Chapter 1

Introduction to *Issues in Civilian Oversight of Policing in Canada*

Ian Scott[*]

This book is an attempt to gather in one publication a series of current writings on issues involving civilian oversight of policing in Canada. The question of civilian oversight of policing is a critical one to address in a political democracy that prides itself on upholding the rule of law. It is through policing agencies that the state enforces the laws it enacts. Policing represents the most overt power of the state in a civil society, and its legitimacy is largely based upon the willing deference of its citizenry to permit police agencies to manage rule-breaking behaviour. If policing fails to maintain public confidence, it fails to maintain its legitimacy, and it will cease to effectively function. Civilian oversight, then, is crucial to facilitating and sustaining public confidence – it is through acceptance of oversight mechanisms that the public will maintain or gain confidence in the important institution of policing. *Issues in Civilian Oversight of Policing in Canada* hopes to play a part in this necessary dialogue between policing on the one hand and the public it serves as represented by oversight mechanisms on the other.

Policing has gained more attention in both the legal community and the public at large in the last 20 years, as we evolve into a society with less deference to authority and more emphasis on individual rights. As well, there has been increased media exposure of police action. In the past seven years, the combination of the 2007 tasering death of Robert Dziekanski at the Vancouver International Airport by RCMP officers, the social disorder at the June 2010 G20 Summit in Toronto, and the 2013 streetcar shooting death of Sammy Yatim by a Toronto police officer, captured on video imagery and then widely distributed through social media, have caused

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many members of the public to question the role of the police and look to the government to develop mechanisms to respond to what many view as questionable police conduct. The role of video in capturing imagery of police use of force, both reasonable and excessive, will increase as the use of camera phones, CCTV surveillance, video cams, and wearable cameras become more ubiquitous. There is even an app now available called "Cop Watch Toronto" which assists in the instant uploading of imagery of police-citizen interaction in that city. Not only does this imagery make it possible for the public to understand that police sometimes engage in misconduct, it breathes life into other allegations against the police that are not as well documented. What previously seemed to be incredible now seems possible in the face of seemingly incontrovertible evidence.

This book provides both a descriptive account of the state of police oversight in both the provinces and the federal government, as well as discusses some more specific issues such as the oversight issues related to the G20 Summit, other legal mechanisms of accountability, disclosure concerns in light of the Supreme Court of Canada decision in *R. v. McNeil*,[1] the use of civil litigation to effect police reform, and police officers' off-duty conduct. As well, there is a chapter containing original research on civilian-led investigations. The book ends with a discussion of the efficacy of oversight agencies, and whether their focus on reviewing after-the-fact police action is misplaced.

Issues in Civilian Oversight of Policing in Canada includes contributors from varying backgrounds. As will be seen below, its authors include a law school dean, a law school professor, those involved in oversight bodies, lawyers who represent affected persons on the one hand and a lawyer who represents police officers on the other, as well as an RCMP detachment commander. While they are writing on different topics, it is hoped by including a spectrum of contributors that the reader will develop an appreciation of the varying perspectives on this complex subject of civilian oversight. The following, then, is a more detailed accounting of the contents of each chapter of this publication.

The chapter immediately following the introduction is authored by Ian Scott, this publication's editor and former Director of Ontario's Special Investigations Unit ("SIU"), and is entitled "Oversight Overview". It provides the reader with a summary overview of the major oversight mechanisms in each province, as well as at the federal level. In most provinces, oversight breaks into two discrete models; one that addresses non-criminal complaints generated from the public, and the other an agency investigating death and serious injury incidents involving the police. While every province and the federal government have a process to address the former, the development of the latter – an independent agency investigating

1 *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, 238 C.C.C. (3d) 353 (S.C.C.).

serious allegations against the police with potential criminal consequences – is evolving. Two provinces, Ontario and British Columbia, have units that conduct independent investigations with an emphasis on civilian investigators, while the Alberta and Nova Scotia investigative agencies rely more heavily on seconded officers. Two other provinces – Manitoba and Quebec – have committed to opening independent investigative agencies but as of the date of this writing, do not have operational units. Some of the Atlantic provinces and Saskatchewan have no current plans for an independent agency involving death and serious injury investigations.

The third chapter focuses on civilian review of policing in the federal system, and is authored by Lisa-Marie Inman, Director of Reviews for the Commission for Public Complaints Against the Royal Canadian Mounted Police ("Commission"). The Commission is responsible for all public complaints concerning on-duty conduct of RCMP members. Ms. Inman takes us through the history of the establishment of the current Commission which has been in existence since 1988 as a result of amendments to the *Royal Canadian Mounted Police Act*.[2] She explains the role of the Commission to review reports from the RCMP when complainants are dissatisfied with the policing agency's attempt to resolve their complaint, and its power to initiate its own complaints as well as to hold public interest hearings. The chapter then discusses the forces at play leading to the enactment of Bill C-42, the *Enhancing Royal Canadian Mounted Police Accountability Act*[3] on June 19, 2013, which will create the new Civilian Review and Complaints Commission when proclaimed into force. The new legislation took into consideration recommendations arising from the report following the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, and the results of the 2007 Task Force on Governance and Cultural Change in the RCMP. The author proceeds to outline other mechanisms in place to address issues of misconduct involving RCMP officers including the criminal law and the force's internal disciplinary process. Finally, Ms. Inman contrasts the efficacy of the public complaints system with these two aforementioned processes, and concludes that the strength of the complaints system lies in its ability to conduct thorough examinations unencumbered by the duty to mete out decisions with criminal or disciplinary consequences.

In Chapter 4, we turn our attention to Canada's Military Police Complaints Commission ("MPCC") in a chapter written by Peter Tinsley, Chairperson of the MPCC from 2005 to 2009. Mr. Tinsley takes us through the evolution of military police oversight to the establishment of the MPCC under the *National Defence Act*[4] in 1998, largely in response to the

2 R.S.C. 1985, c. R-10.
3 S.C. 2013, c. 18.
4 R.S.C. 1985, c. N-5.

recommendations contained in a federal Commission of Inquiry report entitled, "Dishonoured Legacy: the Lesson of the Somalia Affair". The MPCC is the only agency in the world providing oversight of the military police similar to models used for civilian police. The MPCC is also given oversight of complaints of improper interference by the chain of command or senior government officials with the conduct of investigations. The author discusses the process leading to the passing of Bill C-15 entitled the *Strengthening Military Justice in the Defence of Canada Act*[5] on May 1, 2013, which amended the *National Defence Act*. He explains how the military police complaints system operates under these new amendments, and also offers his personal critique of these changes. In his view, these amendments have a deleterious effect on effective oversight of military police, most notably by permitting the chain of military command to give directions in respect of police operations and investigations, and to keep those directives secret. He ends by lamenting the fact that these significant issues of oversight are unlikely to be subject to further consideration until the next statutory review scheduled for 2020.

Chapter 5 is authored by M. André Fiset, a lawyer from Quebec who specializes in representing police officers in labour related matters. He is the author of *Qui doit policier la police? Les enquêtes criminelles concernant un décès ou une blessure grave à la suite d'une intervention policière*, and co-author of *Traité de déontologie policière au Québec*. His chapter, entitled, "The Bureau des Enquêtes Indépendantes du Québec: A Long Time Coming", was written in French and translated for this publication. M. Fiset takes us through the call for an independent investigative agency for police involved serious injury and death incidents from the 1991 death of Marcellus François to the 2008 shooting of Fredy Villanueuva and the related inquest that finally concluded in December 2013. He explains the legislative responses to addressing these incidents in the form of the Charest government's Bill 46 that died on the order paper and the Marois government's Bill12, which passed on May 9, 2013, and will create the Bureau des Enquêtes Indépendantes for Quebec. However at the time of this writing the Bureau is not yet operational.

We return to the writing of Ian Scott in Chapter 6 entitled "Development of Civilian Oversight in Ontario". Here, he discusses its development by tracing the evolution of the government response to two issues: public complaints against the police and allegations of police involved incidents of serious injury and death. The chapter begins with a discussion of the changing social milieu in Toronto during the 1960s and 70s leading to the rise of a police complaints system from 1981 to 1997 in what became the Office of the Public Complaints Commissioner. It follows its demise in 1997, and resurrection in 2009 as the Office of the Independent

[5] S.C. 2013, c. 24.

Police Review Director. The governmental response to serious injury and death incidents was the establishment of the Special Investigations Unit in 1990. The chapter discusses the underlying societal pressures leading to its beginning and the passing of a regulation governing its operations in 1999. It canvasses the multiple studies reviewing the SIU between 2000 and 2011, and in particular the two reports written by Ontario's Ombudsman, André Marin. Mr. Scott concludes the chapter by commenting on the frailties of effective oversight agencies in light of the 1997 abolition of a public complaints system that was in existence for 16 years, and the continued challenges facing the SIU.

Former General Counsel for the Canadian Civil Liberties Association ("CCLA") and current Dean of University of Ottawa Law School Nathalie Des Rosiers and former CCLA counsel Graeme Norton collaborated in the authorship of Chapter 7 entitled "Civilian Oversight and the 2010 G20 Summit in Toronto". As the title suggests, this chapter aims to analyze the various accountability mechanisms deployed to respond to the policing of the G20 Summit in Toronto. It first reviews the chronology of the G20 Summit as a way to highlight some of the problematic aspects of the policing undertaken and the various legal and constitutional questions that arose. It then proceeds to analyze the accountability mechanisms with a view to measuring whether they effectively responded to the various problems encountered. The authors conclude that the accountability reviews did address many of the issues such as the misuse of the *Public Works Protection Act*.[6] Nevertheless, because of their jurisdictional limits, the various reviewers could not look to the entire spectrum of conduct and actors. Accordingly, the authors suggest that there are still many accountability gaps in our police accountability regime. Finally, they make recommendations to strengthen the civilian oversight of the policing of protests.

Mr. Scott also wrote Chapter 8 entitled "Other Legal Mechanisms of Accountability for Police Use of Force". This chapter discusses other remedies available to hold officers accountable for excessive use of force. It begins with a discussion of the criminal law dealing with police use of force, including investigations of allegations of excessive use of force. It also discusses the developing area of the staying of criminal charges against accused who prove that they were the victims of police excessive use of force. It then reviews provincial mechanisms of accountability by canvassing the use of civil lawsuits (including *Canadian Charter of Rights and Freedoms* remedies), inquests, and public inquiries. It ends with a discussion of the interrelationship between criminal law and provincial mechanisms of accountability.

[6] R.S.O. 1990, c. P.55.

Chapter 4

The Military Police Complaints Commission

Peter Tinsley[*]

Introduction and Overview

The Canadian Military Police Complaints Commission[1] was established in 1998 as part of significant amendments[2] to the *National Defence Act*[3] ("*NDA*") which were intended to modernize the military justice system, and came into existence on December 1, 1999. It is constituted under Part IV of the *NDA* and its jurisdiction is further defined by the *Complaints About the Conduct of Members of the Military Police Regulations*.[4]

The MPCC is unique in the field of independent oversight of police as the only agency in the world established by law specifically to provide oversight to a military police force in a fashion consistent with the nation's standards of oversight of civilian police.[5] Moreover, in addition to having a conventional oversight jurisdiction regarding matters of police conduct or performance,[6] in recognition of the positioning of the military police within the hierarchical command structure of the Canadian Forces it was also given jurisdiction to receive complaints from members of the military police concerning "improper interference" by the chain of command or senior government officials with the conduct of investigations.[7]

The introduction of the concept of independent civilian oversight over the last four decades into the tradition steeped, paramilitary environment of Canadian policing has been a challenging process requiring vast changes in

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1 Also referred to as the Commission or the MPCC.

2 Bill C-25, *An Act to Amend the National Defence Act and to Make Consequential Amendments to Other Acts*, S.C. 1998, c. 35.

3 R.S.C. 1985, c. N-5.

4 P.C. 1999-2065 18 November 1999.

5 Not to be confused with such as the "policia militar" of Brazil and elsewhere, which may be literally translated as military police, but which are in fact the uniformed branch of the federal and state police forces.

6 *National Defence Act*, *supra* note 3, s. 250.18.

7 *Ibid.* at s. 250.19.

customs and norms. The establishment of individual agencies of oversight, which now exist in every federal and provincial jurisdiction, has occurred at a pace to meet the demands of individual communities; demands which commonly develop over time, but then are brought to the forefront with events of a sufficiently dramatic nature to serve as a catalyst to overcome resistance to change and prompt law-makers to act. The creation in 1990 of Ontario's Special Investigations Unit was the government's reaction to the deaths of two young black men in Toronto. The introduction of oversight to Canada's military police was no different. The genesis of, or catalyst event for the MPPC can be traced to the deaths of two black youths in Somalia in 1993.

Origins and Evolution

The military police branch of the Canadian Forces can trace its roots to police components of the army and air force first formed for operational support purposes during the First and then Second World Wars. For example, the 1st Canadian Provost Company was formed in 1939 for war time service. It was comprised of 120 volunteers from the Royal Canadian Mounted Police. While police and security components continued to exist under a variety of names following the World Wars, at least in the army and air force but not in the navy, the military police as a common standardized organization only came into being in 1968 on the integration of Canada's three military services into the Canadian Forces. At that time, members of the military police were empowered only as "Specially Appointed Personnel" and solely under the *National Defence Act*[8] for the performance of their policing and security duties. The recognized limitations of that authority, particularly in the performance of law enforcement on military bases, some of which are the equivalent of small towns, led to additional empowerment as peace officers under the *Criminal Code*.[9] The exercise of peace officer powers extends to all persons, including civilians while on defence establishments.[10] Today, with approximately 1,400 full-time members, the military police of the Canadian Forces are the 7th largest police force in Canada.

Notwithstanding the developments outlined above, the military police were still very much embedded in Canada's military hierarchy. They were also a component of Canada's military justice system, as embodied in the *National Defence Act*; a justice system which had remained largely unchanged in terms of overall structure for half a century until the passage of Bill C-25 in 1998.

8 *Ibid.* at s. 156, and *Queen's Regulations and Orders for the Canadian Forces* ("QR&O") 22.02(2).

9 R.S.C. 1970, c. C-34, s. 2(*f*).

10 *R. v. Nolan*, [1987] 1 S.C.R. 1212, 34 C.C.C. (3d) 289, 41 D.L.R. (4th) 286 (S.C.C.).

In 1992 there had been a collective sigh of relief when the military justice system weathered its first significant challenge under the *Canadian Charter of Rights and Freedoms*[11] after the Supreme Court of Canada found the centre piece of the system, trial by court martial, to be *Charter* compliant as a result of changes made by regulation in 1991 which enhanced the independence of the court martial system.[12]

What could not be foreseen was that just over the horizon events occurring in Somalia in 1992-93 during the course of a United Nations mission would result in the Canadian Forces, including the military justice system, being subjected to public scrutiny the likes of which had never previously been experienced. This scrutiny would prove to be far wider in scope than judicial considerations of the requirements of law. Notwithstanding that the conduct of the Canadian Forces members in Somalia was investigated by the military police, charges, including those of murder and torture, were laid and tried by courts martial and appeals made to the Court Martial Appeal Court of Canada, as well as the Supreme Court of Canada, without judicial criticism of the process, the court of public opinion was not so satisfied. Ultimately, fueled by public perception, this scrutiny resulted in changes to historical norms which would impact the status and structure of the military police and lead to the creation of the Military Police Complaints Commission as its oversight body.

However, as will be revealed by the following brief chronology of events, the evolution of oversight does not necessarily move forward in any certain fashion. While "independent", it cannot be forgotten that oversight agencies are creations of government and are very much dependent on the will and support of the government of the day in respect of their operation and even their continued existence as viable agencies of effective oversight.

The Somalia Commission

In 1995 the Government of Canada, by Orders-in-Council,[13] created the Commission of Inquiry into the Deployment of the Canadian Forces to Somalia under Part I of the *Inquiries Act*.[14] The report of that Commission entitled "Dishonoured Legacy: The Lessons of the Somalia Affair" was delivered on June 30, 1997.[15]

11 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

12 *R. v. Généreux*, [1992] 1 S.C.R. 259, 70 C.C.C. (3d) 1, 88 D.L.R. (4th) 110 (S.C.C.).

13 Order-in-Council P.C. 1995-442 dated March 20, 1995, as amended by P.C. 1995-528 dated March 28, 1995.

14 R.S.C. 1985, c. I-11.

15 Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair* (Ottawa: Public Works and Government Services, 1997) ("Létourneau Report").

The deployment of elements of the Canadian Forces to Somalia was in response to a United Nations initiative under Chapter VII of the UN Charter.[16] As such it was a peace enforcement mission in response to the breakdown of a national government. The deployment of the Canadian Airborne Regiment Battle Group occurred in December 1992. On the night of March 16-17, 1993, near the town of Belet Huen, a 16-year-old Somali, an alleged thief found in the Canadian encampment, was horrifically beaten to death by Canadian soldiers while in custody. Following the commencement of the investigation of that death, it was revealed that on March 4, 1993 another alleged Somali intruder was shot to death, in what was described as an execution-style killing, while another was wounded.

The Commission Report was, as tasked in its terms of reference, extremely broad in the scope of its examination of all factors which contributed to the occurrence of the events in question. That is, while it was the deaths of Somali youths at the hands of Canadian soldiers as well as the attempted suicide of one of the perpetrators that initially attracted public attention, the Commission's mandate extended to pre-deployment preparations, the actions of the chain of command in those preparations and other incidents occurring in Somalia. It also examined in detail the institutional response to the events, including that of the military police.[17] In addition to criticisms concerning policing standards, training and resources, the Commission was particularly critical of the positioning of the military police within the military hierarchy. It was equally critical of the influence of commanding officers as well as the chain of command over police operations which vitiated any notion of independence and gave rise to the potential for and perception of improper influence being exercised. Accordingly, one significant recommendation was that the head of the military police be responsible to the Chief of Defence Staff for all purposes "except for the investigation of major disciplinary or criminal conduct".[18]

The Dickson Reports

Prior to the completion of the much-publicized proceedings of the Commission of Inquiry and receipt of its report, the Minister of National Defence, by Ministerial Direction dated January 17, 1997, commissioned a Special Advisory Group (SAG) on "Military Justice and Military Police Investigation Services" to be chaired by the late Rt. Hon. Brian Dickson, formerly the Chief Justice of the Supreme Court of Canada and also a decorated World War II veteran very familiar with military operations. The report of the Special Advisory Group was received on March 25, 1997.[19]

16 *Charter of the United Nations*, online at <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.

17 Létourneau Report, *supra* note 15 at Chapter 40.

18 *Ibid.*, Recommendation 40.11 (emphasis added).

Concerning the military police the SAG report dealt with many of the same themes as those probed by the Somalia Commission including the conflicting imperatives of command and control for the military police role in support of military operations and those for the purely police investigative function. In order to meet the requirements of both roles, which were found to be inherently distinct, the report recommended a bifurcation with military commanders retaining command and control over military police personnel employed in operational support or intelligence roles, while all others would be under the direct command and control of the head of the military police.[20] In the latter regard, the report stressed at length the importance of the independence of policing to ensure the integrity of the justice system.[21] In addition to the recommendation that the police investigative function be independent of the chain of command, the Special Advisory Group report also recommended that this function be under the "oversight and review" of the Vice Chief of Defence Staff (VCDS) facilitated by an annual report from the head of the military police.[22]

An additional significant feature of the SAG Report was that, in the vein of ensuring confidence and respect for the military justice system, it also addressed the matter of oversight and review. In founding its recommendation for the establishment of an independent office for complaint review and oversight the report stated, in part:[23]

> Independent oversight is especially important for the military police and, in this regard, civilian oversight of police forces is particularly instructive. If an individual complains to a civilian police force about improper conduct of its personnel, there is an expectation of and a right to a response. This situation should be no different in the military context.

The subsequent "Report of the Military Police Services Review Group", also initially chaired by the late Rt. Hon. Brian Dickson until his death shortly before completion of the review, was presented to the Vice Chief of Defence Staff on December 11, 1998. That report found that the "*Accountability Framework*" signed by the VCDS and the Canadian Forces Provost Marshal (CFPM)[24] on March 2, 1998 conformed with the recommendations of the Special Advisory Group Report in respect of the

19 Canada, *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services* (Ottawa: Department of National Defence, 1997) ("SAG Report"), online at <http://web.archive.org/web/20021016124657> and <http://www.dnd.ca/eng/min/reports/dickson/justictc.htm>.

20 *Ibid.* at Recommendation 9.

21 *Ibid.* at Chapter 5.

22 *Ibid.* at Recommendation 14.d – In contrast to the Somalia Commission Report which recommended that the military police be responsible to the Chief of Defence Staff, this recommendation recognized the historical norm in the Canadian Forces or any part thereof that the second-in-command is generally responsible for all "support" elements, *i.e.*, the Vice Chief of Defence Staff.

23 *Ibid.* at Chapter 10, p. 65.

Chapter 8

Other Legal Mechanisms of Accountability for Police Use of Force

Ian Scott[*]

Introduction

Prior chapters have focused on police accountability by either the processing of complaints or independent investigations when officers are involved in serious injury or death. This chapter focuses on other legal mechanisms of accountability available to hold officers accountable for excessive use of force.[1] It begins with a discussion of the criminal law dealing with police use of force, including investigations of allegations of excessive use of force. It also discusses the developing area of the staying of criminal charges against accused who prove that they were the victims of excessive use of force. It then reviews provincial mechanisms of accountability by canvassing the use of civil lawsuits (including *Canadian Charter of Rights and Freedoms*[2] remedies), inquests, and public inquiries. Its focus is on the legal framework in Ontario. However, examples are drawn from other provinces as well. It ends with a discussion of the interrelationship between criminal law and provincial mechanisms of accountability, and concludes that the duplication of proceedings that may be brought to bear when police officers are alleged to use excessive force may be a necessary societal response to ensure accountability in a democracy committed to the rule of law but also concerned with officer and public safety.

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1 This chapter is based upon an article previously published by the author in the *Criminal Law Quarterly* entitled, "Legal Mechanisms of Use of Force by Police in Ontario", [2008] C.L.Q. 331; also translated into Chinese and published in (2010), 4 Journal of National Prosecutors College 152.

2 Part I of the *Constitution Act, 1982* being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

Criminal Law Addressing Police Use of Force

This part begins with a discussion of the statutory provisions creating penal liability for excessive use of force and the statutory and common law defences to these allegations. It then turns to the concept of law enforcement immunity and ends with a discussion of investigative and charge-laying issues unique to police use of force.

Statutory Provisions Creating Liability

All of the criminal liability sections involving allegations of excessive use of force are found in Part VIII of the *Criminal Code*[3] entitled "Offences Against the Person and Reputation". The *Code* makes it clear that police officers are criminally responsible for any excess force "according to the nature and quality of the act that constitutes the excess".[4] Over the years, police officers have been charged with and prosecuted for all manner of offences related to excessive use of force in the course of their duties, including murder, manslaughter, and criminal negligence causing death.[5] Liability for these criminal acts may be founded on allegations of direct acts of force, or on concepts of counselling, aiding, abetting, attempting, and conspiring to commit an unlawful act.[6]

Common Law Overlay

In general, mere presence at the scene of a crime is not sufficient ground to found liability for an aider or abettor.[7] However, a police officer present at the scene of an offence, who carries out no act to aid its commission, may still be considered a party, if his purpose in failing to act was to aid in the commission of that offence and he was under a duty to act. Therefore, an officer who has either a statutory or common law duty to protect someone may be found criminally liable for a failure to protect that individual if others assault him.

3 R.S.C. 1985, c. C-46 ("*Code*").
4 *Ibid.* at s. 27.
5 There is currently one Toronto police officer charged with second degree murder – P.C. Forcillo for the July 27, 2013 shooting death of Sammy Yatim. Three York and Durham police officers were charged with, *inter alia*, murder in the shooting death of Mr. Romagnuolo, and acquitted in 2001. Further, four Toronto police officers were charged with manslaughter related to the death of mentally disordered Otto Vass and acquitted by a jury in 2003. Finally, Toronto Police Constable Paul van Seters was charged with criminal negligence causing death related to the death of Kenneth Allen, and acquitted in 1996. For a partial list of charges and dispositions, refer to Scott, "Addressing Police Excessive Use of Force" (2004), 49 Crim. L.Q. 351.
6 *Code* s. 21 (parties), s. 22 (counselling), s. 24 (attempts) and s. 465 (conspiracy).
7 *R. v. Dunlop*, [1979] 2 S.C.R. 881, 47 C.C.C. (2d) 93, 8 C.R. (3d) 349 (Eng.) (S.C.C.).

The seminal case for the expansion of the parties concept with respect to police officers is the British Columbia Court of Appeal decision styled *R. v. Nixon*.[8] When accused Police Corporal Nixon was in charge of the Vancouver City Police lock-up and present when an unidentified officer stomped on a prisoner's knee, he was found guilty of aggravated assault, even though he was never identified as the perpetrator, due to his duty to protect those in his custody and his failure to intervene.

The duties applicable to a British Columbia police officer may be transferred to similarly situated officers through each province's *Police Act* or equivalent statute and the common law. First, with respect to duties expressed under statute, pursuant to s. 42(1) of Ontario *Police Services Act*[9] ("*PSA*"), the following could impose criminal liability for harm caused to those under an officer's care:

> (a) preserving the peace;
> (b) preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention;
> . . . . .
> (d) apprehending criminals and other offenders and others who may lawfully be taken into custody.

Second, all police officers must swear the following oath:

> I solemnly swear (affirm) that I will be loyal to Canada, and that I will uphold the Constitution of Canada and that I will, to the best of my ability, preserve the peace, prevent offences and discharge my other duties as (*insert name of office*) faithfully, impartially and according to law. So help me God. (*Omit this line in an affirmation.*)[10]

These duties and oath are analogous to the ones referred to by the British Columbia Court of Appeal as creating a positive duty for police officers in *Nixon*.[11]

The Ontario *PSA* goes further, and makes clear that all officers have "the powers and duties ascribed to a constable at common law".[12] One of those common law duties is arguably to safeguard a prisoner under one's control from being the victim of preventable criminal acts.[13] Accordingly, a

8 (1990), 57 C.C.C. (3d) 97, 78 C.R. (3d) 349, [1990] 6 W.W.R. 253 (B.C. C.A.), leave to appeal refused [1991] 1 S.C.R. xii (note), 60 C.C.C. (3d) vi, [1991] 1 W.W.R. lxxiv (note) (S.C.C.); followed with respect to Ontario correctional officers at the Toronto East Detention Centre in *R. v. Sammy*, 2004 CarswellOnt 638, [2004] O.J. No. 598, 60 W.C.B. (2d) 503 (Ont. C.J.).
9 R.S.O. 1990, c. P.15.
10 O. Reg. 268/10 s. 2.
11 *Nixon*, *supra* note 8 at p. 106 [C.C.C.].
12 *PSA* s. 42(3).
13 *Funk v. Clapp* (1986), 68 D.L.R. (4th) 229, 35 B.C.L.R. (2d) 222, 1986 CarswellBC 120 (B.C. C.A.), referred to in *Nixon*, *supra* note 8 at p. 106 [C.C.C.].

police officer could be found criminally liable for assault as an aider or abettor under s. 21 where he was in a position to have control over the acts of a detainee and failed to prevent the commission of an offence.[14]

Protections Conferred by Criminal Code Section 25

Of course, police officers engage in conduct that would otherwise be considered assaultive every time they are involved in an arrest. Whether or not a struggle ensues, the mere laying on of hands upon an arrestee is a non-consensual touching, which could lead to penal liability, but for the statutory protections provided by the *Code*.[15] As police officers, they receive the protection of *Code* s. 25(1), which reads:

> 25(1) Every one who is required or authorized by law to do anything in the administration or enforcement of law
> (a) as a private person,
> (b) as a peace officer or public officer,
> (c) in aid of a peace officer or public officer, or
> (d) by virtue of his office,
> is, if he acts on reasonable grounds, justified in doing what is required or authorized to do and in using as much force as is necessary for that purpose.

So long as an officer is acting within his scope of authority as defined by statute or common law, he may use as much force as necessary, and be exempted from the traditional criminal law precept that intentional application of force by any means without the other person's consent is *prima facie* unlawful. However, anyone authorized to use force will be held criminally liable for any excessive use of force by virtue of *Code* s. 26.

While many scenarios involving use of force invoke powers of arrest under s. 495 of the *Code*, officers also have common law and provincial powers to, for example, engage in investigative detention including the power to frisk, enter premises without a warrant in certain circumstances, or stop motor vehicles, which bring them into conflict with the public.[16] In a scenario where a person resists a lawful arrest, or interferes with the appropriate use of an officer's common law powers, that individual has committed an indictable offence for which the officer and others coming to his aid are authorized to use as much force as is reasonable and necessary in the circumstances.

14 *Nixon*, *supra* note 8 at p. 114 [C.C.C.].
15 *Code* s. 265.
16 *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, 185 C.C.C. (3d) 308 (S.C.C.), for investigative detention; *R. v. Godoy* (1998), [1999] 1 S.C.R. 311, 131 C.C.C. (3d) 129, 21 C.R. (5th) 205 (S.C.C.), for warrantless entries; s. 216 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, as amended, for duty to stop for police when requested. See also *PSA* s. 42(3) which preserves a police officer's common law powers and duties.

Code s. 25(1) makes it clear that the force used to effect the lawful purpose must be proportionate to the act authorized by law, usually related to an arrest or detention. The power to arrest has both a subjective and an objective component, such that an officer must subjectively believe in a set of facts that would lead an objective viewer to conclude that the suspect has probably committed a criminal offence.[17]

The courts will generously construe the officer's subjectively held belief in a set of circumstances leading to an arrest, even if ultimately judged to be mistaken, due to the sometimes chaotic and dangerous circumstances in which arrests take place. The Supreme of Canada adopted with approval the following statement by Anderson J.A. of the British Columbia Court of Appeal:

> In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should be directed that the appellant could not be expected to measure the force used with exactitude.[18]

Similarly, the courts will permit the use of force under s. 25 during a strip search including the cutting off of undergarments in certain circumstances.[19] So long as the officer has a reasonable basis for his belief that the arrest, the detention or the existence of exigent circumstances during a strip search was appropriate, the ensuing force used will be deemed reasonable. Much like the officer's belief with respect to his or her arrest power, the belief with respect to use of force must be objectively reasonable in the sense that the force used is to be judged on a subjective–objective basis.[20]

An attempt to arrest without legal authority creates an unlawful assault because the officer would not be in the lawful execution of his duties.[21] Further, pursuant to new s. 34 of the *Code*, more fully discussed below, a citizen has the right to resist an unlawful assault within the factors listed in s. 34(2).

With respect to lethal force, *Code* s. 25(3) reads:

> 25(3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause

17 *R. v. Storrey*, [1990] 1 S.C.R. 241, 53 C.C.C. (3d) 316, 75 C.R. (3d) 1 (S.C.C.).
18 *R. v. Bottrell* (1981), 60 C.C.C. (2d) 211, 22 C.R. (3d) 371, 1981 CarswellBC 463 (B.C. C.A.) at p. 218 [C.C.C.], found at *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, 251 C.C.C. (3d) 293 (S.C.C.), at para. 35.
19 *R. v. Desjourdy*, 2013 ONCJ 170, 1 C.R. (7th) 261, 282 C.R.R. (2d) 343 (Ont. C.J.), more fully discussed in Chapter 14, "Models of Civilian Police Review: The Objectives and Mechanisms of Legal and Political Regulation of the Police".
20 *Nasogaluak*, *supra* note 18 at para. 34. See also *Chartier v. Greaves*, [2001] O.T.C. 121, 2001 CarswellOnt 563, [2001] O.J. No. 634 (Ont. S.C.J.), at para. 69.
21 *R. v. Plummer* (2006), 214 C.C.C. (3d) 84, 45 C.R. (6th) 3, 83 O.R. (3d) 528 (Ont. C.A.). See also *R. v. Delong* (1989), 47 C.C.C. (3d) 402, 69 C.R. (3d) 147, 31 O.A.C. 339 (Ont. C.A.), at p. 411 [C.C.C.].

Chapter 11

Litigation as a Vehicle for Police Oversight Reform: A Family Business

Julian N. Falconer and Meaghan Daniel[*]

Introduction

In 1987, the Canadian Federal Minister of Justice commented that "the victim of crime is often a forgotten person in our criminal justice system".[1] Since that time, there has been a growing awareness and recognition of victims' rights within the justice system, including the expansion of compensation and victim-witness programs, social service referral programs, crisis intervention programs, victim advocacy programs and victim-offender mediation programs.

In Ontario, victims of crime and their families have a number of significant statutorily protected rights. Further to the *Victims' Bill of Rights*,[2] amongst others, victims' rights include: the right to be treated with "respect for their personal dignity"; the right to information about the

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1 A. Young, "The Role of the Victim in the Criminal Process: A Literature Review – 1989-1999", Victims of Crime Research Series (Canada Department of Justice, 2001), at p. 1.

2 See: *Victims' Bill of Rights, 1995*, S.O. 1995, c. 6, ss. 1, 2; *Compensation for Victims of Crime Act*, R.S.O. 1990, c. C.24. See also: *Corrections and Conditional Release Act, 1992*, S.O. 1992, c. 20, s. 2(1) (definition of "victim"); *Police Services Act*, R.S.O. 1990, c. P.15, s. 42(1) ("*PSA*") (assisting victims of crime); *Coroners Act*, R.S.O. 1990, c. C.37, s. 41(3) (persons with standing at an inquest); *United Nations Declaration on Basic Principles of Justice for*

progress of investigations that relate to crime; the right to information about charges laid or the reasons why no charges were laid; the right to information about the outcome of all significant proceedings; the right to make representations to the court by way of a victim impact statement; the right to the return of personal property in the custody of the justice system; and the right to compensation where appropriate. The principles of victims' rights address not only the need to ensure that potential victims are protected from harm, but also that they are treated with respect and dignity when the commission of a crime has occurred.

Further, police officers in Ontario have particular statutory duties to victims. The opening "Declaration of Principles" in the *Police Services Act* ("*PSA*") specifically recognizes the "importance of respect for victims of crime and understanding of their needs".[3] "Assistance to victims of crime" is defined as a "core police service".[4] Police chiefs are authorized to disclose information to the public about crime for the purpose of protection of victims of crime.[5] Police officers have a specific statutory duty to "assist victims of crime".[6]

This chapter explores the role of affected parties, including victims, complainants, families and accused persons, but not from the viewpoint of a victim. Rather, this is a story of agency. During the same period of time which saw the growth in victims' rights, police law in Canada underwent a significant reform. Public accountability of police misconduct under statutory law has undergone a number of changes, as the *PSA* has been amended with the function and mandate of the Office of the Independent Police Review Director, the Ontario Civilian Police Commission and the Special Investigations Unit. But in addition to these statutorily established methods of public engagement with police oversight, affected parties have increasingly turned to the common law, which has evolved to include new causes of action in tort, ones which commonly see police actors as defendants.

Tracing the case law from *Odhavji Estate v. Woodhouse* to *Schaeffer v. Wood*, this chapter will outline the various ways police misconduct has been construed as a cause of action, and oversight reform as a remedy.

Victims of Crime and the Abuse of Power, Approved by the UN General Assembly on 29 November 1985 (resolution 40/34), on the recommendation of the Seventh Congress.

3 *PSA* s. 1.

4 *Ibid.* at s. 4(2).

5 *Ibid.* at s. 41(1.2).

6 *Ibid.* at s. 42(1).

Odhavji Estate v. Woodhouse

This chapter begins with the case of *Odhavji Estate v. Woodhouse*,[7] because in many ways, it was the beginning of a longer battle, which passed from family to family, and was conducted in courtrooms, the media, and in the legislatures for the next 16 years.

On September 26, 1997, 22-year-old Manish Odhavji was being pursued by Toronto police officers Woodhouse and Gerrits following a bank robbery. Mr. Odhavji had fled the scene first in a car, and then later on foot. He was unarmed and running when he was shot and killed.

Within 25 minutes, the Special Investigations Unit ("SIU") had been notified, and its investigation began immediately with several requests. It asked that the defendant officers remain segregated, that they be available for same-day interviews, and that they provide their shift notes, on-duty clothing, and blood samples.

Though the officers were under a statutory obligation to cooperate fully with the SIU investigation[8] and though their Chief, David Boothby, was under a statutory obligation to ensure that they did,[9] the officers did not comply with the SIU's requests. Specifically, they did not remain segregated but rather met as a "crew" prior to the interview. They did not attend same-day interviews but rather attended four days later. And they did not provide their shift notes, on-duty clothing, or blood samples in a timely manner. Further, when the officers did provide statements to the SIU, the statements given were alleged to be inaccurate and misleading. When the SIU completed its investigation of the officers, no charges were laid.

Mr. Odhavji's immediate family, and his estate, sued. They claimed damages for the wrongful death of Mr. Odhavji, for the negligent supervision of the Chief, the Toronto Police Services Board ("TPSB"), and the Province, and for the misfeasance in a public office as against the defendant officers and the Chief. In the statement of claim, the plaintiffs pointed to the lack of a thorough investigation into the shooting as a cause of mental distress, anger, depression and anxiety.

At the time, the tort of misfeasance in a public office was not new, but it was far from being in common use. As Erica Chamberlain puts it, misfeasance in public office had suffered "decades of relative obscurity"[10]

7 1998 CarswellOnt 5007, (*sub nom.* Odhavji Estate v. Toronto (Metropolitan) Police Force) [1998] O.J. No. 5426 (Ont. Gen. Div.), reversed in part (2000), (*sub nom.* Odhavji Estate v. Metropolitan Toronto Police Force) 194 D.L.R. (4th) 577, 52 O.R. (3d) 181, 142 O.A.C. 149 (Ont. C.A.), additional reasons 2001 CarswellOnt 476 (Ont. C.A.), reversed in part 2003 SCC 69, [2003] 3 S.C.R. 263, 233 D.L.R. (4th) 193 (S.C.C.).

8 See *PSA* s. 113(9), where members of the force are under a statutory obligation to cooperate with members of the SIU in the conduct of the investigation.

9 Under *PSA* s. 41(1), a chief of police is required to ensure that members of the force carry out their duties in accordance with the provisions of the Act.

before being resurrected in England in the House of Lords case *Three Rivers District Council & Ors v. Bank of England*[11] and then in Canada in the *Odhavji* case.

The fight, in *Odhavji*, was thus over the legitimacy of the claims of negligence and of misfeasance in public office. The defendants brought motions under Rule 21 of the Ontario *Rules of Civil Procedure*[12] to strike out the claims on the grounds that they disclosed no reasonable cause of action, and the courts were asked how the claim of misfeasance could be established.

Justice Day, of the Ontario Court (General Division) concentrated on the issue of malice. According to Day J., misfeasance in a public office required either proof of malice with intent to injure, or proof that the public officer intentionally engaged in acts that were *ultra vires* the scope of his or her office and that s/he could foresee with a degree of certainty that harm would be caused to the plaintiff. Finding that the Chief was not "directly or consciously involved" in the breach of the obligation to cooperate with the SIU investigation, Day J. struck the misfeasance claim as against the Chief as it was plain and obvious malice could not be established, and thus the claim would fail, but allowed the claim as against the defendant officers.

In so ruling, Day J. did not shy away from the narrative underlying the claims. Rather, it was pointed out explicitly that police would feel the impulse to protect their own, out of a sense of loyalty. Allowing the claims against the officers, compliance with the law was held to be paramount:

> I understand fully the tremendous sense of conflict police officers must feel when they are required to provide potential evidence against a fellow officer, but the brutal truth is that police officers have an obligation to uphold the law which must supersede any sense of loyalty they may have to one of their own who may have committed a criminal act.[13]

With regard to negligent supervision, Day J. allowed the claims to proceed, but for the claim as against the Toronto Police Services Board. This claim was struck on the basis that a duty of care is negated where an agency's involvement is limited to establishing policy.

On appeal, Justice Borins for the majority of the Court framed the success of the misfeasance claim as a question of power versus duty. Holding that the defining element of the tort was the unlawful exercise of a power connected to the public office, Borins J.A. found that the failure to carry out

10 Erica Chamberlain, "What is the Role of Misfeasance in a Public Office in Modern Canadian Tort Law?" 88:3 Can. Bar Rev. 579 at p. 580.

11 [2004] EWCA Civ 218, [2004] 3 All E.R. 168, [2004] Q.B. 916 (Eng. C.A.). First arising in 1703, in the case of *Ashby v. White* (1703), 2 Ld. Raym. 938, 92 E.R. 126 (K.B.), rev'd 3 Ld. Raym. 320, 92 E.R. 710 (H.L.), the tort was first recognized in Canada in 1959 with the case of *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689, 1959 CarswellQue 37 (S.C.C.).

12 R.R.O. 1990, Reg. 194.

13 *Odhavji*, *supra* note 7 at para. 36 (Gen. Div.).

a duty could not constitute misfeasance. With regard to negligent supervision, Borins J.A. struck the claim against the TDSB, as again, its involvement was limited to establishing policy, and against the Province as there is no statutory duty on the Province to control or supervise police officers.

Feldman J.A. dissented, finding no reason to distinguish between a power and a duty, and indeed finding and relying on decisions where the public officer had acted in excess of powers.

At the Supreme Court, Feldman's dissenting opinion was upheld. Justice Iacobucci, writing for a unanimous court, turned first to the misfeasance claim. Tracing through the case law a broad range of misconduct that had been found to ground an action for misfeasance, including both acts and omissions, Iacobucci J. set out the two elements of the tort of misfeasance: "First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff."[14]

In the case of *Odhavji*, the statement of claim was found to meet all of the constituent elements of the tort. Alleging that the officers did not cooperate but instead frustrated the SIU investigation, and that the Chief did not ensure cooperation, the plaintiffs had pled unlawful breaches of duties as laid out in the *PSA*.

With the modern recognition of misfeasance, citizens now have a tort specially aimed at accountability. Misfeasance in public office is a tort with the purpose of protecting citizens from intentional injury by public officers in the exercise of public functions: in short, to remedy abuses of public power. It is a tort explicitly creating private law responses to injuries by public officers, but it is also a tort of vindication and public attention as it labels the public officer's actions as an abuse of office.[15] In this way, misfeasance in public office has been said to help fulfill the "ombudsman" function in tort law.[16]

While *Odhavji* was specifically aimed at holding police officers accountable for corrupt practices in relation to the SIU investigation, and to enforce compliance with the *PSA*, it was also about the fact that officials knew of Toronto police officers' routine refusal to cooperate with the SIU and had done nothing about it.[17]

In addition to the misfeasance claim, Iacobucci J. also considered the negligence claim as against the Chief, and it was found that the Chief owed a duty of care the plaintiffs to take reasonable care to prevent or at least

14 *Ibid.* at para. 23 (S.C.C.).

15 Chamberlain, *supra* note 10 at p. 580.

16 *Ibid.* at p. 581.

17 Thomas Claridge, "Ministry named in suit over shooting", *Globe and Mail*, August 8, 1988, p. A10.

discourage police misconduct. Despite the existence of statutory obligations intended to ensure the same, Iacobucci J. found that this statutory duty aided in proving a duty of care existed, rather than displacing the role of private law.

One problem with declaring the *Odhavji* case a victory is that six years after Manish Odhavji lost his life, what had been won was simply the right to sue. Caught in the morass of a Rule 21 motion, a motion that was fought all of the way to the Supreme Court of Canada, this case established that tort could be a vehicle for enforcing compliance with police accountability mechanisms but the ultimate issues were settled out of court.

It should also be noted that this case had effects outside of the courtroom. Before the case reached the Supreme Court but after it had been the subject of some discussion in the media, new regulations were enacted. On January 1, 1999, Ontario Regulations 673/98 and 674/98 came into force, which for the first time set out the conduct and duties of police officers involved in SIU investigations, more fully discussed in Chapter 6, "Development of Civilian Oversight in Ontario". In the Honourable George Adams' "Review Report on the Special Investigations Unit Reforms" prepared for the Attorney General of Ontario, he noted with regard to this change in the regulation:

> The full extent of the "duty to cooperate" has sometimes become an issue. For example, there has been debate between several police services and the SIU on a requirement to furnish police equipment and other physical items of relevance to the SIU for its investigation when these items are within the police service's custody and control. Similarly, the production of certain police documents with or without a search warrant has been debated on the basis of relevance and privacy issues. These documents and records include personnel files, public complaint files, discipline files and the photographs and fingerprints of officers. I am unwilling to be drawn into theoretical and complex differences lacking the discipline of a concrete set of facts and the legal presentations of talented lawyers. I also see nothing that well meaning parties cannot overcome through their own efforts and this has been happening at the working level. All parties, including the SIU, must be sensitive to problems which can only delay and compromise the integrity of the SIU's investigation. Complex constitutional litigation is not in the interest of anyone.[18]

But complex litigation *was* in the interest of the Odhavji family, and was taken forward in the public's interest. It is important to restate that these duties were owed to the family, and to the victim, of police misconduct. For a period of time thereafter, it was believed that the recognition of the duty of care to victims of negligent supervision in *Odhavji* had opened the

[18] The Honourable George W. Adams, Q.C., "Review Report on the Special Investigations Unit Reforms", prepared for the Attorney General of Ontario (February 26, 2003), at pp. 25-26, online at: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/adams/adamsreport.pdf>.

door to a duty of care owed to victims of negligent investigation. To consider the tort of negligent investigation and its potential, one must start with the case of *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*.[19]

Hill v. Hamilton-Wentworth Regional Police Services Board

Jason George Hill was investigated, tried, wrongfully convicted, jailed and finally acquitted in connection to a series of robberies: the "plastic bag" robberies.

The plastic bag robberies were 10 robberies committed in Hamilton over the course of approximately six weeks in the winter of 1995. They were named quite literally for the fact that the robber carried the loot away in a large plastic bag.

The evidence against Mr. Hill consisted of a Crime Stoppers tip, eyewitness identifications (in the words of the Supreme Court, "some tentative, others more solid"),[20] a potential sighting of Mr. Hill near the site of the robbery by the police officer, and eyewitness evidence that the robber was Aboriginal, a description which would fit Mr. Hill.

The police conducted a photo line-up of Mr. Hill and 11 Caucasian men, placed Mr. Hill under arrest and proceeded with the charges despite certain exculpatory evidence, including: two Crime Stoppers tips, subsequent similar robberies conducted by a similar-looking robber which occurred while Mr. Hill was in custody, and evidence that another suspect, implicated by the two Crime Stoppers tips, looked very much like Hill and even more like the photos from the first robberies.

Though most of the charges were dropped (and some laid against the other suspect), the Crown proceeded to trial on a single charge and Hill was found guilty. He appealed, won a new trial, and was ultimately acquitted of all charges of robbery.

Hill sued. He brought actions against the Hamilton-Wentworth Regional Police Services Board, and a number of individual officers, as well as the Crown prosecutors involved in his trial. The actions against all but the Police Services Board were discontinued before trial, but he pursued in his claims of negligence, malicious prosecution and breach of rights under the *Canadian Charter of Rights and Freedoms*.[21]

The negligence claim ended up making headlines. Hill appealed the issue of the negligent investigation up to the Supreme Court of Canada, while the Police Services Board cross-appealed, arguing that there is no tort of negligent investigation in Canadian law.

[19] 2007 SCC 41, [2007] 3 S.C.R. 129, 50 C.R. (6th) 279 (S.C.C.).

[20] *Ibid.* at para. 6.

[21] Part I of the *Constitution Act, 1982* being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.