

DEBORAH R. HATCH  
CTLA PRESIDENT  
11210-142 STREET  
EDMONTON, ALBERTA,  
T5M 1T9  
TEL: 780.488.4460  
FAX: 780.488.4783

Alberta Solicitor General and Public Security  
By fax to: 780-427-1194

May 28, 2010

ATTN: Bill Meade – Assistant Deputy Minister

Dear Sir:

**RE: Law Enforcement Framework – Police Complaint and Disciplinary Process Review**

On behalf of the Criminal Trial Lawyers' Association, we wish to thank you for the opportunity for the CTLA to make submissions in this process and for meeting with the CTLA's representatives, D'Arcy DePoe and Tom Engel on May 17<sup>th</sup> 2010. At that meeting we reviewed in some detail our positions in relation to all of the points which had been raised in the material previously provided to us. We also agreed to provide you with some written submissions to supplement or clarify our positions in a number of areas. As we agreed, if we make no comments in this correspondence on any issue, then we are content to rest on what we had to say at the meeting.

In this letter, we also raise some issues that have not been identified thus far.

### **General Comments**

In general we were very pleased with the substance and most of the proposals set out in the *Police Complaint and Disciplinary Process Discussion Paper*. In relation to many of the *proposed directions*, we simply advised that we agreed.

### **Law Enforcement Review Board**

#### **General Comments**

One thing that we did not mention at the meeting and we should have is that we feel that the Law Enforcement Review Board, as it is presently constituted and operates, performs very well.

The appointments to the Board are from a diverse background and are highly competent.

The staff members at the Law Enforcement Review Board are also very competent and very helpful. We expect they are also very helpful to members of the public who are not represented by lawyers.

In recent years, the Law Enforcement Review Board has done much to clear up the backlog of appeals waiting for hearings and, generally, has been efficient and timely in relation to decision making.

Having said this, we agree that something must be done in relation to the legislative framework to enable the LERB to become more efficient because the delays inherent in the current process are unacceptable.

### **“Snakes and Ladders Process”**

The CTLA has described the process on many occasions in the past as “snakes and ladders.” That is because, when the Chief either dismisses a complaint or imposes discipline without a hearing, the complainant may appeal to the LERB but the most the LERB can do is order that the officer be charged or that there be a further investigation. Presently, the hearing at the LERB, which we call a “Stage 1” hearing, unless the parties agree otherwise, is a full-blown hearing where *viva voce* evidence is heard, usually including the evidence of the complainant.

In the case where the Board orders that a charge be laid, the matter is returned to the police service for a disciplinary hearing where, again, usually the complainant would testify. If the complainant was dissatisfied with the result of that hearing then the complainant could appeal to the LERB. On that appeal, unless agreed otherwise, there would be a third full-blown hearing, usually including the complainant testifying.

In the case where the Chief has imposed a penalty without a hearing, the complainant can appeal to the LERB where, unless it is agreed otherwise, there is a full hearing. If the complainant wins at the LERB, the matter is then returned to the service for a hearing and so on.

In the case where the Board orders a further investigation, one more hearing could be added to this because the Chief, after conducting the further investigation, may again dismiss the complaint. That would mean that the complainant would have no option but to return to the LERB for a second Stage 1 hearing.

The problems inherent with this are very serious and need not be restated here.

It has been suggested that one way to improve the process would be to have the LERB review the Chief’s initial decision to impose a penalty without a hearing or to dismiss the complaint outright with a hearing that would be on the record that was before the Chief when her or she made the decision. The CTLA agrees that that would be an improvement however the legislation would have to provide the opportunity for the Appellant to call evidence on the Appeal which the Appellant says should have been before the Chief or to show that the investigation was inadequate. C.T.L.A. submits that evidence would frequently have to be called because frequently investigations are inadequate as demonstrated by recent decision of the LERB in Edmonton and also by the decision of Macklin J. in *R. v. Steele*:

The C.T.L.A.’s position is that the Board ought to have jurisdiction to make a final decision on the first appeal. The only exceptions to that might be where it is made to appear that a further investigation is necessary. Even that should not be an impediment because the Board could order that information be provided to the parties or that the further investigation occurs even during an adjournment so that the parties would be able to call that evidence on the appeal. That sort of work could be done in advance of the appeal through directions made by the Board prior to the hearing.

The LERB is quite capable of conducting a fair hearing on the first appeal and reaching an ultimate decision. That was demonstrated in two decisions which were overturned because the Board did not have the jurisdiction to do that:

*Letcher v. EPS* 040-2000

*Durand v. EPS* 013-2002

*Durand* is of interest for another reason. In *Durand* there was an appeal to the Court of Appeal and Durand consented to the appeal because it was clear that the LERB did not have the jurisdiction to make a final decision on a Stage 1 appeal. Part of the agreement was that charges would be laid and there would be a disciplinary hearing held at the level of the Edmonton Police Service. Then, at the outset of the hearing, the Presenting Officer called no evidence on the basis that there was no reasonable likelihood of conviction despite the fact that the LERB on the Stage 1 appeal had made findings of guilt, leaving Durand with no option but to appeal again to the LERB. That is another reason to provide jurisdiction to the LERB to make a final decision on the first appeal.

The savings in time, money and reputation of the process would be enormous if the C.T.L.A.'s position on this was accepted. So, in essence, the C.T.L.A. agrees with the first proposed direction but would like to see it strengthened so that not only would the Board have the discretion to allow an appeal in the first instance and impose a penalty/sanction, that would be the course that would be followed unless there was some exceptional circumstance requiring otherwise.

At the meeting, we raised the possibility of one Board member sitting on a Stage 1 appeal where the only issue was whether a further investigation should be ordered or whether a charge should be laid. We said that we would think about that and provide you with our position. Considering what we have proposed above, we would not support such a change. Even if our position was not accepted we would still not support such a change and we believe that the present configuration of having at least two panel members should be retained.

## **Disclosure**

At the meeting, we submitted that the power of the Board to order disclosure should be expanded. In a recent appeal on which the LERB has reserved decision, (*Engel v. Zielie*) an issue arose as to the Edmonton Police Service providing information to the appellant as to how three computer systems related to each other in terms of the times noted for transactions. In the hearing before Presiding Officer Logar this was held to be a defect in the prosecution's case. Accordingly, the appellant wished to call evidence from the Edmonton Police Service as to how those times related to each other and wanted to call a witness from the Edmonton Police Service who could testify about that. The Chief of the Edmonton Police Service refused to provide such information so the appellant had to make an application to the LERB. The Chief argued that there was no jurisdiction in the LERB to order such disclosure. In the end, the LERB found that it was unnecessary to decide the question at that point but that it might become necessary later.

The position of the C.T.L.A. is that it is obvious that, if the EPS Chief is correct, this is a legislative gap in the jurisdiction of the Board which must be corrected. The legislation should be amended to provide the Board with power to order the disclosure of information including will says from employees and names of witnesses or any other information which would enable the calling of all of the necessary evidence on the appeal.

In addition, the Board should have the power of the Court of Queen's Bench under Rule 209 to order third parties to disclose records and to this we would add information. Such an application would have to be on notice to the third party.

## ***De Novo* Hearings**

As there is a legal debate now as to whether hearings before the Board should be *de novo*, the legislation should clearly provide that they are unless the parties to the appeal agree.

In the case of appeals from cases where hearings were held, it is particularly important that this be the case because the Complainant/Appellant has no standing at a disciplinary hearing and therefore no control over how the prosecution conducts its case.

The C.T.L.A. believes that there are cases where the police service, in prosecuting an officer at a public hearing, will be motivated to soft pedal the prosecution so as to not damage the reputation of the police service itself. A *de novo* hearing before the LERB prosecuted by the Complainant can remedy that situation. An appeal based on a defective disciplinary hearing record alone will not.

Looking at it from the position of the Defendant police officer, it is in the interest of the officer in some cases to have a *de novo* hearing. For example, it may be that there is a reasonable apprehension of bias on the part of the Presiding Officer if that Presiding Officer is selected from the same police service and that police officer is on the “outs” with management.

On the other hand, it may be that there is a reasonable apprehension of bias from the point of view of the Complainant when the Presiding Officer is from the same police service as the cited officer.

All in all, the LERB cannot fulfil its function of independent civilian oversight without actually seeing and hearing the witnesses when they testify in a hearing where the Complainant and not the police service has carriage of the prosecution.

If the appeal raises pure issues of law which do not depend on the assessment of witnesses or the calling of further evidence, then it should be within the jurisdiction of the Board to direct that the hearing will not be *de novo* and that the appeal will proceed on the record.

## **Written Decision Time Frame**

While we indicated at the meeting that we were in favour of this direction, we have given it further thought and have decided that it would be unwise to do this. The Board has done much to clear up the backlog and to submit timely written submissions in the recent past. At present administrative law principles require that the Board issue written reasons on a decision within a reasonable time. A reasonable time depends on all of the circumstances concerning the appeal. It would be impossible to properly provide for a “one size fits all” timeframe and so this is best left to policy rather than legislation. The Board could establish its own policy that it would issue written reasons within a certain period of time unless there were unusual circumstances. In fact, it is our understanding that the Board has such a policy at this time.

## **Police Services and Commissions**

### **Delays in Investigations of Complaints**

One of the most significant problems is, of course, the delays that have been experienced in processing complaints to their final conclusion. In this regard, one of the worst problems has been how long it takes the police to conduct investigations. The C.T.L.A. takes the position that there is no reason why investigations

of complaints that police officers have assaulted citizens should take any longer than investigations of complaints that citizens have assaulted police officers. The latter type of investigation usually takes 1 hour or less before the police make the charging decision. The former often takes a year or more. The former investigations are characterized by video/audio taped interviews of the complainant and non-police officer witnesses by one internal affairs detective in the room conducting the interview and another monitoring and providing feedback to the interviewing detective. Interviews of the complainants and the non-police officer witnesses are, to say the least, thorough and rigorous. In cases of injury, complainants are usually required to consent to the production of their medical records and other records. In relation to the latter type of complaint there are usually only the briefest of written statements made by police officers and no interviews and not even an attempt to interview the accused.

The government needs to do something to speed up investigations.

The C.T.L.A. proposes that Public Complaints Directors (PCDs) be given the jurisdiction and authority to order police services to take investigative steps and to complete them within a certain period of time, failing which there would be disciplinary consequences such as neglect of duty complaints by the Police Commission.

The C.T.L.A. also proposes that timelines be established for the completion of investigations and, if those timelines are not met, the PCD could direct that the investigation of the complaint be taken away from the police service and passed on to ASIRT.

In this regard, the s. 7 *PSR* extension process must be abolished. It makes no sense that, if the police service is neglectful in investigating a complaint and the Police Commission does not grant an extension, the complaint is effectively dismissed. That only prejudices the complainant and, in general, the public.

The C.T.L.A. points out that, so far as it is aware, no such provision exists with respect to any other professional discipline process in the province of Alberta. If there is unreasonable delay, police officers may raise that as a defence on any disciplinary charge and it can also be taken into account in mitigation of penalty. If required, authority can be provided for that proposition.

If the government decides to retain the s. 7 extension process, then the process should be reformed. Notice of such an application should be provided to the subject officer and the complainant and the opportunity to make submissions, at least in writing, should also be provided. The complainant and the subject officer should receive a written decision with reasons. If the extension is refused, then the result should not be the dismissal of the complaint but, instead, should be a referral to ASIRT to take over the investigation.

## **Complaints and Discipline**

### **Third Party Complaints**

The first problem with the “Rationale for Change” in the materials provided to us is the very characterization of a complaint as a “third party complaint.” Any citizen of Alberta is not a “third party” when it comes to having a direct stake in the policing of the citizens of Alberta. The police are not a law unto themselves and they are the servants of the people. All of their powers are derived from the people.

It is trite that the public has an interest in the complaints and discipline process and that the process must be transparent to all citizens.

The second problem is that the rationale is based on a false premise.

On page two of the Discussion Paper the following statement appears:

The increasingly large case loads are due, in part, to the lack of restriction on who can lodge complaint.

Later, on the first page of the chapter on “Complaints and Discipline” the following statements appear:

Members of the public directly affected by a complaint may wish to have someone on his/her behalf (agent) file a complaint. However, police services and review bodies spend significant amounts of time, effort, and resources on the handling of third party complaints by those who are not affected by the policy, service, or the conduct of the police officer or police service in question.

Public complainants should be entitled to make use of an agent but unaffected third party abuse of the process is problematic.

As indicated at our meeting, the C.T.L.A. takes the position that this is simply untrue and that the government should require that whoever is claiming this to be the case to produce proof that it is. To be blunt, the C.T.L.A. sees this as a thinly veiled attempt to eliminate the C.T.L.A. from being able to make complaints.

If this allegation comes from the Edmonton Police Service and/or the Edmonton Police Association, this is not the first time that the Edmonton Police Service has tried to eliminate the C.T.L.A. as a complainant.

Most recently, the Edmonton Police Service took the position that the C.T.L.A. could not be a public complainant in relation to the “No Rats” and “Racist/Mr. Socko emails” scandals. In early 2006 the C.T.L.A. had to threaten to bring judicial review of the Chief’s decisions in both cases which finally resulted in Chief Boyd reversing that position and agreeing that the CTLA legally did have standing to make the complaint. That resulted in the Chief providing the C.T.L.A. with disposition letters which, in turn, enabled the C.T.L.A. to appeal to the LERB where full public hearings on the matters were or are being held.

The proponents of this change also point to other jurisdictions and argue that, because that is the way the process works in those other jurisdictions, that is the way it should work in Alberta. However, as we pointed out in the meeting, our view is that this makes the process worse, not better, and that Alberta should have a process that is better than the other jurisdictions.

In relation to the allegation that there is “third party” abuse, there is no need to restrict the class of persons or organizations who can make complaints. The *Police Act* already provides for dismissing complaints where the complaint is frivolous or vexatious. The *Police Act* already provides that, if a party is guilty of misconduct during the course of an appeal, costs can be awarded. If there is any truth to the allegations that have been made in this area, the proposed direction would be like using a sledge hammer to kill a fly.

It must be pointed out that the C.T.L.A. in particular has had a long and honourable track record in relation to making complaints and prosecuting appeals before the LERB when there is a high degree of public interest. There is also no doubt that, but for the C.T.L.A. doing that, the facts in relation to those matters would never have seen the public light of day. The C.T.L.A. provides the following examples:

- 1) *C.T.L.A. v. Jongejan and Abbott* 026-2008; 008-2009

In that case, it was drawn to the attention of the C.T.L.A. that homeless inner city residents of the City of Edmonton who were vendors of the Bissel Centre's *Our Voice* newspaper were alleging that they were being assaulted and otherwise abused by two Edmonton Police Service officers. Those two men had not made a complaint and there was no realistic possibility that they would. Even if they had made a complaint, it was obvious that they would not have the wherewithal to properly prosecute their complaints, especially in the LERB. So, in the public interest, the C.T.L.A. initiated the complaint and, using the *pro bono* efforts of its member lawyers, prosecuted the appeal before the LERB. In the end, after protracted proceedings which in large part were caused by the loss of quorum, the appeal was unsuccessful when, over the period of delay, one victim died and the other victim disappeared. Notwithstanding that, it was clearly in the public interest that the appeal was heard;

2) ***C.T.L.A. v. EPS* (“Overtime”)** (numerous decisions)

This arose out of the infamous stakeout by a number of Edmonton Police Service officers at the Overtime Broiler and Taproom where the targets of the stakeouts were Martin Ignasiuk, the Chair of the Edmonton Police Commission, and Kerry Diotte, an Edmonton Sun columnist, both of whom had been vocal critics of the Edmonton Police Service, and an EPS media release in connection with that scandal. For their own reasons, Ignasiuk and Diotte declined to make public complaints. The Edmonton Police Service initiated their own internal investigation and it is clear that their intent was to never reveal the evidence gathered in that investigation. Knowing that that would be the case, the CTLA made a complaint to ensure that there would be transparency in the process and that, if the result was unsatisfactory, there would be an appeal to the LERB and a public hearing.

The investigation proceeded and the Chief of the day, Fred Rayner, held a media conference to explain his decisions. Unbeknownst to Chief Rayner, an Edmonton journalist had obtained a CD of many of the radio transmissions and the Edmonton Journal published the transcripts of those transmissions the following day. Those transmissions dramatically contradicted Chief Rayner's statements to the media the day before and the resulting scandal resulted in the termination of his contract with the Edmonton Police Commission.

There were some official warnings and some charges were directed by Chief Rayner which went to public hearings but those charges dealt with peripheral issues and not the substance of the whole scandal.

All of the “Overtime” decisions made by Chief Rayner and the Presiding Officers were appealed by the C.T.L.A. to the LERB. All of the decisions have been made by the LERB and two of them are on appeal to the Alberta Court of Appeal.

All of the complaints in the appeals raised very important public interest issues that never would have been dealt with properly but for the C.T.L.A.'s initiation of complaints and the prosecution of appeals, including defending the appeals to the Alberta Court of Appeal.

3) ***C.T.L.A. v. EPS* (Racist/Mr. Socko Emails)** 014-2010

The Law Enforcement Review Board recently delivered its decision on this, dismissing the appeal.

However, the LERB had harsh criticism of the Edmonton Police Service in relation to how it handled the complaint. In fact, the Board found that the Edmonton Police Service was not interested in properly investigating the complaints and was more interested in covering up the scandal. This cover up would never

have been discovered but for the C.T.L.A.'s standing as a complainant and its ability to prosecute the appeal to the LERB.

This was one of the appeals, as mentioned above, where the Edmonton Police Service tried to cut the CTLA out of the equation. There can be no doubt that this was part of the police service's overall strategy to cover up the scandal.

The public interest in this matter, being fully explored in public, could not have been higher.

#### 4) *C.T.L.A. v. EPS* ("No Rats" T-shirts)

Like Racist/Mr. Socko emails, this was a scandal that, when it became public, resulted in the Edmonton Police Service initiating an internal investigation. However, expecting that the EPS would not handle the matter in the appropriate fashion, the C.T.L.A. made a complaint.

The officer who made the T-shirts and distributed them to his squad mates was ordered by the Chief to go to a discipline hearing. A number of officers who wore the T-shirts received no discipline in a public hearing. The C.T.L.A. appealed to the LERB in relation to that decision.

In relation to the officer that was directed to go to a hearing, that hearing concluded with the EPS accepting an agreed statement of facts and the representations of the officer's lawyer as to the circumstances of the making and distribution of the T-shirts. In other words, the facts in relation to the circumstances surrounding the "No Rats" T-shirts were not publically revealed. The officer received a suspension. The C.T.L.A. appealed to the LERB from that decision.

Those two appeals are presently before the LERB in mid-hearing.

It had been reported in the media that the T-shirts were not only worn at a ball tournament but were also worn at an EPA meeting. When the C.T.L.A. determined that its complaint about that had never been investigated it appealed to the LERB. That appeal has been heard and a decision has been rendered: 020-2009. Once again, the LERB was critical about the investigation by the EPS. The Board ordered that the officer who made and distributed the T-shirts face another hearing and that there be an investigation into the allegation that others wore the T-shirts at the meeting.

During that hearing, the C.T.L.A. discovered, through questioning witnesses, that there were officers who wore the T-shirts at the EPA ball tournament who had not been identified in course of the investigation into that matter. Accordingly, more respondents were added to the other appeal.

The two appeals from the decisions made in relation to the ball tournament shirts have started and will resume in June. The C.T.L.A. believes that it has already been made clear, publicly, that the handling of the investigation was seriously improper.

Finally, the C.T.L.A. made a complaint arising out of a representation made by the acting Chief of the Edmonton Police Service to the C.T.L.A. in the course of the investigation of its complaint. The complaint was one of deceit. The Edmonton Police Commission dismissed that complaint and the C.T.L.A. appealed to the LERB. That hearing has been held and the LERB is on reserve.

There can be no question that this matter raises very important public interest issues pertaining to the code of silence subculture within the Edmonton Police Service and the integrity of the discipline process in the

Edmonton Police Service. Had the C.T.L.A. not made that complaint and prosecuted the appeals, all of this would have been shielded from public view.

**5) C.T.L.A. v. EPS (“Sweatbox” or “Hotbox” matter)**

This is the matter relating to members of the Edmonton Police Service picking up homeless aboriginal people on Whyte Avenue in Edmonton, driving them around for an extended period of time in the police wagon and then dropping them off on the north side of Edmonton. The C.T.L.A. read about this in the *Edmonton Street News*, an inner city newspaper. Like the case involving the vendors of *Our Voice*, the victims were vendors of *Edmonton Street News*. The C.T.L.A. investigated and tracked down the victims who were named in the *Edmonton Street News*.

In the course of the C.T.L.A.’s investigations, which included an access to information application under the *FOIPP Act*, the C.T.L.A. discovered that the EPS had received a complaint from a resident of the neighbourhood in which the victims had been abandoned but the complaint was treated as one of undesirables being dropped off in a residential neighbourhood. That matter was investigated but resolved informally to the satisfaction of the complainant. Despite it being obvious that the real issue was in relation to the conduct of the officers in picking up the people and, against their will, confining them in the wagon and transporting them to another part of the city and abandoning them, there was no investigation of that.

Expecting that the Edmonton Police Service would not properly handle this matter, the C.T.L.A. made a complaint. In the course of its investigation, some of the victims instructed C.T.L.A. members to make complaints on their behalf and so that was done.

(One might argue that the involvement of the C.T.L.A. is unnecessary because some of the individuals made complaints but that would be incorrect. The victims are homeless people and, as amply demonstrated in the complaint about the treatment about the *Our Voice* vendors, it is a sad reality that the likelihood of the individual complainants being available for the duration of the process is questionable. If they are not available then 3<sup>rd</sup> parties have a viable interest in prosecuting).

The Chief disposed of all of the complaints without a hearing and the C.T.L.A. has appealed. That appeal has yet to be heard and, when it is, the public will find out what happened. This is another matter where no one could question that there are very serious public interest issues involved.

**6) C.T.L.A. v. EPS (Sexual Assault and Harassment in the Tactical Section)**

This is a matter which, thus far, has not been drawn to the attention of the public. This appeal to the LERB has yet to be heard.

The letter from officer “Whissel Bloere” was obviously written by a police officer who felt that he or she could not make the complaint himself or herself. This is not surprising given the subculture of the code of silence that exists within all police services and has been shown to be strong within the Edmonton Police Service. The officer may also have considered that a police officer cannot appeal to the LERB. The C.T.L.A. then made a complaint, in the public interest.

This is probably why at least one stakeholder proposed that there be a prohibition on anonymous complaints.

In conclusion, the argument made by the proponents of this restriction is that considerable resources are expended on processing complaints made by “third parties” but the C.T.L.A. responds by asking: what is wrong with expending resources on investigating complaints which have merit and have a high degree of public interest attached to them? The answer is that there is nothing wrong with it and it is appropriate and necessary that the resources be spent. The C.T.L.A. challenges the proponents of this restriction to provide proof that there have been any cases where a significant amount of resources have been spent unnecessarily and, if there are, that the number of cases is significant.

Assuming that the proponents of this change are police services or police associations, the irony of this position is rather obvious. Police services rely on and encourage citizens to provide information, including anonymously, upon which investigations start. One only has to look at the *Crime Stoppers* program. They see this as a valuable tool in law enforcement and no one would disagree. Why then should it be different when it comes to reporting misconduct by the police?

### **Time Limitation**

The rationale for this change is compelling and need not be restated here.

At the meeting, we made it clear that our position is that the discoverability principle should apply and it should not be up to the discretion of the Chief as to whether a complaint should proceed if it was made more than one year after the event.

However, having thought further on this issue, one can see that there may be situations where there ought to be the discretion to extend the time for making a complaint even where the misconduct was discovered. The problem lies in the issue of who discovers the misconduct.

For example, what if the Chief or a Deputy Chief or Superintendent or Inspector or Sergeant is aware of the misconduct but decides, for improper reasons, not to initiate an investigation? No one would agree that the one year discoverability principle should apply so as to preclude *Police Act* discipline.

Changing the scenario slightly, what if the Chief was unaware but other superior officers were? No one would argue that the Chief should be unable to take disciplinary action despite the fact that the misconduct was discovered by officers in the chain of command below him or her.

What if a citizen was aware of very serious misconduct but was afraid to make a complaint and then the Chief found out about it more than one year later? No one would argue that the officer responsible for the serious misconduct should be shielded from *Police Act* discipline because of that.

Aside from the discoverability problem, there is also the problem that if discoverability within one year precluded the complaint, the legislation would preclude discipline for even the most serious misconduct. So, there could be a situation where an officer has committed perjury in relation to the prosecution of a citizen and the citizen was aware of it within one year but did not make a complaint. That officer could still be prosecuted under the *Criminal Code*, found guilty and be immune from any discipline and the Chief would have to allow the officer to carry on as a police officer with impunity.

So, the C.T.L.A. proposes that there be the following measures:

- 1) The time limitation for bringing a complaint should be 1 year from the date that the alleged misconduct was discovered;

- 2) Despite the fact that the alleged misconduct was discovered within 1 year of the misconduct, there should be a residual discretion in the Chief of Police to proceed under the *Police Act* where it is in the public interest to do so;
- 3) The decisions of the Chief as to whether the misconduct was discovered within the 1 year or, if discovered within the one year, in exercising discretion whether to proceed, are reviewable on appeal to the LERB.

### **Internal Disciplinary Hearing Officer**

As stated at the meeting, we agree with the idea of using provincial hearing officers but we stress that the ideal situation would be to have retired judges of the Court of Queen's Bench or the Provincial Court Youth or Criminal Divisions as presiding officers. There is a good supply of these highly qualified people. Failing that option, the next desirable option would be to have retired lawyers who have experience in criminal law either as defence lawyers or prosecutors or both.

While we agree that convening a panel of three presiding officers would cause logistical problems, having a panel of presiding officers is better than having a single presiding officer. We suggest that the Solicitor General look to other professional disciplinary regimes for guidance on that. The C.T.L.A. is aware that the Law Society uses a panel of three for disciplinary hearings involving lawyers.

The other recommendation would be that the Solicitor General consider having a citizen other than a retired Judge or retired lawyer or retired police officer sitting on the panel. That would be similar to what the Law Society does when it has a non lawyer participating as one of the three on the panel.

### **Complaints Against the Chief**

This issue has not been raised in the materials.

Presently there is no requirement that a complainant have the opportunity to see the Chief's response and to make submissions to the Commission about that before the Commission makes its decision. This is unfair and in breach of the rules of natural justice and must be rectified.

### **Police Service Regulation**

#### **Section 10 of the *Police Service Regulation***

Section 10 of the *Police Service Regulation* has created a number of headaches for the participants in the process. We recommend that it be repealed and be replaced with legislation that provides that police officers may be ordered to submit to audio recorded or audio/video recorded interviews and that those statements are admissible in any disciplinary proceedings including appeals before the LERB. That is what the Law Society does and the C.T.L.A. is unaware of any other professional disciplinary regime where it is otherwise. There is no reason to shield officers as is presently the case.

#### **Definition of "Serious" Offence or Default**

The C.T.L.A. believes strongly in restorative justice and the principles underlying the *Police Act*. The *Police Act* and the *Police Service Regulation* is too inflexible in that regard. It is our position that there should be no restrictions on what types of offences are available for Informal Resolution/ADR. It should be up to the

Chief to make the initial determination. If the decision is to proceed to Informal Resolution/ADR and that is inappropriate, then the complainant has the opportunity to appeal to the LERB. Therefore, it would be wise to obtain the consent of the complainant to any Informal Resolution/ADR.

For example, to illustrate our concern, in the Proposed Direction, a serious complaint to be excluded from informal resolution/ADR is any complaint of conduct that appears to constitute an offence under the *Criminal Code of Canada*. That would include the most minor of assaults and causing disturbances..

In the alternative, if the Solicitor General should proceed with legislation following the Proposed Direction, then much more thought will have to be put into defining what serious offences are. We would suggest that, for example, any offence involving dishonesty should be included. There are other types of misconduct that involve serious breaches of *Charter* rights, for example, the illegal search of a home or a strip search.

## **Other Issues**

### **Costs on Appeals to the Court of Appeal**

Complainants who spend their own time and money, which frequently involves retaining a lawyer, have no access to public or police union funding to cover or defray their costs, unlike police services and officers. In the event of a successful complaint or an appeal to the LERB, there is no compensation for those expenses, unless there have been expenses incurred due to a party's misconduct in the course of an appeal to the LERB.

In the other hand, police services have unlimited access to public funds to defend complaints. Police unions also have access to membership fees to defend complaints. Police officers who have to appear at discipline hearings and LERB hearings do not have to lose any income as a result of their attendance.

Increasingly, we see the Edmonton Police Service and respondent officers appealing LERB decisions to the Court of Appeal. In the event of success, the public complainant faces the risk of costs being awarded. This is not fair because the appeal could only be successful if the LERB made an error of law. It would not be the complainant's error.

So, the C.T.L.A. recommends that it be provided that no costs could be awarded against a public complainant unless there was some misconduct in connection with the appeal to the Court of Appeal.

## **Additional Proposed Changes**

We now turn to providing input on some of the comments found in the paper entitled "Additional Proposed Changes." At the meeting we went through each item and provided our verbal comments. There are some we wish to stress:

- There is no justification for an officer being permitted to refuse to have his or her statement audio or video recorded.
- There is no justification for allowing a subject officer not to be compellable to give evidence against himself or herself in disciplinary hearings or LERB hearings. The *Charter* does not apply to *Police Act* disciplinary proceedings and there is no right to remain silent. If this was implemented, police officers would have a

protection unknown to any other professional discipline environment. There are cases where the only way for the complainant to prove the misconduct is to call the officer who is the subject of the complaint to give evidence because the misconduct is only known to the officer.


- The proposals to provide the Presiding Officer or the LERB with the authority to dismiss a complaint because a complainant refuses to attend at a hearing is unnecessary. The Presiding Officer or the LERB already has the power to do that because, if the evidence is insufficient to meet the charging threshold or to prove the offence against the officer because the complainant is not present to testify, then the complaint will be dismissed. If the proponent of this is suggesting that complaints or appeals should automatically be dismissed if the complainant refuses to attend at the hearing then this should be rejected. In criminal cases, prosecutions proceed routinely without complainants attending for various reasons. That is because it is in the public interest to proceed. *Police Act* disciplinary proceedings are not just contests between a citizen and a police officer as there is a primary public interest in such prosecutions.
- The mandate of ASIRT should be expanded to include the investigation of all complaints that appear to involve serious misconduct of the type that, if guilt is established, there would likely be a lengthy suspension or demotion or dismissal. The C.T.L.A. takes the position that more minor complaints can remain to be investigated by the involved police service unless there is reason for it not to. In that regard, if the complainant is of the view that the police service should not investigate the complaint, there should be a mechanism by which the complainant can appeal to the Solicitor General for a direction that the complaint be investigated by ASIRT.
- The question as to whether anonymous complaints can result in a *Police Act* investigation should be answered “yes,” as explained above.
- As for the proposal about the “chronic” complainer, it is unnecessary to do anything more than what the *Police Act* presently provides in relation to frivolous and vexatious complaints. It is of note that the *Legal Profession Act* contains no such provision to provide for that relief in the hypothetical situation where someone is a chronic complainer against lawyers.
- We strongly agree that decisions from public disciplinary hearings must be made available to the public. There is no reason not to, considering that the hearings are public anyway. There is every reason to make them available considering the public interest and the principle of transparency. It is noted that decisions in relation to public hearings under the *Legal Profession Act* are available to the public.
- In relation to the “one year official warnings” proposal, the C.T.L.A. takes a contrary view to the whole idea that records for misconduct under the *Police Act* should be “expunged” after any period of time. It is of note that the federal government is moving towards eliminating pardons and replacing that with a “record suspension.” Also, there are certain types of offences for which a convict will not be eligible for a record suspension. Moreover, in the pardon regime, one must make an application for a pardon and convince the Parole Board that he or she deserves it. The way it is now is that a police officer has his record expunged based on nothing other than the simple passage of time. An officer could receive a demotion and a suspension for corrupt practice for deceit and five years and one day after being found guilty of that, do it again and the Presiding Officer would be unaware of that prior conviction.

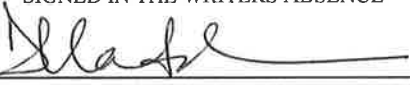
So far as is known to the C.T.L.A., the present situation is foreign to any other professional discipline process and it certainly is not the case for lawyers. A lawyer who acquires a finding of professional misconduct will have that on his or her record forever.

- There is a proposal that section 17(1) should include random sampling for drugs or alcohol. The C.T.L.A. would go further and suggest that s. 17 of the *PSR* requires dramatic change. There should be all kinds of penalty options available to a Presiding Officer or the LERB to meet the needs of the officer, the police service and the public. The penalties available should be reprimand, reduction in seniority, reduction in rank, suspension with pay, suspension without pay, suspended sentence, absolute discharge, conditional discharge and dismissal. There should be no limit on the length of suspensions or the terms of probation.

We invite you to share this letter with the other participants in this process.

All of which is respectfully submitted,

Per:   
Deborah R. Hatch  
President  
Criminal Trial Lawyers' Association

SIGNED IN THE WRITERS ABSENCE  
Per:   
For: Thomas M. Engel  
Chair  
C.T.L.A. Policing Committee