

**“NEW CHALLENGES IN GUARDING THE GUARDIANS”:
RESPONDING TO CITIZEN COMPLAINTS UNDER THE NEW LAW
ENFORCEMENT JUSTIFICATION REGIME**

Text of Address Delivered by Peter O’Flaherty, Counsel,
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to the CACOLE 2002 Annual General Meeting – September 20, 2002

I have been asked in this address to discuss the challenges presented to civilian oversight agencies in responding, in an effective and meaningful way, to public complaints that may arise from the exercise by police of their extended powers under the *Criminal Code of Canada*.

As you will be aware, the new law enforcement justification regime has been in effect for less than one year and, not surprisingly, the impact on the public complaints jurisdiction of Canadian civilian oversight agencies has so far been negligible. Without an established record in Canada to base my comments on, I have attempted to approach the question from a comparative law perspective with special emphasis on the Australian experience. I hope therefore to provide you with a brief overview of the Canadian law enforcement justification scheme, along with some thoughts on how civilian oversight agencies in Canada can prepare for and respond to public complaints that may arise from the new police powers.

I would like to acknowledge the ready cooperation of three Australian colleagues, Mr. Tony Wainwright of the South Australia Attorney-General Department, Dr. Paul Mazzerole of the Queensland Crime and Misconduct Commission and Mr. Steve Robson of the New South Wales Police Integrity Commission. Mr. Christopher Fox, a lawyer in this province made a valuable contribution through research. He was assisted in his research of this topic by one of the lawyers who was responsible for drafting Bill C-24, Mr. Shawn Scromedeia, a counsel with the Criminal Law Policy Section of the Department of Justice Canada. Finally, Mr. Joseph Profaizer of the Washington firm Wilmer, Cutler, Pickering reviewed and commented on the brief American law section of this paper. The views expressed in this address, and any errors, are my own.

THE DEVELOPMENT OF THE CANADIAN REGIME

BACKGROUND

In *R. v. Campbell* [1999] 1 S.C.R. 565 the Supreme Court of Canada upheld the general principle that, absent legislation from Parliament to the contrary, police officers in this country are not permitted to break laws when carrying out their police duties. *Campbell* was a premeditated and planned “reverse sting” operation in which large quantities of hashish had been “sold” to high level members of a drug trafficking organization.

The decision in *Campbell* reportedly led to several ongoing police investigations being abandoned and the Department of Justice Canada moved quickly to remedy the situation brought to light by the high court's ruling. Draft legislation that eventually would become ss. 25.1 to 25.4 of the *Criminal Code* was prepared and circulated for public comment in a June, 2000 White Paper, the Law Enforcement and Criminal Liability White Paper. This document outlined the policy rationale for the legislation, discussed the impact of the *Campbell* case and summarized the situation in other countries. The legislative process concluded with the enactment on December 18, 2001 of *An Act to amend the Criminal Code (organized crime and law enforcement) and to make consequential amendments to other Acts*.

POLICY RATIONALE

The enactment of the new law undoubtedly signaled a major shift in criminal law policy in Canada. Professor Don Stuart of Queens University, in a Canadian journal article written on Bill C-24, described the legislation dramatically as "...the ultimate example of the present law and order feeding frenzy...". The effect of the new law has undoubtedly been to widen the powers of the police, but a more balanced reading of the Act leads the writer to the conclusion that these powers are intended to be used primarily to combat organized criminal activity. In fact, it seems reasonable to conclude that, from an operational perspective, sections 25.1 to 25.4 of the *Criminal Code* will primarily be used to allow undercover police officers to break the law in order to penetrate and investigate organized crime operations. How then will it work?

THE CANADIAN REGIME

The new legislation in Canada contemplates a general designation process for individual police officers, rather than an operation-specific approach under which separate applications must be made for each case. This is perhaps surprising given that the law is directed primarily at combating organized criminal activity, and investigations in that area would seem, by their nature, to require detailed planning and a substantial commitment of resources and time. There is a requirement for prior specific authorization by a senior officer where loss or serious damage to property is likely to result, but even this restriction in the exercise of the new powers is subject to an "exigent circumstances" exception. Officers that are designated under the Canadian regime do have some limitations placed on the scope of their activities through the legislation, however it is largely left to the individual officers to apply a test of reasonableness and proportionality in the exercise of these extended powers in investigating criminal offences. The Act requires that designated officers must file written reports concerning their activities and the Minister responsible for policing must prepare and make public an annual report concerning the use of these powers in each jurisdiction. Finally, the legislation will be subject to a Parliamentary review after three years. For our purposes in examining the appropriate response of civilian oversight agencies, it is also important to note that the legislation specifically requires that before designations are put in place for any individual police officer, subsection 25.1(3.1) requires that there be a public oversight

body that can review the officer's conduct in the exercise of those powers. Oversight bodies must be properly designated for this purpose.

COMPARING OUR REGIME TO OTHER JURISDICTIONS

Our research in the area of police justification for committing criminal offenses also involved a review of similar laws in other countries including available cases, journal articles and texts on this topic from other countries.

UNITED STATES

A] Federal Law

In the United States all federal law enforcement officers are provided with a general retrospective immunity. If the impugned conduct is within the reasonable exercise of the police officer's duty, and if the conduct is proportional in the circumstances the police officer's conduct is not illegal. The U.S. federal approach to this topic is therefore to establish a general immunity scheme for all officers, which is fundamentally different from the Canadian approach which provides that only individually designated officers enjoy immunity. That is not to say that American federal law enforcement agencies, such as the F.B.I., do not have detailed internal procedures for monitoring the specific criminal activity its agents may engage in, but there is not to our knowledge a nationally regulated system like that in Canada.

B] State Law

Our research indicates that approximately 20 U.S. states have legislation that makes reference to a general positive police power to commit offenses in the line of duty. The Iowa State Code appears to be typical of American state legislation. It provides that the police are permitted to commit crimes in the line of duty as long as their actions are reasonable in the circumstances, they are not intending to injure a person that is not participating in the crime and they are investigating a criminal offence. There is also broad authority for officers to engage in illegal acts while in the line of duty stemming from the fact that an immunity provision is found under the defense of "justification," a highly subjective and general defense. See, e.g., NY Penal Law sec. 35.05 ("conduct which would otherwise constitute an offense is justifiable and not criminal when . . . such conduct is required or authorized by law or by a judicial decree, or is performed by a public servant in the reasonable exercise of his official powers, duties or functions").

One can conclude from this brief review that rather than a prospective and focussed approach (ie. to combat organized crime) the American approach has been to enact laws of more general application and to review the impugned conduct retrospectively.

GREAT BRITAIN

The British Parliament has not to date enacted general criminal legislation comparable to ss. 25.1 to 25.4 of the CCC. Halsbury's Laws of England, Volume 11(1) describes the general law in England as follows:

“It may, however, be lawful to take part in an offence ... if the participation is for the purpose of trapping the offender; ... It is doubtful whether a police officer, or a person acting under the directions of the police, who aids, abets, counsels or procures the commission of a crime for the purpose of detecting offenders and bringing them to justice thereby becomes a secondary part of the crime.”

The 1996 decision of the House of Lords in *R. v. Latif* was the most recent opportunity for the courts to review the common law in England and Wales with respect to police powers to commit crimes during investigations. In *Latif* a Customs and Excise officer took delivery of heroin in Pakistan from an agent purporting to be a courier in the drug trade. The officer transported the heroin to London where it was to be delivered to the owner of the heroin. The House of Lords did not decide on the broad issue as the Supreme Court of Canada had done in *Campbell* and as the Australian High Court had done in *Ridgeway*, preferring instead to decide the issue pursuant to the inherent jurisdiction of the Courts to stay proceedings for abuse of process. The House of Lords concluded that the actions of the police in *Latif* did not constitute an abuse of powers. In terms of the effect of police officers breaking the law, the criminal law in Great Britain therefore adopts a retrospective approach to this issue utilizing a case by case analysis guided by common law precedents.

AUSTRALIA

The foreign jurisdiction with legislation most similar to our new law is Australia. In the aftermath of the decision of the High Court of Australia in *Ridgeway v. The Queen*, a case involving the importation of heroin into Australia by a Customs Officer, laws were enacted in a number of Australian states to permit illegal activity during so-called “controlled operations”. Queensland's Police Powers and Responsibilities Act, the Law Enforcement (Controlled Operations) Act of New South Wales, and the South Australia Criminal Law Undercover Operations Act are the three most relevant laws. There is also equivalent federal Australian legislation.

The Australian scheme, like Canada's, is primarily prospective and is also, like Canada's, not a law of general application. The primary differences between the Canadian and Australian approach lie in the requirement for prior authorization of specific operations, rather than a general designation scheme found in Canada, and the involvement of persons outside the police service in the authorization regime. In Queensland, for example, the law provides for the establishment of a controlled operations committee that receives and approves applications for specific operations. The New South Wales

legislation is similar, and provides for an application process with a requirement for advance approval. These differences, and the substantial checks and balances provided in the legislation, probably explain the typically broadly worded immunities provided under the Australian laws. An example provides “Despite any other Act or law, an activity that is engaged in by a participant in an authorized operation in the course of, and for the purposes of, the operation is not unlawful, and does not constitute an offence or corrupt conduct...”.

The Australian laws also provide for accountability for police activity in this area, generally at three levels. The police officers involved are required to file internal reports with the force describing their activities and any controlled operation. The police forces involved in the operations are required to file reports with the relevant civilian oversight agency. There is also a requirement for the public report on the activities in this field from Parliament.

Of significant interest in the context of public complaints is the specific requirement in the New South Wales legislation that there must be a police service Code of Conduct in place for the carrying out of the controlled operations in order for an application to be approved. Section 6(2) of the Law Enforcement (Controlled Operations) Act from 1997 No. 136 provides as follows:

“6(2) An authority to conduct a controlled operation on behalf of a law enforcement agency may not be granted unless a code of conduct is prescribed by the regulations in relation to the agency.”

The jurisdiction of the oversight agency is thereafter confirmed by the inclusion of a legislative direction that any breach of such a code is a disciplinary offence. Attached is the NSW Code of Conduct as Schedule “A” for your review.

THE AUSTRALIAN EXPERIENCE

According to colleagues in New South Wales, South Australia and Queensland, they have not received, or at least they have not yet investigated, complaints by the public concerning police conduct carrying out controlled operations. In explaining the lack of public complaints they all referred to the fact that controlled operations are by their very nature usually undercover and, unless charges arise, a person will not even be aware that a police officer was involved.

The existence of clearly defined Codes of Conduct that require full disclosure in the application process, specific knowledge of the limits of the operation’s criminal activity and good faith on the part of the officers also provide a deterrent to police misconduct. There is also a sense that the most effective mechanism for “guarding the guardians”, in New South Wales at least, is the overarching role of the office of the ombudsman in monitoring, auditing and reporting on these activities.

The writer's view is that the absence of public complaints has its genesis in the pre-approval requirement in Australian law, and is also related to the specific direction provided by the Code of Conduct to police officers. The present Canadian regime leaves much more to the discretion of the individual officers thereby probably increasing the scope of individual responsibility and the likelihood of public complaints.

RESPONDING TO THE CHALLENGES

The writer does not expect that civilian oversight agencies in Canada will see a large volume of complaints arising from the exercise of these increased powers. With that said, the very nature of the general designation process in Canada and the adoption of an American style "reasonable and proportional" test probably makes it likely that a greater number of public complaints of police misconduct will result in Canada than has been experienced in Australia.

That is only part of the answer however. Being in a position to respond effectively to complaints of misconduct in this area also serves to ensure that the high public confidence enjoyed by our police services continues, and that the workings of the police forces we monitor remain as open and accountable as possible. At present the federal legislation contains a positive requirement that civilian oversight agencies exist before any police officers can be designated in a particular jurisdiction. The legislation does not however make it mandatory that police forces develop internal policies to govern the activities of police officers in the exercise of these powers. Furthermore, while every civilian oversight body in Canada possesses a power to receive complaints concerning the failure of police officers to comply with policy and procedures, this power is ineffective in the absence of a Code of Conduct.

RECOMMENDATIONS

The writer therefore recommends that the following steps be considered by civilian oversight agencies in developing an effective response to public complaints in this area:

- The establishment of a specific code or policy in each jurisdiction which imposes a general duty of good faith on individual police officers as well as more specific obligations on those participating in the use of these extended powers;
- The institution of "integrity testing" should be mandated for this process, similar to the testing performed in respect of the search warrant process in Australia; and,
- Finally, although civilian oversight agencies in Canada may not possess a specific auditing and reporting role under the federal legislation the latter may be accomplished in Canada through the policy making function of the civilian oversight agencies.

SCHEDULE “A”

The Code of Conduct

The code of conduct is prescribed by clause 8 of the *Law Enforcement (Controlled Operations) Regulation 1998* and applies to all law enforcement agencies, the NSW Police and Commission included. It is in the following terms:

Schedule 1---Code of conduct

(Clause 8)

1. Applicants for authorities to act in good faith

- (1) In making an application for an authority, or for a variation of an authority, the applicant must at all times act in good faith.
- (2) In particular, the applicant must ensure that the application:
 - (a) discloses all information of which the applicant is aware as to the circumstances giving rise to the application, especially those that could affect the way in which the application will be determined, and
 - (b) does not contain anything that is incorrect or misleading in a material particular.
- (3) If the applicant subsequently becomes aware of information that, had it been known to the chief executive officer when the application was determined, could have affected the way in which the application would have been determined, the applicant must ensure that the information is given to the chief executive officer as soon as practicable.

2. Disclosure of changed circumstances

If the principal law enforcement officer for an authorised operation becomes aware of circumstances that are likely to require a variation of the authority for the operation, the officer must ensure that:

- (a) information as to those circumstances is given to the chief executive officer as soon as practicable, and
- (b) a written application for such a variation is made to the chief executive officer before it becomes impracticable to do so.

3. Participants to be properly briefed

Before conducting an authorised operation, the principal law enforcement officer for the operation:

- (a) must ensure that each law enforcement participant and each civilian participant:
 - (i) has a thorough understanding of the nature and extent of any controlled activities in which the participant may be directed to engage in for the purposes of the operation, and
 - (ii) is made aware of the terms of the authority to the extent to which it authorises the participant to engage in those activities, and
- (b) must ensure that each civilian participant undertakes not to engage in any controlled activities other than those referred to in paragraph (a), and
- (c) must make a written record of each undertaking given by a civilian participant as referred to in paragraph (b).

4. Obligations of law enforcement participants with respect to their own actions

At all times during the conduct of an authorised operation, each law enforcement participant:

- (a) must act in good faith, and

(b) must comply with any lawful directions given to the participant by the principal law enforcement officer for the operation.

5. Obligations of law enforcement participants with respect to the actions of others

Each law enforcement participant in an authorised operation must take all reasonable steps to ensure that the conduct of the operation does not involve any participant in the operation:

- (a) inducing or encouraging another person to engage in criminal activity or corrupt conduct of a kind that the other person could not reasonably be expected to engage in unless so induced or encouraged, or
- (b) engaging in conduct that is likely to seriously endanger the health or safety of that or any other participant, or any other person, or to result in serious loss or damage to property, or
- (c) engaging in any activity that, not being a controlled activity, is unlawful.

6. Reports to be made in good faith

(1) In preparing a report on the conduct of an authorised operation, the reporting officer must at all times act in good faith.

(2) In particular, the reporting officer must ensure that the report:

- (a) discloses all information of which the officer is aware as to matters required to be included in the report, and
- (b) does not contain anything that is incorrect or misleading in a material particular.

(3) If the reporting officer subsequently becomes aware of:

- (a) information that, had it been known to the officer when the report was prepared, should have been included in the report, or
- (b) information that indicates that anything contained in the report is incorrect or misleading in a material particular,

the officer must ensure that the information is given to the chief executive officer as soon as practicable.

7. Breaches of code to be reported

(1) If a law enforcement participant in an authorised operation becomes aware that a breach of this code has occurred in relation to the operation, the participant must ensure that notice of the breach is given to the chief executive officer as soon as practicable.

(2) It is sufficient compliance with this clause if notice of the breach is reported in accordance with the internal reporting procedures applicable to the law enforcement agency to which the law enforcement participant belongs.

8. Relationship to other codes of conduct

In its application to a law enforcement agency, the provisions of this code are in addition to, and do not derogate from, the provisions of any other code of conduct that applies to that agency.