

Police Oversight in Ontario:
A Guide to Representing Complainants for Civil Lawyers

By: Simon Borys¹
Barrister & Solicitor
Borys Law

¹ [Simon Borys](#) began his career as a police officer with a municipal police service in Ontario. After several years he left to attend law school and now works as a criminal defence lawyer, representing all manner of accused people. Simon also devotes a part of his practice to representing police officers on criminal and disciplinary charges.

Table of contents

Overview	2
Part 1: Addressing police conduct directly	2
<i>The Police Services Act</i>	2
<i>The Criminal Code</i>	3
Office of the Independent Police Review Director	4
Policing Standards Departments	8
Special Investigations Unit	9
Private prosecutions	11
Part 2: Civil claims against the police	12
Suing the police	12
Criminal injuries compensation claims	12
Part 3: Intervening in proceedings involving the police	13
<i>Police Services Act</i> charges	13
Informal resolutions	14
Formal <i>Police Services Act</i> hearings	14
Unsubstantiated complaints	15
Appeals of <i>Police Services Act</i> hearing decisions or penalties	15
Coroners inquests	16
Conclusion	17
Appendix A: Misconduct offences under the <i>Police Services Act</i>	19

Overview

Policing is a heavily regulated profession in Ontario. The conduct of police officers is overseen both internally and externally, most directly by the Office of the Independent Police Review Director, Policing Standards Department of the police service, and the Special Investigations Unit.

In terms of accountability for police, complaints about the conduct or performance of police officers can be made to any of these three bodies, depending on the circumstances, and can result in criminal and/or *Police Services Act* misconduct charges against the officer. Claims of a civil nature can also be made against the police in a number of different forums that can result in damages or monetary awards. As well, there are a number of narrow circumstances where complainants may even be able to seek standing in proceedings involving the police to have their voice heard.

Although representation of complainants against the police is often something that is referred to criminal lawyers, because they are the ones who most often deal with the police and the criminal process, the reality is that civil lawyers are well positioned to represent complainants in these processes as well. This paper is intended to provide an overview of the various areas where civil lawyers can represent those who have complaints against the police. It is broken down into three parts: (1) addressing police conduct directly, (2) civil claims against the police, and (3) intervening in proceedings involving the police.

Part 1: Addressing police conduct directly

The prescribed standards for the conduct of the police are set out primarily in the *Police Services Act*² (“PSA”) and the *Criminal Code*³. This part of the paper outlines the relevant sections of these two Acts, as they pertain to the standards for police conduct. It then outlines four forums in which complaints of police conduct not meeting these standards can be made ((1) the Office of the Independent Police Review Director; (2) the Policing Standards Department of the police service; (3) the Special Investigations Unit; (4) and private prosecutions) and discusses how civil lawyers can assist complainants in these forums.

The Police Services Act

The foundation of the regulation of policing comes primarily from the PSA, which is applicable to all police services within the province, including the Ontario Provincial Police. The PSA begins with several broad statements.

First, it charges the Solicitor General of the provincial government to monitor police forces to ensure that adequate and effective police services are provided at the municipal and provincial levels; to monitor police services and ensure that they comply with

² <https://www.canlii.org/en/on/laws/stat/rso-1990-c-p15/latest/rso-1990-c-p15.html>

³ <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html>

prescribed standards of service; to develop and promote programs to enhance professional police practices, standards, and training; to conduct a system of inspection and review of police services across Ontario; to issue directives and guidelines to police services respecting policy matters; and to operate the Ontario Police College, which is a post-hire training institute where all police officers in Ontario attend for 13 weeks of basic training⁴.

To give effect to this mandate, the Ministry of the Solicitor General has created a set of general guidelines for all police services in the province to follow in creating their individual policies and procedures known as the Policing Standards Manual, but for the actual standards of conduct for police officers, one must look to the specific policies and procedures of the individual service in question, which can usually be obtained, at least in part, through a Freedom of Information request and sometimes through disclosure in the criminal process.

Second, the PSA charges every city or municipality that has its own police service to provide adequate and effective policing services in accordance with its needs⁵.

Going beyond these broad directives and sentiments, the PSA creates several specific bodies to regulate and oversee policing, specifically the Office of the Independent Police Review Director and the Special Investigations Unit. These bodies are, in large part, directly responsible for the immediate oversight of police services and individual police officers, along with the Policing Standards Department of the service, as will be discussed in more detail below.

The specific misconduct offences that a police officer can be charged with under the PSA are set out primarily in the schedule of Ontario Regulation 268/10⁶, which is made under the PSA, as well as in the PSA itself. The relevant section of the Schedule is reproduced in Appendix A to this paper. The offences include, among other things, discreditable conduct⁷; insubordination⁸; neglect of duty⁹; breach of confidence¹⁰; corrupt practice¹¹; unlawful or unnecessary exercise of authority¹²; and, generally, unsatisfactory work performance¹³.

The Criminal Code

The *Criminal Code* contains both procedural sections related to policing, as well as criminal offences that police officers can be charged with.

⁴ PSA, s. 3(2)

⁵ PSA, s. 4(1)

⁶ <http://www.canlii.org/en/on/laws/regu/o-reg-268-10/latest/o-reg-268-10.html>

⁷ O. Reg. 268/10, Schedule, s. 2(1)(a)

⁸ O. Reg. 268/10, Schedule, s. 2(1)(b)

⁹ O. Reg. 268/10, Schedule, s. 2(1)(c)

¹⁰ O. Reg. 268/10, Schedule, s. 2(1)(e)

¹¹ O. Reg. 268/10, Schedule, s. 2(1)(f)

¹² O. Reg. 268/10, Schedule, s. 2(1)(g)

¹³ O. Reg. 268/10, s. 29

The *Criminal Code* provides a general protection for police officers to use as much force as is reasonably necessary in carrying out their duties¹⁴; however, it also provides that an officer is liable for any excess force that is used¹⁵. Therefore, a use of force beyond what is justified to carry out an officer's duties can result in criminal charges of assault¹⁶, or any of its more serious forms, including assault with a weapon¹⁷; assault causing bodily harm¹⁸; or aggravated assault¹⁹.

There are also specific criminal offences of torture²⁰ and breach of trust²¹, both of which can only be committed by police officers or other officials, but in reality, police officers may find themselves charged with any offence in the *Criminal Code*.

Since, in Ontario, it is the police who lay criminal charges, the question becomes how police officers themselves are actually charged for criminal or misconduct offences. The answer is the Office of the Independent Police Review Director, Policing Standards Department of the police service, the Special Investigations Unit, and private prosecutions, all of which will be discussed below.

Office of the Independent Police Review Director

In 2009 the Office of the Independent Police Review Director ("OIPRD") became the body primarily responsible for operating the system of complaints about police in the Province of Ontario. The OIPRD was established by amendments to the PSA in 2007, which were based on a comprehensive report commissioned by the government of Ontario, known as the LeSage Report²², after retired Judge Partrick LeSage, who authored it.

The Independent Police Review Director is appointed by the Lieutenant Governor in Council of the provincial government, on the recommendation of the Attorney General²³. Police officers and former police officers are prohibited from this position²⁴.

The OIPRD was an effort to streamline and modernize the public complaints system and to enhance public perception and accountability, since, prior to the creation of the OIPRD, a person with a grievance against the police was generally forced to complain directly to the police service with which they had the grievance. Understandably, there

¹⁴ Criminal Code, s. 25(1)

¹⁵ Criminal Code, s. 26

¹⁶ Criminal Code, s. 265

¹⁷ Criminal Code, s. 267

¹⁸ Criminal Code, s. 267

¹⁹ Criminal Code, s. 268

²⁰ Criminal Code, s. 269.1

²¹ Criminal Code, s. 122

²² <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/LeSage/>

²³ PSA, s. 26.1(1)

²⁴ PSA, s. 26.1(2)

was a view that this discouraged reporting of complaints and allowed for complaints to be “swept under the carpet” by whoever within the police service received the complaint.

The OIPRD, on the other hand, *must* review every complaint made to it²⁵ and *must* decide whether to retain it for investigation itself, or refer it to the police service who it is about for an internal investigation²⁶. If the OIPRD retains a complaint, it must investigate it²⁷. Correspondingly, the chief of police must review every complaint referred to the police service by the OIPRD²⁸ and must notify the OIPRD of the disposition of the complaint²⁹. Investigations that are referred to the police service are actually carried out by that service’s Policing Standards Department, which is discussed below under its own heading.

In addition to being empowered to review the conduct of a specific police officer³⁰, the OIPRD is empowered to review complaints about the policies and procedures of a police service³¹. It is also empowered to review systemic issues within policing generally, and may make recommendations respecting such issues to Solicitor General or the Attorney General of the Province, chiefs of police, Police Services Boards, or any other person or body³². A list of the systemic reviews that the OIPRD has conducted can be found on its website³³.

The amendments to the PSA that created the OIPRD also created a new offence of harassing, coercing, or intimidating any person in relation to a complaint, or attempting to do the same³⁴. This offence applies to police officers, as well as to other members of the public. The penalty for this is a fine of \$2,000, or a term of imprisonment of not more than one year, or both³⁵. The potential for an officer to be charged with this offence for interfering in an OIPRD investigation is, I would suggest, a very real deterrent to them doing so, although I am not aware of any reported cases where this charge has actually been laid.

In terms of the actual misconduct offences an officer can be charged with, as noted above, the specific forms of misconduct set out in Ontario Regulation 268/10, as well as the PSA itself, and include discreditable conduct³⁶; insubordination³⁷; neglect of duty³⁸;

²⁵ PSA, s. 59(1)

²⁶ PSA, s. 59(2)

²⁷ PSA, s. 68(1)

²⁸ PSA, s. 63(1)

²⁹ PSA, s. 63(4)

³⁰ PSA, s. 58(1)(b)

³¹ PSA, s. 58(1)(a)

³² PSA, s. 57

³³ <http://www.oiprd.on.ca/EN/Investigations/Pages/Systemic-Reviews.aspx>

³⁴ PSA, s. 79(1)

³⁵ PSA, s. 79(3)

³⁶ O. Reg. 268/10, Schedule, s. 2(1)(a)

³⁷ O. Reg. 268/10, Schedule, s. 2(1)(b)

³⁸ O. Reg. 268/10, Schedule, s. 2(1)(c)

breach of confidence³⁹; corrupt practice⁴⁰; unlawful or unnecessary exercise of authority⁴¹; and, generally, unsatisfactory work performance⁴².

The penalties for a conviction for one of these misconduct offences under the PSA can include demotion; suspension without pay; forfeiting either pay or hours off; any combination of the foregoing penalties; and even dismissal.⁴³ In addition, or instead of any of these penalties, the chief of police may reprimand the officer; direct that the officer undergo specified counseling, treatment, or training; direct that the officer participate in a specified program or activity; or any combination of the foregoing⁴⁴.

The penalty that is, by far, the most common is forfeiture of pay or hours off, with the amounts ranging from 1-3 days pay and 20-160 hours off, depending on the severity of the misconduct. This is far more common than the suspension without pay option because, quite frankly, most police services already have issues with staffing levels and they do not want the officer not to be present for work. Demotion is sometimes used where the misconduct is more serious than warrants just a loss of pay or hours, but is not serious enough to warrant dismissal. A demotion is, in essence, still a financial penalty, since an officer's pay is tied to their rank; however, there is also a loss of status and position that will accompany a demotion and the shaming effect of this is also part of the punishment. Dismissal is rarely used and is reserved for only the most serious cases of misconduct or the cases of repeat offenders, whose behaviour has not been corrected by previous lesser punishments. The reality is that it takes a lot of time and money to train a police officer and to develop them to whatever point they are at in their career when they find themselves facing a punishment for misconduct and police services are generally loath to throw all of that time and money away by dismissing an officer unless they have no other choice. As well, a dismissal is almost certain to be grieved by the Police Association on behalf of the officer, which can require a significant amount of time and effort for the service to defend.

In terms of actually holding police officers accountable, the PSA *requires* the chief of police to charge an officer with a misconduct offence if, after an investigation into a complaint referred to the chief by the OIPRD⁴⁵, or an investigation by the OIPRD itself⁴⁶, or an investigation that originated internally within the service by the Policing Standards Department⁴⁷, the chief is satisfied on reasonable grounds that the conduct of a police officer constitutes one of the forms of misconduct⁴⁸. A directory of all disciplinary hearing decisions is available on the OIPRD website⁴⁹.

³⁹ O. Reg. 268/10, Schedule, s. 2(1)(e)

⁴⁰ O. Reg. 268/10, Schedule, s. 2(1)(f)

⁴¹ O. Reg. 268/10, Schedule, s. 2(1)(g)

⁴² O. Reg. 268/10, s. 29

⁴³ PSA, s. 85(1)

⁴⁴ PSA, s. 85(7)

⁴⁵ PSA, s. 66(3)

⁴⁶ PSA, s. 68(5)

⁴⁷ PSA, s. 76(9)

⁴⁸ PSA, s. 66(3), s. 68(5), s. 76(9)

⁴⁹ <http://www.oiprd.on.ca/EN/Hearings/Pages/Results-of-Disciplinary-Hearings.aspx>

How lawyers can assist someone making a complaint to the OIPRD is, first of all, by screening their complaint to ensure it is warranted, within the limitation period (six months)⁵⁰, and that the OIPRD is the appropriate forum for the complaint. No one, including the complainant, benefits from frivolous or vexatious complaints – or complaints made in the wrong forum.

Secondly, lawyers can assist a complainant with filling out the complaint form, which can be downloaded⁵¹ or filled out online⁵². While most of the complaint form is simply filling out various boxes, the complainant is required to describe their complaint, including:

- What did the officer(s) do, say or did not do that has caused you to make this complaint?
- Based on your complaint, what do you think the officer(s) should have done or said?
- Describe any injury or damage as a result of what the officer(s) did or didn't do.
- If you are not the directly affected person, outline how you were affected (e.g., loss, damage, distress, and/or inconvenience).
- Identify any evidence of the incident(s) you have (e.g., photo, audio, video, medical records).
- If this happened to someone else and you are a witness to the incident, please include the name and contact information of the person this happened to (if known).

Of course, describing the complaint in a persuasive manner that is more likely to be taken seriously and acted on is a form of advocacy, which is exactly what lawyers do.

As well, a lawyer can actually make a complaint to the OIPRD as agent for the complainant⁵³, if the complainant wants to distance themselves personally from the process.

Lawyers assisting a complainant should also be aware that, although the OIPRD is required to *review* every complaint made to it⁵⁴, this does not necessarily mean that they must *act* on every complaint. The OIPRD may decide not to deal with a complaint for a number of reasons outlined in the PSA, including that the complaint is outside the six month limitation period⁵⁵ (subject to the principle of discoverability⁵⁶); that the complaint is frivolous or vexatious or made in bad faith⁵⁷; that the complaint could be more

⁵⁰ PSA, s. 60(2)

⁵¹ http://www.oiprd.on.ca/EN/PDFs/ComplaintForm2015_E.pdf

⁵² https://complaint.oiprd.on.ca/OIPRD.Efile/Complaint_en.aspx

⁵³ PSA, s. 58(3)

⁵⁴ PSA, s. 59(1)

⁵⁵ PSA, s. 60(2)

⁵⁶ *Wall v Office of the Independent Police Review Director*, 2014 ONCA 884 at 28-47
<<http://www.canlii.org/en/on/onca/doc/2014/2014onca884/2014onca884.html>>

⁵⁷ PSA, s. 60(4)1.

appropriately dealt with, in whole or in part, under another Act or other law⁵⁸; that, having regard to all the circumstances, dealing with the complaint is not in the public interest⁵⁹; and that the complainant was not the person at whom the conduct was directed, a person who was physically present at the time and place of the conduct and saw or heard the conduct or its effects, a person who was in a relationship with a person in one of the two aforementioned categories and suffered loss, damage, distress, danger, or inconvenience as a result, or a person who has knowledge of the conduct, or has in his or her possession or under his or her control anything relating to the conduct⁶⁰.

In *Endicott v. Ontario (Independent Police Review Office)*⁶¹, the Court of Appeal confirmed that this discretion is a screening out process, rather than a screening in process, meaning a complainant does presumptively have a right to have their complaint pursued, subject to the reasons discussed above⁶², so lawyers assisting a complainant would do well to focus their attention on those issues.

If the OIPRD decides to screen a complaint out, they are required to notify the complainant and provide reasons⁶³, which must be sufficiently detailed to actually constitute reasons within the meaning of the PSA⁶⁴. The decision to screen a complaint out is reviewable by a judicial review in the Superior Court, pursuant to the *Judicial Review Procedure Act*⁶⁵. This is an area where, I would suggest, civil lawyers actually have more experience than criminal lawyer and would be particularly well suited to representing a complainant.

Policing Standards Departments

Policing Standards Departments are departments within all but the smallest police services in Ontario, staffed by officers from within the service, who are tasked with investigating other members of the service. These departments are not required by any legislation; it is simply by convention that police services have them.

Policing Standards Departments predate any of the official bodies or formal complaints systems discussed above. They began out of the fact that, in response to complaints about the police or incidents involving the police, the police themselves naturally investigate the matter. As police services grew in size, so did the number of complaints, and, eventually, specific departments were created within the services to handle these matters. Because there was obviously something unseemly about having to rely on police officers to investigate their colleagues, certain other bodies and systems for handling complaints have been created over the years.

⁵⁸ PSA, s. 60(4)2.

⁵⁹ PSA, s. 60(4)3.

⁶⁰ PSA, s. 60(6)

⁶¹ <http://www.canlii.org/en/on/onca/doc/2014/2014onca363/2014onca363.html>

⁶² *Endicott v. Ontario (Independent Police Review Office)*, 2014 ONCA 363 at 23

⁶³ PSA, s. 60(7)

⁶⁴ *Wall v Office of the Independent Police Review Director*, 2014 ONCA 884 at 48-67

⁶⁵ *Endicott*, 2014 ONCA 363 at 16

That being said, Policing Standards Departments still do play an active an important role in investigating police officers. As noted above, they are responsible for investigating complaints regarding an officer's misconduct that are referred to the chief of police by the OIPRD and they also investigate complaints about officers that are generated internally within the service. In addition, they often conduct parallel investigations with the Special Investigations Unit where there is an incident that resulted in serious injuries or death.

As officers within the Policing Standards Departments are themselves police officers, they can arrest and lay charges against other officers if they have grounds to believe a criminal offence has occurred. They also report to the chief of police on the PSA aspect of their investigation and the chief then decides whether to initiate PSA charges.

What lawyers representing a complainant should be aware of is that complaints about the conduct of an officer can be made directly to the police, as opposed to the OIPRD, and that such complaints initiate the same process as described in the section above, so it is really just a matter of who the complainant feels more comfortable reporting to.

Special Investigations Unit

The Special Investigations Unit ("SIU") is another civilian oversight body created by the PSA⁶⁶. It is staffed by civilians and retired police officers as investigators, although the Director, who is appointed by the Lieutenant Governor in Council⁶⁷, cannot be a police officer or a former police officer⁶⁸.

The SIU was created in 1990 with the mandate to investigate incidents of serious injuries or deaths, or allegations of sexual assault, where the police are involved⁶⁹. The impetus for its creation was a series of police shootings of visible minorities, specifically African Americans, during the 1980's, where the public was of the view that the police lacked the objectivity to effectively investigate the incidents themselves. These concerns led to a report in 1989 of the Task Force on Race Relations and Policing⁷⁰, which recommended the creation of the SIU.

As part of the SIU's mandate, if, after an investigation, the Director believes on reasonable grounds that a criminal offence has been committed, they *must* refer the matter to the Crown Attorney for prosecution⁷¹. Police officers are required cooperate fully with the SIU in the conduct of investigations⁷².

In practice, the SIU is usually made aware that there has been an incident that falls within its mandate by the police themselves notifying the SIU at the time of the incident,

⁶⁶ PSA, s. 113(1)

⁶⁷ PSA, s. 113(2)

⁶⁸ PSA, s. 113(3)

⁶⁹ PSA, s. 113(5)

⁷⁰ http://www.siu.on.ca/pdfs/clare_lewis_report_1989.pdf

⁷¹ PSA, s. 113(7)

⁷² PSA, s. 113(9)

although they sometimes become aware of the incident by an aggrieved citizen reporting it to them after the fact, or even by hearing about an incident in the news. Ontario Regulation 267/10: Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit⁷³, which is one of the Regulations enacted under the PSA, imposes a specific requirement on the chief of police to notify the SIU of an incident that falls within its mandate⁷⁴.

In reality, only in the most unusual cases, where the police disagree with a citizen over whether the injuries are serious enough to involve the SIU, or where the allegation was one of sexual assault committed by an officer, might the SIU receive their complaint directly from a citizen. If a lawyer represents a complainant (or someone related to the complainant, if the complainant is deceased) in one of the rare situations where there has been serious injury or death, or an allegation of sexual assault, and the SIU is not yet involved, the lawyer could assist the complainant in contacting the SIU and ensuring that all of the pertinent information in relation to the complaint is put before them to consider in deciding whether to invoke their mandate.

In an effort to enhance transparency and accountability, the SIU makes a press release in relation to every case it opens, and the outcome of every case, which are publically available on their website⁷⁵. The SIU's most recently published annual report for 2014-2015⁷⁶ indicates that they opened a total of 266 in that year, which is slightly lower than their average of the previous five years of 310 cases per year, and laid charges in 13 cases against a total of 12 officers⁷⁷. This relatively low number of charges in relation to the total number of cases opened during the same year should not be viewed as a lack of effectiveness or willingness to act on the part of the SIU. It must be remembered that the SIU opens a file every time there is an incident where a citizen is seriously injured or killed and the police are involved, even where there is no wrongdoing suspected and, most of the time, in fact, the police have done nothing wrong. For example, if someone in police custody had a heart attack, unrelated to anything the police had done, the SIU would still investigate, but obviously no charges would result. Similarly, if someone was running away from the police and they slipped on a patch of ice fell and broke their wrist, the SIU would still investigate, but obviously no charges would result.

One of the weak points of the SIU, however, is that there is no legislated definition of "serious injuries". This has led to incidents where the police do not notify the SIU because they do not believe the injuries meet whatever threshold they are using for "serious", but the SIU finds out some time later from some other source and disagrees about the threshold and commences an investigation, but by then it is too late for them to investigate properly, because either the scene is no longer secured or, in some cases, too much time has passed and memories have faded. Lawyers assisting a complainant in a situation where it is uncertain whether there are "serious injuries" should err on the side

⁷³ <http://www.canlii.org/en/on/laws/regu/o-reg-267-10/latest/o-reg-267-10.html>

⁷⁴ O. Reg. 267/10, s. 3

⁷⁵ <http://www.siu.on.ca/en/news.php>

⁷⁶ http://www.siu.on.ca/pdfs/siu_ar_2014_15_ltr_final.pdf

⁷⁷ 2014-2015 SIU Annual Report, p. 22

of caution and recommend that the complainant contact the SIU, since there is essentially no downside to this. At worst, the SIU can simply decide not to invoke their mandate.

At the conclusion of its investigation, the SIU makes its report to the chief of police and recommends whether criminal charges should be laid; however, it has no jurisdiction to recommend whether PSA charges should be laid. That is left to the Policing Standards Department, which, as noted above, often conducts a parallel investigation to the SIU, so if the actions of the police that caused the serious injury or death, or sexual assault, are potentially both criminal and misconduct, lawyers assisting a complainant should ensure that a complaint is made to both the SIU and the OIPRD or the police service.

Private prosecutions

While in Ontario it is normally the police who lay charges, any person with reasonable grounds to believe a criminal offence⁷⁸ has been committed may initiate a private prosecution, if a Justice in Ontario has jurisdiction over the matter and the accused⁷⁹. The hearing to satisfy the Justice that the complainant has reasonable grounds is known as a pre-enquete hearing. The hearing is before a Justice of the Peace and is ex-parte, although the Attorney General must receive notice of the hearing and have the opportunity to attend and cross examine any witnesses or call any evidence⁸⁰. At the conclusion of the hearing, if the Justice of the Peace is satisfied that there are reasonable grounds, they must issue a summons or warrant for the accused to attend court and answer to the charge⁸¹.

Once the charge has been initiated, the Crown is entitled to intervene and assume carriage of the case, for the purpose of either withdrawing or staying the charges, or prosecuting the matter. If the Crown does not intervene, it is up to the complainant, or their agent, to prosecute the matter.

How lawyers can assist someone seeking to initiate a private prosecution against the police is, first of all, by screening their complaint to ensure that it actually makes out an offence. Secondly, lawyers can participate in the pre-enquete process with the complainant to ensure that they get sufficient evidence before the Justice of the Peace to satisfy them that there are reasonable grounds on all elements of the offence. Third, and perhaps most important, lawyers can actually prosecute the matter on behalf of the complainant if it proceeds.

The obvious reality to attempting to initiate a private prosecution against a police officer is that Justices of the Peace are likely to be very reluctant to initiate such a process, especially where other avenues (such as a complaint to the OIPRD or the SIU) have already been pursued and did not result in charges. If a Justice of the Peace does initiate a prosecution against a police officer, it would be very likely that the Crown would

⁷⁸ Private prosecutions cannot be initiated for misconduct offences under the PSA

⁷⁹ Criminal Code, s. 504

⁸⁰ Criminal Code, s. 507.1(3)

⁸¹ Criminal Code, s. 507.1(2)

intervene and withdraw or stay the charges. If the charge is not withdrawn or stayed by the Crown, they would almost certainly take carriage of the matter for prosecution. Finally, in the extremely unlikely event that the complainant finds themselves prosecuting a police officer, they should expect the case to be heavily defended by the police and their lawyers. For all of these reasons, lawyers assisting someone seeking to initiate a private prosecution against the police should advise their client that this will be a difficult road, not to be embarked upon without sufficient funding.

Part 2: Civil claims against the police

Suing the police

Police misconduct may result in the police being sued for negligent investigation and/or malicious prosecution. The details of these torts are beyond the scope of this paper, which is being written by a criminal lawyer. It is mentioned here only to assist in giving the reader a complete picture of the options for addressing police misconduct.

Criminal injuries compensation claims

The Criminal Injuries Compensation Board (“CICB”), which is created by the Compensation for Victims of Crime Act⁸² (“CVCA”), can award damages of up to \$25,000⁸³, plus costs⁸⁴, to people who are injured or killed as a result of any act or omission of any other person occurring in or resulting from, among other things, the commission of a crime of violence constituting an offence against the *Criminal Code* (but not including an offence involving the use or operation of a motor vehicle other than assault by means of a motor vehicle)⁸⁵. Obviously, this includes, but is not limited to, the actions of police officers that are criminal in nature. The police officer need not have been prosecuted for or convicted of the alleged criminal offence giving rise to the injury or death⁸⁶, but a conviction is conclusive evidence for the Board that the offence was committed⁸⁷.

Damages awarded by the CICB can be for expenses actually and reasonably incurred or to be incurred as a result of the victim’s injury or death⁸⁸; pecuniary loss incurred by the victim as a result of total or partial disability affecting the victim’s capacity for work⁸⁹; pecuniary loss incurred by dependents as a result of the victim’s death⁹⁰; pain and suffering⁹¹; support of a child born as a result of rape⁹²; or other pecuniary loss resulting

⁸² <https://www.canlii.org/en/on/laws/stat/rso-1990-c-c24/latest/rso-1990-c-c24.html>

⁸³ CVCA, s. 19(1)(a)

⁸⁴ CVCA, s. 22

⁸⁵ CVCA, s. 5(a)

⁸⁶ CVCA, s. 16(1)

⁸⁷ CVCA, s. 11

⁸⁸ CVCA, s. 7(1)(a)

⁸⁹ CVCA, s. 7(1)(b)

⁹⁰ CVCA, s. 7(1)(c)

⁹¹ CVCA, s. 7(1)(d)

⁹² CVCA, s. 7(1)(e)

from the victim's injury and any expense that, in the opinion of the Board, it is reasonable to incur⁹³.

There is a two-year limitation period set out in the CVCA, though the CICB, either before or after the expiry of that period, may extend the limitation period⁹⁴. For crimes of sexual violence or crimes that occurred within a relationship of intimacy or dependency, there is no limitation period⁹⁵. Pursuing a criminal injuries compensation claim does not affect a complainant's right to pursue other civil remedies⁹⁶, though the complainant must advise the Board of any civil proceedings brought against the offender who caused the injury or death⁹⁷, and the Board is subrogated to all the rights of the person to whom a damage award is made to recover damages by civil proceedings in respect of the injury or death and the Board may maintain an action in the name of the complainant against the offender and any amount recovered by the Board shall be applied, first, to payment of the Board's costs, second, to reimbursement of the Board for the damage award, and third, to the complainant⁹⁸.

How lawyers can assist someone in pursuing a criminal injuries compensation claim is, first of all, by filling out the form required for filing an application, which can be downloaded or filled out online⁹⁹. While most of the form is simply filling out various boxes, the complainant is required to describe the details of the crime, which, of course, needs to be done in a persuasive manner that is more likely to be taken seriously and acted on, which is exactly what lawyers do.

Secondly, lawyers can assist a complainant by representing them at an oral hearing, if the CICB chooses to convene one to decide the application¹⁰⁰. The Board does not have to conduct an oral hearing; they can decide the application by way of a paper review by a single Board member¹⁰¹. If the Board decides the application by way of a paper review, the applicant or the Minister may demand a hearing within 15 days of the decision¹⁰², or within such time as the Board may extend for a demand for hearing, if they are satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person¹⁰³.

Part 3: Intervening in proceedings involving the police

Police Services Act charges

⁹³ CVCA, s. 7(1)(f)

⁹⁴ CVCA, s. 6(1)

⁹⁵ CVCA, s. 6(2)

⁹⁶ CVCA, s. 26(1)

⁹⁷ CVCA, s. 26(5)

⁹⁸ CVCA, s. 26(2)

⁹⁹ <http://www.sjto.gov.on.ca/cicb/forms-filing/>

¹⁰⁰ CVCA, s. 8(a)

¹⁰¹ CVCA, s. 8(b)

¹⁰² CVCA, s. 10(1)

¹⁰³ CVCA, s. 10(1.1)

As described above, police officers may be charged with a variety of misconduct offences under the PSA. Such charges may result in either informal resolutions or formal hearings to determine guilt and an appropriate punishment.

Informal resolutions

Informal resolutions can occur when, after reviewing the report submitted to them at the conclusion of the investigation, the chief of police believes, on reasonable grounds, that there was misconduct or unsatisfactory work performance, but that it was not of a serious nature; however, for this to occur, both the officer and the complainant must consent to the resolution¹⁰⁴. A lawyer assisting a complainant with a complaint about the conduct of a police officer can advise the complainant on the propriety of the proposed informal resolution. If the complainant does not agree with the chief that the misconduct was not serious, they may ask the OIPRD to review the chief's decision within 30 days of being notified that the chief has made this determination¹⁰⁵ and the chief shall take no action on an informal review until the OIPRD has made its decision, if requested to do so by the complainant¹⁰⁶, or the 30 day period for the complainant to seek a review from the OIPRD has expired without such a request being made¹⁰⁷.

Formal *Police Services Act* hearings

Complaints that are substantiated, but where the misconduct *is* of a serious nature go to formal hearings to determine guilt and an appropriate punishment. Such hearings are prosecuted by a police officer designated by the chief of police, from any police service, who is of equal or higher rank than the officer who is charged with the misconduct, or a lawyer¹⁰⁸. The hearing is presided over by a hearing officer, who is usually a senior police officer, but sometimes, as in the case of PSA hearings related to incidents that occurred at the G20, this role is farmed out to a retired judge. PSA hearings are conducted in accordance with the *Statutory Powers and Procedures Act*¹⁰⁹ (“SPPA”)¹¹⁰.

The complainant has full party status at a PSA hearing¹¹¹ and a lawyer assisting a complainant can act on their behalf at the hearing¹¹². As a party, the complainant has the right to examine any physical or documentary evidence that will be produced or any reports whose contents will be given in evidence¹¹³. The complainant can also call their

¹⁰⁴ PSA, s. 66(4)

¹⁰⁵ PSA, s. 66(5)

¹⁰⁶ PSA, s. 66(b)

¹⁰⁷ PSA, s. 66(a)

¹⁰⁸ PSA, s. 82(1)

¹⁰⁹ <http://www.canlii.org/en/on/laws/stat/rso-1990-c-s22/latest/rso-1990-c-s22.html>

¹¹⁰ PSA, s. 83(1)

¹¹¹ PSA, s. 83(3)

¹¹² PSA, s. 83(4)

¹¹³ PSA, s. 83(5)

own evidence and cross examine on the evidence of the other parties¹¹⁴, who, in this case, are the prosecutor and the officer¹¹⁵.

The standard of proof in a PSA hearing for misconduct or unsatisfactory work performance is “clear and convincing evidence”¹¹⁶. The Ontario Court of Appeal recently clarified in *Jacobs v Ottawa (Police Service)*, 2016 ONCA 345¹¹⁷, that this phrase in the PSA does not simply refer to the quality of the evidence, but actually means a standard of proof that is higher than a ‘balance of probabilities’ (but lower than ‘beyond a reasonable doubt’).

The penalties for a conviction for misconduct under the PSA include, demotion; suspension without pay; forfeiting either pay or hours off; any combination of the foregoing penalties; and even dismissal.¹¹⁸ In addition, or instead of any of these penalties, the chief of police may reprimand the officer; direct that the officer undergo specified counseling, treatment, or training; direct that the officer participate in a specified program or activity; or any combination of the foregoing¹¹⁹.

Unsubstantiated complaints

If, after reviewing the report submitted to them at the conclusion of the investigation, the chief of police is of the opinion that the complaint is unsubstantiated, the chief shall take no action in response to the complaint and shall notify the complainant¹²⁰. If the complainant does not agree with the chief that the complaint is unsubstantiated, they may ask the OIPRD to review the chief’s decision within 30 days of being notified that the chief has made this determination¹²¹. A lawyer assisting a complainant with a complaint about the conduct of the police can advise them on the merits of requesting a review of the chief’s decision by the OIPRD.

Appeals of *Police Services Act* hearing decisions or penalties

The Ontario Civilian Police Commission (“OCPC”) is a body established by the PSA and is composed of members appointed by the Lieutenant Governor in Council¹²². Prior to the creation of the OIPRD, the OCPC was known as the Ontario Civilian Commission on Police Services (“OCCPS”). OCCPS was involved in investigations of police misconduct, albeit in a more limited way that the OIPRD is now. OCCPS was also responsible for hearing appeals of PSA decisions, which is now the primary function it retains under its new label of the OCPC¹²³.

¹¹⁴ SPPA, s. 10.1

¹¹⁵ PSA, s. 83(3)

¹¹⁶ PSA, s. 84(1)

¹¹⁷ <http://www.canlii.org/en/on/onca/doc/2016/2016onca345/2016onca345.html>

¹¹⁸ PSA, s. 85(1)

¹¹⁹ PSA, s. 85(7)

¹²⁰ PSA, s. 66(2)

¹²¹ PSA, s. 71(1)

¹²² PSA, s. 21

¹²³ PSA, s. 22(1)(f)

A complainant may appeal the decision of a formal PSA hearing to the OCPC by written notice that sets out the grounds of appeal¹²⁴. The OCPC *must* hold a hearing if the complainant is appealing an acquittal¹²⁵. The commission *may* hold a hearing if the complainant is appealing the penalty or any other aspect of the hearing¹²⁶. On appeal, the OCPC may confirm, vary, or revoke the decision being appealed¹²⁷; substitute its own decision for that of the police chief¹²⁸; or order a new hearing¹²⁹.

The OCPC has its own Rules of Practice¹³⁰, which include the forms for Notice of Application (Form 1); Summons to a Witness (Form 2); Notice of Motion (Form 3); Request for Leave Appeal A Disciplinary Penalty (Form 4); Notice Of Appeal (Form 5); and Notice Of Intent To Be Heard On Appeal (Form 6). Part II of the Rules of Practice governs disciplinary appeals. According to the Rules, the complainant is a party to the appeal as well¹³¹. The Rules clarify what is discussed above, that leave is required for the complainant to appeal a penalty¹³² (which is why the PSA says that the commission *may* hold a hearing in that case).

A decision of the OCPC may be appealed to the Divisional Court within 30 days of the date the Commission's decision is received¹³³. The appeal may be on a question of law or a question of mixed fact and law, or from the penalty imposed, or from any other action taken at the hearing¹³⁴.

As at a PSA hearing, a lawyer may represent a complainant in a PSA appeal, either before the OCPC or Divisional Court.

Coroners inquests

Coroners inquests are governed by the Coroners Act¹³⁵ and can be convened in a number of different situations to answer the following five questions¹³⁶:

- a) who the deceased was;
- b) how the deceased came to his or her death;
- c) when the deceased came to his or her death;
- d) where the deceased came to his or her death; and

¹²⁴ PSA, s. 87(1)

¹²⁵ PSA, s. 87(3)

¹²⁶ PSA, s. 87(4)

¹²⁷ PSA, s. 87(8)(a)

¹²⁸ PSA, s. 87(8)(b)

¹²⁹ PSA, s. 87(8)(c)

¹³⁰ <http://www.slasto.gov.on.ca/en/OCPC/Documents/Rules%20of%20Practice/FINAL%20-%20Commission%20Rules%20of%20Practice,%202014%20Revision.htm>

¹³¹ OCPC Rules of Practice, s. 30.1(c)

¹³² OCPC Rules of Practice, s. 32.1

¹³³ PSA, s. 88(1)

¹³⁴ PSA, s. 88(2)

¹³⁵ <http://www.canlii.org/en/on/laws/stat/rso-1990-c-c37/100577/rso-1990-c-c37.html>

¹³⁶ Coroners Act, s. 31(1)

e) by what means the deceased came to his or her death.

The full list of situations where an inquest can or must be convened is beyond the scope of this paper, but, suffice it to say that, if a coroners inquest is convened in relation to a matter where there is an allegation of police misconduct, the complainant (or, more accurately, someone acting on behalf of the complainant, since the complainant would be dead) may apply to the coroner for standing at the inquest and the coroner shall give them standing if the coroner finds that they are substantially and directly interested in the inquest¹³⁷.

A person who has been given standing at a coroners inquest may be represented by a lawyer¹³⁸ and may call and examine witnesses and present arguments and submissions¹³⁹ and may cross examine witnesses relevant to their interests¹⁴⁰. Lawyers are obviously well positioned to do this, since a family member of a deceased person is unlikely to be particularly effective in presenting their case to the jury, with a view to promoting systemic change and ensuring that whatever caused the death of the deceased does not happen again.

If the spouse, same-sex partner, or parent of the victim, as defined in the *Victims' Bill of Rights, 1995*¹⁴¹, is given standing at the inquest, that person may apply to the Minister to have the costs of their legal representation paid for out of victims' justice fund¹⁴².

A lawyer representing the family of a deceased person can also assist where the coroner determines that an inquest is unnecessary. In this situation, the spouse, parent, child, brother, sister, or personal representative of the deceased person may make a formal request to the coroner, in writing, that they hold an inquest¹⁴³. If the Coroner refuses such a request, the person making the request (or their lawyer) may, within 20 days after receiving the coroner's decision, request the chief coroner review the decision¹⁴⁴. The chief coroner's decision is final¹⁴⁵.

Conclusion

As can be seen from this paper, complainants have a variety of recourses available to them to address police misconduct. Of course they can expect that any such complaint will be heavily defended by the police and their lawyers and complainants may find themselves overwhelmed by the process itself and the pushback they receive. This is why lawyers are well positioned to assist complainants and, in my opinion, civil lawyers in particular, given that many of the avenues available to complainants are civil in nature

¹³⁷ Coroners Act, s. 41(1)

¹³⁸ Coroners Act, s. 41(2)(a)

¹³⁹ Coroners Act, s. 41(2)(b)

¹⁴⁰ Coroners Act, s. 41(2)(c)

¹⁴¹ <https://releve.canlii.org/en/on/laws/stat/so-1995-c-6/latest/so-1995-c-6.html>

¹⁴² Coroners Act, s. 41(3)

¹⁴³ Coroners Act, s. 26(1)

¹⁴⁴ Coroners Act, s. 26(2)

¹⁴⁵ Coroners Act, s. 26(3)

or, at the very least, overlap with civil remedies. As well, in my experience, surprisingly few criminal lawyers know anything about the avenues available for complainants to raise the issue of police misconduct, other than in the context of a Charter application in a criminal trial where the complainant is charged.

Pursuing the recourses available to address police misconduct, in a responsible way and where appropriate, is an important element in holding the police accountable for their actions, which enures to the benefit of everyone in society, including complainants and the vast majority of hard working police officers who are *not* out there committing misconduct.

Appendix A: Misconduct offences under the *Police Services Act*

Regulation 268/10: Schedule

2. (1) Any chief of police or other police officer commits misconduct if he or she engages in,

(a) Discreditable Conduct, in that he or she,

(i) fails to treat or protect persons equally without discrimination with respect to police services because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability,

(ii) uses profane, abusive or insulting language that relates to a person's race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability,

(iii) is guilty of oppressive or tyrannical conduct towards an inferior in rank,

(iv) uses profane, abusive or insulting language to any other member of a police force,

(v) uses profane, abusive or insulting language or is otherwise uncivil to a member of the public,

(vi) wilfully or negligently makes any false complaint or statement against any member of a police force,

(vii) assaults any other member of a police force,

(viii) withholds or suppresses a complaint or report against a member of a police force or about the policies of or services provided by the police force of which the officer is a member,

(ix) is guilty of a criminal offence that is an indictable offence or an offence punishable upon summary conviction,

(x) contravenes any provision of the Act or the regulations, or

(xi) acts in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the police force of which the officer is a member;

(b) Insubordination, in that he or she,

- (i) is insubordinate by word, act or demeanour, or
- (ii) without lawful excuse, disobeys, omits or neglects to carry out any lawful order;

(c) Neglect of Duty, in that he or she,

- (i) without lawful excuse, neglects or omits promptly and diligently to perform a duty as,

(A) a member of the police force of which the officer is a member, if the officer is a member of an Ontario police force as defined in the Interprovincial Policing Act, 2009, or

(B) a police officer appointed under the Interprovincial Policing Act, 2009,

- (ii) fails to comply with any provision of Ontario Regulation 267/10 (Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit) made under the Act,

(iii) fails to work in accordance with orders, or leaves an area, detachment, detail or other place of duty, without due permission or sufficient cause,

(iv) by carelessness or neglect permits a prisoner to escape,

(v) fails, when knowing where an offender is to be found, to report him or her or to make due exertions for bringing the offender to justice,

(vi) fails to report a matter that it is his or her duty to report,

(vii) fails to report anything that he or she knows concerning a criminal or other charge, or fails to disclose any evidence that he or she, or any person within his or her knowledge, can give for or against any prisoner or defendant,

(viii) omits to make any necessary entry in a record,

(ix) feigns or exaggerates sickness or injury to evade duty,

(x) is absent without leave from or late for any duty, without reasonable excuse, or

(xi) is improperly dressed, dirty or untidy in person, clothing or equipment while on duty;

(d) Deceit, in that he or she,

- (i) knowingly makes or signs a false statement in a record,
- (ii) wilfully or negligently makes a false, misleading or inaccurate statement pertaining to official duties, or
- (iii) without lawful excuse, destroys or mutilates a record or alters or erases an entry in a record;

(e) Breach of Confidence, in that he or she,

- (i) divulges any matter which it is his or her duty to keep secret,
- (ii) gives notice, directly or indirectly, to any person against whom any warrant or summons has been or is about to be issued, except in the lawful execution of the warrant or service of the summons,
- (iii) without proper authority, communicates to the media or to any unauthorized person any matter connected with,
 - (A) the police force of which the officer is a member, if the officer is a member of an Ontario police force as defined in the Interprovincial Policing Act, 2009, or
 - (B) the police force with which the officer is working on a joint forces operation or investigation, if the officer is appointed as a police officer under the Interprovincial Policing Act, 2009, or
- (iv) without proper authority, shows to any person not a member of the police force described in sub-subclause (iii) (A) or (B), as the case may be, or to any unauthorized member of that police force any record that is the property of that police force;

(f) Corrupt Practice, in that he or she,

- (i) offers or takes a bribe,
- (ii) fails to account for or to make a prompt, true return of money or property received in an official capacity,
- (iii) directly or indirectly solicits or receives a gratuity or present without the consent of,
 - (A) the chief of police, if the officer is a member of an Ontario police force as defined in the Interprovincial Policing Act, 2009, or

(B) the person who appointed the police officer under Part II or III of the Interprovincial Policing Act, 2009,

(iv) places himself or herself under a pecuniary or other obligation to a licensee if a member of the following police force may have to report or give evidence concerning the granting or refusing of a licence to the licensee:

(A) the police force of which the officer is a member, if the officer is a member of an Ontario police force as defined in the Interprovincial Policing Act, 2009, or

(B) the police force with which the officer is working on a joint forces operation or investigation, if the officer is appointed as a police officer under the Interprovincial Policing Act, 2009, or

(v) improperly uses his or her character and position as a member of a police force for private advantage;

(g) Unlawful or Unnecessary Exercise of Authority, in that he or she,

(i) without good and sufficient cause makes an unlawful or unnecessary arrest, or

Note: On January 1, 2017, clause 2 (1) (g) of the Schedule to the Regulation is amended by striking out “or” at the end of subclause (i) and by adding the following subclause: (See: O. Reg. 59/16, s. 1 (1))

(i.1) without good and sufficient cause makes an unlawful or unnecessary physical or psychological detention,

(ii) uses any unnecessary force against a prisoner or other person contacted in the execution of duty;

Note: On January 1, 2017, clause 2 (1) (g) of the Schedule to the Regulation is amended by adding “or” at the end of subclause (ii) and by adding the following subclause: (See: O. Reg. 59/16, s. 1 (2))

(iii) collects or attempts to collect identifying information about an individual from the individual in the circumstances to which Ontario Regulation 58/16 (Collection of Identifying Information in Certain Circumstances – Prohibition and Duties) made under the Act applies, other than as permitted by that regulation;

(h) Damage to Clothing or Equipment, in that he or she,

(i) wilfully or carelessly causes loss or damage to any article of clothing or equipment, or to any record or other property of,

(A) the police force of which the officer is a member, if the officer is a member of an Ontario police force as defined in the Interprovincial Policing Act, 2009, or

(B) the police force with which the officer is working on a joint forces operation or investigation, if the officer is appointed as a police officer under the Interprovincial Policing Act, 2009, or

(ii) fails to report loss or damage, however caused, as soon as practicable; or

(i) Consuming Drugs or Alcohol in a Manner Prejudicial to Duty, in that he or she,

(i) is unfit for duty, while on duty, through consumption of drugs or alcohol,

(ii) is unfit for duty when he or she reports for duty, through consumption of drugs or alcohol,

(iii) except with the consent of a superior officer or in the discharge of duty, consumes or receives alcohol from any other person while on duty, or

(iv) except in the discharge of duty, demands, persuades or attempts to persuade another person to give or purchase or obtain for a member of a police force any alcohol or illegal drugs while on duty.