

## **B.C. Civil Liberties Association Submission to the Special Committee to the Review the Police Complaint Process**

December 18, 2001

### **I. Introduction**

The B.C. Civil Liberties Association ("BCCLA" or "Association") would like to thank the Special Committee for the opportunity to share our views on the current police complaint process.

At the outset, we think that it would be useful to describe the work of the BCCLA in the area of police accountability and particularly the police complaint process. We believe that this work has given the Association practical experience and specific knowledge that is crucial for important insights into an appropriate model and provisions for a police complaint process.

The Association has been involved in the area of police accountability for most of its 40 years of work protecting the civil liberties of British Columbians. The motivating principle for our interest is that the police, as servants of the public, must ultimately be accountable to the public for their conduct and action. As a society, we have bestowed upon the police a crucial role in our democracy: to keep the peace and enforce the laws of the land. This is a unique and solemn responsibility. Generally speaking, the police are deserving of citizens' respect and assistance. To equip the police to properly undertake this role, democratic society has given them unique and extraordinary powers. Powers to use force, to detain, to search, etc. are powers that no other citizens enjoy. However, in the granting of those powers and in undertaking their responsibility, society in turn demands that the police remain accountable to the citizenry. Thus, the rationale for a system of police accountability through a citizen complaint process.

The BCCLA works on police accountability through a complaint process in three ways. First, we assist individual complainants or prospective complainants by providing them with information about the process, assisting them in drafting a letter of complaint, attending police investigation interviews and providing legal counsel to complainants in select cases. Importantly, the Association generally does not take a position on the merits of a complaint. Rather, we assist complainants to put forward their version of the events and their concerns as effectively as possible and rely on the complaint process itself to determine the relative merit of their concerns.

Second, the Association itself lodges complaints in its own right. For example, we complained about the New Westminster Police Service's actions in dealing with street level drug trafficking. Typically, we make a service and policy complaint rather than a public trust complaint. We do so because our interest is in changing policy and practices of police department's rather than seeking to blemish the service record of a particular officer.

Third, the Association seeks to improve the process through law reform or litigation efforts. The

Association had been extensively involved in consultations regarding the reform of the process that resulted in the current law. Prior to that, we made extensive submissions to the Oppal Commission which are enclosed as part of this submission. As well, on occasion, we will seek redress in the Courts regarding the correct interpretation of legislation. We should note that our efforts regarding police accountability are focused more on a citizen complaint process rather than legal remedies in individual cases of alleged abuse because we believe that it is vital that all citizens, regardless of income, have access to a meaningful and effective process for police accountability.

We pause to comment generally on the current legislative framework. In general, we continue to endorse the *Police Act's* complaint process as an appropriate and \*\*\* model. Though we have a variety of specific recommendations for change, we wish to be clear that the current model is one that we continue to support and would strongly oppose any moves to undermine it. Four years ago, we argued that the reformed complaint model under the amended *Police Act* is deserving of the support of the BCCLA because it satisfies three basic criteria required for a successful complaint process. First, it provides for significant powers and means for effective oversight of the process by the Office of the Police Complaint Commissioner. Second, the standard for review of misconduct is the civil, not criminal standard. Third, there is proper independent review of complaints. Though we will make a recommendation with respect to adjudicators, the current process under the *Police Act* continues to amply satisfy these criteria.

In addition to these reasons for supporting the current Act, the BCCLA supports the process because it is, generally speaking, fair to police respondents as well as complainants. As much as the BCCLA works primarily with complainants in the process, it is important to us that the process is fair to and has proper due process protections for police officer respondents. Due process is an important civil liberties value and we work to ensure it is respected regardless of the individual or context to which it applies. As well, fairness is important to the system in a practical sense. Police officers would not, quite rightly, support a complaint process that was not fair to them.

## **II. Specific Recommendations**

### A. General Process

#### **1. The BCCLA recommends that the *Police Act* be amended to appoint sitting provincial court judges as adjudicators in public hearings.**

This recommendation accords with the original agreement of interested parties (BCCLA, Chiefs of Police and the B.C. Federation of Police Officers) who were involved in consultations to reform the previous police complaint process after the Oppal Commission's report. Moreover, the post-Oppal Commission legislation originally reflected the intent to use sitting provincial court judges before it was amended to allow the Police Complaint Commissioner to appoint retired

judges.

This recommendation has several advantages. First, it resolves any uncertainty with respect to the independence and impartiality of adjudicators that may exist under the present scheme. We understand that as a result of the *Doern and Jones v. Police Complaint Commissioner* case, adjustments have been made to the appointment process. Nevertheless, the appointment process may remain suspect and open to legal challenge. Whatever may be said about the legalities of the current model, as a matter of policy and public/police confidence in the system, the Police Complaint Commissioner should not hold the joint responsibilities of (i) deciding whether a public hearing will occur, (ii) retaining and instructing Commission counsel at public hearings and (iii) appointing and remunerating adjudicators.

Second, this recommendation, if implemented, will reduce expenditures both for the Office of the Police Complaint Commissioner (OPCC) and, arguably, government. The cost of hiring adjudicators is the greatest single expenditure of the OPCC.<sup>1</sup> Rather than tie up resources paying adjudicators, the OPCC would be able to focus its limited resources on the core areas of its responsibilities — supervision and oversight. Furthermore, given that the government currently funds the provincial court system, including paying its judges, there should be minimal extra cost to the public purse.

Third, provincial court judges, given the demands on their time from other responsibilities, will be very motivated to ensure that public hearings are efficient and timely, two important goals for the process.

We note that provincial court judges are used to adjudicate police complaints under Manitoba legislation.

## **2. The BCCLA recommends that the Freedom of Information and Protection of Privacy Act apply to Part 9 of the *Police Act*.**

Section 66.1 of the *Police Act* exempts the application of the *Freedom of Information and Protection of Privacy Act* (FOIPPA). The BCCLA recommends that this exemption be deleted. Instead, all records created as a result of the police complaint process should be subject to FOIPPA.

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<sup>1</sup> Note that this information was provided by the Police Complaint Commissioner in his testimony before this Special Committee, November 5, 2001. Unfortunately, the Police Complaint Commissioner's 2000 Annual Report provides very little financial information in its financial statement regarding his office's expenditures (see page 35 of the Annual Report).

It is not clear to the BCCLA why the police complaint process was exempted from FOIPPA. It may be that there was a desire to avoid the approach of the Information and Privacy Commissioner in his decision regarding a request to access police complaint files held by the B.C. Police Commission.<sup>2</sup> In this decision, the Commissioner created guidelines with respect to complaint files that would favour disclosure or exemption depending on complaint's status in the process.

In our view, FOIPPA provides a comprehensive regime for regulating access and privacy in the context of a police complaint process. In particular, it provides important protection for the privacy of officers and complainants. Furthermore, it provides significant exemptions from disclosure when the disclosure would cause harm to law enforcement thus providing important protection to policing operations.

Significantly, the Information and Privacy Commissioner has significant expertise with respect to access and privacy issues, expertise that the Police Complaint Commissioner may not have. Given the law enforcement exemption, the Information and Privacy Commissioner also has likely acquired expertise and sensitivity to policing matters. Moreover, there are many procedural safeguards in the legislation to ensure that applicants, respondents and third parties have a full opportunity to argue their case for disclosure or exemption.

In sum, the BCCLA believes that, given the importance of the principle of accountability to the police complaint process, it would be more appropriate to apply the mechanisms for accountability in FOIPPA to the process than to leave this responsibility to the Police Complaint Commissioner.

### **3. The BCCLA recommends against compulsory mediation/conciliation.**

Don Morrison recommended to the Special Committee that the *Police Act* be amended to require "compulsory mediation".<sup>3</sup>

The BCCLA disagrees that compulsory mediation or conciliation would be an appropriate method to resolve police complaints. Mediation by definition requires all parties to *voluntarily* seek a resolution to the dispute. Conciliation (i.e. compulsory resolution) can be appropriate when there is an ongoing relationship that will continue after the resolution to a dispute (e.g. union/management relationship). This clearly isn't the case in the context of police complaints.

Many complainants, having had a negative experience with the police, are distrustful of the police and the investigative process. To force them to submit to a resolution between the parties would be inappropriate.

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<sup>2</sup> Office of the Information and Privacy Commissioner, Order No. 13-1994, June 22, 1994.

<sup>3</sup> Report of Proceedings (Hansard Blues), November 5, 2001, 13:35-13:40 pm.

That said, the BCCLA is very supportive of efforts to encourage informal resolution of police complaints. Sections 54.1 and 54.2 of the Act provide an ample framework for informal resolution. The condition of such resolution is that the complainant and the police voluntarily agree to meet and discuss a resolution. In the experience of the BCCLA, when there is a mutual desire on behalf of the complainant and respondent to meet to seek a resolution, the experience can be an educational and productive one for both parties. Typically, complainants want the police officer to understand their concerns and subjective experiences. Their goal is often to prevent a similar occurrence to other individuals. For their part, police officers want complainants to understand the legal constraints and pressures they face in attempting to do their job as professionally as possible. While informal resolution should not be considered a panacea for a police complaint process, it can provide an important means to resolve complaints efficiently without requiring significant resources.

**4. The BCCLA recommends that the *Police Act and the Code of Professional Conduct Regulation* be amended to make harassment as defined in section 65.2 of the Act a separate “disciplinary default”.**

Occasionally, a prospective police complainant is concerned that the lodging of a complaint will result in threats, intimidation or harassment by police. Alternatively, some individuals who have already made a complaint raise this concern. Section 65.2 of the *Police Act* prohibits the harassment of a complainant by police for having made a complaint. However, there is no sanction provided in the legislative framework if this occurs.

This is an important provision in that it seeks to provide complainants with protection against retaliation for having made a complaint. Ideally, it functions as much as a preventive measure as a remedial one. While the BCCLA’s experience with the complaint process does not suggest that this problem is prevalent, this addition would enhance guarding against this problem in the future.

B. Complainants’ Rights and Duties

**5. The BCCLA recommends that the *Police Act* be amended to provide police complainants with the opportunity to participate in a public hearing with respect to evidentiary matters with leave of the adjudicator.**

Currently, complainants have the right to participate in a public hearing but only with respect to making final submissions (section 61). The BCCLA recommends that complainants should also have the opportunity to participate in evidentiary matters (adducing evidence, cross-examining witnesses, etc.) if they receive leave to participate by the presiding adjudicator.

Some may argue that a public hearing is more akin to a criminal trial where Commission Counsel plays a role akin to Crown Counsel. Thus, as in the case of the criminal hearing, complainants or

victims have no right to participate in evidentiary matters. The BCCLA submits that a public hearing and criminal are dis-analogous.

Unlike victims of a crime, complainants in the police complaint process must be much more pro-active in order to pursue an investigation of alleged police misconduct. First, they must lodge a complaint in writing to initiate the process. The better they communicate their concerns, the more likely the success of their complaint. Second, if their complaint is dismissed by the police, then the onus to pursue the matter to a public hearing falls on the complainant. Again, the quality of their submission in requesting a public hearing will bear on the whether a hearing is granted. Thus, in the police complaint process, there is a considerable burden on complainants to drive the process forward.

As important proxies for the public and police accountability generally, the complainant and their conduct in the process will play an important role in whether the goal of police accountability is achieved. From a principled point of view, they have a justified claim to participate fully in public hearings when a hearing has been granted. In contrast, victims in criminal matters must relate their concerns to the police and cooperate in an investigation and trial. There is a less of an onus on them to pursue the process of accountability.

Notwithstanding this principled claim to participation in public hearings, there may be a concern that permitting complainants to participate fully in the evidentiary portion of a hearing might significantly and unnecessarily prolong the hearing without enhancing the nature and quality of relevant evidence before the adjudicator.

Therefore, the BCCLA recommends that the legislation be amended to require that complainants who wish to participate in a public hearing with respect to evidence must make an application to the presiding adjudicator for leave to participate. The application should specify exactly how they wish to participate and what evidence they expect to lead or why they should be able to cross-examine witnesses. Adjudicators, as masters of their own process, subject to Act, will then be able to grant leave on terms and conditions that they believe are appropriate in the circumstances, or refuse leave if the complainant has not made a sufficient case for his or her participation regarding evidence.

We note that complainant participation regarding the evidence in public hearings should be the exception rather than the rule. Typically, if a complainant is concerned that certain evidence be adduced or particular questions put to witnesses, they should first seek the cooperation of Commission Counsel. However, if Commission Counsel is unable or unwilling to adduce evidence or pursue a line of inquiry that the complainant believes is relevant and important, then the complainant should be able to seek leave to participate. In order to ensure that public hearings are efficient, leave should only be granted in exceptional circumstances.

**6. The BCCLA recommends that the *Police Act* be amended to expand third party complainant's rights to participate in the process.**

According to sections 53 and 53.1 of the Act, third party complainants have none of the rights of a first party complainant except in the circumstances in which discipline proceedings or criminal charges result from the complaint, in which case the third party complainant has the right to be informed of the results of these proceedings or charges.

In our view, third party complainants should have greater rights in public trust complaints. Under the Act, a third party can make a complaint that is a public trust matter. Thus, a third party can cause an investigation to begin but is not entitled to be notified of the result of the investigation or request a public hearing.<sup>4</sup> This is anomalous.

Third party complainants can play an important role in the accountability process for police. It is the experience of the BCCLA that there are times when a first party complaint will not be made for various reasons including educational, cultural and linguistic barriers, a potential complainant's fear or simple apathy. Furthermore, an individual who has been subjected to possible police misconduct may not make a complaint because he or she does not have "clean hands". That is, that person may be involved in criminal, illegal or other suspect behaviour themselves and thus disinclined to make a complaint.

In principle, given that the goal of a police complaint system is the accountability of the police in general, third parties should not be precluded from being informed of the results of an investigation or from the right to request a public hearing after an investigation.

Extending these rights to third party complainants would not likely be onerous to the system. Third parties can now cause an investigation to be undertaken. Thus, informing a third party complainant of the result would not add much a burden to the process. Requiring the Police Complaint Commissioner to review a third party complainant's request for a public hearing, though undoubtedly increasing his responsibility, would not likely overburden his office. If there are concerns that third parties would seek to use the system inappropriately, there are already provisions under section 54 to filter out frivolous and vexatious complaints or complaints where there is a lack of evidence to pursue an investigation.

The BCCLA believes that the third party complainant should not have the right to pursue an informal resolution process. This process is an attempt to bring the officer(s) and complainant together to work through the problem, subject to ensuring that the public interest is served in the resolution. It would be inappropriate for a third party complainant to informally resolve concerns that impacted the first party more directly.

In sum, given the goal of a complaint system -- police accountability -- third party complainants should be entitled to be informed of the disposition of an investigation and have the right to request a public hearing just like first party complainants.

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<sup>4</sup> The current number of third party complaints is uncertain. There are no statistics regarding third party complaints in the Police Complaint Commissioner's 2000 Annual Report.

### C. Police Officers' Rights and Duties

#### **7. The BCCLA recommends that the *Police Act* be amended to require a respondent police officer, or other officer relevant to an investigation with respect to a complaint, be required to cooperate with investigators, including providing a duty report.**

As public servants, the BCCLA believes that police officers should have a legal duty to cooperate with investigators investigating a complaint under the *Police Act*. It may be difficult for investigators to get even the most basic information, such as the identity of officers, to pursue an investigation as a result of a complaint. An inability to determine basic facts about an incident due to a police officer's unwillingness to provide basic information, can be fatal to an investigation and thus undermine accountability even before the process has commenced. Therefore, the BCCLA recommends that officers be legally required to provide basic information about an incident which can assist investigators in obtaining adequate information to pursue their investigation.

HYATT example?

Use of statements\*\*\*\* Immunity?? Can't be used in a hearing???

#### **8. The BCCLA recommends that the *Police Act* be amended to treat any matter that is a "public trust default" as a "public trust complaint" even if it is internally generated.**

Most matters that may be considered public trust defaults (misconduct that causes harm to a person, violates dignity, privacy or other rights of a person or is likely to undermine the public's confidence in the police) are generated as the result of a complaint by a member of the public. However, a public trust default may arise as a result of information that is generated from information internal to a police force.

Currently, the Act permits a disciplinary authority to treat a public trust default as an internal discipline matter if the matter has not arisen due to a complaint by a member of the public. There are different procedures for internal discipline matters (which are theoretically reserved for labour/management matters) and public trust matters. Arguably, there may be less due process protections for police officers in the internal discipline process than the public trust process. \*\*\*\*  
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Therefore, as a matter of fairness to a respondent police officer, he or she should have the option to process the complaint in the public trust stream if the matter is defined as a public trust default.

We note that the Police Complaint Commissioner raised this issue in his testimony before the Special Committee and took the position that, as a matter of flexibility, the Act should not be

changed on this point.<sup>5</sup> The BCCLA respectfully disagrees.

#### D. The Police Complaint Commissioner and His Office

### **9. The BCCLA recommends that section 50(2) of the *Police Act* be amended to include a specific mandate for the Police Complaint Commissioner to undertake public education regarding the police complaint process and the mandate of the Office of the Police Complaint Commissioner.**

Public confidence in the fairness of the police complaint process is critical to its success. The B.C. Civil Liberties Association has been disappointed with the lack of leadership shown by the current Police Complaint Commissioner in this regard. To remedy this problem, the BCCLA recommends that the *Police Act* be amended to provide a clear obligation on the Police Complaint Commissioner to provide public education regarding the process and his office's responsibilities in a pro-active manner.

When the BCCLA first met with Mr. Morrison at the beginning of his mandate, we emphasized the important role he will play in engendering public confidence in the police complaint process. We specifically encouraged him to meet with as many public groups as possible to explain the new complaint process and provide an overview of his office's mandate and powers. The goal of this exercise would be to open a new era of transparency and fairness for police accountability under the new provisions of the Act. To that end, the BCCLA provided Mr. Morrison with a list of contacts that we had assembled as part of the BCCLA's own multi-cultural outreach project regarding police complaints.

Unfortunately, we believe that Mr. Morrison has failed to fulfill that role and has lost an important opportunity to enhance public confidence in the complaint process. His approach to this role is reflected in the comments he made to this Special Committee on this subject:

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<sup>5</sup> See Report of Proceedings (Hansard Blues), November 5, 2001 (11:15 - 11:20 am)

“Community Education. That is a difficult topic, but one that is very important. For example, the OPCC cannot appear to be trolling for business. If it does that, I think that it is not fair, not even-handed. We have an obligation, *when* requested by groups, to go out and speak to them. ... <sup>6</sup> (Emphasis added)

This approach is further reflected in the 2000 Annual Report. There is no mention of efforts made to educate or meet with the public with respect to the process or the Office of the Complaint Commissioner.

Mr. Morrison appears to have confused the importance of maintaining an impartial and independent stance in relation to any particular complaint and his responsibilities under the Act, and the need for general public education to encourage public confidence in the process. In the view of the BCCLA, the two roles are completely compatible and would be satisfied if in his public meetings with groups he avoids public comment on the merits of any particular complaint.

This role is particularly important given that there may well be a considerable number of individuals with concerns about police conduct that do not lodge a complaint for reasons that may include a lack of faith in the process. It has been the BCCLA’s experience that individuals with concerns about police conduct refuse to make a complaint under the Act because of a perception that the system will not treat them fairly.

It would be impossible to expect that public education by the Police Complaint Commissioner will entirely eliminate public scepticism about the fairness of the process. However, public education initiatives by the Commissioner are critical to alleviating public reservations about the process. An amendment as recommended above would be an important signal to the Police Complaint Commissioner that he should play a pro-active role in this regard.

**10. The BCCLA recommends that the *Police Act* be amended to require that the Police Complaint Commissioner provide written reasons when he refuses to grant a public hearing under section 60 and when he refuses to make recommendations to a police board under section 63.1.**

In order to enhance the principles of transparency and accountability that underlie the police complaint process, the BCCLA recommends that the Police Complaint Commissioner be required to provide written reasons for his decisions to refuse to grant a public hearing under section 60 of the Act or to refuse to make recommendations to change service or policy to a police board under section 63.1.

The Office of the Police Complaint Commissioner is the lynchpin of the police complaint process. The success or failure of the process depends to a great extent on the conduct of the

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<sup>6</sup> Testimony of Don Morrison, Police Complaint Commissioner, before the Special Committee to Review the Police Complaint Process, November 5, 2001, (12:30-12:35 pm)

Commissioner and staff in his office. In his responsibility to ensure the police are accountable and that the process for accountability is transparent, he also must be accountable to the public and operate as openly as possible. To further these goals, there should be a legal requirement that he provide written reasons for his decisions regarding public hearings and service and policy complaints. The Commissioner's decisions to refuse to grant a public hearing or make recommendations to a police board are in a sense the end of the road for complainants with respect to public trust and service/policy complaints. As a matter of fairness, complainants should be able to fully understand, if not agree with, the justification for the Commissioner's decision.

**11. The BCCLA recommends that the *Police Act* or its regulations be amended to incorporate the Recommendations of the B.C. Council of Administrative Tribunals Policy and Research Committee on "Independence, Accountability and Appointment Processes for British Columbia Tribunals" with respect to the selection and appointment of the Police Complaint Commissioner and the Deputy Police Complaint Commissioner**

Critical to the success of the police complaint process will be work of the Police Complaint Commissioner in administering the police complaint process. As we noted earlier, he and his office are the lynchpin of the entire complaint process. Thus, it is important that competent and qualified individuals are selected for the positions of Police Complaint Commissioner and Deputy Police Complaint Commissioner. The B.C. Council of Administrative Tribunals Policy and Research Committee has produced recommendations that enhance the selection process for individuals charged with administrative and quasi-judicial functions like the Police Complaint Commissioner. In the paper "Independence, Accountability and Appointment Processes for British Columbia Tribunals"<sup>7</sup>, the Committee made various recommendations regarding the selection process for tribunal members to ensure the qualified and competent individuals are appointed. In particular, the Committee makes recommendations regarding assessment of needs for appointees, statement of qualifications/competencies, the need for transparent process of appointment, etc.

To his credit, Don Morrison sought the advice of the BCCLA when the Office of the Police Complaint Commissioner was undertaking a search for a new Deputy Police Complaint Commissioner. We declined to participate in a selection process because we believe that a selection model that includes interested parties' (police vs. complainants) preferences, familiar in the labour context, might prevent the appointment of truly qualified and outstanding candidates.

### **III. Conclusions**

**The BCCLA recommends that the *Police Act* be amended to require a further legislative review of the police complaint process in four years.**

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<sup>7</sup> This paper can be access on the Internet: [www.bccat.net/policy1.htm](http://www.bccat.net/policy1.htm)

Despite three years of operation, there is not a great deal of experience with the current police complaint process. Therefore, the BCCLA recommends that a further legislative review be undertaken in four years. By that time, there should be considerably more information and experience to gauge whether the legislative framework and its operation are meeting the goal of police accountability.