ISSUES OF INTEREST

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Moore v. The Queen Revisited

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Remember *Moore v. The Queen,*[1] the 1978 Supreme Court of Canada ("SCC") decision about the bicyclist who went through the red light in Victoria? If you went through training at the Police Academy since that time, you have probably been told that it is an important case. I remembered the case from my Academy days, but I recently discovered that I really did not know its significance, nor did anyone else I asked. So I read the *Moore* case and realized why its importance had been stressed in training. The purpose of this article is to revisit the significance of this judgment for operational police officers.

Facts

A Victoria police constable observed Mr. Moore riding his bicycle through a red light at an intersection in Victoria, B.C., contrary to the provincial *Motor Vehicle Act*.[2] The constable then attempted to stop Moore in order to give him a ticket for that offence. After much trouble (Moore refused to stop), the constable was successful in stopping Moore; however, he refused to identify himself and attempted to leave. After a brief struggle, Moore was handcuffed and arrested for obstructing a police officer.

Moore was acquitted at trial, the judge holding that, since Moore had no statutory duty to identify himself, there was no evidence that he was willfully obstructing a police officer. The B.C. Court of Appeal ("BCCA")[3] and the SCC both held that the trial judge was in error, and that Moore's failure to identify himself in the circumstances of the case was sufficient to constitute obstruction of a peace officer. A new trial was ordered.

"Willfully Obstructing"

The central issue in the *Moore* case was whether the failure to identify oneself when found committing a provincial offence can amount to obstructing a police officer under the *Criminal Code*[4] ("Obstruct PO"). Both the BCCA and the SCC distinguished between a case where the police officer is attempting to enforce a law which the officer observed the suspect to break (as in the *Moore* case), in which case failure to identify oneself will amount to obstruction, versus a case where the police observe a subject acting suspiciously, but had no grounds upon which to arrest or otherwise charge the subject, in which case failure to identify oneself does not amount to obstruction.

The BCCA rejected the argument that Moore was entitled to refuse to identify himself as part of his privilege against self-incrimination. The BCCA held that, although the privilege against self-incrimination would apply in a case where a police officer is conducting an investigation with no ascertained suspect (and failure to identify oneself would not amount to obstruction), on the facts in *Moore*, it was simply a case of attaching the correct name to an ascertained offender.[5]

The BCCA found that establishing the identity of a person that a constable finds committing an offence is an essential part of policing for the purposes of adequately enforcing not only the criminal law, but provincial laws and municipal bylaws as well.[6] The BCCA further held that the common law requires a person so caught to answer questions regarding identity and to answer them truthfully.[7] Mr. Justice Carrothers put it this way:

> ...where the peace officer has directly observed the commission of the offense, has cornered the very culprit seen by him to commit the offense, and all that remains is to identify the culprit for summary kerbside [sic] "ticketing" purposes and thus bring the offender to justice....[a]bsent that identification, the peace officer's duty would be completely frustrated.[8]

The SCC agreed with the BCCA's reasoning and held that in the circumstances of *Moore*, where the constable had observed the offence, captured the offender and was attempting to issue him a ticket, failure to identify oneself would amount to

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"willfully obstructing."[9] Mr. Justice Spence, writing for the majority of the SCC, said:

> ...I am of the opinion that the officer was under a duty to attempt to identify the wrongdoer and the failure to identify himself by the wrongdoer did constitute an obstruction of the police officer in the performance of his duties. [10]

Power to Arrest For Provincial Offense

While it was the obstruction question the courts were called upon to answer in *Moore,* and the knowledge that the obstruct provisions do apply is useful to operational police officers, the case is persuasive authority for a still more useful proposition: that police may, in certain cases, arrest offenders for offences against provincial statutes even if there is no arrest authority in the provincial statute creating the offence.

In deciding *Moore*, the judges of both the BCCA[11] and the SCC[12] discussed the application of s. 101 of the provincial *Summary Conviction Act* (now s. 122 of the provincial *Offence Act*[13]). While the comments by the judges *are,* strictly speaking, *obiter dictum* (they were not necessary to decide the case and are not binding as precedent) they are still persuasive, and coming from the SCC, would probably be applied in circumstances similar to the *Moore* case.

Section 122 of the *Offence Act* is difficult to read and I do not propose to recite it here. Generally, it says that for the purpose of provincial offences, the provisions of the *Criminal Code* respecting summary conviction offences apply. For our purposes, this means that a provincial offence can be treated the same as summary conviction offences under the *Criminal Code*, and that the provisions in the *Criminal Code* which relate to summary conviction offences apply to provincial offences.

Of specific relevance in the *Moore* case were a peace officer's powers of arrest for summary conviction offences. Powers of arrest for peace officers are laid out in ss. 495(1) and (2) of the *Criminal Code.*[14] According to these provisions, a peace officer may arrest a person for a summary conviction offence if: (1) the peace officer found the accused committing it, and (2) the arrest is necessary for the purpose of establishing identity.[15]

The BCCA in *Moore* noted that, by virtue of the statutory provision in the *Summary Conviction Act* (now the *Offence Act*), the *Criminal Code* provisions regarding a peace officer's powers of arrest apply to provincial offences, which are treated as summary conviction offences.[16] The BCCA went on to note that, as a result of the combined effect of these provisions, the duty of the arresting officer was to identify Moore in order to ticket him; and failing that, to arrest him.[17]

The SCC did not dwell on this issue; however, the majority concurred with the BCCA's interpretation of this section of the *Summary Conviction Act* and found that once Moore failed to identify himself, the arresting officer could have arrested Moore for the summary conviction offence of proceeding against a red light at an intersection if it were necessary to establish his identity.[18] There is no reason to believe that this rationale would not apply to all provincial offences for which there is no other statutory power of arrest.

Conclusion

Despite an extensive search I have not located any cases which have criticized or rejected the reasoning in *Moore.* Consequently, even in the wake of the *Charter* (which postdates *Moore*) it appears to remain "good law" on both the obstruct question and the application of the *Criminal Code* summary conviction offence arrest provisions to provincial offences.

As a result of the *Moore* case, a

peace officer who finds someone committing a provincial offence may arrest that offender if the offender refuses to identify her or himself. In such circumstances the officer has authority to arrest for: 1) the provincial offence (*e.g.* red light at intersection) by the combined operation of the *Offence Act* and the *Criminal Code*, or 2) for the *Criminal Code* offence of Obstruct PO. In either case the peace officer must, as in all detentions, *Charter* and warn the offender. If at any point in the process the offender decides to cooperate and satisfactorily identifies him or herself, the investigator must release the person in accordance with s.495(2) of the *Criminal Code* and retains discretion whether to charge the offender solely for the provincial offence, for the Obstruct PO offence, or both.[19] If the offender continues to fail to identify her or himself, it may be necessary to hold the offender for court and complete a Report to Crown Counsel for the original offence, including details about the failure to identify and the reasons for arrest.

One last observation. Although the courts in *Moore* did not address the issue specifically, there is no reason to suspect that the other enumerated grounds in s.495(2) could not be relied upon to found an arrest in appropriate circumstances. Therefore, where a peace officer finds a person committing an offence against a provincial statute and the arrest of that person is required to: 1) secure or preserve evidence of or relating to the offence, or 2) prevent the continuation or repetition of the offence or the commission of another offence, the arrest would be authorized by the combined operation of the *Offence Act* and *Criminal Code*. It is my hope that in revisiting the *Moore* case I have identified and emphasized its usefulness for operational officers.

Endnotes

1. (1978), 43 C.C.C. (2d) 83.
2. R.S.B.C. 1960, C. 253 (as it then was); now R.S.B.C. 1979, c. 288 (as amended).
3. (1977), 36 C.C.C. (2d) 481.
4. At the time Obstruct PO was s. 118 of the *Criminal Code*, it is currently s. 129(a) of the *Criminal Code*, R.S.C. 1985, c. C-46 (as amended).
5. *Supra*, note 3.
6. *Ibid.*, at 486-487.
7. *Ibid.*, at 487.
8. *Ibid.*, at 491.
9. *Supra*, note 1 at 89-90.
10. *Ibid.*, at 90.
11. *Supra*, note 3 at 492.
12. *Supra*, note 1 at 88.
13. R.S.B.C. 1960, c. 373; R.S.B.C. 1979, c. 305 (as amended).
14. Section 450 of the *Criminal Code* at the time of the *Moore* case.
15. Section 495(1) which gives a peace officer the power to arrest a person without a warrant for a criminal offence (which includes both indictable and summary conviction offences) if the peace officer finds committing and section 495(2) limits the power of arrest for summary conviction offences, *inter alia*, to those cases where arrest is necessary to establish the offender's identity, secure or preserve evidence, or prevent a continuation or repetition of the offence or the commission of another offence.
16. *Supra*, note 3 at 492.
17. *Ibid.*
18. *Supra*, note 1 at 89.
19. Depending on the circumstances and what charges the investigator is contemplating, modes of release could include release with the intention to compel appearance by way of summons, a provincial or federal Appearance Notice, or a Violation Ticket.

Show and Tell: Disclosure in Criminal Cases

A. Jeffrey Wright, B.A., M.A., LL.B. (RCMP Commerical Crime)

As a general rule police officers do not concern themselves with the names of cases that, over time, wind their way through the court system until finally the Supreme Court of Canada ("SCC") releases a decision. From time to time, however, the release of a finding imprints that case name into the minds of all police officers. Such a name is that of *Stinchcombe*. The SCC released its unanimous decision in the case of *R. v Stinchcombe*[1] in November 1991, and altered forever the rules concerning disclosure in criminal cases. This article will review the principles of disclosure that were set out in *Stinchcombe*, and the obligations it placed on police officers.

Background

Not everyone may be familiar with the facts of the case. Stinchcombe was a Calgary lawyer charged with breach of trust, theft and fraud for allegedly using funds, held in trust for a client, for a purpose other than that which was intended. At the preliminary inquiry his secretary gave evidence favourable to the Defence. She was subsequently interviewed by the police on two separate occasions; once following the preliminary and once during the trial. While Crown advised Defence prior to the trial that the secretary had provided a tape recorded statement, Crown refused to divulge the contents of the statement. Further, the trial judge rejected Defence requests that Crown be ordered to disclose the statements, and requests that either the Court or the Crown call the witness to give evidence. Stinchcombe was convicted at trial and his appeal to the Alberta Court of Appeal was dismissed. The matter was then appealed to the SCC. The issue to be determined was what duty the Crown had to disclose information, and what types of information had to be disclosed to the Defence or accused in a criminal prosecution.

At the core of the disclosure issue were concepts integral to our justice system: the presumption of innocence, the Crown's obligation to see that justice is done and not merely register a conviction, the right of an accused to know the case against him or her, the right to put forward a defence, and, not insignificant, the application of "the principles of fundamental justice" as embodied in section 7 of the *Charter*. After examining the history of the issue of Crown disclosure in criminal cases, noting that full disclosure was already

taking place (to varying degrees) in many jurisdictions, and noting the practice of full disclosure in civil proceedings, the SCC found it relatively easy to conclude that the disputed material in the *Stinchcombe* case should have been made available to the Defence and, therefore, ordered a new trial. As Sopinka J., speaking for the Court, noted:

> It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour, are, in my view, overwhelming.[2]

The Principles

Apart from certain exceptions noted below, the result of this decision is that an accused is entitled to all relevant information in the possession of the Crown so as not to impede "the ability of the accused to make full answer and defence."[3] In addition, it cannot be forgotten that "the obligation to disclose is a continuing one and disclosure must be completed when additional information is received."[4] There are exceptions to the disclosure rule, including: a) when it would *not be in the public interest* for the information to be disclosed;[5] b) when disclosure would *jeopardize the identity or safety of an informant*;[6] c) when disclosure would *hamper an ongoing investigation* or the *integrity of police investigative techniques*; and d) when disclosure would breach a recognized *legal privilege* (*e.g.* solicitor-client privilege).

The key term to determining what information must be disclosed by the police and Crown is "relevance." What relevance means in the criminal context is whether the particular piece of information could possibly have a bearing on any material issue to be dealt with in relation to the specific case. As is obvious, that is a fairly low threshold test. Relevant material would include all statements provided to the police or Crown; whether or not the Crown intended to ever call that particular person as a witness, but would not necessarily include the names of all persons spoken to during the investigation if some of those persons were unable to supply any information concerning the offence. Relevant information *may* also include the criminal record, if any, of Crown witnesses. For example, if an individual was charged with theft from his or her employer and one of the witnesses for the Crown was another company employee, it may be relevant for the Defence to be aware that the witness has been convicted of a similar ("integrity") offence. Conversely, in the same case, it would not necessarily be relevant for the Defence to be aware that another Crown witness had been convicted of an offence unrelated to theft/ integrity; such as Causing a Disturbance. The SCC dealt with the issue of relevance in the case of *R. v. Egger* stating that:

> One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed...This requires a determination by the reviewing Judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.[7]

The wording of the *Stinchcombe* decision does not state that the Crown is obligated to disclose only relevant material, rather, the decision expresses the Crown obligation in the negative: Crown's obligation is to disclose all material except that which is "clearly irrelevant."[8] This language has the effect of increasing the burden on the Crown (and police) to disclose material of even questionable relevance. That obligation is made clear by the passage in the judgment which notes that "the Crown must err on the side of inclusion."[9]

The *Crown Counsel Policy Manual* for British Columbia outlines how disclosure is to be accomplished in this province. When the police submit a Report to Crown Counsel it should contain all relevant information in the possession of the police. Included with that package of material should be the facts of the case as they are known, the written statements or "will says" of all persons proposed to be called as witnesses, copies of any documents, exhibits, authorizations or warrants, and copies of any investigative notes made by officers involved in the investigation. The package should also include relevant information in the possession of the police even if it is not intended to be used as part of the Crown's case. This would include statements or "will says" of persons spoken to by the police, who had knowledge of the offence or circumstances surrounding it, but whom the police or Crown do not intend to call as witnesses. Should the case concern one of the exceptions to disclosure (*e.g.* informant, investigative technique, public interest, or privilege) it is crucial that the Crown be informed so that the appropriate decisions can be made and no improper disclosure will take place.

All disclosure in this province should take place through the Crown. If the police are faced with a request for disclosure direct from the Defence the request should be referred back to Crown. It is Crown that has the responsibility for determining the relevance of any material requested by the Defence. Defence may request further disclosure from the Crown on a certain point. If Crown feels the material is clearly irrelevant

the request can be denied at that point. If Crown cannot establish the relevance or lack thereof based on the request itself the police will be asked to supply the information to Crown. If Crown then determines that the material is relevant it will be supplied to Defence. If Crown determines the material is not relevant then, depending on the nature of the evidence they can, or may be obligated to, withhold it. Any disputes at that point are to be resolved before the trial judge.

It has been argued that the disclosure requirements from *Stinchcombe* and the related cases that have followed have placed an onerous burden on the Crown and the police and have done nothing more than permit the Defence to tailor strategy to correspond with material that it knows the Crown controls. This author believes that this is not the case. On the contrary, experience has often shown that the more information that is initially supplied to Crown for transmission to Defence the less likelihood that the Crown, and thus the investigating officer, will be faced with providing further information in the future. Experience has also shown that the more complete the information supplied to Defence initially, the greater the likelihood of either a plea or, at the least, an ability to focus the issues to be dealt with during the trial; thus shortening the trial process itself. The more you show and tell, the quicker Defence will likely conclude that running a trial may not be the best option.

Endnotes

1. (No. 1), (1991), 68 C.C.C. (3d) 1.
2. *Ibid.*, at 7.
3. *Ibid.*, at 9.
4. *Ibid.*, at 14.
5. See particularly, ss. 37, 38, and 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (as amended).
6. See *R. v. Archer* (1989), 47 C.C.C. (3d) 567 (Alta. C.A.); *R. v. Scott*, [1990] 3 S.C.R. 979.
7. (1993), 82 C.C.C. 193 at 204. See also, *R. v. Chaplin* (1995), 96 C.C.C. (3d) 225.
8. *Supra*, note 1 at 9.
9. *Ibid.*, at 11.

Bridging the Gap - Who Provides Legal Advice to the Police?

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It cannot be assumed that law enforcement agencies in British Columbia receive effective and independent legal advice on operational and policy issues. Police agencies in this province receive legal services in a patchwork manner. In a time of increased public scrutiny of police conduct, complicated and conflicting legal decisions, legislation and policy, this is a wholly unsatisfactory circumstance. Apart from exposing police agencies and their individual officers to increasing legal jeopardy, it does little to enhance the prospects of a well-regarded law enforcement model. This article will argue the inappropriateness of the *status quo* and propose a solution.

Despite the public's belief that the police are purely preventers and investigators of crime, police responsibilities extend far beyond that mandate. As we all know, performing even common police functions can be fraught with complications, some of which an investigator may not even realise exist. Consider the legal direction required to manage the ever-changing law surrounding police obligations under the *Charter* (*e.g.* search and seizure), complicated statutory amendments (*e.g.* Part VI authorizations), conflicting and ambiguous legislative obligations (*e.g.* legislation governing police records[1]), developing civil responsibilities (*e.g.* duty to notify[2]) and detailed policy statements from governmental bodies (*e.g.* Attorney General guidelines on relationship violence[3]). The need for legal advice by police agencies to support operational and policy decision making is self-evident. The real issue to be resolved is who should provide the police with that advice?

The Separation of Investigations & Prosecutions

A common misconception is that provincial Crown Counsel (and federal Crown Counsel) who prosecute offences provide the police with general legal advice. The *Crown Counsel Policy Manual* states that "While Crown Counsel is expected to provide legal advice to the police regarding cases and general policy, the police should be advised to seek advice from their own counsel regarding questions about their own conduct or behaviour."[4] In practice, this statement has been interpreted to mean that Crown Counsel do not provide general operational or policy legal advice to the police. Outside of statutorily mandated situations where Crown Counsel has some involvement during an "investigation" (*e.g.* Part VI authorizations), they will generally only provide legal advice concerning specific files for which a Report to Crown Counsel has already been submitted.

Crown Counsel in British Columbia do not see it as their role to provide general legal advice to the police. The reasons for this are sound and supportable. Our policing and prosecution model is founded upon the separation between the police that investigate and the Crown that charges/prosecutes.[5] The role of Crown Counsel is independently to assess and present the evidence gathered by the police in a fair manner.[6] Crown Counsel are not advocates for the police, nor are the police their "client." By virtue of this fact a number of conflicts are avoided. First, it would be inherently contradictory for the agency that provided legal advice during an investigation (or on operational policy matters) to also be tasked with making

determinations of criminal misconduct against police officers that followed the advice. Second, if Crown Counsel advice was provided to the police, and it was incorrect, the same agency would be, in effect, reviewing its own decision and action. Such scenarios are more than mere supposition, they have in fact occurred.[7] The other problem, as some individual police officers and departments have found out, is that the advice provided by Crown Counsel is probably not protected by solicitor-client privilege.[8]

Compromising Police Independence

In addition to Crown Counsel that deal with criminal prosecutions, there are also lawyers at the federal, provincial and municipal level ("Government Counsel") who act as in-house legal advisers to those governments and their various agencies. The RCMP obtains its legal advice from the Department of Justice ("DOJ"). Provincial law enforcement agencies, such as CLEU, may obtain legal advice from the Legal Services Branch of the Ministry of Attorney General. Municipal police get some operational and policy assistance from municipal legal departments. This practice has a serious implication: because Government Counsel are not acting solely on behalf of the police agency, it is immediately apparent that the "operational independence" of the police and their investigations are compromised in several respects.[9]

"Politically sensitive" investigations provide a clear example of how operational independence is being compromised. Reflect on the actual or perceived position of the Attorney General of British Columbia during the Nanaimo Commonwealth Holding Society investigation by the RCMP. In this particular case, the Attorney General is both a member of the political party that is under investigation, and the member of Cabinet whose portfolio includes not only policing, but also the branch responsible for prosecuting such cases. Although the RCMP handled this case and could have consulted the DOJ on legal issues related to it, if the responsibility had fallen on a provincial or municipal law enforcement agency, how could the independence of the investigation be maintained if the department had to rely on advice from Crown Counsel or Legal Services Branch? Indeed, as a result of the real or perceived lack of independence of provincial Crown Counsel from the Executive, there have been renewed calls for the creation of an independent prosecution service that is not subject to the control and direction of the Attorney General.[10] The same rationale applies to providing independent legal services to the police.

At the federal level, the DOJ, by statute, is singularly responsible for providing legal advice to the federal government and its agencies.[11] The DOJ's top official, the Minister of Justice (and *ex officio* the Attorney General of Canada), is not only a member of the political party in power, but a member of Cabinet. These facts raise serious concerns about the control, actual or perceived, that the federal Attorney General exercises over RCMP investigations, especially when the investigation is politically sensitive (*i.e.* Airbus). Contrary to the reported assertion of the Minister of Justice in a recent speech, RCMP investigations can be directly or indirectly influenced by the Minister/ DOJ because it is the body that provides legal advice to the RCMP.[12] These examples clearly highlight the potential for political infringement of "independent" police investigations, whether actual or perceived. Failure to provide independent legal services to the police will compromise the fundamental recommendation by the Oppal Commission that "The province enshrine in legislation the principles that: (a) a police officer is not subject to direction from any level of government in deciding whether to investigate an alleged offence, how to do so and whether to recommend that charges be laid."[13]

The role of government is to govern and to institute laws and policies intended to implement its objectives. It must, however, be remembered that government legislation and policy (which is not law) is not always determined to be lawful or constitutional by the courts. Often overlooked is that police agencies may be directed by legislation (*e.g. Child, Family and Community Service Act*[14] and Bill C-41 regarding criminal Sentencing Reform[15]) and detailed policy dictates from government bodies (*e.g.* Chief Provincial Firearms Officer policy on revocation of firearms related documents[16]) to take action the lawfulness of which may be questionable or ambiguous. While the objectives of these laws and policies may be desirable, it is still incumbent on the police to ensure their conduct is not unlawful or improper. The problem here is that the police are required to get legal advice from the very Crown or Government Counsel who advised the government on the development of the policy and drafted the legislation in issue. Such a circumstance is not only inappropriate, but also clearly necessitates that law enforcement agencies obtain independent legal advice.

Furthermore, operational independence may not be sustained when Government Counsel represent the interests of the police in civil matters. The DOJ, while representing the RCMP, is also responsible for providing legal services to other federal agencies and representing any other interests the Government of Canada might have. For example, in a recent civil case the plaintiff sued the RCMP, Corrections Canada and the National Parole Board.[17] The same DOJ lawyer represented all three

federal agencies. Even if DOJ supplied separate lawyers or private counsel (who still report to the DOJ) for each agency (which is not likely) and advised them to fight the case in the best interests of their respective agency (also unlikely) there would still be the perception of conflict. The DOJ is, perhaps appropriately, not necessarily concerned with the best outcome for the agencies concerned, but the best outcome for the Government of Canada. Analogous situations exist at the provincial and municipal levels. In such circumstances, who is protecting the best interests of the police agency?

What must be recognized is that the interests of the police cannot necessarily be equated with those of the federal, provincial or municipal government. Unlike some government functions such as road repair or even health care, law enforcement agencies have a unique role in our society and their functional independence and accountability necessitate separate representation. Otherwise, by design or default, the separation, independence and function of the police can be eroded or subverted by interests that are not necessarily legitimate.

One final comment must be made with respect to Government Counsel providing legal advice to the police. In a time of shrinking budgets and personnel resources, many government legal departments simply do not have the resources to meet the growing demands of police agencies. In today's policing environment, operational police officers frequently need prompt, round-the-clock legal advice on matters that are highly technical and situationally based. Sound advice in such circumstances requires knowledge of investigational techniques and strategies, an understanding of the operational policing environment, and a solid grounding in areas of the law relevant to police operations. As a practical matter, because the demands of government are so different from the demands of policing, not all Government Counsel have the necessary skills or knowledge to advise on police matters. While it is always dangerous to generalize, the consistent theme encountered by the authors in speaking with operational police personnel is dissatisfaction with both the quality and timeliness of the legal service provided by their respective Government Counsel.

Legally Trained Police Officers

Many police departments have tried to fill the gap in the delivery of legal services, to some degree, with police officers who have law degrees. Most such arrangements have been relatively informal, and, until recently, the appropriateness of using legally trained police officers to provide legal advice to a department was not really questioned. However, the giving of "legal advice" can constitute the "practice of law" as defined in s. 1 of the *Legal Profession Act*.[18] Unless the legally trained officer is also a member of the Law Society of British Columbia (the "Society"), the member is engaged in the "unauthorized practice of law," a matter the Society takes very seriously. In the authors' view, if a legally trained police officer is providing legal advice to the department, that officer must be called to the Bar. Furthermore, in order to protect the interests of both the member concerned and the department, there must be formal recognition by each that the member is providing legal services.[19]

However, despite their inability to provide the legal services required in policing, and despite the actual or perceived conflict with respect to the operational independence principle, Government Counsel (usually citing policy or statutory authority) zealously assert that only they can provide legal advice to the respective police agency. Such claims seem purely self-serving, fail to recognize the important principles at stake, and ignore the simple steps required to recognize the legal work that can be undertaken by legally trained police officers.

A Proposal

The historic desire that the police be free from political interference in conducting investigations must include the provision of independent legal advice on operational and policy matters. The need to be independent from political interference is *not* inconsistent with the general tenets of political/public accountability of the police and the provision of independent legal advice to the department. In fact, it makes the chain of accountability clearer. The need for independence in police investigations necessitates that structurally and functionally the police obtain independent legal advice. As noted in *Police-Challenge 2000:*

> The legal resources of police services may have to be expanded in the future. With the Charter and the growing legal accountability of police departments, legal advice concerning investigative practices is needed on an ongoing basis. In the past, Crown attorneys would be asked for their advice, but it might now be necessary to retain lawyers on staff who could be involved in the development of police practices and policies.[20]

In the authors' view, the integrity of police independence and investigations not only require, but demand, that legal advice be obtained from in-house counsel. It is perhaps in response to this need that some municipal forces are starting to bring counsel "in-house." Curiously, while there is no shortage of operational issues for resolution, the drive to bring counsel in-house for municipal police agencies was given momentum by the passage of the *Freedom of Information and Protection of Privacy Act*.[21] This legislation provides a complex

legislative basis for the management and access of information held by the government in British Columbia, including law enforcement agencies. Most municipal departments of any size have had to designate a person whose role it is to oversee their respective departments' compliance with the *FOIPPA*. The Vancouver Police Department and the Victoria Police Department originally devolved the function onto legally trained police officers, but have since hired civilian lawyers to oversee their respective FOI offices. The complexity of the *FOIPPA* and its interaction with federal and other provincial legislation raises numerous legal issues.

After much deliberation and discussion with other police colleagues, the authors believe that the police in British Columbia must take the initiative to secure the provision of independent legal advice. There are a number of potential models, but based on the need to maximize limited resources, the authors recommend that municipal police departments, provincial law enforcement agencies and the RCMP form a police legal services centre that would be comprised of police officers that are called to the Bar and civilian lawyers. This mixed model would maximize resources and experience, eliminate research redundancy that currently exists, and it would provide ongoing timely and competent legal and policy advice on matters affecting the police. Another important feature of this model is that it would ensure that the police develop and utilize consistent policy approaches on important issues such as police pursuits. Such a model would also be invaluable for providing important policy papers and research on proposed policy initiatives that affect the police. Most importantly, this model would brush aside any real or potential allegations of political interference in police investigations and restore the operational independence principle. One thing is clear: if the police continue to rely on the current seat-of-the-pants-approach, and do not move ahead cooperatively to bridge the gap in the provision of legal services, the independence and effectiveness of law enforcement will be reduced.

Endnotes

[1] For example, the *Young Offenders Act*, R.S.C. 1985, c. Y-1 ("YOA") record provisions.

[2] See, *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 74 O.R. (2d) 225 (H.C.J.).

[3] British Columbia Ministry of Attorney General, *Policy on the Criminal Justice System Response to Violence Against Women and Children* (August 1996) ("VAWIR").

[4] British Columbia Ministry of Attorney General, Criminal Justice Branch, *Crown Counsel Policy Manual* at No. LEG 1.

[5] See, British Columbia (Stephen Owen, Commissioner), *Discretion to Prosecute Inquiry - Commissioner's Report* (November, 1990).

[6] *Boucher v. The Queen* (1954), 110 C.C.C. 263 (S.C.C.).

[7] In R. v. *Shirose and Campbell* (17 January 1997) C20724 & C20725 (O.C.A.) at 30 the Court harshly criticized the "illegal" (*i.e.* trafficking) "reverse sting" of the RCMP. The judge drew the "inference from Corporal Reynold's evidence that the illegal conduct was authorized at all levels of the R.C.M.P. and by the Crown law office..."

[8] *Ibid.*, at 35 the Court found that the "legal advice" given to the police by Crown Counsel should have been disclosed.

[9] A discussion of this basic principle occurs in British Columbia, Policing in British Columbia Commission of Inquiry, *Closing the Gap: Policing and the Community* (1994) at B5-6 ("Oppal Commission").

[10] Gil McKinnon and Keith Hamilton, "The Need For An Independent Prosecution Service in B.C." (1997), 55 *The Advocate* 37.

[11] *Department of Justice Act*, R.S.C. 1985, c. J-2, ss. 4-5.

[12] Elizabeth Raymer, "Rock Defends role in Airbus affair," *The Lawyers Weekly*, 14 February 1997 (vol. 16 no. 37) at 2.

[13] *Supra*, note 9, Oppal Commission at B-6.

[14] S.B.C. 1994, c. 27. Many believe that s. 96(1)(a) of the Act imposes an obligation on the RCMP to disclose information when it does not. Issues about the interaction and jurisdiction of provincial and federal privacy legislation and the *YOA*, as well as the authority of the Director to impose obligations / direct the police, and the use of force authority, have been raised.

[15] *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof.* Section 734(6) and 741(2) have been questioned as to the authority to seize money, while the authority to arrest individuals under ss. 742-742.7 have been similarly questioned.

[16] Province of British Columbia, Chief Provincial Firearms Officer Instruction BC-5, *Revocations* has been questioned on certain aspects as to its legal validity. The validity of the VAWIR policy, which essentially mandates that the police hold individuals arrested for domestic violence in custody, has been questioned in light of *Criminal Code* and *Charter* principles about release.

[17] T*he Estate of Dennis Fichtenberg, deceased, by the personal representative of said estate, Marjean Fichtenberg v. The Attorney General of Canada et al.*, (1995) Van. Reg. C954683 (B.C.S.C.).

[18] S.B.C. 1987, c.25.

[19] If not recognized as providing legal services as part of their duties, legally trained officers could be found to be acting outside the scope of their duties and therefore, not subject to indemnification from the employer. Further, since "government counsel," which includes police officers giving legal advice to their department, are not covered by the legal insurance scheme for lawyers, they would be personally liable in a civil action. Legally trained police officers that do not address these issues are leaving themselves exposed to allegations of professional misconduct and financial responsibility that could be devastating.

[20] Solicitor General of Canada, *A Vision of the Future of Policing in Canada: Police-Challenged 2000* (Discussion Paper) (Ottawa: Minster of Supply and Services, 1990) at 34.

[21] S.B.C. 1992, c. 61 (as amended) ("FOIPPA").

Operational Notes

***R. v. Cook* (BCCA)**
Ruled that Canadian police officers must administer the *Charter* when questioning suspects in a foreign jurisdiction.

***R.v. Hutchings* (BCCA)**
Held that the use of a forward looking infrared radar (FLIR) device on a helicopter to detect a marihuna operation in a barn was not unconstitutional because there was no reasonable *expectation of privacy* in the circumstance.

***R. v. Cyr* (BCSC)**
When a police officer could not visually identify the accused in court, the accused was ordered by the court to remove his shirt to reveal identifying tattoos. The tatoos could be used for identification.