

# Models of Civilian Police Review: The Objectives and Mechanisms of Legal and Political Regulation of the Police

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## I. Introduction

Civilian oversight of the police is a critical topic in any democracy. A democracy that does not hold its police accountable can become a police state in which those entrusted with the state's most coercive powers can defy the rule of law with impunity. At the same time, democracies can legitimately expect that the police perform to higher standards than not committing criminal or regulatory offences or even actionable civil wrongs such as torts or delicts.

Elected representatives should be able to establish a policy framework for "democratic policing".<sup>1</sup> The democratic regulation of the police, however, raises some concerns about improper political direction of the police that could also result in a police state in which the police are used to hurt enemies and help friends. The democratic regulation of the police also depends on the health of our democracy. There is a general malaise with many people being alienated from politics and not even bothering to vote. At the same time, there is also

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1. I have previously argued that this was the preferable model for police-government relations. See Kent Roach, "Four Models of Police-Government Relations" in Margaret Beare and Tonita Murray eds., *Police and Government Relations: Who's Calling the Shots?* (Toronto: University of Toronto Press, 1997). For endorsement of this approach see Report of the Ipperwash Inquiry (Toronto: Queens Park, 2007) ch. 12. For an account that suggests that politicians have not been eager to accept their democratic responsibilities for policing see Andrew Sancton "'Democratic Policing': Lessons from Ipperwash and Caledonia" (2012), 55 *Canadian Public Administration* 365.

increased polarization in politics with determined activists taking adversarial and aggressive positions.

Despite its manifest importance, civilian oversight of the police is remarkably under-theorized. Basic questions about the objectives of oversight and the fit between these objectives and the range of oversight mechanisms are often not addressed. Assumptions and slogans about maintaining the confidence of “the public” and the need for “independent” review are used without critical analysis. Emphasis is placed on “civilian” review without differentiating between the different types and talents of “civilians” who are outside police forces. This article aims to ask more critical questions about the objectives of civilian oversight of the police and the fit between these objectives and the variety of civilian oversight mechanisms.

In Canada and elsewhere, there has been an increased emphasis on independent investigations of alleged police misconduct. The injection of independence and the avoidance of the “police policing the police” have often been seen as an unqualified good. Not enough attention, however, has been paid to the connections between independent review and the enforcement of legal limits on the police especially the difficulties of establishing that the police have engaged in criminal offences. Similarly not enough attention has been paid to the limits of retrospective remedies for proven police misconduct in preventing police misconduct in the future. Much of the contemporary debate about civilian oversight of the police discounts the importance of *ex ante* political and policy direction to the police and its potential to prevent at least some police misconduct before it happens.

Policing costs in Canada have grown considerably, but so far Canadian police forces have largely escaped the dramatic budget cuts that have affected policing in the United States or the United Kingdom. In the not so distant future, Canadians may ask themselves whether they are getting the best return possible for the over \$12 billion that is spent on public policing each year. The answer to these questions are not likely to be found in the growing number of independent investigation units that investigate possible police misconduct in deaths and serious injuries or even the array of police complaints mechanisms. These questions will require Canadians to ask who is democratically responsible for policing policies and costs.

A recent report by Justice John Morden in the wake of over 1000 arrests at the 2010 G20 demonstration in Toronto has revealed in unequivocal terms the democratic deficit that besets policing.<sup>2</sup> Justice Morden found that the Toronto Police Services Board failed to

exercise its legitimate democratic responsibilities and powers in providing policy guidance to the Toronto police. The seven person Board composed of appointees by the province, Toronto City Council and the Mayor of Toronto had essentially ceded responsibility to the police.

Morden's findings were made in the context of a policing crisis — the largest mass arrests in Canadian history. Issues of civilian oversight of the police generally arise in crises such as police shootings. They have understandably attracted regulatory responses that increasingly focus on deaths and serious injuries caused by the police. An interesting feature of Justice Morden's important report, however, is that it also addressed a democratic deficit with respect to a broad range of policing policies. These policies include training, deployment of the police, police practices such as police stop policies, their use of strip searches, police use of equipment including weapons and conditions in facilities for police custody. Improvements in training and policy reforms in all of these areas have the potential to prevent or minimize misconduct, including those that result in deaths or serious injuries.<sup>3</sup>

In my view, not enough emphasis is placed today on legitimate democratic control of the police through police commissions or Ministerial responsibility. How many Canadians know even one person who sits on their local police commission or police services board?<sup>4</sup> How can the Minister of Public Safety be held responsible for the RCMP and the over 20,000 police officers it employs? The Brown commission on the RCMP recommended the creation of a type of police commission for the RCMP in the form of a 12 person board of management appointed by the federal government,<sup>5</sup> but the recommendation went nowhere. It was not even championed by federal opposition parties when the federal government enacted

2. Hon. John Morden, "Independent Civilian Review into Matters Relating to the G20 Summit" June 2012.

3. For example, deaths and injuries in police custody constituted 252 of 372 serious injuries and deaths investigated by the SIU in Ontario in 2012-13. See SIU Annual Report 2012-2013, at p. 18 available at: <[http://www.siu.on.ca/pdfs/ar\\_2012\\_13\\_\\_english\\_\\_accessible.pdf](http://www.siu.on.ca/pdfs/ar_2012_13__english__accessible.pdf)>.

4. The Toronto Police Service Board is the only board with a full time head, Alok Mukherjee who receives a annual salary of just under \$91,000 unchanged since 1987. The part time provincial appointees are paid under \$9000 a year, unchanged since 1993 and the City Councillors on the board are not paid. See "Board Members" at <[http://www.tpsb.ca/V/Board\\_Members/](http://www.tpsb.ca/V/Board_Members/)>.

5. Rebuilding the Trust: Task Force on Governance and Culture Change In the RCMP December 2007 available at <[http://www.publicsafety.gc.ca/cnt/cntrng-crm/tsk-frc-rcmp-grc/\\_fl/archive-tsk-frc-rpt-eng.pdf](http://www.publicsafety.gc.ca/cnt/cntrng-crm/tsk-frc-rcmp-grc/_fl/archive-tsk-frc-rpt-eng.pdf)>, at pp. 6-7.

major reforms that focused on independent police complaints mechanisms and investigations of serious incidents involving the police.<sup>6</sup> The Ipperwash Inquiry in Ontario rejected calls for a police services board for the OPP. Nevertheless, it called for a “closer relationship between the government and the OPP rather than a more distant one”,<sup>7</sup> albeit one based on more transparency in the form of public and written Ministerial directives and proper respect for the police’s law enforcement discretion. Nevertheless, even these recommendations were not acted upon. Moreover, the responsible Minister has subsequently sought to avoid political responsibility for controversial policing of Aboriginal protests in Caledonia. Apparently, the Minister has issued no directives to the OPP despite the Ipperwash Inquiry’s explicit criticism of such a “hands off” approach.<sup>8</sup> The “governance deficit” that affects the private police<sup>9</sup> also affects the public police despite the existence of democratic governance structures.

The lack of engagement with democratic control and responsibility of the police reflects a deeper malaise about the state of democracy. Many people do not bother to vote, especially at the municipal level which pays for most policing. Ministerial responsibility and accountability has become something of a joke with Ministers often being confined to talking points that amount to little more than slogans. Politicians are held in low repute particularly at the municipal level where Mayor Rob Ford has made Toronto an international punch-line and where an ongoing inquiry in Québec is revealing much corruption. Even if police boards and Ministers became more active with respect to policing issues, there is a concern about what would be achieved. There is a danger that the increasing polarization of Canadian politics and the media would only produce the perception and perhaps the reality of “pro-police” and “anti-police” camps.<sup>10</sup>

The neglect of democratic control of the police does not, however,

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6. *Enhancing RCMP Accountability Act*, S.C. 2013, c. 18.

7. Report of the Ipperwash Inquiry, Vol. 2 (Toronto: Queens Park, 2007), at p. 352.

8. Report of the Ipperwash Inquiry, *ibid.*, at p. 353; Andrew Sancton, “‘Democratic Policing’: Lessons from Ipperwash and Caledonia”, *supra*, footnote 1, at p. 380.

9. Scott Burbidge “The governance deficit: Reflections on the future of public and private policing in Canada” (2005), 47 *Canadian Journal of Criminology and Criminal Justice* 63.

10. The disputes between the Ford brothers and Chief Blair underline the unpredictability of polarized politics, but they also underline how politics are increasingly adversarial and often personal.

mean that Canadians do not care about policing or possible abuses by the police. It means that more and more emphasis is placed on the legal control of the police. Legal control, however, occurs after the event when a complaint is made against a police officer or when they are investigated and perhaps charged with a regulatory or a criminal offence. Legal controls involve lawyers. Lawyers are adversarial. It should not be surprising that attempts to impose legal controls often result in an adversarial relationship between the police and the civilian bodies that are designed to conduct oversight.

In the absence of faith in democracy, Canadians are increasingly turning to the courts or quasi-judicial public inquiries or their somewhat less expensive alternatives, administrative tribunals and bodies. Police shootings in a number of provinces have led to the creation of civilian or quasi-civilian investigative units such as Ontario's Special Investigations Unit (SIU) that are designed to ensure that the rule of law is applied and perceived to apply impartially to all. The SIU has been criticized by the Ontario Ombudsperson for not being independent enough.<sup>11</sup> Nevertheless, there is a danger that independence will be viewed as an often illusive end in itself. The Supreme Court has recently endorsed the importance of the SIU as a means to secure public confidence in the police,<sup>12</sup> but even at its best, the SIU can only lay criminal charges that allege police officers have committed assaults, sexual assaults, manslaughter, murders or other criminal offences. These are the most minimal standards that we can expect of the police. The criminal process with its emphasis on proof of guilt beyond a reasonable doubt is an extremely blunt instrument to assert civilian oversight of the police. In most cases, criminal charges against the police have resulted in acquittals. Yet much of the current momentum in Canada is towards importing the Ontario SIU model to other provinces.

If the criminal process is too demanding and imposes only minimal standards, what about less demanding processes of civilian oversight? The Canadian courts have been particularly active in the last decade or so. An aggrieved citizen can now sue the police for negligent investigation, abuse of public office and for *Charter* damages. These causes of actions have potential, but they are almost as demanding as criminal prosecutions. They may result in minimal damages that do not justify the extremely high costs of litigation

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11. Ontario Ombudsman, *Oversight Unseen: Investigation into the Special Investigations Unit's operational effectiveness and credibility* (September 2008); Ontario Ombudsman, *Oversight Undermined* (December 2011).

12. *Schaeffer v. Wood*, 2013 SCC 71, 2013 CarswellOnt 17584, 2013 CarswellOnt 17585 (S.C.C.).

against an aggressive and well-resourced adversary, as the police generally are. As Ian Scott has pointed out, regulatory *Police Act* charges against the police may often be a more realistic instrument than criminal prosecutions.<sup>13</sup> At the same time, however, these regulatory charges often focus on misconduct. They are also tied up in matters such as the Police Chief's assertions of disciplinary prerogatives and push back from police unions and associations.

Another alternative is complaints against the police that are not necessarily tied to allegations of criminal or regulatory offences or civil wrongs. There is a wide array of complaints mechanisms in Canada that reflect the Canadian federal reality. Unfortunately, not much research has emerged from this natural experiment of diversity. Basic questions about why a person would complain against the police, police responses to founded complaints and complainant satisfaction are barely asked let alone answered.<sup>14</sup> More work needs to be done on the optimal allocation of resources between the handling of complaints and systemic reviews or audits of problematic areas of police conduct. More work also needs to be done on the optimal allocation of external "command and control" style regulation and regulation that encourages the police to use their own resources for reform matters.

The academic literature on civilian oversight of the police is surprisingly thin given the importance of the topic. This is especially true in Canada. There is a need for an interdisciplinary approach that employs the insights of lawyers, social scientists and management specialists. The focus in Canada has been almost entirely on ways to test and ensure the propriety of police conduct. Driven by the media including real-time social media, policing shootings and events like the G20 will remain a constant and may continue to drive the oversight debate.

There is no shortage of civilian oversight review mechanisms focused on propriety. The G20 arrests resulted in a broad array of oversight mechanisms including reports by both provincial and federal police complaints bodies, independent reviews appointed by the Toronto Police Service Board, reports by the Ontario government, criminal prosecutions, regulatory offence prosecutions and civil lawsuits. Police shootings in Toronto have

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13. Ian D. Scott, "Addressing Police Excessive Use of Force: A Proposal to Amend the Mandate of the Special Investigations Unit" (2004), 49 C.L.Q. 351.

14. For one now dated exception see Tammy Landau, *Public Complaints Against the Police: A View from the Complainants* (Toronto: Centre of Criminology, University of Toronto, 1994).

similarly triggered criminal prosecutions, coroner's inquests, civil lawsuits and ongoing systemic reviews by both the Independent Police Review Director and by the Toronto police service. There is a danger that propriety review is being diluted by its fragmented nature including the possibility of inconsistent findings and approaches to propriety based questions.<sup>15</sup> A thousand flowers may be blooming, but a stinking rose in the field can easily be ignored. Multiple reviews also fuel police concerns that they are subject to too much duplicative review and may eventually fuel backlashes against civilian review.

In contrast to the multiple mechanisms of propriety review, efficacy review remains nascent and non-existent compared to propriety-based review. A downturn in the economy and declining public trust and deference to the police may also place questions of efficacy and cost effectiveness more squarely on the Canadian public agenda.

This article is intended to be a preliminary and conceptual overview of the different objectives and mechanisms of civilian oversight of the police. The first part will examine some of the different objectives of civilian oversight of the police while the second part will examine the range of mechanisms that can be used to achieve these objectives. My ambition is to provide a glimpse of the bigger picture of civilian oversight and to provide some analytical categories to guide and expand discussion of the important but too often neglected topic of civilian oversight of the police.

## II. The Objectives of Civilian Oversight

Nietzsche said the most common form of stupidity is to forget one's purposes. Much of the available literature on civilian oversight is long on institutional design and detail and short on analysis of the objectives of review. Philip Stenning made this point in concluding that "one of the great weaknesses of a great deal of the literature on police complaints processes is that the authors frequently do not clearly spell out precisely what it is they think such processes should accomplish."<sup>16</sup> Professor Stenning's insight made over 14 years ago

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15. For arguments that accountability gaps still remained despite the many reviews arising out of the G20 arrests see Kent Roach, "Post 9/11 policing of protests: Symbolic but illusory law reform and real accountability gaps" in Margaret Beare and Natalie Des Rosiers eds. *The State on Trial: G20 and the Policing of Protest* (Vancouver: University of British Columbia Press, forthcoming, ch. 3).

16. Philip Stenning, "Evaluating Police Complaints Legislation: A Suggested Framework" in Andrew Goldsmith and Colleen Lewis eds., *Civilian Oversight of the Policing* (Oxford: Hart Publishing, 2000), at p. 162.

remains true today. Moreover, it could be applied to other forms of civilian oversight including political oversight of the police and investigations of serious injuries and deaths caused by the police.

There is a particular danger that review in Canada has focused almost exclusively on the propriety of police behavior including its legality and little on the efficacy of police behavior including its cost effectiveness. The focus on propriety review has also led to an emphasis on the independent status of the body conducting the oversight or review and on whether the police conduct is legal or not. To be sure, there are dangers in terms of real and perceived conflicts of interests in the police policing the police and it remains very important that the police are subject to the rule of law. Nevertheless there is a danger that independence may be an unattainable ideal and push review mechanisms towards the most independent institutions in our democracy: the judiciary.

Judicial oversight is necessary to maintain the rule of law. Justice Moldaver eloquently affirmed the importance of the rule of law in his majority judgment prohibiting witness officers from consulting with a lawyer when preparing notes for the SIU when he stated “No one is above the law. When a member of the community is killed or seriously injured by a police officer, it is not only appropriate to ask whether the police were acting lawfully, it is essential. To that end, the SIU plays a vital role in ensuring that our society remains fair and just and that everyone is treated equally before and under the law.”<sup>17</sup> At the same time, the entire Court accepted that under the regulations, the subject officers would be entitled to the right to counsel before being interviewed by the SIU.<sup>18</sup> The Supreme Court’s decision may be a pyrrhic victory if all that is achieved is more accurate notes but with little co-operation from the police after that very preliminary stage of the SIU’s criminal investigation.

Police officers are of course entitled to the same *Charter* and reasonable doubt protections as all suspects and all accused persons. That is as much part of the rule of law as their being bound by the criminal law. Nevertheless the focus on SIU-type investigations disregards that the public can rightly demand more from the police than their notes and conduct that is not criminal. The episodic and fault-based review by courts or quasi-judicial institutions — as important as they may be in protecting the rule of law — should not exhaust the review process. Such a legalistic approach will discount the importance of elected representatives and ultimately the public

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17. *Schaeffer v. Wood*, *supra*, footnote 12, at para. 3.

18. *Ibid.*, at para. 87.

being able to hold the police accountable for their performance and policies.

### **The Balance between Review for Propriety and Efficacy**

The focus on review and oversight of the propriety and legality of police conduct as opposed to its efficacy or effectiveness is understandable given the coercive powers of the police and the importance of ensuring that they respect the rule of law. Complaints and perceptions of police impropriety also have the potential to undermine public confidence in and co-operation with the police. That said, public policing costs the Canadian taxpayer over \$12 billion in 2012 and we cannot ignore questions of whether taxpayers are getting optimal value for their money. A closely related issue is whether taxpayers through their elected representatives are appropriately taking responsibility for policing policies and outcomes.

The most basic form of propriety is to ensure that the police do not engage in criminal conduct and if they do that the law is impartially applied to them. An alternative standard is whether the police conduct violates codes of conducts or regulatory offences under Police Acts. Other forms of propriety focus on whether police conduct violates the *Charter of Rights and Freedoms* or are actionable civil wrongs. Although legality is an important component of propriety, it should not exhaust propriety review. In other words, conduct that is not clearly illegal may still be improper.

A related question is whether the propriety of police conduct should be mainly determined in adversarial and legalistic forums. Much of the focus has been on whether sanctions should be applied against the police. Not enough attention has been paid to the issue of rewards.<sup>19</sup> One important exception which demonstrates how rewards and sanctions can be linked is the decision of the Toronto Police Service to deny promotions to a few officers disciplined in connection with the G20 events.

More work needs to be done on developing standards of efficacy. There is a need to articulate what we expect from the police. One measure is law enforcement outcomes such as clearance and conviction rates. This is a relatively crude measure of effectiveness. At the same time, more attention should be paid to how many police charges are resulting in convictions and whether there is police overcharging especially in jurisdictions that do not require Crown

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19. See generally, M.L. Friedland eds., "Sanctions and Rewards in the Legal System" (Toronto: University of Toronto Press, 1989).

pre-approval. Another measure of efficacy is how the police perform in emergencies and how they respond to traffic issues. The police are one of the few public services providers left after decades of cuts to the public sector and we need to know about the various jobs that they are being asked to do and how well they perform these tasks. We also need to evaluate how police interact with other security providers including private police (who now outnumber the public police) and corporations who play an important role in regulating the real and virtual environment in which crime takes place. More attention needs to be paid to the optimal division of responsibilities between the public police and others security providers including the private police. There needs to be political debates about how the police should spend limited resources. Police officers are well-paid professionals who in Canada generally make over \$100,000 a year. Like other professionals, they should be subject to professional standards and expectations well above the standards of not committing offences or actionable wrongs. Although the police should not be an entirely self-regulating profession, they should be subject to the same type of professional licensing requirements as teachers, nurses, doctors and lawyers including professional discipline and professional educational requirements.

Questions of propriety and efficacy can be intertwined. The proactive carding policy used by the Toronto police has been a matter of considerable controversy with concerns being raised about the disproportionate carding of African-Canadian men. There has been some speculation that declines in carding following changes to police practice has also contributed to declines in criminal and especially youth criminal justice cases in Toronto.<sup>20</sup> More research is required but this suggests that some propriety driven reforms may also have an impact on the cost effectiveness of both policing and prosecutions.

### **The Balance between Democratic Oversight by Elected Officials and Legal Oversight by Independent Bodies**

A question closely related to the propriety/efficacy issue is whether review and oversight of the police is designed to ensure that the police respect legal standards or to ensure political control. Review for observance of legal standards may gravitate towards oversight by bodies that are independent from the police and the government. The gold standard of independence is the judiciary which enjoys constitutional guarantees of independence. This may be a somewhat unattainable ideal for police complaints bodies and

20. "Criminal cases drop sharply across T.O.", *Toronto Star*, March 8, 2014.

special investigation units. At best, they can be made independent officers of the Legislature and cannot be placed within the judiciary.

The focus today is often on whether the police have acted legally in the sense of not engaging in criminal or regulatory offences or committing actionable civil wrongs. Not so long ago, however, there was less concern about legality and more about propriety. In May 1974, the Niagara police conducted a raid on the Landmark Hotel in Fort Erie. Under the broad powers given to them at the time under both warrants and writs of assistance, they strip searched many of the patrons, including 36 women. No drugs were discovered as a result of these invasive searches. The Ontario government appointed a public inquiry in response to the public controversy. Justice Pringle was the commissioner and he concluded that under the law of the day, all the searches were conducted “lawfully” and in “good faith”. Such conclusions would be different today. Nevertheless, a conclusion that the police actions were legal and in good faith would still stop a prosecution or a civil suit today. It did not in the 1975 Fort Erie public inquiry report because Justice Pringle found that while the strip searches were lawful, they were also “foolish” and “unnecessary” and should not be repeated.<sup>21</sup> In other words, concerns about the propriety of police conduct were not limited to questions of legality. The Fort Erie inquiry ultimately played an important role both in the development of civilian complaints mechanisms in Ontario and in the entrenchment of rights against unreasonable searches and seizures and arbitrary detention and imprisonment in the Charter.<sup>22</sup>

Oversight for democratic purposes is designed not so much to ensure fair and impartial application of existing standards of propriety, but to create standards and impose democratic expectations on the police. In Canada we have been cautious to mediate the involvement of elected politicians in policing often through the creation of police commissions or police services boards composed of members appointed by politicians with often a minority of directly elected municipal officer holders. Ministerial accountability with respect to the RCMP and provincial police forces remains somewhat murky. Both the O’Connor Commission on Maher Arar and the Ipperwash Inquiry encouraged Ministers to take greater responsibility for sensitive policy matters by issuing directives. The Ipperwash Inquiry recommended legislative

21. Hon. John Pringle, “The Royal Commission on the Conduct of Police Forces at Fort Erie on the 11th of May, 1974” (January, 1975), at pp. 64-69.

22. Dominique Clement, *Canada’s Right Revolution* (Vancouver: University of British Columbia Press, 2008), ch. 7; Kent Roach, *Due Process and Victims’ Rights* (Toronto: University of Toronto Press, 1999), ch. 2.

amendments that would make Ministerial directives more transparent through a system of publication. The Ontario legislature has not acted on this recommendation and Professor Sancton has reported no Ministerial directives have even been issued to the OPP since the 2007 Ipperwash Inquiry report.<sup>23</sup> The findings of the Ipperwash Inquiry as well as political science work on trends to “governing from the centre”<sup>24</sup> suggest that the traditional model of Ministerial accountability is challenged by increased centralized control within government especially in crises and on matters such as national security.

### **Where Oversight May Not Be Appropriate: The Limited and Legitimate Scope of Police Independence**

One possible restraint on increased democratic oversight of the police are concerns that politicians or their appointees might interfere with police independence. Much work has been done on police independence in Canada over the last decade. The Ipperwash Inquiry explored the subject in some depth in response to allegations of improper political interference with respect to the police response to the Aboriginal occupation of Ipperwash provincial park. The issue was also explored by the O’Connor Commission into Maher Arar and the Air India commission. The Supreme Court of Canada also considered police independence in *R. v. Shirose*.<sup>25</sup> Although there have been legitimate concerns about overinflated claims of police independence that would inhibit legitimate democratic oversight, there is a developing consensus in Canada that police independence is limited to the exercise of law enforcement discretion with respect to investigations and charges. There may also be some legitimate claims of police independence with respect to specific operational decisions,<sup>26</sup> but there is no police independence from political direction on the policy that should govern operational matters. The

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23. Andrew Sancton, “Democratic Policing’: Lessons from Ipperwash and Caledonia”, *supra*, footnote 1, at p. 380.

24. Donald Savoie, *Governing from the Centre* (Toronto: University of Toronto Press, 1999).

25. (1999), 133 C.C.C. (3d) 257, (*sub nom.* *R. v. Campbell*) [1999] 1 S.C.R. 565, 24 C.R. (5th) 365 (S.C.C.).

26. Section 31(4) of the Ontario *Police Services Act*, R.S.O. c. P-15, provides that “the board shall not direct the chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police.” Section 17(2) of the Act provides: “Subject to the Solicitor General’s direction, the Commissioner has the general control and administration of the Ontario Provincial Police and the employees connected with it.”

Ipperwash Inquiry was at pains to point out the legitimacy of democratic input on the policy framework that surround police operations.<sup>27</sup> Unfortunately, there is a continued tendency for responsible Ministers and police service boards to hide behind inflated and inaccurate claims of police independence over all operational matters.<sup>28</sup> This political timidity reflects more a general malaise about democracy and politics in Canada than uncertainty about the ambit of police independence.

### **The Balance between Independent Review and Self-Regulation**

The focus on independent review of the police is understandable given the coercive power of the police and the need to enforce the rule of law, but it runs the risk of dismissing the strengths of self-regulation. John Braithwaite's work on "responsive regulation" is relevant to the proper balance between independent review of the police and self-regulation.<sup>29</sup> Braithwaite is a world famous criminologist from Australia who wrote his first book on coal mining safety. He admits in the preface of the book, that as a person who grew up in a coal mining town and who had lost "mates" to coal mining disasters, he started his project inclined to a punitive approach that would impose regulatory and even criminal sanctions. After his research including extensive ride alongs with coal mine safety inspectors were complete, however, Braithwaite concluded that a gentler collaborative approach was actually best suited in most cases to ensure coal mining safety.<sup>30</sup> He has subsequently refined and

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27. Justice Linden stated: "I agree that the provincial government should have the authority to establish a "policy of operations" for the OPP and other police services in Ontario. I believe that this is a legitimate and beneficial exercise of the policy-making function of the provincial government, as the McDonald and Arar commissions also concluded": Report of the Ipperwash Inquiry (Toronto: Queens Park), vol. 2, at p. 330.

28. Andrew Sancton, "'Democratic Policing': Lessons from Ipperwash and Caledonia", *supra*, footnote 1. The Ipperwash Inquiry was also aware of this problem of political "shirking" and to counteract it stressed the co-existence of police operational responsibility with Ministerial responsibility. It explained that "ministerial policy responsibility" confronts and (it is to be hoped) discourages abdication or shirking of appropriate oversight and policy responsibilities by ministers or the government. Government and ministerial shirking is a serious risk in police/government relations. I wholeheartedly agree with the late Professor John Edwards that "undue restraint on the part of the responsible Minister in seeking information as to police methods and procedures can be as much as a fault as undue interference in the work." Report of the Ipperwash Inquiry, *ibid.*, at p. 337.

29. John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002).

developed these insights into a regulatory pyramid in which attempts to persuade and encourage compliance are the front line intervention with more punitive approaches being reserved only for those who demonstrate that they are unwilling or unable to comply.<sup>31</sup>

Any attempt to apply these insights to policing will require due allowance for the unique nature and culture of police work. Nevertheless most resources in Canada have been directed at the adversarial and punitive responses that Braithwaite would reserve for the top of the regulatory pyramid. To be sure, police resistance to regulation might justify harsher and more punitive approaches, but it is not clear that softer approaches that allow the police to engage in self-regulation have always been given an adequate chance. The current Police Ombudsman for Northern Ireland has warned that “oversight systems in some cases cause police to abdicate their own responsibility to self-regulate conduct and maintain public trust and confidence.”<sup>32</sup>

Although the need for independent examination of police conduct has considerable appeal, difficult questions must be asked about the consequences of having independence and the practical difficulties of making any complaints or review mechanism completely independent. The case for independent investigations of alleged misconduct was recently put in strong terms by Justice Braidwood in his inquiry report on the death of Robert Dziekanski. Relying in part by statements by the RCMP officer in charge of the investigation that “we shouldn’t be doing this. Time for an SIU in this province. We can’t win this one”, Justice Braidwood stressed that when the police investigate themselves, there are “legitimate concerns about conflict of interest. Many members of the public perceive that the investigators may allow loyalty to fellow officers to interfere with the impartial investigative process. This perception, even if not true in a given case, can lead to public distrust and an undermining of public confidence in the police.”<sup>33</sup> He also stressed that municipal police and the RCMP had both recently committed themselves to external forms

30. John Braithwaite, *To Punish or Persuade Enforcement of Coal Mining Safety* (New York: SUNY Press, 1985).

31. John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002).

32. As quoted in David MacAlister, ‘Policing the Police in Canada: Alternative Approaches to the Investigation of Serious Wrongdoing’, in David MacAlister (ed.) *Police Involved Deaths – The Need for Reform* (Vancouver: British Columbia Civil Liberties Association, 2012), at p. 215.

33. *Why? The Robert Dziekanski Tragedy*, Phase 2 report, May 20, 2010, at p. 411, available at <[http://www.braidwoodinquiry.ca/report/P2\\_html/00-TitlePage.php](http://www.braidwoodinquiry.ca/report/P2_html/00-TitlePage.php)>.

of criminal investigation of the police so that “the debate is no longer whether British Columbians should have a civilian-based investigative body, but what it should look like.”<sup>34</sup> Justice Braidwood affirmed the need for independent civilian investigation with the power to recommend prosecutions to Crown prosecutors in cases of death and serious injury. He stressed that the new body should not use seconded police officers if it were “to address the public’s distrust of the police investigating themselves.”<sup>35</sup> He proposed a five year period to move towards a completely civilian Independent Investigation Office model but during that five years he contemplated that former police officers could be a minority of investigators provided that they never investigate their former force. He rejected the idea that the civilian body should be able to lay charges itself as is done in Ontario as inconsistent with BC’s tradition of pre-charge Crown approval of charges. Nevertheless in order to deal with perceptions of conflict of interest within the Attorney General’s criminal justice branch, he recommended that a special prosecutor should decide whether to proceed with charges in every case investigated by the independent civilian body.<sup>36</sup> These proposals represent a Cadillac model of independence largely driven by concerns that the public does not trust the police to investigate themselves.

Independent review may be necessary but it often comes with the high cost of police resistance that might even adversely affect other forms of civilian and political oversight. Andre Marin, a former director of Ontario’s SIU, has written of “the entrenched and often instinctive rejection by those in policing of any form of independent civilian oversight” which produces a “blue wall of resistance” that is manifested “in many ways, from subtle passive non-compliance to outright refusal to co-operate.”<sup>37</sup> Police resistance to the SIU has ranged from disagreements over the SIU’s mandate, delays and failures in notifying the SIU, and non-co-operation including have the same police association lawyer provide services to witness and subject officers. Marin also claims that police resistance had produced a “passive approach” within the SIU so that it “had adopted a spirit of compromise, conciliation and consensus in its

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34. *Ibid.*, at p. 413.

35. *Ibid.*, at p. 419.

36. *Ibid.*, at p. 421.

37. Andre Marin, “The Ontario Special Investigations Unit: Securing Independence and Impartiality” in David MacAlister (ed.) *Police Involved Deaths – The Need for Reform* (Vancouver: British Columbia Civil Liberties Association, 2012), at p. 102.

dealing with the police.”<sup>38</sup> He also expressed concerns about delayed interviews of officers, often designed to fit the schedules of the officers or their legal counsel. He concluded that tension between independent investigators and the police “is inevitable and to a certain degree it is actually healthy” but warned that the independent SIU “will continue to struggle to carry out its mandate against some of the most powerful interests in our society, police and their associations.”<sup>39</sup>

In a 2008 report, Marin acting as the Ontario Ombudsman criticized the SIU for not being independent or transparent enough. He detailed many problems of lack of police co-operation with SIU investigations.<sup>40</sup> In a 2011 follow up, Marin found that while the SIU has responded to many of the 2008 recommendations to ensure its independence and effectiveness, the SIU itself was not sufficiently independent of the government. For example, the government had resisted proposals for legislative enhancements of the SIU and even interfered with the dissemination of an annual SIU report that raised systemic concerns.<sup>41</sup> The report did note, however, that regulations were enacted in August 2011 on the recommendation of Justice Lesage that witness officers not be represented by the same counsel as subject officers. The requirement of officers to submit their contemporaneous notes without consulting counsel was eventually affirmed by the Supreme Court.<sup>42</sup> This was an important victory for the SIU, but it is also noteworthy that it required a Supreme Court decision. Indeed, it required two Supreme Court decisions because the Court in 2003 allowed an intentional tort action to proceed against police officers and a Chief of Police (but not the police service board or the province) over alleged lack of co-operation in a SIU investigation.<sup>43</sup> The SIU may be necessary but the consequences of resistance to its independent review on police culture and other forms of oversight need to be better understood. The difficulties of prosecuting police officers should not be underestimated and so the benefits obtained by a SIU may not be as great as its costs in terms of

38. *Ibid.*, at p. 105.

39. *Ibid.*, at pp. 116-117.

40. Ontario Ombudsman, “Oversight Unseen: Investigation into the Special Investigations Unit’s operational effectiveness and credibility”, *supra*, footnote 11.

41. Ontario Ombudsman, “Oversight Undermined”, *supra*, footnote 11.

42. *Schaeffer v. Wood*, *supra*, footnote 12. See also Ian D. Scott, “The Long Road to Independent Police Officers’ Notes in SIU Incidents” in Scott ed. *Civilian Oversight of the Police* (forthcoming).

43. *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69, 233 D.L.R. (4th) 193 (S.C.C.).

resistance. At the very least, more thought needs to be given to the consequences and limits of independent review and the potential of internal review or self-regulation.

Bodies such as the SIU are not immune from criticism simply because they are called independent. As discussed above, the Ontario Ombudsman criticized the SIU for not being independent enough of both the police and government. The Braidwood inquiry made recommendations designed to make a B.C. version of the SIU more independent and a Quebec version of the SIU may be headed by a retired judge. As Stephen Savage has suggested, independence has become a litmus test for civilian review.<sup>44</sup> Nevertheless, there is a danger that independence will become an end in itself divorced from the objectives of review. In addition, complete independence from police and government may be an unattainable end. Savage has written how the Police Ombudsman in Northern Ireland was criticized for not being independent enough. The challenges of making a SIU completely independent of the police are likely greater than a police complaints body because of the specialized criminal investigation and forensic skills that a SIU requires. In any event, as Savage warns:

. . . civilian control is not simply something established at a stroke by statute and organizational form: it depends on organizational ethos, organizational policies, organizational practices — informal as well as formal — and, not least, the make-up and orientation of those that populate the organization. In this respect, the notion of not being ‘of’ the police is complicated by the issue raised earlier: that many independent, civilian, oversight bodies — and certainly the bodies in question in this paper — operate on the basis of a ‘mix’ of investigators with both non-police and police backgrounds, including most of those holding the most senior investigative roles. This begs the question: how ‘civilian’ is civilian control?<sup>45</sup>

Independent civilian review may be necessary but we should not be blind to the problems of achieving true independence from the police or government especially in the eyes of knowledgeable and/or cynical members of the public. The consequences of independent review in terms of police resistance and possible loss of self-regulation also need to be considered.

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44. Stephen Savage, “Thinking Independence” (2013), 53 *British J. of Criminology* 94.

45. Stephen Savage, “Seeking Civilianness” (2013), 53 *British J. of Criminology* 886, at p. 889.

### **Maintaining Public Confidence: Engaging with a Knowledgeable, Diverse and Cynical Public**

A commonly asserted goal of civilian oversight is to maintain public confidence. For example both the O'Connor Commission into the actions of Canadian officials in relation to Maher Arar, the Canadian who was rendered and tortured in Syria,<sup>46</sup> and the Braidwood inquiry into the tasing death of Robert Dziekanski<sup>47</sup> stressed that review mechanisms should inspire public confidence. The Supreme Court in its recent decision affirming police obligations to prepare contemporaneous notes also stressed the importance of the SIU in maintaining public confidence.<sup>48</sup> These are important statements and are related to the traditional Peelian idea that the police must be part of the public to enjoy co-operation from the public.

Nevertheless, references to the confidence of the public often seem to assume that there is single undifferentiated public. In fact, the public in Canada is especially diverse. The available evidence suggests that visible minorities have less confidence in the police than others in Canadian society.<sup>49</sup> Maintaining the confidence of Aboriginal people in Canada is quite different than maintaining the confidence of non-Aboriginal people. The Missing Women Inquiry has recently commented that one of the reasons why Aboriginal people may be reluctant to co-operate with the police is past negative encounters with the police including the role of the RCMP in enforcing attendance at Residential Schools.<sup>50</sup> The Saskatchewan Public Complaints Commission established in 2006 requires that one of its five members be of First Nations ancestry and another be of Metis ancestry. This responds to the troubled history of relationships between the police and Aboriginal people in that province. At the same time, there have been conflicts between police and Aboriginal people from coast to coast to coast and it will be interesting to see if other bodies follow the overtly representational model used in Saskatchewan.

Aboriginal people are not the only segment of the Canadian police

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46. Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the National Security Activities of the RCMP* (Ottawa: Government Services, 2006).

47. *Why? The Robert Dziekanski Tragedy*, *supra*, footnote 33.

48. *Schaeffer v. Wood*, *supra*, footnote 12, at para. 44.

49. Liqun Cao, "Visible minorities and confidence in the police" (2011), 53 *Canadian Journal of Criminology and Criminal Justice* 1.

50. *Forsaken: The Report of the Missing Women Commission of Inquiry* (Victoria: Distribution Centre, 2012).

that have experiences that affect their confidence in the police. Visible minorities and especially African-Canadian minorities have a history of troubled relations with the police in Ontario, Quebec, Nova Scotia and elsewhere. Many inquests into police shootings have focused on police interactions with the significant number of the Canadian public that live with mental disorders. As Richard Ericson's pioneering work on the Peel police indicated, the police may interact with youth differently than they interact with older segments of the population.<sup>51</sup> The massive arrests at G20 and other similar public order events may have created a legacy of distrust among youth and activists.

Information technologies and social media also mean that the public can quickly become well-informed sometimes with dramatic video accounts of encounters between the police and the public. The public may also become polarized through reliance on tailor made and interconnected mainstream and social media. Although the maintenance of public confidence remains an important objective of civilian review, we need to be more attentive to differences within the public. Civilian institutions need to reflect a more diverse Canadian public both with respect to racial diversity but also age and class differences. Indeed, in a world of increased political polarization, attempts to maintain the confidence of a certain segment of the public may even alienate other segments of the public.

Another factor that may affect public confidence is the increased visibility of police actions through various forms of digital recording ranging from closed circuit television monitoring to the use of mobile phones to record police interactions with the public.<sup>52</sup> The increased visibility of police conduct makes individual members of the public the direct judge of police conduct. The public may lose confidence in expert bodies that reach conclusions that seem contrary to what they themselves may have observed in a video recording. The idea of maintaining the confidence of the public through one representative or expert body may be becoming obsolete given the diversity of the public and new communications technologies.

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51. Richard Ericson, *The Ordering of Justice* (Toronto: University of Toronto Press, 1982).

52. Andrew Goldsmith, "Policing's New Visibility" (2010), 50 *British J. of Criminology* 914; D. Walsh, "Twenty Years of Handling Police Complaints in Ireland" (2009), 29 *Legal Studies* 305.

### **The Balance between Resolution of Complaints and Systemic Reviews or Audits**

The balance between effective and fair resolution of complaints and systemic reviews is an important issue in civilian oversight. Complaints by affected individuals need to be taken seriously and attention should be paid to the learning about the importance of procedural justice to aggrieved people's perception of the fairness of a process.<sup>53</sup> At the same time, there is very little incentive for people to bring complaints even to independent bodies.<sup>54</sup> Existing studies suggest that complainants are often dissatisfied with the time it takes to resolve complaints and the ultimate disposition of complaints.<sup>55</sup> Studies should be undertaken about what satisfies and dissatisfies complainants and the hypothesis that an unsatisfactory handling of a complaint may make things worse should be explored. The ability of complainants to commence civil litigation as an alternative to the use of police complaints processes needs to be examined both in light of increased causes of actions available to sue the police but also the high costs of civil litigation.

Standing rules also need to be studied. There may be advantages to allowing civil society groups to bring complaints on behalf of marginalized groups in particular the mentally ill and the homeless. Increased engagement between review bodies and civil society groups may also help to increase a review body's legitimacy in dealing with a more diverse public.

Another factor is the identity of those who bring complaints and how this is related to the diversity of the public and the different experiences and confidence levels that different segments of the public may have in the police. We should also not ignore that the increased grounds to hold the police civilly liable may mean that civil litigation competes with administrative models of police complaints many of which still rely on the police handling at least part of the investigation of complaints. Research into the motivations and experiences of those who complain to the police is needed and a hypothesis that should be explored is that police complaints may be a

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53. Simon Merry et al., 'Drivers of Public Trust and Confidence in Police in the U.K.' (2012), 14(2) *Int'l. J. of Police Science and Management* 118, at p. 123 " . . . procedural justice is more important than outcome of a police encounter because fair procedures are associated with feelings of a valued status . . .".

54. Graham Smith, "Why Don't More People Complain Against the Police?" (2009), 6(3) *European J. of Criminology* 249.

55. Ian Waters and Katie Brown, "Police Complaints and the Complainants' Experience" (2000), 40 *Brit. J. of Criminology* 617.

second best strategy for complainants who know or have found that they cannot afford to take the police to court in civil litigation.

Another issue that needs to be explored is the optimal division and relation between individual complaints, systemic reviews and proactive audits of police conduct. The O'Connor Commission in its systemic report on accountability for the RCMP's national security activities stressed that relying on complaints was inadequate in the national security context because some people may not even know they are being investigated due to the secrecy of national security activities.<sup>56</sup> At the same time, the new legislation creating the Civilian Complaint and Review Body for the RCMP privileges the complaints process over the systemic review function by requiring that the Commission certify to the Minister that it has adequate resources to process complaints before undertaking proactive systemic reviews.<sup>57</sup> More needs to be known about the comparative advantages of complaints and systemic reviews. One hypothesis would be that the latter may be both more efficient and more effective in changing police behavior. Attention also needs to be paid to the synergy between examination of individual complaints or incidents and systemic reviews. Systemic reviews may be more effective after a critical mass of individual complaints have clearly established that there is a systemic problem that needs to be addressed.

### **The Balance between Mediation and Adjudication of Complaints**

Many police complaints systems place considerable emphasis on the mediation of police complaints. To some extent this follows an older model used by human rights commission to resolve complaints about discrimination. The existing studies, often from the United States, suggest relatively high levels of complainant satisfaction with mediation.<sup>58</sup> There is a need, however, for qualitative approaches that pay more attention to what different complainants want from

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56. Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Government Services, 2006).

57. *Enhancing RCMP Accountability Act*, S.C. 2013, c. 18, s. 55.34.

58. Samuel Walker and Carol Archbold, "Mediating Citizen Complaints against the Police: An Exploratory Study" (2000), *J. Disp. Resol.* 231; Elizabeth C. Bartels, Eli B. Silverman, "An exploratory study of the New York City Civilian Complaint Review Board mediation program" (2005), 28 *Policing* 619; Raymond Patterson, "Denver's Citizen/Police Complaint Mediation Program: Officer and Complainant Satisfaction" (2013), 24 *Criminal Justice Policy Review* 626.

the process. There is a danger that mediation may replicate power imbalances and favour peace and agreement over justice.

The choice of dispute resolution is not necessarily limited to adjudication or mediation. Some success has been observed in conducting mediations with a restorative justice focus. Restorative justice approaches are open to creative resolutions including face-to-face encounters and apologies by the officers. Mediations run on restorative principles had higher rates of complainant satisfaction and lower rates of dissatisfaction than other informal resolutions where complainants might not even have an opportunity to confront the officer face-to-face. Officers also had better experiences in restorative processes but not to the same degree as complainants.<sup>59</sup>

Some complainants and some officers may want “their day in court”. Some police complaints processes seem to embrace adjudication. The British Columbia *Police Act*, for example, provides that former Judges can act as Adjudicators of some disputed complaints. Manitoba’s *Law Enforcement Review Act*<sup>60</sup> goes a step further and provides that sitting provincial court judges may adjudicate complaints. There is a need to examine both the benefits and costs of increased legal representation and legalization of complaints processes. There is a distinct trend towards legal forms of control of the police, but not enough is known about its effects on both complainants and the police.

### **Para-Military or Professional Discipline?**

The police complaints process has traditionally been tied to the disciplinary process with police chiefs often being able to resolve complaints by imposing disciplinary sanctions on their officers. Unfortunately the available social science evidence suggests that most people who complain about police behavior are not that interested in punishing the police: they want explanations and perhaps an apology for how they were treated.<sup>61</sup> Disciplinary sanctions such as the deduction of pay or a rank demotion may be a significant sanction for police officers and resisted by police associations. Nevertheless, they may ring hollow for many complainants. A related question is the degree to which the

59. Richard Young, et al., “Informal resolution of complaints against the police: A quasi-experimental test of restorative justice” (2005), 5 *Criminology and Criminal Justice* 279, at p. 302.

60. C.C.S.M. c. L75.

61. Samuel Walker, “Complaints Against the Police: A Focus Group Study of Citizen Perceptions, Goals, and Expectations” (1997), 22 *Criminal Justice Review* 207.

remedies and sanctions that independent police complaints bodies can impose are affected by the Police Chief's traditional prerogatives to impose discipline on the police as a para-military organization.

The very nature of the police as a para-military organization is evolving and may change in the future. Although there will always be a need for general duty constables, increased use of civilian employees to deal with cyber crime may be a factor. There are also movements in the United Kingdom to governing police officers as a profession. Traditional accountability mechanisms centered around maintaining discipline in a paramilitary organization may be less effective as policing evolves into a profession.

### **Sanctions or Rewards?**

Most businesses rely on rewards such as promotions, bonuses and awards far more than sanctions such as pay deductions, demotions or dismissals. Denying officers rewards as a response to either misconduct or failure to meet management expectations may be more effective and efficient than attempts to impose sanctions, especially if there is legalistic resistance to the imposition of sanctions. Rewards may perversely even assist with police officers that are attracting a disproportionate number of complaints. It may be easier to convince these people to leave police services through early retirement packages than to justify their dismissal as a sanction. This also raises complex questions about whether rank and pay structures are sufficiently differentiated in policing organizations to allow more emphasis to be placed on rewards and less emphasis placed on sanctions.

### **Fragmented/or Fail Safe Review or Focused Review?**

The police, with some justification, argue that they are subject to multiple reviews. Most provinces have a complex array of complaint mechanisms involving internal and external processes. Many have separate SIU-like bodies that conduct criminal investigations. Police officers may also face regulatory offence prosecutions under Police Acts. They may be sued civilly, their conduct may be reviewed in criminal trials and their work may be examined by coroners inquests or public inquiries. Governing bodies are also sponsoring their own mini-inquiries. The Toronto Police Services Board hired retired judge John Morden to examine the G20 debacle and his report was quite critical. The Toronto Police Service has hired retired judge Frank Iacobucci to examine their policies in relation to shootings in the

wake of murder charges being laid against an officer who shot Sammy Yatim. The Ontario Ombudsman and the Independent Police Review Director are also conducting inquiries in the wake of this shooting. Ontario has three different civilian review bodies: the Office of the Independent Police Review, the Ontario Civilian Police Commission, and the Special Investigations Unit. The police may also be subject to various forms of systemic reviews by police complaints bodies, Ombudsperson and even public inquiries. The mass arrests and detentions at the Toronto G20 demonstrations resulted in a multiplicity of reviews conducted by federal and provincial police complaints bodies, the Toronto Police Services Board and the Ontario government. I have argued elsewhere that demands for a public inquiry into the G20 can be seen as demands for focused review<sup>62</sup> but others have argued that the multiple reviews that were conducted may have been more beneficial in part because of the delay of public inquiries and the poor record of governments in implementing their recommendations<sup>63</sup> In addition, it can be argued that multiple layers of accountability are necessary as a fail-safe.

The Saskatchewan Public Complaints Commission has an interesting power to attempt to promote a focused review by making recommendations to the government for the appointment of a public inquiry. In any event, there is a need for more research and thought about how multiple review mechanisms interact. Perceptions and perhaps realities of duplicative review mechanisms could easily fuel a backlash against the whole concept of civilian review. Ontario's experience with the repeal of civilian review from 1997 to 2008, demonstrates the real potential of such a response,<sup>64</sup> especially if fueled by political polarization in attitudes and trust of the police.

### III. Mechanisms of Civil Oversight

Almost all of the different parts of the legal process can be brought to bear on review and oversight of the police. Different mechanisms

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62. Kent Roach, "Post 9/11 policing of protests: Symbolic but illusory law reform and real accountability gaps" in Margaret Beare and Natalie Des Rosiers eds. *The State on Trial: G20 and the Policing of Protest* (Vancouver: University of British Columbia Press, forthcoming ch. 3).

63. Liora Salter and Colleen Mathews, "Making the Best of Bad Choices: Inquiry versus Investigations in the G20 Case" in *ibid.*

64. Tammy Landau, "Back to the Future: The Death of Civilian Review of Complaints about the Police in Ontario, Canada", in Andrew Goldsmith and Colleen Lewis eds., *Civilian Oversight of the Policing* (Oxford: Hart Publishing, 2000).

are better suited to serve different purposes. For example, police commissions or services boards and Ministerial accountability are the main institutions to provide policy direction to the police whereas SIU's, complaints bodies and ultimately the courts are used to hold the police accountable to the law.

### **Police Commissions or Services Boards**

Police commissions or services boards are generally attached to municipal police forces. Some elected municipal council members may sit on the board, but a majority of the board is often composed of political appointees. This structure demonstrates caution about elected politicians interfering in policing. At the same time, such caution is often based on an inflated view of the legitimate ambit of police independence which, as suggested above, is limited to the exercise of discretion over law enforcement powers and does not include the policy of operations.

A more compelling concern than the remote danger that police services boards or commissions would interfere with police independence, is that they may fail to be sufficiently active in providing legitimate policy direction to the police. As discussed above, a recent report by retired Justice Morden was quite critical of the Toronto Police Services Board for failing to provide sufficient policy direction to the Toronto Police Service with respect to the policing of the G20 protests including on matters such as planning, training, the policing of protests, mass detention and strip searches. He criticized the Board for failing to make policies. He also found that the board did not even bother to consider the policies that the police made to fill the policy vacuum. He concluded that the board had "viewed it as improper to ask questions about, comment on, or make recommendations concerning operational matters. The Board's approach in this regard has been wrong."<sup>65</sup> The Morden report also notes that the police services board did not have sufficient information to fulfill its policy making role and that it rendered itself "a virtually voiceless entity".<sup>66</sup> The report confirms the continued and unfortunate effect of exaggerated views of police independence on democratic control of the police.

The Morden report also raises questions about whether the lack of active policy involvement by police services boards reflects a malaise about politics in general and perhaps municipal politics in particular.

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65. Independent Civilian Review into Matters Relating to the G20 Summit, *supra*, footnote 2, at p. 6

66. *Ibid.*, at p. 19.

When less than 30% of citizens bother to vote in municipal elections it is not surprising that few show interest in the role of police services boards which are at least one step removed from the municipal politicians that so few elect. The pay of members of the police service board in Toronto also raises concerns. The full time chair of the Toronto Police Service Board is paid under \$91,000, unchanged from 1987.<sup>67</sup> The Board is supposed to provide police direction and oversight to the Toronto Police Chief who has a salary of over \$350,000. My point is not that the Chief of Canada's largest municipal police force should be paid less, but that the salary provided to the full time chair of its oversight board is less than most police constables make.

The Law Commission of Canada has proposed the creation of public security boards that could provide regional and provincial oversight beyond those of existing local police services boards. Such boards might manage how police services increasingly work with security partners in both the private sector and the community.<sup>68</sup> There has been no up take on this proposal which is not surprising given how existing police services boards tend to underperform. The answer to underperforming institutions is not to create similar new ones. The lack of uptake on the Law Commission's proposals or those made by the Brown Task Force to create a type of police services board for the RCMP also reflects the general tendency to focus limited resources and energies on review of the propriety and legality of police conduct as opposed to its effectiveness and efficacy.

### **Ministerial Responsibility**

Issues of Ministerial responsibility typically arise in the context of Ministerial controls on the RCMP or provincial police services. As with police services boards, there is some concern that Ministerial responsibility could interfere with police independence. The Ipperwash Inquiry carefully examined claims that there was improper political influence on the OPP's response to an Aboriginal protest in the former Ipperwash Provincial Park which led to the police shooting and killing of Dudley George, an unarmed protester. Interestingly enough the Inquiry found that the greatest danger of improper political interference came not from the responsible Minister but from others in government. It viewed written Ministerial directives outlining the proper policies to be

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67. See "Board Members" at <[http://www.tpsb.ca/V/Board\\_Members/](http://www.tpsb.ca/V/Board_Members/)>.

68. Law Commission of Canada. *In Search of Security: The Future of Policing in Canada*. (Ottawa: Law Commission of Canada, 2006).

followed for police operations as a healthy exercise of democratic and transparent control over the police. It recommended that Ontario's *Police Services Act* be amended to allow for the publication of such directions and to prohibit anyone other than the responsible Minister from giving directions to the police.<sup>69</sup> The Arar Commission reached similar conclusions about the legitimate role of Ministerial directives with respect to the policy framework for national security policing. It also dismissed any idea that such proactive directives would interfere with police independence.<sup>70</sup> The response to these recommendations has been disappointing. The *Police Services Act* in Ontario has not been amended in the way proposed by the Ipperwash inquiry. Moreover, Professor Sancton has reported that no directives have been issued to the OPP including with respect to the policing of Aboriginal protests.<sup>71</sup> Ministerial directives to the RCMP remain largely undisclosed, generally coming to light through access to information requests and only when they deal with sensitive topics such as torture.

The low profile of Ministerial responsibility as a civilian and democratic oversight mechanism may be related to the general malaise about politics. The very idea of Ministerial accountability, though traditionally fundamental in Parliamentary democracies, has been challenged by increased "whole of government" central direction that crosses Ministerial lines,<sup>72</sup> a trend that has intensified with post 9/11 concerns about national security.<sup>73</sup> Political controls of the police whether at the level of police services boards or Ministerial responsibility are underperforming. This sacrifices democratic and civilian ex ante direction to the police that has the potential to prevent police misconduct. In turn, increased reliance is placed on legal controls that are only imposed after the fact and often only after adversarial hearings.

### Police Complaints Bodies

Most provinces have established police complaints bodies as part

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69. Ipperwash Inquiry, *supra*, footnote 7, ch.12.

70. Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar. *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Government Services, 2006).

71. Andrew Sancton, "'Democratic Policing': Lessons from Ipperwash and Caledonia", *supra*, footnote 1, at p. 380.

72. Donald Savoie, *Governing from the Centre* (Toronto: University of Toronto Press, 1999).

73. Kent Roach, *The 9/11 Effect* (Cambridge: Cambridge University Press, 2011).

of the exercise of jurisdiction over the administration of justice. Provincial control, however, is heavily qualified outside Ontario and Quebec because of RCMP contract policing and the role played by the RCMP complaints commission with respect to the over 20,000 RCMP officers. Although it was revived in 2009, the Harris Conservatives in Ontario effectively abolished independent police review with the *Police Services Amendment Act, 1997*.<sup>74</sup> The federal Harper Conservatives have not taken such extreme steps. It enacted new legislation in 2013 that re-branded the Commission for Public Complaints for the RCMP into the Civilian Review and Complaints Commission for the RCMP, complete with a preamble that stressed the connections between public confidence in the police and civilian review and transparency.<sup>75</sup> Hopefully this is a positive sign that independent police review bodies are becoming a permanent part of the Canadian policing landscape.

The 2013 federal legislation stops short of the Brown Task Force's recommendations that the complaints body be given more powers to be involved in and resolve matters of internal discipline.<sup>76</sup> The Brown Task Force included two former RCMP Commissioners, but its recommendations were ignored. The 2013 federal legislation also rejected the Arar Commission's recommendations that the body be given unfettered access to secret information so it could audit the RCMP's national security activities and share information with other federal review bodies for national security activities. At the same time, however, the new *Act* allows the re-named commission to conduct joint investigations and hearings with provincial complaints bodies<sup>77</sup> and enhances its power to initiate its own systemic investigations. The Commission has the power to investigate complaints and hold hearings when in the public interest<sup>78</sup> and it also has the power to merge the hearings of different complaints.<sup>79</sup> These are positive developments that recognize the importance of systemic and co-ordinated review.

The 2013 federal legislation also recognizes the growth of SIU-type bodies. It provides for RCMP co-operation with provincial SIU-like bodies and the appointment of other police forces and independent

74. S.O. 1997, c. 8.

75. *Enhancing RCMP Accountability Act*, S.C. 2013, c. 18.

76. Rebuilding the Trust: Task Force on Governance and Culture Change in the RCMP December 2007 available at: <[http://www.publicsafety.gc.ca/cnt/cntrng-crm/tsk-frc-rcmp-grc/\\_fl/archive-tsk-frc-rpt-eng.pdf](http://www.publicsafety.gc.ca/cnt/cntrng-crm/tsk-frc-rcmp-grc/_fl/archive-tsk-frc-rpt-eng.pdf)>.

77. *Enhancing RCMP Accountability Act*, S.C. 2013, amending *RCMP Act*, s. 45.75.

78. *Ibid.*, s. 45.66.

79. *Ibid.*, s. 45.68.

observers in “serious incident” cases defined to include not only serious injuries and deaths but other “public interest” cases as determined by the responsible federal or provincial Minister or the RCMP commissioner.<sup>80</sup> This has the potential to avoid some of the disputes over the “serious injury” mandate that have occurred with respect to Ontario’s SIU. The federal approach on these matters reflects a willingness to incorporate different provincial mechanisms that is not present when it comes to complaints against RCMP officers exercising contract policing responsibilities.

Although it has a new name emphasizing its civilian character, the re-branded commission Civilian Review and Complaints Commission for the RCMP is not a powerhouse. It only has a full-time chair (with the existing chair having served as interim part-time chair since 2010 after the departure of two outspoken former chairs). The Commission is supposed to have four time part members, but these positions have not been filled for some years. The Commission is only allowed to conduct special systemic reviews if it certifies to the Minister that the reviews will not compromise the processing of complaints.<sup>81</sup> The Commission can only make recommendations to the Commissioner of the RCMP who must respond to the Commission’s recommendations but need not implement them.<sup>82</sup> Some opposition parties criticized the new act for not allowing the Commission to impose its own remedies.

The non-binding nature of the Commission’s recommendations raises complex questions about the appropriate balance between independent review and self-regulation and the role of police resistance. It is possible that recommendations that are voluntarily accepted by the RCMP Commissioner may not encounter the same resistance as those that may be imposed on the force. Whether the new act strikes the right balance between external oversight and internal discipline may not be known because it does not include a five-year Parliamentary review as recommended by the Brown committee.

British Columbia has established the Office of the Police Complaint Commissioner as an independent officer of the Legislature, but it only has jurisdiction over a minority of police officers in that province because of the important role of RCMP contract policing. In other words, most police in B.C. and many other provinces will be subject to the RCMP Civilian Review and Complaints Commission. The federal Commission faces great challenges in dealing with the great geographic and ethnocultural

80. *Ibid.*, ss. 45.8-45.83.

81. *Ibid.*, s. 45.34.

82. *Ibid.*, ss. 45.71-45.72.

diversity of RCMP policing services from coast to coast to coast. The federal Commission casts a large shadow even though police complaints and reviews are generally matters within provincial jurisdiction over the administration of justice.

Saskatchewan appears to be ahead of other provinces in dealing with Aboriginal issues related to police complaints. The Saskatchewan Federation of Indian Nations set up its own Special Investigations Unit with a toll free number and two investigators in 2000 to assist First Nations people with their complaints and dealing with various federal and provincial complaints bodies. This development was a reaction to media revelations about so-called Starlight tours by the Saskatoon police. This is an interesting development that suggests that more attention should be paid to the role of civil society groups and the media as a form of civilian oversight of the police. It also underlines the skepticism that Aboriginal people and other marginalized groups may have about even independent and civilian complaints bodies. What a lawyer or politician might see as independent may be perceived by a person on the street as just another part of an alien system.

In 2006, Saskatchewan enacted legislation which provides that one member of its five member Public Complaints Commission should have First Nation ancestry and another should be Metis. The Saskatchewan Commission, tailored to the particular history and demographics of Saskatchewan, alas only applies to municipal and one tribal police service. Like the BC commission, the Saskatchewan commission does not have jurisdiction over the majority of police officers in that province who belong to the RCMP. There is a need to understand how police complaints bodies interact with Aboriginal police forces. There are arguments that independent complaints mechanisms are especially needed with respect to police forces in small communities where there may be conflicts of interests and issues of favouritism. At the same time, police complaints bodies should also make allowance for the possibility that Aboriginal police services may legitimately want to resolve disputes in a different manner than other police services.

Most police complaints bodies in Canada adopt an oversight model with the police still investigating most complaints but with an increasing ability of the independent bodies to conduct their own investigations and to hear complaints about police investigations. Relying on internal handling of complaints creates perception problems of the police policing the police. There has been low level of complainant satisfaction with earlier systems that stressed police handling of complaints.<sup>83</sup> Such findings, however, beg the question of

whether complainant satisfaction would necessarily be higher simply because of more independence. There is some evidence from the United States that increasing independence does not necessarily increase complainant satisfaction.<sup>84</sup> More research needs to be done to understand how police complaints bodies triage complaints and decide which ones merit direct independent investigation or close review of the initial police investigation of the complaint.

The 2007 *Report on the Review of the Police Complaint Process in British Columbia*<sup>85</sup> conducted by Justice Wood found that over a third of complaints, including more serious ones, were not properly investigated by the police. This report led to changes to the BC Police Complaint Commission including the ability of a retired judge effectively to sit in appeal of a decision made by a particular police service about whether a complaint was substantiated. This represents a move towards legal control and independence that many will praise. At the same time, it may sacrifice some of the benefits of the police force taking responsibility for the misconduct of officers and potentially introducing new policies to prevent such misconduct in the future. Regulatory theory suggests that some of the most effective means to change organizations are from within. The strong organizational culture of the police may make police services particularly resistant to change ordered from outside.<sup>86</sup>

Ontario's Office of the Independent Police Review Director (OIPRD) receives and screens complaints, but police forces still investigate and decide on the initial disposition of most complaints. A dissatisfied complainant may then appeal back to the OIPRD which can refer an investigation to another police force or even conduct an investigation itself. It will be important to study how the Director exercises his broad discretion and what principles are used to triage those complaints that are independently investigated. If there is a disciplinary hearing, both the police officer and the complainant can appeal to another body, the Ontario Civilian Police Commission. Ontario's system is quite complex and even confusing. It has a variety of procedural options. Most of these procedural options, however,

83. Tammy Landau, "When Police Investigate Police: A View from the Complainants" (1996), 38 *Can. Journal of Criminology* 291.

84. Joseph De Angelis, "Assessing the Impact of Oversight and Procedural Justice on the Attitudes of Individuals Who File Police Complaints" (2009), 12 *Police Quarterly* 214.

85. The Report was released in February 2007 and may be found at: <[http://www.pssg.gov.bc.ca/police\\_services/publications/complaint\\_process/Report\\_PoliceComplaintProcess.pdf](http://www.pssg.gov.bc.ca/police_services/publications/complaint_process/Report_PoliceComplaintProcess.pdf)>.

86. John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002).

are limited to contested cases and appeals which will constitute a small minority of cases. There is a need to better understand how “typical” complaints that do not go on appeal are handled and how complainants, police officers and police services experience both typical complaints and more exceptional ones heard on appeal.

At least on appeal, most complaints systems are becoming more legalized and some systems are using sitting or retired judges to resolve contentious cases. Intuitively, this seems like a potential equalizer of power imbalances between complainants and the police. At the same time, police officers represented by experienced and well-paid counsel may benefit from more formal processes and the delay that they often involve. There is a need to study and compare formal and informal processes with particular attention to their effects on complainant satisfaction and their ability to stimulate organizational change or resistance from the police.

### **Regulatory Offences and the Disciplinary Process**

Police complaints can trigger disciplinary proceedings under various Police Acts. Disciplinary offences are subject to less than the criminal standard of proof of guilt beyond a reasonable doubt. Nevertheless, there remains some confusion about the precise standard to be applied and whether the clear and convincing evidence standard differs from the balance of probabilities standard generally used in administrative and civil law. In Ontario, ss. 80 and 81 of the *Police Services Act* incorporate a code of conduct established by regulation that prohibits a wide variety of matters including discreditable conduct, insubordination, neglect of duty, breach of confidence, unlawful or unnecessary exercise of authority, and consumption of drugs and alcohol in a manner prejudicial to duty. These regulatory or disciplinary offences are generally broader than *Criminal Code* offences. For example, unnecessary exercise of authority may not necessarily constitute a criminal assault and consumption of alcohol prejudicial to duty need not constitute the criminal offences of impaired or over 80 driving.

Ian Scott has suggested there are a number of occasions where police officers have been found guilty of discreditable conduct even in circumstances where proof of criminal guilt beyond a reasonable doubt might be lacking.<sup>87</sup> For example, a police officer was removed from his job even though acquitted on drunk driving charges as a

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87. Ian D. Scott, “Addressing Police Excessive Use of Force: A Proposal to Amend the Mandate of the Special Investigation Unit” (2004), 49 C.L.Q. 351, at pp. 368-9.

result of a successful *Charter* argument.<sup>88</sup> Scott has recommended that Ontario's SIU Director be able, like its Independent Police Review Director, to refer matters directly to the Ontario Civilian Police Commission for regulatory disciplinary proceeding when such a response is more appropriate than a criminal prosecution.<sup>89</sup> This recommendation might improve the regulatory payoff of expensive SIU investigations of serious injuries and deaths involving the police, but it may not always satisfy expectations in the media and among some members of the public for the "big bang" of a criminal prosecution. Nevertheless, in many cases, it will be more realistic to establish that the officer has violated a disciplinary offence. The sanctions for breach of a disciplinary offence can also be more creative and job related than those available under the *Criminal Code*. For example, penalties imposed for disciplinary offences can include termination of employment, demotion, reprimands, suspension, forfeiture of pay or time off, directions to undergo specific counselling or treatment or to participate in a specified program. More attention needs to be paid to the jurisprudence of disciplinary offences including the sentences imposed. Ontario's Independent Police Review Director has recently started to post some of the decided cases on its website and this is a positive development.

### **Criminal Investigations and Prosecutions and the Special Investigations Model**

Ontario has the longest experience with an independent investigation unit with the Special Investigations Unit (SIU) first being established in 1990. Many other provinces are, however, starting to move in the direction of the SIU often in response to high profile police involved deaths. As a result of the Braidwood inquiry into Robert Dziekanski's death,<sup>90</sup> BC has an Independent Investigations Office (ILO) to investigate serious injuries and deaths involving the police. The Braidwood report recommended an even more independent model than the SIU including prohibitions on the use of former police officers and the appointment of special prosecutors. Manitoba also is moving in the direction of the SIU model with an Independent Investigations Unit enacted in its *Police*

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88. Ian D. Scott, "Legal Framework of Use of Force by the Police" (2008), 53 C.L.Q. 331, at p. 357 citing *Norris v. Loranger* (1998), 2 P.L.R. 493.

89. Ian D. Scott, "Reforming Ontario's Special Investigations Unit" (2013), 60 C.L.Q. 190, at p. 205.

90. *Why? The Robert Dziekanski Tragedy – The Braidwood Commission on the Death of Robert Dziekanski*, May 20, 2010.

*Services Act* as a result of recommendations by an inquiry into a botched internal police investigation into an off duty fatal car accident.<sup>91</sup> Québec also is moving to a formal independent model of special investigations to be headed by a retired judge or a criminal lawyer with at least 15 years experience and no employment as a police officer.<sup>92</sup>

Other provinces have moved in the SIU direction, but with less emphasis on formal legal independence. Alberta established a Serious Incident Response Team in 2007 led by a seconded prosecutor with seconded police officers investigating. Nova Scotia has a similar Serious Incident Response team that unlike the Alberta model has the power to lay charges. Saskatchewan provides for an independent observer from another police force to oversee investigations into deaths and serious injuries.<sup>93</sup> These models clearly vary in the degree of independence. There is a need to study whether these different degrees in independence make a difference in the confidence of different groups of the public. The public debate about these matters has sometimes proceeded on the basis that the real or perceived independence of the investigators is the main indicia of their ability to maintain public confidence. Such an approach, however, ignores the extent to which public dissatisfaction with the handling of deaths and serious injuries caused by the police may be related to the high threshold required for criminal prosecutions.

The barriers to criminal convictions of police officers are formidable. They include special defences provided under s. 25 of the *Criminal Code*. In *R. v. Nasogaluak*,<sup>94</sup> the Supreme Court found these defences did not excuse the breaking of the ribs and puncturing of the lungs of a Dene/Inuit man. The Court, however, cautioned that “Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances.”<sup>95</sup>

In addition to s. 25, police officers can rely on the expanded self-defence provisions<sup>96</sup> in s. 34 of the *Criminal Code*. It requires that acts of self-defence be reasonable in the circumstances. The new

91. Commissioner Salhany, *Report of the Taman Inquiry into the Investigation and Prosecution of Derek Harvey-Zenk* (Man.) October 2008.

92. Ian D. Scott, “Oversight Overview” in Ian D. Scott ed., *Civilian Oversight of the Police in Canada* (forthcoming).

93. *Police Act*, S.S. 1990, c. P-15.01, as amended, s. 91.1.

94. (2010), 251 C.C.C. (3d) 293, [2010] 1 S.C.R. 206, 72 C.R. (6th) 1 (S.C.C.).

95. *Ibid.*, at para. 25.

96. Kent Roach, “A Preliminary Assessment of the New Self-Defence and

provisions allow the size and physical capabilities of all parties to an incident to be considered and the accused officer can tender evidence of the victim's propensity for violence.<sup>97</sup> Although stated in the context of a review of search powers, the Supreme Court's statements that "the police must be allowed a certain amount of latitude in the manner in which they decide to enter premises. They cannot be expected to measure in advance with nuanced precision the amount of force the situation will require" as well as its admonition to avoid being a "Monday morning quarterback"<sup>98</sup> are likely to influence judgments about police use of force.

Given all the challenges of proving both guilt and the non-existence of any defence beyond a reasonable doubt, it should come as no surprise that a 2004 study found that SIU prosecutions had a conviction rate five times less than ordinary criminal prosecutions.<sup>99</sup> The Ontario Commission on Systemic Racism found that 16 black people had been shot by the police between 1978 and 1994. Nine police officers were charged. None were convicted.<sup>100</sup> The SIU's conviction rate has improved though it still remains lower than other criminal cases. The SIU caused 49 criminal charges to be laid between October 15, 2008 and March 31, 2013 and of 30 dispositions, there were 19 acquittals or withdrawals and 11 convictions or guilty pleas.<sup>101</sup>

The difficulties of gaining criminal convictions are well demonstrated by a recent case in which a male police officer was acquitted of sexual assault in connection to a strip search of a woman arrested for consuming alcohol in public. The findings of the trial judge leave no doubt that something seriously wrong occurred though the judge also concluded that a criminal offence had not been proven beyond a reasonable doubt. The judge noted that "the strongest evidence supporting the Crown's theory that Sgt. Desjourdy's purpose was retaliatory is, in my view, the fact that

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Defence of Property Provisions" (2012), 16 Can. Crim. Law. R., at pp. 275-299.

97. Ian D. Scott, "Legal Framework of Use of Force by the Police", *supra*, footnote 88.

98. *R. v. Cornell* (2010), 258 C.C.C. (3d) 429, [2010] 2 S.C.R. 142, 76 C.R. (6th) 228 (S.C.C.), at para 24.

99. Ian D. Scott, "Addressing Police Excessive Use of Force: A Proposal to Amend the Mandate of the Special Investigation Unit", *supra*, footnote 87, at p. 361.

100. Report of the Ontario Commission on Systemic Racism in the Criminal Justice System (Toronto: Queens Printer, 1995), at p. 378.

101. SIU Annual Report 2012-2013 at: <[http://www.siu.on.ca/pdfs/ar\\_2012\\_13\\_english\\_accessible.pdf](http://www.siu.on.ca/pdfs/ar_2012_13_english_accessible.pdf)>.

S.B. was left in her cell, topless and in soiled pants, for three hours and twenty minutes before being provided with disposable replacement clothing.”<sup>102</sup> The trial judge also found that S.B. “credibly asserts in her evidence:”

I was very embarrassed and absolutely humiliated to be partially naked in front of all the uniformed male officers. I felt sexually violated after having my clothes forcibly cut off me and then having to stand there partially nude. It was horrifying and I was very uncomfortable with being exposed in a public place ‘[In the cell she]’ was barefoot, topless and wearing wet pants . . . and remained in the cell for a very long time.<sup>103</sup>

Despite these findings, as well as Crown submissions that the cutting off of the prisoner’s bra and shirt was an excessive use of force that none of the other male officers who witnessed it had seen before, the trial judge concluded “that the application of force by Sgt. Desjourdy was justified within the meaning of s. 25 of the *Criminal Code*. On all of the evidence, I am satisfied that he cut off S.B.’s top and bra for a valid law enforcement objective which was to complete a reasonably necessary search of S.B. for weapons and contraband. I am left in reasonable doubt that Sgt. Desjourdy cut off the bra and shirt in order to punish and humiliate S.B. I am also satisfied on all of the evidence that there was no sexual context to Sgt. Desjourdy’s conduct. It was reasonable and necessary for Sgt. Desjourdy to conduct the search of S.B. in the manner that he did because of the presence of exigent circumstances described earlier in these reasons. As well, the manner in which Sgt. Desjourdy conducted the search was not unreasonable, excessive or abusive. The Crown has failed to prove beyond a reasonable doubt that Sgt. Desjourdy is guilty of sexual assault or the included offence of simple assault.”<sup>104</sup>

The limits of criminal prosecutions were also underlined by the fact that Sgt. Desjourdy was subsequently convicted of discreditable conduct under the *Police Services Act* in relation to the strip search and subsequent treatment of the prisoner.<sup>105</sup> As discussed above, disciplinary offences have a lower burden of proof than criminal offences and often prohibit a broader range of conduct.

Leaving aside whether the trial judge erred with respect to his interpretation of the requirements of sexual assault, the decision demonstrates that criminal trials are not well suited to address the

102. *R. v. Desjourdy*, 2013 ONCJ 170, 2013 CarswellOnt 3806, 1 C.R. (7th) 261 (Ont. C.J.), at para. 92.

103. *Ibid.*, at paras. 92-93.

104. *Ibid.*, at para. 108.

105. Ottawa Sgt. Steven Desjourdy guilty of discreditable conduct for leaving prisoner topless Ottawa Citizen April 9, 2014.

question of the propriety of police behavior or whether remedies are required to prevent the conduct from occurring again in the future. As the Ontario Commission on Systemic Racism warned, a criminal trial is highly circumscribed and it cannot conduct “a general inquiry into racism”<sup>106</sup> or other systemic issues. It also pointed out the disparity of allowing the victim’s past conduct and mental condition to be put on trial whereas any past misconduct by the accused officer’s misconduct will often be kept from the jury.<sup>107</sup>

Another consequence of the SIU model that stresses independent investigations and possible criminal prosecutions is that it often results in adversarial and defensive relations between the police and the investigators. One trial judge in Ontario commented that:

There appeared to be, on the part of certain of the police witnesses and certain police associations, an almost Pavlovian reaction against a civilian agency investigating the conduct of police officers in carrying out their duties and against the idea that such an agency could conduct an investigation which would be fair to police officers<sup>108</sup>

A glimpse of how adversarial the SIU model can become is seen by an oft-quoted story of a police lawyer who was quoted as writing in a police association newsletter “I was tempted to have a pencil manufactured with the slogan “shut the F up” embossed on it so that when police officers began to write their notes, they would pause and first give me or their association a call. I think I may still do it. The first few hours of an SIU investigation are the most important. They decide the future of your career. They may even decide your liberty.”<sup>109</sup>

Police resistance to Ontario’s SIU has been so intense that the legislature in 1999 had to affirm that the police had a duty promptly to notify the SIU of cases involving serious injuries and death. The Supreme Court has also been involved. In 2003, it confirmed the availability of the intentional tort of abuse of public officer in cases where it was alleged that police officers and a police chief did not cooperate in a SIU investigation.<sup>110</sup> A decade later, the Supreme Court had to affirm that officers had to prepare their notes without

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106. Report of the Ontario Commission on Systemic Racism in the Criminal Justice System (Toronto: Queens Printer, 1995), at p. 384.

107. *Ibid.*, at p. 385.

108. *Wiche v. Ontario* (2001), 9 C.C.L.T. (3d) 72, 2001 CarswellOnt 1698, 38 Admin. L.R. (3d) 194 (Ont. C.A.).

109. Quoted in Ombudsman *Oversight Undermined*, *supra*, footnote 11, at para. 93.

110. *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69, 233 D.L.R. (4th) 193 (S.C.C.).

consulting a common lawyer.<sup>111</sup> At the same time, subject officers do not have to co-operate with SIU investigations. They can assert their rights to counsel and to silence. The SIU model is an adversarial one, as may well be expected when a person faces jail.

Despite its challenges, the SIU model may be necessary to ensure impartial application of the rule of law. A 2009 study by the RCMP complaints body found many problems when the RCMP investigated alleged criminal activity by other RCMP officers.<sup>112</sup> It recommended that the complaint body be granted the statutory authority to monitor any criminal investigation within the RCMP relating to the conduct of a RCMP member and to undertake joint investigations with relevant provincial investigative bodies. The 2013 legislative reforms facilitate the provincial growth of SIU's by allowing criminal investigations of RCMP members involved in serious incidents to be conducted by any provincial SIU equivalent model and by allowing the appointment of other police forces and external monitors for investigations where provinces have not yet created SIUs. As in the original Ontario SIU model, serious incidents are defined to include police involved serious injuries and deaths. At the same time, the responsible federal and provincial Ministers, as well as the RCMP Commissioner, have the ability to designate other cases as serious incidents for public interest reasons.<sup>113</sup> These reforms

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111. *Schaeffer v. Wood*, *supra*, footnote 12.

112. The Commission issued a final report based on its examination of 28 randomly selected cases in which the police investigated the police. It found that in 68% of the cases, the structure and reporting relationship of the investigation was inappropriate. In 17 of the 28 cases only one RCMP investigator was used to investigate another member. In 8 of the 28 cases, charges were laid but in only three cases were convictions recorded. At the same time, the report also found that appropriate policies were complied with and that the vast majority of investigations were timely. It concluded that the RCMP investigators were free of bias and conscientious in all of the cases examined. It recommended that the most serious investigations be conducted by external police forces or police investigative bodies. For investigations that remained within the RCMP, they should be undertaken by those of a higher rank than those being investigated. In addition, administrative reviews and reviews by Crowns with respect to laying charges should be undertaken and national policies and a registrar be created to track such RCMP investigations. Chair's Final Report *Police Investigating Police* August 11, 2009 available at: <<http://www.cpc-cpp.gc.ca/prr/rep/rev/chair-pre/pipR/pip-pep-finR-0908-eng.aspx>>. The CPC did not go as far as to recommend a full independent model associated with Ontario's SIU in part because of a recognition of the role for police expertise in criminal investigations of the police, but it also did not preclude the use of fully independent investigations when available at the provincial level.

113. *RCMP Act*, ss. 45.8-45.83.

may well be necessary to ensure respect for the impartial application of the rule of law. That said, low prosecution and conviction rates may erode public confidence even if they are legally warranted. They may also create resistance within policing organizations that may adversely affect other forms of civilian control and review.

### Civil Lawsuits

Civil lawsuits have some regulatory benefits over criminal prosecutions. Civil fault only has to be established on a balance of probabilities. In the last decade, the Supreme Court has recognized a variety of innovative theories of liability including intentional abuse of public office,<sup>114</sup> negligent investigation<sup>115</sup> and *Charter* damages.<sup>116</sup> The *Charter* damages case of *Ward* is especially intriguing as the Court recognized the deterrence of *Charter* violations as a legitimate remedial purpose. That said, the quantum of damages awarded for an unconstitutional strip search — \$5000 — is likely to deter all but the most determined and economically irrational plaintiffs. To be sure, civil actions are important. *Roncarelli v. Duplessis*<sup>117</sup> is rightly viewed as a landmark civil lawsuit that affirmed that everyone including the Premier of a province was subject to the rule of law. It should not be forgotten, however, that the 1959 case resulted in over \$33,000 being awarded in damages<sup>118</sup> a far cry from the \$5000 awarded in *Ward*.

Negligent investigation is also an innovative form of relief that has been rejected in some jurisdictions, but depends on the ability to establish that the police departed from established reasonable standards. It was not available in the case where it was first recognized by the police because the court determined that reasonable standards for conducting photo line ups so as to minimize the risk of misidentification had not yet been established.<sup>119</sup> Abuse of public office is an intentional tort that requires proof of deliberate and not simply negligent conduct.

114. *Odhavji Estate v. Woodhouse*, *supra*, footnote 110.

115. *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, [2007] 3 S.C.R. 129, 50 C.R. (6th) 279, 2007 SCC 41 (S.C.C.).

116. *Ward v. Vancouver (City)*, (*sub nom.* Vancouver (City) v. Ward) [2010] 2 S.C.R. 28, 76 C.R. (6th) 207, 2010 SCC 27 (S.C.C.). The author represented the British Columbia Civil Liberties Association who supported the damage award in this case.

117. [1959] S.C.R. 121, 16 D.L.R. (2d) 689, 1959 CarswellQue 37 (S.C.C.).

118. *Ibid.*, at p. 145.

119. *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, *supra*, footnote 115.

Although the Supreme Court allowed a lawsuit alleging abuse of office when the police did not co-operate with the SIU, it struck the claims against the police service board and the province on the basis that they had no duty to ensure that the police co-operated with the SIU.<sup>120</sup> This decision does nothing to enhance the regulatory role of police services boards and the responsible Minister as political controls over the police.

One of the benefits of civil litigation is that it allows plaintiffs broad discovery rights including the opportunity to examine defendants in examinations for discovery under oath. Contingency fee arrangements as well as *pro bono* work can ease economic barriers to justice. Nevertheless plaintiffs still face and may often be deterred by the downside risk of having to pay a significant part of the costs of well-resourced defendants if they sue the police and lose. The absence of a principled framework for departure from loser pay costs rules in Canada aggravates this risk.<sup>121</sup> The downside risk of suing the police in the United States is much less because of the absence of cost-shifting rules. Canada also does not have the same established traditions of public interest litigation including class actions and litigation aimed at patterns of police conduct with a recent class action in relation to the G20 mass arrests and detentions not being certified.<sup>122</sup>

The various negligence, abuse of office and *Charter* causes of actions that are available to sue the police are still in their infancy so the jury is still very much out on civil litigation as a form of civil oversight. That said, the deterrent value of civil litigation in changing police behavior remains speculative especially given indemnification practices that often shelter individual officers from awards. Awards may also simply be taken out of general revenues and not internalized to the responsible police service. In addition, the barriers to establishing civil liability though lower than criminal prosecutions should not be underestimated. Legal oversight of the police is an important component of the rule of law and it allows the independent courts to evaluate police behavior. At the same time, however, there may be a social interest in changing police conduct that does not amount to an actionable wrong. Such preventive action may require proactive policy supervision by police services boards or in the cases of the RCMP, OPP and SQ, the responsible Minister. For example, a

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120. *Odhavji Estate v. Woodhouse*, *supra*, footnote 110.

121. Kent Roach, *Constitutional Remedies in Canada*, 2nd ed. (Toronto: Canada Law Book, 2013) ch. 11.

122. *Good v. Toronto Police Services Board*, 2013 ONSC 3026, 43 C.P.C. (7th) 225, 2013 CarswellOnt 6662 (Ont. S.C.J.).

change in policies and training on strip searches may be far more effective and far reaching than relying on a few damages awards to change police behavior.

### Indirect Review of Police Conduct in Criminal Cases

Criminal court judges review police conduct every day in deciding whether police conduct violated the Charter and whether remedies such as exclusion of evidence, stays of proceedings or sentence reductions should be awarded. There is a danger, however, that the findings of criminal courts are not well tied into the disciplinary and supervisory police processes. For example, courts have stayed proceedings and reduced sentences in some cases of serious police violence,<sup>123</sup> but little is known about how, if at all, the police responded to such findings. A *Toronto Star* investigation found over 100 reported cases where judges did not believe the police, but found little evidence of follow-up discipline.<sup>124</sup> There is a danger that society may not be receiving the optimal regulatory and disciplinary pay-off from expensive Charter litigation.

In a recent case involving domestic violence, the Supreme Court raised concerns that the woman had not been adequately protected by the RCMP.<sup>125</sup> To its credit, the Commission for Public Complaints Against the RCMP responded promptly. It conducted a subsequent public interest investigation and found that the RCMP investigation was consistent with its policies and that the RCMP had not received information that would provide them with reasonable grounds to believe that woman was a victim of domestic violence.<sup>126</sup> Some might be inclined to see this report as a result of the inevitable “capture” of independent police review bodies by the police,<sup>127</sup> but without more information such a conclusion would be unfair. The report does, however, reveal the possibility that police conduct may be more complex than revealed in a case where the courts only examine a single incident.

123. *R. v. Bellusci* (2012), 293 C.C.C. (3d) 565, [2012] 2 S.C.R. 509, 94 C.R. (6th) 221 (S.C.C.).

124. “Police who lie: how officers thwart justice with false testimony”, *Toronto Star*, April 26, 2012, at: <[http://www.thestar.com/news/canada/2012/04/26/police\\_who\\_lie\\_how\\_officers\\_thwart\\_justice\\_with\\_false\\_testimony.html#](http://www.thestar.com/news/canada/2012/04/26/police_who_lie_how_officers_thwart_justice_with_false_testimony.html#)>.

125. *R. v. Ryan* (2013), 290 C.C.C. (3d) 477, [2013] 1 S.C.R. 14, 98 C.R. (6th) 223 (S.C.C.).

126. Public Interest Investigation Report, July 2013, at: <<http://www.cpc-cpp.gc.ca/cnt/decision/pii-eip/2013/doucet-finR-eng.aspx>>.

127. Tim Prezler, “Civilian Oversight of the Police” (2000), 40 *British J. of Criminology* 659.

### Public Inquiries and other Systemic Reviews

One high profile and oft-demanded form of review of police conduct is independent scrutiny from a public inquiry, coroner's inquest or other similar bodies. Indeed public inquiries are seen as the "gold standard" of independent review. Nevertheless, governments can simply refuse to appoint public inquiries. The federal government has recently refused to appoint inquiries into the mass arrests and protests at Toronto's G20 summit and it has rejected calls by many Aboriginal groups and the provincial government for an inquiry into the RCMP's handling of missing and murdered Aboriginal women.

Coroner's inquests are mandatory in some cases such as deaths in custody, but often lack the lasting high profile of public inquiries. Inquests have played an important role in cases of police deaths and research comparing the effects of inquests with criminal prosecutions would be a valuable addition to the literature. Inquests have made recommendations about police training especially in relation to dealing with people who may be mentally ill. One recent study found about a third of inquest recommendations are acted upon.<sup>128</sup> This may seem low, but at least it addresses the systemic implications of deaths in a way that is not done in criminal prosecutions or civil lawsuits.

Frequent demands for public inquiries reveal much about the limits of current accountability processes. Public inquiries are constitutionally precluded from making conclusions of criminal or civil liability, yet they are still demanded as a response to perceived police misconduct. This suggests that some of the current emphasis on SIU investigations and civil lawsuits against the police may be misplaced and that the public is interested in the propriety of police conduct beyond the question of whether the police conduct in question was illegal. To be sure, there is a need to apply the rule of law when police officers engage in intentional misconduct, but the public often wants misconduct to be publicized and not repeated again. Public inquiries are designed to achieve these latter objectives and they focus more on organizational responsibility than individual fault that is the focus of criminal and civil litigation.<sup>129</sup> In addition, public inquiries are not bound by the adjudicative ideal of applying pre-existing rules to past events. They can engage in a quasi-legislative fashioning of new rules to guide police conduct.

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128. "Coroner's jury advice goes ignored", *Toronto Star*, Feb 15, 2014.

129. Kent Roach, "Public Inquiries and the Processes of Accountability" in Stebbing ed., *Accountability for Criminal Justice* (Toronto: University of Toronto Press, 1995).

Canadians often refer to public inquiries as “judicial” inquiries even though they are technically part of the executive. There is an increased tendency to use retired judges to conduct not only public inquiries but other forms of systemic reviews of police conduct. The demand for “judicial” inquiries and reviews to do work that might otherwise be done by Ministers and police service boards again reveals a deep disenchantment about politics. Rather than allowing elected legislators to do public inquiry work including the oft neglected implementation of reforms, we are so disillusioned with our politicians that we would rather pay retired judges to do such work even though we know that the politicians remain free to ignore the reform recommendations that emerge from expensive inquiries. To be sure, there is a legitimate role for public inquiries and they remain a more creative oversight mechanism than criminal, regulatory or civil liability. Nevertheless, they can only make findings and recommendations. They cannot replace political regulation of and policy direction to the police.

#### IV. Conclusion

Civilian review of the police is an important issue in any democracy. Unfortunately, such issues are generally only examined in the midst of public controversy.<sup>130</sup> The controversy usually involves a fatal encounter between the police and a member of a public and/or an allegation of serious police misconduct. This tends to skew the response to police misconduct towards *ex post* forms of legal regulation that are designed to hold the police criminally or civilly accountable as opposed to *ex ante* forms of political regulation and direction that might prevent or minimize the misconduct in the first place.

The demands for independent investigations and prosecutions are understandable given the importance of applying the rule of law fairly and impartially to all including the police. Nevertheless, they also tend to underestimate the practical difficulties both of achieving independence and applying legal limits to police conduct. Ontario has the longest experience with the SIU model, but it has struggled with issues of independence, police co-operation and conviction rates. All of these factors have improved in recent years, but the uphill nature of

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130. A similar “police complaints reform scandal” driven by scandal, institutional reform and scandal leading to more institutional reform with greater emphasis on external investigations by independent bodies has been identified in the UK. See Graham Smith, “A Most Enduring Problem: Police Complaints Reform in England and Wales” (2006), 35 *Journal of Social Policy* 121, at p. 124.

the struggle has not dampened the enthusiasm of other provinces in emulating the SIU model. Yet we know next to nothing about whether the SIU model works. Does it really, as so many insist, bolster public confidence in the police and rule of law? Do all the public think the same? Do decisions not to prosecute and acquittals harm public confidence in the process and the police? Does police resistance to independent investigations spill over and taint police reactions to other forms of civilian insight? There is a need to compare the advantages of the SIU in relation to other civilian review mechanisms before the SIU model migrates to other parts of Canada. Alas, in response to public controversies including high profile deaths in B.C. and Québec, the SIU train has left the station.<sup>131</sup> In the absence of a knowledge base about its actual effects, the growth of SIUs, like independent police complaints mechanisms, may ultimately be simply a form of symbolic<sup>132</sup> and expressive politics about our attitudes towards the police. If that is true, then civilian review will, as it did in Ontario, remain fragile when the winds of politics shift. Without more knowledge and critical analysis, there is a danger that defenders of civilian review may have little beyond rhetoric about the dangers of the police policing the police and the importance of independence to defend existing institutions.

The main message of this article has been the need not to lose sight of the common limits of all forms of ex post legal oversight of the police and to pay more attention to the potential of ex ante political direction of the police. Both the Ipperwash and Arar Commissions stressed the important and legitimate role of Ministerial responsibility for the OPP and the RCMP but there has been too little up-take. The Brown Task Force's recommendations for a police board for the RCMP similarly were ignored. The danger is that Ministers will simply defer to the police on so-called operational matters and hide behind inflated claims of police independence in order to avoid political controversy and responsibility.

The municipal mirror of the decline in Ministerial responsibility is the low profile of municipal police services boards. Justice Morden's G20 report reveals the poor performance of the Toronto Police

131. For arguments that other provinces need to avoid mistakes made in setting up the SIU see Gareth Jones, "The Top Ten Things Not to do When Setting up a Police Oversight Agency", in David MacAlister (ed.) *Police Involved Deaths – The Need for Reform* (Vancouver: British Columbia Civil Liberties Association, 2012).

132. Tammy Landau, "Back to the Future: The Death of Civilian Review of Complaints about the Police in Ontario, Canada", in Andrew Goldsmith and Colleen Lewis eds., *Civilian Oversight of the Policing* (Oxford: Hart Publishing, 2000).

Services Board and its willingness to abdicate its legitimate policy responsibilities to the police. Alas, the report does not seem to have stimulated increased vigor. The board continues to accept and not take proactive steps to reduce the Toronto's police use of over 20,000 strip searches each year<sup>133</sup> though it is debating a policy on police carding and proactive stops, an issue that raises concerns about both the propriety and efficacy of police conduct.

The move towards the SIU model across Canada may reflect concerns about police conduct and a lack of confidence in political direction to police forces on matters such as training and use of weapons. This trend may increase polarization with many in the "pro" police camps believing that the police are being unfairly targeted for possible criminal sanctions for doing their jobs and those in the "anti" camps believing that the police are getting away with misconduct or being punished too leniently for it. In other words, the trends towards increased legal regulation of the police and decreased political regulation identified in this chapter may be interrelated in a manner that is producing a vicious circle of overinvestment in difficult *ex post* attempts to legally regulate the police and underinvestment in *ex ante* political regulation of the police.

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133. "Strip searches likely to stay, despite unrest", *Toronto Star*, Feb 14, 2014 GT4.