

Off-Duty Police Conduct:

A Discussion Paper

Prepared for the Office of the Police Complaint Commissioner

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1. Introduction

I have been asked by Mr. Don Morrison, Police Complaint Commissioner, to draft a discussion paper concerning off-duty conduct by police officers. The discussion paper is intended to serve as the starting point in consultations with interested parties, perhaps leading to a guideline, policy or other appropriate response to the various issues related to police off-duty conduct.

The regulation of police officers' "off-duty" conduct has become quite prominent and controversial of recent years. This is so for several reasons. First, off-duty conduct and worker privacy has become an important issue in employment law generally. Second, off-duty conduct of police officers has become more prominent because of the general increase in public concern and debate in the last twenty years over how society should regulate its police.

The purposes of this discussion paper are, first, to examine the threshold issue of the distinction between "on-duty" and "off-duty" in police employment, and then to examine general principles governing the application of the complaint process to off-duty police conduct. The remainder of the analysis will focus on specific issues related to off-duty police activity: secondary employment and political activity. Finally, the discussion paper will then pose several issues for response by interested parties.

In the course of researching and drafting the discussion paper, I contacted a variety of organizations in British Columbia to invite participation. I also discussed the issue with representatives from police management, associations and the legal profession outside of the province.

2. The Distinction Between "On-duty" and "Off-duty" in the Constabulary

(a) Introduction

Any analysis of the issue of off-duty conduct necessarily involves an examination of the distinction between "on-duty" and "off-duty", particularly as it pertains to police employment.

Despite the importance of this distinction, considerable confusion surrounds it. Much of the confusion originates from the fact that the two general approaches to the issue have not been reconciled.

The first approach favours the view that no distinction exists between on-duty and off-duty as it pertains to policing: owing to the nature of the office of constable, a police officer is never "off duty."

The second approach holds that a valid distinction does indeed exist, as it does for other workers, and the important issue is the extent to which police officers are subject to greater regulation than other workers with respect to off-duty conduct, by virtue of the duties and powers of the office of constable.

(b) "There is No Distinction Between On-duty and Off-duty"

Although the view that there is no distinction between on-duty and off-duty is archaic in a number of regards, there is an established body of judicial decisions which supports it. The most frequently cited authority in support of this position is the judgment of the Ontario Court of Appeal in *R. v. Johnston*, in which the court allowed an appeal from a ruling that a police officer was not in the execution of his duty because he was privately employed by a business to direct traffic outside of its premises. The court's conclusion that "a police officer is on duty at all times" is still cited with approval.

This view has been endorsed in other forums. In Nova Scotia, for example, Chief Judge Green in the *Report of the Commission to Review the Police Act and Regulations* preferred this approach.

A variation on this theme is the view that police officers are "in effect" always on duty. The Alberta Court of Queen's Bench, for example, expressed the view that police officers, because of their office and position, are "in effect 'on duty' 24 hours a day, 7 days a week" and therefore subject to discipline for acts committed beyond regular working hours. The Nova Scotia Supreme Court used similar language: "[i]t goes without saying that a police officer can be called out at any time and essentially is never off duty".

The most obvious problem is that, although some courts of law have resisted the conclusion that police officers can be off-duty, legislation and regulations have

contained specific provisions that clearly recognize the distinction between on-duty and off-duty conduct. For example, the Ontario Code of Conduct enacted in 1969 created specific disciplinary offences for particular "on duty" conduct, suggesting that the statement in the *R. v. Johnston* case that "a police officer is on duty at all times", decided only four years earlier, was no longer good law. In more modern times, the regulation of police involvement in political activity explicitly recognizes the fact that a police officer can be off-duty.

(c) "There is a Distinction Between On-duty and Off-duty"

As discussed, the second approach – that police officers *are* off duty outside of "prescribed hours of duty" – also finds support in case law, as well as Canadian statutes and regulations and other sources.

Police officers who are off-duty may "put themselves on duty" at any time by exercising the powers of the office of constable. In British Columbia, at least, it would appear to be settled law that a police officer may be "on duty" beyond the conclusion of prescribed working hours. In the words of the British Columbia Supreme Court, a police officer is not restricted to "acting within the confines of a working day".

To be "on duty" while outside of formal working hours, a police officer must take some action *qua* police officer, or "rel[y] on his position of authority." In *R. v. Crimeni*, an off-duty New Westminster constable approached a suspected impaired driver, presented his police identification, asked the driver to produce his licence and registration, confiscated the driver's keys and sought assistance from a private citizen to find the nearest police detachment. The court ruled that the constable was acting as a police officer. In *Love v. Saanich (District)*, a police officer investigated a noise outside his home late in the evening, and discovered that someone was attempting to remove a stereo from an automobile parked in his driveway. He was casually dressed and was armed only with a bamboo tomato stake. The police officer was injured in the course of apprehending the suspect, who was convicted of attempted theft and assault. The Workers' Compensation Review Board concluded that the injury arose "out of and in the course of" his employment within the meaning of the term in the *Workers' Compensation Act*. The Board reasoned that the police officer objectively had embarked on a criminal investigation at the point at which he saw the open car door, despite the fact that he was on his own property: "[o]nce he saw objective evidence of a crime in progress, his police officer role was engaged." A similar decision resulted in a West Vancouver case in which an off-duty police officer attempted to apprehend a person unlawfully entering his residence.

The English common law was set out in the case of *Davis v. Minister of Pensions*, a war reserve constable was injured on the way to work, and claimed compensation for a "war service injury." Eligibility for compensation depended on whether the injury arose in the course of the performance of duty, and the

claimant argued that because a constable is on duty "at any time" although outside regular hours of duty, any accident must therefore have arisen in the performance of his duties. The Court rejected this position:

When the prescribed hours of duty of a constable have come to an end and an emergency arises it is his duty to attend to that emergency, and at that moment he is on duty in the strict and narrow sense [...] but until such an emergency arises he is in the position of any other civilian.

3. The Application of the Complaint Process to Off-Duty Conduct

(a) General Principles

Assuming that a valid distinction exists between on-duty and off-duty activity, and both logic and the weight of legal authority suggest it does, then the question to be answered is the extent to which the complaint process captures police officers' behaviour while off duty.

The starting point in responding to this question involves an examination of the general principles of employment law. Ball distills the law in this regard:

An employer cannot determine in a paternalistic fashion how employees shall conduct their lives when off the job in matters which do not affect work performance or the employer.

Both courts of law in common law wrongful dismissal cases and arbitrators in grievance decisions have adopted a similar approach on this issue. In one Newfoundland dismissal decision, in fact, the court cited with approval the following statement of the law from *Kashinsky and Sack, Discharge and Discipline*:

While arbitrators are generally of the view that employers are not custodians of their employees' character, whether an employee may be disciplined for off-duty conduct will depend upon whether the conduct is work-related. This will involve a consideration of the nature of the offence, the employment duties and the nature of the employer's business. In particular, it will depend upon whether the employee's conduct

(1) detrimentally affects the employer's reputation;

(2) renders the employee unable properly to discharge his or her employment obligations;

(3) causes other employees to refuse to work with him or her; or

(4) inhibits the employer's ability to efficiently manage and direct the production process.

In short, a connection or nexus must be established between the employee's actions and the employment relationship.

The test in policing is not dissimilar. Courts of law and tribunals have consistently ruled that the police complaint process captures off duty conduct, so long as a nexus exists between the impugned off duty conduct and either public respect for the constabulary or the fitness of the police officer to hold the office of constable.

As the Ontario Court of Appeal observed in *Trumbley v. Metropolitan Toronto Police*, however, the relation of police officers to the police force is not akin to that of an ordinary citizen to government: "[t]he police officer has voluntarily accepted a vocation entailing duties which are peculiar to it and essential to its proper performance, duties to which ordinary citizens are not subject." Thus, the more important question is how these general principles governing off-duty conduct are applied, given the nature of the duties and powers of the office of constable. The point was expressed as follows by the R.C.M.P. External Review Committee:

The debate now, as always, is over how much higher those standards may legitimately be, and in what respects (and with respect to what conduct) they may legitimately differ from standards demanded of ordinary citizens and other employees.

The law will be examined through a review of case law originating in various forums: courts of law and tribunals, inquiries and grievance arbitration. Relevant legislation will also be discussed.

(b) Court and Tribunal Decisions in Misconduct Cases

A reasonably large body of court decisions has developed dealing with the application of the complaint process to off-duty conduct. The bulk of these court judgments originate from appeals of disciplinary tribunal decisions or applications for judicial review.

The first modern Commonwealth court judgment offering guidance on the extent to which the police complaint process captures off-duty conduct appeared in the Australian case of *Henry v. Ryan*, involving the offence of "misconduct against the discipline of the police force". Here, the Court ruled that off duty behaviour was subject to internal discipline in certain circumstances:

"Discipline" in this sense involves more than mere obedience to lawful orders. It is a wide concept and I have no doubt extends to conduct of a police officer when off duty so far as that conduct may affect his fitness to discharge his duties as a police officer.

The leading Canadian judgment is the decision of the Nova Scotia Court of Appeal in *Blakeney v. Police Review Board*, in which a police officer called a neighbour a "senile old bastard" during an argument over the telephone that occurred off duty. The police officer was convicted of the discipline offence of abuse of authority under s. 5(1)(g) of the Nova Scotia Police Act Regulations, which read as follows:

5. (1) A member of a police force commits a disciplinary default where the member

...

(g) abuses authority by

...

(iii) being discourteous or uncivil to any member of the public having regard to all the circumstances

The Police Review dismissed the police officer's appeal against the conviction, and made the following observation in its decision:

Cst. Blakeney was in a position of authority. The public expects that a police officer should always conduct himself with respect and courtesy towards members of the public. The public expects this when the police officer is on or off duty.

The Nova Scotia Supreme Court dismissed the police officer's application for an order to quash the decision, and his further appeal to the Nova Scotia Court of Appeal was also unsuccessful.

While *Blakeney* and many other "off duty" cases have involved incidents occurring within the geographical boundaries of the police force, courts of law have applied the same principles to cases in which the conduct in question occurred outside of the geographic jurisdiction of the police force. The issue of the applicability of "public complaint" legislation to off-duty conduct was the subject of an application for judicial review under one of the first legislative public complaint schemes in Canada, the *Metropolitan Toronto Police Force Complaints Act, 1984*. In *Marks v. Lewis*, the chief of police challenged the authority of the Police Complaints Commissioner to review a decision made by the chief of police not to deal with a complaint alleging improper behaviour on the part of two police

officers while off duty at a cottage 130 miles outside the city limits. In dismissing the application, the Court provided only brief reasons, but did conclude that the conduct alleged (an assault) "may well fall within the definition of 'discreditable conduct'". In a British Columbia case, *Bowles v. Post*, the court ruled that a chief constable acted within his powers in commencing discipline proceedings against several members who were off duty and outside the department's geographical jurisdiction at the time. The court concluded that neither the statute nor the regulations contained geographical restrictions, and concluded as follows:

Common sense dictates that if a police officer acts in a disorderly or embarrassing manner that may not be criminal but which brings discredit upon the reputation of the police force, whether it happens at Shawnigan Lake, Vancouver or New York City, the chief constable must have the power to correct and discipline such conduct. If he could not discipline such conduct the public's respect for the force as a whole would be diminished. Such a result could render the force ineffective.

The reference in *Bowles* to the authority of the chief constable over matters occurring outside of the country is thought to be the first explicit statement that the complaint process reaches this far. Although the misconduct alleged in that case did not occur outside the country, the Alberta Court of Queen's Bench did consider allegations against an Edmonton police officer respecting an incident alleged to have occurred in Indiana. The court in *Vanovermeire v. Edmonton Police Commission* confirmed that the complaint process captured conduct alleged to have occurred in another country:

I would also reject the [police officer's] contention that, because an incident took place involving a police officer of the E.P.S. outside of the city limits the E.P.S. should be uninterested and have no jurisdiction or duty to investigate the same. Whether we like it or not, many public servants and officials, because of their offices and positions are, in effect, "on duty" 24 hours a day, 7 days a week. I believe police officers are in this category. So are judges. It would be inconceivable to me that the Canadian Judicial Council, which has a statutory duty to review complaints made against Federal Judges, would not have the jurisdiction to investigate a complaint that a judge was behaving in an unacceptable fashion just because the incident happened after court sitting hours and in another province than that in which the judge normally sits. Surely the question of whether that judge's conduct has brought disrepute to the justice system has nothing to do with where it took place and whether it was within normal working hours.

The law governing whether particular misconduct would likely damage the reputation of the police force is not free from doubt. One view is stated by the

R.C.M.P. External Review Committee, in its report *Sanctioning Police Misconduct - General Principles*, as follows: "[i]n determining whether certain misconduct would likely damage the reputation of the police force, the proper test is whether a reasonable person who was fully informed of all the relevant facts would be of the opinion that the misconduct in question brings discredit on the police force." However, the report goes on to state that:

The issue of "harm to the reputation of the police force" needs to be carefully examined in the context of each case. Police discipliners should not automatically report to this criteria as a justification for a severe sanction without some evidence that damage to the reputation of the force has occurred and is so great that a severe sanction is warranted. The assumption that the reputation of the police force is damaged by the misconduct of an individual police officer can easily be overstated. Seldom will the isolated misconduct of one police officer result in the loss or substantial lowering of a good police force's overall reputation. The public and others are normally intelligent enough to appreciate that the individual misconduct of one police officer ought not to be visited upon the reputation of the entire police department.

As well, the locality in which a police officer is stationed can affect the severity of discreditable conduct. The R.C.M.P. External Review Committee, in its Report entitled *Off-Duty Conduct*, made the following observation:

[T]he conduct of an officer who lives in a large, relatively anonymous, urban area is inherently less likely to be "discreditable" than the same conduct of an officer working in a small rural community where everybody knows everyone else. The necessary implication is that officers working in small communities are held to higher standards of private conduct than officers working in large urban areas.

Tribunal decisions have generally followed the court decisions. The Alberta Law Enforcement Review Board, for example, set out its view of the law as follows:

In our free and democratic society it has long been recognized that employees (in public or private occupations) are entitled to a private life while off duty. During that time period people are at liberty to choose their activities and regulate their lawful conduct as they see fit so long as their employer is not damaged or harmed in some fashion. A prima facie presumption exists in favour of the off duty right to privacy, non-interference, and the absence of surveillance.

...

Disciplinary proceedings against an employee for off duty conduct absent a sufficient nexus are unlawful and will not be sustained ...

...

[T]he Board is persuaded that some guidelines should be provided concerning where a nexus or rational connection is likely to occur in the context of off duty conduct. The following list, though not exhaustive, is intended to identify key areas of connection and concern:

- (1) Where the conduct of the officer harms the reputation or credibility of the Police Service.
- (2) Where the officer's behaviour renders him or her unable to perform his or her duties in a satisfactory manner.
- (3) Where the officer's behaviour leads to refusal, reluctance, or inability of other officers or employees to work with the officer.
- (4) Where the officer has contravened the law in a manner that renders his or her conduct injurious to the reputation of the service and its members.
- (5) Where the officer's conduct places difficulty in the way of the service to properly carry out its functions and effectively manage its work or effectively direct its work force.

Tribunals rarely conclude that off-duty misconduct is unlikely to damage the reputation of the police force, however. While time has not permitted an exhaustive examination of tribunal decisions across Canada, a quick review of recent cases from Alberta and Ontario (as examples) reveals findings of misconduct for a wide range of off-duty behaviour. In Alberta, the Law Enforcement Review Board has found misconduct in off-duty cases involving involvement in prostitution-related activity, damage to a vehicle during a personal dispute, use of police identification to obtain favourable treatment and using a false name. In Ontario, the Commission has found misconduct in off-duty cases involving involvement in prostitution-related activity, child abuse, shoplifting and other theft, assault, insurance fraud, playing Russian roulette, improper use of police identification, improper personal relationships and sexual harassment.

A small number of tribunal decisions, however, have concluded that misconduct could not be established because there was no nexus between the impugned off duty conduct and either public respect for the constabulary or the fitness of the police officer to hold the office of constable.

One case containing some useful discussion in this regard is *Leone v. Catalano*, a decision of the board of inquiry under the public complaint provisions found in the former Part VI of the Ontario *Police Services Act*. This case involved an extraordinary series of events beginning with an off-duty police officer observing a car full of people stop in front of his house. One of the occupants, a realtor, removed his company's "for sale" sign, which the police officer was using for his own purposes (to advertise fill). The police officer thought he had the right to use the sign and, while still in barefeet, commenced a vehicle pursuit in a highly dangerous manner. The incident ended at an O.P.P. detachment, where the police officer offered his assessment of the realtors in blunt fashion. The police complaints commissioner constituted a board of inquiry to hear the allegations of misconduct arising from the realtors' complaints, and the board offered the following analysis on the issue of off-duty conduct:

Having found, on clear and convincing evidence that allegations 1 and 2 of the Statement of Alleged Misconduct [relating to the pursuit and forcing the car off the road] are proven, the Board must ask itself if such actions are "likely to bring discredit upon the reputation of the police force" contrary to s. 1(a)(i) of the Code of Offences set out in the Regulations made pursuant to the *Police Services Act*, R.S.O. 1990, c. P.15.

Counsel for the Police Complaints Commissioner referred the Board to two decisions by the former Police Complaints Board, namely *Re Footman* [*Footman v. Davies*, Police Complaints Board, 14 December 1984, aff'd, Ont. Div. Ct., 14 October 1986], and *Re Khoury* [*Khoury v. Pike*, Police Complaints Board, 31 October 1985, aff'd, Ont. Div. Ct., 23 November 1988]. In *Re Footman*, [the Police Complaints Board] states at pp. 3-4:

. . . Moreover, the Code of Offences set out under Regulation 791 (R.R. O. 1980) the *Police Act* (R.S.O. 1980, c. 371) includes offences which do not require a wrongful intent. For example, under s. 1(i) of the Schedule of Offences, acts which are "likely to bring discredit upon the reputation of the police force" are discreditable conduct. Such an offence clearly does not contain a requirement of wrongful intent. This offence is based on the concept that if an action has the appearance of wrongful conduct, such as the appearance of suppressing evidence or inappropriately failing to act, then it may be held to be misconduct, regardless of intent, because it may bring discredit on the force by virtue of its appearance.

and at p. 5:

. . . It is the Board's view that the conduct of the officers should be judged against the standard of reasonableness . . . This is not the highest possible standard . . . Nor is it to impose the standard referred to earlier, that a wrongful intent must be found. Rather, it is to impose a standard which requires the officers to act in accordance with the reasonable expectations of society and to judge their conduct against that standard.

In *Re Khoury*, Mr. Makuch, the Chair, states at p. 6:

. . . the Board should apply the test of whether the community or a reasonable person, would see the conduct as uncivil or likely to discredit the force.

The Board adopts and accepts the reasoning in these decisions and has assessed Officer Catalano's conduct against what we believe are reasonable community standards. On that basis, both allegations 1 and 2 of the Statement of Alleged Misconduct, proven on clear and convincing evidence, do offend reasonable community standards, and misconduct is established on both these allegations.

... Counsel argued that discreditable conduct is not an offence applicable to an officer off-duty. ... The Board is clearly of the opinion that an off-duty police officer can commit the offence of discreditable conduct. Police officers are respected by the public because of who they are. That respect is afforded to police officers off duty as well as on duty, and the public is entitled to expect a certain standard of behaviour from police officers, whether off duty or on duty. This is not to say that the matter is not a factor however. It comes in to play in assessing whether the police officer's conduct falls below the reasonable community standards referred to previously. Certain actions which might be considered to offend reasonable community standards when taken by an officer on duty, might not offend reasonable community standards when taken by an officer off duty. In this case, the Board has found that Officer Catalano insulted Mr. Leone prior to the pursuit by calling him a "son of a bitch". Allegation # 3 in the Statement of Alleged Misconduct is not established in that other essential elements of the allegation were not proven. However, if this were the only element of the allegation, the Board would not consider this likely to bring discredit upon the reputation of the police force. These words would almost certainly bring discredit if used by an officer on duty dealing with the public. However, in this case, unknown persons to Officer Catalano upset his wife and invaded the sanctity of his home while he was at home on vacation (whether the sign was within the legal limits of Officer Catalano's lot or not, this was as a person would

normally view it, his home), by taking property that he legitimately believed he had a right to have. Police officers have the same right to be angry and upset about an intrusion of this nature, as anyone else, and in our opinion this insult would not offend reasonable community standards.

The Ontario Civilian Commission on Police Services has also concluded in a number of cases that the employer did not establish the required nexus. In its decision in *Morin and Ontario Provincial Police*, for example, the Commission dealt with a long-standing dispute between a police officer and the municipality concerning a property boundary. The municipality sent its workers to perform ditching operations, and the police officer took the position that the workers could not proceed because the location fell within his property boundary. The police officer succeeded in his appeal from a conviction for discreditable conduct for obstructing the workers and throwing a worker's helmet in a ditch. The Commission concluded that the police officer honestly believed that the municipality had encroached on his property, had relied on survey evidence and had engaged in *bona fide* discussions with municipal staff. In particular, the Commission concluded that his actions did not bring, or were not likely to bring, discredit to the employer. In its more recent case of *Burdett and Guelph Police*, the Commission considered an appeal by a police officer who had been convicted of two counts of discreditable conduct for off-duty behaviour. The first involved sending an offensive and threatening Christmas card to a person he suspected of breaking into his home. The suspect did not know the sender was a police officer. The second arose when investigating police officers attending his residence looked through his front door and saw a hand-painted message on an unfinished wall: "When I catch you I'm going to kill you. And believe me ... you're as good as caught ... Eric!". The Commission ruled that sending the threatening card did constitute misconduct, but the writing on the wall was "essentially a private act" and therefore not discreditable conduct:

Like every other citizen, a police officer is entitled to enjoy the privacy afforded by his or her own home and to express himself or herself as he or she wished to the extent that is lawful. Angry thoughts scribbled in a personal diary or scratched on an internal wall in a private home under renovation is not conduct subject to discipline. We consider that Constable Burdett's action had no practical connection with any member of the public, his employment or the reputation of the police service.

The final remark to offer regarding tribunals cases dealing with off-duty conduct concerns the recent proceedings involving the former chief of the Edmonton Police. In *Re Lindsay*, the Alberta Law Enforcement Review Board made a recommendation that policy governing off-duty conduct be reviewed:

It is recommended that the Edmonton Police Service undertake a review of its current policy concerning the off-duty conduct of [its] members. Existing policy may require further detail and strengthening in regard to off-duty member contact or association with career criminals, their close associates, or those involved in criminal organizations (O.M.G.s). Some emphasis may be required concerning the negative aspects of such associations (or perceived associations) and the inherent dangers that arise from such contact. It is further recommended that the Edmonton Police Commission review the existing Police Service policy in relation to off-duty conduct.

(c) Inquiries

The standard of conduct expected of police officers while off duty has also been examined in various inquiries. Several inquiries in Great Britain have offered guidance in this regard. The following comment appears in the *Report of the Committee on the Police Service of England, Wales and Scotland, 1919* (the "Desborough Report"):

[A constable] must at all times, both on and off duty, maintain a standard of personal conduct befitting to his position, and this does impose upon him certain restrictions which do not exist in ordinary employments and hardly apply in the same degree even in the case of other public servants.

The *Report of the Committee on Police Conditions of Service, 1949* (the "Oaksey Report") made similar remarks:

Without a high standard of conduct, both on and off duty, [the police] would lose the confidence of the community and without that confidence the police service could never be fully effective.

In Canada, Mr. Justice Campbell Grant, writing as a Commissioner under public inquiry legislation, offered the following analysis:

This inquiry is based on the premise that there is a minimum standard of conduct which police officers must observe in their private lives. This standard is quite obviously much higher than the standard required of an ordinary citizen. The most basic reason for requiring this high standard of care in a policeman's private as well as his public life stems from the realization that the efficient operation of a police force depends upon the existence of mutual respect and trust between the public and the police and also among the members of the police force itself. This mutual respect and trust will deteriorate when the conduct in a policeman's private or public life is less than blameless. The reasons being:

(1) The equal administration of law depends upon the principle that justice must not only be done but seen to be done. Thus a police officer must do nothing in his private life that would influence or appear to influence the performance of his public duty as an officer of the Crown.

(2) The police officer is the person most responsible for initially setting the wheels of the administration of justice in motion and therefore the public cannot be expected to respect the law if it does not respect and believe in the dedication and integrity of the police force.

(3) A police officer's conduct ought to set an example for the community to follow and thus any shortcomings in his conduct will colour the image of the police force in the eyes of the public.

(4) There are few professions, if any, where a person is put in a position of such temptation to use his professional authority for personal gain and thus any irregularity in a police officer's conduct becomes the subject of speculation, thereby jeopardizing the respect and trust of the public.

(5) As in any other military or quasi-military organization it is essential that morale among members be kept as high as possible and this requires that the members believe in the honesty and integrity of one another. Without this respect the force will not function as it ought to. This is particularly important if the members of the more junior ranks of the force do not respect the members in the more senior ranks. Thus all members must ensure that by their conduct they do not place themselves or the morale of the force in jeopardy.

The *Policing in British Columbia Commission of Inquiry Final Report* summarized the law as follows:

Because police officers hold a special public office, courts have allowed police agencies to hold their members to a higher standard of off-duty conduct than expected of other groups in society. However, courts require this standard to be related to the legitimate interests and requirements of the police agency. To intervene in the private lives of its members, a police agency must show a rational relationship between the intervention and the legitimate occupational requirements and reputation of the force.

(d) Arbitral Jurisprudence

Arbitral jurisprudence has also been consistent in this regard. In *Granby (Ville) and Fraternite Des Policiers De Granby, Inc.*, the arbitrator made the following statement:

The position of a law enforcement officer differs from other employment as regards the standard of conduct that will be required of an incumbent in such a position. The conduct of such a person, whether on or off duty, may be the subject of scrutiny. Such conduct, where it places in doubt the integrity, honesty or moral character of the police officer, may weaken his effectiveness, cause embarrassment to the police force of which he is a member, and may as such be quite incompatible with his position.

In *Metropolitan Board of Commissioners of Police and Metropolitan Toronto Police Association*, the higher standard was applied to a civilian member of the police department: "Although the grievor was not a uniformed member of the police force but was only a civilian member, his employee-employer relationship was significantly different than the usual relationship in an industrial enterprise. The board's function is to uphold and enforce the law."

(e) Legislation and Regulations

British Columbia has now specifically addressed off duty conduct in its Code of Professional Conduct Regulation, and created a separate disciplinary default of improper off duty conduct: "a police officer commits the disciplinary default of improper off-duty conduct if (a) the police officer, while off duty, asserts or purports to assert authority as a police officer and does an act that would constitute a disciplinary default if done while the police officer is on duty, or (b) the police officer, while off duty, acts in a manner that is likely to discredit the reputation of the municipal police department with which the police officer is employed." In Ontario, s. 74(2) of the *Police Services Act* now specifically provides that "[a] police officer shall not be found guilty of misconduct if there is no connection between the conduct and either the occupational requirements for a police officer or the reputation of the police force."

4. Secondary Activity

Historically, secondary activity on the part of police officers, especially secondary employment, was looked upon with some disfavour. In Ontario, for example, the law until 1990 provided that a police officer could not, without consent of the chief of police, "engage directly or indirectly in any other occupation or calling, and he shall devote his whole time and attention to the service of the police force".

The traditional caution towards secondary activity, and secondary employment in particular, derived in large part from the nature of a police officer's authority. The R.C.M.P. External Review Committee addressed this concern in its discussion paper *Off-Duty Conduct*.

A major concern with some kinds of employment is that a police officer may exercise the office of constable and the functions of a peace officer whether on or off duty. Secondary employment which can blur the officer's status and source of authority is thus suspect. For this reason, employment requiring firearms, or which might involve arresting someone, is often prohibited. Similarly, members who engage in any business or employment for which they could also be required to perform any inspections or regulatory functions as part of their police duties run a serious risk of conflict.

Confidentiality presents a further concern when police officers work in security or similar fields.

In the last decade, both Ontario and Newfoundland have addressed secondary activity using similar language. The *Royal Newfoundland Constabulary Act, 1992*, addresses secondary activity in ss. 15(2) - (4):

(2) A police officer shall not engage in any activity,

(a) that interferes with or adversely influences the performance of his or her duties, or is likely to do so;

(b) that places him or her in a position of conflict of interest, or is likely to do so;

(c) that would prevent or impair his or her ability to be recalled to duty by the chief or his or her superior officer; and

(d) in which he or she may acquire an advantage derived from employment as a police officer.

(3) A police officer who proposes to undertake an activity that may contravene subsection (2), or who becomes aware that an activity that he or she has already undertaken may contravene subsection (2) shall disclose full particulars of the activity to the chief.

(4) The chief shall decide whether or not an activity proposed to be engaged in or engaged in by a police officer is prohibited under this section and that police officer shall comply with the decision of the chief.

In Ontario, s. 49 of the *Police Services Act* governs secondary employment:

- (1) A member of a police force shall not engage in any activity,
 - (a) that interferes with or influences adversely the performance of his or her duties as a member of a police force, or is likely to do so;
 - (b) that places him or her in a position of conflict of interest, or is likely to do so;
 - (c) that would otherwise constitute full-time employment for another person; or
 - (d) in which he or she has an advantage derived from employment as a member of a police force.
- (2) Clause (1) (d) does not prohibit a member of a police force from performing, in a private capacity, services that have been arranged through the police force.
- (3) A member of a police force who proposes to undertake an activity that may contravene subsection (1) or who becomes aware that an activity that he or she has already undertaken may do so shall disclose full particulars of the situation to the chief of police or, in the case of a chief of police, to the board.
- (4) The chief of police or the board, as the case may be, shall decide whether the member is permitted to engage in the activity and the member shall comply with that decision.

Some jurisdictions have chosen to control outside employment activity by way of policy and rules, rather than by statute or regulation. The Alberta Court of Appeal ruled that implementation of such rules is a valid exercise of the statutory authority to make rules governing the operation of a police force. At the time, s. 26 of the Alberta *Police Act* provided as follows:

- (2) The commission may make rules not inconsistent with this Act governing the operation of a police force of an urban municipality including
 - (a) the conduct, dress, deportment and duties of members of the police force,
 - (b) the prevention of neglect or abuse in the discharge of duties,
 - (c) the efficient discharge of duties by the members of the police force, and

(d) punishment for contraventions of the rules.

In this case, the rule read as follows:

87.1 A member will not invest in any of the following businesses or ventures or accept part-time employment in any of the following occupations:

(i) bill collector;

(ii) skip tracer;

(iii) watchman, security guard, or other security work;

(iv) taxi or limousine driver, or the owner or operator of a taxi service or limousine service;

(v) owner, operator, or employee in an establishment in which alcohol is consumed

(vi) owner, operator, or employee in an establishment in which gambling occurs;

(vii) insurance adjuster or investigator;

(viii) private investigator;

(ix) escort, or an employee of an escort agency;

(x) process server;

(xi) armoured car driver or guard;

(xii) body guard; or

(xiii) any occupation which requires a member to be armed.

87.2 A member may invest in a business or venture not listed in Section 87.1 and may accept part-time employment in an occupation not listed in section 87.1 providing the following conditions are met:

(i) the member's effectiveness as a peace officer will not be adversely affected;

(ii) participation in the business or other venture, or part-time employment, will not create a conflict of interest with the member's duties as a peace officer; and

(iii) the business venture, or part-time employment, will not be demeaning to the member's position as a peace officer, or to the service.

87.3 Prior to investing in a business venture or accepting part-time employment to which section 87.2 applies, a member must apply for and receive permission to do so from the Chief of Police. Applications must be in writing and include the name and address of the employer, or owner of the business, and the duties and responsibilities the member will be expected to fulfill.

87.4 A member who is notified by the Chief of Police that his application to invest in a business or venture, or accept part-time employment, does not meet the conditions specified in section 87.2, may, within 30 days, appeal to the Commission.

Such restriction of secondary employment would not likely contravene s. 7 of the *Charter of Rights*. In the *Calgary Police Association* case, the Court of Appeal found no *Charter* violation where the chief of police and the police commission added a provision to the police administration manual prohibiting certain outside employment activities and regulating others. The Nova Scotia *Police Act* now requires municipal boards of police commissioners to establish written policies respecting off duty employment. The policy must prohibit police officers from engaging in the business of serving civil process documents, private investigation and private guard.

Some jurisdictions have extended their regulation in this area to the extent of including outside business interests of family members of police officers.

5. Political Activity

Participation in political activity has historically been considered incompatible with the impartiality necessary to the fulfilment by police of their duties, and many jurisdictions have formulated some type of restrictions on the right of police officers to engage in political activity. These restrictions fall within a broad spectrum ranging from a complete ban on police officers' involvement in political activity to permissive schemes in which police officers have substantive political activity rights.

While the purpose of this discussion paper does not include a detailed survey of political activity provisions across Canada, an example of the extremes is useful. The *Royal Newfoundland Constabulary Act, 1992* is an example of the restrictive approach: a police officer shall not engage in political activity, except in accordance with the regulations, and the Royal Newfoundland Constabulary Regulations provide that a police officer shall not "wear the emblem, mark or insignia of a political party or in another way manifest political partisanship". Recent years, however, have seen a trend in favour of greater political activity rights for police officers. Professor Stenning argues that community-based policing, with its expectation that police be both more proactive and more alive to addressing "underlying causes" of crime, require greater police involvement in the community, which in turn may increase politicization of both police officers and police forces.

Recent trends are evident in both the jurisprudence and legislative amendment. In England, the House of Lords decision in *Champion v. Chief Constable of the Gwent Constabulary* is the leading case, and contains an instructive examination of the scope of permissible political activity by police officers. In *Champion*, a constable was elected to serve as a parent governor of a local comprehensive school, and served on the appointments sub-committee, which interviewed applicants for teaching positions and made recommendations for appointments. The chief constable refused to allow the member to sit on the sub-committee. At issue was the interpretation of regulations which required a police officer to abstain from "any activity which is likely to interfere with the impartial discharge of his duties or which is likely to give rise to the impression amongst members of the public that it may so interfere; and in particular a member ... shall not take any active part in politics". The House of Lords approached the issue by addressing the two principal objections raised by the chief constable. The first was that the constable might have information about an applicant which he had gained only by virtue of his employment. Lord Griffiths, stressing that the regulation prohibited activities *likely* to lead to an impression of unfairness in the public mind, discounted the possibility that a disappointed candidate might think that the constable had improperly used confidential information to prevent the appointment, thereby giving rise to a public perception that the constable's activities as a member of the sub-committee would interfere with the impartial discharge of his police duties. In particular circumstances, Lord Griffiths noted, a constable possessing confidential information may wish to excuse himself from attending a meeting. Second, the chief constable did not want the police involved in controversial decisions which could affect the reputation of the force for impartiality, but Lord Griffiths found no evidence supporting the position that the appointment of teachers would likely lead to public controversy. While Lord Griffith's speech addressed an activity which is less partisan than most political activity, his Lordship avoided interpreting the regulation in a narrow fashion:

Its object is to prevent a police officer doing anything which affects his impartiality or his appearance of impartiality. Impartiality means

favouring neither one side nor the other but dealing with people fairly and even-handedly. The paragraph takes its colour from the particular prohibition on taking part in politics which is an overly partisan activity in which one favours one side to the exclusion of the other. It is activities that are likely to be seen in a similar light that are aimed at, activities that identify those taking part with a particular interest or point of view in a way which will, or may be thought to, make it difficult for them to deal fairly with those with whom they disagree. Exceptionally, it may include activities involving controversial decisions but I would have thought that such occasions would be rare, for surely most of us are, from time to time, involved in controversial decisions without it being thought that we cannot deal fairly in other matters. [...] This restriction is not intended to protect police officers from the occasional embarrassing decision with which they may be faced during off-duty activities; it is there to ensure both impartiality and the appearance of impartiality. There are in my view great dangers in isolating the police from the community and every encouragement should be given to police officers to play a full part in the life of the community in which they live.

The scheme governing permissible political activity for members of the R.C.M.P. was also recently modified after the Québec Superior Court ruled that the existing provisions contravened s. 2 of the *Charter of Rights and Freedoms*.

A number of jurisdictions have now modified their regulations. Ontario recently made O. Reg. 554/91, in which it reformulated its approach to permissible political activity by municipal police officers, and adopted a very permissive approach. A municipal police officer may vote in an election, hold membership or office in an organization engaged in political activity and contribute money or goods to an organization engaged in political activity, and to a candidate. A municipal police officer may engage in a further set of political activities when not on duty or in uniform, as authorized by s. 2:

1. Expressing views on any issue not directly related to the police officer's responsibilities as a police officer, as long as the police officer does not,
 - i. associate his or her position as a police officer with the issue, or
 - ii. represent the views as those of a police force.
2. Attending and participating in a public meeting, including,
 - i. a meeting with elected representatives or government officials, or

- ii. a meeting with candidates in an election.
- 3. Attending and participating in a meeting or convention of a political party or other organization engaged in political activity.
- 4. Canvassing on behalf of a political party or other organization engaged in political activity, or on behalf of a candidate in an election, as long as the police officer does not solicit or receive funds on behalf of the party, organization or candidate.
- 5. Acting as a scrutineer for a candidate in an election.
- 6. On the polling day of an election, transporting electors to a polling place on behalf of a candidate.
- 7. Engaging in any other political activity, other than,
 - i. soliciting or receiving funds, or
 - ii. political activity that places or is likely to place the police officer in a position of conflict of interest.

The police services board or a chief of police may authorize a municipal police officer to engage in certain political activities on behalf of the police force. The regulation also permits the appointment or election of a municipal police officer to a local board other than a police services board, unless such activity interferes with the police officer's duties as a police officer, or places or is likely to place the police officer in a position of conflict of interest. Finally, a municipal police officer other than a chief of police or a deputy chief may be a candidate in a federal, provincial, or municipal election:

6. (1) A municipal police officer may be a candidate, or may seek to become a candidate, in a federal or provincial election or in an election for municipal council only while on a leave of absence granted under subsection (2).

(2) A municipal police officer who seeks to become a candidate in a federal or provincial election or in an election for municipal council shall apply to the board of the municipality in which he or she is employed for a leave of absence without pay and the board shall grant the leave of absence.

(3) Despite subsections (1) and (2), a municipal police officer may seek to become a candidate or may be a candidate in an election for municipal council without taking a leave of absence if,

(a) the election is in a municipality that does not receive police services from the municipality in which the police officer is employed; and

(b) seeking to become or being a candidate does not interfere with the police officer's duties as a police officer and does not place, or is not likely to place, the police officer in a position of conflict of interest.

(4) Regardless of whether a leave of absence is required under this section, a board shall grant any leave of absence that is requested by a municipal police officer to enable the police officer to seek to become a candidate or to be a candidate in an election for municipal council.

(5) The following rules apply to a leave of absence granted to a municipal police officer under subsection (2) or (4):

1. A leave of absence shall begin and end on the dates specified in the police officer's application, subject to paragraphs 2, 3, and 4.

2. A leave of absence granted to enable a police officer to be a candidate in an election for municipal council shall not begin earlier than sixty days before polling day or continue after polling day.

3. A leave of absence granted to enable a police officer to be a candidate in a federal or provincial election shall not begin earlier than the day on which the writ for the election is issued or later than the last day for nominating candidates under the applicable provincial or federal statute and shall not continue after polling day.

7. (1) A municipal police officer who is elected in a federal or provincial election or in an election for municipal council shall immediately resign as a police officer.

(2) Despite subsection (1), a municipal police officer need not resign as a municipal police officer upon being elected in an election for municipal council if,

(a) the police officer is elected a member of the municipal council of a municipality that does not receive police services from the municipality in which the police officer is employed; and

(b) being a member of the municipal council does not interfere with the police officer's duties as a police officer or does not place, or is

not likely to place, the police officer in a position of conflict of interest.

(3) A municipal police officer who is elected in an election for municipal council and who, as permitted by subsection (2), does not resign as a police officer,

(a) shall not take part at any meeting of the municipal council in the discussion of, or vote on, any question relating to the budget for a police services board under section 39 of the Act; and

(b) shall not attempt in any way, whether before, during or after a meeting of the municipal council, to influence the voting on any such question.

(4) A former municipal police officer who resigns in accordance with subsection (1) and later ceases to be an elected political representative is entitled, on application, to be appointed to any vacant position on the police force for which he or she is qualified under section 43 of the Act.

(5) Subsection (4) applies only if the former police officer,

(a) ceases to be an elected political representative within,

(i) in the case of a former police officer who was elected in a federal or provincial election, five years after resigning as a police officer,

(ii) in the case of a former police officer who was elected in an election for municipal council, three years after resigning as a police officer; and

(b) makes an application to be reappointed to the police force within 12 months after ceasing to be an elected political representative.

(6) Another person's right to be appointed or assigned to a position on the police force by virtue of a collective agreement prevails over the right conferred by subsection (4).

8. (1) The period of a leave of absence granted under subsection 6 (2) or (4) shall not be counted in determining the length of the police officer's service, but the service before and after the period of leave shall be deemed to be continuous for all purposes.

(2) Subsection (1) applies, with necessary modifications, to a police officer who has resigned and subsequently been reappointed to the police force in accordance with subsection 7 (3).

In Ontario, police involvement in political activity has become prominent in the past year. The Toronto Police Association's "True Blue" campaign generated various legal proceedings, all of which have apparently now settled. More recently, the O.P.P. Association has involved itself in the Canadian Alliance leadership race, as the following newspaper report indicates:

The union representing 7,000 Ontario Provincial Police officers has sent its members a letter saying Tom Long "has adopted our issues as his justice platform" in his bid to become leader of the Canadian Alliance.

Brian Adkin, president of the OPP Association, sent the letter to his members June 1. Although he says the association is not endorsing any political party - and mailing costs "are paid by Tom Long" - the union president reminds members that it's good political strategy to advance "our justice and law and order goals."

Attached to Adkin's short covering letter, which he said is confidential, is a three-page letter from Long. The Alliance candidate outlines a tough justice platform that could see youth offenders as young as 10 tried in adult court and facing mandatory adult sentences.

Long urges the police to support his candidacy, and encloses Canadian Alliance membership forms.

Adkin spent yesterday at the funeral of OPP Sergeant Marg Eve, 38, who died of head injuries following a pileup involving her cruiser on Highway 401. Reached by The Star on his cell phone, he declined to discuss the appropriateness of his letter "on the day of the funeral of one of our members."

Dave Levac, the Liberal MPP who is his party's critic for police matters, said Ontario police have had the legal right to engage in political activities since Mike Harris' government changed the Police Act in 1998. However, Levac accused Long of exploiting "hot button issues" in his letter.

The letters of both Adkin and Long use the death of OPP Constable Thomas Coffin, shot in the back of the head in an unprovoked attack three years ago, to attack federal Liberal justice policy.

"Will Tom Coffin's killer serve his 25-year sentence?" Adkin asks. Long adds that Coffin's killer "needs to serve his life sentence."

Allen MacDonald was sentenced last month to life imprisonment, without eligibility for parole for 25 years, for shooting Coffin. Under present law, MacDonald could apply at 15 years to have his mandatory 25 years reduced. But an early release is unlikely since MacDonald faces concurrent sentences on other charges, and still must go to trial for threatening to kill Toronto's fire chief.

Paul Rhodes, spokesperson for the Long campaign, said the police association is doing what several other organizations, including the Ontario Medical Association, have agreed to do by sending out Long's campaign literature. It is part of a high-spending, professionally-organized effort to sign up enough Ontario supporters for Long to beat his front-running rivals Preston Manning and Stockwell Day.

Rhodes said the tough law-and-order content of Long's letter is consistent with Long's campaign statements on crime. In the letter, Long says that because the federal Liberals pretend crime is not a problem "our communities are less safe than they were 20 or 30 years ago."

Long advocates reducing the minimum age for trying young offenders to 10 from 12 years, and says that at any age, prosecutors should have the discretion to try youth in adult court, with mandatory adult penalties for serious offences. (Present law provides for such discretion at 14, with a presumption that adult sentences may apply.)

Long calls the OPP "a great source of strength to the Mike Harris government in Ontario" and asks OPP members to support his candidacy "to have a similar impact in Ottawa."

Long was a key Harris adviser and is considered an architect of the Common Sense Revolution. Rhodes said Long has friends in the police association who offered to help his campaign, but Adkin's letter says Long approached him asking about justice issues important to OPP members.

6. Options for Consideration

This discussion paper has considered three issues that invite input from interested parties: the application of the complaint process to off-duty conduct; secondary activity; and political activity. Interested parties considering these issues may decide that one or more require attention at present, and various possibilities exist in this regard.

One vehicle to address these issues is a guideline. The police complaint commissioner has authority under s. 50(2)(j) to establish guidelines involving informal resolution of public trust complaints under s. 54.1, and under s. 50(3)(d) to "prepare guidelines respecting the procedures to be followed by a person receiving a complaint". There is some doubt, however, whether the *Police Act* provides authority for a guideline on the issue of off-duty conduct. Moreover, there is uncertainty surrounding the legal status of a guideline. For these reasons, a guideline may well not be the preferred response.

A second vehicle would see the police complaint commissioner formulate a policy or informational report, or similar instrument. There would seem to be no bar to the police complaint commissioner's authority to do so. Once again, however, there is a question regarding the effectiveness of such measures. A policy document, for example, has limited status in law.

Interested parties may see some advantage to a regulatory response. The advantage of a regulation is that regulations have the force of law. Section 74 of the *Act* contains a wide grant of regulation making power.

On the issue of the application of the complaint process to off-duty conduct, there is some advantage to a response which would clarify the distinction between on-duty and off-duty conduct. Despite the fact that much of the case law dealing with this distinction originates from British Columbia – the *Crimeni*, *Love* and *Burnett* cases discussed above – there remains considerable uncertainty among police officers regarding the relevant concepts. There remains some uncertainty regarding the *standard* applicable to off-duty conduct, as well. Thus, some statement that would guide police conduct in this regard would be of use. Interested parties may also wish to address the wisdom of educating police officers concerning the standard of off-duty behaviour.

On the issue of secondary activity, most police departments have put into place some form of policy, and any response would need to consider whether this issue is more properly handled by police departments and police boards on an individual basis, or whether a province-wide standard for secondary activity is more appropriate.

On the last issue – permissible political activity on the part of police officers – the question again arises as to whether this issue is more properly handled on a local or province-wide basis. Political activity rights for police officers is quite a

prominent issue at present, however, and interested parties may wish to give it preventive consideration.

All of which is respectfully submitted.

"Paul Ceysens"

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