

Addressing Police Excessive Use of Force - A Proposal to Amend the Mandate of the Special Investigations Unit

Ian D. Scott*

Introduction

The November 5th, 2003 verdict of acquittal of Toronto police officers Robert Lemaitre, Phillip Duncan, Filippo Bevilacqua, and Nam Le on a charge of manslaughter relating to the death of mentally disordered Otto Vass joins the long litany of acquittals by juries deciding the fate of police officers facing criminal allegations of on-duty excessive use of force.¹ The charge of manslaughter in the Vass case was laid by an independent investigative agency called the Special Investigations Unit ('SIU'). Since 1990, it has been responsible for the investigation of serious injury or death caused by the acts of police officers connected with their employment in the province of Ontario.² However, no homicide charge laid by the SIU has ever led to a finding of guilt by a jury,³ and

* Crown Law Office Criminal- Ministry of the Attorney General. While the writer prosecuted a number of SIU laid charges for the Ministry, the views expressed herein are solely his.

¹ *Toronto Star*, November 6th, 2003, at p. A1.

² *Police Services Act*, ('P.S.A.'), R.S.O. 1990, c. P.15; as amended. The 1990 amendments created Part VII of the P.S.A., entitled *Special Investigations*. Please refer to *Race Relations and Policing Task Force Report* (Toronto: Queen's Printer, 1989) (Chair: Clare Lewis) for an understanding of the genesis of the SIU. A brief history of the Unit may be found at pp. 8-12 of the *Consultation Report of The Honourable George Adams, Q.C. to the Attorney-General & Solicitor-General Concerning Police Co-operation with the Special Investigations Unit* (May 14th, 1998) ('Adams Report') & pp. 9-11 of the *Review Report on the Special Investigations Unit Reforms prepared for the Attorney General of Ontario* by The Honourable George W. Adams, Q.C., dated February 26th, 2003 ('Adams Review Report').

³ In fact, as best as can be determined, no Ontario jury has ever found a police officer guilty of on-duty homicide. For partial authority, please refer to *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Queen's Printer: 1995) ('*Report on Systemic Racism*'), at p. 377, which documented nine police prosecutions involving fatal shootings of black men between 1978 and 1995, all leading to acquittals. The SIU statistics, to be discussed more

only two charges involving excessive use of force laid by the Unit in its first ten years of existence led to convictions, one heard by a judge alone and the other by a jury.⁴

The response by the police community upon juries' pronouncement of verdicts of 'not guilty' varies from relief that their fellow officers are now free from criminal liability, to outrage that the charge was ever laid in the first place.⁵ Arguably, given this reaction of the police community, these verdicts may "legitim[ize] police violence that, while not proven to be criminal, might still be objectionable and preventable".⁶

By reviewing SIU statistics of investigations, charges and convictions over its first ten years of operation, this article attempts to explore the aforementioned quote, that verdicts of acquittal in police cases involving on-duty excessive use of force may actually be counter-productive in a criminal justice system attempting, at least in part, to promote goals of specific and general deterrence. It will suggest that, while prosecution of police officers for allegations of on-duty excessive use

fully in the article, disclose only one jury finding of guilt in the manslaughter trial of Chatham Police Constable Ronald Tricker in 1993. However that finding was overturned upon appeal and the accused officer acquitted at his jury retrial in 1997. See *R. v. Tricker* (1995), 96 C.C.C. (3d) 198 (Ont.C.A.). The only other close call to a jury conviction was *Shank*, in which a Toronto drug officer was ultimately acquitted for shooting a drug dealer, after a hung jury at his first trial.

⁴ They are: *R. v. Deane* (2000), 143 C.C.C. (3d) 84 (Ont.C.A.), appeal to S.C.C. dismissed 152 C.C.C. (3d) 96 (OPP Tactics and Rescue Unit Team officer convicted of criminal negligence causing death) and *R. v. Lervet*, [1994] O.J. 2627(C.A.) (Sarnia Police Constable convicted of discharging firearm with intent to wound).

⁵ In relation to the *Vass* trial after the verdict, president of the Toronto Police Association Rick McIntosh said, "The majority of the public, had they been told the facts of this case, would have been outraged that charges were laid.": *Toronto Star*, November 5th, 2003, at p. A1.

⁶ Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999), at p. 233.

of force can be a legitimate use of the criminal law power in appropriate circumstances, the province, through amendments to the *Police Services Act* ought to change the mandate of the director of the SIU to permit more scope to refer matters to the Ontario Civilian Commission on Police Services ('OCCPS') for disciplinary hearings. This proposed change could lead to findings of disciplinary misconduct against police officers involved in excessive use of force, and address the issue of objectionable police violence in circumstances where no criminal charges were laid. A proposed amendment to the *Police Services Act* may be found at Appendix 'A'.

The Problem with Police Trials

In the last decade, the SIU has been the investigative agency leading to charges and prosecutions of police officers before juries based upon allegations in such incidents as:

- A Nepean police officer shooting a middle aged unarmed man sitting in a chair during the execution of a drug search warrant of a Rastafarian house;⁷
- A Chatham officer strangling a man in front of his two children after the officer chased the victim into his home;⁸
- Four Toronto officers carrying a man suffering from cocaine toxicity into a downtown police station, with one of them holding a night stick under the deceased's throat, arguably causing his death;⁹

⁷ P.C. John Monette of the Ottawa Police Service was tried for manslaughter in 1994, and acquitted by a jury.

- And, more recently, the assault by four Toronto police officers of a mentally disordered man, who subsequently died.¹⁰

In every one of these cases, the accused police officers successfully relied upon the defence of self-defence. In at least two of these cases, the defence called evidence of the deceased's propensity for violence, unknown to the accused, permitting an attack on the character of the deceased.¹¹ The well-funded defence counsel¹² only had to raise a reasonable doubt that their clients were threatened with imminent serious harm if they did not respond with lethal force against their assailants. Once the defence of self-defence had an air of reality to it,¹³ the trial judge was obliged to instruct the jury that the accused officer did not have to weigh the niceties of his response, and could rely upon an honestly held mistake of fact.¹⁴ When the juries compare the good character of the accused officers¹⁵ with the often disreputable character of the deceased (and sometimes eye-witnesses to the event), they are willing to find a generous reasonable doubt in assessing the elusive line between justifiable and excessive use of force.

⁸ P.C. Ronald Tricker, *supra*, fn 2.

⁹ P.C. Paul van Seters of the Toronto Police Service was acquitted by a jury of criminal negligence causing death in 1996.

¹⁰ The *Vass* case, *supra*, fn 1.

¹¹ *R. v. Scopelliti* (1981), 63 C.C.C. (2d) 481 (Ont. C.A.).

¹² Collective bargaining agreements between police associations and their employers include clauses indemnifying police officers for their legal costs upon acquittal: S. 50 of the *P.S.A.* See also: *Report of an Inquiry into Nepean Police*, O.C.C.P.S., July 19th, 1994.

¹³ *R. v. Cinous* (2002), 162 C.C.C. (3d) 129 (S.C.C.).

¹⁴ *R. v. Baxter* (1975), 27 C.C.C. (2d) 96 (Ont. C.A.).

¹⁵ Ss. 43(1)(d) of the *P.S.A.* See also *R. v. Finlayson*, [1996] O.J. 1423 at para 9.

While it is impossible to question jury members in Canada for their reasons acquitting police officers,¹⁶ an American study suggests that the average citizen, at least in New York City in 1966, cared more about crime control than control of police abuse. In an analysis of voting patterns conducted in that city after a 1966 referendum abolishing the newly formed Civilian Complaint Review Board by an overwhelming 2-1 margin, the researchers found that eighty percent of those voting against the board agreed with this statement: “unfairness and brutality may have to be tolerated if the welfare of the community is at stake”.¹⁷ In other words, if the results of this study can be extrapolated to the average Canadian jury panel, they too will be predisposed to acquit if the competing interests are characterized as crime control versus police misconduct.

The Mandate of the Special Investigations Unit & Some Numbers

The mandate of the SIU is found in Part VII of the *Police Services Act*, and its director’s role is defined as:

The director may cause investigations to be conducted into circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers.¹⁸

In practice, the director investigates *any* case where the actions of police officers caused serious injuries or death, even when it is fairly obvious that no criminal liability will attach. As the chart below indicates, investigations include motor

¹⁶ S. 649 of the *Code*

¹⁷ Samuel Walker, *Police Accountability, The Role of Civilian Oversight* (Toronto: Nelson Thomson Learning, 2001), at pp. 30-31.

¹⁸ Ss. 113(5) of the *P.S.A.*

vehicle injuries, deaths in custody, and allegations of sexual assault,¹⁹ as well as those involving excessive use of force.

After the investigation, pursuant to ss. 113(7) of the *P.S.A.* the director *shall* cause an information to be laid against a police officer if he has reasonable grounds to believe that a criminal offence has been committed. The only statutory option available, then, for a director who finds police misconduct causing serious injury or death, is to characterize it as criminal misconduct and lay a criminal charge. Further, the current wording of the section gives the director no choice but to lay a charge once he has reasonable and probable grounds to do so. This lack of discretion is anomalous in the criminal justice process in the sense that police officers, when deciding to lay a charge, exercise a discretion independent of both their superior officers and Crown counsel.²⁰ There is also no mention in Part VII of whether it would be in the public interest to lay a criminal charge against a suspect officer, an issue to be more fully discussed later.

The director is required to report the results of investigations to the Attorney General under ss. 113(8) of the *P.S.A.*, in which he may comment that a subject officer's actions, although not criminal, were likely misconduct. However, these reports have not been made available to the public, notwithstanding a

¹⁹ The inclusion of sexual assault investigations conforms to the Supreme Court of Canada decision in *R. v. McCraw* (1994), 66 C.C.C. (3d) 517 (S.C.C.).

²⁰ Michael Code 'Crown Counsel's Responsibilities When Advising the Police at the Pre-charge Stage' (1998), 40 *Crim.L.Q.* 326, at pp. 334-337.

recommendation to that end by The Honourable George Adams in both his initial study on SIU reforms and follow-up review.²¹ As a result, it is impossible to assess whether the director's observations to the Attorney General provide an effective form of oversight.

Since 2001, the SIU has produced an annual report, with the following digest of occurrence reports by fiscal year April 1st to March 31st, dating back to its inception in October 1990:²²

²¹ *Adams Report*, at pp. 77-82 and *Adams Review Report*, at pp. 59-60.

²² *Special Investigations Unit, Annual Report, 2000-2001* (Toronto: Queen Printer, 2001), at p. 16.

Chart No. 1

SIU Occurrence Chart - October 1990 to March 31st, 2001 (By Fiscal Year)*

Type of Occurrences	1990 to 1991	1991 to 1992	1992 to 1993	1993 to 1994	1994 to 1995	1995 to 1996	1996 to 1997	1997 to 1998	1998 to 1999	1999 to 2000	2000 to 2001	TOTAL
Firearm Deaths	2	8	6	2	2	4	9	4	1	3	5	46
Firearm Injuries	4	13	12	14	11	16	12	19	9	8	8	117
Custody Deaths	2	7	15	12	14	24	24	12	18	21	18	167
Custody Injuries	1	12	32	84	93	54	42	52	65	60	85	580
Other Injuries/Deaths	-	-	-	-	-	-	-	-	-	1	2	3
Vehicle Deaths	2	5	3	12	11	6	8	5	12	10	8	82
Vehicle Injuries	11	23	16	86	80	55	57	56	64	43	36	527
Sexual Assaults	-	0	11	9	11	9	8	9	11	10	15	93
Totals	22	68	95	219	222	168	160	148	180	156	177	1,615
# of cases in which charges laid	1	14	8	1	3	4	3	2	3 (6)***	6 (6)	5 (9)	

*Fiscal Year – April 1 to March 31

**Reporting for 1990-91 began October 1990

***Number of Officers charges is noted in brackets

The above *Occurrence Chart* contains all of the charges laid over a ten-year period, and indicates that 1,615 occurrences have been investigated within that time frame. These investigations have led to fifty criminal charges being laid against fifty-seven officers. If we compare the number of occurrences (1,615) to the number of charges laid (50), we learn that charges were laid in approximately 3% of all investigated cases.

What is not indicated on the above *Occurrence Chart* is the outcome of the charges. *Chart #2* below attempts to track the outcome of those fifty charges laid between the inception of the SIU in October 1990 and March 31st, 2001.

First, a disclaimer about the data. There are no central records tracking the outcome of SIU laid charges since the Unit's inception. The Justice Prosecutions branch of the Ontario Ministry of the Attorney General's Crown Law Office-Criminal prosecutes these charges, but this protocol was not always followed in the early days of the SIU. However, by reviewing SIU records, *Quicklaw* searches, and newspaper reports, as well as engaging in discussions with former investigators and prosecutors, the following data have been collected. When there are discrepancies between the number of charges laid per year in the two *Charts*, they may be explained by the use of a staggered fiscal year in *Chart #1* and a calendar year in *Chart #2*.

Finally, these statistics do not express the total number of charges against police officers in the province during this period; more were laid as a result of Professional Standards and Internal Affairs investigations relating to both on and off duty misconduct. There were also charges laid by private citizens after a *pre-enquete* before a Justice of the Peace.²³ These charges are also not included in the following chart.

²³ Ss. 507.1 of the *Code*. This subsection is a recent amendment, giving the Attorney General standing at the *pre-enquete* initiated as a result of a private information: S.C. 2002, c.13, s.22

Chart No. 2: Disposition of SIU Laid Charges between Oct 1990 & March 31st, 2001

Year/Service	Name	Charges	Jury?	Disposition
1990- Toronto	Costabile	Dangerous Driving	No Trial	Withdrawn
1991-Toronto	Bennett	Impaired Causing Death	Yes	Guilty
1991-York	Baggat	Assault Causing B.H.	No	Acquitted
1991-Toronto	Stinson	Dangerous Causing B.H.	No	Guilty of careless
1991-Sarnia	Levert	Discharge firearm w. intent	Yes	Guilty
1991-Deseronto	Howell	Assault Causing B.H.	No	Acquitted
1991- First Nations Mattawa	Bussierers	Assault Causing B.H.	No Trial	Withdrawn
1991- Toronto	Moore	Criminal Negligence Causing B.H.	Yes	Acquitted
1991- Nepean	Monette	Manslaughter	Yes	Acquitted
1991- Toronto	Sokolowski	Careless use of Firearm	No	Guilty
1991- OPP Kingston	?	Motor Vehicle Offence	?	Guilty
1991- Toronto	Van Seters	Criminal Negligence Causing Death	Yes	Acquitted
1991- Toronto	Lines	Criminal Negligence Causing B.H.	Yes	Acquitted
1991- Toronto	Robertson	Dangerous Causing B.H.	?	Guilty of careless
1992- London	Blackwell	Dangerous Causing Death	No	Guilty
1992- Chatham	Tricker	Manslaughter	Yes	Acquitted after retrial
1992-OPP Madoc	Bonter	Assault Causing B.H.	No	Acquitted
1992- OPP Orillia	McFadden	Assault Causing B.H.	No	Withdrawn
1992- Niagara	Mattison	ABH, b & e, point firearm	No Trial	Withdrawn
1992- Toronto	Kane	Sexual Assault	No	Acquitted
1992- Timmins	Harris	Assault Causing B.H.	No Trial	Withdrawn
1992- York	Jones	Careless Driving	No	Acquitted
1992- Niagara	Duncan	Dangerous Driving	No	Acquitted
1993- Windsor	Ducharme	Careless use of Firearm	No Trial	Withdrawn
1993- OPP Pickle Lake	Jonasson	Careless Driving	No	Acquitted
1994- London	Gateman	Sexual assault	No	Acquitted
1994- Kenora	Curtis & Hudson	Fail to provide necessities	No	Acquitted
1994- OPP Nepean	Loranger	Impaired/Fail to remain	No	Acquitted
1995- OPP TRU	Deane	Criminal Negligence Causing Death	No	Guilty
1995- Halton	Gibson	Careless use of firearm	No Trial	Withdrawn
1996- OPP Napanee	Bothwell	Assault w/weapon	No	Acquitted
1996- Peel	McGarry et al	Aggravated Assault	No Trial	Discharged at prelim
1996- York	Wiche	Manslaughter	No Trial	Discharged at prelim
1997- Kingston	Heyman	Criminal Negligence Causing Death	No	Acquitted
1997- Toronto	Licop	Assault w/weapon	No Trial	Withdrawn
1997- London	Coon	Careless use of firearm	No Trial	Withdrawn
1997- Toronto	Shank	Manslaughter	Yes	Acquitted
1998- Toronto	Heilimo/Kane	Dangerous Causing Death	Yes	Acquitted
1998- Durham/York	Hoskins et al	Murder, assault	Yes	Acquitted
1999- Thunder Bay	Baker	Dangerous Driving x 2	No Trial	Discharged at prelim
1999- Pembroke	Gagne	Sexual assault	No	Acquitted
1999- Ottawa	Hrabchak	Assault Causing B.H. x 2	No	Acquitted
1999- Sudbury	Goedhuis	Sexual assault	No Trial	Withdrawn
1999- Toronto	Davis	Sexual assault	Yes	Acquitted
2000- Hamilton	Bishop	Sexual assault	No	Acquitted
2000- Peel	Dhillon	Criminal Negligence Causing B.H.	Yes	Acquitted
2000- Toronto	Lemaitre et al	Manslaughter	Yes	Acquitted
2000- Thunder Bay	Elvish et al	Assault Causing B.H.	No	Withdrawn after appeal
2001- Chatham	Teetzel, Thompson	Assault Causing B.H.	No Trial	Withdrawn
2001- OPP Kanata	Churchill	Criminal Negligence Causing B.H.	No	Acquitted

As an overview, the figures reveal that eight convictions²⁴ have been registered from the fifty charges laid by the Unit, creating a charge/conviction rate of 16%. As best as can be determined, ten of the charges were decided by way of jury, with two resulting in findings of guilt. Those two trials involved, first, Toronto Detective Leonard Bennett, who was convicted of impaired driving causing death after his unmarked cruiser crashed into a cement abutment in 1991, causing the death of his partner. The other jury guilty verdict was against Sarnia Police Constable Stanley Levert for shooting at and grazing the arm of an intruder committing a break and enter at a gas station, also in 1991.

For the purposes of this discussion, I would like to focus on the excessive use of force cases. The following chart therefore includes charges where intentional force was used, and excludes driving related cases, sexual assaults and careless use of a firearm charges. Accordingly, if we tease out solely the excessive use of force cases from *Chart #2*, the following chart emerges:

²⁴ Convictions and findings of guilt are used interchangeably.

Chart No. 3

Disposition of SIU Laid Excessive Use of Force Dispositions 1991-2001*

Year/Service	Officer	Charge	Method	Jury?	Disposition
1991-York	Baggat	Assault Causing B.H.	assault	No	Acquitted
1991- Deseronto	Howell	Assault Causing B.H.	assault	No	Acquitted
1991-Sarnia	Levert	Assault w/weapon	shooting	Yes	Guilty
1991-Toronto	Moore	Criminal Neg CBH	shooting	Yes	Acquitted
1991-Nepean	Monette [Gardiner]	Manslaughter	shooting	Yes	Acquitted
1991-Toronto	Van Seters [Allen]	Criminal Neg CD	strangulation	Yes	Acquitted
1991-Toronto	Lines	Criminal Neg CBH	shooting	Yes	Acquitted
1992- Chatham	Tricker [Rioux]	Manslaughter	strangulation	Yes	Acquitted
1992- OPP Madoc	Bonter	Assault Causing B.H.	breaking arm	No	Acquitted
1992- Niagara	Mattison	Assault Causing B.H.	assault	No Trial	Withdrawn
1992- Timmins	Harris	Assault Causing B.H.	pepper spray	No Trial	Withdrawn
1995- OPP TRU	Deane [George]	Criminal Neg CD	shooting	No	Guilty
1996- OPP Napanee	Bothwell	Assault w/weapon	shooting	No	Acquitted
1996- Peel	McGarry et al	Aggravated Assault	shooting	No Trial	Discharged at prelim
1996- York	Wiche [Suleman]	Manslaughter	shooting	No Trial	Discharged at prelim
1997- Toronto	Licop	Assault w/weapon	shooting	No Trial	Withdrawn
1997- Toronto	Shank [Dawson]	Manslaughter	shooting	Yes	Acquitted
1998- Durham/York	Hoskins et al [Romagnuolo]	murder, assault	shooting	Yes	Acquitted
1999- Ottawa	Hrabchak	Assault Causing B.H.	assault	No	Acquitted
2000- Toronto	Lemaitre et al [Vass]	Manslaughter	assault	Yes	Acquitted
2000- Thunder Bay	Elvish et al	Assault Causing B.H.	assault	No Second Trial	Withdrawn after appeal
2001- Chatham	Teetzel, Thompson	Assault Causing B.H.	assault	No Trial	Withdrawn

*If the victim died during the incident, his name is placed in square brackets after the name of the accused officer.

The figures indicate that of twenty-two excessive use of force charges laid by the SIU, only two led to convictions, creating a charge/conviction rate of approximately 9%. In other words, there is a less than a one in ten chance of a police officer being found guilty of an excessive use of force charge laid by the director of the SIU. Furthermore, by correlating the seven homicide charges in the excessive use of force category heard by a jury, we find that none led to a conviction.

The only excessive use of force jury trial leading to a conviction upheld on appeal was the aforementioned *Lever* case.²⁵ It is anomalous in the context of jury trials against police officers, both because a jury convicted an officer of on-duty misconduct, and because, as discussed in the appellate decision, the accused officer relied upon the defence of accident instead of the usual one of self-defence. The only other conviction on the list, albeit in a non-jury context, involved the judge alone finding of guilt for criminal negligence causing death against OPP TRU Team member Kenneth Deane for the shooting of First Nations protestor Dudley George in September 1995 at Ipperwash Provincial Park.²⁶

²⁵ *Supra*, fn 4.

²⁶ *Supra*, fn 4.

Comparison of Police Conviction Rates with General Rates

It is instructive to compare the charge/conviction rate of SIU laid charges against police officers with the conviction rate for the general population of the province. Using Statistics Canada figures from 2002²⁷, we find that 188,496 *Criminal Code* cases were lodged in Ontario adult criminal courts; of those, 103,340 led to a finding of guilt, creating a charge/conviction rate of 55%. The remaining cases were either withdrawn or stayed (approximately 42%), led to acquittals (0.5%), or fell into a category entitled 'other' which included findings of not criminally responsible, special pleas and charges waived in and out of the province (2.3%).

Similarly, the ratio for crimes of violence (roughly analogous to excessive use of force offences) for the same year was 61,792 charges laid and 30,137 guilty findings, creating a charge/conviction rate of 49%. If we round out the charge/conviction rate for crimes of violence in the adult Ontario population to 50%, and compare it to SIU laid excessive use of force charges, we may conclude that the likelihood of a member of the public being found guilty after being charged with a crime of violence is over five times greater than a police officer charged with a similar offence.

Is This Disparate Charge/Conviction Rate a Problem?

Two fundamentally different perspectives characterize the disparity between these charge/conviction rates. From the perspective of police officers, the charge/conviction rate of 9% simply proves that the Unit improperly charges too many officers with criminal offences.

From the perspective of community groups interested in greater police accountability, the number of acquittals is merely *indicia* that the criminal justice system protects its own from undesirable verdicts, and a truly fair system would produce a charge/conviction rate against police officers approaching that of the general public. Their position that the criminal justice system produces unfair results is particularly highlighted when a police officer is charged with a homicide related offence and the deceased is a member of a visible minority.²⁸

The writer is of the view that the low percentage of convictions is a problem for a number of reasons, one that is exacerbated when reference is made to the high number of jury acquittals for on-duty homicide charges against police officers. First, the laying of these charges creates expectations among community groups, family members and supporters of victims that the criminal justice process will result in a fair trial leading minimally to a probability of a conviction. We can now predict that the chance of a conviction is in the range of 9%, and probably lower

²⁷ Statistics Canada – Cases in Ontario Adult Criminal court, 2002; <http://www.statscan.ca/english/Pgdb/legal/19g.htm>. Also refer to Statistics Canada- Catalogue no. 85-002, vol. 22, No.2 for a discussion of adult criminal court statistics, 2000-01.

²⁸ See ch. 11 'Systemic Responses to Police Shootings', *Report on Systemic Racism*, *supra*, fn 3.

in a jury trial. Second, it is an ineffective use of state resources to investigate, charge and prosecute cases in which the high probability is an outcome of acquittal.²⁹ Third, while an objective observer may be able to predict an acquittal, from the perspective of the accused police officer, his family and supporters, this result is by no means assured, and the ensuing period between charge and verdict creates an environment of enormous personal stress. The reality is that the criminal justice system is failing both the police *and* the general community when so many SIU laid charges lead to acquittals, failing the public by creating expectations that are not met, and failing police officers charged with a criminal offence when the acquittal rate is so high.

But the proposed solutions to the issue of low conviction rates are as radical as the perceptions of the problem. On the one hand, the police community would say that the obvious solution is to lay fewer or no criminal charges against officers for on-duty misconduct. The police associations have never been shy to denounce charges laid by the SIU, and have always taken the view that the ensuing acquittals strongly support their position that charges should have never been laid in the first place. As a result, they have attacked the competence of its directors and the Unit itself.³⁰

²⁹ The Unit's annual budget in 2002-03 was slightly over \$5.2 million: *SIU Annual Report*, at p. 24.

³⁰ *Adams Review Report*, p. 28. See also *PAO, Issue No. 06*, Winter 1998, 'The SIU- Another Perspective' at p. 10

Further evidence of the police association's view of the SIU may be found in the civil lawsuit launched by York Detective Wiche against the Unit for negligent investigation, after he was discharged at the end of his preliminary inquiry on a charge of manslaughter for the 1996 shooting death of Faraz Suleman. His position that the Unit was incompetent was rejected by the trial judge with the following strong words:

Evidence given by Wiche and other police witnesses at trial that they believed the SIU to be incompetent and incapable of carrying out a fair investigation must be given little weight. The witnesses failed to cite any examples of negligent or incompetent behaviour on the part of the SIU or any basis on which their opinions were formed. There appeared to be on the part of certain witnesses and certain police associations an almost Pavlovian reaction against a civilian agency investigating the conduct of police officers in carrying out their duties and against the idea that such an agency could conduct an investigation which could be fair to police officers. This is particularly surprising when the statistics given in evidence establish that in about 97% of the cases, the investigation exonerates the subject officer. [emphasis added]³¹

On the other hand, those arguing for more police accountability express dissatisfaction with the number of acquittals by looking at methods to increase the number of convictions. Community groups have successfully advocated for additional financial resources for the Unit. As a result, the SIU budget has been increased from slightly less than \$2.2 million in fiscal year 1997-98 to just over \$5.2 million in FY 2002-03. During 2000 and 2001, thirty-three new investigators joined the Unit.³²

³¹ [2001] O.J. 1850 (S.C.J.), at para 61; affirmed [2003] O.J. 221 (C.A.)

³² 'Adams Report', at p. 39; *Adams Review Report*, at pp. 23-24.

The same community groups have argued that these cases should be prosecuted by outside senior counsel, as apparently is the approach in Manitoba. They are of the view that prosecutors with more ‘fire in their bellies’ might lead to more desirable results, i.e. more convictions.³³ With respect to the trials themselves, Professor Glasbeek, in a background paper to the *Report on Systemic Racism*, took the position that a possible way of redressing the number of acquittals in police shooting cases would be to change the rules of evidence, such that the character of the victims could not be so easily attacked, and to ensure that more representative juries hear these kinds of cases.³⁴

With respect to these criticisms and suggested remedies by community groups, the following comments may be made. Whether more resources will lead to more convictions remains to be seen. However, based upon the judicial comments in *Wiche*, evidence of past incompetence is non-existent. Ironically, if we return to the figures in *Chart #2*, the Unit’s few convictions are related to charges laid nearer its inception when its budget was relatively low. Further, there is no empirical evidence to support the assertion that outside counsel could more effectively prosecute these cases than salaried prosecutors. Also, the notion that police officers on trial should have less *Charter* and evidentiary protections than the average citizen seems both politically unfeasible and constitutionally suspect.

³³ *Adams Report*, p. 39; *Adams Review Report*, pp. 69-71.

³⁴ *A Report on Attorney General’s Files, Prosecutions and Coroner’s Inquests Arising Out of Police Shootings* (1993), at p. 24; Background Paper to *Report on Systemic Racism*, *supra*, fn 3.

In fact, the future for convictions related to serious charges laid by the SIU is likely to be even bleaker than the past. All homicide offences and aggravated assault charges are straight indictable offences, permitting defence counsel to elect trial by judge and jury. Since the *Deane* case was tried in 1997, defence counsel elected trial by judge and jury in the next three SIU homicide related trials, with those juries acquitting in every case.³⁵

Finally, regarding the community's expectations in police prosecutions, even if a police officer were convicted of an on-duty excessive use of force offence, the likelihood of incarceration since the amendments to the *Criminal Code* permitting conditional sentences is remote.³⁶ As the Supreme Court of Canada made clear in *R. v. Proulx* and *R. v. S (R.N.)*,³⁷ conditional sentences address both punitive and rehabilitative objectives of sentencing, and should generally be imposed if the statutory preconditions of a reformatory length sentence and the offender not representing a danger to the community are met. Because police officers, by the very nature of their position, do not represent a danger to the safety of the community and are invariably first offenders, they are prime candidates for conditional sentences, even if convicted of serious offences (barring ones with statutory minimums).

³⁵ Those cases are *Shank, Hoskins et al, and Le Maitre et al*. A jury also acquitted Niagara Regional Police Constable Kenneth Davidson of the SIU laid charge of dangerous driving causing death on March 18th, 2004.

³⁶ S.C. 1995 c. 22, s. 6.

³⁷ (2000), 140 C.C.C. (3d) 449 & (2000), 140 C.C.C. (3d) 553.

The only SIU example of a sentencing in this context conducted in the post conditional sentence era is *Deane* in which the trial judge sentenced the offender to a conditional sentence of two years less a day, including 180 hours of community service, a sentence upheld on appeal.³⁸ The reaction by the relatives and supporters of the victims to a non-custodial sentence was one of disbelief and anger.³⁹ Accordingly, even in those rare cases where a police officer is convicted of an on-duty excessive use of force offence, the relatively light sentences will underscore the community's view that the offenders have received preferential treatment.

A Proposed Solution

Two American professors, James Fyfe and Jerome Skolnick, in a treatise entitled *Above the Law: Police and Excessive Use of Force*, concluded that the American criminal justice system was simply ineffective in providing accountability for the misuse of force by police officers.⁴⁰ The authors reviewed the *Rodney King* incident and trial in detail, and used it as springboard to discuss the American experience with excessive use of force by the police. They argue that the acquittals in the face of seemingly incontrovertible videotape evidence of police brutality were the result of the jury pool being drawn from Simi Valley, a predominantly white and middle-class suburb. When those jurors viewed the videotape shot by George Holliday of a large black man down on his hands and

³⁸ *Supra*, fn 4 (Ont. C.A.) at p. 128. See also 35 W.C.B. (2d) 498.

³⁹ Peter Edwards, *One Dead Indian: The Premier, The Police and the Ipperwash Crisis* (Toronto: McLelland & Stewart, 2002), at pp. 215-216.

⁴⁰ (Toronto: Free Press, 1993), at pp. 195-198.

knees, impaled with wires from a Taser gun struck fifty-six times by two Los Angeles police officers wielding two foot metal truncheons and being stomped on by a third officer while ten officers watched, they believed the police testimony that King's behaviour controlled the officers' response. The jurors:

...did not perceive police brutality in the videotaped beating. Over zealotness perhaps, but not brutality.... The jury understood that the defendants were cops, and that Rodney King, the ex-con was a criminal. They voted accordingly.⁴¹

The authors referred to another notorious jury acquittal of five Dade County Florida police officers indicted for manslaughter in the beating death of a black man named Arthur McDuffie after a high speed chase in 1979 and wrote:

As the King and McDuffie verdicts suggest, use of the criminal justice process *against* police officers who respond with violence to such calls for action also usually proves an inadequate mechanism for holding them accountable. We should not be surprised at this, and we should not view the criminal law's ineffectiveness in such cases as something that occurs only when *police* misconduct is at issue. However egregious, and whatever other labels are attached to it, the police action caught on the Holliday videotape was first and foremost an abuse of police professional discretion. Our observations of what happens when people in other lines of work cross their occupations' lines of propriety suggest that the criminal justice system and the criminal law are ineffective controls on the discretion of *any* professionals [emphasis added].⁴²

After a discussion of the notable lack of criminal charges against doctors who have caused death and disfigurement, Fyfe and Skolnick distill two principles of police accountability: first, professionals adjudicating disciplinary proceedings are better suited to deal with sinners among their ranks than lay juries through

⁴¹ *Ibid.*, at p. xv.

⁴² *Ibid.*, at p. 195.

criminal trials. Second, justice in occupational crimes is better served by victim's private civil actions than public criminal prosecutions.⁴³

The latter concept, that private civil law suits are better vehicles for police accountability of excessive use of force cases, is a difficult one to transport into the Ontario context, notwithstanding the recent success of indigent plaintiff Thomas Kerr's lawsuit against nine members of the Toronto Police Service for assaulting him in 1996.⁴⁴ The awards in the United States can run into millions of dollars and force operational change in a police service,⁴⁵ whereas civil judgments in Canadian cases may lead to compensation in the range of \$50,000 to \$60,000, too low to have an institutional effect.⁴⁶ Further, the United States' history of permitting compensation for civil rights violations has no direct parallel here.⁴⁷ However, the first point, that disciplinary proceedings can be an effective tool for accountability, is a concept worthy of further inquiry in the context of excessive use of force.

Disciplinary Proceedings under *The Police Service Act*

For Ontario police officers, disciplinary proceedings are a statutorily mandated employer-employee dispute resolution mechanism governed by Part V of the

⁴³ *Ibid.*, at pp. 196, 198.

⁴⁴ 'Homeless Man Wins Battle With Police', *Globe & Mail*, January 25th, 2002, at p. A12.

⁴⁵ For example, New York City paid out \$177 million between 1994 and 2000 in cases involving police misconduct: Walker, *Police Accountability*, at pp. 100-101.

⁴⁶ Comment by Clayton Ruby in *Saving Lives: Alternatives to the Use of Lethal Force by Police* (Toronto: Urban Alliance on Race Relations, 2002), at p. 36. Mr. Ruby, a Toronto lawyer, has acted for families affected by police shootings in the past.

⁴⁷ The difficult issue of civil remedies for alleged *Charter* violations is discussed in *Wiche*, at para. 101-119.

Police Services Act entitled *Complaints*. Under ss. 74(1) of the *Act*, a subject officer may be disciplined for offences prescribed in the scheduled *Code of Conduct*,⁴⁸ which include such topics as discreditable conduct, insubordination, neglect of duty and unnecessary exercise of authority. Disciplinary consequences from a finding of liability range from a reprimand to dismissal.⁴⁹

The first advantage of disciplinary proceedings to adjudicate police misconduct is that the range of misconduct subject to discipline is obviously much broader than *Criminal Code* allegations. The second advantage is that the emphasis of the hearing is a fact-finding process unencumbered by the criminal rules of evidence and due process protection of individual rights.

With respect to the process in which evidence is received in a disciplinary hearing, the rules are governed by ss. 15(1) of the *Statutory Powers Procedure Act*,⁵⁰ which permits admission into evidence of any oral testimony, document or thing relevant to the subject matter, unless it is unduly repetitious. The *Charter* has no application in these proceedings⁵¹ and the standard of proof is based on clear and convincing evidence,⁵² not the *Code* standard of beyond a reasonable doubt. Unlike SIU cases, which are extremely protective of the right against self-

⁴⁸ O.Reg. 123/98 to the *P.S.A.*

⁴⁹ S. 68 of the *P.S.A.*

⁵⁰ R.S.O. 1990, c. 22, as amended ('*S.P.P.A.*'). See also David Paciocco & Lee Stuesser, *The Law of Evidence*, 3rd Ed. (Toronto: Irwin Law Inc., 2002), at p.11.

⁵¹ *R. v. Wigglesworth*, [1987] S.C.R. 541.

⁵² Ss. 64(10) of the *P.S.A.*

incrimination,⁵³ the subject officer's notes and statements are admissible in a disciplinary proceeding.⁵⁴ Further, a disciplinary hearing can look at issues of supervision, and punish managers for failing to supervise those officers involved in disciplinary breaches.⁵⁵ Equally as important, the internal tribunal adjudicators are police professionals who may take judicial notice of many aspects of police protocol.⁵⁶

Notably, there are a number of examples of internal disciplinary decisions in non-SIU matters involving criminal allegations in which the tribunal found liability that either never went to a criminal trial, or went to trial and the accused officer was acquitted, suggesting that the range of liability is much greater in the internal forum. For example, Ontario Provincial Police Constable Favretto was found not guilty of pointing a firearm at a fellow officer contrary to the *Criminal Code* on the basis of non-insane automatism, but was found guilty of discreditable conduct at his internal hearing for the same conduct.⁵⁷ Similarly, OPP Constable Parker was found guilty under the *Police Services Act Code of Conduct* of discreditable conduct for stealing money involved in a drug arrest after a jury acquittal on

⁵³ See s.9 of O.Reg. 673/98, *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit*. See also *Adams Review Report*, at p.54, which discusses a Ministry of the Attorney General directive dated December 23rd, 1998 granting use and derivative use immunity to subject officer's notebook entries. See also the unreported ruling by LeSage J., the trial judge in *Vass*, released October 15th, 2003, denying production of the accused police officers' notes to the prosecutor.

⁵⁴ *Orr and York Regional Police (No. 2)* O.C.C.P.S. 26 March 2001.

⁵⁵ Review of supervision may permit a focus on organizational issues. See Walker, *Police Accountability*, at pp. 4-5.

⁵⁶ See, for example, *Norris v. Loranger* (1998), P.L.R. 493 (Ont. Bd. Inq.), which permitted the Hearing Officer to take into consideration his prior experience as a breathalyzer technician.

⁵⁷ *Favretto v. Ontario Provincial Police*, [2003] O.J. 5052 (Div. Ct.); *R. v. Favretto*, [1997] 5128 (Ont. Ct. (Gen. Div.))

charges of theft, breach of trust and assault.⁵⁸ Finally, Peel Regional Police Constable Armstrong was found guilty of discreditable conduct for having an inappropriate relationship with a teen-aged girl, after a Crown Attorney advised the investigating officer that there was no reasonable prospect of a conviction if the officer were to be charged with a *Criminal Code* sexually related offence.⁵⁹

In all three of the above cases, the subject officers were dismissed from their respective services. The Divisional Court decision in *Favretto* is particularly instructive of the appropriate penalty in circumstances of pointing a firearm. In reinstating the Hearing Officer's decision to dismiss the subject officer, the Divisional Court panel stated that, "there can be a single act committed that is so serious that rehabilitation would not be a controlling factor".⁶⁰ The Court was of the view that some actions go to the fundamental ability of a police officer to carry out their duties, and considered Favretto's act to fall into this category.⁶¹ Accordingly, if a police officer through serious misconduct were to cause injury or death, he may be dismissed, even though he could by all accounts be rehabilitated into a position with his police service.

The biggest complaint from community groups about Part V disciplinary proceedings is that the entire process is controlled internally by the Chief of the affected service. The Chief designates the Hearing Officer, and through the

⁵⁸ *Parker and Ontario Provincial Police*, O.C.C.P.S., January 20th, 2004.

⁵⁹ *Armstrong v. Peel (Regional Municipality) Police Services*, [2003] O.J. 3437 (Div. Ct.).

⁶⁰ *Favretto*, at para 13.

⁶¹ *Ibid.*, para 15.

professional standards branch, controls the investigation.⁶² Further, all public complaints, as opposed to internally generated ones, must also be resolved by the affected police service's internal disciplinary process.⁶³

In contrast, SIU investigations and the ensuing prosecutions are *external* to the affected police service. While this external process may mollify the concerns of community groups, resistance to SIU investigations often emanates, not only from the rank and file, but also from management of the affected police service.⁶⁴ As a result, while management has the power to conduct a parallel investigation,⁶⁵ it does not appear to have the will to pursue the issue of police misconduct after the SIU has invoked its mandate.

The only example known to the writer of a disciplinary proceeding taking place after the acquittal of an SIU laid charge is *Norris v. Loranger*.⁶⁶ Police Constable Loranger was dismissed from the Ontario Provincial Police after he was acquitted of two drinking and driving related criminal charges connected to the death of a young man named Shayne Norris. However, Loranger's disciplinary hearing was

⁶² S. 64 & ss. 76(1) of the *P.S.A.*

⁶³ S. 64 of the *P.S.A.* An aggrieved complainant may request a review of his or her complaint by OCCPS if the affected police service refuses to hold a hearing, but the Commission's powers are limited to directing a hearing before a hearing officer: see s. 72 of the *P.S.A.*

⁶⁴ "If the monitoring influence comes from outside the police, it tends to rouse the opposition of police managers as well as the rank and file..." Paul Chevigny, *Edge of the Knife, Police Violence & Accountability in the Americas* (New York: The New Press, 1995) at p. 267.

⁶⁵ S. 11 of O.Reg 678/98 of the *P.S.A* mandates a parallel investigation by the chief of the affected service leading to a report to the board. These s.11 reports are not available to the public, notwithstanding the fact that this regulation permits their release: *Adams Review Report*, at pp. 57-58.

⁶⁶ *Supra*, fn 56.

initiated by the deceased's father under former Part VI of the *Police Services Act*, which permitted an external Board of Inquiry to hear a public complaint.⁶⁷ It is accordingly unclear whether management of the affected service would have initiated disciplinary proceedings on its own. Even in the rare case of an SIU laid charge leading to a conviction, officers have remained on the job.⁶⁸

However, the *Police Services Act* also permits disciplinary matters to be heard by the Ontario Civilian Commission on Police Services under ss. 25(1)(a) of the *Act*.⁶⁹ OCCPS is an independent quasi-judicial agency, which is ultimately responsible for police services and police services boards in Ontario. Its *Mission Statement* states that it is an agency "committed to serving the public by ensuring that adequate and effective policing services are provided to the community in a fair and accountable manner".⁷⁰

S. 25 of the Act permits a process whereby an adjudicative body external to the affected police service could hear a wide range of evidence and make decisions with significant employment-related consequences to the subject officer.

Hearings of first instance before OCCPS are relatively rare, and usually reserved

⁶⁷ Part VI of the *P.S.A.* was repealed in 1997: S.O. c. 8, s. 35. Under the current regime, public complaints are dealt with under Part V of the *P.S.A.*

⁶⁸ P.C. Levert remained employed by the Sarnia Police Service after being convicted of discharging a firearm with intent to wound and serving a six month sentence: 'Sarnia Police Get Tough', *Sarnia Observer*, September 8, 2000.

⁶⁹ Ss. 25(1)(a) of the *P.S.A.* may be found in Appendix 'A'.

⁷⁰ Annual Report, 2000-2001 *Ontario Civilian Commission on Polices Services* (Toronto: Queens Printer, 2001), at p. 4.

for matters involving police service board members.⁷¹ However, the Commission has developed a unique expertise and insight into police disciplinary matters because its members hear all of the appeals throughout the province from police disciplinary decisions.⁷² Because the standard of proof is lower, the body of admissible evidence broader and the penalty employment related, it is more likely that a Commission panel will find fault for misconduct than a jury in a criminal trial. If the Commission finds misconduct after a hearing conducted under this section, it has the same power as that held by a Hearing Officer to mete out a penalty ranging from reprimand to dismissal.⁷³

A hearing which results in a finding against the subject officer will satisfy many of the traditional aspects of sentencing found in the *Criminal Code*. In the most extreme scenario, a penalty of dismissal will have, not only an obvious specific deterrent effect, but also one of general deterrence on other police officers as well. The hearings are open to the public,⁷⁴ and closely monitored by police association and management representatives. Another articulated objective of the disciplinary process is to assess the damage to the reputation of the affected police service.⁷⁵ Accordingly, inclusion of this consideration allows the tribunal to

⁷¹ For a recent example, please refer to: *In the Matter of an Inquiry into the Conduct & Performance of Duties of Norman Gardiner of the Toronto Police Services Board*, O.C.C.P.S., March 1st, 2004.

⁷² Ss. 22(1)(f) of the *P.S.A.*

⁷³ Ss. 25(4) of the *P.S.A.* Unlike the Chief who may suspend a member under s. 67, the Commission does not have the power to suspend a police officer prior to a hearing.

⁷⁴ S. 9 of the *S.P.P.A.* There are some limited exceptions, such as public security, when the tribunal has the option of holding the hearing *in camera*.

⁷⁵ *Krug and Ottawa Police Service*, O.C.C.P.S. January 21st, 2001, at p. 13.

weigh the public's expectations of police officers' conduct before deciding penalty.⁷⁶

Of course, findings of misconduct by the Commission do not have the same social opprobrium as a conviction under the *Criminal Code*. But as the statistics indicate in *Chart #3*, the criminal justice system so rarely produces convictions in these types of cases, those affected by police misconduct will be better off having their concerns addressed by an administrative tribunal external to the affected police service with unique expertise in policing, with the likelihood that serious police misconduct would lead to dismissal of the subject officer.

Criteria to Refer Matters to OCCPS

As previously discussed, the criteria used for the director's laying of a criminal charge is governed by ss. 113(7) of the *P.S.A.*⁷⁷ Given that 97% of the Unit's investigations over its first ten years have not led to criminal charges, it appears its directors did not over-reach their mandate.⁷⁸ However, the low charge/conviction rate, particularly in excessive use of force cases, suggests that even fewer of these cases should be decided in the criminal justice system. This point is further highlighted by reference to the number of withdrawals and discharges at the end of preliminary inquiries reflected in *Chart #2*: fourteen of the fifty charges laid by the Unit were never tried due to either Crown withdrawal or a judicial discharge at the end of the preliminary inquiry.

⁷⁶ *Bright and Konkle*, (1997), 2 P.L.R. 481 (Ont. Bd. Inq.)

⁷⁷ Please refer to Appendix 'A'.

One option to increase the charge/conviction rate is to, first, give the director the discretion *not* to lay a charge even if he forms the opinion that there are probable grounds to believe a criminal offence has been committed. Second, the discretion not to lay a charge should be linked to the ability to refer cases to the Ontario Civilian Commission on Police Services for disciplinary proceedings if he is of the view that it is in the public interest to do so. This result could be attained by the following amendments to ss. 25(1) and ss. 113(7) of the *Police Services Act*:

Suggested Amendment to ss. 25(1)

The Commission may, at the Solicitor General's request, at the request of the director of the Special Investigations Unit, at a municipal council's request, at a board's request or of its own motion, investigate, inquire into and report on,

- (a) the conduct or the performance of duties of a police officer.....
[amendments unlined]

Suggested Amendment to ss. 113(7)

- (a) If there are reasonable grounds to do so in his or her opinion, the director may cause informations to be laid against police officers in connection with the matters investigated and if laid, shall refer them to the Crown Attorney for prosecution.
- (b) The director may refer the matter to the Commission if he is of the opinion that it is in the public interest to do so, and the Commission shall have the same power to investigate, inquire into and report on the matter as it has under s. 25. [amendments underlined and emphasis added]

To a layperson, the expression, 'the public interest' seems so amorphous as to defy meaning. However, in the criminal justice system involving prosecutors

⁷⁸ *Wiche*, at para 61.

deciding which cases should go to trial, it is a term of art discussed at some length in the Ministry of the Attorney General Criminal Law Division's *Charge Screening Practice Memorandum*.⁷⁹ Because most SIU directors have been prosecutors, they are familiar with the charge screening concept which includes determining, first, whether there is a reasonable prospect of a conviction, and, second, whether it is in the public interest to continue the prosecution.

Once a charge has satisfied the reasonable prospect of a conviction test, the reviewing Crown Attorney under the *Charge Screening Memorandum* must consider whether or not it is in the public interest to continue the prosecution. One of the criteria is "the availability and efficiency of any alternatives to prosecution such as diversion, civil remedies, or alternative measures".⁸⁰ To fit this concept into the context of the role of the SIU director, he could refer the matter to a disciplinary hearing before OCCPS as an alternative to the laying of a criminal charge, if he is of the view that it is in the public interest to do so.

When would a director refer a case to the Commission? While it is impossible to anticipate all of the factual circumstances presented to a director after an investigation, it would be my suggestion that his discretion in referring cases be informed by the reality that too many SIU laid charges lead to acquittals, and be guided by some of the following considerations:

⁷⁹ PM [2002] No. 5.

⁸⁰ *Charge Screening Memo*, at p. 6.

- Bad judgement as opposed to moral turpitude associated with the misconduct;⁸¹
- Evidence of misconduct, but weak evidence of criminal misconduct;
- Anticipated advantage of a statement from the suspect officer;
- Obvious anticipated defences;
- Anticipated rulings in a criminal trial rendering material evidence inadmissible, which would be admissible in a disciplinary hearing;⁸²
- Seriousness of the injuries, and;
- View of the complainant or family.

Once a case is referred to OCCPS, the director could encourage openness by issuing a statement indicating his reasons for doing so. Further, OCCPS would then have the ability to gather previously unavailable information, such as statements and notes from subject officers.⁸³ As well, it could consider issues involving the policies and practices of the affected police service before deciding the ambit of its hearing.

Conclusion

This article has attempted to review SIU statistics of occurrences and charges laid by the Unit's directors over its first ten years, and track their outcome in the

⁸¹ An extreme example of the latter was documented in the 1994 *Mollen Commission Report* in which a New York City police officer shot a drug courier to take his money: *Commission to Investigate Allegations of Police Corruption and the Anti-corruption Procedures of the Police Department* (New York City, July 7, 1994), at p. 45.

⁸² For example, evidence of a pattern of misconduct may be difficult to admit in a criminal trial. See Schreck, *Handy: Raising the Threshold for the Admission of Similar Fact Evidence* (2002), 1 C.R. (6th) 245. However, it should be admissible at a hearing governed by the S.P.P.A.

⁸³ See Ian D. Scott, *Taking Statements from Police Officers Suspected of Criminal Misconduct: A Proposed Protocol*,

criminal justice system. The figures indicate that, of the 1,615 occurrences investigated over that time frame, fifty criminal charges were laid and, of those, eight led to convictions. Of the fifty charges, twenty-two involved allegations of excessive use of force and only two resulted in convictions. With a charge/conviction rate of approximately nine per cent in excessive use of force cases, I have attempted to demonstrate that the criminal justice system is not an appropriate forum for addressing the issue of police accountability for many of these allegations.

I am suggesting that fewer criminal charges be laid by the Unit's director, and more allegations of police misconduct be adjudicated by the Ontario Civilian Commission on Police Services in a disciplinary, as opposed to a criminal, context. By characterizing the misconduct as a disciplinary issue, it is anticipated that OCCPS would hear all relevant evidence unencumbered by statutory restrictions on information gathering and constitutional issues of admissibility, and arrive at a more factually accurate determination than a case heard in the criminal justice system. If adopted, we increase the probability that disciplinary hearings will more effectively address issues of objectionable police violence than criminal trials which disproportionately lead to acquittals.

Appendix 'A'

Current Wording of ss. 25(1)(a) of the *Police Services Act*

The Commission may, at the Solicitor General's request, at a municipal council's request, at a board's request or of its own motion, investigate, inquire into and report on,

(a) the conduct or the performance of duties of a police officer.....

Suggested Amendment to ss. 25(1)(a) of the *Police Services Act* (changes underlined)

The Commission may, at the Solicitor General's request, at the request of the director of the Special Investigations Unit, at a municipal council's request, at a board's request or of its own motion, investigate, inquire into and report on,

(a) the conduct or the performance of duties of a police officer.....

Current Wording of ss. 113(7) of the *Police Services Act*

If there are reasonable grounds to do so in his or her opinion, the director shall cause informations to be laid against police officers in connection with the matters investigated and shall refer them to the Crown Attorney for prosecution.

Suggested Amendment to ss. 113(7) of the *Police Services Act* (changes underlined)

- (a) If there are reasonable grounds to do so in his or her opinion, the director may cause informations to be laid against police officers in connection with the matters investigated and if laid, shall refer them to the Crown Attorney for prosecution.
- (b) The director may refer the matter to the Commission if he is of the opinion that it is in the public interest to do so, and the Commission shall have the same power to investigate, inquire into and report on the matter as it has under s. 25.