Duncanson and Tracey Huffman "Source: Police shielded drug dens" *The Toronto Star* (24 April 2004) A1, A23; Nick Pron "Former chief's son facing charges" *The Toronto Star* (26 April 2004) A1, A12; Christie Blatchford "Chief details charges against officers" *The Globe and Mail* (27 April 2004) A10; Linda Diebel and Cal Millar "Police reform: 'I want action'" *The Toronto Star* (28 April 2004) A1, A19; "Police require outside probe," Editorial, *The Toronto Star* (28 April 2004) A22; Royson James "An independent inquiry is the only way to solve police mess" *The Toronto Star* (28 April 2004) B3; Royson James "Fantino's message is loud, but is it clear?" *The Toronto Star* (29 April 2004) B1, B5; Linda Diebel and Cal Millar "RCMP probing Toronto Police" *The Toronto Star* (30 April 2004) A1, A4. Recent scandals in Ontario, coupled with the change in provincial governments, has led to a review of the civilian complaints process: Richard Brennan "LeSage to review police watchdog system" *The Toronto Star* (10 June 2004) A1; Richard Brennan "Police complaints role 'a challenge', former judge says" *The Toronto Star* (11 June 2004) A20; "Police complaints reform overdue," Editorial, *The Toronto Star* (11 June 2004) A26.

[5]. The Toronto police service, by way of their union, as well as other bodies, such as the Canadian Association of Chiefs of Police have been highly effectively at disseminating these views through the local newsmedia: Linda Diebel "Mistrust of 'suits' fills void behind badge" *The Toronto Star* (2 May 2004) A1; David Hilderley "OPP adds support to Metro Police protest" *The Globe and Mail* (26 October 1992) A19 (protest regarding use-of-force amendments to the Police Act); Philip Mascoll, "Striking Metro police lock station doors" *The Toronto Star* (27 January 1995) A1, A6 (labour action in response to charges laid against officer regarding the 'high-risk takedown of TV personality Dwight Drummond); Paul Walter, "Investigative overkill poisons civilian review of police conduct" *The Toronto Star* (10 February 1995) A19 (president of the Toronto Police Association argues the force is subject to "excessive" oversight); John Duncanson, "Police chiefs getting ready to take on SIU" *The Toronto Star* (13 March 2000) A4; John Duncanson "Fantino tries to change rules on SIU probes" *The Toronto Star* (7 November 2000) A1, A26.

been harmed by police error or police misconduct and not been satisfied by the remedies on offer, it is 'clear' that more effective discipline and accountability measures are required. To the police manager who finds it difficult to discipline or otherwise deal with an inadequate or problem officer it may be 'clear' that faster easier disciplinary measures and management tools are required. To the individual officer faced with multiple levels of scrutiny, any one of which with the potential to end a career, any additional means to monitor and sanction his or her decisions and conduct is oppressive. Other viewpoints are relevant as well.

That said, some things are clear. There is no doubt that police encounter a host of legal rules and expectations in all aspects of their occupational lives, and that many of those encounters have consequences for them both personally and professionally. There is also little doubt that the system of regulation and discipline faced by members of the Toronto Police Service has been described as "unnecessarily complicated", and "... frequently reactive, slow, not fully transparent and unnecessarily bureaucratic."[7] Some complexity is inevitable, some flows from the legislative structure which constructs a distinction between 'policy' and operations in an attempt to balance police independence with accountability; some could be reduced given more thought to the culture and the context in which those rules will operate.

In this intricate and complex structure, policy is expressly made the province of the elected and appointed civilian governors, while operations, and the carrying out of board ("broad", or are

---

[6] Roach, Stenning, Sossin, these papers.

[7] Ontario Civilian Commission on Police Services, "Report on a fact-Finding into Various Matters with respect to the Disciplinary Practices of the Toronto Police Service, July 1999, p 3.. This report dealt with a complaint from the Toronto Police Association that discipline was unfairly administered on the Toronto Service in that it was inappropriately lenient in regard to the misconduct of senior officers in comparison with the ways that 'rank and

you introducing the concept of oversight by the police services boards?) policy, are the province of the chief of police who serves as a sort of CEO employed by the civilian authority. All employees and officers report, directly or indirectly to the Chief of Police and all discipline is administered in his or her name. With variations, this is the model currently operating throughout Canada, at all levels of law enforcement; federal, provincial, aboriginal, municipal and military.

Police services are governed as a whole in matters of policy, while at the same time police officers are regulated as individuals. Police services are required to report to the political bodies charged with responsibility for their governance through the Chief of Police that they employ, who in turn must accept policy direction from them. When that relationship breaks down and this apparently simple 'chain of command' is found wanting, or an event occurs which triggers outside intervention, further measures of accountability are engaged, which may have implications for the police service as a whole and for any individual officers who may be involved. In turn, the conduct/misconduct of individual officers is managed through a highly structured, legalistic mechanism providing for the investigations of allegations of misconduct and the hearing of cases. Inevitably this artificial distinction generates conflicts - and well earns the description that it is complex. That such a structure might also be overly bureaucratic and opaque is obvious. The following brief description of the structures in place will serve to illustrate the degree of complexity at least.

---

file' officers were treated. Although that complaint was not upheld, OCCPS found a number of matters requiring improvement.

1. The Legislative structure in Ontario

Police services, despite their common law roots[8], are creatures of statute and both their scope of practice and the modes of accountability are located in the legislation that creates them. In Ontario, authority for police to act flows from the *Police Services Act*[9] and the Ministry of the Solicitor General[10], who is charged with the monitoring of all police forces and boards, and the issuing of policy directives.[11] The authority over policing vested in the Ministry of the Solicitor General under the Act is divested to both the Ontario Civilian Commission on Police Services (OCCOPS)[12] and local Police Services Boards[13]. OCCOPS members are appointed by the Lieutenant Governor[14], while the Act provides for a police services board for every municipality that maintains a police force, composed of three, five or seven members, depending upon the size

---

[8] See Roach, Foundation paper

9 Police Services Act, R.S.O. 1990, c. P.15 [*Police Services Act*].

10 Police Services Act, s. 3 (1).

11 Police Servics Act, s. 3 (2)

12 *Police Services Act*, s. 21-27.

13 Police Services Act, s. 27-40.

14 Police Services Act, s. 21(2).

of the municipality.[15] The membership of the board is to be composed of the head of the municipal council (or their designated representative), members of council, a civilian, and members appointed by the Lieutenant Governor.[16] Police Services Board are charged with the provision of police services in the municipality and appoint the members of the force (including the chief), determine police objectives and priorities, direct and monitor the performance of the chief, and establish guidelines for dealing with complaints. The board is also empowered to enact by-laws for the effective management of the force.[17] The "policy vs. operations" distinction is clearly entrenched within the Act, which states that the board may not give orders to any member of the police force aside from the chief.[18]

The Act also sets out the duties of a chief of police, who reports directly to the police services board, and the duties of police officers.[19] The Act is supported by 15 active regulations

---

15 Police Services Act, s. 27.

16 Police Services Act, s. 27.

17 Police Services Act, s. 31. The Act places responsibility for all but the OPP onto municipalities, in the form of Police Services Boards. An interesting perspective on the downloading of policing onto municipalities and the policy rationale for government support of community policing initiatives is provided by Christopher Murphy, "Policing Postmodern Canada" (Fall 1998) 13 CJLS/RCDS 2. Murphy assess the impact on policing of postmodern forces such as the decline of the nation state, localization of once centralized power, the triumph of market logic, and the privatization of public services. The future of policing is seen as including an increase in community policing (not as a method of ensuring accountability, but of justifying decreasing public services) and the privatization of non-essential police services. The role of privatization on policing is also recognized in David H. Bayley and Clifford D. Shearing, *The New Structure of Policing: Description, Conceptualization, and Research Agenda*. National Institute of Justice, U.S. Department of Justice (July 2001, NCJ 187083). The authors find that policing is undergoing worldwide restructuring, characterized by the separation of policing authority and operations, and the transfer of both functions away from government. Because policing is being challenged by forces inside and outside the nation state, it is essential that government develop the capacity to regulate and audit the restructuring of policing.

18 Police Services Act, s. 31 (3).

[19] *Police Services Act*, s. 41 and 42.

which contain, among other things, the Code of Conduct and the restriction on police political activity.

The Act empowers OCCOPS in a variety of ways designed to ensure accountability at the level of the police service as a whole, including the local managers (the Police Services Boards). OCCOPS is empowered to conduct investigations and inquiries into complaints about the policies or services provided by a police force, or the conduct of officers.[20] OCCOPS may conduct inquires on its own motion, upon the direction of the Solicitor General, a Police Services Board, a chief of police, a municipal council, as well as by a member of the public.[21] An OCCOPS investigation or inquiry has all the powers of a commission under Part II of the Public Inquires Act, and may impose wide-ranging sanctions, including: the suspension or removal of a chief, one or more members of a Police Services Board, or the entire Boards, the appointment of a replacement chief, and the disbanding of a municipal police force.[22] Appeals from OCCOPS hearings are to the Divisional Court and must be made within 30 days of receiving notice of the Commission's decision.[23]

The mechanisms regarding the misconduct individual police officers are found in Part V of the *Police Services Act*, which directs the chief to inquire into every complaint regarding the conduct of an officer, except those which the chief deems to be made by a party not directly

20 Police Services Act, s. 22 (1)(a)(ii)(e).

21 Police Services Act, s. 22, 25.

22 Police Services Act, s. 23.

23 Police Services Act, s. 25 (6) and (7).

affected by the policy, service or conduct, or a complaint deemed to be "frivolous, vexatious or made in bad faith".[24] A chief may also decline to address a complaint made more than six months after the facts on which it is based occurred.[25] Otherwise, the chief must review or investigate all complaints, notifying the complainant of and the implicated officer of the receipt of the complaint and the decision whether or not to further investigate. A decision of the chief not to investigate a complaint may be appealed to OCCOPS. Any complaints regarding the conduct of a chief or a deputy chief are referred directly to the police services board.[26] The chief must report on the disposition of complaints to the board, and must notify the complainant in writing. If a complainant is dissatisfied with the chief's disposition of their complaint, they may request that the police services board (or committee thereof) review the complaint. The board may conduct a public meeting to review the complaint and take any action (or no action) that it considers appropriate.[27] A chief may themselves make a complaint about the conduct of an officer on his or her force.[28] Additionally, a police services board may make and investigate a complaint into the conduct of the chief or deputy chief of police.[29]

Complaints by either a member of the public, the board or the chief may be resolved informally, or by way of a hearing. The powers of both the chief and the board are expansive and

---

24 Police Services Act, s. 59.

25 Police Services Act, s. 59 (4).

26 Police Services Act, s. 60 (5).

27 Police Services Act, s. 61.

28 Police Services Act, s. 64.

29 Police Services Act, s. 65.

discretionary, and include dismissal, suspension, demotion, forfeiture of pay and reprimand.[30] Either a police officer, a complainant or a police services boards may appeal a decision to OCCOPS within 30 days. A hearing conducted by the Commission is an appeal, but new evidence into allegations of misconduct may be heard.[31] Appeals from OCCOPS decisions are to Ontario Divisional Court, and may not be on a question of fact alone.[32]

Misconduct is governed by s. 74 and may include breaches of a municipal force's code of conduct, or regulations involving firearms, personal property or money, as well as the withholding of services or the inducement of another officer to misconduct. A chief may order an internal investigation into allegations of misconduct or may request that a member of an outside force, or a judge or former judge, conduct the investigation.[33]

While most matters of misconduct, whether brought by a police Chief or superior officer or initiated by a complaint from a member of the public are in most instances investigated internally, cases of death or serious bodily harm that may have resulted from criminal offences committed by police officers are investigated by an independent agency.[34] The Police Services Act creates the SIU as a unit of the Ministry of the Solicitor General. Investigations may be conducted at the initiative of the director (who is not to be a police officer or former police officer) or at the

---

30 Police Services Act, s. 68.

31 Police Services Act, s. *Police Services Act*, s. 70.

32 Police Services Act, s. 71.

33 Police Services Act, s. 74-76.

34 Police Services A ct, s.113 (5).

request of the Solicitor or Attorney General.[35] In a further attempt to maintain independence from the officers under investigation, the legislation also stipulates that an SIU investigator is not to work on an investigation that relates to members of a police for of which he or she was a member.[36] The director shall, if there are reasonable grounds to do so, cause informations to be laid against officers, and report the results of investigations to the Attorney General for prosecution.[37] Perhaps most importantly, the Act clearly states that "members of police forces shall co-operate fully" with the SIU in the conduct of investigations.[38]

Under Regulation 673/98, the chief of police is charged with the responsibility with securing the scene of an investigation until the SIU arrives, and with segregating the officers involved.[39] Officers involved in the incident are prohibited from speaking to each other, but are each entitled to legal and/or union representation. The regulations also require each involved officer to appear for an interview with the SIU and to turn over t heir notes regarding the incident.[40]

The distinction drawn between "subject officers" and "witness officers", a categorization the SIU is required to make before ever speaking to the officers involved in the incident.[41] The regulations also provide that while the Chief will also convene an internal investigation, this

---

35 Police Services A ct, s.113 (1)(5)(3).

36 Police Services A ct, s.113 (6).

37 Police Services A ct, s.113 (7)(8).

38 Police Services A ct, s.113 (9).

39 O. Reg. 673/98, s. 3, 6.

40 O. Reg. 673/98, s. 8, 9, 11.

41 O. Reg. 673/98, s. 10.

investigation will be nto the policies and procedures of the force and will be "subject to the SIU's lead role in investigating the incident".[42]

2. Accountability by Other Means

Legal measures which attempt to ensure accountability are not limited to the discipline, misconduct, investigation and review mechanisms contained in the *Police Services act.* The actions and decisions of individual officers are scrutinized daily in the justice system, from the review done by a Crown Attorney of charges to be laid to the assessment of a court as to the propriety and reliability of an investigation. Deaths at the hands of police are scrutinized not only by the Special Investigations Unity and by police supervisors, but also through the mechanism of the Coroner's Inquest. In all cases police officers, police services, and possibly even police services boards[43] may be subject to a civil law suit. All of these sites of legal decision making have the potential for generating public attention and significant consequences for the individuals and police services involved. The following brief discussion provides an overview of these

(a) Crown Attorneys and Police

42 O. Reg. 673/98, s. 11 (1) and s. 5.

43 *Odhavji Estate v. Woodhouse* (2003), 2003 SCC 69, 19 C.C.L.T. (3d) 163, 233 D.L.R. (4th) 193, 180 O.A.C. 201. In *Odhavji* the SCC recognized the tort of misfeasance in public office against officers who failed to co-operate with an SIU investigation into a fatal police shooting. The SCC held that the public officer must engage in deliberate unlawful conduct in exercise of his or her public functions, and he or she must know that conduct is unlawful and that it is likely to injure plaintiff. However, although the claim was also allowed to proceed against the police chief for not ensuring compliance with the SIU investigation, the Police Services Board and the province were found not to owe similar private law obligations.

The importance of police independence has become a feature of the prosecution process in Ontario. While the Crown[44] has charge of the prosecution of cases in court, the police investigate offences and have the ultimate decision whether or not to lay charges. This division of responsibility is said to preserve police independence and freedom from political interference.[45] That said, crown attorneys work closely with police, and in matters such as the obligation to provide disclosure to the defence direct the police and rely on their cooperation in fulfilling a constitutional obligation[46].

(b) Coroner's inquests

Under section 10(4) of the *Coroner's Act*, the coroner has a duty to investigate and hold an inquest into all deaths that occur while a person is "detained by or in the actual custody a peace officer".[47] A defining feature of the modern Ontario's coroner's system is its departure from its criminal law

---

[44] The "Crown" refers collectively to the agents of the Attorney General of Ontario; Crown Attorneys, Assistant Crown Attorneys and Crown counsel. The Attorney General, through his or her agents, is responsible for the prosecution of Criminal Code offences as the chief prosecutor of the province. The "Crown" is said to be "indivisible" so that although a number of counsel may act on a particular case, all are equally charged with the obligations and duties associated with the prosecution.

[45] For example, the then Attorney General of Ontario Roy McMurtry said in 1978: "No one can tell an officer to take an oath which violates his conscience and no one can tell an officer to refrain from taking an oath which he is satisfied reflects a true state of facts" The Hon. R. Roy McMurtry, "Police Discretionary Powers in a Democratically Responsive Society" (1978), 41 RCMP Gazette no. 12 at 5-6.; And see *R v. Appleby, Belisle, and Small*, (1990) 78 C.R. (3d) 282 (Ont. Prov. Ct). Charges of theft brought against a reporter and those who leaked a copy of the upcoming federal budget (retrieved from a copy room) were stayed on the basis that the officer who laid them had no real subjective "belief" that a crime had occurred, but laid them from "excessive zeal". They were stayed despite the fact that no case was made for either the reality or reasonable grounds for perception of political interference in use of the criminal process, because no evidence was led that the source of the officer's "zeal" was political. The principle was recognized recently by the Supreme Court of Canada in the context of the RCMP: *R. v. Shirose*, [1999] 1 S.C.R. 565 at 591.

[46] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; The right to disclosure was framed as a constitutional right in *R. v. Carosella*, [1997] 1 S.C.R. 80.

roots: the legislation itself clearly stipulates that an inquest proceeding is not to be construed as creating a criminal court of record.[48] However, the major inquests into police-related deaths in Ontario have been lengthy and contentious proceedings, involving complex legal wrangling and extensive media coverage.[49] The Donaldson inquest, in particular evidenced many of the key legal debates surrounding the modern police-related coroner's inquest; namely, the issues of standing for non-parties[50] and the matter of legal representation[51]. Under the Act, the test for standing is whether the applicant is "substantially and directly interested in the inquest".[52] There remains debate regarding the possibility of "levels of standing" at a coroner's inquest, given that s.41(2) only grants a party with standing the right to examine witnesses on matters "relevant to the interests of

---

47 Coroner's Act, R.S.O. 1990, c. C. 37, s.10(4) [*Coroner's Act*].

48 Julian N. Falconer and Peter J. Pliszka, eds., *Annotated Coroner's* Act 2001/2002 (Markham, Ontario;: Butterworths Canada, 2001) 4. *Coroner's Act*, s.2(2).

49 Two of the most widely-publicized inquests have been into the shooting deaths of Lester Donaldson and Raymond Lawrence, both killed by members of the Metropolitan Toronto Police Service. Jack Lakey, "Police acted as they should have, Donaldson probe told" *The Toronto Star* (18 March 1994) A9. Gail Swainson, "Officer's testimony questioned by expert" *The Toronto Star* (24 March 1994) A6. Gail Swainson, "Report contradicts officers, inquest told" *The Toronto Star* (15 February 1994) A6. Gay Abbate "Inquest wrangles over race" *The Globe and Mail* (26 May 1993). Tony Wong "Group wants race made an issue at inquest" *The Toronto Star* (23 March 1993) A7. Gay Abbate "Lawrence used cocaine, toxicologist tells inquest" *The Globe and Mail* (27 May 1993).

50 Both the Black Action Defence Committee and the Urban Alliance on Race Relations sought standing to pursue the racial dimensions of the case, the coroner denied both groups' applications, and judicial review was sought: *Black Action Defence Committee v. Huxter, Coroner* (1992), 11 O.R. (3d) 641, 16 Admin. L.R. (2d) 88 (Div. Ct.) leave to appeal to Ont. C.A. dismissed. Ultimately the Urban Alliance on Race Relations, alone, was granted standing to pursue issues limited to cross-cultural sensitivity and the mentally-ill. All other claims were denied. John Deverell "Racial issue ruled out for inquest" *The Toronto Star* (23 February 1993) A7. **:** Bob Brent "Black group tries new tack to get role at inquest" *The Toronto Star* (4 September 1992) A9.

51 The conflict of interest issue in the Donaldson inquest turned on the question of whether Todd Archibald was entitled to jointly represent the officers implicated in the shooting, the Police Services Board, and the Chief, at the inquest. The rights of a party with standing at an inquest to be represented by counsel are found at s.41(2) of the *Coroner's Act*. In *Booth v. Huxter* (1994), 16 O.R. (3d) 528, 111 D.L.R. (4th) 111 (Div. Ct), Moldaver J. held that Coroner Huxter was properly exercising his residual discretion under the Act to disqualify Archibald from acting for all the parties given the conflict of interest.

52 Coroner's Act, s.41(1). "Court backs coroner over conflict ruling" *The Toronto Star* (15 January 1994) A13. Gail Swinton "No proof of conflict, Donaldson inquest told" *The Toronto Star* (27 October 1993) A12.

the person with standing".[53] Traditionally, the police have sought to narrowly circumscribe the scope of coroner's inquests, resisting efforts to introduce evidence surrounding systemic racism or racial profiling, etc.

Although the jury "shall not make any finding of legal responsibility or express any conclusion of law",[54] they jury may make recommendations aimed at avoiding similar deaths in the future.[55] Coroner's inquests are public proceedings, but the Act does permit closed inquests where "a person is charged with an indictable offence under the *Criminal Code*".[56]

3. The role of the courts in both criminal and civil contexts

(a) Criminal/Charter context

The criminal law impacts police practice both directly, through criminal charges brought against officers and through limits on the admissibility of evidence which constrains police investigative practices. Courts can effect changes in police practice in the context of criminal cases where Charter issues are raised. Police practice has been significantly impacted by the constitutional duty to inform an accused of the right to counsel, and various requirements surrounding the way personal searches are conducted.[57] While law enforcement has traditionally

---

53 Annotated Coroner's Act, 108.

55 Coroner's Act, s.31(2).

56 Coroner's Act, s.34.

57 Coroner's Act, s.32. Note that the Donaldson inquest, for example, was public but did not commence until criminal proceedings had been resolved.

58 R. v. Golden [2001], 159 C.C.C. (4th) 449 (SCC) recognized the racial dimensions of personal searches and held that Strip searches as routine policy to obtain concealed evidence or check for weapons cannot be justified under s.8 of the Charter, and will always be unreasonable if carried out abusively. A search will fail to meet the constitutional standard of reasonableness if the police cannot establish that they had reasonable and probable grounds for concluding that the search is necessary to discover weapons or evidence. Strip searches are prima facie unreasonable, and must be conducted with careful attention to the health, safety and dignity of the subject. Strip searches should be conducted at a police station in all but the most exigent circumstances. See *R. v. Brown*, (2003)

resisted the Charter, arguing that it frustrates the ability to maintain law and order, its requirements have undoubtedly altered the way in which policing in Canada is conducted.[58]

The courts also direct police practice through the interpretation of Criminal Code sections, particularly the provisions contained in s.25, dealing with justifiable use of force.[59] Section 25(4) justifies the use of force by a peace officer that is "intended or likely to cause death or grievous bodily harm" when it is reasonably required to effect a lawful arrest (with without a warrant), is reasonably necessary to prevent harm to the peace officer or to others, or to prevent the suspect's flight if not preventable by other means.[60] These Criminal Code provisions often exonerate officers

---

173 C.C.C. (3d) 23 (Ont. Court of Appeal) on the subject of s.9 infringements. The court held that the test to be applied under s.9 of the Charter is whether the officer had articulable cause to stop the motorist, which will exist where the grounds for stopping the motorist were reasonable and can be clearly expressed.

59 Reginald A. Devonshire, "The Effects of Supreme Court Charter-Based Decisions on Policing: More Beneficial than Detrimental?" 31 C.R. (4th) 82. Recalls that the Canadian Association of Chiefs of Police (C.A.C.P.) was strongly opposed to the Charter. Between 1982 and 1993, 53 of 260 Charter challenges involved allegations of violations by police officers, many of which mandated a reform of police practices. The author conducted interviews with officers of the Metropolitan Toronto Police, and evaluated training material to assess the impact of Charter rulings, arguing that police have generally been able to adapt to the most "adverse" decisions by altering investigative methods and procedures, and even abandoning improper practices. The article lists some 18 police practices sanctioned by the SCC, and outlines the Toronto police response to each ruling. In addition, the article sets out the rulings that have conditionally approved or approved outright of particular police actions and practices. Devonshire concludes that there has been little attempt on the part of police to circumvent the Charter, with the Toronto police experts and manuals demonstrating "a good knowledge of, and positive attitude towards the Charter". The statistics indicate only 19 cases where the SCC has found serious Charter violations and resolved the case in favour of the accused. During interviews with senior members of the Toronto police, the primary frustrations with the Charter appear to be that it has made investigations more difficult, labour-intensive and expensive, doubling paperwork and increasing trial times. Devonshire concludes that the C.A.C.P.'s concerns regarding the "Americanization" of our justice system have not been borne out in the post-Charter period, in large part because the exclusionary rule in the Charter is not automatic, and because the police have been able to integrate Charter standards into their policies and practices.

60 Priestman v. Colangelo, [1959] S.C.R. 615, 124 C.C.C. 1, 19 D.L.R. (2d) 1. See Grant Smythe Garneau, "*Roberge*: Judicial Extension of Police Powers" 33 C.R. (3d) 309. Garneau argues that the expansion of "apparently committing" to reasonable and probable grounds for arrest is incorrect, and that the court defeated the intentions of Parliament in regards to s.25(4). *R. v. Roberge* (1980), 31 N.B.R. (2d) 668, 75 A.P.R. 668. See also: Tracey Tyler "Conviction of officer a rare win by crown" *The Toronto Star* (11 January 1994) A1, A4.

[60] *Criminal Code*, R.S.C. 1985, c. C-46, s. 25(4). Note also that s.25 is frequently cited in the context of civil suits

who are charged with use of force offences. Holding individual police officers accountable through direct criminal charges (especially around the use of force) has proved largely unsuccessful[61], and even rare convictions or guilty pleas may not carry the type of punishment that might serve a deterrent function.[62] Criminal charges against police officers may come out of SIU investigations or investigations by members of other forcces called in by the chief (for example, the RCMP investigation of the Toronto Drug Squad).[63] However, recent changes in police regulation, designed to promote accountability have not been interpreted in a manner which facilitates criminal charges against officers. For example, the use-of-force reports made mandatory by the Ontario government under Premier Bob Rae have been ruled inadmissible as evidence in the criminal prosecution of police officers.[64]

---

against officers arising out of the use of force, see *e.g. Chartier v. Greaves* [2001], O.J. No. 634; *Sherman v. Renwick* (2001), 2001 CarswellOnt 595.

[61] Criminal convictions against police officers for actions occurring in the course of duty are notoriously difficult to obtain: See, most recently, the Otto Vass manslaughter case; Nick Pron and Betsey Powell "Officers cleared in Vass case" *The Toronto Star* (6 November 2003) A1. Traditionally, the Toronto Police Association has brought a great deal of public pressure to bear in regards to criminal prosecution of officers: Rosie DiManno "Police union follows its thin blue whine" *The Toronto Star* (1 October 2003) A2 (discusses union response to Vass charges and the very public manslaughter trial of Constable David Deviney in the Lester Donaldson shooting). See also *R. v. Wighton* (2003), 176 C.C.C. (3d) 550, 13 C.R. (6th) 266; *R. v. Smith* (1998), 163 Nfld. & P.E.I.R. 179, 503 A.P.R. 179. For interpretation of s.25 see *Bottrell v. R.* (1981), 22 C.R. (3d) 371.

63 *R. v. Cronmiller* (2004), 2004 BCPC 1. Sentencing judgement for the six Vancouver police officers who had each plead guilty to three counts of assault in the beating of three men in Stanley Park. The three complainants were arrested in the middle of the night at a downtown mall, and then driven by officers to a secluded area of the park, where the assaults occurred. The Crown did not dispute that the arrests were lawful. One of the officers entered a "less than forthright" and "misleading" account in a General Occurrence Report following the incident, but disclosure did not occur until an unidentified recruit who was present during the incident reported it to the police department authorities. Weitzel J. argued that while some leniency may be granted to officers who commit assault during a struggle while attempting to make arrest, the Stanley Park assaults, which he characterized as "mob mentality" on the part of the police, was not such an occasion. Weitzel J. held that it would be contrary to the public interest to grant conditional discharges to 4 of the 6 officers.

64 Gay Abbate and Joe Friesen, "Probe results in 22 charges filed against six officers" *The Globe and Mail* (8 January 2004) A14. David Tanovich, "Don't let cops investigate cops" *The Globe and Mail* (31 August 2001) A13. Kirk Makin, "Police chief denies 'blue wall of silence' in corruption probe" *The Globe and Mail* (21 January 2004) A6.

[64] *R. v. Wighton* (2003), 176 C.C.C. (3d) 550, 13 C.R. (6th) 266. The Ontario Court of Justice held that the admission

The courts have also generally protected police officers in the context of attempts by defence counsel to compel disclosure of an arresting or investigating officer's disciplinary record. In *R v. Paryniuk* (2002) (Ont. Superior Court of Justice), an accused charged with narcotics offences sought to introduce evidence pertaining to the ongoing Internal Affairs investigation into potential misconduct involving members of the Toronto Drug Squad who arrested him. The Crown argued Internal Affairs documents were 3rd party records and should be governed by the *O'Connor* principle, as well as by investigative, informant and public interest privilege. The accused was not entitled to compel the production of the Internal Affairs investigation findings.[65] In *R. v. Altunamaz* [1999] , the accused sought to compel production of the arresting officers' prior disciplinary/complaints records. The accused,charged with narcotics offences, brought an application for an order forcing disclosure of records of investigation by the Public Complaints Investigation Bureau, Police Complaints Commission and OCCOPS The accused also sought disclosure of records of Internal Affairs and the Chief of Police into past allegations of misconduct and disciplinary proceedings. The Ontario Superior Court held that the records held by the Police Complaints Commission and OCCOPS were third-party records.[66] However, in *R. v. Scaduto*, the court held that the accused was held to be entitled to disclosure of records pertaining to past Police Act charges brought against several of the officers involved in his case. The court ruled that

---

into evidence of the report, made under compulsion of Reg. 926 under the Police Services Act, would violate the accused officer's right against self-incrimination, and that the admission of use of force reports in criminal proceedings generally would impair the effectiveness of the statutory reporting regime.

66 R. v. Paryniuk (2002), 97 C.R.R. (2d) 151.

67 R. v. Altunamaz [1999], O.J. No. 2262. (The judgement contains a summary of the different oversight bodies/complaints mechanisms in Ontario and their relationship to the Ministry of the Attorney General).

becausethe records in question had come into possession or control of the Crown, third party status could not persist.[67]

On a related matter, though involving the public complaints process, the Ontario Court of Appeal has ruled that an officer's s.7 Charter right against self-incrimination does not extend to an officers' notebooks, and that the Police Complaints Commissioner was not prevented on relying on extracts from the officers' notebooks during a disciplinary hearing[68]

(b) Civil context

Civil actions against the police may also serve an accountability and supervisory function. For example, the *Jane Doe* case was a clear judicial sanctioning of police policy and operations (with respect to the investigation of a serial rapist).[69] The same individuals who may lay formal complaints regarding use of force or unjustified arrest and/or search, may also launch civil suits against the police. These suits tend to involve allegations of malicious prosecution (after charges are dropped), battery, unlawful arrest and/or search).[70] In *Odhavji Estate v. Woodhouse* the

---

[67] *R. v. Scaduto* [1999], 63 C.R.R. (2d) 155, [1999] O.J. No. 1906, 97 O.T.C. 307.

69 Ontario (Police Complaints Commissioner v. Kerr) (1997), 96 O.A.C. 284, 143 D.L.R. (4th) 471 (Appeal by the Commissioner of a Board of Inquiry finding that the notebook extracts were not admissible, resulting in the dismissal of the complaint).

70 Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (1990), 50 C.P.C. (2d) 92, 40 O.A.C. 161, 74 O.R. (2d) 225, 72 D.L.R. (4th) 580, 5 C.C.L.T. (2d) 77, (sub nom. Doe v. Metropolitan Toronto (Municipality) Commissioners of Police) 1 C.R.R. (2d) 211 (Ont. Div. Court), *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1991), 1 O.R. (3d) 416 (Ont. Court of Appeal).

71 *McLean v. Siesel* (2004), O.A.C. 122, 2004 Carswell Ont 200 (unreasonable force), *Hudson v. Brantford Police Services Board*, [2001] 204 D.L.R. (4th) 645, 158 C.C.C. (3d) 390, 150 O.A.C. 87, 48 C.R. (5th) 69, [2001] O.J. No. 3779 (unlawful arrest and entry, statutory exemption from civil liability including mistakes of fact not law), *Scott v. Ontario*, 2002 Carswell Ont 3606 (malicious prosecution, implied malice negated by reasonable and probable cause), *P.(P.) v. Pecorella* (1998), 1998 Carswell Ont 1887 (unlawful assault, false arrest and imprisonment), *Stevens v. Toronto Police Services Board* (2003), 2003 Carswell Ont 4612 (malicious prosecution, false arrest and imprisonment), *Lloyd v. Toronto Police Services Board* (2003), 2003 Carswell Ont 58 (malicious prosecution, false imprisonment), *Bainard v. Toronto Police Services Board* [2002], 2002 Carswell Ont 2366, [2002] O.T.C. 504 (malicious prosecution, false imprisonment), *Wason v. Gillis* (1996), 1996 Carswell Ont 1816, 3 O.T.C. 307 (wrongful arrest and battery, limitation of actions under the *Public Authorities Protection Act*), *Frazier*

Supreme Court of Canada recognized the validity of a civil claim of misfeasance in public office brought by the family of a man killed by the Toronto Police Service. They were suing to hold police to account for failing to co-operate with the SIU investigation into the shooting.[71] The American experience with government "pattern and practice" suits against systematically unruly police forces may been seen as an example of the way in which civil law can be used effectively to promote changes in police practice (though, it is to be noted, through settlement agreements, rather than trials).[72]

4. A lot of legal activity - how much accountability?

(a) The Rise and Fall of Civilian oversight

The police enjoy a high degree of community support despite periodic concerns raised by high profile scandals, and changes in governance and regulation comes slowly. The lack of progress is not for lack of attention: many options for reform have been proposed, or introduced over the

---

v. Purdy (1991), 6 O.R. (3d) 429 (malicious prosecution).

72 Odhavji, *supra* note 43. *McLean v. Siesel* [2001], O.J. No. 2882, 2001 WL 453842 involved claims of negligence and misfeasance in public office against the Ontario Government, arising out of police injuries to a mentally-ill woman. The court held that the Ontario Government, under the Police Services Act, is under no duty to supervise the operational conduct of a municipal police force and is not vicariously liable for its torts (in keeping with the judgment of the Ontario Court of Appeal in *Odhavji*) and struck out the negligence claims against the Ontario government. The misfeasance in public office claim against the province was also struck, given that the plaintiffs had not alleged the requisite exercise of statutory power "in bad faith, with malice or for an ulterior or improper purpose" (para. 31).

73 The 1994 Violent Crime Control and Law Enforcement Act, gave the US federal government has the power to investigate and bring suit against any city whose police were routinely abusing their authority. Pittsburgh was the first large city where such a "pattern and practice" suit has been settled through a consent decree (1997) following allegations of excessive force, false arrests and improper searches by police. Vera reports that five years later, Pittsburgh has exhibited excellent compliance with the changes to police practices mandated by the consent decree, which listed 74 "tasks" which the force had to perform to resolve the suit. "Pittsburgh's Experience with Police Monitoring" (18 June 2003), online: Vera Institute of Justice http://www.vera.org/project/project1_1.asp?section_id=2&project_id+13&sub_section_id=1&archive=.

years. However most citizen complaint and review schemes have been largely unsuccessful at reducing police misconduct or, in any event, at increasing public accountability. Andrew Goldsmith in introducing a collection of articles detailing police accountability systems around the world, (including England, Australia, Canada, and U.S. cities like Chicago, Pittsburgh, Philadelphia, San Francisco) identifies failures to reduce misconduct or to increase community confidence in police accountability in those jurisdictions, and notes that "the widely attributed failure of internal complaints mechanisms reflects a loss of public confidence in the way in which the police have responded previously (or more to the point, have not responded) to expressions of citizen dissatisfaction and to evidence of misconduct more generally within their own ranks."[73] In Ontario, as elsewhere, changes have tended to follow significant periods of public concern. For example, public concerns about police misconduct and existing police controlled complaint mechanisms raised throughout the 1970's led to the establishment of a unique civilian review agency to deal with complaints of concerning misconduct by Toronto police in 1984.[74] The Office of the Police Complaints Commissioner, (PCC) was mandated to provide independent review and resolution of citizen complaints (including the authority to sanction officers found guilty of

[73] Andrew Goldsmith, "External review and Regulation", in Andrew J. Goldsmith, ed, *Complaints Against the Police: The Trend to External Review*, (Clarendon Press, Oxford, 1991) pp 15 -61; p.19; pp 73-83, 227-263. And See: Dawn Currie, Walter DeKeseredy, Brian Maclean, "Reconstituting Social Order and Social Control: Police Accountability in Canada" 2:1 *The Journal of Human Justice* (1990) 29 at pp 33-37. They identify both the failure of the police to respond internally to misconduct and a failure of scholars to address police intransigence on the issue. They argue for use of locally conducted and controlled victimization surveys to determine satisfaction with policing and to inform local police community liaison panels in a "left Realist model" of criminology.

[74] Clare E. Lewis, who headed the expanded complaint commission that followed this experiment, details the history of the system as a response to growing public concern, in: "Police Complaints in Metropolitan Toronto: Perspectives of the Public Complaints Commissioner" in Andrew J. Goldsmith, ed, *Complaints Against the Police: The Trend to External Review*, Clarendon Press, Oxford, 1991, pp. 153 - 176.

misconduct), while leaving most initial investigations of complaints in police hands.[75] The system was widely praised and offered as a model for other jurisdictions and was extended to cover all police forces in the province in 1991.[76]

Successful,[77] or not [78], following considerable police lobbying and a change in government, governance of police services in Ontario was once again studied. And revamped in 1996. In a fairly brief report to the new government Roderick McLeod, Q.C. successfully argued for the need to simplify and narrow the legislative foundation for governance of the police.[79] Significant changes to the structure of civilian oversight followed the McLeod report and while the new Act did not make

---

[75] The *Police Services Act* was amended to add part VI (since repealed) to deal with the Complaints system.. Part VI created a complete disciplinary regime, including a civilian oversight component. Citizen complaints were investigated at first instance by police officers assigned to the "Police Complaint Bureau". Details of complaints and progress of the investigation were reported monthly to the office of the Public Complaint Commissioner (PCC) who could intervene at any time. The results of the police investigation of the complaint were then provided to the Chief or his designate for a determination. The Chief had the authority to mediate a resolution between the citizen and the subject officer; order a disciplinary trial (as above); or, 'take no further action'. If the citizen was dissatisfied with the result (90% of complaints result in 'no further action') she could appeal the result to the PCC. The PCC was required to review the police investigation and was authorized to reinvestigate the complaint, either in the event of an appeal, (or if dissatisfied with the investigation), and could order a trial before a "Public Complaint Tribunal", a three person tribunal chaired by one of a panel of lawyers appointed by the Attorney General along with one member each from panels composed of appointees the local Police Association (police union), and the Attorney General. The tribunal had full disciplinary powers up to and including dismissal.

[76] See, for example, Werner E. Petterson, "Police Accountability and Civilian Oversight of Policing: An American Perspective", in Andrew J. Goldsmith, ed, *Complaints Against the Police: The Trend to External Review*, (Clarendon Press, Oxford, 1991), 280-283.

78 Susan Watt, "The Future of Civilian Oversight of Policing" (2001) 33 Canadian Journal of Criminology 347-362. Wattalls the Ontario PCC the first successful Canadian effort at the civilianization of police complaints procedures. It is suggested that the Ontario system will ultimately be accepted by police and lead to the creation of similar systems in other Canadian jurisdictions.

[78]. Among many criticisms of the PCC, Landau cites the fact that the Commission had very limited powers to investigate or initiate a complaint and that adjudicate decisions with respect to the outcome of complaints continued to rest with the chief. Furthermore, she argues that the rank and file never accepted the legitimacy of a civilian authority; Tammy Landau, "Back to the Future: The Death of Civilian Review of Public Complaints Against the Police in Ontario, Canada" in Andrew Goldsmith and Colleen Lewis, eds., *Civilian Oversight of Policing: Governance, Democracy, and Human Rights* (Oxford: Hart Publishing, 2000) 66-67.

80 Roderick McLeod, Q.C., *A Report and Recommendations On Amendments to the Police Services Act Respecting Civilian Oversight of the Police*, commissioned by the Ministry of the Attorney General and the

all the changes proposed in the report, it did include the abolishment of the Public Complaints Commissioner and the "narrow legislative framework" McLeod called for, including leaving the details of the conduct of investigations into complaints to the discretion of individual forces.[80] The Ontario experiment in civilian oversight was over.[81]

At least for a time. The cycle of scandal, public dissatisfaction, apparent failure of accountability mechanisms, and a change in government has been repeated in Ontario.[82] Former

---

Ministry of the Solicitor General (November 1996).

81 Roderick McLeod, Q.C., *A Report and Recommendations On Amendments to the Police Services Act Respecting Civilian Oversight of the Police*, commissioned by the Ministry of the Attorney General and the Ministry of the Solicitor General (November 1996).

82 Tammy Landau, "Back to the Future: The Death of Civilian Review of Public Complaints Against the Police in Ontario, Canada" in Andrew Goldsmith and Colleen Lewis, eds., *Civilian Oversight of Policing: Governance, Democracy, and Human Rights* (Oxford: Hart Publishing, 2000) 63.

83. Far-reaching corruption scandals have plagued the Toronto Police Service in recent months: Nick Pron and John Duncanson, "Officers face charges of fraud, theft and assault" *The Toronto Star* (7 January 2004) A15; Christie Blatchford, "Six officers to be charged in corruption investigation" *The Globe and Mail* (7 January 2004) A9; Gay Abbate and Joe Friesen, "Probe results in 22 charges filed against six officers" *The Globe and Mail* (8 January 2004) A14; Kirk Makin, "Police blocked corruption probe" *The Globe and Mail* (20 January 2004) A1, A12 Kirk Makin, "Police chief denies 'blue wall of silece' in corruption probe" *The Globe and Mail* (21 January 2004) A6; Christie Blatchford, "'Conscience is clean' Fantino says" *The Globe and Mail* (21 January 2004) A6; Betsy Powell and Nick Pron, "Weeding out corruption" *The Globe and Mail* (22 January 2004) B1, B6; Cal Millar, John Duncanson and Nicholaas Van Rijn "Police unit faces internal probe" *The Toronto Star* (17 April 2004) A4; Christie Blatchford "Police probe corruption as union boss steps down" *The Globe and Mail* (19 April 2004) A1, A9; John Duncanson "Betting scandal rocks police force" *The Toronto Star* (20 April 2004) A1; Nick Pron and John Duncanson "6 may face betting probe charges" *The Toronto Star* (21 April 2004) A1, A16; Katherine Harding "Mayor let down by chief's reply to corruption recommendations" *The Globe and Mail* (23 April 2004) A12; John Barber "Enough with the few 'bad apples'" *The Globe and Mail* (24 April 2004) M1; John Duncanson and Tracey Huffman "Source: Police shielded drug dens" *The Toronto Star* (24 April 2004) A1, A23; Christie Blatchford "Chief details charges against officers" *The Globe and Mail* (27 April 2004) A10.
84 The recent scandals have prompted calls for reform: Linda Diebel and Cal Millar "Police reform: 'I want action'" *The Toronto Star* (28 April 2004) A1, A19; Christie Blatchford, "Judgement day for Toronto Police Service" *The Globe and Mail* (28 April 2004) A12; "Police require outside probe," Editorial, *The Toronto Star* (28 April 2004) A22; Royson James "An independent inquiry is the only way to solve police mess" *The Toronto Star* (28 April 2004) B3. The provincial government has responded by appointing retired Superior Court Chief Justice Patrick LeSage to conduct a comprehensive review of the civilian complaints process and issue recommendations for its overhaul: Richard Brennan "LeSage to review police watchdog system" *The Toronto Star* (10 June 2004) A1; Richard Brennan "Police complaints role 'a challenge', former judge says" *The Toronto Star* (11 June 2004) A20; "Police complaints reform overdue," Editorial, *The Toronto Star* (11 June 2004) A26. There is some evidence that the Toronto Police Service has recognized the need to be seen to be responding to the corruption crisis: Betsey Powell "Tipster line for bad cops" *The Toronto Star* (7 June 2004) E1 (force announces anonymous

chief Justice Patrick Lesage has just been appointed to examine the mechanisms for dealing with complaints concerning police in Ontario.[83]

(b) Police Discipline

The apparent failure of public complaint and internal discipline regimes to change police behaviour provides a further illustration of the inadequacy of reform strategies that concentrate on legalistic solutions. The police are trained to view the criminal law as their "tool".[84] That perception sustains them in their work and in efforts to deflect public criticism and demands for public accountability. It encourages the belief that as members of the police force they are immune from criminal liability, and it dominates the structure and procedures around the disposition of citizen complaints. Although the police are frequently bitter about the 'protection' granted to accused persons by the criminal law,[85]ironically, this view of the criminal law may manifest itself in an almost evangelical belief in the criminal trial process when it frees a police officer who has been accused of criminal conduct arising out of violence that the police perceive to be necessary.

An examination of the Metropolitan Toronto Police Force attitudes toward internal employment discipline illustrates the phenomenon. Despite clear rulings from the courts that disciplinary proceedings against officers under the Police Act are <u>not</u> penal or quasi-criminal, but

---

tip line, as per the recommendation of George Ferguson).

[83] Richard Brennan “Police face new watchdog” *The Toronto Star* (16 January 2004) A1, A20., and others

[84] Richard Ericson, Police Use of Criminal Rules" in Clifford D. Shearing, *Organizational Police Deviance*, "Its Structure and Control", (Toronto, Butterworths, 1981), pp 83-110 at p 101. At the same time, the rule of law is taken for granted as the formal standard against which 'deviance' should be measured and judged.

[85] For example, the police distrust of courts and disdain for criminals who "demand all the safeguards of due process" ... "assumes thereby that they [the safeguards] exist".; Doreen McBarnet, "Arrest: The Legal Context of Policing", pp 24-40, p.25,27, in Simon Holdaway, ed, *The British Police*, (Arnold, London, 1979).

rather administrative and disciplinary in nature,[86] the proceedings remain shrouded in quasi-criminal trappings. The police force uses the procedure set out in the *Police Services Act* as a forum analogous to the criminal courts for the disposition of serious misconduct allegations against its officers, whether brought as citizen complaints or not. In serious cases criminal defence lawyers represent the accused officer, rather than labour or administrative lawyers. Formal "briefs," identical to those used in criminal prosecutions are prepared. The practices and procedures followed, from providing "particulars" and "disclosure" to "setting dates" and imposing "sentences", reflect this perception and reinforce the adversarial and punitive aura of the proceedings. Members of the public participating as victim witnesses are isolated from the process and are rarely satisfied by the outcomes of the hearings[87], while individual officers are selected as scapegoats by police management.[88]

A clear illustration of strategic use of the special relationship that exists between police officers and the criminal law is found in the case of Metropolitan Toronto Police Constable Terence Weller. Weller was ordered to resign when the public complaint tribunal found him responsible for a serious assault that ruptured a suspect's testicles and dislocated his knee. The Police Association, which had earlier "declared war" on the public complaints tribunal,[89] was

---

[86] *Re Trumblay et al* (1986) 55 O.R (2d) 570 and cases cited therein at pp 590 and ff.

[87] Andrew J. Goldsmith, ed, *Complaints Against the Police: The Trend to External Review,* (Clarendon Press, Oxford, 1991) at pp. 15-61.

[88] Richard Ericson, identifies the use of internal discipline rules and procedures in order to maintain the belief that misconduct is isolated to "bad apples" both within the police culture itself, and, of course, in the community at large; "Police Use of Disciplinary Rules" in Clifford D. Shearing, *Organizational Police Deviance*; "Its Structure and Control", (Toronto, Butterworths, 1981) pp 97-101. And See: "Submissions on Behalf of Jane Doe: Ontario Civilian Commission of Police Services Inquiry (Junger Inquiry), Parkdale Community Legal Services

[89] Pat McNenly, "Police Union vows fight to abolish complaints board", *Toronto Star*, December 20, 1985.

outraged that the officer had been denied the opportunity to "clear" himself of the charges in a *criminal* trial. A police officer member of a neighbouring Police Association filed a criminal charge in order to give the officer that opportunity. However, the Attorney General stayed the proceedings on the ground that it was an abuse of the criminal process to lay a charge with no honest belief (based on reasonable and probable grounds) that an offence had occurred, foiling the officer's bid to clear himself in what he and his colleagues perceived to be a forum more sympathetic to them than the one operating under the Police Complaint Commissioner.[90]

The police have employed novel legal methods to resist disciplinary action. For example, there have been attempts to argue that both disciplinary and criminal proceedings violate an officer's s.11(d) right against multiple convictions. However, Iin *R. v. Wigglesworth*, the SCC held that disciplinary offences (in that case, under the RCMP Act) are separate and distinct from criminal charges .[91]

---

[90] s. 579 of the Criminal Code of Canada R.S.C. 1985 c. C-46 authorizes the Attorney General of a province to enter a stay of criminal proceedings. Charges may be reactivated at any time within a year of the stay. If they are not the charge is deemed "never to have been commenced". They were not reactivated in this case.The agent of the Attorney General in placing his reasons for the stay on the record, noted that Weller's 'conviction' by the Police Complaint Tribunal had been upheld on appeal to the Divisional Court. There was no doubt that the charge had been laid as a device, demonstrating a troubling belief in the tendency of criminal courts to acquit police officers who harm citizens while in the execution of their duty. *Her Majesty the Queen v Terence Weller*, Ontario Court (Provincial Division) April 21, 1988, Before Judge J. Kerr, Scarborough, (unreported).

92 R. v. Wigglesworth [1988], 1 W.W.R. 193, 61 Sask. R. 105, 60 C.R. (3d)193, [1987] 2 S.C.R. 541, 24 O.A.C. 321, 45 D.L.R. (4th) 235. See also *Armstrong v. Peel Regional Police Services Board* (2003), 2003 CarswellOnt 3331 (distinction between criminal and disciplinary proceedings); *Burnham v. Metropolitan Toronto Chief of Police*, [1987] 2 S.C.R. 572, 32 C.R.R. 250; *Trimm v. Durham Regional Police Force* [1987], 37 C.C.C. (3d) 120, [1987] 2 S.C.R. 582, 24 O.A.C. 357, 45 D.L.R. (4th) 276, 32 C.R.R. 244; *Trumbley v. Flemming* [1987], 29 Admin. L.R. 100, 81 N.R. 212, 24 O.A.C. 372, (sub nom. Trumbley v. Metropolitan Toronto Police) [1987] 2 S.C.R. 577 , 32 C.R.R. 254, 37 C.C.C.(3d) 118, 45 D.L.R. (4th) 318, [1987] 2 S.C.R. 577 trilogy on s.11(d) Charter compliance of disciplinary proceedings. For general discussion of multiple proceedings see Caroline Murdoch and Joan Brockman, "Who's on First? Disciplinary Proceedings by Self-Regulating Professions and Other Agencies for "Criminal" Behaviour" Sask. L.R (2001). According to the authors, many self-regulating professions have traditionally waited until the outcome of criminal proceedings to complete disciplinary proceedings, in part to avoid expending resources on investigation. However, s.13 of the Charter has been used to

The police have also resisted disciplinary action by launching malicious prosecution suits against police services boards and disciplinary bodies, a subject addressed by the Ontario Superior Court in *Bainard v. Toronto Police Services Board*.[92] In that case, the officers had been charged with both disciplinary and criminal offences after allegedly assaulting a homeless man. All proceedings were eventually stayed, due to delay and the fact that witness statements did not support the allegations. The officers brought an action for damages in relation to the *disciplinary proceedings*. The Ontario Superior Court dismissed the action, acknowledging that while the officers were victims of a "very sloppy investigation", there was no evidence of malice in relation to the investigation or the laying of the disciplinary charges. In the 2004 case *Heasman v. Durham Regional Police Services Board*[93], Durham Region officers sued the police services board for breach of fiduciary duty, negligent investigation and abuse of public office for investigation resulting in charges of neglect of duty and discreditable conduct, which were later stayed. The court dismissed the claim, holding that the Board had no fiduciary obligation to act only in the interests of the plaintiff officers. Police officers may also seek judicial review of disciplinary decisions and penalties. In *Browne v. OCCOPS*[94], several complainants complained to Ottawa Chief about conduct of officers. Chief investigated and found no misconduct under the

---

bar evidence from criminal convictions being used at disciplinary hearings. The authors also voice the concern that self-regulation ought not to be seen as a way of funnelling behaviour away from the criminal justice system, but rather be viewed as two separate processes, serving different ends.

93 *Bainard v. Toronto Police Services Board* [2002], O.T.C. 504. See also (2004), 2004 WL 858890 (Ont. S.C.J.), 2004 CarswellOnt 1675 (officers suing board for breach of fiduciary duty, negligent investigation and abuse of public office for investigation resulting in charges of neglect of duty and discreditable conduct, which were later stayed. Court dismissed the claim, holding that the provisions of the Police Services Act and the Public Service Act create a complete code of discipline for the OPP, leaving no gap in jurisdiction to hear the matter as a civil cause of action, and that the Board had no fiduciary obligation to act only in the interests of the plaintiff officers).

[93] *Heasman v. Durham Regional Police Services Board* (2004), 2004 WL 858890 (Ont. S.C.J.).
95 *Browne v. OCCOPS* (2001), 207 D.L.R. (4th) 415, 151 O.A.C. 302, 56 O.R. (3d) 673 reversing (1999), 127

Police Services Act. Complainants asked OCCOPS to review decision, the Commission ordered a hearing based on unsatisfactory work performance, rather than on misconduct. Officers sought judicial review. Ontario Divisional Court granted the officers' application, quashing the OCCOPS decision, finding that the Commission's letter to the officers did not satisfy the requirement for specificity and particularity when ordering a hearing under s.72(8) of the Police Services Act. However, the Ontario Court of Appeal overturned this ruling, holding that the Commission had satisfied the notice requirements, enabling the officer to know the case they had to meet. The case of *G. (P.) v. Ontario (Attorney General)* dealt with an officer's appeal of an PCC Board of Inquiry finding of guilt related to a corrupt practice charge. The Ontario Divisional Court held that the constable did not actually breach any rules or regulations, and that the Board of Inquiry had exceeding its jurisdiction by attempting to set standards for police conduct.[95] In *Hayes v. Ontario (Police Complaints Commissioner)*, accused officers sought judicial review of the Commissioner's refusal to quash the statement of alleged misconduct, on the grounds of procedural unfairness regarding the investigation. The Ontario Divisional Court discussed the jurisdiction of the Commissioner to conduct investigations under the Act, and held that there is no statutory prohibition against a rather extensive investigation conducted by the Office of the PCC. The court dismissed the appeal.[96] Illustrating the role played by s.25 of the Criminal Code in disciplinary proceedings, *Duriancik v. Ontario (Attorney General)*[97] considered the relationship between Board of Inquiry hearings and the Criminal Code protection afforded to

---

O.A.C. 182 (Ont. Div. Ct.); and reversing (2000), 4 C.C.E.L. (3d) 153 (Ont. Div. Ct.).

96 *G. (P.) v. Ontario (Attorney General) (1996), (sub nom. P.G. v. Police Complaints Commissioner), 90 O.A.C. 103.*

[96] *Hayes v. Ontario (Police Complaints Commissioner)* (1995), 33 Admin. L.R. (2d) 34, 88 O.A.C. 96.

peace officers regarding the use of force. The Ontario Divisional Court held that the Board erred in failing to consider s.25 of the Criminal Code, and that without considering s.25, the Board could not have legally concluded that the officer had used unnecessary violence. *Tomie-Gallant v. Ontario (Board of Inquiry)*[98] addressed the issue of the burden of proof in a Board of Inquiry hearing. The officer sought judicial review of a finding of guilt on charges of making an unlawful arrest arrest under the Police Act regulations, the Ontario Divisional Court held that the Board of Inquiry had wrongfully reversed the burden of proof by requiring the officer to convince the board of more than the fact that she had reasonable and probable grounds for making the arrest.[99] In *Dulmage v. Ontario (Police Complaints Commissioner)*, the Ontario Divisional Court dealt with an officer's claim of reasonable apprehension of bias on the Board of Inquiry. The case involved a complaint by a black woman regarding a strip-search. The Congress of Black Women of Canada had made public statements condemning the officers conduct. A member of the panel was also a member of the Congress. The court held that the Board, as then constituted was prohibited from continuing the proceedings, finding that the test for reasonable apprehension of bias had been met.[100]

In addition to police officers, both the complainant and (under the PCC), the Commissioner may also seek judicial review. In *Ontario Provincial Police Commissioner v. Silverman*, the police commissioner sought judicial review of the penalty imposed for a discreditable conduct charge. The Divisional Court held that the individual or body who hears

---

[97] *Duriancik v. Ontario (Attorney General)* (1994), 114 D.L.R. (4th) 504, 75 O.A.C. 27. .

[98] *Tomie-Gallant v. Ontario (Board of Inquiry)* (1995), 33 Admin. L.R. (2d) 34, 88 O.A.C. 96.

100 Tomie-Gallant v. Ontario (Board of Inquiry) (1995), 33 Admin. L.R. (2d) 34, 88 O.A.C. 96.

101 Dulmage v. Ontario (Police Complaints Commissioner) (1994), 30 Admin. L.R. (2d) 203, 21 O.R. (3d) 356, 75

the evidence ought to impose the penalty, and dismissed the appeal.[101] The *Corp. of the Canadian Civil Liberties Assn. v. Ontario Civilian Commission on Police Services* is an example of complainant-driven judicial review. In that case, the chief had dismissed as "unsubstantiated" complaints respecting decision to transfer female protesters to facility where police knew they would be strip searched. The decision was affirmed by OCCOPS and the complainants applied successfully for judicial review pursuant to s. 72(5) of Police Services Act. The court held that the standard of review is whether the commission's decision was patently unreasonable. In reviewing the decision of the chief, thecommission must determine whether the alleged facts constitute a reasonable basis for the complaint. The court found that both the commission and chief applied the wrong evidentiary standard in determining whether hearing should be held. Only evidence which "may" constitute misconduct or unsatisfactory work performance is required, not "clear and convincing" evidence, and the failure of the commission to apply correct standard under Act rendered its decision patently unreasonable. The complainants were held to be entitled to a hearing to be conducted by different police force.[102] However, Ontario Courts have generally shown considerable deference to OCCOPS decisions.[103]

(c) The relationship between the Police Services Board and the Chief of Police

This relationship is characterized by the tension, reflected in the Police Services Act,

---

O.A.C. 305, 120 D.L.R. (4th) 590.

[102] *Ontario Provincial Police Commissioner v. Silverman* (2000), 49 O.R. (3d) 272, 188 D.L.R. (4th) 758, 135 O.A.C. 357.

Corp. of the Canadian Civil Liberties Assn. v. Ontario Civilian Commission on Police Services (2002, 165 O.A.C. 79, 61 O.R. (3d) 649, 97 C.R.R. (2d) 271, 220 D.L.R. (4th) 86 (Ont. C.A.). for further confirmation that the standard of the review for a PCC Board of Inquiry decision is that of unreasonableness, as well as the deference generally afforded the Board of Inquiry by the courts.

[103] See *Townley v. Ontario (Police Complaints Commissioner)* (2000), 2000 Carswell Ont 343; *Ontario (Police Complaints Commissioner) v. Hannah* (1997), 145 D.L.R. (4th) 443, 1997 Carswell Ont 820;

between policy and operations. Under s.31 of the Police Services Act, the board is charged with the responsibility for setting policy priorities for the management of the force in general and is explicitly given the power to direct the chief (who reports directly to the board). However, the board may not issue orders or directions to any member of the force aside from the chief.[104] Under the current legislative model, the chief is appointed by and is directly accountable to the Police Services Board, which may issue direct orders and review the performance of the chief, and which carries the responsibility for negotiating and approving the chief's contract. The legislation is also very clear that the Police Services Board may contract, sue and be sued in its own name.[105]

Given the ambiguous nature of the policy versus operations relationship, conflicts, or at least misunderstandings between the board and the chief inevitably arise. The distinction between policy and operations is a particularly under-developed notion, with an ever present potential for chiefs to feel that the board has overstepped its bounds by interfering in actual operations, and the board clashing with chiefs over what it views as policy issues. Contract negotiations have also been highly contentious.[106] Tensions between the Toronto Police Services Board Chair and the Toronto Chief are often publicly acrimonious, as the oversight body and chief vie for ultimate power.[107] While the legislation appears to confer significant power on the

---

105 *Thomas v. Ontario (Police Complaints Commissioner)* (1994), 1994 Carswell Ont 3222.

106 Police Services Act, s.31(3).

106 Police Services Act, s.30(1).

107 In recent years two Toronto Chief's, Former Chief William McCormack and current Chief Julian Fantino, have both engaged in very public and sometimes hostile contract negotiations with the Toronto Police Services Board. Linda Diebel, "No fast renewal of chief's contract: Miller" *The Toronto Star* (22 January 2004) A1, A14.

108 See particularly the tensions surrounding the replacement of Chief Boothby and the conflict between Board Chair Susan Eng and Chief McCormack. John Duncanson, "Boothby doomed as chief: sources" *The Toronto Star*

boards, the ability to exercise this power has been limited by a number of factors, from the personality and style of a particular chief and board to a political reluctance on the part of boards to openly question the authority of the chief on what may appear to be "operations" issues, or to appear 'soft on crime' or 'anti-cop'.[108] It is perhaps inevitable that the Toronto Police Services Board has become a highly-politicized oversight body with a limited ability to pursue its mandate under the Police Services Act.

The search for an appropriate response to the problem of racism/racial profiling within the force represents a particularly difficult an issue that has generated considerable tension between the board and various chiefs over the years. The interests of the Chief and those of the Board have been recognized as divergent on the matter of pursuing the racial dimensions of police violence, a conflict made public at publicized coroner's inquests (Raymond Lawrence, Lester Donaldson in particular) dealing with police shootings of young black males.[109] Although the courts have recognized the phenomenon of racial profiling and the findings of the various commissions of inquiry have unequivocally noted the presence of racial bias in policing, [110] it has been difficult for Toronto police chiefs to acknowledge that racism may be systemic and unconscious as well as deliberate and/or malicious. The Toronto Police Services Board, under its jurisdiction to set policy has sought to make the issue a priority, but these efforts have been met

---

(8 May 1999) A4. Jack Lakey "Eng queries secret study on blacks" *The Toronto Star* (12 February 1994) A8.

109 This may be seen as directly related to the proportion of the Board which is comprised of elected city-councillors, concerned about their prospects for re-election.

110 See, in particular, the Donaldson Inquest discussion of the conflict of interest involving police lawyer Todd Archibald.

111 R. v. Golden, [2001] 159 C.C.C. (4th) 449 (Supreme Court of Canada); R. v. Griffiths, (2003) 11 C.R. (6th) 136, 106 C.R.R. (2d) 139. *R. v. Brown*, (2003) 173 C.C.C. (3d) 23. (Ont. Court of Appeal) The accused, a black Toronto Raptor's basketball player, was stopped for speeding, required to give a breath See also Kirk Makin "Police

with extreme resistance (and even denial) by the union and successive chiefs.[111]

(c) The relationship between the Police Services Board and the Chief of Police

Given the nature of the relationship created by the Police Services Act, conflicts between the board and the chief inevitably arise, particularly over the under-developed notion of the distinction between policy and operations, with chiefs feeling that the board has overstepped its bounds by interfering in actual operations, and the board clashing with chiefs over what it views as policy issues. Contract negotiations have also been highly contentious.[112] Tensions between the Toronto Police Services Board Chair and the Toronto Chief have on occasion been publicly acrimonious.[113] While the legislation appears to confer tremendous power on the boards, the ability to exercise this power has been limited by chiefs and by a political reluctance to openly question the authority of the chief on what may appear to be "operations" issues, or to appear 'soft on crime' or 'anti-cop'.[114]

(d) The relationship between the Chief of Police and the Police Association

---

engage in profiling, chief counsel tells court" *The Globe and Mail* (18 January 2004) A1, A26.

112 Jim Coyle "Bromell huffs and puffs and blows his credibility" *The Toronto Star* (19 April 2003) A25. Criticizes Bromell's "knee-jerk and petulant...defiant and threatening" rejection of the judicial notice taken of the existence of police racial profiling in the Dee Brown case, and calls for a change in police union leadership. Catherine Porter "Action urged on race profiling" *The Toronto Star* (19 January 2004) A11. Canadian Race Relations Federation and others criticize Toronto Police Service for not acting more quickly to respond to the Crown's admission of racial profiling and the recommendations of a recent summit on racial profiling in the justice system. Toronto police union president Craig Bromell and Chief Fantino continue to deny the existence of racial profiling.

113 Two Toronto Chief's, former Chief William McCormack and current Chief Julian Fantino have both been involved in public and sometimes hostile contract negotiations with the Toronto Police Services Board. Linda Diebel, "No fast renewal of chief's contract: Miller" *The Toronto Star* (22 January 2004) A1, A14.

114 See particularly the tensions surrounding the replacement of Chief Boothby and the conflict between Board Chair Susan Eng and Chief McCormack. John Duncanson, "Boothby doomed as chief: sources" *The Toronto Star* (8 May 1999) A4. Jack Lakey "Eng queries secret study on blacks" *The Toronto Star* (12 February 1994) A8.

115 This may be seen as directly related to the proportion of the Board which is comprised of elected city-councillors, concerned about their prospects for re-election.

The relationship between police management and the police association has also become more confrontational and adversarial in recent years [115]. Perhaps the most hotly-contested issue has been the issue of political activities and endorsements by Police Associations, particularly the Toronto Police Association. The Police Services Act specifically limits curtail the political activities of individual officers: Regulation 554/91 prevents the endorsement of political candidates or parties and permits an officer to voice political opinions on behalf of the force only when authorized to do so by the Board or the Chief.[116] The Toronto Police Association claims that the regulation does not apply to them and that it is the associations constitutional right to lobby, to express political positions and to endorse candidate and political parties. The issue erupted in the controversy surrounding the Union's 'True Blue' fundraising campaign[117], but has continued to arise periodically over the years.[118]

---

118 It is almost ten years since the Association led members into wide spread protests and job action against a new provincial use-of-force requirements that a report be filed every time an officer drew his or her weapon). The union undertook an illegal work-to-rule campaign that Chief McCormack was seemingly powerless to prevent.. Jack Lakey, "Police ignoring job action: Chief" *The Toronto Star* (15 May 2003) B2. Philip Mascoll, "Striking Metro police lock station doors" *The Toronto Star* (27 January 1995) A1, A6. In his memoirs, the former chief presented the issue as highly political, almost a 'plot' by the government of the day. Bill McCormack, *Without Fear or Favour: The Life and Politics of an Urban Cop* (Toronto: Stoddart, 1999) Chapter Twenty-one, "Bob Rae's Kind of People".

119 Police Services Act, Amended to O. Reg. 89/98, s.3.

120 Timothy Appleby, "Toronto police union turns to telemarketing" *The Globe and Mail* (22 January 2000) A23. John Duncanson, "Drive not linked to force, chief says" *The Toronto Star* (23 January 2000) A4. Virginia Galt and John Saunders, "True Blue controversy shakes solidarity in the ranks of police, board says" *The Globe and Mail* (31 January 2000) A16. Colin Freeze "Toronto police, board agree on fundraising issue" *The Globe and Mail* (2 May 2000), John Duncanson "Chief brokers deal with board, union" *The Toronto Star* (2 May 2000) B1, B4. Bagesheree Paradkar, "True Blue gets mixed reviews from officers" *The Toronto Star* (28 January 2000) A19. John Duncanson and Jennifer Quinn, "Showdown! Police chief threatens union boss over True Blue fundraising scheme" *The Toronto Star* (27 January 2000) A1, A24. Gay Abbate, "Politicians launch crackdown on police union" *The Globe and Mail* (28 January 2000) A1, A17. Paul Maloney and Bruce DeMara, "New bylaw bans True Blue" *The Toronto Star* (29 January 2000) A1, A21. Gay Abbate, "Police union defies orders, leaders face sanctions" *The Globe and Mail* (29 January 2000) A1, A27.

121 Linda Diebel, "Police union resists board" *The Toronto Star* (23 January 2004) F1 (Complaints and court ruling sought on the issue of police union political endorsements). Rosemary Speirs "OPP union sends out a Long letter" *The Toronto Star* (14 June 2000) A6. Paul Maloney "Police union endorsements split council" *The Toronto Star* (26 August 2000) B1, B3. John Duncanson "Police union puts heat on candidates" *The Toronto Star* (19 October 2000)

The issues at the heart of the labour action, including the powers of the SIU and antipathy towards civilian oversight in general have led to increasing tensions between the Toronto chief and the union. As chief's feel increased pressure to crack down on excessive force, corruption, etc within the ranks, the union has responded by holding unofficial "votes of confidence" in the performance of the chief. It was in this manner that the Toronto Police Association expressed its displeasure with chief Julian Fantino[119]; however the phenomenon has not been isolated to Toronto.[120]

Recently, the Toronto Police Association has been rocked by a widespread corruption scandal involving prominent members (including president Rick McIntosh). The scandal, which has resulted in criminal charges including breach of trust, fraud, influence peddling, obstruction of justice and weapons-related charges, has caused tension between the union and both the chief and the Police Services Board.[121] Because two of the accused were union officials at the time, the

---

D1, D4. Colin Freeze "Police union and politics and volatile mix" *The Globe and Mail* (6 November 2000) A21. Royson James "City councillors are to fearful to bell Bromell" *The Toronto Star* (20 November 2000) B1. Gay Abbate, "Bully tag worked, union leader says" *The Globe and Mail* (2 October 2003) A17. Gay Abbate, "Police union accused of intimidation" *The Globe and Mail* (27 January 2000) A1, A21.

[122] Gay Abbate, "Union puts Fantino's leadership to a vote" *The Globe and Mail* (15 November 2001) A24. John Duncanson and Jennifer Quinn, "Doubts raised over chief's leadership in police vote" *The Toronto Star* (19 January 2002) A27. Jennifer Quinn and John Duncanson, "Police chiefs feel heat of unions" *The Toronto Star* (14 January 2000) A1, A18. See also Vanessa Lu "8 officers sue police chief over fink fund case" *The Toronto Star* (21 January 2003) A16. Colin Freeze "Drug squad officers blast police brass in civil suit" *The Globe and Mail* (22 January 2003) A20. Gay Abbate, "Pall cast over bargaining with police" *The Globe and Mail* (22 November 2001) A30. Jim Rankin, "Police union sues Fantino" *The Toronto Star* (25 November 2001) A10. Jim Rankin and John Duncanson, "Bromell blasts chief over charges" *The Toronto Star* (20 September 2001) B1, B5.

[123] Graeme Smith, "Saskatoon police chief faces revolt in the ranks" *The Globe and Mail* (2 July 2003) A5. Rod Mickelburgh, "Rumours swirl around Vancouver chief" *The Globe and Mail* (8 May 1999) A12.

[124] Nick Pron and John Duncanson "4 officers facing criminal charges" *The Toronto Star* (4 May 2004) A1, A13. Jonathan Fowlie "Officers charged in 'shakedown' case" *The Globe and Mail* (4 May 2004) A1, A14. Jonathan Fowlie "McCormack defends his wife" *The Globe and Mail* (7 May 2004) A13.

125 Jason Tchir "Hammer drops on four cops" *Toronto Sun* (4 May 2004) 1, 5. Jonathan Fowlie and Katherine Harding "McIntosh submits formal resignation" *The Toronto Star* (21 May 2004) A11. Union boss resigns almost three weeks after being charged with four criminal offences in relation to the corruption scandal. The scandal has also caused division within the Toronto Police Association itself: Jonathan Kingstone "Union boss: I am the victim

scandal has led to a resurfacing of the issue of whether union officials are technically officers, or whether they have immunity from Police Services Act charges.[122] The scandal has served to bolster political support for proposed changes to civilian oversight structures in the province.[123]

III. The Regulation of Police Misconduct

1. Introduction

Police culture and structure are widely recognized by scholars as playing a fundamental role in police misconduct,[124] but despite considerable attention to the subject, or at least to community - police relations and complaints of misconduct, there has been only modest progress in reducing in it. Analyses written more than thirty-five years ago seeking to understand the causes of the riots in Watts and black ghettoes all over America have a contemporary tone both in terms of issues (poverty, despair, racism, bias) and concern over the role of police misconduct as part of the problem, not the solution.[125] Reform initiatives such as community policing, or better

---

of smear" *Toronto Sun* (4 May 2004) 5. Nick Pron "Union trying to oust charged officers" *The Toronto Star* (5 May 2004) A1, A21. Jeff Gray and Jonathan Fowlie "Police union moves to oust its president" *The Globe and Mail* (5 May 2004) A8. Robert Cribb and Nick Pron "Police union meets to oust pair" *The Toronto Star* (6 May 2004) A16. Jonathan Fowlie and Jeff Gray "Police group won't discuss officers" *The Toronto Star* (6 May 2004) A15.

[126] John Barber "You go, Mike. We're counting on you" *The Globe and Mail* (8 May 2004) M2. Barber cites the need for a definitive judicial finding on the subject of Police Services Act jurisdiction over union officials. Jennifer Lewington "Police oversight issue unifies city hall" *The Toronto Star* (6 May 2004) A15.

[124] Andrew J. Goldsmith, ed, *Complaints Against the Police: The Trend to External Review,* Clarendon Press, Oxford, 1991 at pp 19-27; Clifford D. Shearing, *Organizational Police Deviance;* "Its Structure and Control", (Butterworths, Toronto, 1981), at pp. 83-110; Steven Box, "Police Crime" in *Power, Crime and Mystification,* (Tavistock Publications, London, 1983) pp 80-95.

[125] Robert M. Fogelson, "White on Black: A Critique of the McCone Commission Report on the Los Angeles Riots" (1967) *The Political Science Quarterly*,LXXXII, 337-367. And See: Lee Bridges, "Keeping the lid on: British urban social policy 1975-81", *Race & Class*, XXIII, 2/3 (1981-2) pp 171-185, (Race riots in Britain in the mid 70's and 80 were similarly construed.) The Los Angeles riots of May 1992 evoked similar commentary in the popular press. Colin MacKenzie, "Causes similar, temper distinct. Technology may have changed since Watts erupted in 1965, but the images of racial inequality in Los Angeles remain the same", *The Globe and Mail*, Sat. May 2, 1992 A12; Politicians in both Canada and the United States were reported as drawing the same parallels: David Olive, "Racial violence has been

training, were soon criticized for failing to touch the core of the problem. Paul Gordon points out that such reform efforts must be scrutinized closely, as often the "community relations officers" and "community liaison committees" that are often a part of community policing initiatives for example, are merely add-ons that do little more than make policing more intrusive. He challenges the panacea of "improved training" as well, concerned that often that training focuses on the failures of the policed to have adequate knowledge or skills to understand their place and role in the larger society. This premise produces training that teaches that uncomprehending and ignorant ethno-cultural minorities deserve tolerance for their failings; thus locating this approach within, not against, racism

---

hijacked by community leaders to serve their own cynical ends. (Prime Minister) Brian Mulroney snapped at the chance to draw a parallel between the L.A. riots and the Reform Party's agenda of limiting immigration and dismantling multicultural programs, stopping just short of lumping (Reform Party leader) Preston Manning in with Daryl Gates", *The Globe and Mail*, Sat. May 9, 1992 D4. (George Bush was criticized for using the riots as an opportunity to "trash" the social reform agendas of Democratic presidents "who held office before most of the rioters were born".)

Part of the poor record may stem from an understandable reluctance to rethink the policing enterprise in any fundamental way. Even when reform is considered, initiatives that assume that the basic operation is sound, and merely needs some enhancement or fine tuning to respond to contemporary demands will tend to frame misconduct as isolated and exceptional, the misdeed of the rare "bad apple". This perspective accepts that responsibility for stability and social order is basic to the contemporary policing function. This view is not universal however. Werner Petterson, for example, refers to the disparate interpretations of social order that the police are asked to maintain as basically reflecting the "prevailing moral consensus of society".[126] In exercising this mandate, the police have been given (or have taken upon themselves) an impossible task in communities where such consensus does not truly exist. However, *the belief* that such a consensus is operating preserves a policing status quo, and thus it continues to be fostered. More critically, Richard Ericson describes the interaction between the goal (preservation of a status quo) and the action (assumption of a consensus) and observes that "the police have defined, and had defined for them, a mandate so broad that it includes responsibility for crime control, other deviance control, and ultimately social order. The police have taken on this responsibility for social processes that are beyond the possibility of any one group's control in that they are embedded in the social, cultural, political and economic structures of society." [127] Steven Box offers an even more pointed explanation for the relationship of police crime to the needs of the wider society, by arguing that misconduct has

[126] Werner E. Petterson, "Police Accountability and Civilian Oversight of Policing: An American Perspective", in Andrew J. Goldsmith, ed, *Complaints Against the Police: The Trend to External Review*, (Clarendon Press, Oxford, 1991), at p.265.

[127] Richard V. Ericson, "Rules for Police Deviance" pp 83-110, in Clifford D. Shearing, *Organizational Police Deviance*;

been mythologized as essential to police work given the perceived and actual constraints placed on that work by the criminal law. He argues that there is a level of police misconduct, in the questioning of dangerous suspects for example, that has been accepted by both the police and the public as a "necessary evil" in the exercise of their duties, and thus that only the rare occurrence is considered in practical terms to be unacceptable.[128] The relationship is complex. At one level, belief in the police as uniquely even handed, even tempered protectors of community values may operate to mask the existence of any but the most rare and exceptional misconduct. At the same time, at another, more "worldly" level, a degree of misconduct is tolerated, even expected, as the police fulfil the subtext of their mandate, to do society's "dirty work" in any way they see fit.

Many institutions contribute to the belief that whatever the police do, and however they do it, must be "OK". The exceptional power to use force and invasive measures that has been granted to the police is acceptable because we believe that the power wielded in enforcing the criminal law is bounded and contained by strict limitations and ultimate accountability in a court of law in accordance with the requirements of due process.[129] When that legitimacy is challenged

---

"Its Structure and Control", (Toronto, Butterworths, 1981)

[128] Steven Box, "Police Crime" in *Power, Crime and Mystification,* (Tavistock Publications, London, 1983) , at p.80.

[129] Herbert Packer first set out the tension between "order" and "due process", Herbert Packer, *The Limits of the Criminal Sanction*,(Stanford University Press, 1968). Just as Skolnick identified the weaknesses in this model in the context of the United States, Doreen McBarnet's study of the British criminal trial process effectively exposes the dissonance between the 'due process' ideal and reality in the UK. . Doreen McBarnet, *Conviction: Law, the State, and the Construction of Justice*, (London, MacMillan Press, 1981); pp 1-25. ch 3 "Police powers and the Production of

by evidence of police corruption or abuse of authority, a form of cognitive dissonance results and transmutes that evidence into palatable forms. What is palatable is a restricted and essentially non-threatening perception of the scope and nature of police misconduct.

Evidence" pp 26-78.

The common result of community initiated complaints, for example, is that despite evidence that police misconduct is frequently a systemic problem, as well as an issue of individual wrong doing, both the community and the police are made comfortable believing that misconduct, if it is acknowledged at all, is nothing more than isolated incidence of misbehaviour by "bad apples".[130] Some questionable conduct, such as a "fleeing felon" shooting, receives substantial media attention, forcing the wider community to acknowledge the incident. The means that attract the most public attention, such as extortion of confessions, perjury, manipulation of witnesses and evidence, reliance on bigoted stereotypes and the use of excessive force, may result in the death, injury, or imprisonment of innocent people.

However day to day policing practices also generate misconduct. Techniques of investigation and crime control tend to rely on perceptions of "who doesn't fit". Change in attitudes and behaviours may be difficult to achieve in the conservative (in the literal sense) world of police work. Promotion is hierarchical, loyalty to colleagues and the force is the primary directive; the culture reinforces cynicism, authoritarianism, and stereotyped thinking. An aggressive and courageous response to danger and a capacity to dominate any policing situation are inculcated and reinforced daily.[131]Each time that a community insists that street

[130] Richard Ericson, identifies the use of internal discipline rules and procedures in order to maintain the belief that misconduct is isolated to "bad apples" both within the police culture itself, and, of course, in the community at large; "Police Use of Disciplinary Rules" in Clifford D. Shearing, *Organizational Police Deviance*, "Its Structure and Control", (Toronto, Butterworths, 1981) pp 97-101. Riots in Toronto in May 1992, sparked by the acquittal of Rodney King in Los Angeles, generated denials by police managers in Toronto that there were any issues with systemic racism in Toronto. Metro Chairman Alan Tonks refused to attend an Anti-racism rally held in the wake of the May 4, 1992 riots. He is reported as saying: "The police force is not a racist institution. Some individuals are, but there are checks and balances on them"; Jack Lakey and Michael Tenszen, "300 police corall crowd" Fri. May 8, 1992 *The Toronto Star* A1.

[131] Many misconduct issues are structural, and not amenable to redress through training or recruiting alone, and not simply caused by "bad apples". Claude Vincent identifies behavioral tendencies fundamental to the police role as;

prostitution, or drug trafficking for example, be dealt with firmly by the police, that "Dirty Harry" is needed in other words,[132] the risk is that the wider society has sent the police the message that when the "rule of law" conflicts with an overriding need for social order, the rule of law may be modified to serve the pursuit of order rather than justice. Routine acts of misconduct have as powerful an impact on communities as high profile cases of wrongful conviction or violence, reflecting and reinforcing race, class and gender bias in a myriad of ways.

Many of these issues were examined by the Ontario Civilian Commission on Police between October 1990 and May 1992. They were brought in to investigate the Metropolitan Toronto Police Force's policies practices and procedures for internal investigations. The specific cases investigated were that of former Constable Gordon Junger and former Sgt. Brian Whitehead. The context was police corruption and police involvement in prostitution..[133] In

---

secrecy, cynicism, stereotyped thinking (reinforced by training to be acutely observant of the what or who 'doesn't fit), cynicism and decisiveness; Claude M. Vincent *Police Officer*, (Carleton University Press, Ottawa, 1990,) "The Police Officer, Responses to the Occupational Environment" pp 117-167;

[132] Steven Box identifies the "Dirty Harry problem" as the mystification of police crime into a necessity if the police are to "get their man" (and protect us) Steven Box, "Police Crime" in *Power, Crime and Mystification,* (Tavistock Publications, London, 1983) at p 81.

[133] The relationship between police officers and prostitutes is complex. Police hassling, for information or on general principle, is almost a constant in the lives of street prostitutes. News, "Police nab 166 prostitutes", *The Toronto Star*, March 24, 1990, p. A6 ."Metro police will continue their crackdown on prostitutes in the Parkdale area after two recent sweeps netted 166 prostitutes and customers" More dramatic complaints of extortion of sexual services by police officers also surface publicly on occasion. An officer known on the streets of Toronto as "sperm whale" was reported as using his hand gun to extort oral sex from street prostitutes with impunity.Glen Cooley, "Charging police officers too risky for prostitutes". *Now*, October 31 - November 6, 1991, p.21; Andrew Duffy, "Prostitutes say officer extorting sex, probe told". *Toronto Star*, October 22, 1991, p.A6. In San Francisco an Oakland police officer was charged with kidnaping six women while on duty on his late night shifts and forcing them to submit to sex acts or be arrested. Associated Press, "Oakland cop charged with sexual battery, kidnaping." *San Francisco Examiner*, Sunday Feb 2, 1992, B-3. In Seattle allegations have been made that Sacramento police have been involved in the murder of prostitutes. The force has been reported as referring to the deaths of the prostitutes as "NIH -No Humans Involved", suggesting the depth of dehumanizing stereotypes involved .Ann Nocenti, "Crimes and Misdemeanors. 'Sometimes we'd call them NIHs - no humans involved', police source, Sacramento Bee, October 7, 1990", *Lies of Our Times*, September 1991, 11. Inn a case eerily similar to that of Brian Whitehead, except this officer Constable Albert George Coombs was suspended and charged with breach of truest for allegedly extorting sexual favours at a downtown house were prostitutes worked. News, "Metro officer faces charge of extorting sexual favors", *The Toronto*

August 1992 the Commission issued a comprehensive report that was very critical of the Toronto police, the Chief and the Police Services Board. The report made twenty-four wide sweeping recommendations designed to improve the accountability and public trust they concluded had been lost.[134]

2. A Case Study: The Junger/Whitehead Inquiry [135]

(a) Gordon Junger

In the fall of 1989, Toronto Police Force Constable Gordon Junger and his girlfriend, Franklina (Roma) Langford, operated an escort service in Toronto called the "Pleasure can Be Yours Escort Service". After Ms. Langford complained to Toronto Police Internal Affairs about

---

Star, September 29, 1992, p. A5 (In the April 24, 2003 Minutes of the Public Meeting of the Toronto Police Services Board, Coombs was listed in the Service Awards Summary for 2002 as being awarded a "Teamwork Commendation" out of 53 Division. He was at 51 Division when arrested in 1992,) The related problem of a failure to protect prostitutes is starkly demonstrated in the cases of the "missing women" in Vancouver (and elsewhere). News, "Some key dates in the case of 63 women missing from Vancouver's downtown eastside", *The Toronto Star* July 24, 2003, p. A06 . Robert Pickton is committed for trial on 15 counts of First degree murder in the "missing women case". The case first reached national attention in 1990 when the count of murdered sex trade workers in Vancouver reached 12. since 1982. Kathleen Kenna, "Women in fear after 12 murders 'but no one cares, we're hookers'", *The Toronto Star*, October 8, 1990, p. A2. Families of some of the missing women launched a law suit against the Vancouver Police. Canadian Press, "Negligence alleged in missing women case" *The Toronto Star*, April 24, 2002, p. A21 .

[134] The Ontario Civilian Commission on Police Services, *Report of an Inquiry into administration of internal investigations by the Metropolitan Toronto Police Force*, August 1992

[135] These facts are derived primarily from the facts found by the OCCOPS Inquiry

Junger's role in the escort service and a number of other matters of discreditable conduct, including possession of narcotics, Junger was arrested on December 5, 1989 in a hotel room where he was acting as an 'escort'. The client was, in fact, a policewoman and the entire exchange with her was videotaped. Although charged with "Living on the Avails of Prostitution and possession of cannabis, Junger was never prosecuted.

In lieu of prosecution, Junger's lawyer negotiated an agreement, in writing, with officers from Internal Affairs that would result in Junger resigning from the force as of February 1, 1990 and in exchange a possession of narcotics charge would be withdrawn, no criminal or Police Act charges would be laid against him "arising from or with respect to his relationship both personal and business with Franklina Langford", all physical evidence relating to the investigation was to be destroyed, and Junger would not receive a negative employment reference. To all intents the agreement was fulfilled before any aspect of the 'deal' became public. Junger resigned, the charge was withdrawn, and the Metropolitan Toronto Police Services Board simply were advised, in brief report form the Chief made in closed session, that an officer about whom there were allegations of drug use, and prostitution related activities had left the force. Apparently even the Chief did not know all of the details in February when the deal was executed, but when he learned the specific terms of the agreement in March he still did not advise the Board about the agreement but instead asked the Force's legal advisor to develop guidelines for any future agreements of that sort.

(b) Brian Whitehead

On November 7, 1989 a woman working as a prostitute was picked up by an off duty police officer, former Sergeant Brian Whitehead who threatened to arrest her, if she didn't do what he asked. She complied but after Whitehead told her he would continue use her she sought legal advice about what he had done to her and how to make him stop. Toronto Police Internal Affairs were advised, agreed to preserve the woman's confidentiality, and after a three week investigation, on November 22, 1989, arrested Whitehead for sexual assault and extortion. Although arrested and detained briefly, Whitehead wasn't processed on these charges. Instead, on March 11, 1990 he was charged with "Corrupt Practice" under the Police Services Act. Pursuant to a plea agreement reached without any notice to Jane Doe, Whitehead pleaded guilty to the charge of corrupt practice. Although a joint submission had made for a penalty "days off", he was demoted to Constable on May 11, 1990. On March 19, 1991 Jane Doe was forced to obtain an injunction to prevent the threatened release of her identity by Chief McCormack.

(c) The Media - 1990

The story of Jane Doe and (former) Sgt. Brian Whitehead did not appear in the press until March 1991, but there was considerable media attention on the escapades of Gordon Junger and his controversial deal with Toronto Police. A review of the print media produces a valuable record of what was said before evidence at the Inquiry clarified the facts, what wasn't said, and by whom.

In the first story on the Junger affair, written by Toronto Star reporter Alan Story[136], Chief William McCormack claimed that no "special deal" had been reached with Junger and that a thorough and impartial investigation had been conducted into possible criminal offences that he might have faced. His explanation for the withdrawal of the possession of cannabis charges was that the evidence of a key witness (presumably Roma Langford) had changed. On the issue of a deal he was quoted saying that the allegation by Junger of a deal "does not dignify a reply."

In the days following, Chief McCormack said that he had informed the Police Services Board concerning the deal and the resignation, although some board members had no memory of being advised about such a remarkable case.[137]

Roma Langford had advised Internal Affairs that two officers on the force had performed sex acts for money, and denied ever saying that she would recant her evidence concerning the drug charge against Junger. In regard to the first, Chief McCormack is reported as saying that "no evidence" had been found to substantiate the claim about the other officers but that the continued publicity concerning the matter was hurting morale. In regard to the latter, he is quoted as saying; "Who do you believe? The word of the police chief or that of a prostitute?". The same story notes that Ms. Langford provided police with a number of audio tapes of telephone conversations concerning the escort service as well as call sheets containing the officers names.[138] That story was followed with the first of many strong editorials:

---

[136] Alan Story, "Morality officer ran sex-for-pay service" *The Toronto Star,* April 7, 1990, A1.

[137] Tracy Tyler, " Police board's memories vary on escort case" *The Toronto Star*, April 11, 1990, A7.; Andrew Duffy, "Chief promised no charges if officer quit" *The Toronto Star*, April 12, 1990, A8.

[138] Cal Miller and Lisa Priest, "Chief irate over publicity in escort case" *The Toronto Star*, April 18, 1990, p A1. The matter of the other officers allegedly involved in the escort service surfaced again almost 15 years later. Reports on investigation into 52 Division shakedown scandal, disbandment of 52 Division plainclothes

"Metro Police Chief William McCormack has reacted angrily to allegations that the force suppressed a sex-for-money scandal involving force members.

He insists the Metro force conducted a "thorough" inquiry. Yet contradictory statements by a key player in the scandal have raised more questions. For example

* Was a thorough investigation conducted into all possible charges against the key officer about his

---

unit and allegations from eight transvestite prostitutes that they provided free sex to a police officer, Jonathan Kingstone and Rob Lamberti "T.O. cop extorted payoffs at clubs?" *The Toronto Sun* (18 April 2004). The story became more specific and linked allegations of prostitution scandal to Bill McCormack Jr., son of former Chief Bill McCormack. McCormack Jr. was Gordon Junger's partner at the time. implicated in the 52 Division shakedown scandal. Article links these prostitution allegations to the Junger scandal.Jonathan Kingstone and Rob Lamberti "Hooking police rumour" *The Toronto Sun* (19 April 2004). Finally it is confirmed that Bill McCormack Jr. was suspended pending investigation (he was subsequently charged with a number of Criminal Code offences), rumour links him to Junger scandal, but he denies all wrongdoing. Mark Bonokoski "Rumour wed to lies" *The Toronto Sun* (20 April 2004).
.

> running of the escort service before he left the force, without being prosecuted?
>
> * Second, did the police force's internal affairs bureau conduct an exhaustive investigation before concluding that there was no evidence linking two other officers to the escort service? The woman involved in the service now says she has evidence showing their participation.
>
> * Third, why were no drug charges laid against the key officer or his then companion when hash oil was found in their townhouse?
>
> To his credit, McCormack has now invited the Ontario Police Commission -- a body with investigative powers -- to go through files on the case and put the doubts to rest.
>
> However, even without seeing the files, commission Chairman Douglas Drinkwalter yesterday called it "a tempest in a teapot," saying "we don't have any big, grave concerns."[139]

Media coverage of the evidence heard by the Commission was extensive and continued to build to the long awaited report.

(d) The Report: August 1992

[139] Editorial, "The escort affair" *The Toronto Star*, April 19, 1990.

In the introduction to their report, the commissioners set out their four central criticisms. They concluded that:

> "There has been a tendency by the force to treat cases involving errant officers as an in-house problem, rather than a matter of public concern.
>
> In an effort to rid the force of an officer who was considered unsuitable, expediency has taken precedence over principle.
>
> Accountability for police discipline and civilian review has been compromised.
>
> Inadequate consideration has been given to victims of police wrongdoing."[140]

They identified as a key problem a culture of denial and insularity, which consistently minimized their errors and blamed anyone but themselves. The noted with concern:

> "The Metropolitan Toronto Police Force has maintained throughout this Inquiry that nothing seriously went wrong -- nothing that a few procedural changes could not fix. The Chief of Police William McCormack told the Inquiry that the force has not been "procedurally perfect," but his officers have acted in good faith. It is significant that, as far as this Inquiry has been informed, not a single member of the force has been reprimanded in connection with these matters.
>
> Internal Affairs, which conducted the investigations into Junger and Whitehead, has gone on record in its final submission (p. 2) as assessing

[140] The Ontario Civilian Commission on Police Services, *Report of an Inquiry - into administration of internal investigations by the Metropolitan Toronto Police Force*, August 1992, Part 2, Introduction, pp 3-4.

> its performance as flawless -- "totally proper, totally correct and totally legal" and in the best interests of the force and the community."[141]

Attitudinal and structural failures were directly implicated in creating a crisis of confidence in the governance of the Toronto Force. The conclude their introductory remarks as follows:

> "If the Metropolitan Toronto Police Services Board had reacted differently in April, 1990 when circumstances of the resignation of Gordon Junger first came to light in the media, this Inquiry need never have taken place. If the Board had used its own authority to uncover the facts of the Junger case and respond appropriately, the Ontario Civilian Commission on Police Services would not have felt obliged to intervene.
>
> If the Chief of Police for Metropolitan Toronto had responded vigorously and openly when he discovered the full details of the Junger resignation agreement, instead of keeping them confidential, the reaction to this whole matter would have been different.
>
> Had the force been less defensive and the Board less complacent at the outset, the public would have been assured that the issues were being

[141] The Ontario Civilian Commission on Police Services, *Report of an Inquiry - into administration of internal investigations by the Metropolitan Toronto Police Force*, August 1992, Part 2, Introduction, pp 3-4.

addressed. This report would not have been necessary.[142]"

They rejected entirely the former the Chief's rationalizations of the agreement reached with former Constable Junger (the "deal" the Chief denied had taken place), and identified it as an attempt to make the ends justify the means:

> "The Inquiry heard a range of justifications from the force for the agreement, such as: it was worth it to get rid of a bad officer; there was no intention of complying with the terms anyway; the criminal case against Junger had fallen apart because the witness had changed her story; there was no hope of any other successful prosecutions; once he resigned, disciplinary charges were irrelevant; and it would have taken a long time to go through the disciplinary hearing process and would have cost the taxpayers a lot more to continue to pay Junger's salary on suspension until the case was resolved.
>
> All of these excuses amount to the end justifying the means. They are totally unacceptable.
>
> It is disturbing that the response of the Internal Affairs unit, which signed the agreement on behalf of the Chief, has been to continue to deny any error. The final written submission from Internal Affairs concluded that "the conduct of Internal Affairs was appropriate, just and fair." (p.3) The motive expressed by Internal Affairs witnesses -- their desire to secure the resignation of an officer they believed should be off the force -- may have been understandable, but their actions were wrong.
>
> The smugness of Internal Affairs in finding itself to be totally without fault is likely in part the result of the fact that no one has been censured for conduct in connection with any aspect of the Junger matter. According to testimony, the closest the force came to admitting a problem was to

[142] The Ontario Civilian Commission on Police Services, *Report of an Inquiry - into administration of internal investigations by the Metropolitan Toronto Police Force*, August 1992, Part 2, Introduction, pp 3-4.

> indicate that the agreement should have been shown to a lawyer before it was signed. This sounds like a procedural error only. It ought to have been recognized that in substantive terms, there were serious problems with the agreement."[143]

They were equally critical concerning their finding that Chief McCormack failed adequately to inform the Police Services Board or to act on what he learned:

> "Chief William McCormack testified that he was not fully aware of the details of the resignation agreement when he gave consent to it. The information he received about the agreement appears to have been second or third-hand. When he did see it, he was still not overly concerned because he believed that prosecution of the officer either in criminal court or a disciplinary hearing was not a viable option. He insisted that the agreement was not a "deal" because neither party got anything out of it.
>
> But he was sufficiently worried about public criticism when he saw the agreement that he thought it best to keep the agreement confidential.
>
> The Chief of Police should have been fully informed -- and should have ensured that he was fully informed -- of the details of the agreement before his signature was attached to it. Once the Chief became aware of the agreement, he should have repudiated it and taken it to the Police Services Board. Keeping the agreement confidential, especially from his own Board, was an inappropriate reaction."[144]

Their conclusion that the Board's response was "wholly inadequate" included their failure to require answers from the Chief. It was not adequate supervision to simply accept whatever information the Chief chose to provide.

The Report devoted Part 9 to the treatment of the victims of police misconduct - in this case both Roma Langford and Jane Doe. In almost all cases the Report chose to accept the

---

[143] The Ontario Civilian Commission on Police Services, *Report of an Inquiry - into administration of internal investigations by the Metropolitan Toronto Police Force*, August 1992, Part 6 "The Junger Agreement" p 1- 2.
[144] The Ontario Civilian Commission on Police Services, *Report of an Inquiry - into administration of internal investigations by the Metropolitan Toronto Police Force*, August 1992, Part 6 "The Junger Agreement, pp 4-5.

word of prostitutes over that of police officers or of the police chief. Although Internal Affairs "quickly and professionally" investigated Jane Doe's allegations against Brian Whitehead (which were confirmed in all respects), they rejected the officer's rationalizations for failing to proceed with criminal charges, which she advised them she was anxious to proceed with, and were critical with the way that she was treated in regard to the Police act charges. They said:

> "Disciplinary hearings are not in-house matters to be dealt with in private by the force. Jane Doe should have been informed and involved. Furthermore, it is presumptuous and patronizing to make decisions on behalf of an adult who is capable of deciding on her own what is best for her. Police officers must take into account the greater good of the community in their decisions, but they should not presume to know what is best for an individual victim without consulting the person.
>
> The sad thing is that the response of the force to Jane Doe only got worse. She was not notified, as the key witness, of the disciplinary proceeding. Neither was her lawyer. Her statement was changed at the hearing by the prosecutor, at the insistence of Whitehead's lawyer, without her knowledge or concurrence. The prosecutor and defence agreed on a penalty of days' off (which was rejected by the hearing officer). During the hearing, in her absence, the promise to Jane Doe to protect her identity was ignored, and her name was entered into the transcript.
>
> The subsequent treatment of Jane Doe by senior management of the force seemed to emanate from a quite remarkable fog of ignorance.
>
> It is almost unbelievable that -- having failed to notify Jane Doe of the disciplinary hearing, having reneged on a commitment to keep her name confidential, and having made unauthorized changes to her statement at the hearing - the force would call a news conference in which the Chief blamed Jane Doe for not showing up at the hearing and protecting her own interests. To add insult to injury, Jane Doe was also forced to go to court for an injunction to prevent her name being disclosed through public release of the transcript by the force.
>
> The force was simply too eager to deflect any public criticism from itself.

> It reacted defensively and in the process disregarded the interests of an individual who was twice victimized -- by the original offence and by the police disciplinary system"[145].

Equally significant, the Report accepted the need to investigate further the issue of gender bias:

> "Counsel for Jane Doe has suggested that a study be conducted into the treatment of women complainants and offences against women. We agree that more must be done to grapple with this issue. There is something seriously wrong when sexual assaults are going unprosecuted in cases where the accused is identified, and the allegations are substantiated by police investigators.
>
> Police forces should be interested in ways of ensuring that more cases go to court. It is frustrating for police to substantiate that an offence has been committed and not be able to proceed because of the reluctance of the victim. For the victim, the longer-term consequences of avoiding facing the accused can be devastating.
>
> We recommend that a task force be established by the Attorney General to develop practical means of supporting victims so as to encourage their cooperation in testifying against perpetrators of sexual crimes. The findings of the task force should help police forces to prosecute more sexual assaults successfully. The task force should not be limited to cases where the accused is a member of a police force, but it should give special consideration to that aspect of the issue.
>
> Based on the practical measures developed by the work of the task force, all Police Services Boards should develop strategies to support victims of sexual assault and encourage their cooperation in prosecutions. Special consideration should be given to cases where the accused is a police officer.

[145] The Ontario Civilian Commission on Police Services, *Report of an Inquiry - into administration of internal investigations by the Metropolitan Toronto Police Force*, August 1992, Part 9 Treatment of Victims, p 2 - 4.

> Once these strategies are in place, all Police Services Boards should develop policies for the vigorous prosecution of all sexual assaults. The measure of success of these initiatives should be when sexual assault is prosecuted in every case where there are reasonable and probable grounds to lay a charge"[146]

(e) Lessons Learned: 1992-2004

(i) The Chief of Police: 1992 - 1999

After the Report was issued, Chief McCormack continued to insist that he and his officers had done nothing wrong.[147] However his most vigorous arguments in this regard were not made until after he retired and published a memoir; *Without Fear or Favour: The Life and Politics of an Urban Cop*.[148] He titled the chapter concerning the Junger affair "An officer and a Gigolo" and repeated the position rejected by the OCCOPS Report (that Ms..Langford changed her evidence, that they had no option but to accept Junger's resignation) and then proceeded to blame the controversy concerning police handling of the case on the newly elected New

[146] The Ontario Civilian Commission on Police Services, *Report of an Inquiry - into administration of internal investigations by the Metropolitan Toronto Police Force*, August 1992, Part 9 Treatment of Victims, pp 6-9.; recommendations 17-20.

[147] Rosie DiManno, The chief still doesn't get it, *The Toronto Star*, Aug. 29, 1992, A4; Christie Blatchford, "Shameless! Cops don't flinch at Junger report", *Toronto Sun*, August 29, 1992, p 5..

Democratic Party government and the panel itself.[149] In a position reminiscent of more recent attacks on members of Police Services Boards, he ended the chapter with recounting the curious incident of an attempt to link new Police Services Board member with Roma Langford, the woman who reported Gordon Junger to internal Affairs and forced an investigation. A traffic officer claimed to have recognized Ms. Rowe as a passenger in a car being driven by Roma Langford who he charged with impaired driving. The officer selected Ms. Rowe's photo from " numerous others shown him by senior officers", and " also attended her swearing-in ceremony at headquarters the next day, in front of television news cameras and everyone else in the room, identified Laura Rowe as the passenger in Roma Langford's car." Retired Chief McCormack muses (and gives no credence to Ms. Rowe's denial that she was there or the claim of one Lara Hoshowsky that it was she who was with Ms. Langford):

> "What would Bob Rae's choice as the new member of the Police Board have been doing in a car with a drunken prostitute, on the eve of her swearing-in ceremony? Neither Rae nor Rowe, a lesbian activist, would say,

---

[148] (Toronto: Stoddart, 1999).

[149] Bill McCormack, *Without Fear or Favour: The Life and Politics of an Urban Cop* (Toronto: Stoddart, 1999).Ch 19.

> which I thought very curious in light of the premier's oft-repeated declaration that an NDP government would be an open government. Nor did the province's top law official, Solicitor General Allan Pilkey, care to comment."[150]

His political critique continued in Chapter twenty one " Bob Rae's Kind of People" with a wide-ranging criticism of Susan Eng who replaced June Rowlands as Chair of the Police Services Board.

The Chief's opposition to the approach that OCCOPS took to his and his senior officer's decisions in the Junger/Whitehead cases, so clearly demonstrated in his memoir, may be relevant to understanding the difficulties the Board had in implementing the recommendations.

(b) The Police Services Board

[i] 1992-1999

The Board made consistent efforts to accept the twenty four Recommendations and to develop an accountability culture, but it is not always to easy to determine how successful they ultimately were. One month after the Report was issued the Board acknowledged the criticism and the need to both accept responsibility for the errors and to change the practices and the culture that permitted the failure in governance.[151] In February 1993 the Board provided OCCOPS with the draft of what would become known as the "1992" Directive and a "firm

---

[150] Bill McCormack, *Without Fear or Favour: The Life and Politics of an Urban Cop* (Toronto: Stoddart, 1999).Ch 19.

[151] Extract of the Minutes of the September 10, 1992 Board meeting, Ontario Civilian Commission on Police Services, *Report on a Fact-Finding into Various Matters with Respect to the Disciplinary Practices of the Toronto Police Service*, July 1999, p 33. This Fact Finding and report was made in response to a complaint from the Toronto Police Association that there was a double standard for discipline - senior officers were being treated more leniently than front-line officers. That allegation was not made out, but in the process of investigating it OCCPS took the opportunity to revisit the implementation of the recommendations made following the Junger/Whitehead Inquiry.

commitment" to implement all of the Junger/Whitehead recommendations. In 1999, OCCPS said "Unfortunately, it is our conclusion that this commitment has yet to be fully met."[152]

Recommendation 1

> "The Metropolitan Toronto Police Services Board should develop mechanisms to improve its effectiveness in overseeing implementation of its policies by the force. The Board should have the capacity to monitor compliance with its policies on an ongoing basis and to investigate specific matters where necessary as they arise. The Board shall report to the Ontario Civilian Commission on Police Services within six months on the decisions it has made to respond to this recommendation."

OCCPS provided a number of reasons for its concern and recommendations. First they identified the problem of " Fragmented Information". That is, rules and disciplinary information are found all over the place. The "multi-layered complex of policies, orders, directives and procedures that govern behaviour of civilians and police officers" are not made available to members in any way that ensures that the information is: received, read and understood, and is being followed.[153] This is also true of Board Directives. The Board committed in 1992 to establish "standards of conduct", and to put in place "policies and procedures to ensure appropriate standards of conduct are complied with in the future. They committed to "set in place mechanisms to ensure that the Chief, Internal Affairs, and the entire discipline system of the Force is monitored by the Board in order to ensure that appropriate standards of conduct are maintained." The former Chief advised then in February 1993 that these directions had been followed. "Unfortunately, the Board did not follow

[152] Ibid
[153] Ibid pp 34 - 35.

through in auditing the Chief's implementation mechanism." " .. until recently the Board had no formal mechanism for monitoring compliance with Board policies. Consequently, reports are requested, but there is a tendency for them to 'fall off the scope' over time, if no response is provided by the police service." OCCPS recommends a system of effective auditing of the Services's implementation.[154]

Recommendation 2

> "The Metropolitan Toronto Police Services Board should adopt a policy stating clearly and unequivocally the obligation of the Chief to report fully on cases involving alleged wrongdoing by members of the force if the integrity of the force or the public interest is affected. The policy should state the obligation of the Board to be so informed. In addition, the Board should require regular status reports on serious disciplinary matters."

The 1992 Directive placed the balancing point in favour of reporting. "In May 1998 the current chief (Chief David Boothby) advised the Board that he did not report all allegations. The list of non-reported allegations included: those resulting from complaints through the Public Complaints Investigation Bureau; allegations made to Unit Commanders and investigated through the normal disciplinary process; about the conduct of members of other police services; about Board members; and those which would endanger an individual or obstruct an investigation. *Reports were generated only when Internal Affairs opened a criminal investigation file. ...* It was also found that matters relating to command officers were not routinely reported. " For example the matter of Deputy Chief Reesor and the unauthorized

[154] Ibid pp 36- 37

handling of a revolver[155]. Improvements were made because of Board concerns with this position, and effective January 1999 the Board receives updates on "public complaints of a 'serious' nature and relevant information regarding issues involving officers of senior rank ..." [156]

Not all of the Junger/Whitehead recommendations were seen as requiring follow up. For example, recommendation 17 and 18 concerning gender bias and the treatment of victims, were considered fulfilled[157]. In that regard, tt is important to keep in mind the experience and advice of Jane Doe when assessing the 'successful' implementation of these recommendations.

The implementation of the Junger/Whitehead recommendations was also considered by Thomas Lederer of the law firm Genest Murray, beginning in November 1996[158] They concluded, in the executive summary:

"We conclude that the discipline process currently in place at the Metropolitan Toronto Police Service is unpredictable and inefficient. The existing discipline process does not consistently inspire confidence and often the participants in the process are dissatisfied."[159]

[155] Deputy Reesor was 'counselled' by Chief Boothby for transporting a revolver he (legally) owned to sell (legally)t to another police without obtaining a transfer permit (Police Officers do not require these permits for transferring their service revolvers). Police association head Craig Bromell used the distinction between this counselling and the dismissal of two civilian employees of the firearms unit when goods were found missing from the firearms unit. News, "Police union boss plays politics", *Now Magazine*, May 7- 13, 1998.

[156] Ontario Civilian Commission on Police Services, *Report on a Fact-Finding into Various Matters with Respect to the Disciplinary Practices of the Toronto Police Service*, July 1999 pp 39-40

[157] Ibid pp 48-49.

[158] Report Prepared by Genest Murray Debrisay Lamek in response to the request by the Metropolitan Toronto Police Services Board to Conduct a Review in Accordance with the Resolution f the Board dated November 14, 1976. Ontario Civilian Commission on Police Services, *Report on a Fact-Finding into Various Matters with Respect to the Disciplinary Practices of the Toronto Police Service*, July 1999, p 50.

[159] Ibid p ii

OCCPS, in its July 1999 report, required a detailed report from the Board by December 31, 1999[160]. In fact, no report was received until May 1, 2000.[161] There was a change in Chief in the time that OCCPS sought a report on the Toronto Board's progress. It would be quite reasonable of outgoing Chief Boothby to not wish to bind his successor, current Chief Julian Fantino. The May 2000 response claims to have substantially complied with all or most of OCCPS' recommendations. The devil, as always, is in the details of that 'implementation'.

[ii] 1999 – present

The "Final Response to Ontario Civilian Commission on Police Services (OCCPS) Regarding their Fact Finding Report" is contained in an Extract from the Minutes of the Meeting of the Toronto police Services Board held on May 1, 2000 as number 156. It is a 25 page document, with 28 recommendations . In response to OCCPS's recommendation that: "The Board must fulfill its governance role and assert control over the systems and policies for which it is accountable by periodically requiring audits of the services's implementation of its lawful directions and policies", little new was actually proposed. It was acknowledged that the background to the recommendation was the 1992 "Junger/Whitehead directive, which was not properly implemented until 1997. The response simply asserts that "the issue of auditing is not new to the Board", lists a number of audits conducted between April 1991 to 2000 and notes that in February 2000 the Board required the Chief, in consultation with the City Auditor to develop an audit work plan. The Board's response, Recommendation 16, was to require the

[160] Ontario Civilian Commission on Police Services, *Report on a Fact-Finding into Various Matters with Respect to the Disciplinary Practices of the Toronto Police Service*, July 1999 P4.

[161] Extract From the Minutes of the Meeting of the Toronto Police Services Board Held on May 1, 2000. Item #156/00 "Final Response to the Ontario Civilian Commission in Police Services (OCCPS) Regarding the Fact-Finding Report".

Chief to provide an annual report tracking the implementation of internal and external audit recommendations.[162]

OCCP's recommendation eleven, concerns the need for a review of the discipline process to improve efficiency and accountability and reduce delays in processing discipline charges. The response indicates that a complete review is dependent on the improvements to information technology improvements that are in the process of being implemented. Other measures include better case load management across units, and the implementation of a team approach to the investigation of Public Complaints so that regardless of leaves etc one member of the team is "continually addressing" each complaint. Finally, Chief Fantino, as part of the 90 day review of operations he undertook upon becoming Chief, "is personally examining integrity issues". These are typical assessments and responses. They are very difficult to assess in a vacuum, and one is left to assess them against events, which may not be the most helpful approach. The most obvious events are the corruption scandals that have exploded in the past two years.

In January of 2004, after a two and a half year investigation, criminal charges, including fraud, theft, extortion and perjury, were laid against six former drug squad officers. The allegations stemmed from the officer's alleged treatment of suspects and accused persons in drug investigations, which included theft of money, assault and perjury.[163] There is no doubt that the accused officers defended themselves vigorously against the allegations in the course of the

[162] Ibid pp 21-22.
[163] Nick Pron and John Duncanson, "Officers face charges of fraud, theft and assault" *The Toronto Star* (7 January 2004) A15; Christie Blatchford, "Six officers to be charged in corruption investigation" *The Globe and Mail* (7 January 2004) A9; Gay Abbate and Joe Friesen, "Probe results in 22 charges filed against six officers" *The Globe and Mail* (8

investigation, and rumours surfaced about efforts to stonewall the RCMP probe, but Chief Fantino, who to his credit brought in a senior RCMP investigator, Chief Superintendent John Neily, to head up the probe, resists any claim that there are widespread or systemic problems associated with the drug squad scandal.[164]

In response to concerns initially raised by defence counsel with Chief Boothby, Chief Fantino not only brought in Supt. Neily, he commissioned the services of retired justice George Ferguson, Q.C. on November 29, 2001 to prepare for a "Review and recommendations Concerning Various aspects of Police Misconduct". Part I concerns "Disclosure of Police Misconduct"[165] Part II addresses Systemic issues, including recruitment, training and promotion, internal affairs, and officer abuse of alcohol ands drugs.[166] Mr. Ferguson's report to the chief is dated January 2003. Chief Fantino did not provide the report to the Police Services Board until February 26, 2004.[167] No explanation has been provided for either the decision to retain Mr. Ferguson without obtaining directions, or even advice, from the Police services Board, nor for the

---

January 2004) A14..

[164] Kirk Makin, "Police blocked corruption probe" *The Globe and Mail* (20 January 2004) A1, A12; Kirk Makin, "Police chief denies 'blue wall of silence' in corruption probe" *The Globe and Mail* (21 January 2004) A6; Christie Blatchford, "'Conscience is clean' Fantino says" *The Globe and Mail* (21 January 2004) A6; Betsy Powell and Nick Pron, "Weeding out corruption" *The Globe and Mail* (22 January 2004) B1, B6.

[165] The issue of disclosing to the defence in a criminal trial the disciplinary records of investigating officers has been contentious in Ontario for a number of years. It was exacerbated by the decision to stay numerous drug charges investigated by the discredited officers. See generally; *R. v. Paryniuk* (2002), 97 C.R.R. (2d) 151; *R. v. Altunamaz* [1999], O.J. No. 2262; *R. v. Scaduto* [1999], 63 C.R.R. (2d) 155.

[166] The report is significantly more narrow in scope than the terms of reference, which included an examination of organizational structure, the culture of policing, and fairly wide scope of integrity testing and background checks. Mr. Ferguson chose (without providing a rationale for the choices except to say that these are areas where change is required) to report only on recruitment, training and promotion, the structure and function of internal affairs and the use of alcohol and drugs.

[167] In his March 26, 2004 letter to the Police Services Board, "Response to recommendations if the Honourable Justice George Ferguson", Chief Fantino said that Ferguson's report was received in March 2003.

delay in providing the report to the Board, although both have been criticized.[168] In any event, the drug squad scandal is not the only one facing the Toronto Police Service. In mid April the news broke that more corruption charges were expected. First the plainclothes unit at the downtown 52 Division was disbanded in response to a major investigation into an alleged shakedown of area bars.[169] The scandal spread as former Chief Bill McCormack's eldest sun is identified with it (and linked to the Junger scandal of the 1990's)[170] and Rick McIntosh, the head of the Toronto police Association steps down because he too is linked to the scandal.[171] A third set of serious misconduct allegations, involving officers involved with a serious drug addict included another of former Chief McCormack's children and more charges.[172] Not surprisingly there have been calls for an independent inquiry[173] but so far Chief Fantino remains in charge of the issue, with the assistance of Mr. Ferguson..[174]

---

[168] Katherine Harding "Mayor let down by chief's reply to corruption recommendations" *The Globe and Mail* (23 April 2004) A12.

[169] Cal Millar, John Duncanson and Nicholaas Van Rijn "Police unit faces internal probe" *The Toronto Star* (17 April 2004) A4.; Jonathan Kingstone and Rob Lamberti "T.O. cop extorted payoffs at clubs?" *The Toronto Sun* (18 April 2004) .

[170] Jonathan Kingstone and Rob Lamberti "Hooking police rumour" *The Toronto Sun* (19 April 2004) ;

[171] Christie Blatchford "Police probe corruption as union boss steps down" *The Globe and Mail* (19 April 2004) A1, A9.

[172] Christie Blatchford "Numbered firm received cheques" *The Globe and Mail* (21 April 2004) A15; Jonthan Fowlie "A venerable police dynasty in turmoil" *The Globe and Mail* (24 April 2004) A16.; John Duncanson and Tracey Huffman "Source: Police shielded drug dens" *The Toronto Star* (24 April 2004) A1, A23; .Shannon Kari "Addict-thief helped by officer in police probe" *The Globe and Mail* (26 April 2004) A10; Nick Pron "Former chief's son facing charges" *The Toronto Star* (26 April 2004) A1, A12.

[173] John Barber "Enough with the few 'bad apples'" *The Globe and Mail* (24 April 2004) M1; Royson James "An independent inquiry is the only way to solve police mess" *The Toronto Star* (28 April 2004) B3.; Royson James "Fantino's message is loud, but is it clear?" *The Toronto Star* (29 April 2004) B1, B5; "Police require outside probe," Editorial, *The Toronto Star* (28 April 2004) A22.

[174] Katherine Harding "Board backs Fantino's handling of probe" *The Globe and Mail* (27 April 2004) A10; Linda

IV. Conclusion and Recommendations

John Braithwaite argues that "legal checks on abuse of power [are] difficult at best, counter-productive at worst", and suggests instead two key "counter-intuitive" strategies:

1) Replace narrow, formal and strongly punitive sanctions with broad, informal and weak sanctions;

2) Separate enforcement targeting from the identification of the actor who benefits from the abuse of power. Specifically treating the matter of police corruption and outcry over compromised independence, Braithwaite suggests that in order to be resilient to the domination of any one structure or group (state, business, professions like the law), the police must actually be dependent on all. That is, the police structure must be vulnerable to checks on power from a diversity of sources, including oversight bodies, civil society, loosely organized community groups, a free press, the judiciary and, at the highest level, the executive branch of the state structure. "In other words, a police service that is enmeshed in many webs of dependency will be vulnerable to the many when it corruptly does the bidding of one"[175].

Braithwaite's (and my own) view that current concern over the multiple sites of regulation is misplaced has been out of fashion in recent years, although may be somewhat on the rebound in light of recent events. One hopes so, as it is an important feature of both the accountability and responsibility aspects of police executive relations. When the executive is attentive to the complexities of the relationships and viewpoints, it is less likely that one perspective will dominate. A review of the recent history of the Toronto Police Service

---

Diebel and Cal Millar "Police reform: 'I want action'" *The Toronto Star* (28 April 2004) A1, A19;

[175] John Braithwaite, "On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republication Separation

demonstrates how important it is that police governors, in this case the Toronto {Police Services Board, be aware of the history and complexity of the institution they are responsible for. Perhaps the single most important reform one could recommend in this regard, is the guarantee of some continuity on police services boards so that essential history and appreciation of the multiple factors engaged when any change is attempted is preserved.

However, the complexity that in my view is a strength must not be a complexity of rules. Rather, it is a complexity of sites of observation and accountability and includes many that are quite free from legal rules and doctrine. For example, the involvement of a community legal clinic in assisting Jane Doe in her struggle to hold former Sgt. Whitehead to account was instrumental in elevating the Junger Inquiry into a wide ranging and significant tool of police governance. Similarly, the catalyst for the Toronto Drug squad investigation was the effort of a defence lawyer who had reason to trust the Professional Standards Branch of the Toronto Police and brought his concerns and evidence of corruption to Chief Boothby and then to Chief Fantino. In other words, there were resources in the wider community that acted as agents for investigation and accountability. Other examples abound and should be respected and supported rather than denigrated or merely tolerated. A similar catholicism of approach is required to ensure that the tension between policy and operations remains nuanced and evolving. The investigation of sexual assaults and sexual offences are a matter of operations, but these investigations generate significant policy issues that cannot be considered in a vacuum. Once again, multiple sources of information and opinion should be encouraged.

---

of Powers" (Summer 1997) 47 Univ. of Toronto L.J. 305.

Finally, absent a fundamental re-examination of the enterprise of law enforcement in a post modern world, one has to expect continued conflict and crises as we swing between independence and accountability, oversight and autonomy. The challenge is to appreciate that a pendulum always swings back.