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Court of Appeal decisions change OCCPS approach to public complaints



BY DAVID WRIGHT

Two decisions released in the last eighteen months by the Court of Appeal for Ontario have significantly affected the approach that police services must take to public complaints under the *Police Services Act* (PSA). They have also changed the manner in which the Ontario Civilian Commission on Police Services (OCCPS) deals with appeals from police service decisions on public complaints. In our view, these decisions should be of concern to officers and police associations, as they will have a significant negative effect on the system of disciplinary hearings.

The *Police Services Act* and Public Complaints

Part V of the PSA sets out the procedure for dealing with complaints about the conduct of police officers initiated by members of the public and by the Chief of Police. Many elements of the process are common to both types of complaints while others are different.

In the case of public complaints, a member of the public may make a complaint about the policies or services provided by a police force or about the conduct of a police officer. A public complaint may be made only by someone who is directly affected by the matter complained about. When the complaint is made, the Chief (or an officer whom he or she has asked to carry out this power) must determine whether it is about the policies or services of the police force, or about the conduct of a police officer. The Chief (or the Chief's delegate) must notify the complainant of this determination, and the complainant can appeal this decision to OCCPS within 30 days.

At this stage, the Chief or the Chief's delegate may also decide not to deal with a complaint if it is frivolous or vexatious, if it is made more than six months after the events occurred, or if he or she decides that the complainant was not directly affected by the conduct that is the subject of the complaint. The complainant may ask OCCPS to review such a decision.

Unless the Chief or the Chief's delegate decides not to deal with the complaint under one of these grounds, he or she must cause a complaint about the conduct of a police officer to be investigated and the investigation to be reported on in a written report. The decision maker must then review the written report, dismiss the complaint if he or she is of the opinion that it is unsubstantiated, and cause a discipline hearing to be held if the conduct may constitute misconduct. If the Chief or his or her delegate decides that the complaint is unsubstantiated, the complainant may request that OCCPS review the decision.

The legislation provides that OCCPS is to review a Chief's decision to dismiss a complaint without holding a hearing, taking into account any material provided by the complainant, the Chief of Police, Detachment Commander, or Board. OCCPS may substitute its own decision for that of the Chief or his or her delegate.

In *Ontario (Civilian Commission on Police Services) v. Browne* (2001), 56 O.R. (3d) 673 (C.A.) and *Canadian Civil Liberties Assn. v. Ontario (Civilian Commission on Police Services)* (2002), 61 O.R. (3d) 649 (C.A.) ("CCLA"), the Ontario Court of Appeal addressed the manner in which OCCPS must review a Chief's decision not to hold a hearing into a public complaint. Both of these cases arose from applications for judicial review of OCCPS decisions, in the *Browne* case by the subject officers and in the *CCLA* case by the complainant.

The *Browne* Case

The *Browne* case involved appeals of two separate OCCPS decisions. In the first, civilians who had been involved in a motor vehicle accident complained about the conduct of Browne, an O.P.P. officer who investigated it. They raised eight separate allegations of misconduct. The O.P.P. Professional Standards Bureau concluded that the officer had acted appropriately and that no further action would be taken.

The complainants requested that OCCPS review the decision not to proceed to a hearing. The OCCPS panel issued a decision indicating that the matter was being remitted to the O.P.P. for a hearing under the PSA. The Superintendent of the Bureau then wrote to OCCPS requesting clarification of which the allegations to which the hearing should relate. The Commission replied to this letter explaining that it believed that there was "sufficient evidence to allege unsatisfactory work performance of a serious nature arising from the failure of the officer to vigorously pursue any and all investigative avenues open to him . . .". The Superintendent again wrote to the Commissioner, clarifying why the matter was now being classified as "unsatisfactory work performance" rather than "misconduct" and again inquiring as to what specifics of the officer's conduct it found problematic. OCCPS wrote back that the Bureau was directed to charge the officer with either misconduct or unsatisfactory work performance, and that its particular concern was the officer's failure to attempt to obtain a warrant for a blood sample from the other driver. Counsel for the O.P.P. wrote back to OCCPS indicating that the officer did not have the requisite reasonable grounds to obtain a warrant, and requesting that it reconsider its decision. OCCPS replied by saying that there was no new evidence or sufficient reasons to overturn its previous decision.

The officer brought an application to Divisional Court for judicial review of the OCCPS decision. It determined that since OCCPS had not been sufficiently specific in explaining the basis on which the officer was to be charged, it had made an error. It also suggested that OCCPS had to explain in greater detail why it was overturning the Chief's decision. As explained below, this decision was overturned by the Court of Appeal.

The second case involved a complaint by civilians against two Ottawa-Carleton Regional Police Service officers, Sadaka and MacMillan. The officers suspected that a minivan parked on an Ottawa street was stolen. They set up surveillance, and when the complainants drove

off in the vehicle, they were blocked by unmarked police cars and approached by police officers. They did not realize that these were police officers, thought they were under attack, and drove away, attempting to escape. While they were departing, an officer fired his gun at the tires. They complained to OCCPS both about the policies of the police service as well as the conduct of the individual officers. The Chief found the complaints against the officers unsubstantiated, noting there were errors in judgement but none that constituted misconduct. The complainants asked for a review by OCCPS, and the Commission found that there was sufficient evidence to allege unsatisfactory work performance against two of the officers. In a similar manner to the *Browne* case, the service attempted to obtain further guidance from OCCPS about the nature of the charges that should be laid; however, OCCPS declined to do so.

The officers applied for judicial review to the Divisional Court. The Court found that OCCPS had not set out the reasons and allegations with sufficient particularity. OCCPS appealed this decision and that in *Browne* to the Court of Appeal, which overturned both and restored the OCCPS order that a disciplinary hearing be held.

The Court of Appeal found that OCCPS had complied with its obligation to provide sufficient particulars about the allegations against the officers. It found that the Commission had to provide enough information for the Chief to inform the police officer of the case he or she must meet, but that this did not require “elaborate particularity”. The Court also held that there is no need for the Commission to provide reasons for its conclusion that a hearing should be held, because it is carrying out a screening process rather than making a conclusion on the merits, and because such a requirement could compromise its role as an appellate body from the determination of the Chief.

The Court of Appeal also dealt with the issue of

whether the Commission could properly order a hearing into an allegation of unsatisfactory work performance. There is an Ontario regulation that requires that before the Chief of Police may make a complaint of unsatisfactory work performance; (i) the police officer’s work performance must be assessed in accordance with established procedures, (ii) the Chief must advise the officer of how work performance may be improved, (iii) the officer’s needs must be accommodated in accordance with the *Human Rights Code*, if applicable, the Chief must recommend that the officer obtain remedial assistance, and (iv) the officer must be given a reasonable opportunity to improve work performance. The Court had to decide whether, in light of the fact that these steps had not been taken, a hearing into unsatisfactory work performance could be ordered by OCCPS in relation to a public complaint.

The Court found that there was no such obligation. It held that the conditions in the regulation apply only to complaints by the Chief of Police, not by members of the public. Accordingly, an officer can be found guilty of unsatisfactory work performance in relation to a public complaint even when the steps in the regulation have not been followed.

The CCLA Case

The *CCLA* case concerned the manner in which OCCPS reviews a decision not to hold a disciplinary hearing following a public complaint of misconduct. The case arose after a protest was held at a Guelph hotel in 1997. Fifteen people, including nine women, were arrested for breach of the peace. The Guelph police station has sixteen holding cells: ten for adult males, three for adult females, and three for young offenders. A plan was devised, in which, if there were more protesters than available places in holding cells, the overflow would be sent to the Wellington Detention Centre. The first six women placed in the holding cells were chanting and singing and were asked by the officers to be quiet. When the seventh woman arrived at the station the officers decided to transfer all of them

to the detention centre, where they were strip searched in accordance with ministry policy.

The complainants, who were among the adult females arrested, alleged that the officers made the decision to transfer them to the detention centre in bad faith, knowing that they would be subjected to a strip search which they found humiliating. They also alleged that there was no legitimate basis for their arrest, and some made additional complaints such as the use of excessive force, undue delay before being informed of their rights, and being detained in custody for an excessive period of time. The Chief dismissed the complaints for being out of time; however, OCCPS overturned this decision, ordering that the complaints be investigated by the Waterloo Police. The Waterloo Police characterized the complaints as complaints about the conduct of a police officer and the complainants appealed, alleging the complaints should be treated as relating to policy. OCCPS confirmed this decision.

Relying on the investigation of the Waterloo police, Guelph Chief Bradburn concluded that most of the allegations were unfounded. The complainants appealed to OCCPS, which confirmed the Chief's decision. The Divisional Court and the Court of Appeal, however, overturned this decision. The Court of Appeal ordered that a hearing be held in relation to the complaints, conducted by a different police force.

The most important issue dealt with by the Court in the course of its decision was the standards that a Chief of Police should apply in deciding whether to hold a hearing into a civilian complaint of misconduct. The Police Association of Ontario, the Ontario Provincial Police Association and the Ontario Association of Chiefs of Police, who intervened in the hearing, argued that a hearing should be held into an allegation of misconduct only where there are reasonable and probable grounds to believe that the police officer has committed misconduct. However, the Court of Appeal rejected this submission. It found that so long as there is a

reasonable basis from the evidence presented by the complainant to conclude that misconduct has occurred, the Chief must order a disciplinary hearing. In addition, the Court found that when OCCPS deals with an appeal from the Chief's decision, it can review the decision of the Chief and overturn it on any basis -- there do not have to be errors made by the Chief. In other words, no deference is given to the decision of the individual within the police service who has considered the investigator's report.

The Implications of the Two Decisions for Officers and Associations

Police associations and police officers should be concerned about these two decisions, as the consequences for officers are almost entirely negative. The first problem is the holding in *Browne* that the regulation setting out the requirements before an allegation of Unsatisfactory Work Performance can be made does not apply in the case of public complaints. The regulation requires that work performance be assessed pursuant to policies available to an officer, and that the officer be given assistance in improving his or her performance before a disciplinary hearing is held. Among the purposes behind these requirements are ensuring that principles of progressive discipline are followed and that officers are given the opportunity to correct their performance. Now that complaints may go directly to a hearing without these processes being followed, these purposes are defeated. Moreover, the legislation and regulations envisage unsatisfactory work performance as relating to ongoing performance, not isolated incidents. It simply does not make sense for public complaints about isolated incidents to fall under this category.

Of serious concern is the very low threshold that the Court set for when public complaints will proceed to a hearing. The Court severely limited the ability of the Chief to weed out complaints that have very little chance of success, and in the process, it made it likely that a

larger number of officers will be put through the difficult process of disciplinary hearings, even where clear and convincing evidence for misconduct clearly does not exist. This will not only disrupt the lives and careers of officers, but lead to large and unnecessary expenses for officers, police associations, and police services for hearings to be held.

Finally, it is puzzling that the Court found that OCCPS should not give deference to the findings of the Chief in relation to civilian complaints. Given that in reviewing findings of guilt and penalty decisions after a hearing, OCCPS is extremely reluctant to overturn the decisions of hearing officers, it is inconsistent that it is now

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expected to intervene so readily in the police service's decisions about public complaints. Combined with the Court's decision that OCCPS need give only very limited reasons for its decisions, OCCPS has now been invited to take over a role that was principally assigned to the Chief in the legislation, with no requirement that it explain why it makes its decision.

We hope that these decisions will be reconsidered by the Court of Appeal or by the Supreme Court of Canada, and that in doing so they will give greater consideration to the general scheme of police discipline and to the rights of officers affected by the process.

Note that the Ontario Civilian Commission on Police Services has recently announced the launch of the OCCPS website.

The website address is www.occps.ca

Features on the website include:

- Schedule of hearings being conducted by the Commission
- Complaint Process under Part V of the Police Services Act
- Disciplinary Appeals Process
- Rules of Practice

- Protocols for Police Restructuring
- Police Services Act Legislation
- Forms

Another important feature is a new database which allows for searches on recent OCCPS decisions including:

- Disciplinary Appeals
- Budget
- Status
- Police Restructuring
- Medical, Section 47

Adams Report on SIU Reforms

BY SUSAN LUFT

Editors' Note: The following is a summary only of the Adams report on SIU Reforms. It contains no commentary on the Adams report.

Former Justice, the Honourable George W. Adams, Q.C. made recommendations in 1997/98 which resulted in the 1999 Special Investigations Unit (SIU) Reforms. On February

26, 2003 he issued a follow-up report which evaluated the success of the 1999 Reforms.

Adams has stated that the 1999 Reforms resulted in a vast improvement in SIU performance and that they either had achieved or were in the process of achieving their intended purpose. Adams states in his report that there was general agreement among the stakeholders that the SIU is well-equipped to carry out its work.

In addition, he believes that the stakeholders now have a better appreciation of one another's legitimate perspectives and confidence in both the professionalism and integrity of the SIU. In his report, Adams indicates that one of the results of the implementation of his earlier recommendations was to better institutionalize the SIU within a racially diverse Ontarian society.

Having carried out his review, Adams concluded that there was no need to extend his involvement beyond this report.

Notwithstanding the many positive conclusions noted above, Adams identified a number of issues about which he offered some recommendations:

- He wants an amendment to permit the Director of the SIU to be included as a “complainant” in order to establish standing for the Director to enforce the regulations.
- He felt it unnecessary to address the question of “duty to cooperate” further, feeling that those issues have generally been resolved satisfactorily and/or that the parties will be able to resolve them satisfactorily in the future.
- After noting the development of internal procedures within many large Police Services to deal with the SIU, he has recommended that the SIU itself create a package of materials for Chiefs and their designates in consultation with the OACP and to convene working update conferences once a year.
- Adams has encouraged the parties to move away from disputing what constitutes “serious injury” and to focus on cooperating more and on providing the public better guidance on what would be considered to be serious. He encouraged Police Services to err on the side of caution in the reports they chose to make to the SIU.
- He felt that the differentiation between subject and witness officers will likely be resolved satisfactorily by procedures that Police Services are developing.
- He expressed concern with respect to the practice of one lawyer acting for multiple witness officers and sometimes even including subject officers. He suggests that this practice can undermine the purpose of segregating the officers and clearly needs review.
- He noted that the analogous treatment offered to civilian employees of police services has facilitated some investigations, but that it should be formalized beyond internal SIU procedures. Analogous treatment means that civilian employees are obligated to cooperate but would also be accorded the same protections of the Regulation as accorded to police officers.
- Referring to the AG Directive to Crown Attorneys regarding Police Officer statements, he outlined some of the concerns with the directive, however, he did not make specific recommendations in this respect. Specifically, there were concerns that the word “compelled” in the Directive is not defined and would best be defined.
- Although some concerns were raised with respect to delays in obtaining statements when officers went off duty or on sick leave, Adams was satisfied that the 1998 changes were sufficient to assure meaningful and timely responses. He did note that the issue of delay is serious and demands a committed effort by the chiefs of police and SIU in addressing them within the current framework.

- He encouraged a move from manual recording of oral interviews of officers to include recording of interviews by audiotape or videotape, notwithstanding section 8 of the regulation.
- He expressed satisfaction on issues of completion of notes and their delivery to the SIU.
- He encouraged Police Services Boards to engage in their section 11, a “review of the policies of or services provided by the police force and the conduct of its police officers”, in a more transparent manner.
- He encouraged review again of his earlier recommendation that the written report of the SIU be made public when no charges are laid.
- In order to facilitate broad dialogue within the community, he stated that it might be appropriate for the Attorney General to request a few leaders from the stakeholder groups to meet and assess the practicalities of institutionalizing joint meetings, including their timing, locations, scale, appropriate sponsoring bodies, appropriate participants and typical topics.

Note that the full text of the review report on the SIU Reforms prepared for the Attorney General may be found at <http://www.siu.on.ca/adamsreview2003.pdf>

Chercover's Notebook

BY BARRIE CHERCOVER

Most unions negotiate “SUNSET CLAUSES” into their collective agreements to guarantee that bargaining unit members’ personal records or files will show as “clean”, provided the member is free of discipline for a defined period of time (e.g. one year).

The purpose of this kind of clause is to make certain that old discipline history will NOT be used against the member FOR ANY REASON in the future.

Such member protection should be part of every collective agreement, covering both uniform and civilian members.

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