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**A REPORT AND
RECOMMENDATIONS
ON
AMENDMENTS TO THE
POLICE SERVICES ACT
RESPECTING
CIVILIAN OVERSIGHT OF POLICE**

RODERICK M. MCLEOD, Q.C.

NOVEMBER 21, 1996
TORONTO, ONTARIO

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November 21, 1996

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- and -

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Dear Sirs:

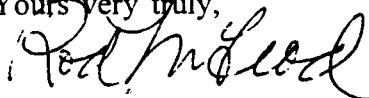
Re: Review of Civilian Oversight

I am pleased to provide you with my Report in response to your letter of October 9, 1996.

Alternative options are noted in the text of the Report in appropriate sections although time constraints did not permit as full an examination of options as you might have desired.

Thank you for the opportunity to conduct this review of Civilian Oversight of Policing in Ontario. I am indebted to you for the excellent legal staff assistance that you provided to my colleague and counsel, Michael Tulloch, and me.

Yours very truly,



Rod McLeod, Q.C.

Encl.

ACKNOWLEDGMENTS

- The groups, agencies and individuals who made submissions in writing or in person are set out in Appendices B and C. Some shared experiences in or with law enforcement in Ontario which reached beyond the anecdotal. Others, in government and policing today, or yesterday, including the various agencies under review, provided many helpful insights.
- Current Crown Counsel and senior MAG and MSG officials, with SIU and related experience, including Graham Reynolds, Dana Venner, Ian Scott, Jim Stewart and Bill Wolski gave me specific, reliable, criminal law and policy advice from the Crown's perspective.
- Others, not in the system, including Alan Borovoy, Professor Philip Stenning, Clay Ruby, Paul Copeland and Julian Falconer and others from the defence bar showed me different and useful perspectives I would not have found on my own.
- Hugh Graham, a senior and busy executive with the Royal Bank of Canada and leader in the Black Community in Toronto, gave generously of his time and experience and special insights into many of the issues.
- Mark Leach, Counsel, Public Law and Policy Division, MAG, headed the review's Government assistance team, which included Aimee Gauthier, Crown Law Office Criminal, Tamara Levy (articling student, Policy Division), Brian Fazackerley, Advisor PSD, MSG and John Ritchie, MAG counsel and formerly Director, Legal Services MSG. They not only worked extremely hard under the time pressure we faced but pushed and prodded me in the best tradition of Crown Law Officer Legal Advice. I am especially indebted to Mark Leach whose quick mind and ability to respect legal principle in finding practical human solutions made this report possible.
- Michael Tulloch brought not only the perspective of a member of a minority community who works full time in the Justice system, but, a young quick mind with a strong sense of how the civilian oversight system can be improved for all the communities it serves.
- Andrew Roman (Administrative Law) and Gita Anand (Labour Law), of Miller Thomson, gave valuable advice in their specialties.
- My long suffering assistant, Pauline Wood, and her capable colleagues, Karen Annandale, Barb Draper, Kim Pryor, Liz Holmes and Lori Losak worked tirelessly and through some crazy hours at Miller Thomson in Markham. Mark Leach's talented assistant, Dinah Watts at MAG, was responsible for keeping the whole process afloat.
- My wife, Mary Anne, (the kids have flown), and my colleagues at Miller Thomson were patient and supportive.

RMM

PART I - EXECUTIVE SUMMARY

OVERALL THEMES AND HIGHLIGHTS

- **Simplify current legislative maze with a coherent, minimal legislative foundation.**
- **Build upon the narrower legislative foundation with a matrix of Regulations/Standards/Orders/Protocols based on consultation with the community and the Police including early and focused consultation on the issues to be addressed in the Regulations.**
- **Streamline and clarify Oversight Structure. Revise and collapse 4 Provincial organizations into 1 agency: the Ontario Police Services Commission (OPSC) with two Divisions: Adjudications and Investigations.**
- **Ministerial Responsibility and Accountability:**
 - **The Attorney General is responsible for that part of the Civilian Oversight of the Police that is accomplished by Crown Counsel advice and scrutiny of the adequacy of an investigation (whether by a Police Service or by OPSC Investigations Division), including advice on the existence of reasonable and probable grounds for laying a charge, likelihood of a successful prosecution, the selection and drafting of charges, and advising on public policy issues.**
 - **The Solicitor General is responsible for all other aspects of Civilian Oversight in the Cycle of Oversight.**
 - **These separate responsibilities should not be confused or mixed.**
- **Maintain the Policing Services Division (PSD) of the Ministry of the Solicitor General and Correctional Services, ensuring that the work of the PSD and the OPSC is coordinated and complementary.**

- **Cycle of Oversight:** learn from the investigation and adjudication of specific conduct and from auditing; reformulate standards to resolve systemic problems; enforce standards by ongoing auditing and orders when necessary.
- **Communities, through representatives on the OPSC and other direct involvement suggested here, should infuse policing with their knowledge and perspective.**
- **Civilian oversight at the Provincial and Local levels should not be the cause of FIDO (Forget It, Drive On). People in positions of authority in the Cycle of Oversight should have the respect and confidence of the whole public, including police officers and minority communities. The overseers should recognize the difficulties and dangers of police work and be champions of and advocates for good policing and the thousands of excellent people we have serving as police officers today.**
- **The Province should continue to be the defining authority in policing. It can devolve substantial responsibility to local Police authorities but for that approach to work it is important that the Province continue to have a significant role in the appointment of Police Service Boards. The precise definition of that role is beyond my mandate.**
- **Chiefs and senior officers should manage. Police services boards should oversee that management. The Province's role is to assist and, where necessary, insist.**
- **The Province should train, set standards, advise, audit, investigate and adjudicate in certain limited situations, and, where necessary, order, - all through the cycle of oversight. Devolve responsibility and authority down from the Province to the local authorities. But, require better reporting and consulting: up, down, across and out. Audit. Revise the devolution, where necessary, by requesting/ordering change.**

- **Chiefs and Boards should consult up, down, across and out. They should seek, listen to and consider advice from external sources including PSD, OPSC and Crown counsel (MAG). Failure to do so should result in less local autonomy.**
- **Return SIU and other important investigations to the time-honoured and proven system of having investigators investigate and Crown counsel scrutinize and advise through every step of the investigation and decision-making process.**
- **The existing complaints/discipline systems should be modernized, simplified, and streamlined. The current laws are highly technical, confusing and amount to over regulation. It is time to get back to basics. The framework of the system should be set out in the Legislation, and all of the procedural provisions and details should, with some simplification, streamlining and reform, be moved into the Regulations.**
- **Stress informal resolution and the ability of Community Groups and Police Associations to help effect early consent resolutions.**
- **Merge Complaints/Discipline systems as much as possible.**

CIVILIAN OVERSIGHT STRUCTURES

ONTARIO POLICE SERVICES COMMISSION

Full Time:
CHAIR
VICE-CHAIR - ADJUDICATION
VICE-CHAIR - INVESTIGATION
 Part Time:
COMMUNITY COMMISSIONERS
 (Numbers TBD)

- Cycle of Oversight: learn from investigation and adjudication of specific conduct and from audit by OPSC investigations division and by Policing Services Division, and recommend new standards to deal with systemic problems

ADJUDICATION VICE-CHAIR

- Community Commissioners
 - Other tribunal members as required
- Functions:
- Appeals in complaints/discipline matters
 - Inquiry functions of the former OCCOPS (Ontario Civilian Commission on Police Services) including: the adequacy of police services, the performance of police officers and abolishing or reducing the size of police services
 - Appeals from compliance orders
 - Inquiries for the purpose of developing new or improved standards
 - Hearings/Appeals referred by the DPCC

INVESTIGATION VICE-CHAIR

- Liaise with Chiefs on serious incidents (non-SIU legislated or regulated mandate)
 - Consult Crown counsel
 - Liaise with the Chief Coroner
 - Liaise with OACP
 - Request/Order compliance
 - Report re SIU investigations
- Assign investigation (Request/Order)
 - SIU (discretionary mandate)
 - Other police service
 - Host police service
 - Report to public re SIU investigations
 - Chair SIU Protocol discussions

SPECIAL INVESTIGATIONS UNIT (SIU)

Chief Investigator
 Investigators - full time/part-time
 - civilian

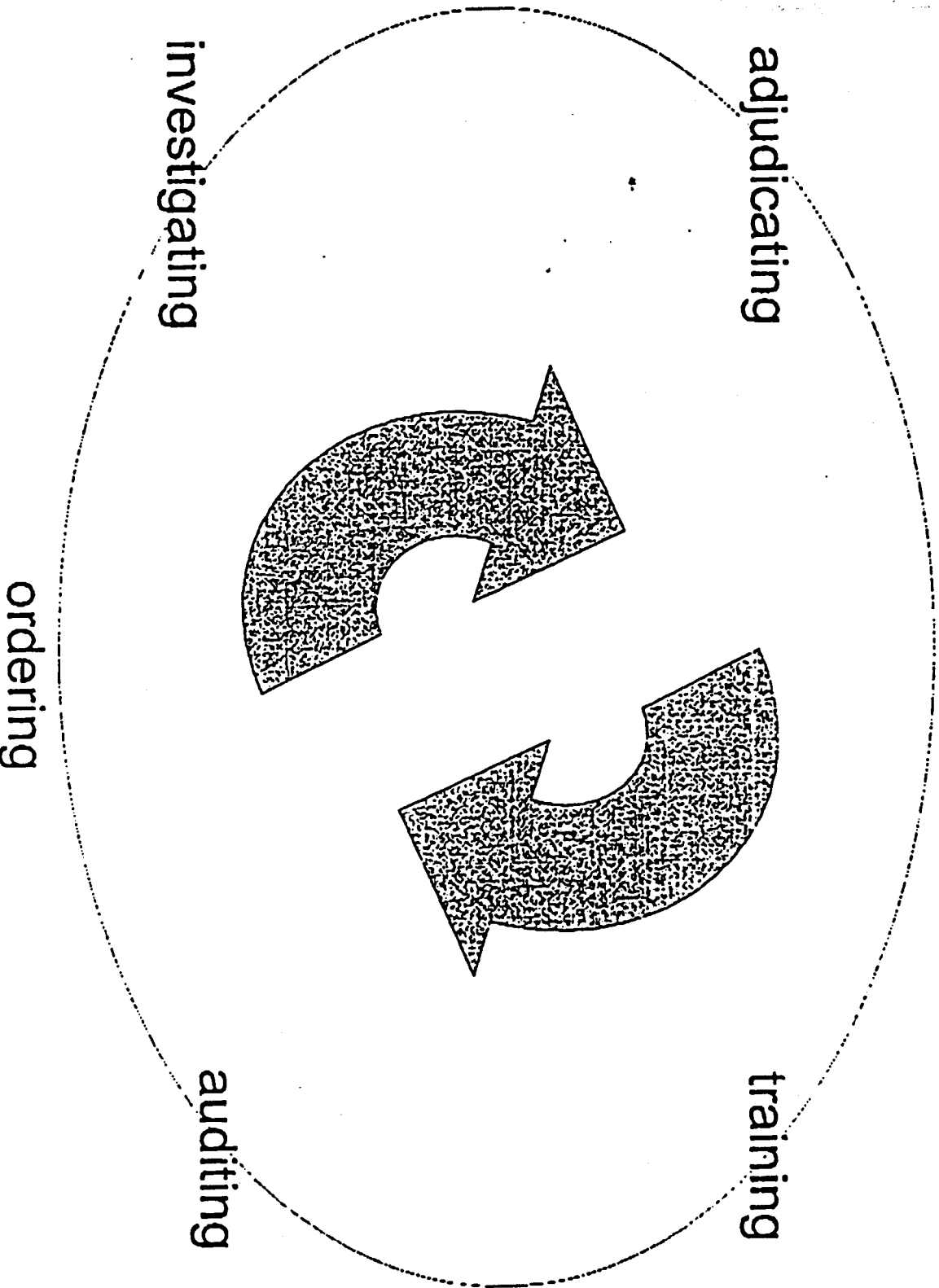
- Functions:
- Receive notice of SIU legislated/regulated mandate incident
 - Investigate
 - Liaise with Chief Coroner's office
 - Consult Crown Counsel
 - Lay charges or not

POLICE CONDUCT COMPLAINTS (PCC)

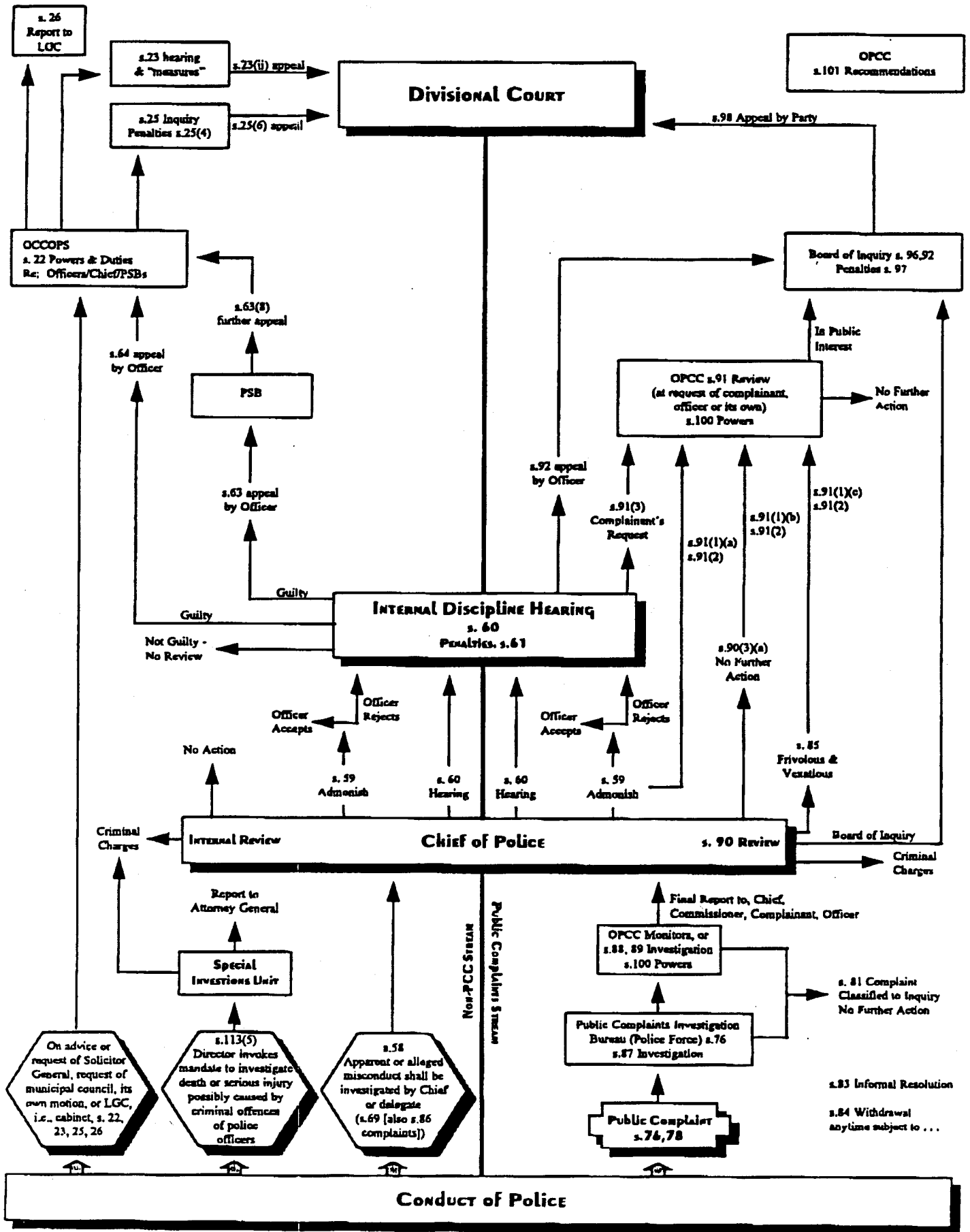
- Director - (DPCC)
- Develop community intake
 - Audit oversight processes
 - Liaise with local Professional Standards Branches
 - Confirm local investigation/assign alternative/Investigate
 - Request/Order hearings
 - Recommend changes to standards
 - Establish and Chair PC protocol discussions

Civilian Oversight Cycle

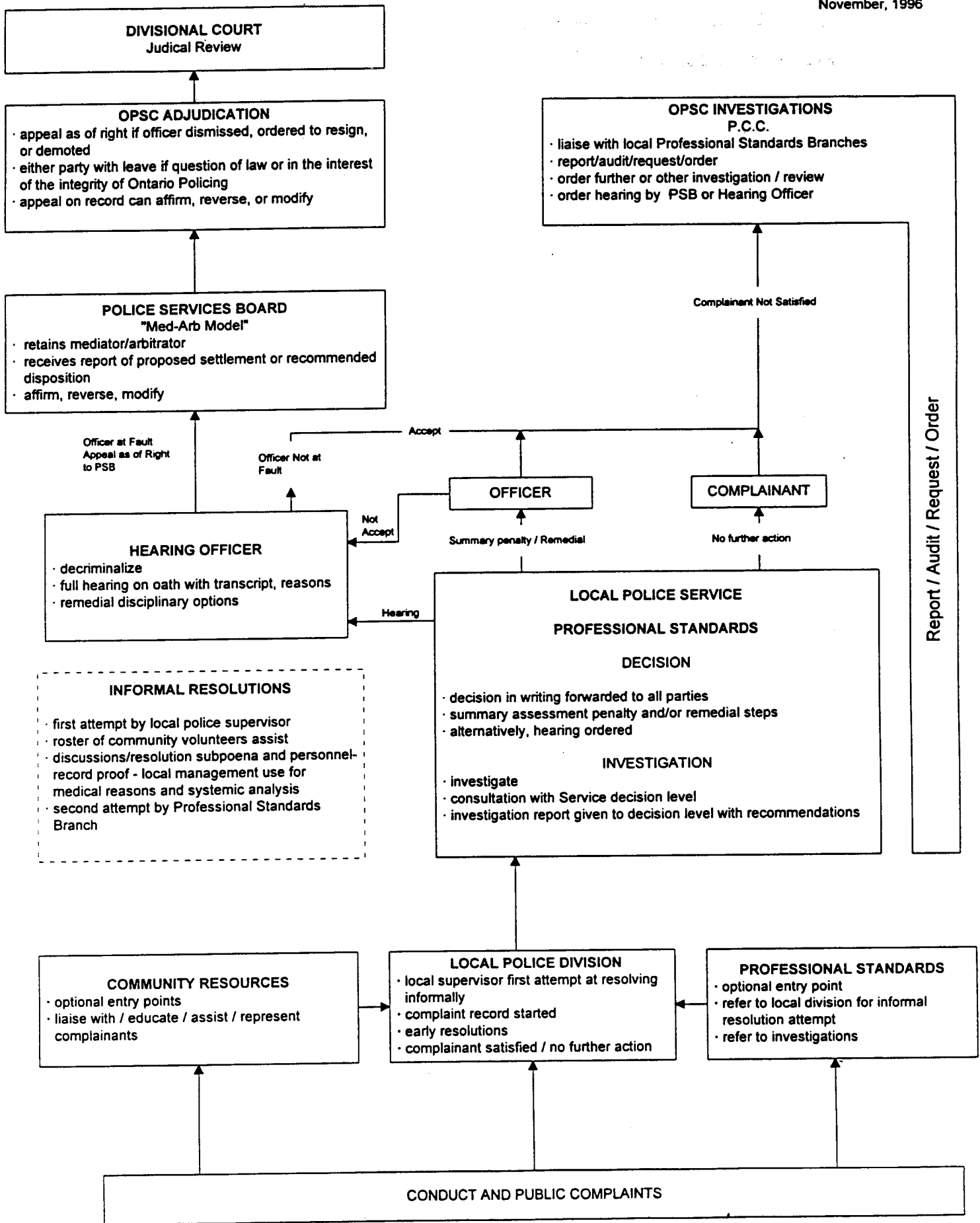
standards



Outline of Police Oversight in Ontario



Complaints/ Discipline Model (Proposed)



PART II - REPORT

SECTION 1 - MINISTERIAL RESPONSIBILITY AND ACCOUNTABILITY

- 1.1 The Attorney General is responsible for that part of the Civilian Oversight of the police that is accomplished by Crown Counsel advice and scrutiny of the adequacy of criminal investigations (whether by a Police Service or by SIU). This includes advice on the existence of reasonable and probable grounds, the likelihood of success and the selection and drafting of charges but is by no means limited to those questions. This responsibility is intrinsic to the role of the Attorney General as recorded in the Ministry of the Attorney General Act and as developed by the common law.
- 1.2 The Solicitor General, as the minister of the Crown responsible for public safety, including policing, and as the other member of the executive branch traditionally tasked to ensure legality and order, is responsible for all other aspects of civilian oversight in the Cycle of Oversight. The separate responsibilities of the two ministers should not be confused or mixed.
- 1.3 The MAG role in Civilian Oversight, as described above, is not part of my mandate except insofar as the accessing of Crown Law Officer advice is necessary to that part of Civilian Oversight that is within my mandate.
- 1.4 Both Ministers must be able to account to the Premier, the Cabinet, the Legislature and the public on a daily basis. It would be inappropriate to have any of the cycle of oversight located anywhere other than in the appropriate Ministry.
- 1.5 It is time to return SIU and other important investigations to the time-honoured and proven system of having investigators investigate and Crown counsel scrutinize and advise through every step of the investigation and decision-making process.

1.6 Alternative Options

- Leave SIU and/or PCC (or equivalent) in MAG
- Have some or all of the Provincial Civilian Oversight System in an Agency, like the Ombudsman, reporting to the Legislature.

1.7 Comment

1.7.1 The respective Ministerial responsibilities are referred to above. The Solicitor General should have responsibility for all of the agency functions that are relevant to his responsibilities especially those with significant public policy ramifications. The Solicitor General is the Minister responsible for Policing Services including Civilian Oversight of the Police. He or she is not the Minister for the Police.

He or she can be the "advocate" of policing services and financing within the government (just as the AG can be in respect of Crown Attorneys or the Judiciary). The Solicitor General does so as the chief civilian overseer of the police and the senior civilian to whom they are accountable.

1.7.2 During our consultations, there was a genuine expression of concern from several persons about the prospect of moving the SIU and PCC functions from MAG to MSG. However, several others, - lawyers, Judges and academics, support the logic and wisdom of the structure proposed as properly reflective of the separation of prosecutions and policing.

1.7.3 Although names and practices vary, the weight of persuasive authority and experience disclosed in the literature supports this division of responsibility. See, for example, the Marshall Inquiry and Professors Edwards and Stenning as excerpted briefly in Appendix "A", paragraphs 1, 2 and 3.

1.7.4 The "Ombudsman" option, although favoured by some, would be completely unworkable with respect to Civilian Oversight of Policing. It suffers from at least two deficiencies:

- a) no accountable Minister to answer to the Cabinet or the Legislature on a daily basis;**
- b) unnecessary risk of politicizing individual cases in the oversight system.**

SECTION 2 - THE MATRIX OR LADDER FROM LEGISLATION TO ADVICE: DOWN/UP

- 2.1 Simplify current legislative maze with a coherent, minimal Legislative foundation.**
- 2.2 Build upon the narrower Legislative foundation with a matrix of Regulations/Standards/Orders/Protocols based on consultation with the community and the Police, including early and focused consultation on the issues to be addressed in the Regulations.**
- 2.3 The descending ladder of instruments is:**
- Legislation
 - Regulation
 - Standard
 - Order
 - Protocol
 - Guidance/Advice
- 2.4 The ascending ladder of action is:**
- seek advice
 - listen to it
 - consider it
 - decide/act
 - report
 - be audited
 - be requested
 - be ordered
 - be regulated
 - be legislated
- 2.5 Chiefs and Senior Officers should manage. Police Services Boards should oversee that management. See, for example, Professor Stenning,**

Appendix "A", paragraph 3. The Province's role is to assist and, where necessary, insist.

- 2.6 The Province should train, set standards, advise, audit, investigate and adjudicate in certain limited situations, and, where necessary, order - all through the cycle of oversight.**
- 2.7 The Province should place as much management and oversight responsibility as possible on the local Police Service and the local Police Services Board but create mechanisms to ensure that problems are detected and corrected through Provincial investigation, audit, order and adjudication where necessary.**
- 2.8 My review disclosed what I perceive to be a disturbing tendency by Chiefs and Senior officers in certain local Police Services to be reluctant to seek, listen to, and consider external advice through appropriate channels. "Crown shopping" does not advance the cause of good policing. Similarly, using majority public support and popularity of the police to avoid or deflect true accountability to the local and Provincial authorities does not advance the cause of good policing.**
- 2.9 These problems exist in varying degrees throughout the Province and will always exist to a certain extent but they can be minimized by getting the rules right and by getting good people to play by the rules.**
- 2.10 The correct way to do that now is to involve the players and communities they serve in formulating the mix of Regulations and lesser instruments necessary to make the Legislation work.**
- 2.11 Chiefs and Boards should consult up, down, across and out. They should seek, listen to and consider advice from external sources including PSD, OPSC and Crown counsel (MAG). Failure to do so should result in less local autonomy.**

SECTION 3 - ONTARIO POLICE SERVICES COMMISSION (OPSC) (NEW)

3.1 Structure/Streamlining and Clarifying

3.1.1 The current oversight systems should be streamlined and clarified.

This can be done by revising and collapsing the 4 Provincial organizations into 1 agency: the Ontario Police Services Commission (OPSC) with two Divisions: Adjudications and Investigations.

3.1.2 I recommend a full-time Chair and two full-time Vice Chairs, all civilian.

3.1.3 I also recommend the appointment of part-time Community Commissioners (number to be determined) whose skill and knowledge could bring a strong community voice to deliberations. The Commission membership should reflect Ontario's diverse population and should have the respect and confidence of Boards, Chiefs and Police Officers.

3.1.4 The Commission should liaise with the Policing Services Division with respect to the Cycle of Oversight , having learned from investigation and adjudication of specific conduct and from audit by OPSC Investigation Division and by Policing Services Division, and recommend new standards to deal with systemic problems. See, for example, Geller and Scott, Deadly Force, Appendix A, paragraph 12.

3.1.5 Recommendations with respect to standards would flow to Policing Services Division.

3.1.6 The OPSC should have two Divisions: Adjudication and Investigation, each headed by one of the Vice-chairs.

3.1.7 This structure would encompass the functions currently performed by OCCOPS, Board of Inquiry, SIU and OPPC.

3.1.8 Please see Chart 1, p. 4.

3.1.9 Alternative Options

- **Make PSD a third Division of OPSC rather than leaving it in the Ministry of the Solicitor General**
- **Put OPSC in PSD.**

3.1.10 Comment

3.1.10.1 The Adjudication function should be at some distance from the mainstream Ministry operations.

3.1.10.2 I see merit in having both the Adjudication and the Investigation functions at some distance from the mainstream Ministry operations. I also see merit in having the two functions together as long as they do not cross inappropriately.

3.1.10.3 The Minister and Ministry can benefit from the community involvement at the top of the Commission and the work of the Adjudication and Investigation Divisions in the Ministry's formulation and promulgation of new standards as the product of the Cycle of Oversight.

3.2 Adjudication

3.2.1 The Adjudications Division of the OPSC should be administered by the Vice Chair, Adjudications although the Chair should sit on appropriate cases in addition to chairing meetings of the Commission.

3.2.2 There should be an ability to retain outside lawyers from time to time as needed to assist as Chair of a panel on a particular adjudication.

3.2.3 The OPSC should have appellate jurisdiction in complaints/discipline matters as described in Section 8.

3.2.4 It should also have the Inquiry and decision functions of the former OCCOPS (Ontario Civilian Commission on Police Services) including: the adequacy of Police Services, the performance of police officers and abolishing, or reducing the size of police services.

3.2.5 It should also have jurisdiction to hear and decide appeals by local Police Services Boards from orders issued by the PCC.

3.2.6 Please see Chart, 1, p. 5.

3.3 Investigations

3.3.1 The primary and initial jurisdiction for all police investigations and assignment of investigative responsibility should remain with the local Police Service (with the exception of SIU investigations). The Province should play a supervisory role in the assignment of investigative responsibility, involving itself only when the need is identified (in non SIU cases).

3.3.2 The Vice Chair, Investigations should establish a relationship with Chiefs and Deputy Chiefs that would involve freely flowing two-way communications with respect to problems/ potential problems in the assignment of investigative responsibility in any matter involving allegation of criminality/serious misconduct on the part of a police officer (short of SIU mandate cases).

3.3.3 The Vice Chair should have the authority to arrange for, and if necessary, order, the investigation of any such matter, by another local Police Service.

3.3.4 The Vice Chair should have the additional authority to request the Assistant Commissioner "O" Division, RCMP to conduct such an investigation.

- 3.3.5 The Vice Chair should have the authority, after consultation with Crown counsel, to invoke the discretionary SIU mandate on the recommendation of the director of the SIU. (Please see section 4.3.)
- 3.3.6 The Vice Chair should consult with Crown counsel with respect to these decisions.
- 3.3.7 More generally, the Vice Chair should liaise with the OACP, be a resource to Chiefs and Deputies with respect to the difficult decisions they have to make with respect to these matters, and similarly, in return, receive advice from the OACP in his decision-making process.
- 3.3.8 The Vice Chair should reactivate and Chair the SIU Protocol discussions.
- 3.4 **Current Oversight Challenges**
- 3.4.1 **Public Confidence in the Civilian Oversight System**
- 3.4.1.1 Confidence of the public in our policing and the civilian oversight of that system is obviously critical.
- 3.4.1.2 Although public confidence in Ontario's police services is justifiably high in many respects, there is concern on the part of a number of people regarding the accountability of the police to the civilian authority. This is more prevalent with respect to certain Police Services and with respect to certain aspects of the accountability/oversight system than others.
- 3.4.1.3 A strong civilian oversight system is an essential part of securing accountability to the civilian authority.
- 3.4.1.4 This challenge can be successfully met through the matrix of changes recommended here starting with the OPSC and an integrated Cycle of Oversight.

- 3.4.1.5** As in any organization, the qualifications and qualities of the personnel running the OPSC will be crucial. The Chair and Vice Chairs must be civilians who know and understand police customs and culture and have the confidence of public generally and including both the police and minority communities.

3.4.2 Conduct Subject to Oversight

- 3.4.2.1** Question 10 poses:
"What police conduct should be subject to civilian oversight".
- 3.4.2.2** Individual police officers generally enjoy a level of respect which is deservedly high. This stems not only from their role as guardian but from the quality of policing services traditionally provided in Ontario. Police officers express concern about the intrusion into their private lives that a duty to be publicly accountable creates. I believe there are levels of accountability while off duty that are the necessary counterpoint to the police officer's public esteem and trust.
- 3.4.2.3** The off-duty/private life issue vis-a-vis the application of the public complaints process could be addressed by the OPSC.

3.4.3 Responding to Diversity of Communities

- 3.4.3.1** My terms of reference and letter of transmittal directed me to consider past reports which dealt with racism in policing. These reports included the Report of the Commission on Systemic Racism in the Criminal Justice System (The Cole-Gittens Report 1996), the

Stephen Lewis Report (1992), and the Clare Lewis Report on Race Relations and Policing (1988).

3.4.3.2 I invited a number of community stakeholders to discuss their concerns. Many of them accepted my invitation, and provided me with valuable help. However, other groups voiced their concern about the timing and process of the review and declined to participate in the process. Their inability to canvass their volunteer membership and prepare a submission in the time available was understandable. We also met with community leaders and with The Honourable Judge David Cole and one of his commissioners, Sri-Guggan Sri-Skanda-Rajah, The Honourable Sidney B. Linden, Chief Judge, Ontario Court (Provincial Division), Clare Lewis and Mark Conacher.

3.4.3.3 A common theme throughout the literature and consistent with submissions which we received suggests that in many racial minority communities there is a strong perception of systemic racism in policing services. Much of what we have heard and read supports the view that this perception continues. See, for example, the Clare Lewis Report, Appendix "A", paragraph 4, and Cole-Gittens, Systemic Racism, Appendix "A", paragraph 7.

3.4.3.4 Unfortunately, there is still a prevailing belief that the system is failing minority communities. That perception is itself a reality that needs attention.

3.4.3.5 While the delivery of police services is often described as a partnership between the police and the community,

the Cole-Gittens Report noted that systemic racism in police practices was "widespread and deeply felt" and extensive consultations conducted by the Cole-Gittens Commission revealed the belief that police authorities tolerated such abusive behaviours.

3.4.3.6 Perceptions, particularly among black and other minority youth, were/are that these "partnerships" were exclusive of many communities; these partnerships were/are viewed with suspicion and fear.

3.4.3.7 I note the following recommendations of the Cole-Gittens Commission on Systemic Racism:

- a) that each Ontario police service that has not yet done so, conduct a comprehensive review of its commitment to racial equality in policing. The review process should involve members of police services as well as community groups and interested individuals.
- b) that police services widely publicize their race relations action plans in the languages most commonly spoken by local communities.

3.4.3.8 Minority communities would have more confidence in civilian oversight if the OPSC:

- "advanced the ball" with respect to paragraph 3.4.3.7;
- encouraged Police Services to recruit, on a volunteer basis, qualified and respected individual(s) in the community, to flag race relations issues in the delivery of the police service and advise the Chief on methods of dealing with those issues;

- found additional ways to help middle and upper level management in local Police Services help themselves to be both as responsive to and reflective of the racial diversity of Ontario;
- considered methods of assisting Police Services to "fast-track" competent young black and other minority officers as detectives not because of some "employment equity" notion but because he or she can do things others cannot. (A black detective in a homicide squad, for example, may obtain more and better evidence in certain murder investigations than is otherwise possible.)

3.4.3.9 The oversight system is not as responsive as it can and should be. Good efforts have been made by people of good will who work in the system and in Policing and by members of minority communities, who have given freely of their time, expertise and energy to help. The structures and initiatives recommended here will hopefully advance those efforts further. Much will depend on the personnel involved at both the local and Provincial levels.

3.5 Communications

- 3.5.1** The short answer on this issue is: more, better, faster, and more frequently.
- 3.5.2** The primary communication to the public on SIU cases should be by the OPSC/SIU and not, at least not inappropriately, by the local Police Service, especially at the outset.
- 3.5.3** The OPSC/SIU should increase existing good efforts to communicate directly and frequently with the dead or injured person's family in SIU cases.

- 3.5.4** It must always be recognized, however, that the Chief, in addition to all his/her other responsibilities, has a need, as a manager, to be alert to and deal with the post-event trauma that one or more of his officers may be experiencing.
- 3.5.5** The Vice Chair, Investigations should speak to the media and public openly, early, and regularly regarding SIU investigations to the extent that it is possible to do without interfering with the integrity of the investigation or potential prosecution.
- 3.5.6** It may be appropriate to give the OPSC the authority to inquire/review, and report publicly at the conclusion of an investigation conducted under the umbrella of the Investigations Division (including SIU investigations and other investigations by Police Services) when appropriate, and, when to do so, would not interfere with any pending or ongoing hearing or trial procedure. The nature and scope of such inquiries/reviews are issues that should be addressed in the process leading to new Regulations.
- 3.5.7** Section 113(8) is unnecessary if the reporting and possible inquiring/reviewing referred to above is adopted.

SECTION 4 - SIU

4.1 Introduction

4.1.1 There are cases that engage the public interest in having a completely independent investigation.

4.1.2 Even if there is eventually found to be no criminality on the part of the police, the nature of the incident deserves a full, fair and independent investigation. This preserves public confidence in the oversight system, and in the police themselves.

4.1.3 This was the rationale behind the creation of the SIU and remains the justification for the continuation of the SIU function.

4.2 The Perception of Police officers

4.2.1 The SIU currently conducts criminal investigations.

4.2.2 This has caused some concern to members of Police Services, who feel they are being judged to be criminals whenever the carrying out of their responsibilities results in serious injury or death.

4.2.3 However, it must be recognized that SIU investigations must be treated as criminal investigation from their inception in order to ensure the integrity of the investigation.

4.2.4 It is wrong to interpret the words " circumstances..... that may have resulted from criminal offences committed by police officers" in s. 113(5) as suggesting that anyone has pre-judged members of a local police service or as requiring such a pre-determination.

4.2.5 If SIU is doing its work properly at this stage, it has not prejudged anything or anyone. It certainly should not.

4.2.6 The SIU approach is exactly the same approach as Police Services use every day in comparable fact situations involving other citizens.

4.2.7 However, it is important to remember that the police, by the very nature of their duties, are more likely to be exposed to allegations of criminal misconduct than any other group of persons employed to perform a public duty.

4.3 SIU Mandate

4.3.1 While the rationale for the continuation of the SIU is clear and easily stated, the mandate of the SIU needs to be clarified to ensure:

4.3.1.1 all appropriate cases get SIU attention;

4.3.1.2 SIU resources are devoted to cases which need them;

4.3.1.3 community/public concern about the need for independent investigations is satisfied.

4.3.2 The present mandate in 113(5) is too vague. Results have included:

4.3.2.1 many cases of less serious nature have been tying up valuable SIU resources;

4.3.2.2 unhappiness over lack of clarity in the mandate;

4.3.2.3 difficulty explaining the mandate to the public.

4.3.3 The current legislated mandate was an attempt to cast the net wide enough to encompass all cases where the SIU was needed. We have the benefit now of six years of cases.

4.3.4 The need is still there for an ability to use the SIU in a range of situations but there are problems as stated above.

4.3.5 The best approach is to define a narrower legislated mandate in the statute and provide the appropriate methods of refining and/or clarifying the existing statutory mandate.

4.3.6 I recommend:

4.3.6.1 A Regulation to Refine or Clarify - In addition to a statutory mandate, the legislation should provide a power to make Regulations refining and/or clarifying the mandate after consultation.

4.3.6.2 A Case Specific Discretionary Mandate

The Vice Chair Investigations should be given a case specific discretion to assign the SIU to investigate potential criminality when he or she feels it appropriate in the public interest. Crown counsel advice may be obtained prior to making this determination. Information which will facilitate this decision may come from an expanded duty to report by local Police Services and by the audit function within the Investigation Division of the OPSC.

4.3.6.3 The SIU Protocol - Reactivate the SIU Protocol discussions.

4.3.7 The SIU mandate is consequence rather than conduct driven. This has contributed to the officer's feelings that they are being accused automatically of wrongdoing.

4.3.8 However, in my opinion the mandate must continue to be mainly consequence-oriented, primarily for practical reasons. Since an SIU investigation is independent of police, the SIU must be called in as soon as possible after an incident occurs, without a judgement as to potential criminality of the conduct in question being made by the local police service. At this early stage all that may be known is that an officer or officers used force on a person during the course of their duties, with serious consequences to that person. The SIU will invoke its mandate, conduct a fact-finding investigation within a

criminal context, and come to a conclusion about such criminality, or lack thereof, based on what it finds.

4.3.9 I therefore recommend that the legislation continue to provide for mandatory investigations in cases where police contact with persons results in death. Serious injury cases requiring SIU intervention should be defined, after consultation, in a Regulation and the revision to the legislation should not come into force until the Regulation is available to come into force at the same time.

4.3.10 The Regulation may also provide for the case specific discretionary mandate referred to above in section 4.3.6.2.

4.3.11 The Regulations may also define the appropriate level of potential criminality in order to invoke the discretionary SIU mandate or continue to investigate. It may be that in cases which result in less serious consequences the SIU should not investigate at all or only if there is clear evidence of potential criminal conduct.

4.3.12 The Regulation may also provide for other procedures recommended through the SIU Protocol process.

4.4 SIU Location and Decision-Making

4.4.1 At the present time the legislation provides that the Director of the SIU "shall cause informations to be laid against police officers". This is an anomalous system for determining criminality and laying charges against an individual.

4.4.2 It is time to return to the time-honoured and proven system of having investigators investigate and Crown counsel scrutinize and advise through every step of the investigation and decision-making process where necessary and possible.

4.4.3 The words "...shall, at the request of the Solicitor General or Attorney General, cause investigations to be conducted..." should not appear in the Legislation. There is a long established tradition of Ministers of the Crown referring a matter to a police service or investigative agency for such action, with the advice of Crown counsel, as the agency considers appropriate. On the other hand, it is not consistent with established practice to statutorily require the agency to take a specific course of action at the request of a Minister.

4.4.4 Please refer to Section 1 - Ministerial Responsibility and Accountability.

4.4.5 The SIU should be located in the Investigations Division of the OPSC, an agency of MSG.

4.4.6 Crown Counsel from MAG, Criminal Law Division, should play an important and direct role in the SIU function. They should be available at any time to provide needed advice on all aspects of an SIU investigation. In this way the Attorney General can continue to provide an important oversight function to police conduct.

4.4.7 The SIU should be headed by a Chief Investigator who should be an experienced investigator and a person who is presently a civilian. He or she should have good communications skills and credibility in the eyes of the public generally, but also, more specifically in the eyes of both communities directly affected by SIU investigations and police officers.

4.5 Responsibilities of the Local Police Service

4.5.1 The local police service must assist in the following ways:

- a) report incidents within the SIU mandate immediately to the SIU;
- b) preserve the scene of the incident and all evidence without taking steps to gather further evidence unless asked to do so by the SIU;
- c) segregate the witnesses involved, both civilian and police (not just from a "subject officer" but from each other), in order to ensure the integrity of their evidence;
- d) provide to the SIU all evidence in its possession immediately.

These and similar matters should be addressed in the Regulations and in the SIU protocol process.

4.5.2 The SIU must be able to conduct its investigation quickly and without interference from other investigative agencies.

4.5.3 This has been a problem since the outset, 6 years ago, in certain jurisdictions. Efforts have been made by both local Police Services and the SIU to deal with those problems. Progress has been made but there are still problems. They should be further addressed forthwith.

4.5.4 The legislation should make it clear that when the SIU invokes its mandate, the SIU is the lead investigative agency. No other agency or its members should be able to investigate the incident without the authorization of the SIU. This means that s.13 of Reg. 926 of the *Police Services Act* must be clarified to reflect that it does not give the Chief of a local Police Service an equal or greater authority to investigate once the duty to report arises.

SECTION 5 - DUTY TO COOPERATE

5.1 Introduction

5.1.1 Section 113(9) now states:

"Members of police forces shall co-operate fully with the members of the [Special Investigations] unit in the conduct of investigations."

5.1.2 As noted above, the timely co-operation of members of local police services is very important in ensuring that the SIU can exercise its mandate and carry out its investigations.

5.1.3 However, the "Duty to Cooperate" has come to be interpreted as referring specifically to the ability of the SIU to compel members of subject police forces to give statements during the course of its criminal investigations. Few, if any issues surrounding the working of the present SIU are as complex and perplexing to both the police and the public as this one.

5.2 Legal and Policy Analysis

5.2.1 Briefly, the legal framework for the analysis of this issue is as follows. Recent caselaw from the Supreme Court of Canada has determined,

- a) The right of any citizen to remain silent which is protected under s. 7 of the Canadian Charter of Rights and Freedoms is not absolute. In certain circumstances the state can compel a citizen to assist in criminal proceedings. In those circumstances the interest of the state in pursuing its valid objectives will override the citizen's privacy interest. An example of this is the situation that arises when a co-accused or suspect is subpoenaed to give evidence at a related criminal proceeding involving another accused.**
- b) In situations where a citizen may be compelled to answer questions about an incident in which he or she was involved,**

the recent caselaw has confirmed that the statement so given will not be admissible against that citizen for the purpose of incriminating him or her. This "use-immunity" may extend to derivative evidence, which is evidence that could not have been discovered "but for" the compelled statement.

- c) Where a statement is compelled from a citizen, and it is later found that such evidence or evidence derived from that statement has so affected the prosecution of any charges subsequently laid against the compelled citizen, that person may argue that those criminal proceedings should be stayed as an abuse of process.

5.2.2 This has several implications for the manner in which SIU investigations may be conducted.

5.2.2.1 Most importantly, it suggests that even if the SIU could compel a statement from an officer whose conduct is deemed to be responsible for consequences which gave rise to the investigation, there may be sound policy reasons to reject this approach. There will always be a risk that a criminal investigation may be tainted by the compulsion. Moreover, given the subsequent use - immunity provided by law, it may be somewhat anomalous to permit the SIU to compel a statement during the course of a criminal investigation only to have it deemed inadmissible in subsequent criminal proceedings against that person.

5.2.2.2 Secondly, the ability or inability of the SIU to compel a statement from the officer whose actions are directly under investigation should not affect that officer's duty to account to his/her superiors for his/her actions while on duty unless compulsion to so account could

rebound in any way to affect admissibility in the criminal proceeding.

- 5.2.3 It may be appropriate to clarify and strengthen an officer's duty to account in a regulatory discipline context.
- 5.2.4 However, I am not prepared to recommend legislation to that effect without further consultation and legal analysis. I believe that the same practical result can be achieved, if desired, by Regulation as long as the Regulation making power is clear in the Legislation.
- 5.2.5 In the case of officers whose conduct is not reasonably suspected by the SIU investigator to give rise to potential criminal liability the criminal law rights are not engaged in the same way. Privilege against self-incrimination will be adequately protected by the same use-immunity of statements and derivative evidence in any subsequent criminal proceedings against that "witness" officer.
- 5.2.6 It may be that "witness" officers, as designated by the SIU investigator, with Crown advice if necessary, should be mandated to co-operate and to give statements to the SIU within a time and in a manner to be specified in the Regulations. If so, that this mandated co-operation could be enforced by the Chief with sanctions if the officer refuses to comply. However, as noted above, given the complexity of this issue, further consultation and legal analysis is required.
- 5.2.7 I understand that SIU investigators are currently, quite properly, affording both subject and witness officers an opportunity to consult independent legal counsel. This does not mean that anyone other than the investigator (with Crown advice) should be deciding who is a subject officer and who is a witness officer (for purposes of the SIU investigator's decisions as to his/her next steps).

5.3 Recommendation and Conclusion

5.3.1 Section 113(9) of the *Police Services Act* should be replaced with a provision reflecting the following:

Subject to the criminal law and Charter rights of a member, a Police Service and each member thereof shall co-operate fully with the members of the unit (SIU) in the conduct of investigations.

5.3.2 The Legislation should also clearly permit Regulations relating to:

5.3.2.1 the duty of the Chief, as part of his management responsibilities, to compel an account from a "witness" or a "subject" officer in an SIU investigation, and the timing of the exercise thereof, and the discipline consequences of the officer's failure to so account.

5.3.2.2 other management duties of the Chief in relation to subject and witness officers.

5.3.3 No such regulations should be passed without further research and consultation.

5.3.4 At the conclusion of any criminal proceedings flowing from the SIU investigation, the subject officer is in the same position as any other officer for the purpose of subsequent proceedings or management initiatives.

SECTION 6 - OPSC INVESTIGATIONS - POLICE CONDUCT COMPLAINTS (PCC)

- 6.1** The initial and primary jurisdiction to deal with and resolve police conduct complaints should be with the local Police Service with community assistance in appropriate cases. The Province should play a supervisory role based on a matrix of reporting/auditing/requesting/ordering backed up by a strong but limited (in number) Provincial investigative capacity.
- 6.2** The existing PCC monitoring and reporting scheme should be replaced with a system which would require the Professional Standards Branch of each local Police Service to report regularly to the PCC and be audited by PCC auditors.
- 6.3** A complainant should have three alternative places to make his/her complaint as described in section 8.2 and 8.3 and depicted in Chart 4, p. 7. Complainants who come directly to the PCC, in the first instance, should be redirected to one of three alternative entry options. Whichever entry option the complainant selects, the complaint should be directed to the local police division to start the process described in sections 7 and 8 and shown in Chart 4.
- 6.4** Once the local Police Service starts the process of dealing with a complaint, as depicted in the bottom of the centre of Chart 4, the role of the PCC is to supervise by the matrix of reporting/auditing/requesting/ordering.
- 6.5** The Director of the PCC should establish a relationship with local Police Service Professional Standards Branch directors that would involve freely flowing two-way communications of reports, audits, discussions, requests and, if necessary, orders.
- 6.6** The PCC should be empowered to intervene at any stage in the process and, if necessary, order:

- 6.6.1 further investigation by the local Police Service;
 - 6.6.2 investigation by the Professional Standards Branch of another local Police Service (with charge back of the cost);
 - 6.6.3 a PCC investigation;
 - 6.6.4 a hearing by the local Police Service;
 - 6.6.5 a hearing by a Hearing Officer of another local Police Service (with charge back of the cost);
 - 6.6.6 an appeal (review) by the local PSB.
- 6.7 In addition, the PCC should have the authority to require temporary additional reporting requirements by a local Professional Standards Branch.
- 6.8 To paraphrase one Ontario expert in civilian oversight:
It is fine for the watchdog to growl and bark. But, it must bite when necessary. More importantly, it must be perceived as ready, willing and able to bite when appropriate.
- 6.9 The PCC should assist local Police Services in the development of local alternative community intake resources as described in section 8.2. Some local Police Services already have a "Public Complaints" office which, in some cases, is located away from regular police facilities. (Please see the box on the lower right of Chart 4, p. 7.) These offices can be continued at the option of the local Police Service but such local Police Services should still develop alternative access through existing community resources. (Please see the box on the lower left of Chart 4.)
- 6.10 The DPCC should establish and Chair PCC Protocol discussions.

SECTION 7 - INFORMAL RESOLUTION

- 7.1 The oversight system should encourage consensual informal resolution at all levels in the public complaint and discipline (management) systems.**
- 7.2 First level police managers should make every effort to try to resolve the less serious complaints and discipline (management) problems early and on consent.**
- 7.3 Please see section 8 and Chart 4, p. 7 for the details of the use of informal resolution.**
- 7.4 Local Police Services should create rosters of community group representatives who can be accessed by police service managers and/or the citizen who has a complaint, to assist in the informal resolution effort. Community representatives have confirmed that organizations and individuals with the necessary skills and interest would support this.**
- 7.5 Local Police Services should access local Police Association representatives or monitors to assist the officer about whom the complaint is made in the informal resolution effort.**
- 7.6 I believe that the Police Association of Ontario (PAO) and the Metropolitan Toronto Police Association (MTPA) would agree with this idea and even be advocates of such a process. They would like to see documentation for reporting and auditing be both subpoena-proof and personnel record-proof (subject to management access thereto for current human resource management needs to deal with recurring problems or capacity issues). (There is an obvious limitation on the ability of the Province to control a party's access by subpoena to any document in a criminal proceeding but some effective administrative control is possible, for example, through a directive to Crown Attorneys.)**

- 7.7 I received one report of a significant increase in the numbers of matters resolved informally as a result of the creation of a dedicated investigative unit, trained in dispute resolution.**

SECTION 8 - COMPLAINTS / DISCIPLINE

8.1 Introduction

- 8.1.1 Merge Parts V and VI of the Police Services Act to provide stream to resolve public complaints and discipline problems including discipline problems where there is no complaint by a member of the public.**
- 8.1.2 At the present time, police forces are required to have a Public Complaints Investigations Bureau. In line with my proposal to blend complaints/discipline arising out of complaints and other discipline into one system, all police services should have a professional standards branch, or professional standards officer to deal with occurrences where the conduct of a police officer is brought into question.**
- 8.1.3 Investigations into possible police officers' criminal conduct outside the SIU mandate should be handled entirely separately from this merged complaints discipline system. Criminal investigators can pass information or records on to the complaints/discipline process at any time, subject only to the judgment of the criminal investigators as to whether the disclosure might possibly prejudice their investigation or a possible future prosecution. However, there cannot be a similar flow of information in the other direction. This is so because of the employee's duty (subject to the discussion in section 5, Duty to Cooperate), to disclose matters to his or her employer. Police officers, like any other employees, are, generally, under a duty to answer the employer's questions with regard to a workplace incident. An employee who refuses is subject to disciplinary action, including possible dismissal. Since "compelled statements" are used in the context of complaints/discipline systems, these systems must be isolated from any criminal**

investigations. Also, Section 108 of the Act which is concerned with confidentiality, non-compellability and the inadmissability of evidence, should be preserved.

- 8.1.4 The new stream is reflected in the Chart 4 at p. 7. Compare with the Chart 3 showing the system as it is now at p. 6.
- 8.1.5 In considering this proposal, it is important to bear in mind that throughout the process, the new OPSC - PCC civilian oversight system would be in place. Please see section 6.
- 8.1.6 Complaints/discipline systems must recognize the complex and dangerous nature of a police officer's work. Police officers are called upon to make split second decisions in life and death situations. These decisions will be analyzed in minute detail over successive months or years through a large number of mechanisms for accountability. Police officers may become involved in criminal charges, civil actions, coroners inquests, complaints/discipline proceedings, public inquiries, royal commissions and other types of review mechanisms. Complaints/discipline systems must treat both complainants and police officers in the fairest manner possible.
- 8.1.7 The existing complaints/discipline systems should be modernized, simplified, and streamlined. The current laws are highly technical, confusing and amount to over regulation. It is time to get back to basics. The framework of the system should be set out in the legislation, and all of the procedural provisions and details should, with some simplification, streamlining and reform, be moved into the Regulations.
- 8.1.8 Allegations involving individual conduct of members of police forces, either through complaints from members of the public, or through internal police mechanisms should be dealt with initially at

the local police management level. These managers will hear the allegations, and attempt to resolve them informally, where appropriate. To assist in this, managers will call upon representatives of the community whose member has been affected by the conduct in question, as well as police association representatives to assist the officer if desired. The record of such resolutions should be subpoena- and personnel file-proof subject to the need of police managers to access the record for current human resource management needs and deal with recurring problems or capacity issues. Managers will also be able to liaise with the Professional Standards Branch.

8.1.9 I considered recommending the mainstream labour relations model for dealing with less serious matters. Under such a model, a series of discussions takes place between the employer and employee representatives and, if a satisfactory solution is not arrived at, the employer imposes discipline. The employee can then grieve the disciplinary action and require a hearing before an independent arbitrator or mediator-arbitrator whose decision would be final and binding. Although I found some aspects of this approach attractive for less serious cases, I could not explore it further without more research and consultation.

8.2 Accessibility to the Complaint System

8.2.1 There is a prevailing view in several communities that the complaints system is not accessible and fails to provide support to complainants. The Cole-Gittens report, Tammy Landau's study of complaints in Toronto and the Uniform Treatment report (Community Inquiry into the Policing of Disadvantaged Peoples) all note that participants in their consultation processes were dissatisfied with the complaints filing system and their treatment throughout the process.

- 8.2.2** One of the concerns expressed by members of various communities is the need to have support available to assist complainants in filing complaints and in the initial stages of the process.
- 8.2.3** Concerns have also been raised about the accessibility of the complaints process for northern communities and for aboriginal communities, both urban and remote. Mechanisms should be established to assist these communities to gain access to the complaints system and remain informed throughout the process.
- 8.2.4** Some police services have made good improvements in their responsiveness to the needs of diverse communities and in their use of community assistance. Other police services have not made as much progress. Continuing issues can be addressed through further consultation on issues to be dealt with in the Regulations and in ongoing dialogue amongst the OPSC, police and communities thereafter.
- 8.2.5** The structure and process proposed here will encourage greater responsiveness and community assistance at the earliest stage in the complaints process. Initiatives could include but should not be limited to the following:
- 8.2.5.1.** Rosters consisting of community volunteers who would be available to assist in the intake and informal resolution process, should be created and shared by Police Standards Branches.
 - 8.2.5.2** These volunteers could not only help explain the system to complainants but could also accompany them to the host police division or hearings when required.

8.2.5.3 The PCC should develop educational materials explaining the new complaints process and complaint forms available in various languages and distributed to community centres, community legal clinics and other appropriate social agencies throughout the province.

8.2.5.4 The PCC should work with community agencies and legal clinics and local Police Services across the province to create additional doorways through which potential complainants can access the new police complaints system. For example, establish relationships between local Police Services and native friendship centres; this would help ensure that the system is responsive and accessible to Ontario's diverse aboriginal communities.

8.3 The Filing of the Complaint / First Attempt at Informal Resolution

8.3.1 An individual should be able to complain either at the local police station or separate office of Professional Standards (currently Public Complaints Information Bureaus) or at an alternative local community resource location where he or she would receive assistance in bringing the complaint to the attention of the local police manager.

8.3.2 The local police manager should attempt to resolve the complaint informally, except in those cases where it is inappropriate to do so. (This issue should be addressed in the process leading to new Regulations.)

8.4 Professional Standards Branch Investigation

8.4.1 If no informal resolution is arrived at by the police manager, the matter could be investigated by the Professional Standards Branch of the local force, or as arranged/directed by the Director of the PCC

office. Informal resolution attempts should be continued. Community and police association representatives should continue to assist. It is anticipated that members of the Professional Standards branches would be trained specifically in informal resolution techniques. Recent experience in one Police Service discloses encouraging success as a result of such specialized training and the use of a new group of specialized investigators. There has been further encouraging experience recently in one OPCC pilot project.

8.4.2 Informal resolution may resolve some of the complaints that Professional Standards would, under the current system, classify as either "frivolous and vexatious" or "no further action". If not, Professional Standards will still have the power to decide on "no further action". They do not need two classifications. Section 85 (frivolous and vexatious) can therefore be repealed.

8.5 Professional Standards Branch: Decision

8.5.1 If a matter is investigated without resolution, the Professional Standards Branch would be required to prepare an investigative brief. This brief will then be sent to the head of the Professional Standards Branch who would make a decision as to what further action, if any, is appropriate. That decision would be in writing and would be communicated to the involved officer and the complainant, where there is one.

8.5.2 It is recommended that the current trappings of the criminal law be removed from the complaints/discipline process and replaced with a discipline/management model which recognizes the need of the Chief or his designate to maintain discipline and impose penalties but imports such appropriate management methods of solving employment problems as are consistent with the fair and orderly discharge of the Chief's responsibilities.

8.5.3 In addition to the current options of ordering a discipline hearing, taking no further action, or imposing an admonishment, the head of the Professional Standards branch should have a range of further remedial options to resolve a discipline problem as identified in the investigative report. Further training, counselling, or other such disposition should be available. As with admonitions, if the officer refuses these options, the matter would go to a hearing. At the present time it is possible under the *Police Services Act* for summary sanctions to be imposed with an officer's consent if there is an agreement in place between Police Services Boards and police associations. It may be that such a system of summary sanctions should be provided for in Regulations governing all forces equally, but prior to implementing such an option further consultation with stakeholders is needed.

8.5.4 If the complainant is dissatisfied with a sanction accepted by the officer, or with a decision not to send a matter to hearing, he or she may seek a review of this decision by the PCC. The PCC would review and may invoke its jurisdiction to request/order a further investigation by the Professional Standards Branch, or otherwise, or to request/order a hearing.

8.6 Hearing

8.6.1 At the hearing stage it is again recommended that the trappings of the criminal law be removed. Informal resolution should still be available, save in exceptional cases.

8.6.2 There is inappropriate language in both the Statute and the Regulations such as "charge", "offence", "plea", "trial", "prosecutor", "acquit", "guilty", "not guilty", and "punishment". Such wording should be avoided.

- 8.6.3 In line with the decriminalization of language and in recognition of the professionalism of police officers, the "Code of Conduct" should be renamed the Code of Professional Standards and recast in a more positive, simplified and far less technical manner. As mentioned above, the whole of the Regulation on discipline employs archaic and inappropriate language, which should be adjusted.
- 8.6.4 The current legislation requires that disciplinary matters be proven "on clear and convincing evidence". In the mainstream labour relations context, the recognized standard of proof in the normal course is "balance of probabilities" and in more serious cases (eg. theft or fraud) "clear and cogent" evidence. Consistent with the approach suggested regarding decriminalizing the hearing process, I favour a change towards the mainstream standards. This issue should be addressed in the Regulations.
- 8.6.5 The range of penalties following a finding that the officer was at fault should be broadened to include remedial measures as mentioned above.

8.7 Appeals

- 8.7.1 Where a police officer is dissatisfied with disciplinary action taken an appeal lies to the local police services board. I propose a new system for the handling of these appeals. In all cases, an independent mediator-arbitrator would be engaged by the PSB to consider the appeal on the record and report any proposed settlement and, failing settlement, a recommended disposition of affirm, reverse or modify. The PSB would accept or vary the recommendation.
- 8.7.2 If the complainant, after the hearing, is not satisfied with a finding that the officer is not at fault or with the sanction imposed upon the

officer, he or she may seek a review of that finding by the PCC. The PCC would review the record and may order the PSB to review the matter in the same manner as it would on an appeal from the officer pursuant to section 8.7.1, or decline to intervene.

8.7.3 Following the PSB review/appeal process, there should be a limited avenue of appeal to the Adjudications Division of the OPSC.

8.7.4 An officer should have an appeal as of right to this Division where he/she has been dismissed, ordered to resign, or demoted. In all other cases, the officer should have a right of appeal with leave on a question of law alone, or, with leave, on a matter of importance to the integrity of the Policing Service in Ontario.

8.7.5 The complainant should have a right of appeal with leave on a question of law alone or, with leave, on a matter of importance to the integrity of the Policing Service in Ontario.

8.7.6 At the Adjudications Division, the appeal would be on the record. The Division may affirm, reverse or modify the decision of the Police Services Board as to findings or as to penalty. Other powers and procedures can be dealt within the Regulations.

8.7.7 Appeals in cases involving OPP officers should go from the hearing directly to the Adjudication Division, in the case of the officer, on his or her application, and in the case of the complainant, if the PCC so directs, in accordance with section 8.7.4 and 8.7.5.

8.7.8 There is no need for any appeal beyond the Adjudication Division. Judicial Review to the Divisional Court would, of course, be available.

SECTION 9 - POLICING SERVICES DIVISION OF MSG

- 9.1 I have proceeded on the assumption that PSD will continue with its responsibilities relating to standards, training, the Ontario Police College and other Police Service support functions. The PSD role in matters outside civilian oversight is beyond my mandate.
- 9.2 Based on that assumption, the OPSC would forward its recommendations to PSD for consideration for implementation in new Provincial Standards.

SECTION 10 - POLICE SERVICES BOARDS (PSBs)

- 10.1 The Province should continue to be the defining authority in policing. It can devolve substantial responsibility to local Police authorities but, for such devolution to work properly, it is important that the Province continue to have a significant role in the appointment of Police Service Boards. The precise definition of that role is beyond my mandate.**
- 10.2 Please see section 8 for a description of the proposed new method by which PSBs can effectively discharge the appellate role in the Complaint/Discipline part of the oversight system.**

SECTION 11 - CHIEFS OF POLICE

- 11.1 A complaint relating to a Chief or Deputy Chief should be forwarded to the Vice Chair, Investigation, OPSC, who should assign the appropriate investigative agency unless he/she is satisfied it is a matter that does not require action.**
- 11.2 There should be a new originating jurisdiction in the Vice-Chair, Investigation, OPSC, to request/require a PSB to hold a hearing pursuant to Section 62(1). Section 62(1) would remain subject to a Chief's or Deputy Chief's right under Section 62(2) (amended) to require that the OPSC hold the hearing rather than the PSB.**
- 11.3 There should be an appeal as of right by the Chief or Deputy Chief to the OPSC on the record from a Section 62(1) hearing by the PSB with power in the OPSC to affirm, reverse or modify.**
- 11.4 There should be a further right of appeal to the Divisional Court from any OPSC hearing or appeal relating to a Chief or Deputy Chief with leave on a question of law alone or with leave, on a matter of affecting the integrity of the Policing Service in Ontario.**

SECTION 12 - OPCC, OCCOPS, BOARD OF INQUIRY

12.1 I recommend that these agencies/tribunals be discontinued and certain of the functions they are currently performing be carried out by the OPSC in the manner described above.

PART III - QUESTIONS AND ANSWERS

- 1. How should a system of oversight be structured to ensure effective and efficient accountability of police to the public?**

The OPSC, through the Cycle of Oversight, could be a primary vehicle to assist the Minister in ensuring accountability of the police to the public.

Please see:

| | | |
|---------|-------|---|
| Section | 3 - | Ontario Police Services Commission (OPSC) (New): |
| | 3.4.1 | Establishing Public Confidence in the Civilian Oversight System |
| Section | 4 - | OPSC Investigations (SIU) |
| Section | 6 - | OPSC Investigations - Police Conduct Complaints (PCC) |
| Section | 8 - | Complaints/Discipline |
| Charts | 1 - | Civilian Oversight Structures |
| | 2 - | Civilian Oversight Cycle |
| | 4 - | Complaints/Discipline Model (Proposed) |

- 2. How can police oversight processes be designed so that they reduce delay, while at the same time ensuring that procedural fairness is preserved for complainants, subject officers and police services?**

The report attempts to identify ways in which the oversight process could preserve procedural fairness but simplify the current legislative maze with a coherent, minimal legislative foundation and an integrated matrix of Regulations / Standards / Orders / Protocols, while preserving procedural fairness.

Please see:

| | | |
|-----------|---|--|
| Section 2 | - | The Matrix or Ladder from Legislation to Advice: Down/Up |
|-----------|---|--|

| | | |
|------------------|----------|---|
| Section 5 | - | Duty to Co-operate |
| Section 8 | - | Complaints/Discipline |
| Charts 1 | - | Civilian Oversight Structures |
| 4 | - | Complaints/Discipline Model (Proposed) |

3. 3.1 In what ways could oversight processes and procedures be streamlined?

3.2 For example, can a fair test be developed which would enable administrators to classify complaints of police misconduct?

3.1 Revise and collapse 4 of the 5 existing Provincial organizations into one new commission. Devolve responsibility down to local police authorities and supervise by an integrated system of report/audit/request/order. In addition, much can be done by stressing informal resolution at all stages of the Complaints/Discipline system and "decriminalizing" the process.

Please see:

| | | |
|------------------|----------|---|
| Section 2 | - | Matrix or Ladder from Legislation to Advice: Down/Up |
| Section 3 | - | Ontario Police Services Commission (OPSC) (New) |
| 3.1 | - | Structure |
| 3.2 | - | Adjudication |
| 3.3 | - | Investigations |
| Section 7 | - | Informal Resolution |
| Section 8 | - | Complaints/Discipline |
| Chart 4 | - | Complaints/Discipline Model (Proposed) |

3.2 Although informal resolution should be encouraged wherever possible, local police supervisors and members of Police Standards Branches must recognize when it would be inappropriate to mediate. Power imbalances, or their perception, in the police/complainant

relationship are not uncommon. The more serious the matter the more inappropriate it may be to pursue, or at least persist with, informal resolution. Certain serious complaints are not properly the subject of informal resolution. This issue should be addressed in protocol discussions and thereafter, potentially in the Regulations. Training in dispute resolution techniques, including detection of power imbalances, is necessary.

4. **Would informal dispute resolution techniques such as mediation be appropriate in speeding decision making and reducing costs while maintaining fairness and accessibility for the parties?**

Yes. Informal resolution of complaints is a key feature of the proposed system of oversight, subject to the comments on power imbalances in 3.2

Please see:

- Section 7 - Informal Resolution
- Section 8 - Complaints/Discipline
- Chart 4 - Complaints/Discipline Model (Proposed)

5. **To what extent are there areas of police activity which could be treated as administrative or labour relations matters rather than questions of public trust and which need not be the subject of civilian oversight?**

Stress informal resolution at all stages and move the current discipline systems towards the mainstream management labour relations model by "decriminalizing" the process and providing more remedial disposition options.

Please see:

- Section 7 - Informal Resolution
- Section 8 - Complaints/Discipline:

Chart 4 - Complaints/Discipline Model (Proposed)

- 6. Who are the appropriate persons to carry out the various functions of oversight, such as investigations and adjudications, in order to ensure that each is delivered with competence, independence and economy?**

Revise and collapse 4 of the 5 existing Provincial organizations into one new commission. Devolve responsibility down to local police authorities and supervise by an integrated Provincial system of reporting/auditing/requesting/ordering. In addition, much can be done by stressing informal resolution at all stages of the Complaints/Discipline system and "decriminalizing" the process.

Please see:

- Section 3 - Ontario Police Services Commission (OPSC) (New)**
 - 3.1 - Structure**
 - 3.2 - Adjudication**
 - 3.3 - Investigations**
- Section 2 - The Matrix or Ladder from Legislation to Advice:
Down/Up**
- Section 7 - Informal Resolution**
- Section 8 - Complaints/Discipline**
- Chart 4 - Complaints/Discipline Model (Proposed)**

- 7. What are the appropriate accountability relationships between governments and civilian oversight organizations?**

The appropriate Ministerial accountability for oversight and the manner in which the proposed OPSC and the Divisions within it report to and liaise with the appropriate Ministry are discussed in some detail in the report.

Please see:

| | | |
|-----------|---|---|
| Section 1 | - | Ministerial Responsibility and Accountability |
| Section 3 | - | Ontario Police Services Commission (OPSC) (New) |
| Section 4 | - | OPSC Investigations (SIU) |
| 4.4 | - | SIU Location and Decision-Making |
| Section 9 | - | Policing Services Division (MSG) |

- 8. Are there oversight matters which are substantially local such that the oversight process could be conducted more effectively or efficiently at the local level, rather than at the provincial level?**

The report proposes that the Province should continue to be the defining authority in policing, but the Province should devolve responsibility and authority down to the local level. The Province should retain the ultimate authority to revise the devolution by an integrated matrix of reporting / auditing / requesting / ordering.

Please see:

| | | |
|-----------|---|--|
| Section 2 | - | Informal Resolution |
| Section 8 | - | Complaints/Discipline |
| Chart 4 | - | Complaints/Discipline Model (Proposed) |

- 9. Is the oversight system sufficiently responsive given the increasing diversity of the population of Ontario? If not, are there improvements which would render the oversight system more responsive?**

9.1 No.

9.2 Yes.

Please see:

| | | |
|-----------|---|---|
| Section 3 | - | Ontario Police Services Commission (OPSC) (New) |
| 3.1 | - | Structure |
| 3.4.3 | - | Responding to Diversity of Communities |

- 3.5 - Communications
- Section 8 - Complaints/Discipline:
 - 8.2 - Accessibility to the Complaints System
 - 8.3 - The Filing of Complaints/First Attempt at Informal Resolution

10. What police conduct should be subject to civilian oversight?

Police officers should be able to enjoy a private life. But, the test "put yourself on duty" does not deal adequately with the public trust our society places on police officers. This issue requires further consultation and study and is identified as a Current Oversight Challenge for the OPSC.

Please see:

- Section 3 - Ontario Police Services Commission (OPSC) (New)
 - 3.4.2 - Conduct Subject to Oversight

Glossary of Acronyms and Definitions

| | |
|-----------------------------|---|
| ABLE | Association of Black Law Enforcers |
| AG | Attorney General of Ontario |
| AMO | Association of Municipalities of Ontario |
| BI | Board of Inquiry, Part VI, <i>Police Services Act</i> |
| CABL | Canadian Association of Black Lawyers |
| CBA-O | Canadian Bar Association - Ontario |
| CCLA | Canadian Civil Liberties Association |
| CHIEF | Includes the Commissioner of the OPP; includes Deputy Chief |
| Clare Lewis Report | Report of the Race Relations and Policing Task Force, 1989 |
| Cole-Gittens Report | Report of the Commission on Systemic Racism in the Criminal Justice System, 1995 |
| DPCC | Director of Police Conduct Complaints |
| F.I.D.O. | <i>Forget it, drive on!</i> A street-level police colloquialism indicative of the temptation for officers to avoid getting into contentious encounters with public citizens because of apprehension over the multi-tiered response of police "watchdog" agencies (present civilian oversight system) |
| IACOLE | International Association for Civilian Oversight of Law Enforcement |
| Local Police Service | Includes the OPP |
| MAG | Ministry of the Attorney General |
| MSG | Ministry of the Solicitor General and Correctional Services |
| MSGCS | Ministry of the Solicitor General and Correctional Services |
| MTP | Metropolitan Toronto Police Services |
| MTPA | Metropolitan Toronto Police Association |
| MTPSB | Metropolitan Toronto Police Services board |
| OACP | Ontario Association of Chiefs of Police |
| OAPSB | Ontario Association of Police Services Boards |

| | |
|---------------|--|
| OCCOPS | Ontario Civilian Commission on Police Services |
| OPAC | Ontario Police Arbitration Commission, Part VIII, <i>Police Services Act</i> |
| OPCC | Current Office of the Police Complaints Commissioner |
| OPP | Ontario Provincial Police |
| OPSC | Ontario Police Services Commission (New) |
| OSOPA | Ontario Senior Officers' Police Association |
| PAO | Police Association of Ontario |
| PCC | Police Conduct Complaints (New) |
| PSD | Policing Services Division, Ministry of the Solicitor General and Correctional services |
| SG | Solicitor General of Ontario (Solicitor General and Minister of Correctional Services, Ontario) |
| SIU | Special Investigations Unit, Part VII, <i>Police Services Act</i> |

APPENDIX "A"**Excerpts from Reports and Submissions**

1. **The Royal Commission on the Donald Marshall, Jr., Prosecution, Volume 1: Findings and Recommendations, Nova Scotia, December 1989.**

Recommendation 35, at pp. 232, Paragraph 2

"We recognize that cooperative and effective consultation between the police and the Crown is also essential to the proper administration of justice. But under our system, the policing function - that of investigation and law enforcement - is distinct from the prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice."

Recommendation 36, at pp. 232, Paragraph 1

"We believe that the right of the police to lay a charge ensures protection of the common law position of police independence and acts as an essential check on the power of the Crown."

Recommendation 36, at pp. 233, Paragraph 1

"We do not wish to interfere with the right of the police to lay a charge, but when competent Crown law officers give advice in good faith, we believe that advice should be rejected only after careful consideration. If there is a disagreement, it should be first discussed between the police force and the Department of Attorney General at correspondingly higher levels. If a disagreement still exists after pursuing such discussions to the highest level on each side, the police should then, if they still feel it is warranted, lay the charge. The police department should have a clear written policy setting out the steps to be taken in the event of a disagreement between the police and Crown respecting the laying of a charge."

2. **Professor Emeritus John L.I.J. Edwards, Walking the Tightrope of Justice - A Series of Opinion Papers prepared for the Royal Commission on the Donald Marshall, Jr., Prosecution, Nova Scotia, 1989.**

Chapter I at pp. 3 - 4

"Because of its relevance to the emerging Department of the Solicitor General in Nova Scotia I will quote the pertinent extracts in full. Speaking in 1969, I observed:

'Nothing is more calculated to engender disillusionment with the criminal justice system and its constituent parts - the police, prosecutors, judges or the executive branch of government - than disclosures indicating a susceptibility to extraneous pressures. I have no doubt in my mind that the greatest safeguard against the sullyng of the pillars of justice is to be found in the integrity and independence of the individuals who, in their respective capacities, have to administer the several parts of the system. Without these personal qualities any structure is extremely vulnerable. The responsibility of government is to create the kind of machinery that will assist, rather than prejudice, the fulfilment of those ideals which are essential to maintaining public confidence in the criminal justice system. An important step in this direction would be realized by separating the portfolio of the Attorney General from that of the Minister of Justice and by making the Minister of Justice the member of the Government answerable for the courts and the police. In addition to emphasizing the distinctive functions of the two ministers this separation will serve to ensure that the Attorney General concentrates his efforts on being the principal legal adviser to the Government, on supervising the entire machinery of criminal prosecutions, on ensuring through the Law Reform Commission that the statute law is kept abreast of modern needs, as well as fulfilling the historic role of the Attorney General as the guardian of the public interest in all matters coming before the courts or administrative tribunals.

In wishing to see the police forces become the responsibility of the Minister of Justice, rather than the Attorney General, I am by no means advocating the assumption of direct supervisory powers by the Minister over the day-to-day activities of the various police forces. This would be as much anathema to my way of thinking as the policy presently being advocated in many quarters, of a return to the system of control over local police forces by commissions or committees composed of a majority of elected representatives drawn from the local municipal council. Past history suggests that this path leads to the erosion of the independent exercise by the police of their statutory and common law powers. To my mind the arguments against permitting the resurgence of local politics and political interference in the area of law enforcement far outweigh the criticisms levelled against the present system of police commissions. If there have been occasions when the police commission of a particular city or municipality has been impervious to requests for information made by the responsible Minister, it is time to reassert the ultimate accountability of the police and the police commissions at all levels to the Legislature. Undue restraint on the part of the Minister concerned in seeking the facts can be as much a fault as undue interference in the

work of police commissions. The existing framework, at least in this province [Ontario], provides the right kind of checks and balances that are so necessary to ensure the impartial application of the criminal law. If some changes are felt to be necessary in the composition of these local supervisory bodies great care must be exercised not to mutilate the essential foundations of the police commission system." (1969-70) 12 *Crim. L.Q.* 417 at pp. 424-425)

Chapter I, 1.6 at pp. 22 - 23

"In the course of police testimony before the McDonald Commission senior members of the RCMP persisted in drawing a firm line between "policy matters" and "operational matters", in support of their view that the responsible Minister, the Solicitor General, should restrict his ministerial functions to questions that fell within the former category only. Operational matters, on the other hand, they maintained, should never concern the political head of the Department of Government responsible for the RCMP. This dichotomy was firmly rejected by the McDonald Commission in its final report when it declared:

'In our view such a distinction between policy and operations leads to insurmountable difficulties in application, and even worse, it results in whole areas of ministerial responsibility being neglected under the misapprehension that they fall into the category of 'operations' and are thus outside the Minister's purview.... The concept of independence for peace officers in executing their duties has been elevated to a position of paramountcy in defining the role and functions of the RCMP, thus setting the norm for all relationships between the Government and the Force. We believe, on the contrary, that the peace officer duties of the RCMP should qualify, but not dictate, the essential nature of those relationships. The Government must fulfil its democratic mandate by ensuring that in the final analysis it is the Government that is in control of the police and accountable for it. There is no inconsistency in asserting simultaneously that every member of the Government, and above all the Minister responsible for the RCMP, has an essential obligation not normally to become involved in the decisions to be made by members of the force, including the Commissioner himself, with respect to investigation, arrest and prosecution in individual cases.' (Second Report, Vol. 2. pp. 868, 1007-8)

My own sense of where things now stand in Canada in terms of public understanding or that of legislators and Ministers of the Crown as to the distinctions drawn in the above exposition is not one of buoyant confidence. If the underlying principles are sound they must be explained over and over again whenever the

opportunity presents itself. I see the eventual report of this Royal Commission as necessitating this kind of adherence to a set of fundamental principles."

3. **Philip C. Stenning, "Police and Politics: There and Back and There Again" in *Police Powers in Canada: The Evolution and Practice of Authority*, Toronto: University of Toronto Press in association with the Centre for Constitutional Studies, University of Alberta, 1994.**

at pp. 214 - 215

"Beginning in the very late nineteenth century, and culminating in the now oft-quoted words of an English Court of Appeal judge written in 1968, there has evolved the crucially important legal doctrine of 'police independence' which has had more influence over the realities of police governance in this country than any legislated mandate ever did.

It is not necessary to trace the tortuous legal history of this critical doctrine here The essence of the doctrine, however, is that in matters of law-enforcement (or with respect to law enforcement decisions in particular cases, depending on which version of the doctrine you read), the police are constitutionally immune to any supervision or control other than by the courts. In its most extreme version, epitomized by the following famous dictum of Lord Denning in *R. v. Metropolitan Police Commissioner, ex parte Blackburn*, the doctrine appears to rule out not only political control or direction in matters pertaining to law enforcement, but also political accountability:

'I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.'" ([1968] 1 All E.R. 763, at 769)

Lord Denning went on to indicate that only in most exceptional circumstances would the courts even interfere with this discretionary authority of the police.

The doctrine represents the zenith of the attempts to equate the police with the judiciary in terms of their constitutional status and their immunity from political control and accountability. Despite the fact that it has been discredited by every legal analyst who has seriously examined it, in terms of both its historical and its legal authenticity ... the doctrine persists as conventional wisdom among police officers, policy-makers, and judges alike."

and at p. 218:

"A quarter of a century later, in 1985, the commissioner of the RCMP again found occasion to publicly proclaim the independence of the force in his report on its investigation of the premier of New Brunswick. In an addendum to the report he wrote: 'I accept that the Minister has broad powers of direction over the Commissioner with respect to *control* and *management* of the Force, and all matters connected with that *control* and *management*. However, I do not accept that the Minister's powers of direction over-ride the inherent responsibilities, authorities and powers that are given to every member upon appointment to the office of "Peace Officer"' (Simmonds 1985: addendum, p. 6) (emphasis in original). The *Blackburn* case was cited in support of this position.

In the interim, the concept of the independence of the police from political accountability as well as political control in matters of law enforcement had been expressly endorsed by none other than the prime minister of Canada as a general principle of democratic government. In a press conference in 1977, Prime Minister Trudeau, in response to a journalist who had asked him 'just how ignorant does a minister have to be before, at the very least, some responsibility is applied to the advisers who seem to have kept him ignorant?' was reported as having replied:

I have attempted to make it quite clear that the policy of the Government and, I believe, the previous governments in this country, has been that they, indeed, -- the politicians who happen to form the Government -- should be kept in ignorance of the day-to-day operations of the police force and even of the security force. I repeat that it is not a view that is held by all democracies, but it is our view, and it is one we stand by. Therefore, in this particular case, it is not a matter of pleading ignorance as an excuse. It is a matter of stating, as a principle, that the particular minister of the day should not have a right to know what the police are doing constantly in their investigative practices, in what they are looking at and what they are looking for, and in the way in which they are doing it ...

... That is our position. It is not one of pleading ignorance to defend the Government. It is one of keeping the Government's

nose out of the operations of the police force at whatever level of government.

On the criminal law side, the protections we have against abuse are not with the Government, they are with the courts (*Globe and Mail* 1977).

Trudeau's version of the police-independence doctrine, like Lord Denning's version that it closely emulates, declared the police to be independent from both political control and political accountability with respect to individual law-enforcement decisions...."

and at pp. 219 - 221:

"A study of municipal-police governance in Canada, undertaken under the sponsorship of the Canadian Police College in Ottawa in the early 1980s, found that this policy/operations distinction, attractive as it is, was not well understood by members of municipal-police governing authorities or their police chiefs, and did not appear to explain when municipal-police governing authorities became involved in decisions with respect to their police forces, and when they did not (Hann et al. 1985).

There can be no question, however, that the doctrine of police independence, vague and contentious as it is, has had a profound effect on attitudes towards police governance in this country. In the 1970s a major overhaul of legislation concerning the police began to take place across the country. Many provinces imitated each other's initiatives in this regard, with the result that standard formulations began to appear in the new provincial Police Acts that were enacted during this decade. One of these involved the provisions concerning the respective roles of police governing authorities and chiefs of police. In 1971, Alberta passed a major revision of its *Police Act*, which contained the following sections:

- 18(3) Every member of the police force of a municipality, however appointed, is from and after the passing of a by-law establishing a board, subject to the jurisdiction of the board to the same extent as if appointed by the board and shall obey its lawful directions.
- 23(1) Notwithstanding the right of a municipality to direct its own police operations, the functions of any board or police committee shall primarily relate to the administrative direction, organization and policy required to maintain an efficient and adequate police force.

- (2) Except when inconsistent with the provisions of the Act, the actual day to day direction of the police force with respect to the enforcement of law and the maintenance of discipline within the force shall rest with the chief of police or person acting for him. (*Alberta Police Act*, 1971, c. 85).

Unclear as these provisions were, they seemed to reflect a legislative intent to adopt, to some degree, the principle of police independence. The provisions were virtually copied in revisions to police legislation in Saskatchewan and Nova Scotia in 1974, and in Prince Edward Island in 1977. The version in the Prince Edward Island *Police Act*, however, did not have the qualifying words 'Except when inconsistent with the provisions of the Act' at the beginning of its clause specifying the chief as having the day-to-day direction of the force (1977, c. 28, s. 18).

New Brunswick also revised its *Police Act* in 1977, but did not opt for this formulation. Instead, its legislation stated quite specifically that a chief of police 'shall be responsible directly' to the board or municipal council, as the case may be (1977, c. P-9.2, ss. 10(1)(a) and 11(1)(a)). The act did, however, also stipulate: 'The chief of police is the chief executive officer of the police force and shall have all necessary powers to direct the police force in carrying out its duties and responsibilities' (ss. 10(3) and 11(3)).

Ironically, in Ontario -- the province in which the move to insulate municipal police from local political influence had begun over a century before -- the *Police Act* still provided simply: 'the board is responsible for the policing and maintenance of law and order in the municipality and the members of the police force are subject to the government of the board and shall obey its lawful directions' (R.S.O. 1970, c. 351, s. 17(1)). In a controversial court case involving the attempted firing of a chief of police in the province in 1957, however, the Ontario Court of Appeal had held that: 'while members of a police force must obey "the lawful direction" of the board, neither the board nor any municipality not having a board can lawfully give directions to any member of a police force prescribing the duties of his office' (*Re a Reference under the Constitutional Questions Act* [1957] O.R. 28, at p.30). While the precise implications of this ruling were far from clear -- especially as, in the case before the court, the municipality had not sought to 'prescribe the duties' of the chief's office, but rather to fire him -- the case was widely interpreted as proclaiming the independence of the police from political control or accountability with respect to their law-enforcement duties (see, for instance, McDougall 1971).

It was not, in fact, until 1990, when Ontario replaced its *Police Act*, that the principle of police independence found legislative

expression in that province. The new *Police Services Act* defined in much greater detail the authority of the new 'police services boards' that it established as municipal-police governing authorities. Two of the key provisions in this regard required boards to:

(b) generally determine, after consultation with the chief of police, objectives and priorities with respect to police services in the municipality.

and

(e) direct the chief of police and monitor his or her performance. (1990, c. 10, s. 31)

The bill also included the following clause: 'The board may give orders and directions to the chief of police, but not to other members of the police force, and no individual member of the board shall give orders or directions to any member of the police force' (s. 31(3)).

When these provisions were discussed in legislative committee, they were the subject of considerable disagreement, some arguing that the board's powers should be strengthened, others (including the Ontario Association of Chiefs of Police) that chiefs should be given more operational autonomy. The government's response was to introduce an amendment to the bill, adding the following clause, which was eventually enacted: '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 force' (31(4)).

It remains to be seen, of course, how this provision is interpreted in practice by boards, police chiefs, and the courts. The provision is of considerable importance, however, representing as it does the first unequivocal inclusion of the doctrine of police independence in a statute governing the police in Canada."

4. Clare E. Lewis Q.C., "Public Complaints in Metropolitan Toronto: Perspectives of the Public Complaints Commissioner" in Andrew J. Goldsmith, *Complaints Against the Police: The Trend to External Review*, Oxford: Clarendon Press, 1991.

at pp. 153

"As our democratic institutions have matured, it has become increasingly apparent that no individual or organization performing important public services can maintain widespread respect and support without public accountability. The more significant and public the function, the more insistent is community need and demand for accountability to balance the responsibility and trust

granted to the individual or organization. The purpose of the Toronto police force complaints legislation is to provide for such accountability and to ensure that an individual who has a complaint about the conduct of an officer of the Metropolitan Toronto police will receive fair treatment in its disposition, while preserving appropriate protection for subject officers."

at pp. 171

"...[P]ublic complaints systems incorporating civilian review can assist interested police managers in asserting worthwhile authority over officer conduct and reduce unnecessary and debilitating conflict with the community."

at pp. 174

"As Maxwell Yalden, Chief Commissioner of the Canadian Human Rights Commission, said in his presentation to the Ontario Task Force on Race Relations and Policing: 'The greatest enemy of effective policing is loss of public confidence.' Civilian oversight, through review of public complaints, assists police to achieve congruence with the values and expectations of the broad community and has the potential for generating high police morale through that increased public support necessary for police and community harmony."

5. Andrew J. Goldsmith, "External Review and Self-Regulation: Police Accountability and the Dialectic of Complaints Procedures" in Andrew J. Goldsmith ed., *Complaints Against the Police: The Trend to External Review*, Oxford: Clarendon Press, 1991.

at pp. 19

"Given that policing is likely to remain a contentious topic, complaints need to be seen not simply as *threats* to existing policies and procedures or individual officers but more importantly, as *opportunities* for re-examination of organizational policies and practices, particularly in terms of their community-relations dimension, of immense potential benefit to the police as well as to the public. The issue then is not whether there are adequate mechanisms and resources to ensure that citizens' complaints are articulated fully and that the information provided by complaints is systematically collected and analysed for the administrative lessons it provides for the future organization and practice of police work."

at pp. 23

"..the nature of police work undoubtedly does cause police officers to be more exposed to the risk of complaints, perhaps more than

any other occupation, and defensiveness in these circumstances is scarcely surprising and even natural. Moreover, cynicism and resentment among those subject to complaint are not confined to the police ranks as the literature on disputes shows.... But what is regrettable specifically about the police response is its consequences for police-community relations. It has been noted in a number of jurisdictions that in such circumstances the police are prone to being excessively defensive. The challenge is to break this pattern of response: 'if,...[the police] cease thinking of themselves as a brotherly band beleaguered by citizens (and, of course, other hostile forces) and start thinking of themselves as public servants within a specialized law administration organization - the gap between them and the community they serve should begin to close'...."

at pp. 28

"As any reform concerned with public legitimacy entails, what is at issue is not merely the question of *effective* complaint investigation, but that such investigations are *credible* precisely to those groups in which legitimacy levels are low. That numbers of these groups may often find themselves the target of police attentions does not detract from, but rather underlines, the importance of adequate complaints investigations. As Hogg and Findlay argue: 'The real test of police accountability and responsiveness to the community must lie in their relationships with those with whom they have the most frequent contact, groups who, currently tend to be the least favoured by police stereotypes and working images.'.... Poor internal investigation of complaints does nothing to restore the police relationship with these groups; for them, such investigations are 'incredible'. Therefore if external review agencies equipped with investigative powers can go some way to restoring the credibility of police internal complaints procedures, this will bring about something which in many cases the police themselves have not achieved."

6. **Report of the Commission on Systemic Racism in the Criminal Justice System, December 1995.**

Introduction, at pp. 2, Paragraph 1

"Over the past two decades, a lack of confidence in the Ontario criminal justice system has been articulated particularly strongly by members of black communities. Fears have been aroused by several police killings and woundings of black persons since 1978, and sustained by the apparent inability of the system to examine how far racism contributed to these tragedies. A sense of injustice has been intensified by the lack of any systemic response to

repeated experiences of arbitrary and humiliating encounters with the police. Feelings of exclusion from the system have been reinforced by under-representation of black and other racial minority communities among justice officials. There are strongly held perceptions that black and other racial minority people are often unfairly charged, unjustly denied bail, unnecessarily prosecuted, wrongly convicted, harshly sentenced and mistreated in prisons."

Chapter 10, at pp. 341, Paragraph 1

"Ontario's large urban police forces, particularly the Metropolitan Toronto Police, unquestionably realize that they must integrate racial equality into their services. In the last few years they have made important changes in institutional policies and procedures, reformed and professionalized hiring and employment practices, and attempted to reach out to the black and other racialized communities. Nevertheless, our findings show that more needs to be done. As was succinctly put in a recent Metro Toronto Police report on race relations in policing, *Moving Forward Together*, 'it is not a time for complacency ... the time is ripe for a new departure.'"¹⁵

Chapter 11, at pp. 380, Paragraph 3

"...[T] the well-documented culture of closeness, loyalty and mutual support among working officers means that police investigations of police officers, even if properly conducted, may lack credibility."³

Chapter 11, at pp. 381, Paragraphs 1, 3 and 4

"Although the Government established the Special Investigations Unit in 1990, its structure and performance have fallen short of satisfying the need for independent and effective investigations.

...

Many Ontarians had high expectations that independent investigation by the SIU would improve public accountability for police use of force. In turn, such accountability was expected to reduce the risk of racism in police practices. However, because the Government failed to give the SIU sufficient financial support to function properly, in April 1991 the SIU agreed to what has been described as a secret protocol between Ontario police forces and the Solicitor General's office. In effect, the protocol handed back to local forces the investigation of the very incidents that the SIU was created to investigate. This arrangement confirmed for many in the black community that criminal justice officials were prepared to create a public impression of openness while privately collaborating to avoid independent scrutiny and accountability.

The SIU is an essential component of Ontario's criminal justice system. An independent and effective investigation of allegations of improper police use of force, particularly shootings of civilians that may have a racial aspect, is central to public confidence in the integrity of the entire criminal justice system."

7. **Andrew J. Goldsmith, "New Directions in Police Complaints Procedures: Some Conceptual and Comparative Departures" *Police Studies* Volume 2, No. 1, 1988.**

at pp. 61

"It would seem clear that those intent on overhauling police complaints procedures, if they are not to be doomed to exercises of futility, need to be sensitive to this organizational reality [of the existence of informal rules within the police subculture]. Nowhere, perhaps, has this point been made more persuasively than in a paper by the American comparative police scholar, David Bayley. In that paper, for example, he states:

'the art of achieving accountability, especially when there is clamour for reform, is to enlist the support of the police in disciplinary activities. If they become alienated, a crisis will emerge that is not to the benefit of discipline, public confidences, or law enforcement. In order for processes of external regulation to succeed in the long run, to be more than a highly publicised morality play, the police must be convinced that they will be trusted to bear most of the active responsibility for ensuring correct performance.'"

at pp. 62

"Then, another crucial aspect of the social context which requires recognition is the existing state of police-public relations. It has become relatively commonplace over the past ten years or so in the U.K., and also in Canada (though probably to a lesser degree), to refer at specific moments and over time to various 'crises' of public confidence in the police. Often, a royal or some other commission of inquiry has been the result of media scandals involving the police. Perhaps at no other moments in the history of modern policing does the old adage that "justice must not only be done, but be also seen to be done" become so applicable in describing official responses and public attitudes to police accountability. Such attitudes and responses characteristically demand at the very least a new degree of procedural openness and fairness in police accountability mechanisms, whether this be specifically in the area of police complaints or in some other aspect of accountability."

8. **Letter from Roberta L. Jamieson, Ontario Ombudsman, November 12, 1996.**

at pp. 1

"One of the most important features of our democratic institutions is the right of complaint. This right signals a willingness to be held accountable to the people and enables members of the public to complain should they believe that they have experienced unfair treatment by a public official providing service on behalf of government."

at pp. 2 and 3

"I have highlighted the following additional characteristics which, in my view, are essential to an effective system of investigation and resolution of public complaints regarding police conduct.

- **The system which emerges must be accessible to all those who may require its services. As a result, a proactive public education role is an essential part of its mandate which must be adequately resourced. It must also reflect in its workforce, policies and procedures a sensitivity to and understanding of the diversity of the Ontario public.**
- **The system of review must avoid the features of overlap and duplication which are prevalent in the field today. Such a streamlined system would avoid confusion on the part of the public and promote the effective provision of service and use of resources.**
...
- **The independent agency must have the power to make its reports public, both on an annual basis in terms of its own accountability, and also in those cases where it is in the public interest to do so, or where the agency complained against has not implemented the recommended course of action to correct the unfairness identified by the investigation.**
...
- **Early complaint resolution efforts by those agencies/police forces themselves who are complained against should be fostered and encouraged."**

9. **Tammy Landau, Public Complaints Against the Police: A View from Complainants, Toronto: University of Toronto, Centre of Criminology, 1994.**

Part Four, Conclusion at pp. 77

"In addition, however, the Office of the Police Complaints Commission, which is to be an active, if not symbolic,

counterbalance to the police handling of investigations and an avenue of appeal for both complainants and subject officers, remains either misunderstood or suspect due to its perceived passivity in individual complaints. It cannot, then, achieve any of the goals of accountability or control of the police or improve police-community relations from the perspective of those who use the system. In fact, many complainants remain angry and alienated as a direct result of their experience making a formal complaint against the police."

10. **Letter from Marilyn Warf, Regional Director of Persons United for Self-Help N.W.O. (PUSH Northwest), Thunder Bay Ontario, October 21, 1996.**

at pp. 1

"Although the PCC is staffed with individuals that appear to take interest in their responsibilities, we have yet to see a role that justifies the enormous expense for running this Commission.

In fact, we believe that the existence of the PCC is a barrier to people in the community establishing communication links directly with the Chief of Police. Does the community know that any complaints through the PCC go directly back to the local Chief related to the complaint? We did not and, as such, see the PCC as a duplication of administration. Could the PCC be combined with an investigative/inquiry division? There seems, from the layman's perspective that there is considerable duplication in services in the roles of administration, investigation, Commissions and service Boards."

11. **Letter dated November 4, 1996, submitted to the review team by Susan McNab, on behalf of herself and her husband Russ Norris, parents of Shayne McNab, the young boy who died in the Loranger case:**

"...The SIU conducts a much more serious investigation in regard to police oversight than any of the other current processes. The SIU search for the truth and criminality.

...

We conclude by strongly urging you to favour the special investigation unit in creating a system of civilian oversight of police that will provide the people of Ontario with a strong and open process which the public will have full confidence."

12. **William A. Geller and Michael Scott, "Deadly Force: What We Know -A Practitioner's Desk Reference on Police-Involved Shootings", Washington, D.C.: Police Executive Research Forum.**

"One of the best 'friends' a police agency can have in the aftermath of a controversial police-involved shooting is a widely credible independent investigation. We discussed internal and external review of police-involved shootings earlier in Chapter 5 in connection with our overview of deadly force policy enforcement and personnel practices. How an investigation achieves the status of "independent" and fair in the minds of police personnel generally, the public, and those more directly involved in a violent encounter is a complex matter. This involves balancing a quality investigation, conducted by those with the skill to understand police work and how police think and might tend to cover up any deficiencies in their performance, with an audit of the quality of that investigation. The audit needs to be conducted by a body, internal or external to the police agency depending on each jurisdiction's history and current needs, that will have credibility to all significant constituencies.... [T]he audit need not entail a complete re-investigation of each or even very many police-involved shootings. The objective is to examine the integrity and strength of the investigation sufficiently that the auditor can periodically place a seal of approval on the investigative process...."

...

Moreover, it must be clear that the investigation will be completed as expeditiously as possible, consistent with the need to uncover and weigh all relevant facts. Police executives who decline comment at all on an officer-involved shooting until the agency's investigation is completed often cause trouble for themselves. In these cities, the chief, confronted with a flurry of media inquiries, tends to say only, 'I cannot comment on a pending investigation.' This leaves an information vacuum that all too often is filled with rumour and partisan speculation about the professionalism of the police."

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APPENDIX "D"Office of the
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du ministreMinistry of
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du Procureur
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October 9, 1996

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FAX 416/326-4016

Roderick M. McLeod, Q.C.
Miller Thomson
Barristers & Solicitors
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Dear Mr. McLeod:

The government is concerned that the current system of civilian oversight of police is unduly complex and promotes inefficient delivery of services and delays in resolving issues. Many members of the public who have come into contact with the oversight system and members of police services who have been the subject of oversight scrutiny have found that it is confusing and frustrating, and unresponsive to their needs including their need for a timely resolution of the issue.

One of the policy objectives of the government of Ontario, therefore, is to have a more efficient and effective system of overseeing the actions of municipal, regional and provincial police, while ensuring the integrity of civilian oversight.

We hereby request that you consider and advise on how the current system of civilian oversight of police in the province can be improved to meet this objective.

We further request that you provide the government with options for a new oversight system, including your preferred option.



- 2 -

As you know, there are a number of bodies at both the provincial and municipal levels of government currently performing civilian oversight functions in relation to the police. These bodies are:

- the Special Investigations Unit
- the Office of the Police Complaints Commissioner
- the Board of Inquiry
- the Ontario Civilian Commission on Police Services
- Police Services Boards
- the Policing Services Division of the Ministry of the Solicitor General and Correctional Services.

Chiefs of police, although not civilians, play an essential role in the civilian oversight system and their oversight role is within the scope of this review.

This civilian oversight system has already been the subject of much investigation and public comment. We hereby request that you review the existing literature and documentation from earlier public consultations, including those on the attached list, with a view to answering such questions as what kinds of conduct should be subject to oversight, how oversight should be structured, and what processes and procedures should be involved. A full list of the questions you should consider is also attached.

You should take into account the previously expressed positions of the many groups and individuals interested in or affected by police oversight, including representatives of government and oversight agencies, police services and associations and individuals and groups in the broader community.

You should also meet with and receive additional submissions from the individuals, groups, associations or agencies you consider appropriate.

There are certain matters that we would ask you to keep in mind as you commence your deliberations. First, the oversight system should reflect the principle of accountability of police to independent civilian authority. Second, the province will continue to be the defining authority in oversight.

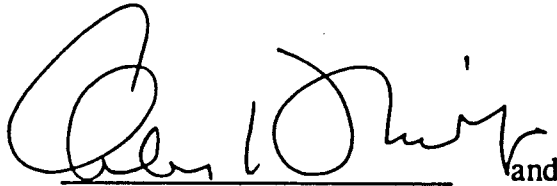
- 3 -

It is essential to public and police confidence that the system of civilian oversight of police have integrity in its investigative and decision-making processes. We therefore ask that you ensure that accessibility, fairness and timeliness be integral to any redesigned system.

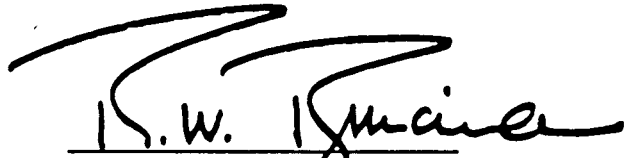
This review is a priority for the government. The government will be introducing legislation in the near future dealing with police services, including oversight. Consequently, we ask that you submit your report to us by the middle of November, 1996.

Thank you for your assistance. We look forward to receiving your advice.

Yours sincerely,



Charles Harnick
Attorney General and
Minister Responsible for
Native Affairs



Robert W. Runciman
Solicitor General and
Minister of Correctional
Services

PUBLIC DOCUMENTS

REPORTS AND COMMISSIONS

- ◆ Police Summit - Review of Police Services in Ontario: Framework for Discussion, May 1996
- ◆ Royal Commission into the New South Wales Police Service, The Honourable Justice J.R.T. Wood, Commissioner, February 1996
- ◆ Police Complaints Commissioner Recommendations to Honourable Charles Harnick, Attorney-General: Re: *Police Services Act* Amendments, July 1995
- ◆ Report of the Commission on Systemic Racism in the Ontario Criminal Justice System, December 1995 and A Community Summary of the Report, 1995
- ◆ Police Services Boards and Police Governance in Ontario by Katherine Liao, 1994
- ◆ Audit of the Special Investigations Unit, Ministry of the Attorney-General: Final Report, 1994
- ◆ Commission of Inquiry into Policing in British Columbia - The Honourable Mr. Justice Wallace T. Oppal, Commissioner, 1994
- ◆ Stephen Lewis Report, 1992
- ◆ The Report on the Race Relations and Policing Task Force, Clare Lewis, Chair, 1989

ANNUAL REPORTS

- ◆ Board of Inquiry Annual Report, 1995
- ◆ Office of the Police Complaints Commissioner Annual Report, 1995
- ◆ RCMP Public Complaints Commission Annual Report, 1994-1995
- ◆ Ontario Civilian Commission on Police Services Annual Report, 1995

LEGISLATION

- ◆ *Police Services Act*, R.S.O. 1990, c. P-15 and amendments

QUESTIONS TO BE ANSWERED

1. How should a system of civilian oversight be structured to ensure effective and efficient accountability of police to the public?
2. How can police oversight processes be designed so that they reduce delay, while at the same time ensuring that procedural fairness is preserved for complainants, subject officers and police services?
3. In what ways could oversight processes and procedures be streamlined? For example, can a fair test be developed which would enable administrators to classify complaints of police misconduct?
4. Would informal dispute resolution techniques such as mediation be appropriate in speeding decision making and reducing costs while maintaining fairness and accessibility for the parties?
5. To what extent are there areas of police activity which could be treated as administrative or labour relations matters rather than questions of public trust and which need not be the subject of civilian oversight?
6. Who are the appropriate persons to carry out the various functions of oversight, such as investigations and adjudications, in order to ensure that each is delivered with competence, independence and economy?
7. What are the appropriate accountability relationships between governments and civilian oversight organizations?
8. Are there oversight matters which are substantially local such that the oversight process could be conducted more effectively or efficiently at the local level, rather than at the provincial level?
9. Is the oversight system sufficiently responsive given the increasing diversity of the population of Ontario? If not, are there improvements which would render the oversight system more responsive?
10. What police conduct should be subject to civilian oversight?

APPENDIX "E"**TERMS OF REFERENCE****REVIEW OF ONTARIO SYSTEM OF
CIVILIAN OVERSIGHT OF POLICE****OCTOBER 9, 1996****I. OBJECTIVE**

To advise the Attorney General and the Solicitor General how to achieve a simpler, more efficient and more effective civilian oversight system.

II. CONDUCT AND PARAMETERS OF THE REVIEW

The report will review the existing literature and jurisprudence, documentation from earlier public consultations, and reforms in other jurisdictions.

In order to consult, the reviewer will solicit and consider written submissions from the public and conduct meetings with selected stakeholders from groups and individuals interested in or affected by police conduct.

The review will assume that the structure, governance and financing of police services in Ontario that is in place on October 1, 1996 will continue.

III. PRINCIPLES GOVERNING THE REVIEW

The oversight system will reflect the principle of accountability of police to independent, civilian authority.

Fairness, equity, accessibility, affordability and timeliness will be integral components of a redesigned system.

Integrity of the investigative and decision making process will be assured.

Conclusions will reflect the current jurisprudence and constitutional standards.

The province will continue to be the defining authority in oversight.

IV. SCOPE OF THE REVIEW

1. The definition of conduct subject to civilian oversight:

- individual conduct which raises questions of public trust or is criminal in nature
- institutional policies which raise broader issues of service delivery

- 2 -

2. The oversight functions performed by civilian agencies including the following:

- investigating possible police misconduct
- adjudicating conduct
- monitoring investigations and discipline
- imposing penalties or informal resolution
- considering appeals
- making recommendations on more general or systemic issues arising from policing

3. The organizations which perform oversight functions including:

- Office of the Police Complaints Commission (OPCC)
- Board of Inquiry (BI)
- Special Investigations Unit (SIU)
- Ontario Civilian Commission on Police Services (OCCPS)
- Police Services Boards
- Policing Services Division, Ministry of the Solicitor General and Correctional Services

[Chiefs of police, although not civilians, play an essential role in the civilian oversight system and their oversight role is within the scope of this review.]

4. The structures and relevant inter-relationships of these organizations and their accountability to the Attorney General and the Solicitor General.
5. Oversight as it applies to all levels of police services governed by the Police Services Act, i.e. municipal, regional, and provincial police services
6. Any other relevant matter relating to the accountability of police to civilian authority.

V. DELIVERABLES

A report to the Attorney General and the Solicitor General which:

- i. defines the options for a new system
- ii. recommends the most desirable option taking account of the answers reached in response to the *Questions to be Answered*.

VI. TIMING

To be completed by mid-November, 1996.

APPENDIX "F"

LIST OF PUBLISHED SOURCES

Reports

- ◆ *The Royal Commission on the Donald Marshal Jr., Prosecution, Volume 1: Findings and Recommendations*, Nova Scotia, December 1989
- ◆ Professor Emeritus John LI.J.Edwards, *Walking the Tightrope of Justice - A Series of Opinion Papers* prepared for the Royal Commission on the Donald Marshall Jr., Prosecution, Nova Scotia, 1989
- ◆ Tammy Landau, *Public Complaints Against the Police: A View from Complainants*
Toronto: University of Toronto, Centre of Criminology, 1994
- ◆ Coalition Against Police Violence, *Uniform Treatment: A Community Inquiry into the Policing of Disadvantaged Peoples*, Toronto: Ontario Legal Aid Plan, 1994

Books and Articles

- ◆ Law Reform Commission of Canada, *The Legal Status of Police in Canada*, 1981
- ◆ A. Goldsmith, "New Directions in Police Complaint Procedures: Some Conceptual and Comparative Departures", *Police Studies* Vol.2 No.1, 1988 pp. 63-70
- ◆ A. Goldsmith ed., *Complaints Against the Police*, Oxford: Clarendon Press, 1991
- ◆ Clare Lewis, "Police Complaints in Metropolitan Toronto: Perspectives of the Public Complaints Commissioner" in Goldsmith ed. *Complaints Against the Police*, Oxford: Clarendon Press, 1991
- ◆ Philip C. Stenning, "Police and Politics: There and Back and There Again?" in R.C. MacLeod and David Schneiderman eds., *Police Powers in Canada: The Evolution and Practice of Authority*, Toronto: University of Toronto Press in association with the Centre for Constitutional Studies, University of Alberta, 1994
- ◆ William A. Geller and Michael Scott, "Deadly Force: What We Know: A Practitioner's Desk Reference on Police-Involved Shootings", Washington D.C.: Police Executive Research Forum

Annual reports

- ◆ Board of Inquiry Annual Report, 1995
- ◆ Office of the Police Complaints Commissioner Annual Report, 1995
- ◆ RCMP Public Complaints Commission Annual Report, 1994-1995
- ◆ Ontario Civil Commission on Police Services Annual Report, 1995

Legislation

- ◆ *Police Services Act*, R.S.O. 1990, c. P-15 and amendments