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AN OVERVIEW OF CHANGES UNDER THE *FIREARMS ACT* AND *CRIMINAL CODE*

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Introduction

On December 5, 1995, Bill C-68 (*An Act respecting firearms and other weapons*) received Royal Assent. The Bill created the *Firearms Act* (*"FA"*) with consequential amendments to the *Criminal Code* (*"CC"*) and various other statutes including, the *Young Offenders Act*, the *Criminal Records Act*, the *Export and Import Permits Act* and the *Explosives Act*.

The *FA*, and its regulations, remove much of the administrative and regulatory aspects of licensing and registration of firearms from the *CC*. The *FA* creates a comprehensive regulatory scheme intended to ensure that all individuals and businesses who possess or acquire firearms are licensed and that all firearms are eventually registered. The following overview of the *FA* and its regulation is not intended to be exhaustive, but merely a summary of the key provisions of the legislation.

Criminal Code Amendments

By now, most peace officers will be familiar with some of the amendments to the *CC* (Part III "firearms and other weapons"). On January 1, 1996, amendments to ten of the most violent indictable offences were proclaimed. These amendments created minimum sentences (4 years) to be imposed upon an individual where a firearm is used in the commission of any of these offences. A charge under s. 85 (using a firearm in the commission of an offence) may still be laid if a firearm is used in the commission of any other indictable offence. The *FA* and the remainder of the consequential *CC* amendments will take effect on October 1, 1998.

The *Firearms Act*

In addition to licensing individuals and businesses to possess and to acquire firearms, the *FA* also regulates shooting clubs, shooting ranges, gun collectors, gun shows, imports and exports, lending, transfers of ownership, carrying, safe storage, display, transport, and handling of firearms. The *FA* will be administered by provincially appointed Chief Provincial Firearms Officers ("CPFO") and by a federally appointed Registrar. The CPFO is authorized to delegate any of his or her powers to Firearms Officers ("FO"), except for the power to issue an Authorization to Carry and a Business Licence to acquire prohibited items. The duties which will be delegated to a FO will include conducting investigations to determine an applicant's eligibility to hold a licence and conducting inspections to ensure compliance with the *FA* and the regulations.

New Terminology

Licence to Possess a firearm: issued to persons who, on the commencement date of October 1, 1998, already possess firearms and wish to keep them once their Firearms Acquisition Certificate ("FAC") expires.

Licence to Possess and Acquire firearms: issued to persons who wish to acquire a firearm for the first time or to acquire additional firearms.

Minor's Possession Licence: no licence may be issued for a minor to acquire a firearm.

Non-Resident 60 Day Possession Licence: allows a visitor to Canada to possess a borrowed firearm.

Business Licence: "business" is defined in the *FA* and includes activities such as manufacture, assemble, purchase and sale, display, repair, ship, transport, deliver, import, export. All activities which the business is allowed to carry on are included as a condition of the licence, therefore, there is no need to obtain separate authorizations for those activities.

Licence to Acquire a Cross-Bow: there is no licence needed to possess a cross-bow.

Transfer: changing ownership of firearms (sell, barter or trade).

THIS ISSUE

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Authorization to Transport: (individuals only) to transport, import or export restricted or prohibited firearms.

Authorization to Carry: (individuals only) to carry a restricted firearm or a grandfathered prohibited handgun (see s. 12(6) of the *FA*).

Firearm Classifications

Although there have been some changes to the classification of certain firearms, the *FA* and the *CC* amendments utilize familiar terminology:

- Non restricted firearms
- Prohibited Weapons
- Restricted Firearms
- Restricted Weapons
- Prohibited Firearms
- Prohibited Ammunition
- Prohibited Devices
- Prohibited Weapons (OIC)

Licences

Only one licence may be issued to an individual *(note: a business must have a licence for each location where it conducts business)*. The licence will appear in a format similar to a plasticized drivers licence, complete with the licensee's photograph, and will contain all the information about the privileges granted to the licensee. Current firearms owners will have until January 1, 2001, to obtain a licence. However, a valid FAC will act as a Licence until its expiry date. This means that if a person obtains an FAC (which is valid for 5 years) on September 30, 1998, the day prior to the commencement of the *FA*, the FAC will be deemed to be a Licence until it expires on October 1, 2003.

Grandfather Clauses (s. 12 FA)

Certain "grandfather" provisions are provided allowing the continued possession of firearms lawfully possessed in the past but which have since been prohibited *(e.g.,* certain small caliber short barreled hand guns and certain automatic and converted automatic firearms lawfully possessed and registered under previous legislation).

Loaning, Sustenance Hunting & Lawful Professions

There are special rules for loaning a firearm, for sustenance hunters and for persons who require a firearm in their lawful profession or occupation and for "outfitters" *(e.g.,* a 60 day temporary non-resident Licence to be used for a client).

Eligibility to Hold a Licence

The purpose of the *FA*, as outlined in s. 4, is to provide for the issuance of licences, registration certificates and authorizations in order that a person may possess firearms in circumstances which would otherwise constitute a criminal offence. However, the objective of the *FA* (*i.e.,* public safety) is best described in s. 5:

> A person is not eligible to hold a licence if it is desirable, in the interests of the safety of that or any other person, that the person not possess a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition of prohibited ammunition.

The eligibility criteria to be considered include: (a) whether the applicant has, within the past 5 years, been convicted of a criminal offence, in the commission of which *violence* was used, threatened or attempted, *criminal harassment*, *drug/narcotic trafficking* or an offence against the *FA* or Part III of the *CC*, (b) whether the person has been treated for *mental illness that was associated to actual, threatened or attempted violence*, or whether the applicant has *a history that includes violence*. Any spouse (including common law) who has cohabited with the applicant within the previous 2 years will be made aware of the application and any concerns the spouses(s) may have must be considered. The requirement remains that an applicant complete the Canadian Firearms Safety Course and,

in the case of acquiring a restricted firearm, a Restricted Firearms Safety Course.

Refusing or Revoking a Licence or Authorization

The FO must communicate in writing to the applicant any refusal or revocation of a licence or an authorization. The letter must state the reasons for the refusal or revocation, but the FO may withhold any information which would be desirable in the interests of safety of any person (*e.g., certain information may have been obtained from a spouse, relative, neighbour or co-worker who wishes to remain anonymous*).

Appeals

The letter of refusal or revocation must also contain copies of the appeal provisions of the *FA*. The applicant may appeal, by "reference", the decision of the CPFO to a provincial court judge who must then hold a "hearing". The judge must advise the CPFO of the decision and must give reasons. An appeal of a decision of the provincial court may be filed in the Supreme Court by either the applicant or the CPFO. A further appeal to the Court of Appeal is available only with leave on a question of law.

Prohibition Orders

The *CC* provides for mandatory and discretionary prohibition orders to be imposed by the courts upon certain criteria being met. However, a FO or a peace officer may apply to the provincial court for a *preventive prohibition order*. At a hearing, the FO or peace officer must show that it is not desirable in the interests of public safety that a particular person possess firearms. In instances where the person had a licence, it would be more appropriate simply to have the licence revoked than to apply for a prohibition order. A similar application may be made for a *cohabitant or associate order*. Such an order would prohibit a cohabitant or associate of a person prohibited from possessing firearms in circumstances where the prohibited person could have access to the associate's firearms. A likely example would be where the spouse of a prohibited person possesses firearms.

Evidence at a Reference Hearing

The *CC* sets out the procedures for reference hearings. The rules of evidence differ significantly from those in a criminal trial. The onus is on the party who submitted the reference to the court to prove that the particular decision was not justified. The standard of proof is on a "balance of probabilities" and not "beyond a reasonable doubt". The court will hear all relevant evidence which could include hearsay evidence and opinions. There are provisions for an *ex parte* hearing if the judge is satisfied that the applicant was properly notified of the hearing but failed to appear.

Offences

Part III of the CC creates various firearms related offences which are "criminal" in nature:

- use
- possession
- careless handling
- sale, delivery or acquisition
- trafficking
- import & export
- lost, destroyed or defaced firearm
- prohibitions

The *FA* creates various firearm related offences which, although in some cases are hybrid, are considered "regulatory" in nature:

- no registration certificate
- breach conditions
- tampering with documents
- contravene *Firearms Act* regulations
- false statements to procure licence
- fail to surrender revoked document
- fail to assist inspector
- fail to present firearm on demand

Exemptions for Peace Officers

While carrying out certain activities related to firearms in the course of their duties, peace officers are exempt from the application of certain offences under the *CC* and the *FA*. However, public agencies including police forces and police academies are regulated by the *Public Agents Firearms Regulations*. These agencies have certain duties with respect to training, inventory reporting, recording the disposition and acquisition of firearms and other responsibilities.

The Registry

Each firearm must be registered. Firearm owners will have until January 1,2003, to register their existing firearms. The Registrar, who is appointed for the entire country, will direct the operation and administration of the Canadian Firearms Registry ("CFR") and is responsible for firearms Registration Certificates, Authorizations to Import and Export and licensing of international and interprovincial firearms carriers. All other matters are the responsibility of the respective CPFO's.

The Central Processing Site (CPS) for Quebec is in Montreal and, for the rest of Canada, it is Miramich, New Brunswick. The CPS will process all licence and registration information. The Canadian Firearms Registration System (CFRS) is an information registry which will be available to all CPFO's, FO's, police officers and agencies which have demonstrated a "need to know" or who perform a role in processing the information. CFRS information will be linked to the CPIC database for easy access. This will include a Firearms Interest Police (FIP) system, an adjunct to the CPIC persons file, which will provide valuable "on line" information intended to enhance the safety of the police and the public.

The Role of Peace Officers

The CPFO will appoint and provide training for FO's who will administer the *FA* and perform the inspections and investigations necessary for its enforcement. However, peace officers have an important role to play in ensuring the effective administration

and enforcement of the *FA*. It is expected that peace officers, primarily police officers, will perform the following function:

Administration

- Receive firearms and documents from businesses and individuals who are required to surrender them
- Receive firearms believed to be lost or abandoned
- Receive reports of lost or stolen firearms
- Receive notice of firearms which have been destroyed.

Enforcement

- Enforce offences in Part III of the *CC*
- Apply for preventive prohibition orders against person who are not eligible to possess a firearm
- Apply for cohabitant or associate prohibition orders
- Exercise the search and seizure powers under Part III of the *CC*
- Assist FO's in their investigations and in executing a warrant to enter and inspect a dwelling house under the FA.
- Provide the CPFO with information on persons who should be refused a licence or have an existing licence revoked
- Help to maintain the FIP system.

Conclusion

Preparation is well underway in British Columbia to meet the implementation date of October 1, 1998, for the firearms regime. Policy is being finalized by the CPFO to firm up procedures and to assist in interpreting the legislation. Training of the new FO's will take place at the Justice Institute of British Columbia, Police Academy. The CPFO, along with his staff, is working toward a smooth transition. However, as with any new legislation some matters will require some fine tuning and there will likely be future direction from the courts.

FINGERPRINTING THE ACCUSED: PRACTICAL CONSIDERATOINS OF THE B.C.C.A. DECISION IN *CONNORS*

Det. Steven Ing, LL.B. (Victoria Police Department)

Introduction

In a previous article, entitled *Fingerprinting the Accused: Legal Shades of Gray*[1], R. Kroeker provided a comprehensive review of the various authorities pertaining to the fingerprinting of an accused. That article arose out of the British Columbia Supreme Court ("B.C.S.C.") decision in *R. v. Connors*, which has since been overturned by the British Columbia Court of Appeal[2] ("B.C.C.A."). Accordingly, a discussion of the current state of the law and remaining issues with regard to fingerprinting is again appropriate.

The *Connors* Scenario

The main issue in *Connors* was the taking (and subsequent use) of fingerprints from a prior impaired driving investigation. Although Connors had been lawfully arrested for impaired, his fingerprints were taken prior to the laying of an Information *or* the issuance of a Promise to Appear or Appearance Notice. Therefore, at the actual moment that the fingerprints were taken, Connors was not in "lawfully custody" formally "charged" with an offence, which was required by the wording of the relevant sections of the *Identification of Criminals Act*[3] and the *Criminal Code*[4] in force at that time for the taking of the fingerprints to be lawful. Standard police practice at the time was to fingerprint all persons "in lawful custody" for an indictable offence (which included hybrid offences), in reliance upon a certain grammatical interpretation (*i.e.* disjunctive versus conjunctive) of the *ICA (i.e* in lawful custody, [or v. and] charged with...).

The impaired fingerprints were later used to identify Connors as being responsible for an armed robbery. During the robbery trial, Connors counsel argued that there was no statutory authority for the taking of Connors fingerprints during the impaired driving investigation, as (even though he may have been in lawful custody) they had been taken before he had been formally "charged". Therefore, it was argued that the impaired fingerprints could not be used as comparison evidence at his robbery trial. Initially, the B.C.S.C. agreed with this reasoning, and found that the fingerprint evidence was inadmissible, resulting in an acquittal for Connors. No bad faith was ever attributed to the police.

On January 15, 1998, the B.C.C.A. overturned the lower court decision. A new trial was ordered for Connors on the basis that the fingerprints taken during the impaired driving investigation *were* lawfully obtained, and therefore, they were admissible in the robbery proceedings. The three B.C.C.A. justices hearing the case all agreed on the result (*i.e.* admit the fingerprints), but each gave separate reasons for deciding *why* the fingerprints had been properly obtained. Interestingly, although both the B.C.S.C. and B.C.C.A. decisions note that amendments passed in 1996[5] remove the grammatical ambiguities in the *ICA*, those amendments do not address the problem that occurs when an accused is fingerprinted before a formal charge is laid in a case where a Promise to Appear or an Appearance Notice is *not* going to be issued. The ramifications of this remaining "loophole" will be discussed after a brief analysis of the B.C.C.A. decision.

The B.C.C.A. Decision

In the most lengthy and detailed judgment of the three, Cumming J.A. decided that the fingerprints in

question had been obtained lawfully for a number of reasons. Firstly, he held that at the time the fingerprints were taken Connors was "charged" within the meaning of the *ICA*, for the purposes of the investigation being conducted, even though no Information had been sworn and no Appearance Notice or Promise to Appear had been issued. His rationale was that he considered the term "charged" as "not one of fixed or unvarying meaning at law", although neither of his fellow justices agreed with this interpretation.

Cumming J.A. then entered into a discussion regarding the common law authority to take fingerprints arising from the general powers of search incident to arrest. After considering several cases, most notably the decisions of the Supreme Court of Canada in *R. v. Beare*[6] and *R. v. Stillman*[7], Cumming J.A. concluded affirmatively that the power to fingerprint incident to arrest exists at common law. In doing so, Cumming J.A. repeatedly made reference to the importance of the public purpose served by the taking of fingerprints in the context of the criminal justice system, due to their "great usefulness" to the administration of justice generally.

The remaining members of the Court, Donald and Newbury JJ.A., agreed that the fingerprints were lawfully obtained, but both held specifically that in their view Connors could not be considered "charged" within the meaning of the *ICA* when the impaired fingerprints were taken. Further, both Donald and Newbury JJ.A. felt that it was not necessary to address the existence of any common law right to fingerprint. In holding that the fingerprints were nonetheless lawfully obtained, they decided that, because the police officer *could have* issued an Appearance Notice or Promise to Appear directing Connors to attend within five minutes to have his fingerprints taken, the fact that the fingerprints were taken in another way was not of consequence. Although a practical solution to the fact pattern in the case, this rationale simply does not address the practical legal issues raised by the wording of the *ICA*.

Remaining Practical Issues

Although the Connors appeal was allowed, the varying reasons given by the Court for doing so ensure that questions regarding the "authority to fingerprint" remain. Specifically, the amended *ICA,* even in its present incarnation, still fails to address the situation where an accused is held in custody pending a bail hearing (*i.e.* no Appearance Notice or Promise to Appear is applicable) and an Information is not sworn prior to the arrival of the accused at the court facility.

There are many practical situations that give rise to the scenario noted above, not the least of which is the situation documented in the Kroeker article[8] where a person arrested for a domestic assault is held in custody (due to the potential for the continuation of the offence (*i.e.* the "legal"/*CC* authority to hold in custody) and not solely on the basis of the B.C. Attorney General's policy regarding violence against women in relationships).

In fact, there are many situations where an arrested party may be held in custody pending a bail hearing in order that appropriate conditions of release can be placed upon that party. In most jurisdictions, staffing resources dictate that those parties being held in custody must be transported to the court facility prior to the Information being sworn. If those parties cannot be fingerprinted by the police prior to their transport, the opportunity to do so (in accordance with the *ICA*) is lost, unless the Crown, at the bail hearing, asks the court to require the accused to attend for the purposes of the *ICA* as a condition of release. This option is only available, however, at the discretion of the Crown and the court. If the offence charged is a hybrid offence and the Crown elects to proceed by way of summary conviction at the bail hearing, the court is unlikely to order the accused to appear for fingerprints in the absence of the application of the *ICA*.

Apart from questions about the authority to fingerprint, a further issue remains with regard to the likelihood of any additional criminal charges for an accused who fails to appear for fingerprinting as directed by an Appearance Notice or Promise to Appear. Since s. 145 of the *CC* requires that both release mechanisms be "confirmed" by a justice in order for an offence for failing to appear to be made out, a police officer who wishes to propose a charge under s. 145 must first determine the date that the Information was laid and the release document was confirmed.

Lastly, the "age-old" problem remains with regard to the fingerprinting of an accused upon conviction of a summary offence. It has always been the case that, without fingerprints, a conviction cannot be entered onto the Canadian Police Information Centre criminal history database. Though such a conviction will always exist within the individual Court Registry where it was entered, as a matter of practicality that conviction is simply not accessible to criminal justice system personnel for background investigations or, more importantly, sentencing purposes. Although there are those who would argue that this type of "non-recorded" conviction was actually intentionally designed, so that certain offences could effectively be "de-criminalized", it is submitted that there are still certain summary conviction offences (and hybrid offences, for that matter) that are, if present in an individual's history, extremely relevant with regard to any risk assessment of that individual. At present, absent the making of a judicial order to attend for fingerprinting upon conviction of a summary offence, there is no way to obtain fingerprints in such cases.

Addressing the Problem

If one accepts the reasoning of Cumming J.A., as being the current state of the law with regard to fingerprinting, then the common law authority to fingerprint fully addresses two of the problematic situations noted above. Given the comments of both Donald and Newbury JJ.A., it would appear that relying on common law authority to fingerprint, which they

specifically chose not to address, is more sound than relying on the premise that an accused in lawful custody can be considered "charged" within the meaning of the *ICA*, which those justices specifically rejected.

Clearly, the federal legislators responsible for the amendments to the *ICA* did not consider the effect that those amendments would have on a situation where an accused is in lawful custody, not yet "charged" with an offence, where an Appearance Notice or Promise to Appear is not applicable. Reliance on the common law authority to fingerprint would alleviate any concerns about the strict legality of taking fingerprints in those circumstances, and would also protect the use of fingerprints so taken in any future proceedings.

Further, the common law authority to fingerprint arising out of the general power of search incident to arrest also ensures that an accused in lawful custody for a summary conviction offence (*i.e.* arrested pursuant to a warrant or the power to arrest without warrant for a summary offence found committing) can be fingerprinted immediately upon arrest, ensuring that any subsequent conviction is properly recorded.

Summary

Cumming J.A.'s comments in *Connors*[9] seem to definitively conclude that the common law authority to fingerprint a person in lawful custody exists, and such authority is not in any way limited by the existence of the *ICA*. On this point, it is his view that the *ICA* augments the authority to fingerprint at common law as opposed to the view that the legislation displaces such authority.[10]

It is submitted, therefore, that the common law authority to fingerprint should be considered when developing both operational police policy pertaining to the procedures for fingerprinting an accused and in training programs dealing with police authority in general. Doing so would help ensure that fingerprints are legally obtained in all of the appropriate circumstances; which in turn will ensure that all criminal convictions are properly recorded. In addition, police officers will be better able to effectively articulate the legal authority for taking fingerprints in the event of any further technical or grammatical attacks on the legal wording of the *ICA*.

Endnotes:

[1] Robert Kroeker, "Fingerprinting the Accused: Legal Shades of Gray" (1997) 48:1 *Issues of Interest* 4.

[2] (1998), 155 D.L.R. (4th) 391 (B.C.C.A.).

[3] R.S.C. 1985, c. I-1 ("*ICA*").

[4] Pursuant to s. 501 of the *Criminal Code*, R.S.C. 1985, c. C-46 ("*CC*").

[5] *An Act to Amend the Contravention Act and to Make Consequential Amendments to Other Acts*, S.C. 1996, c. 7.

[6] [1988] 2 S.C.R. 387.

[7] [1997] 1 S.C.R. 607.

[8] *Supra*, note 1.

[9] *Supra*, note 2.

[10] Cumming J.A. refers in *Connors* to a number of cases to support this contention, including *R. v. Buckingham and Vickers* (1983), 6 C.C.C. 76, [1986] 1 W.W.R. 425 (B.C.S.C.) and *R.v. Hayward* (1957), 118 C.C.C. 365 (N.B.S.C).

Administering the *Charter* and Sobriety Tests During Impaired Investigations

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After reading the excellent article on "Improving Impaired Driving Investigations" in the last *Issues of Interest,* as Crown Counsel, I felt it was important to clarify two points in relation to impaired investigations.

First, it is my view that during an impaired investigation the s. 10(b) (informed of right to retain and instruct counsel without delay) *Charter* right only arises upon the *legal obligation* being administered (*i.e.* the breath demand). There are, in essence, *three* distinct stages in an impaired driving investigation: (I) the *investigation* (which may or may not lead to an opinion regarding impairment); 2) the *demand* (*i.e.* the legal obligation); and 3) compliance with the demand (*i.e.* the breath tests).

Accordingly, during the *investigative stage,* which the British Columbia Court of Appeal in *R. v. Ferris*[1] recently styled an "investigative detention", the peace officer may ask questions,[2] administer an alcohol screening device ("ASD") test,[3] make observations in respect to *indicia* of impairment, and request *voluntary* sobriety tests.[4] The law is clear, in my view, that during this stage, after providing the suspect with the reason for the stop (to comply with s. 10(a) of the *Charter* (*e.g.* to investigate for impaired driving, check for driver's licence)), there is no requirement to provide the right to counsel under s. 10(b). To provide the s. 10(b) *Charter* right prior to the demand as suggested in the article would mean that there is a corresponding right to exercise the right to retain and instruct legal counsel. One may readily appreciate that such a situation may restrict or negate the gathering of further evidence for reasonable and probable

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grounds for any demand.

It is during the second (*i.e.* demand) stage that s. 10(b) of the *Charter* comes in play, once an opinion is formed. In brief, it is *the demand to accompany a police officer to a police station and to submit to a breath test that constitutes the detention* within the meaning of s. 10(b) of the *Charter.* Persons detained in these circumstances are, of course, entitled to be informed of the right to retain and instruct counsel without delay.[5] During the third stage (*i.e.* compliance/breath test) the suspect, now subject to an obligation in law under the *Criminal Code,* is provided a reasonable opportunity to contact counsel prior to complying with that duty.

Second, sobriety tests, as noted in the article, are an excellent investigatory tool for police officers. Persons under investigation should, however, be advised that these tests are *voluntary* and that they are for the purposes of forming the reasonable and probable grounds which ultimately may lead to a breath demand. At trial, the onus is on the Crown to establish the voluntariness of the suspect's actions. Any evidence obtained during the investigative stage leads only to the reasonable and probable grounds for the demand and not to the impaired investigation *per se* (*i.e.* proving the driver was impaired). Cases such as *R. v. Milne*[6] and *R. v. Barlow*[7] make it clear that to use any evidence towards the impaired investigation, the subject would need to be asked to voluntarily repeat the test after the breath demand and further be advised of the purpose of this second effort on his or her part.

Subject to the above clarifications, I consider the article to be a most useful and informative commentary on the law relating to impaired driving investigations. The author of the article is to be commended for his initiative, interest and valued commentary on a very important subject.

Endnotes:

[1] (15 June 1998) unreported, Van. Reg. CA021944 (B.C.C.A.).

[2] See, *R. v. Kay* (1990), 53 C.C.C. (3d) 500 (B.C.C.A.) and *R. v. Regnier* (1995), 55 B.C.A.C. 287.

[3] See, *R. v. Bernshaw* (1995), 95 C.C.C. (3d) 193 (S.C.C.).

[4] See, for example *R. v. Smith* (1996), 105 C.C.C. (3d) 58 (Ont. C.A.) and *R. v. Milne* (1996), 107 C.C.C. (3d) 118 (Ont. C.A.)

[5] See, *R. v. Rahn,* [1985] 1 S.C.R. 659 and *R. v. Therens*, [1985] 1 S.C.R. 613.

[6] *Supra*, note 4.

[7] (23 October 1996) Victoria Reg. No. 8141 (B.C.S.C.).

POLICE ACT AMENDMENTS

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Introduction

On July 1, 1998, the long awaited amendments to the *Police Act* ("*PA*") and regulations became law in BC. The amended *PA* is based on the Oppal Commission report and a broad-based consultative process that included representatives from the municipal Chiefs of Police, the BC Federation of Police Officers, and other various interest groups.[1] While amendments to the *PA* include dissolving the BC Police Commission, providing a new regime for creating and governing specialized police forces and expanding the authority to develop regulations on the use of force, this article will only provide a brief examination of the new complaints and discipline process.[2]

There are several key features[3] of the framework that governs the handling of complaints against municipal police officers and departments. For the most part, municipal police departments retain the authority to investigate and adjudicate alleged disciplinary defaults, subject to certain civilian and judicial oversight. One of the central features of the new accountability framework is the *Code of Professional Conduct Regulation* (the "Code") which sets out the professional standards of conduct and core values for police officers in British Columbia. Under the Code, a broad range of measures are provided to deal with discipline.

There is also a new civilian Office of the Police Complaint Commissioner (the "Commissioner") that is responsible for independently overseeing various aspects of the complaints and discipline process. Of note, the Commissioner is authorized to prepare "guidelines" respecting the procedures to be followed by a person receiving a complaint. These guidelines are binding on all municipal officers and violating them can constitute a default under the Code.

There are three categories of complaints that can be made under the amended *PA*.[4]

Public Trust Complaints

A public trust complaint ("PTC") involves a breach of the Code that (1) causes or has the potential to cause physical or emotional harm or financial loss to any person, (2) violates a person's dignity, privacy or other rights recognized by law, or (3) is likely to undermine public confidence in the police.

There are a number of important aspects to a PTC. First, a PTC can be the subject of *summary dismissal* where it is (1) frivolous or vexatious, (2) there is no reasonable likelihood that further investigation would produce evidence of a public trust default, or (3) the act or omission occurred more than a year before the complaint was filed *and* the complainant was aware of the conduct. Second, there is a basis for the *informal resolution* of a PTC. While the Commissioner has no formal authority to investigate or adjudicate a PTC, he oversees the process, can overturn certain discipline authority decisions (*e.g.* reclassify complaint), direct that the complaint be investigated by another police department, appoint a civilian observer, and order a public hearing.

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PTCs can be *adjudicated* in *discipline proceedings* before the discipline authority and *public hearings* before a provincial court judge. Before discipline proceedings are held, the chief constable can offer a *confidential, without prejudice, prehearing conference* to try and resolve the complaint. The standard of proof is on balance of probabilities.

Internal Discipline Complaint

An internal discipline complaint ("IDC") relates to the acts, omissions or deportment of a police officer and (1) is not a public trust complaint, or (2) is a public trust complaint but it is not processed as a PTC because no PTC was lodged or the complainant withdrew the complaint and no investigation or public hearing has been ordered. IDCs are handled in accordance with labour law principles, are proven on a balance of probabilities, and are subject to arbitration. IDCs distinguish conduct on the basis of *culpable* (*i.e.* blameworthy conduct within control of employee) (*e.g.* assault or drunk) and *nonculpable* (*i.e.* employee unable to meet standard) (*e.g.* incompetence) behaviour. Culpable behaviour is to be addressed through a process of progressive discipline and nonculpable behaviour is to be addressed through management intervention (*e.g.* training).

The discipline authority must provide the Commissioner with a copy of any recommendations for the resolution of an IDC, the Commissioner can ask for further information and he can reclassify the complaint as a PTC.

Service or Policy Complaint

A service or policy complaint ("SPC") is an allegation that the policies, procedures or services of a municipal police department are inappropriate or inadequate. Allegations involving SPCs may deal with standing orders, supervision and management controls, training programs, staffing and resource allocation. The police board has the responsibility to respond to SPCs.

The police board can request the chief constable to investigate and report back to the board, initiate a study, dismiss the complaint with reasons, or take any course of action it deems necessary. The Commissioner has an oversight role and can make recommendations to the police board, request status reports, review the board's decision, recommend that the Director of Police Services take action or that the Attorney General order an inquiry.

Other Forms of Complaints

A *compound complaint* is a complaint that is comprised of two or more of the following components: (1) PTC against a municipal constable, (2) IDC against a municipal constable, (3) PTC against a chief constable or deputy chief constable, (4) IDC against a chief constable or deputy chief constable, or (5) a service or policy complaint. Each component of a compound complaint is processed as a separate complaint.

A *confidential complaint* is any form of complaint that is made in confidence. A confidential complaint may be made orally or in writing, and the *PA* has specific procedures for handling a confidential complaint.

Although not defined, a third-party complaint is a complaint lodged by a person not directly or adversely affected by the conduct that is the subject of the complaint. Third-party complainants have none of the rights provided to first-party complainants under the process.

Statements

The obligations and rights of a officer with respect to the making and use of statements is somewhat complex. First, no oral or written statement made or given during an attempt to *informally resolve* a complaint is admissible in any civil, criminal or administrative proceeding. Further, no apology is to be admitted into evidence or construed as an admission of fault in any subsequent criminal, civil or administrative proceeding. With respect to PTCs, the subject officer is not compellable to testify, but an *adverse inference* may be drawn for failing to testify. At IDC proceedings, the subject officer is compellable to testify. In relation to duty reports, it is our understanding that a Duty Report Regulation ("DRR") was proposed that would allow chief constables to obtain duty reports from an officer before serving the officer with a formal notice of investigation of an alleged breach of the Code. Under the proposed DRR statements made in response to a duty report request were not compellable or admissible in any disciplinary proceeding before the chief constable or in a public hearing. However, at the time of writing, the DRR was not enacted and the issue of duty reports has not been legislatively settled. Given the complexity of the PTC, IDC, civil and criminal process under the regime, it is recommended that officers obtain legal advice *before* providing any statement or report, particularly in serious cases (*e.g.* shooting).

Conclusion

Tthe above overview provides a basic framework to understand the new complaint and discipline process in BC. On a positive note, the Municipal Chiefs of Police Association, the BC Federation of Police Officers, the JIBC Police Academy and Commissioner have recently given their support to a project to complete an annotated *PA* which will include a digest of police discipline cases.

Endnotes:

1. See, Ministry of the Attorney General, Police Services Division, *Background Information on the Police Amendment Act, 1997 and Associated Regulations* (Victoria, B.C.: Queen's Printer, 1998).
2. *Ibid.*, see also, Bob Rich, *Synopsis of the Police Amendment Act: Citizen Complaint Procedure* at 1 as cited in JIBC, Police Academy, *Police Act Training for Internal Investigators - Participant's Manual* (Feb., 1998) at 19.
3. *Ibid.*, see Rich and the Police Services material on certain key features of the new regime.
4. The following discussion on complaints was drawn in part from the material prepared by Rich, Police Services and *PA*, *ibid.*