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Royal Canadian Mounted Police External Review Committee

Off-Duty Conduct



Off-Duty Conduct

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The Committee publishes a series of discussion papers to elicit public comment to assist the Committee in the formulation of recommendations pursuant to the *Royal Canadian Mounted Police Act* (1986). The views expressed in this paper are not necessarily the views of the Committee.

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**Royal Canadian Mounted Police
External Review Committee**

Discussion Paper Series

Number 7: Off-Duty Conduct

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Disciplinary Dismissal - A Police Perspective

FOREWORD

This discussion paper is the seventh in a series produced by the Research Directorate of the RCMP External Review Committee.

It could not have been written without the cooperation and assistance of many people in the police community across the country. The Committee would like to extend its sincere appreciation to all those who have helped, particularly those who met with the consultant and provided valuable information to assist him in the preparation of this report.

Simon Coakeley
Executive Director
RCMP External Review Committee

OFF-DUTY CONDUCT

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"I will keep my private life unsullied as an example to all."

from a "Law Enforcement Code of Ethics"

INTRODUCTION

It is only in relatively modern times, and even now only in certain societies, that the private and work lives of individuals have come to be regarded as so separate and distinct.¹ Cultural traditions, as much as factors such as urbanization and industrialization, seem to play a key role in determining the extent of separation between a person's work life and his or her home life. In his well-known study of public policing in Japan, for instance, Bayley argued that one of the reasons for the enviable record of the Japanese police with respect to the propriety of their conduct is the extent to which the work group "dominates personal life"² in that country.

In North America, at least during the 20th century, our traditions have been very different. Influenced by the ideas of classical liberalism, in which individualism and privacy are celebrated, North American employees are likely to think that what they do during their off-duty hours is not their employer's business. To paraphrase the oft-quoted words of one arbitrator, the employer is not the custodian of the employee's character.³

Despite this attitude, it has long been recognized in labour relations law that some off-duty conduct of an employee may have sufficient negative implications for the employer that the latter is entitled to take steps to prevent it, or to respond to it with disciplinary or other measures should it occur. A great deal of attention has been devoted to trying to delineate with greater precision the extent of this right of employers to try to influence and react to off-duty employee conduct.⁴ Arbitrators, judges, legislators, and more recently management consultants and health professionals have become involved. This paper reviews the broad principles of management and discipline which have evolved in this area in recent years.

There has been a recognition, too, that employment in public services may carry with it greater responsibilities for employees with respect to the propriety of their off-duty conduct than is the case with most purely private employees. Indeed, recent public interest in the private lives of those who hold, or aspire to, public offices, suggests that these expectations of those in public life are not limited to employees, as that term has traditionally been understood.

On the other hand, with the growth of modern concerns about the social responsibility and business ethics of even private corporations, the argument that public employees should be held to higher standards of conduct than private employees may be weakening. The enormous harm that may be caused to the environment, public health and public safety by incompetent, corrupt or unprofessional employees in some occupations has been recognized. Because of this, there appears to be a growing willingness to entertain monitoring or screening of off-duty conduct which might have a negative impact on an employee's performance on the job. The current debate over random testing of employees and prospective employees for illegal drug use is but the most obvious and controversial manifestation of this trend.

Because of its unique association with public safety and the integrity of the law and legal

system, the public police officer's job has always been regarded as involving special responsibilities in this respect. The special powers which are accorded to police to interfere with the liberty of citizens are also seen as requiring that police officers maintain an unusually high standard of personal conduct. From the very beginnings of the modern public police force, officers were urged

[t]o recognize always that the power of the police to fulfil their functions and duties is dependent on public approval of their existence, actions and behavior, and on their ability to secure and maintain public respect.⁵

The special responsibilities of police officers in this regard were explicitly recognized by Mr. Justice Rand of the Supreme Court of Canada in *R. and Archer v. White* in which, referring to a member of the RCMP, he said:

...the member, by joining the Force, has agreed to enter into a body of special relations, to accept certain duties and responsibilities, to submit to certain restrictions upon his freedom of action and conduct and to certain coercive and punitive measures prescribed for enforcing fulfilment of what he has undertaken. These terms are essential elements of a status voluntarily entered into which affect what, by the general law, are civil rights, that is, action and behaviour which is not forbidden him as a citizens.⁶

To what extent this characterization of police discipline codes and procedures, penned 35 years ago, is still applicable in the current era is open to question. Today, employment discipline is generally regarded as intended to be remedial rather than "coercive and punitive",⁷ and all such regulations must be measured against standards of civil rights enunciated in the *Canadian Charter of Rights and Freedoms*⁸. The general principle which it reflects, however -- that police officers can legitimately be held to higher standards of private as well as public conduct than those demanded of the citizenry at large -- seems to be just as well accepted today as it has been at any time in the past.⁹ The debate now, as always, is over how much higher those standards may legitimately be, and in what respects (and with respect to what conduct) they may legitimately differ from standards demanded of ordinary citizens and other employees.

SCOPE

This discussion paper explores one largely neglected aspect of this general responsibility of police officers. The main objectives of the paper are:

- (1) to identify the broad principles which define the extent to which police forces are permitted to regulate the off-duty conduct of their members, and discipline them for breaches of such regulations;

- (2) to identify the general areas of conduct which have been the object of such attempts at regulation and discipline;
- (3) to identify changes which have been occurring in both these areas in recent years, and the extent to which trends are discernible;
- (4) to compare, in a general way, the situation of police officers in this regard with that of other public and private sector employees; and
- (5) to consider what reforms are being suggested in this area, and the reasons why such reforms are needed.

The paper is not concerned, other than peripherally, with issues concerning disciplinary processes, such as procedure, competing forums, concepts of double jeopardy, standards and burden of proof, etc. This is because these issues are rarely unique to the handling of off-duty, as opposed to on-duty, infractions, and are in any event the subject of other papers which have been commissioned by the RCMP External Review Committee. For similar reasons, there shall not be substantial attention given to the issue of what sanctions are being meted out, or considered appropriate, for off-duty disciplinary infractions. While occasional reference is made to decisions from other countries, the focus of this paper is on the situation in Canada.

METHODOLOGY

The bulk of the work undertaken in preparing this discussion paper consisted of conventional library and legal research, but focusing necessarily as much, if not more, on "arbitral jurisprudence" as on decisions of the "regular courts". In addition, however, approaches were made to officials associated with a dozen large police departments in Vancouver, Edmonton, Winnipeg, Toronto, Ottawa, Montreal, Halifax and Dartmouth, seeking more detailed information about relevant legislative and regulatory provisions, force policies and practices, and individual cases in which off-duty conduct had been the subject of decisions and rulings. Almost 40 interviews were held with officials in the following categories:

- (1) police managers (especially heads of internal affairs units);
- (2) police association and union representatives;
- (3) provincial police commission representatives;
- (4) persons involved in police training;
- (5) representatives of provincial Solicitor General's Departments;
- (6) representatives of public complaint and disciplinary review bodies;

- (7) municipal, provincial and federal government officials (especially lawyers and others concerned with conditions of public service employment and the administration of human rights legislation);
- (8) academics and others with expertise in employment and labour relations law.

From these interviews, much was learned about the policies and practices, not only of the police forces represented but also of other police forces in Canada. Time and other constraints precluded surveying a statistically representative sample. The object was to discover, as best we could within these constraints, what is the current range of attitudes, policies and practices with respect to the control and regulation of off-duty conduct of police and other public sector and private sector employees in Canada at present.

We are grateful to all those who assisted with our research in this way. Unfortunately, protection of the confidentiality of some of the information provided to us, as well as the privacy of officers involved in some of the cases we reviewed, precludes us not only from identifying publicly those who did assist us, but also from citing, as freely as we would have wished, the sources of much of the information we obtained. We regret that considerations of space have precluded us from referring specifically to much of the vast amount of information which was provided to us by these various sources. It has, however, greatly assisted our analysis.

REGULATION AND CONTROL OF OFF-DUTY EMPLOYEE CONDUCT: SOME GENERAL PRINCIPLES

In general, the extent to which an employer can legitimately seek to regulate the off-duty conduct of employees, and take action in response to breaches of such regulations, depends upon a number of factors. If employees are not unionized, the employer will be governed by the principles of the common law of master and servant (employment and labour relations law) developed by the courts over the years, as well as the provisions of specific statutory enactments which impinge on the employment relationship. With respect to the private sector, statutory provisions are almost never concerned with off-duty employee conduct. Such matters are not infrequently covered, however, by statutory provisions governing public sector employment (such as those in public service acts, municipal acts, election acts (re off-duty political activities, etc.)).

Where employees are unionized, the extent to which, and the circumstances under which, the employer can regulate employee conduct and discipline employees will usually be defined or constrained to a greater or lesser extent by the terms of a collective agreement. Such terms will normally prevail over the more general principles of the common law, because they are treated as the expression of the common will of the employer and the employees in the bargaining unit. They may often be interpreted and applied, however, in light of common law principles, thus allowing the common law to influence negotiated terms of employment indirectly.

Most often, in unionized situations, the employer's right to regulate off-duty conduct will be governed by a general management rights clause in the collective agreement. In these circumstances, the extent of the employer's right to promulgate and enforce rules concerning the off-duty behaviour of employees will be determined in light of general principles of reasonableness and notice. That is to say, any such rule promulgated by the employer will only be enforceable against employees if it is held to be a reasonable one (i.e. that there is a rational connection between the rule, the conduct which it seeks to regulate and the employer's legitimate interests), and if adequate notice of the rule has been given to employees.¹⁰ If a rule (e.g. a rule prohibiting employees from working for a competitor during off-duty hours) is written into a collective agreement, however, these conditions will be deemed to have been met (since the collective agreement is the product of agreement between the employer and the bargaining unit employees).

Arbitration cases have established some reasonably clear principles by which the reasonableness of an employer's rule concerning the off-duty behaviour of employees can be assessed. The most often cited statement of these principles is that of arbitrator Anderson in *Re Millhaven Fibres*:

...[I]f the discharge is to be sustained on the basis of a justifiable reason arising out of conduct away from the place of work, there is an onus on the Company to show that:-

- (1) the conduct of the grievor harms the Company's reputation or product;
- (2) the grievor's behaviour renders the employee unable to perform his duties satisfactorily;
- (3) the grievor's behaviour leads to refusal, reluctance or inability of the other employees to work with him;
- (4) the grievor has been guilty of a serious breach of the Criminal Code and thus rendering his conduct injurious to the reputation of the Company and its employees;
- (5) places difficulty in the way of the Company properly carrying out its function of efficiently managing its Works and efficiently directing its working forces.¹¹

Even if it is not provided for in a collective agreement, however, it is now well recognized that the employer has the right to discipline an employee for participation in off-duty activities which conflict with that employee's duties to the employer. It has also been established that principles similar to the ones just cited will be used to determine whether this is the case with respect to particular activities.

As Palmer has noted, on the basis of a review of pertinent arbitration cases in Canada, there

is "an extremely broad range of activities over which an employer's interest may extend."¹² Just what this range is in any given instance will be determined largely by the nature of the employer's business, and the standards generally recognized within the industry of which it forms a part. Thus, as Brown & Beatty point out:

...depending upon the circumstances and context in which the grievance arises, the nature of the employer's operations, and the character of the conduct complained of, identical off-duty conduct may or may not expose an employee to disciplinary sanctions.¹³

SPECIAL CONSIDERATIONS RELATING TO PUBLIC SERVICE EMPLOYMENT

While private sector employment relations are largely governed by the common law and the terms of collective agreements (at least as far as the regulation and control of off-duty conduct are concerned), public service employment is much more commonly regulated by legislation. This is true of the regulation of off-duty as well as on-duty conduct and, in recent years at least, has become especially true of the public police occupation.

Thus, for instance, as we shall note in more detail below, public service acts now routinely include provisions regulating certain aspects of off-duty public employee conduct, such as involvement in political activities. In the case of the public police, detailed codes of discipline or codes of conduct or ethics are now included in most provincial police acts, as well as the federal *RCMP Act*,¹⁴ or in subordinate legislation (regulations or by-laws) enacted pursuant to them. All of these codes cover aspects of off-duty as well as on-duty conduct, although the extent to which particular provisions of them are applicable to off-duty conduct is often a matter of interpretation. Breaches of the codes are legislatively declared to be cause for disciplinary action.

The important point to bear in mind here is that such legislated provisions supersede the more general principles of the common law (and usually also override the provisions of collective agreements) discussed above, which largely govern private sector employment relations. Thus, a validly enacted provision regulating some aspect of off-duty conduct will be enforceable through a disciplinary process regardless of whether it conforms, for instance, with the *Millhaven* principles cited above. Only in the event of doubt as to the scope or meaning of a legislated provision (e.g. whether a prohibition on "discreditable conduct" is intended to cover a particular kind of off-duty behaviour) will common law principles be invoked as an aid to interpretation. Otherwise, the only way to attack the application of a legislated rule concerning off-duty conduct is to argue either that it is *ultra vires* (i.e. the legislating body was not authorized to promulgate such a rule), or that the rule violates some constitutional requirement (e.g. some requirement of the *Charter*).

By way of example, such a legal challenge was recently launched in the courts by the Calgary Police Association against provisions in the force's Police Administration Manual regulating "outside business interests" of members of the force, which had been enacted by the Calgary Police Commission. The Association argued that enactment of such a regulation was not authorized by the Alberta *Police Act*¹⁵ or, if so authorized, was an unreasonable exercise of the Commission's

legislative authority and contrary to the rules of natural justice. It argued further that in any event it involved a violation of the principles of fundamental justice protected by section 7 of the *Charter*. The Alberta Court of Queen's Bench, and subsequently also the Alberta Court of Appeal, ruled in favour of the Calgary Police Commission on all of these grounds;¹⁶ leave to appeal to the Supreme Court of Canada was refused.

The point, then, is that different (and often higher) standards of conduct can be, and frequently are, applied to public service employees through primary and subordinate legislation than those which are typically applied to private sector employees through the common law and collective bargaining.

Court rulings have established, too, that where such specific legislation has been enacted, it supersedes not only the common law but also the more general provisions of labour relations legislation.¹⁷ Nowadays, such legislation usually also takes precedence over the terms of collective agreements, although this has not always been the case for all police forces in Canada. The Nova Scotia *Police Act*, for instance, used to contain a provision to the effect that "Nothing in this Act contained shall affect the provisions of any collective agreement entered into pursuant to the *Trade Union Act* and in force at the time this Act comes into force".¹⁸

Having said all this, it should be noted that some public service discipline codes specifically incorporate the *Millhaven* (common law) principles into their provisions (e.g. Section 4.5 of Revenue Canada, Customs and Excise's Code of Conduct and Appearance, and Section 19 of the Department of National Defence's Code of Discipline). In these cases, of course, public servants are in a similar position with respect to the regulation of off duty conduct, as private sector employees.

SPECIAL CONSIDERATIONS WITH RESPECT TO PUBLIC POLICE OFFICERS

It has long been recognized that public police officers are not simply employees like others in public employment, but are holders of a particular public office (that of "constable" and "peace officer") by virtue of which they enjoy a relatively independent legal status.¹⁹ In most jurisdictions, police officers are recognized as enjoying this status at all times, whether they are on duty or off duty (and typically in all parts of the province in which they are appointed).²⁰ While the implications of this special status for the regulation and control of off-duty police conduct do not appear to have been clearly established in any definitive court ruling, there does seem (from our interviews) to be general agreement about two aspects of it.

The first aspect involves off-duty police officers who witness criminal or other disorder over which they would legitimately have jurisdiction if they were on duty, and intervene to exercise their authority as peace officers (e.g. to arrest someone). These police officers are considered in most police circles to have automatically put themselves on duty. Thus any conduct which is in the purported legitimate exercise of formal police authority will be regarded not as off-duty conduct (even if it occurs during off-duty hours), but as conduct in the performance of duty. Within American legal parlance, an officer under such circumstances, even if off duty at the time, is said to be acting "under color of law",²¹ and thus in the execution of duty. The case of *Lockhart v. Ens*²²

illustrates well the potential dangers to officers involved in attempts to exercise their official authority while off duty and out of uniform. In that case an off-duty officer out of uniform attempted to give a motorist a ticket for a driving infraction. The driver of the vehicle, not realizing that he was being accosted by a police officer, and thinking that he was about to become the victim of a mugging or a robbery, wound up his car window, catching the officer's arm in it, and attempted to drive away, seriously injuring the officer in the process. (The driver was held civilly liable for the officer's injuries even though his mistake as to the officer's identity was believed by the court.)

The second aspect involves abuses of police authority during off-duty hours and must be distinguished from the out-of hours exercise of duty. In one case which came to our attention, a police officer whose wife was involved in a dispute with a third party over the purchase of a truck, went to the residence of the third party during his off-duty hours, showed his police badge and emphasized that the third party was dealing with a police officer's wife (presumably hoping that this would encourage the third party to take a different stand in his negotiations over the purchase of the truck). The third party complained to the officer's police force about this abuse of authority, and the officer was disciplined for discreditable conduct. It is clear that in such cases, the officer's conduct is not properly considered to be on-duty conduct (since he had not purported to be in the legitimate exercise of his authority as a peace officer, and had not therefore put himself back on duty), but as an off-duty abuse of his position as a police officer for personal advantage.

In some cases, the distinction we have just drawn seems to be somewhat blurred. In another case which came to our attention, for instance, an officer who was driving home in his own vehicle at the end of his shift (and therefore off duty) was involved in an accident with another vehicle. He drew up an incident report himself, and also persuaded his passenger to submit statements which falsely exonerated him from any blame for the accident, blaming instead the driver of the other vehicle. When his police force discovered this, he was disciplined for not following force procedures (he should have summoned traffic unit officers) and for discreditable conduct (his attempts to obstruct a proper investigation of the accident). While it was never determinatively decided, it would seem that this incident should properly be regarded as on-duty misconduct rather than off-duty abuse of the officer's position. This is because, as a peace officer, it was a potentially legitimate exercise of his authority to investigate the accident (even though his force's policies required him not to under these circumstances, and even though in this particular case he was abusing his authority for personal advantage). The matter, however, is not entirely free from doubt.

In another, perhaps clearer, case, an officer who was on his way home from work in his own car, was "cut off" on the highway by another vehicle. He began to flash his headlights at the other vehicle in front of him, indicating that the driver should pull over. When she did not, he followed her until she pulled into the driveway of her home. He pulled into the driveway behind her, and proceeded to write out a traffic ticket for her alleged driving infraction. During this encounter he used very abusive and insulting language. As a result of the other driver's complaint, the officer was disciplined for discreditable conduct. Again in this case, there was no doubt that the officer had the legal authority (and perhaps even a legal duty) as a peace officer to respond to a driving offence which he observed, even during his off-duty hours. By exercising this authority, the officer automatically put himself back on duty (or so prevailing opinion holds). His misconduct is thus most

properly viewed as on-duty rather than off-duty misconduct.

While this distinction may seem somewhat tendentious, it is important to make it because it has possible legal implications. This is because the civil law concept of vicarious responsibility (whereby employers are held legally responsible for the civil wrongs of their employees) applies only to such wrongs which occur in the execution of the employee's duties. Thus, an employer cannot normally be held vicariously liable for an employee's off-duty misconduct, but will normally be liable for an employee's on-duty misconduct, even if it involves abuse of the employee's authority.²³ While it has been argued that the independent legal status of constables precludes such vicarious liability at common law, this uncertainty has now been cured by statutory provisions holding police chiefs responsible for wrongs committed by their constables in the execution of their duties in virtually every jurisdiction in Canada.²⁴

Concerns over the possibility of vicarious responsibility for the conduct of officers while off duty have led some police forces in the United States to adopt very specific policies concerning when officers may and may not exercise their peace officer powers while off duty.²⁵ The theory behind such policies is that if an officer purports to exercise his authority in violation of the explicit policy of the force he will not be regarded as acting "under color of law", and the department will thus not be civilly liable for any wrongdoing he may commit.²⁶ As we shall note below, many Canadian police forces have adopted policies concerning off-duty employment of their officers. Such policies, however, do not address this particular issue.

The other aspect of the continuous peace officer status of police officers which seems to be the subject of general agreement is that the main justification for it is thought to be that, because of the nature of police work, there is a need for police officers to be available for duty at all times, even when they are off duty. Virtually all police forces have internal regulations requiring such availability (often including requirements that officers reside within, or within a certain distance of, the area in which they work). This requirement that officers be available to be called up for duty at any time at short notice (e.g. to respond to a major emergency) is said to justify higher standards with respect to the off-duty conduct of police officers than is the case for other public service and private sector employees who are not required to be available for duty round-the-clock. In particular, disciplinary tribunals have argued in many cases that police forces are entitled to be very hard on officers who consume legal or illegal intoxicating substances to excess off duty, because such consumption is likely to render the officer unfit for emergency duty (although of course in the case of illegal substances, other considerations also come into play).

THE DISTINCTION BETWEEN EXTRA-DUTY AND OFF-DUTY EMPLOYMENT

Another distinction which has to be understood in the context of the regulation and control of off-duty police conduct is that between off-duty and so-called extra-duty employment (sometimes also referred to as special-pay duty or call-out duty).

In every jurisdiction which we visited, provisions were made in force regulations or policies for such extra-duty employment. Such employment occurs when some member of the public (usually a private corporation) enters into an agreement with the police force for the provision of special police services for a fee. Obvious examples would be a sports stadium which contracts for the services of police officers to provide extra protection and order maintenance during a sporting event, or a jewelry store which contracts to have a police officer stand outside its premises during the hours in which it is open to the public. Such arrangements are almost always subject to the approval of the chief of police (although the logistics of assigning particular officers to these tasks are sometimes left, under the terms of a collective agreement, to a police association or union), and are governed by a standard form of agreement. Services under such agreements are generally provided by officers who are not scheduled to be on shift (i.e. who would otherwise be off duty) at the times for which the services are required, and collective agreements frequently include formulas for determining which officers will have priority with respect to the right to be offered such assignments. The standard agreements also usually specify the rates of pay which officers who are assigned to these duties are to receive. Such rates are typically negotiated with the police association or union, and are usually the equivalent of overtime pay rates. Usually, the person contracting for extra-duty services pays the officers directly for their services although, in some forces, the officers are paid by the force which then recovers the appropriate amount from the person contracting for the services.

There is variation among forces as to what kind of extra-duty assignments will be permitted. The general rule, however, seems to be that extra-duty assignments can only involve the kind of work which would be contemplated for officers on regular duty (keeping the peace, enforcing the law where appropriate, etc.). In some forces, there is no clear policy as to what kind of extra-duty assignments will be permitted; this decision is left to the discretion of the chief of police. There appears to be a growing trend, however, towards the adoption of formal written policies in this area. Indeed, the Nova Scotia *Police Act*²⁷ now requires all municipal police boards in that jurisdiction to establish written policies respecting both extra-duty and off-duty employment of the members of their forces, and specifies some minimum content for such policies. Some of the policies which have been established under this provision, however, do not seem to reflect a clear understanding of the difference between extra-duty and off-duty employment.

The important point about such extra-duty employment for the purposes of this paper, however, is that although officers who are off duty are assigned to extra-duty employment, while performing such tasks they are regarded as being fully on duty and subject to all the same rules and regulations as apply when they are engaged in their regular duties. This typically includes the

requirement to be in uniform unless the force specifically permits them to be in civilian clothes, and to be under the supervision and orders of superior officers.

These characteristics of extra-duty employment are well reflected in the *NS Police Act*, which provides that:

21(1) Every [municipal police] board shall establish a written policy respecting extra-duty employment by members of its police force and the policy shall

- (a) define extra-duty employment;
- (b) provide that requests for a member of the police force to be employed on extra duty be made to the chief officer;
- (c) require that a member of the police force engaged in extra-duty employment shall wear his uniform except where the chief officer determines that plain clothes are required;
- (d) require that at all times while on extra duty the member of the police force is under the orders of the police force and no one else.²⁸

Extra-duty employment is thus, theoretically at least, in sharp contrast to true off-duty employment, in which police officers, while off duty, perform services pursuant to private arrangements with employers other than their police forces, which arrangements are not made through their police forces. They remain off duty at all times while engaged in such employment. Unlike the situation with extra-duty employment, therefore, the police force and police governing authority are not liable for any wrongdoings committed in connection with such off-duty employment unless they purport to exercise their authority as peace officers (as discussed above).

As we note below, true off-duty employment of police officers is the subject of some regulation (and in some instances outright prohibition) by most police forces.

Because officers undertaking extra-duty work are generally considered to be on duty, we do not consider these activities further in the paper. Reiss' exploratory study of this subject in the United States, however, provides a good starting point for anyone interested in this area.²⁹

INSTRUMENTS FOR THE REGULATION OF OFF-DUTY POLICE OFFICER CONDUCT

As noted earlier, in virtually all jurisdictions in Canada, police officer conduct is the subject of regulation through provisions of primary or subordinate legislation setting out codes of discipline, codes of conduct or codes of ethics. In most jurisdictions, such codes are enacted as part of a *Police Act* (as was, for instance, the case under Part II of the old *RCMP Act*³⁰) or (more commonly) as part

of regulations enacted pursuant to such Acts (see e.g. the *Police (Discipline) Regulation*³¹ passed pursuant to the British Columbia *Police Act*).³²

These regulations are province-wide or, in the cases of the RCMP and the Royal Newfoundland Constabulary, force-wide. In addition provincial police acts also provide authority to police governing bodies, and sometimes also to chiefs or commissioners of police, to promulgate force-specific regulations. Until very recently, some provinces (e.g. Manitoba and Québec) did not have province-wide codes of discipline or conduct, and in these circumstances such codes varied greatly from one force to another, both in terms of their general scope and in terms of the extent to which they specifically regulated off-duty conduct.

Legislated codes of police discipline have shown a tendency to become very detailed. A not untypical, although perhaps somewhat extreme, example of this is a municipal regulation which sets out 149 separate offences against discipline under 21 broad headings. Of that total, 105 are worded in such a way that they could cover off-duty conduct. Such offences range from "engaging in employment for an employer other than the City" to "engaging in immoral practices".

All of the many disciplinary codes which we have examined include offences embracing off-duty conduct which are very broadly worded. The most common (and most commonly used) of these is the disciplinary offence of "discreditable conduct". A typical example of such an offence is found in the code of discipline in the *BC Regulation*, which provides that:

1. Discreditable conduct, that is, if he
 - (a) acts in a disorderly manner or in a manner prejudicial to discipline or reasonably to bring discredit upon the reputation of the police force,...³³

While the breadth and vagueness of such rules are understandable, they arguably constitute an inducement to arbitrary and discriminatory enforcement. There is probably not a single police officer who could honestly say that he or she has never been "uncivil to a member of the public" either on or off duty, et this offence appears in the discipline codes of most police forces.

The disciplinary offence of "discreditable conduct", which is a mainstay of police discipline, especially for off-duty conduct, carries with it the unfortunate result that officers may in effect be disciplined for matters over which they have little or no control. This is because whether or not a particular instance of conduct is reasonably likely to bring "discredit" on the police force (the nub of this offence) will depend upon whether the perpetrator's membership in the police force is likely to become publicly known. Where the officer is off duty and has not identified himself as a police officer (i.e. in cases other than the classic abuse-of-authority cases), whether his or her membership in the police force is likely to become known may depend upon circumstances entirely beyond the officer's control (e.g. the presence or absence of a diligent journalist). The inevitable result would seem to be that conduct of an officer who lives in a large, relatively anonymous, urban area is inherently less likely to be "discreditable" than the same conduct of an officer working in a small

rural community where everybody knows everyone else. The necessary implication is that officers working in small communities are held to higher standards of private conduct than officers working in large urban areas. While this increased responsibility for rural officers may well be explained as "part of the job", it can easily lead to a perception of unfairness on the part of officers.

A case which illustrates a recognition of this relativity of the notion of discredit is one which involved a relatively inexperienced officer in a small town. The officer was charged with several instances of discreditable conduct. One of these involved his going to a local bar in an intoxicated state and asking to see a nude dancer he had met on a previous occasion. Told that she was not there, he then asked another dancer to go with him to find the one he had been looking for. She refused, and while she was dancing in a booth for some patrons of the bar, the officer entered the booth flashing his police ID badge and identified himself as a member of the police force. He then went to another establishment to look for the other dancer, and again identified himself with his badge as a police officer. When members of the local municipal police force arrived as a result of a complaint, he identified himself to them as a police officer and told them that he was investigating a murder. He was taken to the local police station where he admitted that he had not in fact been investigating a murder but was merely conducting a "personal investigation". He was convicted in a service court of discreditable conduct. A review board which reviewed this decision commented that while this conduct was less serious than some other offences alleged against the officer, "in view of the fact that it occurred in a relatively small town, where the reputation of the [force] is important", the officer's conduct on this occasion could properly be regarded as discreditable.

In addition to disciplinary codes, Police forces have very extensive manuals of policies and procedures, approved by their governing authorities, some of which touch on off-duty conduct. These policies are drawn into the discipline net by general provisions in discipline codes which make it a separate disciplinary offence to act in contravention of such policies and procedures. A good example of this is provided by the policies of some forces which require members to reside within the municipality, or within a certain distance of it. Failure to conform to such a policy is typically a disciplinary offence itself. An order by a superior officer to conform to the policy constitutes a lawful order, and failure to comply with the lawful order of a superior officer constitutes the separate disciplinary offence of "insubordination".³⁴

In addition to provincial and internal police force regulations and policies, some off-duty conduct of police officers in some jurisdictions is also regulated by other provincial legislation and/or municipal bylaws or policies. In many jurisdictions, for instance, off-duty political activities of police officers are regulated through the provisions of provincial election acts or municipal acts, while off-duty employment is regulated by city ordinances or policies detailing conflict of interest guidelines or codes of ethics.

In sum, police executives typically have available to them very extensive instruments with which to regulate and control off-duty activities of their members. Many of these instruments go far beyond the common law in the extent to which they purport to regulate such off-duty conduct. This is due to the fact that they often do not require any proof of a rational link between the impugned conduct and the legitimate interests of the police force, as the common law generally does. For

discipline to occur, it is sufficient to establish that the officer has violated a duly promulgated rule of conduct or policy; the force does not have the additional burden (which the private employer bears) of proving that the conduct in question did in fact (or was likely to) negatively affect the legitimate interests of the force in some way. Rather, this latter conclusion is often simply presumed from the existence of the rule or policy.

The rules tend to be so voluminous and so vaguely worded that no officer could be expected to fully comprehend their content and scope. Indeed, senior officers whom we interviewed (including those who were responsible for internal disciplinary matters) frequently admitted to uncertainty as to the scope and application of many of these rules. Even more frequently these senior officers indicated that they knew of no instances in which many of the rules had been invoked as the basis of disciplinary action against officers.

As Ericson³⁵ has pointed out, however, even if many (or most) of the rules are rarely or never invoked in practice, their very existence, and the possibility that they could be invoked at any point, constitute significant resources for police managers in controlling their officers' conduct both on and off duty.

ORGANIZATIONAL RESPONSES TO OFF-DUTY MISCONDUCT

The most common organizational reaction to off-duty employee misconduct, of course, is disciplinary action, or at least the threat of it. As our interviews confirmed, discovery (especially as a result of a public complaint) combined with minimal investigation proves sufficient by itself in many cases to induce self-correction on the part of an errant officer. We were told countless times that minor or first-time off-duty misconduct had been satisfactorily dealt with by the officer concerned being "spoken to" or simply "told", without any need for the invocation of formal disciplinary measures. For the officer concerned, this informal manner of responding has the particular advantage that it typically does not result in any entry on his or her formal service record.

At the more serious end of the offence scale, when discharge would be a likely outcome of a successful disciplinary charge, we learned that discovery and the threat of disciplinary action is frequently sufficient to induce an offending officer's resignation (after which disciplinary action is no longer possible).³⁶

For these reasons, it is virtually impossible to obtain any data as to the actual extent of off-duty infractions for any police force; the dark figure is invisible and therefore unknown. We also found, however, that aggregate statistics on even recorded infractions are apparently not kept or monitored by most of the police forces that we visited. We asked our interviewees to tell us what proportion of public complaints and internal discipline cases during the last few years had involved off-duty conduct. Most indicated that they were unable to provide such statistics, and we were provided instead with informed guestimates which ranged wildly from less than 5 percent to more than 50 percent. Most forces, however, estimated that off-duty conduct is involved in less than 5 percent of formal disciplinary charges against their officers, indicating that off-duty misconduct is not regarded by them as a major problem.

Two alternatives to disciplinary action which are at least potentially available to some forces in some cases are those of medical discharge and so-called administrative release. The former may be available where off-duty conduct involves serious alcoholism or other substance abuse, the latter where off-duty conduct has led to criminal convictions resulting in incarceration or the loss of driving privileges. The argument here would be that whether or not the off-duty conduct constituted a disciplinary offence, the conduct or its consequences are such as to render the officer unfit or unable to perform his or her duties, and therefore liable to dismissal. In the case where an officer has been sentenced to a period of incarceration as a result of off-duty conduct, an argument might also be made that this constitutes an effective abandonment of his or her position of employment, again justifying termination.

While we are aware of attempts in other areas of public employment to adopt these alternative responses to problematic off-duty conduct,³⁷ we discovered no cases in which police organizations had attempted such alternatives. Indeed while administrative release is contemplated in legislation covering other public servants, it does not appear to be contemplated as an option (other than for probationary constables) in most legislation governing police organizations. The somewhat enigmatic subsection 37(2) of the *Alberta Police Act*, which provides that:

- (2) Notwithstanding the provisions of a collective agreement, the [municipal police] commission may terminate the services of a police officer for reasons other than disciplinary reasons.³⁸

is a notable exception. We have not been able to ascertain, however, whether, or to what extent, this provision might have application to the control of, or response to, off-duty police officer conduct in Alberta.

Another, more limited exception appears to be provided for in paragraph 4(3)(c) of the Regulations under the *NS Police Act*, which is discussed further.³⁹ Medical discharge, on the other hand, is provided for in some police regulations.⁴⁰ Because this is the subject of another Discussion Paper published by the RCMP External Review Committee,⁴¹ it will not be considered in this paper.

A notable and important trend in recent years, however, is the development of employee assistance and peer group counselling programs which have begun to play an increasingly important role in police forces' responses to certain kinds of off-duty conduct problems, notably alcohol, drug and stress-related problems.⁴² The health orientation of such approaches has certainly not replaced disciplinary approaches. We were, however, told of a number of cases in which either disciplinary action was delayed to give officers a chance to sort out their off-duty problems with medical or counselling assistance, or disciplinary penalties were suspended on condition that the officer

successfully participate (or more commonly, continue to successfully participate) in some kind of treatment or counselling program.

In one such case, an officer, while off duty, had been found in an intoxicated state in the company of four prostitutes on a public street, and was consuming alcohol in his personal vehicle at the time. He was charged with discreditable conduct, found guilty, and the penalty imposed was that he should resign within seven days or be dismissed. On his appeal to the municipal police board, an agreed settlement of the matter was reached between the constable, the police chief and the board, under which the original penalty was replaced by the following:

- (1) Const. [X] will be reinstated on the [ABC] Police Department effective [date].
- (2) Const. [X] will not receive any pay or allowance from the date of his dismissal until [the date of his reinstatement].
- (3) For a period of one year commencing on [the date of his reinstatement], Const. [X] will be on probation with the [ABC] Police Department, the conditions of which are
 - (a) that he not drink alcoholic beverages
 - (b) that he continue to the satisfaction of the Chief with his present course of rehabilitation, including his attendance at A.A. and his ongoing participation in the Department's employee assistance program
 - (c) that he properly perform his duties as a constable with the Department.
- (4) At the conclusion of one year, the Chief shall report to the Commission and if the terms of the probation have been met to the satisfaction of the Commission, Const. [X] will revert to normal status.
- (5) If Const. [X] should breach any term of its probation, his dismissal from the Department will be confirmed by the Commission.⁴³

In confirming Its acceptance of these terms of settlement, the municipal police board emphasized that "it is expressly understood that the Commission views Const. [X]'s conduct on the evening of [date] as reprehensible and in normal circumstances as grounds for dismissal from the force." The board concluded:

The Commission was convinced on the evidence that Const. [X] is an alcoholic, that his behaviour on the evening in question was related to his alcoholism, and that since then he has taken steps to rehabilitate himself. This agreement was proposed by the Commission to give Const. [X] a chance to continue with that rehabilitation and to turn himself into a strong link and competent performer in the [ABC] Police Department.

Around the same time, this police board reached a similar agreement with another of its officers who had been involved in serious alcohol-related off-duty misconduct. The police force reports that both officers successfully fulfilled the conditions of their probation, are now fully reinstated, and have, together, been the mainsprings in the establishment of a successful peer group counselling program within the force. They are now considered highly valued members of the force. The apparently remarkable success of this approach in these two cases has convinced the force that this should be the way of the future in dealing with such cases.

There is some reason to think that this kind of approach to off-duty conduct which is determined to be the product of alcohol or drug dependency or addiction may, at least in some jurisdictions, now be mandatory rather than optional. This is because in some human rights legislation in Canada, alcoholism and drug dependency have been recognized as "disabilities" or "handicaps", on the basis of which discrimination in employment is prohibited. Section 25 of the *Canadian Human Rights Act*,⁴⁴ for instance, provides that "disability" means "any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug". Section 3 provides that "disability" is a "prohibited ground[s] of discrimination", and Section 7 provides that:

7. It is a discriminatory practice, directly or indirectly,
 - (a) to refuse to employ or continue to employ any individual, or
 - (b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

[Emphasis added]

Such provisions are relatively new in Canadian law and their exact implications for the application of employment discipline (for on- or off-duty conduct) remain somewhat unclear. A recent decision of the Supreme Court of Canada,⁴⁵ however, suggests that this kind of legislation places an onus on an employer to take all possible steps to accommodate an employee so as to avoid discriminating against him or her on a "prohibited ground of discrimination", unless the employer can demonstrate that such steps would involve "undue hardship" for the employer. In particular, an occupational requirement or qualification established by an employer which has the effect of discriminating against a particular employee or class of employees on a "prohibited ground of discrimination" will

only be upheld as *bona fide* and lawful if the employer can demonstrate that the requirement or qualification is "objectively related" to, and "reasonably necessary" for the performance of the job, and that it accommodates the employee's protected "disability" at least up to the point of "undue hardship" to the employer.

Translated to the context of a police officer suffering from alcoholism or drug addiction, this case suggests that, in the absence of any clear statutory authority for discipline or dismissal, there would be an onus on the police force to demonstrate that not being an alcoholic or a drug addict is objectively related to, and reasonably necessary for, the performance of any work to which the officer might reasonably be assigned without undue hardship to the force. Since both alcoholism and drug addiction are remediable disabilities, it would also presumably be incumbent upon the force to demonstrate that it had taken all reasonable steps not causing undue hardship to the force, to "accommodate" the disabled officer (by, for instance, giving him or her a reasonable chance to obtain a cure for the disability, or at least bring it within manageable bounds), before any discipline for conduct arising out of it (let alone dismissal) could be justified.

It will be evident from this that such laws require careful and responsible judgments to be made, for instance about whether, and to what extent, alcoholism or drug addiction is or is not compatible with the performance of different kinds of police work, what would amount to reasonable "accommodation" of an alcoholic or drug-dependent officer, and at what point such accommodation would result in "undue hardship" to the force. The courts, however, have apparently not yet been faced with a concrete case in which to make such judgments.

There is, of course, the additional problem -- which is a very real one in the police context -- of how such legislative provisions are to be reconciled with equally explicit provisions in police legislation and regulations which characterize excessive consumption of alcohol, on or off duty, as a disciplinary offence. As noted below, most police discipline codes contain such provisions. Here there is the possibility that such provisions may be held constitutionally invalid as being in violation of *Charter* guarantees with respect to such standards as equality and non-discrimination on the basis of "mental or physical disability" (section 15), or "principles of fundamental justice" (section 7). This possibility would only exist to the extent that such provisions result in differential treatment for police officers compared with other employees, and the differential treatment could not be justified as reasonably necessary for the fulfilment of its legislative mandate by the police force. Since there are as yet apparently no reported cases in which such issues have been raised, we can do no more than speculate how they might be resolved by the courts.

Clearly, the more remedial, non-punitive approach to such problems will be likely to forestall such legal challenges. Those responsible for police discipline, however, would undoubtedly do well to prepare themselves for such challenges in the future. It is possible, too, that to the extent that occupational stress is being recognized as a medically treatable disability, conduct which can be successfully demonstrated to have been the product of such stress may also have to be responded to in ways other than the traditional disciplinary approach. The Ontario Workers' Compensation Appeals Tribunal, for instance, recently recognized work-related stress as sufficient basis for a compensable claim by an employee of a provincial youth centre.⁴⁶ This possibility, however, raises

issues which go far beyond the scope of this discussion paper.

There remains, of course, the mechanism of a public complaint as a way of responding to alleged off-duty misconduct of an officer. In this respect, however, practice and legislation vary significantly from one jurisdiction to another. Whether off-duty conduct can be the subject of a formal public complaint (i.e. handled under legislated processes for responding to such complaints) will depend on the definition of a "complaint" in the particular legislation concerned. Under the RCMP Act, for instance, the RCMP Public Complaints Commission has jurisdiction only to entertain complaints "concerning the conduct, in the performance of any duty or function under this Act, of any member or other person appointed or employed under the authority of this Act".⁴⁷ Complaints concerning off-duty conduct are thus excluded from the Commission's jurisdiction by definition. A similar situation is created by section 51 of the amendments to the Québec *Police Act*, which refers to "a complaint respecting the conduct of a police officer in the exercise of his duties and constituting a default under the Code of ethics."⁴⁸

Such is not the case for most statutory bodies in Canada charged with responding to public complaints against the police. In most cases, "complaints" are defined either to include allegations of disciplinary offences,⁴⁹ or broadly enough to include virtually any conduct, whether on or off duty.⁵⁰

POLICE TRAINING WITH RESPECT TO OFF-DUTY CONDUCT

An important question to be addressed is how police officers learn about the standards of conduct they will be expected to meet while off duty.

In many forces, recruits are required to subscribe to a code of ethics on joining the force. The manual of one police department (which will not be identified) stated that all members of the force are required to abide by the following "Police Officers' Code of Ethics":

As a police officer I recognize that my primary obligation is to serve the public effectively and efficiently by protecting lives and property, preventing and detecting offences, and preserving peace and order.

I will faithfully administer the law in a just, impartial and reasonable manner, preserving the equality, rights and privileges of citizens as afforded by law.

I accept that all persons rich or poor, old or young, learned or illiterate, are equally entitled to courtesy, understanding, and compassion. I will not be disparaging of any race, creed or class of people.

In the performance of my duties I acknowledge the limits of my authority and promise not to use it for my personal advantage. I vow never to accept gratuities or favours or compromise myself or the Police Service in any way. I will conduct my public and private life as an example of stability, fidelity, morality, and without equivocation adhere to the same standards of conduct which I am bound by duty to enforce.

I will exercise self-discipline at all times. I will act with propriety toward my associates in law enforcement and the criminal justice system. With self-confidence, decisiveness and courage I will accept all the challenges, hardships, and vicissitudes of my profession. In relationships with my colleagues I will endeavour to develop an "esprit de corps".

I will preserve the dignity of all persons and subordinate my own self-interests for the common good. I will be faithful in my allegiance to Queen and Country. I will honor the obligations of my office and strive to attain excellence in the performance of my duties.

[Emphasis added.]

The notes which follow this code of ethics in the manual include the following advice on off-duty conduct:

Your conduct while off duty, as a member of the community, is as much under critical notice as when you are on duty. In this regard you must remember that the behaviour of an individual reflects upon the entire police service.

We asked officials at two major police training institutions to what extent standards of off-duty conduct are discussed in their basic recruit training programs. The answer was similar in each case. A single session on police ethics is included in each course. In one case this is a three-hour session, in the other a 90-minute session. Our informants were not able to estimate with precision the extent to which off-duty, as opposed to on-duty, conduct is the subject of discussion in these sessions. One said that he thought that it might occupy 20 minutes of a three-hour session. The other said that it would vary from class to class, depending on the level of interest in the subject shown by the students.

In one case, the main instructional material used for this session is a 15-page booklet on police ethics. Half of this booklet is devoted to a general discussion of ethics in a police context, in which off-duty conduct is not specifically addressed. The remainder of the booklet consists of a set of "Canons of police ethics", and a "code of ethics", which have been endorsed by the International and Canadian Associations of Chiefs of Police. A brief bibliography for further reading follows.

The "canons of police ethics" includes the following:

Article 6. Private Conduct

Law enforcement officers shall be mindful of their special identification by the public as an upholder of the law. Laxity of conduct or manner in private life, expressing either disrespect for the law or seeking to gain special privilege, cannot but reflect upon the police officer and the police service. The community and the service require that the law enforcement officers lead lives of decent and honorable citizens. Following the career of a police officer gives no individual special perquisites. It does give the satisfaction and pride of following and furthering a broken [sic] tradition of safeguarding the Canadian public. The officers who reflect upon this tradition will not degrade it. Rather they will so conduct their private lives that the public will regard them as examples of stability, fidelity and morality.

The four-paragraph "code of ethics" includes the following:

I will keep my private life unsullied as an example to all; maintain courageous calm in the face of danger, scorn or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed in both my personal and official life, I will be exemplary in obeying laws of the land and regulations of my department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

In one case, we have been unable to ascertain what other instructional materials, if any, are used in teaching these sessions, and in particular whether decisions in actual disciplinary cases are used as examples for students. In the other case, we have been advised that no other written materials are used in these sessions. Officials of both institutions stressed, however, that issues of personal conduct, both on and off duty, are likely to arise in discussions in other sessions of the basic training course, although they were not able to give an indication of how often this in fact occurs.

KINDS OF POLICE OFF-DUTY CONDUCT WHICH HAVE BEEN SUBJECT TO DISCIPLINE

For reasons noted earlier, we are unable to provide any statistical data indicating what proportions of discipline cases involve which kinds of off-duty misconduct. What we shall do in this section of the paper, therefore, is provide examples of the kinds of off-duty conduct which are either contemplated in police discipline codes or reflected in actual discipline cases which have been brought to our attention. For clarity, we have classified these kinds of conduct into nine broad categories.

(1) CRIMINAL CONDUCT

Conviction for a criminal offence, even if the relevant conduct occurred while the officer was off duty, is regarded as grounds for discipline in all Canadian police jurisdictions. In most police discipline codes, conviction is listed as a separate offence in its own right, often under the broad heading of "discreditable conduct". Section 17 of the *Alberta Municipal Police Disciplinary Regulations* provides a good illustration:

(a) DISCREDITABLE CONDUCT, that is to say, if he

...(v) is guilty of an indictable offence under a federal start-up, plan offence punishable upon summary conviction under the *Criminal Code* (Canada)...⁵¹

This provision also provides a good illustration of the extent to which some police disciplinary codes demand higher standards of conduct from police officers than are demanded of other employees. It will be recalled that the common law rules stipulate that conviction of a criminal offence involving off-duty conduct will only be grounds for discipline if the offence is "serious" and "thus rendering his conduct injurious to the reputation of the Company and its employees" (*Millhaven*).

The common law rule places a burden on the employer to demonstrate a significant relationship between the criminal offence for which the employee was convicted and the legitimate interests of the employer. Just how difficult this can be is well illustrated by the arbitrator's decision in *Re Iron Ore Co. of Canada and United Steelworkers, Local 5795*.⁵² This was a policy grievance, in which the union local was seeking to challenge a company rule. The rule being challenged was that any employee who was convicted of "trafficking in narcotics, armed robbery [or] sex-related criminal offences" would henceforth be terminated "whether or not the offence giving rise to the conviction takes place on Company property."

The arbitrator ruled that this was not a reasonable rule (the collective agreement authorized the company to make "reasonable rules and regulations to be observed by the employees") for general application. The reason for the ruling was that employee convictions for such offences involving off-duty conduct were not necessarily and inevitably prejudicial to the interests of the company. To be reasonable, a rule would have to require separate consideration of each case on its individual merits, rather than provide for automatic termination regardless of the particular circumstances of each case.

The provision of the Alberta police discipline code cited above is, of course, in one sense much broader than that which was proposed by the company in the *Iron Ore* case, because it applies to convictions for all criminal offences, rather than for particular classes of criminal offences. On the other hand, it is narrower, because it does not stipulate that dismissal will necessarily result from a conviction for the disciplinary offence. Most significantly, however, the Alberta provision does not require the police force to demonstrate that the officer's criminal conviction will have damaging effects on the force's interests. Instead, the provision defines such a conviction as "discreditable conduct"; by being criminally convicted, the officer has apparently automatically committed the

disciplinary offence of "discreditable conduct".

Not all police regulations are as harsh as the Alberta code in this regard. Regulations under the *NS Police Act*, for instance, provide that:

a member of a municipal police force may be dismissed upon conviction for an indictable offence or an offence punishable on summary conviction pursuant to an Act of the Province, a province or territory of Canada or the Government of Canada which, in the opinion of the municipal board of police commissioners or the chief officer... renders the member unfit to perform his duties as a member.⁵³

While this provision is in one important respect broader than the Alberta provision (it includes convictions under provincial and territorial enactments), it does place a burden on the board to establish that the conviction "renders the member unfit to perform his duties". Mere proof of the conviction (whatever the offence) will not satisfy this requirement.

The Nova Scotia provision is also interesting because it seems to provide for a form of administrative release in such cases, rather than a disciplinary discharge. Conviction for a criminal offence is not defined as a disciplinary offence, therefore formal disciplinary process would not have to be followed before an officer could be dismissed under this provision of the Regulation. Somewhat anomalously, however, the "Code of Conduct and Discipline" set out in the next section of the Regulation provides for the following disciplinary offence:

[being] found guilty of an indictable offence or an offence punishable on summary conviction under any statute of Canada, the Province or any province territory in Canada which renders the member unfit to perform his duties as a member,⁵⁴

The combined effect of these two provisions would seem to be that disciplinary proceedings need not be instituted if a dismissal is sought on grounds of a criminal or other conviction, but must be followed if some lesser penalty is sought.

A third approach is illustrated by the Regulations of the Winnipeg Police Department, which provide for the disciplinary offence of:

124 (20) COMMITTING AN OFFENCE, that is:

- (a) being convicted of an offence in a superior court of criminal jurisdiction, a court of criminal jurisdiction or a summary conviction court, which conviction is detrimental to the prestige of the Department
- (b) being convicted of being an accessory to or conniving at the commission of an offence against any Provincial or Federal Statute.

[Emphasis added.]

Again this seems somewhat anomalous in that under paragraph (a) some detriment to the prestige of the Department has to be shown in order to establish the disciplinary offence, while under paragraph (b) there is no such requirement.

There are ample cases to illustrate the point that the mere fact that an officer has not been convicted of a criminal offence (e.g. if charges have been withdrawn), or where the case has been diverted out of the criminal courts, does not mean that he or she cannot be disciplined for apparently criminal conduct. If it is thought to be "discreditable conduct", he or she can be disciplined in some police departments, although in others such an outcome is thought to preclude disciplinary proceedings. We have, however, come across cases in which disciplinary proceedings have been successfully pursued even after an acquittal in the criminal courts, an outcome which is usually explained by the fact that in some jurisdictions the standard of proof is not as high for disciplinary proceedings as for criminal proceedings. Indeed, the Supreme Court of Canada has held that disciplinary offences are not to be treated as "offences" for the purposes of Section 11 of the *Charter*,⁵⁵ and that conviction for a major service offence does not preclude prosecution for a criminal offence based on the same facts.⁵⁶ In reviewing a disciplinary case, however, the Ontario Police Commission has held that a disciplinary conviction had to be quashed when the officer's criminal conviction was set aside on appeal.

In some instances, disciplinary codes are explicit about the relationship between criminal and disciplinary proceedings. Section 5 of the *Regulation respecting the code of ethics and discipline of members of the Sûreté du Québec*, for instance, provided that:

A member may be the subject of a complaint notwithstanding the fact that he has been acquitted or convicted by a court of criminal jurisdiction of an offence with respect to which the facts giving rise to an accusation are the same as the facts on which the disciplinary charge is based.⁵⁷

It is clear, even from our limited research, that actual discipline cases have involved convictions for a wide variety of criminal offences, ranging from attempted murder to shoplifting. Undoubtedly, however, the most common instances in this category involve convictions (or allegations) of shoplifting, impaired driving, assault or sexual assault.

There seems to be no doubt in any of these cases that conviction for a criminal offence is sufficient in itself to constitute a disciplinary default. Rather, discussion in the cases centres on what the penalty should be. Even quite minor cases of petty shoplifting, in which officers have sought to explain their misconduct as a product of stress or embarrassment, have resulted in dismissals from the force, with adjudicators arguing that the fact that this offence involves dishonesty makes an officer convicted of it inherently unsuitable for continued employment as a police officer. The Federal Court of Appeal, however, has recently ruled that such a blanket approach to the

determination of a penalty for a disciplinary infraction is inappropriate; each case must be considered on its own merits and in light of all relevant circumstances.⁵⁸

(2) OTHER ILLEGAL CONDUCT

As we have noted (see the provisions from the discipline codes quoted in the preceding section), many police discipline codes contain a specific disciplinary offence of having been convicted of a non-criminal offence (e.g. under non-criminal federal or provincial legislation). We have come across cases in which officers have been disciplined as a result of convictions for such offences, either pursuant to such specific discipline code provisions or under the umbrella offence of "discreditable conduct". In Ontario and New Brunswick, for instance, officers have been disciplined for, among other things, having been convicted of hunting at night contrary to provincial legislation.

In most jurisdictions which we visited, however, we were told that while disciplinary action in such cases is certainly theoretically possible, in practice it is rarely invoked, especially with respect to isolated (as opposed to repeat) incidents, and especially in cases of convictions for minor driving offences such as speeding. Two reasons were cited for this. In the first place, such offences are thought to be too trivial to justify discipline. Secondly, such incidents often do not come to the attention of the force (especially if they occur outside the force's jurisdiction), and most forces do not go out of their way to discover them. There is apparently no requirement in most forces that an officer report such a conviction to the force. We did encounter the following rule, however, in the regulations of one force we visited:

4.2.2. DISCREDITABLE ACTS TO BE REPORTED

A member shall report forthwith to a supervisor or a member of the Internal Affairs Unit:

- whenever he is charged with a criminal offence, giving the particulars of the charge and the agency or individual laying the charge
- details of any instances where another member performs acts or conducts himself in a manner which will, or is likely to, bring discredit on the reputation of the Force.

Breach of this regulation is, of course, itself a separate disciplinary offence.

(3) POLITICAL ACTIVITIES

Active participation in politics has always been thought to be incompatible with the impartial and independent exercise of discretion which is such an essential element of police work. Indeed, the vaunted "independence" of the police has usually been justified in terms of the need to protect the exercise of their authority from "improper political interference".⁵⁹ Despite this general

consensus about the need to "keep politics out of police work", it is only quite recently that many police discipline codes have included specific prohibitions on political activity by police officers, whether on or off duty. Indeed, we were somewhat surprised to find that many police discipline codes do not contain such prohibitions, and we have found only one case in which an officer has been charged with a disciplinary offence for political activities.

Regulation 791 under the old Ontario Police Act, referring to the Ontario Provincial Police Force, provided that:

62. No member of the Force shall,
- ...
- (b) take any part in politics or occupy an official position in a party organization, but this does not affect the right of the member to private political views or to vote.⁶⁰

Members of the Provincial Police Force, however, are "Crown employees" subject to the Ontario *Public Service Act*, which provides that Crown employees other than deputy ministers or other Crown employees designated in regulations under the *Act* can run for elective office in municipal, provincial or federal elections, under certain specified conditions (sections 11 & 12). Section 12 provides that:

- 12.(1) Except during a leave of absence granted under subsection (2), a Crown employee shall not,
- (a) be a candidate in a provincial or federal election or serve as an elected representative in the legislature of any province or in the Parliament of Canada;
- (b) solicit funds for a provincial or federal political party or candidate; or
- (c) associate his position in the service of the Crown with any political activity.⁶¹

Subsection (2) provides that only Crown employees who are not deputy ministers or designated in the regulations can apply for such a leave of absence.

In 1980, OPP officers were not designated under the regulations. Consequently, an OPP constable applied for, and was granted, a leave of absence to run as a Conservative candidate in the federal election that year. He was not elected and, when he returned to his duties, he was charged with "discreditable conduct" for his political activities. He filed a grievance, which was upheld, the arbitrator acknowledging that there appeared to be a conflict between the provisions of *Regulation 791* and the provisions of the *Public Service Act* and its regulations, but concluding that the constable was within his rights in applying for a leave of absence and running for office.

The disciplinary charge against him had been held in abeyance pending the resolution of this grievance and, as far as we can tell, was never resumed. In 1983, the Ontario Divisional Court confirmed this view of the conflict between the provisions of *Regulation 791* and those of the *Public Service Act*.⁶²

The Government of Ontario, however, responded to this situation by designating OPP officers under the *Public Service Act* regulations, so that they can now no longer run for political office, with or without a leave of absence.

Under Section 38 of Ontario's *Municipal Act*,⁶³ an employee of a municipality is entitled to a leave of absence to run for a municipal elected office, but if elected must resign. In 1985, a Durham Regional Police officer took leave of absence, was elected to municipal office and resigned from the force. He took legal action, however, to challenge the requirement that he resign. The action was settled by way of Minutes of Settlement under which the officer's resignation was withdrawn, and he was granted an unpaid leave of absence while he continued to hold elected office.

The Ontario *Police Services Act* now provides that "No municipal police officer shall engage in political activity, except as the regulations permit."⁶⁴ At the time of writing, however, the new regulations had not been published.

A similar approach to the regulation of political activities of police officers, both on and off duty, was taken by the *SQ code of ethics*:

21. A member must be politically neutral in the performance of his duties.

The following in particular constitute breaches of discipline:

- (a) being present in uniform at a political meeting, unless he is on duty at that place;
- (b) failing to show moderation in publicly expressing his political opinions;
- (c) during an electoral period, publicly expressing his political opinions, soliciting funds for a candidate for election, a party authority or a political party, or publicly expressing his support for a candidate for election or for a political party.⁶⁵

As far as we have been able to determine, few municipal police forces have prohibitions on political activities of their members which are as explicit as this. On the contrary, we were told of many instances of police officers holding elected political offices (e.g. as members of municipal councils or school boards) in neighbouring municipalities to those where they were employed. Indeed we heard of one police officer who sits as a member of the local police commission in a nearby municipality.

In 1980, it was reported that a Niagara Regional Police officer had been given permission by his Chief to run for a seat on a county board of education within the force's geographical area of jurisdiction. The police chief was reported in the press at the time to have said that he gave his permission because:

[I]t is not a political thing. Police have a sense of duty the same as any fellow citizen, but they must remember they are policemen 24 hours a day. I would not sanction anyone running for councillor on regional council where, for example, he may be required to vote on the police budget.⁶⁶

Senior police officers generally seem to agree, however, that it is not appropriate for police officers to run for, or hold, political office within the areas in which they work many would go further than this by banning such political activities altogether.

Arguments have been made in the United States that the involvement of police officers in the political process is beneficial rather than detrimental. Professor William Ker Muir, Jr., has argued that police officers' involvement in politics strengthens public debate about policing issues and leads to more open police institutions whose leaders are more focused on the larger community rather than just the police. Additionally he believes it develops police officers' communications and negotiation skills and dissipates police cynicism about the world being divided into good and bad.⁶⁷

The current preference for community-based policing as the mode for the future, however, raises significant questions about the more traditional negative attitudes towards police involvement in politics. In particular, it raises the question of when involvement with the community, or with community organizations, can be characterized as sufficiently 'political' to be incompatible with the independent and impartial exercise of police authority.

At a seminar on community policing held at the Canadian Police College in 1986, one of the foremost U.S. exponents of community-based policing recounted early experiences with this style of policing in Flint, Michigan. He described how officers had been given great autonomy and flexibility to develop links with their local communities, and develop "problem-oriented" rather than "incident-oriented" solutions to policing problems, in conjunction with community members. Police officers were encouraged to become "social activists" within their communities. All was thought to be going well with this program until one day an officer of the force, during his off-duty hours, and not in uniform, was seen to be leading a march of community residents on the city hall, demanding more efficient garbage collection. The speaker noted that it was at this point that police officials began to realize that there might be more to community-based policing than they had bargained for!

A second issue which the prohibition of political activities raises is the question of how compatible such prohibitions are with the *Charter* guarantees of equality, and freedom of speech and association. In this connection, it is worth noting that the Supreme Court of Canada has upheld the constitutionality of the provisions of the Ontario *Public Service Act*.⁶⁸ In *Osborne v. Canada*,⁶⁹ however, the Federal Court of Appeal held that the provisions of section 33 of the federal *Public Service Employment Act*⁷⁰ which prohibited public servants from working for political parties were

in violation of the *Charter*, and therefore constitutionally invalid. An appeal of this case is currently before the Supreme Court of Canada.

These cases do not, however, resolve the issue of whether more extensive restrictions on political expression, such as those in the Ontario and Quebec police regulations cited above, would be found to be compatible with the requirements of the *Charter*. As far as we can determine, none of these provisions has yet been challenged in the courts.

(4) OUTSIDE EMPLOYMENT AND BUSINESS ACTIVITIES

This is the area of off-duty conduct in which the gap between official policies (and sometimes even the law) and practice seems to be the widest. We encountered many legislative provisions and force policies which prohibited any and all outside (or "secondary") employment of police officers. Yet we have encountered no force in which management does not concede that such secondary employment or business activity is commonplace among its members. In practice, it seems that such prohibition or regulation is enforced only when cases come to the attention of management where it is seen to be a problem. For the rest, deviation from the official rules seems to be routinely understood and tolerated.

Two trends in this area are clearly discernible. The first is a trend from outright prohibition to regulation. The second is a trend from reliance on unfettered discretion of police chiefs in this area (i.e. outside employment or business activities are only permitted if the chief's approval has been obtained, and there are no formal rules to guide the chief in exercising his discretion in this area) to more detailed and formal policies.

There are still many jurisdictions in Canada in which secondary employment or business activities of police officers are officially prohibited. For example, the *SQ code of ethics* provided:

A member of the Police shall occupy himself solely with the work of the Police Force and the duties of his position. He may not assume any other employment nor engage in any business, directly or indirectly.⁷¹

It is not entirely clear whether, or to what extent, the last three words of this regulation prohibit officers from arm's-length investments or other interests in businesses (e.g. investments in stocks and shares, or interests in businesses owned by family members). We have not been able to ascertain to what lengths the force goes to enforce this general prohibition.

More common than such outright prohibitions nowadays, however, are general regulatory provisions such as the following, which appeared in *Regulation 791* under the *Ontario Police Act*:

29. Except with the consent of the chief of police, granted in accordance with the bylaws of the board [of police commissioners] or council, as the case may be, no member of a police force shall engage directly or indirectly in any other occupation or calling, and he shall devote his whole time and attention to the

service of the police force.⁷²

Under such a regulation, it was up to the police governing authority (the board or council) to decide whether to lay down policy guidelines for the chief in this matter, or leave it entirely to the chief's discretion.

As noted earlier, the *NS Police Act* now requires all municipal police governing authorities in that province to promulgate policies concerning off-duty employment of their members. It also provides that:

- (3) The chief officer shall determine whether employment is extra-duty employment or off-duty employment, and whether a particular kind of off-duty employment is permitted or prohibited within the off-duty police guidelines.⁷³

The Nova Scotia Police Commission has drafted a model policy in this area (as well as a model policy concerning extra-duty employment) for the guidance of municipal police governing authorities. The model policy on off-duty employment reads:

Off-duty employment means all non-police related work performed by off-duty members of a municipal police department.

A member of a municipal police department may not undertake to perform any off-duty work, for remuneration or otherwise, which is likely to bring discredit upon the police force, nor perform such off-duty work which is likely to interfere with the efficient performance of his duties as a police officer.

A member shall not be involved in fund raising, solicitation activities, contract or work for any person for remuneration by any member of the public, that may bring discredit to the force or otherwise place the member in violation of any section of the Code of Conduct and Discipline as set out in part 2 of the Regulations made pursuant to the *Police Act*.

A member of a municipal police force shall not engage in the service of civil documents nor work as a private investigator or private guard or engage in the business of providing private investigators or private guards for hire, either within or outside of the municipality for which he is employed.

A member of a municipal police force shall not wear any article of uniform while engaged in off-duty employment.⁷⁴

We were provided with copies of many of the policies on off-duty employment which municipal police governing authorities had promulgated under section 21 of the *Police Act*. Most, but not all, followed closely the Nova Scotia Police Commission's model policy set out above, thus ensuring

a high degree of uniformity on this issue, at least at the level of official policy, in police forces across the province (although of course the contract police services of the RCMP in the province are not subject to these policies).

It will be noted that the Nova Scotia policies cover only off-duty employment, and are silent on investments and business activities, which remain largely unregulated. We were told by members of the forces we visited in Nova Scotia that these areas tend to be regulated informally in accordance with the conflict of interest guidelines promulgated by city or town administrations for all their municipal employees. Indeed, we were told the same thing in many other jurisdictions we visited, in which police employment and/or business and investment activities are not formally regulated by written policies drawn up by the police forces or governing authorities themselves.

Even in those jurisdictions which had formal policies on these matters, we noted that in some cases the policies appeared to have been interpreted extremely permissively. In one jurisdiction, for instance, we learned that a police officer, employing his fellow officers while off duty, was providing firearms and street survival training under contract to his own and other local police forces. His regular job was that of firearms training officer for his force. This off-duty business activity was apparently approved not only by his own police force, but also by the provincial police commission, which was arranging for his company's services to be provided to other police forces. Although there was some acknowledgement that such off-duty business activity could be viewed as involving a substantial conflict of interest, it was apparently justified on the basis that the training this officer was providing was not available to police forces from other sources in the province. Under these circumstances, it was believed that any conflict of interest was outweighed by the benefits which police forces in the province were deriving from this service.

In another instance, we were told of a police officer who was running a business selling uniforms and equipment. His own police force was one of his business clients. Apparently this was not thought to be an unacceptable conflict of interest such that the force was prepared to take any action with respect to it.

In a third case, we were told of a president of a municipal police association who had been running a business which provided the services of off-duty police officers (who were members of his association) to guard provincial liquor outlets under contract. The contract stipulated that the pay for such services should be equal to the overtime rates which the police officers would earn in their regular employment. These overtime rates, of course, were determined by a collective agreement between the association and the police governing authority. The officer involved has now left the force, but this situation apparently persisted for several years without any disapproval by the force.

Some other jurisdictions have been even more explicit in defining acceptable kinds of off-duty employment and business activities. In June, 1985, the Calgary Police Commission inserted the following provisions in the Calgary Police Service's Administration Manual:

87.0 OUTSIDE BUSINESS INTERESTS

- 87.1 A member will not invest in any of the following businesses or ventures or accept part-time employment in any of the following occupations:
- (i) bill collector;
 - (ii) skip tracer;
 - (iii) watchman, security guard, or other security work;
 - (iv) taxi or limousine driver, or the owner or operator of a taxi service or limousine service;
 - (v) owner, operator or employee in an establishment in which alcohol is consumed;
 - (vi) owner, operator, or employee in an establishment in which gambling occurs;
 - (vii) insurance adjuster or investigator;
 - (viii) private investigator;
 - (ix) escort, or an employee of an escort agency;
 - (x) process server;
 - (xi) armored car driver or guard;
 - (xii) body guard;
 - (xiii) any occupation which requires a member to be armed.
- 87.2 A member may invest in a business or venture not listed in Section 87.1 and may accept part-time employment in an occupation not listed in Section 87.1 providing the following conditions are met:
- (i) the member's effectiveness as a peace officer will not be adversely affected;
 - (ii) participation in the business or other venture or part-time employment, will not create a conflict of interest with the member's duties as a peace officer; and
 - (iii) the business or venture, or part-time employment, will not be demeaning to the member's position as a peace officer or to the Service.
- 87.3. Prior to investing in a business venture or accepting part-time employment to which s. 87.2 applies, a member must apply for and receive permission to do so from the Chief of Police. Applications must be in writing and include the name and address of the employer, or owner of the business, and the duties and responsibilities the member will be expected to fulfill.

- 87.4 A member who is notified by the Chief of Police that his application to invest in a business or venture, or accept part-time employment, does not meet the conditions specified in Section 87.2 may, within 30 days, appeal to the Commission.
- 87.5 A member will not, under any circumstances, use any of the resources of the Service to assist him in carrying out any function of a business or venture, or part-time employment.
- 87.6 A member who, at the time this Amendment comes into force, is employed in a part-time position in an occupation listed in Section 87.1 shall terminate such part-time employment, or dispose of such investments, as the case may be, within twelve months from the effective date of this Amendment.

This represented the most comprehensive attempt to regulate the area of off-duty employment and business activities ever undertaken in a Canadian police jurisdiction. As noted above, the new regulation was unsuccessfully challenged in *Calgary Police Association*. The Alberta Court of Appeal upheld the lower court ruling to the effect that the regulation was intra vires, not unreasonable and not in violation of the *Charter*. The court's unanimous judgment concluded:

...we hold the view that restrictions on extra-curricular activity found in the disciplinary regime of a modern police force are domestic and internal contractual arrangements that may be negotiated or modified by the parties in the usual course.⁷⁵

The Ontario Provincial Police Force has since adopted a regulation modeled closely on the Calgary version.

It will be evident that these kinds of regulations create the possibility of two quite distinct disciplinary offences. First, there is the offence of engaging in secondary employment or business activities without the requisite permission (usually the permission of the chief), Second is the offence of engaging in secondary employment or business practices which are regarded as unacceptable.

Realistically, the second kind of case will arise only in those jurisdictions (which are now few in number) where permission is not required to engage in secondary employment or business activities. In such circumstances, discussion centres on whether particular kinds of employment or business activity are compatible with full-time employment with the police force. From our interviews, we would conclude that the three criteria set out in Section 87.2 of the Calgary policy represent an appropriate distillation of prevailing concerns of police forces in this area. They are a concern that the secondary activities not be such as to adversely affect the officer's job performance (e.g. because of long hours or physical demands which leave the officer too tired to work effectively as a police officer); a concern that the activities not involve a conflict of interest with the officer's

police work (this may, of course, vary according to what assignment the officer has); and a concern that the activities not adversely affect the reputation of the officer or the force.

We have come across few written decisions which discuss these matters in detail. The reason for this seems to be that proving lack of requisite permission for secondary employment or business activities is so relatively easy that tribunals rarely have the opportunity to address these larger questions. One such recent case, however, involved an implicit conflict between two governmental agencies. In this case, a constable in Manitoba had applied for registration as a real estate salesman, with the intention of selling real estate part-time when off duty. His application was the subject of a hearing by the Manitoba Securities Commission. The regulations of his police force prohibited its members from "engaging in employment, for an employer other than the City", and the Registrar of the *Real Estate Brokers Act*⁷⁶ had advised him that his application would not be entertained unless he could show that he had the permission of his chief of police. He had accordingly applied for such permission, which had been granted. In granting it, however, the chief's representative had reminded him of the rule against outside employment. Apparently because of this rule, however, the Securities Commission had adopted a long-standing policy of not granting licences to police officer applicants. When advised of this policy, the officer withdrew his application. After this, the Registrar had written to him saying that:

In my view, it is inappropriate for an individual, who carries the weight of authority granted him by virtue of his employment as a police constable and a peace officer, to also deal with members of the public in the capacity of a real estate agent. This is a long-standing policy of my office.

A few months later, however, the officer reapplied, enclosing a supporting letter from a real estate firm, in which it was pointed out (a) that the police force concerned did not object to his application, and was willing to tolerate self-employment but not employment by others, (b) that the Chairman of the Manitoba Police Commission had indicated that he was not opposed to the application or aware of any legal impediment with respect to it, and (c) that another police officer in the province was already registered as a salesman, and was in good standing. The Registrar referred the matter to the Securities Commission for a decision. In rejecting the application, the Commission wrote:

The policy [of not granting licences to police officers] is designed to protect the public from any mischief that might occur by reason of a person's position or perceived position. Police constables hold a special position in the community and depending on the citizen, are perceived in various lights. A constable could, because of his position, unknowingly bring pressure to bear on the public and by the same token, the public could use the police constable to their advantage. The policy is designed to deal with such situations. It is the opinion of this Commission that the policy is just as true and necessary today as it was fourteen years ago.

The officer sought judicial review of the Commission's decision by the Court of Queen's Bench of Manitoba. In upholding the officer's challenge to the Commission's decision, and directing the Commission to register the officer as a real estate agent, Mr. Justice Coleman concluded that:

In my opinion the Commission erred in refusing the applicant a licence by relying solely on the policy that has been uniformly applied against police officers in general without dealing with the application solely on its merits and on an individual basis. Furthermore I would respectfully find that such a general policy was of a discriminatory nature and that the onus on the registrar and/or the Commission of establishing that such policy was in the public interest was not established on the evidence.⁷⁷

In reaching this conclusion, Coleman J. emphasized that the fact that practising as a real estate salesman might involve a breach of the force's regulations prohibiting outside employment "would be a matter solely between a police officer and his employer",⁷⁸ and should not have been given any weight by the Commission in arriving at its decision. He characterized the reasons cited by the Commission in support of its policy against police officers as "speculation", noting that no complaints had been received over the years against the one police officer who had "unintentionally" been licensed by the Deputy Registrar in contravention of the policy. He noted that police officers "by reason of their specialized training and experience are accustomed to dealing with the general public and in particular on matters of detail and integrity, all of which are excellent tools, not only for a real estate sales person, but also serves to the benefit of the general public", and that "when employed as a salesman [the officer] would not be in uniform and there would be no need in disclosing his identity as a police officer."⁷⁹ He also drew attention to the fact that schoolteachers, who could be school principals or vice-principals, thereby also occupying positions of responsibility and authority within the community, were not similarly prevented from being licensed.

It is, of course, a matter for speculation as to whether the court would have taken a similar position had there been evidence that the constable's force had been opposed to the granting of a licence. The case is important, however, in that it suggests that the courts, when given the opportunity, may require justification of even clear rules prohibiting secondary employment by police officers. In this respect, the case might be interpreted as evincing a desire to treat police officers as much as possible similarly to the way other employees are treated in this matter. What this means is that, although the legitimate requirements for the effective performance of the police job may vary from those of other jobs, there will nevertheless be an expectation that restrictions on off-duty employment and business activities by police officers must be justified in terms of those requirements. This is consistent with the necessity that they be justified under the common law (*Millhaven*) principles which apply to other employees. Such restrictions cannot simply be imposed by executive fiat.

Too much should not be read into Mr. Justice Coleman's decision in *Partridge*, however, especially in light of the unanimous decision of the Alberta Court of Appeal upholding the Calgary Police Commission's general secondary employment policy in *Calgary Police Association*. Mc Clung J.A., delivering the judgment of the court, held that the rules promulgated by the Commission

were clearly authorized by the Alberta *Police Act*, nor did their "imposition arise in breach of any rule of natural justice."⁸⁰ He further held that the rules were clearly supportable "to prevent conflicts with the recognized duties and responsibilities of police officers generally" and could not be considered unreasonable or in violation of *Charter* rights.⁸¹

It is worthy of note, however, that in its very short judgment, the court reached this conclusion without any detailed examination of the rules themselves. Thus, for instance, there was no discussion of the particular justifications which might legitimately be invoked for prohibiting each of the particular forms of employment and business activities prohibited by the rules. This might be thought to be a weakness in the persuasiveness of the decision, which could perhaps be exploited in future litigation.

(5) DOMESTIC AND SOCIAL ACTIVITIES

As we have noted, the disciplinary offence of discreditable or disgraceful conduct is so broadly defined that it can be applied to an almost infinite range of private or public off-duty conduct. Indeed, in our research and interviews we encountered an amazing variety of cases of discreditable conduct, ranging from a female police officer who posed nude for a magazine (not a Canadian case), to a male officer who cohabited with a 16-year-old girl in a small town, a male officer who engaged in homosexual practices in a public washroom, officers who painted an obscene message on a neighbour's fence, and several cases in which officers were disciplined for associating with known criminals or other undesirables (e.g. prostitutes). Many officers have been disciplined for using obscene or insulting language in public places, and for being intoxicated and disorderly in public. There have been, more recently, cases in which officers were disciplined for sexual harassment and expressions of racial hatred while off duty.

While in the past certain sexual orientations and practices (such as homosexuality) would undoubtedly have been regarded by police forces as amounting to discreditable or disgraceful conduct, even if engaged in off duty and in private, modern human rights legislation would preclude such disciplinary charges in most jurisdictions. This does not, of course, mean that such practices are now fully tolerated, let alone supported, by police organizations. A senior female police officer in England is currently the subject of disciplinary proceedings for allegedly swimming in her underwear in a businessman's swimming pool while on duty. She is, however, simultaneously pursuing a complaint that her force has persistently discriminated against her in employment decisions on the basis of sex.⁸²

Along with the broadly defined offence of discreditable conduct -- which at least requires the police force to show some adverse relationship between the off-duty conduct and the legitimate interests of the police force, and in this respect parallels the standards of conduct applied to other employees -- some police discipline codes contain other equally broadly defined offences which do not require proof of such a rational connection between the conduct of the officer and the interests of the police force. Under the Winnipeg Police Department's regulations, for instance, it is an offence for any officer when in uniform and in public view, whether on or off duty, to use tobacco or chew gum.

With respect to racism and sexism, many police departments, mindful of the need for harmonious community relations, have promulgated explicit policies prohibiting such conduct by officers both on and off duty. The Metropolitan Toronto Police Force's *Standing Order No. 24* is regarded as something of a model in this regard. In addition to enjoining members of the force against "any expression or display of prejudice, bigotry, discrimination, and sexual or racial harassment", the Order contains the following paragraph:

Members of the Force are conspicuous representatives of government and are symbols of stability and authority upon whom the public can rely. As such, members of this Force must recognize that individual dignity is vital to a free system of law and that while all persons are subject to the law, they are equally entitled to dignified treatment by all persons involved in law enforcement. Therefore, members of the Force must, at all times, whether on duty or off duty, refrain from conduct or remarks which may be interpreted in a way that is detrimental to themselves, the Force, the Metropolitan Corporation, or any other person or agency involved in the administration of justice.

[Emphasis added.]

The Order specifies that "disciplinary action will be taken against members who contravene this Declaration of Concern and Intent".

Another area of regulation which can significantly affect the private lives of officers is regulation of where they may live. Many police forces specify that their officers must live either within the municipality where they are employed, or within a specified distance from it. Legal challenges to such regulations by police officers have proved unsuccessful,⁸³ and the Court of Queen's Bench in New Brunswick held in 1987 that such regulations do not violate officers' mobility rights under Section 6 of the *Charter*.⁸⁴

Officers in charge of internal affairs units have consistently told us that the offence of associating with known criminals is a particularly difficult one to sustain, since innocent explanations are hard to rebut. A not untypical case recounted to us involved an officer who was a fitness enthusiast, and frequented a local gym during his off-duty hours. The force knew, and he knew, that the gym was operated and frequented by known criminals, and the force advised him that he should not continue his patronage of it. He, however, insisted that his only interest in being there was to do his physical training, and that alternative comparable facilities were not available to him elsewhere. The force apparently did not feel that a disciplinary charge would be sustainable under these circumstances.

Another explanation which is often difficult to refute is that an officer is associating with criminals in order to obtain information or cultivate an informant. Since this involves a claim that the officer is engaged in police work, however, it can be overcome with respect to further associations through the expedient of an order to the officer not to pursue such lines of inquiry. Such superior orders have been judicially recognized as lawful⁸⁵. If the officer then continues the association, a charge of insubordination can be laid.

(6) IMPROPER DISCLOSURE OF POLICE INFORMATION

In all Canadian jurisdictions, the improper disclosure of police information is a disciplinary offence. While addressed in codes of discipline under categories such as improper disclosure of information, breach of confidence or confidentiality, prohibition of such behaviour is also specified in standing orders concerning the release of news and information and in departmental media relations policies.

One of the most comprehensive statements concerning improper disclosure of police information is found in Alberta's *Municipal Police Disciplinary Regulations*, which define "breach of confidence" as follows:

- (i) divulges any matter which it is his duty to keep secret, or
- (ii) gives notice, directly or indirectly, to any person against whom any warrant or summons has been or is about to be issued, except in the lawful execution of such warrant or service of such summons, or
- (iii) without proper authorization from a superior officer or in contravention of any rules of the police force of which he is a member communicates to the news media or to any unauthorized person any matter connected with the police force, or
- (iv) without proper authorization from a superior officer shows to any person not a member of the police force or any unauthorized member of the force any book or written or printed paper, document or report that is the property of or in the custody of the police force, or

...⁸⁶

While certainly not as comprehensive as the one outlined above, most provisions prohibit the oral or written disclosure of confidential information to the public, press, radio, television or to an unauthorized person.

A few explicitly prohibit the inspection of or access to any confidential information by unauthorized persons. In one case we came across during our study, a young officer was charged and convicted of "disgraceful conduct" for taking a girlfriend into the police station while he was

off duty, opening a locked safe containing confidential information (including information about informants) in her presence, and showing her around the exhibits room and armoury. In his decision, the trial officer said that he could "appreciate the fact that a young police officer may want to impress a young lady by playing his role as a policeman", but that such conduct could not be excused.

Generally, the disclosure of any police-related information is held to be 'improper' when such disclosure may be detrimental to effective operations of the police department or is without proper authority. Obviously, those forces which have clear and explicit policies in this area (e.g. a media policy) will find it easier to establish whether a particular disclosure was or was not authorized.

One of the most serious forms of improper disclosure of police information involves tipping off a friend or relative that he or she is under police investigation. One case involved an officer who informed his brother-in-law that a stake-out on his home was being conducted by detectives and instructed him to dispose of any drugs that might be on the premises. In another case which came to our attention, a female police officer was alleged to have disclosed at a social gathering the fact that allegations had been made to the police about a resident of a small town to the effect that he had been sexually abusing his children. The man's ex-wife complained to the police force, and at the time of our interviews this case was still under investigation.

Other cases suggest that, in certain limited circumstances, unauthorized disclosure of even potentially damaging police-related information will not constitute a disciplinary offence. In one case, charges of discreditable conduct were laid against an officer who attended a special meeting of the municipal council for the municipality in which he worked, and discussed police matters. The officer was convicted and appealed this decision to the provincial police commission. The commission held that he was not guilty of discreditable conduct, and commented:

How can this be considered discreditable conduct considering that the Council is the governing authority of the police force and he was notified by them to attend?

In another case, a constable who, acting on behalf of his police association, and without consulting his board of police commissioners, sent confidential documents that were prejudicial to the force and its chief directly to the provincial police commission, was convicted of discreditable conduct. On appeal, the Ontario Police Commission ruled that the constable's

...conduct is not discreditable for policy reasons that Police Associations should be at liberty to approach the Commission for advice and assistance without fear of prosecution.

The emergence of practices of community-based policing may well require some redefinition of the practical boundaries of the offence of improper disclosure of police information. If officers are to become more integrated with the communities where they work, and communities are to become more involved in policing policy and decision-making, a distinction between on-duty and off-duty community consultation may become harder to sustain. Police officers may be encouraged

to discuss policing matters with community members whenever the opportunity arises, and regardless of whether they happen to be on or off duty at the time. While unauthorized disclosure of such information will, of course, still be an offence, the scope of authorization seems likely to change in favour of greater openness. Definitions of what constitutes improper or prejudicial disclosure may well have to change too.

Within the rest of the public service, and in the private sector, there are no common standards in this area, since the restrictiveness of information policies varies enormously in both sectors, depending on the nature of the enterprise concerned. One important difference is that the public sector, including the police, is now regulated in most jurisdictions by so-called "freedom of information" legislation, which also contains provisions restricting the release of information which could jeopardize individual privacy. As far as we have been able to tell, however, this legislation does not differentially affect off-duty, as opposed to on-duty, conduct of public servants.

(7) PUBLIC CRITICISM OF THE POLICE, CRIMINAL JUSTICE SYSTEM, ETC.

Closely related to the issue of improper disclosure is that of public criticism by an officer of the police force, or of other aspects of, or functionaries within, the criminal justice system. Most police discipline codes include provisions which either explicitly or implicitly make such public criticisms a disciplinary offence. For example, Alberta's *Municipal Police Disciplinary Regulations* include the following in the definition of the offence of "breach of confidence":

signs or circulates a petition or statement in respect to a matter concerning the police force, except through the proper official channel or correspondence or established grievance procedures.⁸⁷

Cases in which attempts have been made to discipline police officers for publicly criticizing their departments when off duty have been rare, and rarely successful. In one case, which achieved considerable public notoriety, a police officer was charged with discreditable conduct when, despite warnings from his supervisor not to do so, he appeared in public in a rock band wearing his police uniform. When he complained to the press about what he perceived to be the unfairness of the disciplinary process, this was treated by the force as a further offence of discreditable conduct. Although he was initially convicted, he appealed the decision, and the case was eventually settled, the officer receiving a substantial cash payment in return for resigning.

In another case, an officer wrote to a newspaper; the letter was published and contained strong criticism of a member of a commission of inquiry which was investigating an incident involving the officer's police force. His rank and his association with the force appeared at the bottom of the letter. He apparently received an informal verbal reprimand for this, and wrote a second letter to the newspaper explaining that his first letter had been written in his personal capacity, rather than as a member of the police force.

Critics of such provisions may argue that they represent a violation of fundamental freedom

of thought, belief, opinion and expression, including freedom of the press and other media guaranteed by Section 2(b) of the *Charter* and thus raise the issue of whether such rights for police officers are limited by their positions as peace officers. Williams asserts that "...a policeman's rights are constrained by the employer-employee relationship in that he owes loyalty and trust to his employer the same as any employee, public or private."⁸⁸

In contrast to police forces, the public sector sets out definitive statements prohibiting public criticism. For example, the Code of Conduct of Employment and Immigration Canada impresses upon employees the reticence required of a public servant under existing jurisprudence and the reticence required of a public servant as compared to an ordinary citizen and proceeds to specify:

CEIC/D employees must not indulge, through any public medium, in any criticism or adverse comment with respect to any Minister, deputy head, or governmental or Commission/Department policy, programs, services, on matters remote from collective bargaining (i.e. terms and conditions of employment) and those closely associated with political controversy. It must be emphasized that public criticism or denunciation by employees of their leaders or superiors is incompatible with the employment relationship and will be regarded as misconduct.

As a result of the rather unexpected jury acquittal in the now-famous *Ponting case* in England in 1984,⁸⁹ it began to be thought that there may be some circumstances in which whistle-blowers will be protected from disciplinary action. There is, however, little judicial support for such an exception,⁹⁰ especially in Canada where courts have been particularly unreceptive to the pleas of civil servants who have publicly criticized their departments or gone public about alleged irregularities.

In *Fraser v. Public Service Staff Relations Board*,⁹¹ the Supreme Court of Canada upheld the dismissal of a federal public servant, holding that his persistent and highly visible attacks on one of the government's major policies demonstrated a lack of loyalty which was inconsistent with his duties as one of its employees. In *Re Ministry of Attorney-General, Corrections Branch and British Columbia Government Employees' Union*,⁹² an arbitrator upheld the dismissal of two senior correctional officers who had strongly criticized the operations of the Corrections Branch of the British Columbia Attorney-General's Ministry on a radio show.

(8) ABUSE OF AUTHORITY

Under the categories of abuse of authority, unlawful or unnecessary exercise of authority or less commonly that of corrupt practice, most codes of discipline specify that abuse of an officer's authority as provided by statute constitutes a disciplinary default. Regulatory provisions vary, however, in the way they define abuse of authority. Alberta's *Municipal Police Disciplinary Regulations*, for instance, contain the offence of

- (g) UNLAWFUL OR UNNECESSARY EXERCISE OF AUTHORITY, that is to say, if he is unnecessarily discourteous or uncivil to a member of the

public.⁹³

By contrast, Manitoba's *Law Enforcement Review Act* provides for the following disciplinary default:

- (a) Abuse of authority, including
 - (i) making an arrest without reasonable or probable grounds,
 - (ii) using unnecessary violence or excessive force,
 - (iii) using oppressive or abusive conduct or language,
 - (iv) being discourteous or uncivil,
 - (v) seeking improper pecuniary or personal advantage,
 - (vi) without authorization, serving or executing documents in a civil process, and
 - (vii) discriminating on the basis of race, nationality, religion, colour, sex, marital status, physical or mental handicap age, source of income, family status, political belief, or ethnic or national origin.⁹⁴

Other regulatory definitions of abuse of authority which we have seen include such matters as the use (without reasonable justification) of a baton, billet, handcuffs or other restraining device, and influencing an individual in custody to make a guilty plea.

The wording of such provisions, while not directed to off-duty conduct *per se*, is often applied to it, as is illustrated by an incident reported in the annual report of a complaints review body:

Mr. X alleged that Inspector A "misused his position as an officer of the Law". The incident occurred when Mrs. A, the mother-in-law of Mr. X, decided to recover a vehicle which she had sold to him. Mrs. A and Inspector A [her husband], who was off duty, went to Mr. X's residence where Mr. X, after discussion, turned over the keys of the truck to Mrs. A who drove it away. Mr. X failed to state in his testimony in what manner Inspector A abused his position as police officer in his dealings with Mr. X. The Board agreed with the Chief of Police who found the presence of Inspector A in this situation to be inappropriate and made him aware of his role as a peace officer in disputes of this nature. The Board dismissed the appeal after hearing the evidence of Mr. X.

Most recorded abuse of authority cases have involved abuse of authority for personal advantage as in the case cited above. Another case cited to us involved an off-duty police officer

who attempted to cash a post-dated cheque at a bank after identifying himself as a police officer, and replied with obscene language when the teller refused to cash the cheque. He was dismissed from the force.

In a 1988 incident, two off-duty officers who arrested a taxi driver for impaired driving without sufficient cause were charged with unlawful exercise of authority. The officers appealed their convictions and penalties of two and three days leave respectively. In its decision to confirm the penalties, the provincial police commission raised the issues of the credibility of the officers and the sufficiency of the penalties in securing both general and specific deterrence. In another case, an off-duty officer who was accompanied by another officer and a civilian, all of whom, representing themselves to be police officers, questioned and searched two groups of citizens, was charged with a major offence of discreditable conduct. In disallowing an appeal and confirming the penalty of dismissal, the provincial police commission emphasized a higher standard of conduct for police officers:

Our whole police system is based on public trust in police officers' meeting a standard of conduct beyond that demanded of citizens generally. Police have special powers, and, in consequence, the highest standards of conduct are imposed. The present instance where, in the company of two experienced police constables, a civilian is allowed to break the law by identifying himself as a police officer is one which cannot be condoned; it is one that destroys that very relationship of public trust that police constables must have.

(9) UNAUTHORIZED/IMPROPER USE OF POLICE EQUIPMENT/PROPERTY)

All police forces have rules about the use of departmental equipment, although these rules vary somewhat from force to force. Most forces, for instance, allow their officers to take their service revolvers home with them, on the theory that in the event of an emergency call-out, they will arrive properly equipped. Use of such equipment for personal, as opposed to official, purposes, however, is regarded as a disciplinary offence by most forces.

Such prohibitions include the wearing of the police uniform on inappropriate occasions, as is illustrated by the case cited above in which the officer wore his police uniform while performing in a rock band.

Many police regulations also insist that when worn in public, the police uniform must be worn in its entirety or not at all. Thus, for instance, the Winnipeg Police Force's regulations include the offence of "appearing in public dressed partly in identifiable uniform and partly in civilian attire".

Other public and private sector employers undoubtedly impose rules concerning the wearing of uniforms while off duty (especially rules requiring tidy appearance, etc.) in order to protect the image of the employer's organization. The particular public responsibilities of the police, however, in addition to the need to ensure unequivocal public recognition of police officers, provide grounds

for more stringent regulations concerning the wearing of a police uniform.

Off-duty misuse of the police identification badge, of course, tends to be characterized as a form of abuse of authority, as discussed above.

CONCLUSIONS

While we have been able to cover only a fraction of the great amount of pertinent material to which we were given access during the research for this paper, we have attempted to illustrate not only the broad range of off-duty conduct which police forces in Canada have sought to regulate, control and discipline their members for, but also the range of regulatory strategies and responses which police forces have adopted in this regard. We have also sought to compare these with the situations pertaining to other public and private sector employees.

Our review reveals a number of significant trends, most notable of which is the trend towards replacing vaguely defined prohibitions with quite detailed policies. Calgary's policy on outside employment and business activities provides the most vivid example of this trend, which reflects not only a move towards greater specificity in regulation, but a move in favour of clear rules rather than vague prohibitions whose interpretation and application depends on the discretion or judgment of chiefs of police and disciplinary tribunals. While this is undoubtedly a beneficial trend from the point of view of police officers who have to try to live in conformity with the rules, it may well carry some costs in terms of reduced flexibility for police managers. In the era of the *Charter*, however, it is probably not a trend which could have been long forestalled.

Another less clear trend has involved elimination, or at least relaxation, of prohibitory regulation which was once thought appropriate. This is particularly noticeable in the areas of secondary employment (which used to be prohibited entirely by many police forces), political activity, cohabitation arrangements and private sexual conduct. In other areas, however, regulation of off-duty conduct appears to be expanding; explicit restrictions on racial and sexual harassment provide clear examples. As new approaches to policing (such as so-called community-based policing) begin to take hold, it seems likely that other areas of regulation may have to be reconsidered.

The heavy reliance of police forces on the concept of "discreditable conduct" as the basis for regulating off-duty conduct, and the broad interpretations and applications of this term, raise some other difficult questions. On the face of it, the concept of "discreditable conduct" appears to mirror the common law rules respecting the regulation of off-duty conduct which apply to most other employees in the public and private sectors. For the concept seems to require that conduct will be subject to regulation only if a rational connection between it and the legitimate interests of the employing police force can be demonstrated. There can be no doubt from the cases, however, that the breadth with which "discredit" has been interpreted in the police context has allowed for interventions in officer's off-duty lives which are considerably greater than those normally authorized in the case of other employees. As we have noted, the courts (including the Supreme Court of Canada) have upheld the right of police forces to impose higher standards of off-duty

conduct on the part of their officers than those imposed on other citizens.

Even when this is acknowledged, it does not answer the question of what the limits might be in this regard. To put it another way, the breath of the concept of "discreditable conduct" raises serious questions about the extent to which engagement in the police occupation allows officers to have a private life over which the police force does not have supervisory jurisdiction. This is compounded by the prevalence of regulatory prohibitions which do not require proof of a rational connection between the conduct and the legitimate interests of the police force.

This issue has been raised most recently by the Metropolitan Toronto Police Association in connection with proceedings under the Metropolitan Toronto Police Force Complaints Act, 1984,⁹⁵ and now the *Ontario Police Services Act*, which provides that:

75. Complaints by members of the public about the conduct of police officers shall be dealt with in accordance with this Part.⁹⁶

Since the term "conduct" is not defined or limited anywhere in the Act, section 75 would appear to contemplate that the Public Complaints Commissioner can entertain any complaint concerning any conduct of a police officer, whether the officer was on or off duty at the time. Indeed, the Ontario Divisional Court has recently confirmed that off-duty conduct could be the basis for a complaint under the *Police Services Act*, even though at the time the conduct occurred the complainant did not know that the person involved was a police officer.⁹⁷

This is merely a particularly clear example of the way current regulations seem to authorize almost unlimited supervision of, and intervention into, the private lives of officers. What is not clear from our review is what the limits of such supervision and intervention might be. On the face of it, one would think that the *Charter* might play an important role in setting such limits, and in defining for police officers a realm of truly private life for which they are not accountable to their police forces. The few *Charter* challenges which have been taken, and which we have noted, however, do not seem to offer police officers much comfort in this regard, since police force regulations have been consistently upheld as not violating *Charter* rights.

On the basis of our review, we would not expect this virtual immunity from legal challenge to continue for long. In the first place, there have been few such challenges so far. As more challenges emerge, as they undoubtedly will, the likelihood that some of them will be successful will increase. Secondly, as pointed out earlier, the cases which have been decided under the *Charter* so far are not noteworthy for the careful and detailed scrutiny of the regulations they display. More sophisticated arguments in future cases, requiring more exacting scrutiny by the courts for their disposition, may produce different results.

Quite apart from legal challenges, regulations regarding off-duty conduct of police officers raise more general social questions about how we regard our police, and what kind of people we expect them to be. How, for instance, can we expect them to be more in tune with the communities they serve and more empathetic towards those they police -- both ostensible and laudable goals of

community-based policing - if we deny to them the most basic rights to private lives and freedom of expression which other citizens enjoy"? In this regard, the words of the Commission of Inquiry Relating to Public Complaints, Internal Discipline and Grievance Procedure within the Royal Canadian Mounted Police seem just as appropriate today as they were when it wrote them 15 years ago:

The discipline system with the greatest likelihood of success is one which, through its provisions and procedures, earns the respect of those for whom it is administered. Essential to such a system are provisions which demonstrably recognize and protect the rights of members.⁹⁸

In order to achieve such a system, the first priority would seem to be the development of a rational principled basis for it. A key to this would seem to be the adoption of a fundamental principle which underlies legally authorized intervention with respect to off-duty employee conduct in the private sector namely, that such intervention can only ever be justified if the employer can demonstrate a rational connection between the off-duty conduct and the legitimate interests of the employer. As has frequently been noted in this paper, this basic principle is not consistently recognized in current rules governing police force interventions with respect to off-duty police officer conduct.

TOWARD A MORE RATIONAL BASIS FOR THE REGULATION AND CONTROL OF OFF-DUTY POLICE OFFICER CONDUCT

If it is accepted that there are characteristics and requirements of police work which distinguish it from other work, and these distinctive aspects are taken into account, there is no reason why the accepted common law principles respecting employer regulation and control of off-duty conduct should not be regarded as equally appropriate and adequate to the context of the police occupation. Such an approach (which is the normal one in other areas of employment) would require that the *bona fide occupational requirements* of police work and the *police force's legitimate reputational interests* be identified. It would also require that disciplinary action with respect to off-duty police officer conduct would, in each case, have to be justified through the demonstration of a rational connection between the impugned conduct and these legitimate requirements and interests.

Since most of the existing regulatory provisions respecting off-duty police conduct are rarely or never invoked, it may be that such an approach would not produce significantly different results in practice. It would probably serve to enhance the legitimacy of such discipline in the eyes of police officers, however, and may serve to forestall legal challenges which can be anticipated under the existing regime, some of which could be expected to be successful.

Bona fide occupational requirements and reputational interests respecting police work

In view of the current debates over the proper role of the public police, it is of course particularly difficult to identify a set of *bona fide* occupational requirements and reputational interests respecting public police work which would be universally accepted. The following are offered, therefore, merely as an illustration of how the regulation and control of off-duty police officer conduct might be made more consistent and principled, recognizing that the occupational requirements suggested may not necessarily be the most appropriate or acceptable ones. Even assuming that they are the right ones, however, the relative weight attached to them could be expected to vary according to the particular type of police work involved in any given case:

- (1) An understanding of, and respect for, prevailing notions of peace and good order - necessary for the peace-keeping functions of police work;
- (2) A respect for, and obedience to, the laws of the land - necessary for law enforcement functions;
- (3) A demonstrated commitment to impartiality and against unacceptable prejudice and discrimination
 - necessary for all police work involving contact with or consequences for members of the public;
- (4) Demonstrated honesty, trustworthiness, and conduct and deportment worthy of general social respect
 - necessary to ensure public confidence in, and hence accessibility to, police as service providers, especially in situations of conflict and crisis,
 - also necessary to ensure credibility of police as witnesses in court;
- (5) A specified minimum level of physical and mental fitness
 - necessary for (and to be determined by) actual physical and mental demands of police work;
- (6) Availability for, and fitness for, duty at all times
 - necessitated by the nature of peace officer status which is an incident

of employment as a police officer.

It could be suggested that beyond the limits of these *bona fide* occupational requirements and reputational interests, police officers are entitled to a private off-duty life in which they are free from interference or surveillance by their employing police forces. Furthermore, as under common law applicable in the private sector, the onus should always remain on the police force to justify intervention on the basis of these criteria. A *prima facie* presumption in favour of an officer's privacy and non-intervention should always be recognized.

Accommodating changes in the police role

The current preference for community-based policing raises questions as to whether the traditional *bona fide* occupational requirements for police work will still be appropriate or accorded the same relative weight and application in the future. For instance, our current notions of what the impartiality requirement consists of, and possible implications of this requirement for off-duty political activities of police officers, may well need review. The point illustrates the need for occupational requirements which form the basis for discipline to be kept in constant review to ensure that they appropriately reflect current conceptions of the police officer's (and police force's) role in society.

The nature of police force responses to off-duty police officer misconduct

Informal and formal discipline have been the most common police force responses to off-duty police officer misconduct. Changes in the nature of such responses, however, have resulted from two important trends in the late 20th century.

First has been a trend, within employment discipline generally, towards emphasis on the remedial rather than the punitive purposes of discipline. This has implications primarily for the allowable responses once misconduct has been established, rather than for the definition of misconduct itself.

The second important trend has occurred through the promulgation of human rights and anti-discrimination laws which have redefined certain conduct (especially that which is related to alcoholism, drug dependency, sexual orientation, and perhaps even occupational stress) either as the product of disabilities or, in the case of sexual orientation, as legally protected conduct, rather than as misconduct which can appropriately be the subject of (punitive) discipline. These laws now require that such conduct must be responded to using approaches which emphasize accommodation and, in the case of disabilities and were possible without undue hardship to the employer, remediation, rather than those of traditional punitive discipline.

Those two trends dovetail effectively to require an approach towards police force intervention with respect to off-duty conduct of police officers which will have (and in some cases quite different outcomes) from the more traditional punitive, disciplinary approach.

Implications of these suggestions

- (1) Many existing outdated (and rarely invoked) disciplinary offences relating to off-duty conduct, and all those which do not require a rational connection between the impugned conduct and the *bona fide* requirements of the police job to be demonstrated, could be removed from police disciplinary codes.
- (2) Disciplinary decisions with respect to off-duty police conduct would be based on a set of agreed, articulated and rational principles which, over time, would be the subject of consistent and accepted interpretation and application. (Greater publicity of decisions would facilitate this.) The result would be a disciplinary regime which would have greater legitimacy in the eyes of police officers and the public, and would actually be fairer and easier to defend.
- (3) The regulation and control of off-duty police officer conduct would be based on the same fundamental principles as the regulation of off-duty employee conduct in the private and public sectors more generally (although of course those general principles might often produce different outcomes when applied to police work than they would when applied to other occupations).
- (4) Managerial flexibility to adapt existing criteria for discipline, and interpretations and applications of the police role would be enhanced.
- (5) Approaches to responding to off-duty conduct of police officers would be more readily adaptable to changing conceptions of fundamental human rights, equity and protections against unlawful discrimination.
- (6) The right of officers to a private, off-duty life free from interference and surveillance by their employing police forces would become more clearly defined and more effectively protected.

Whether, and to what extent, these suggestions are adopted depends in part on the attitudes of legislators and other rule makers. More importantly, though, their adoption depends on how police officers and managers see their roles in society. It would appear that this perception is still evolving.

ENDNOTES

1. See D. Flaherty (ed.) Essays in the History of Early American Law (Chapel Hill: University of North Carolina Press, 1969); P. Aries & G. Duby (eds) Histoire de la Vie Privée (5 vols) (Paris: Éditions du Seuil, 1985-87).
2. D. Bayley, Forces of Order: Police Behaviour in Japan and the United States (Berkeley: University of California Press, 1976) at 71.
3. *Re United Automobile Workers, Local 1524 and General Spring Products Ltd* (1968), 19 L.A.C. 392 (Weatherill) at 395.
4. See, for example, D. Brown & D. Beatty, Canadian Labour Arbitration, 3d ed., (Aurora, Ont.: Canada Law Book Co., 1990) para 7:3000 *if* [hereinafter Brown & Beatty]; E. Palmer Collective Agreement Arbitration in Canada, 2d ed., (Toronto: Butterworths, 1983) at 381-401 [hereinafter Palmer].
5. C. Reith, The Blind Eye of History (1952; rpt Montclair, N.J.: Patterson Smith, 1975) at 157.
6. (1956), 114 C.C.C. 77 (S.C.C.) at 80-81.
7. C. Shearing, Post-Complaint Management: The Impact of Complaint Procedures on Police Discipline, Discussion Paper 4 prepared for RCMP External Review Committee (Ottawa: Minister of Supply and Services Canada, 1990).
8. Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act* 1982 (U.K.), 1982, c. 11 [hereinafter the *Charter*].
9. *Re Carpenter and Vancouver Police Board et al.* (1983), 47 B.C.L.R. 161, 149 D.L.R. (3d) 405 (S.C.); *aff'd* (1985), 63 B.C.L.R. 310, 18 D.L.R. (4th) 585 (C.A.); leave to appeal refused *sub nom. Vancouver Police Board v. Carpenter*, [1985] 2 S.C.R. xiii (1 October 1985); *Carpenter v. Vancouver Police Board*, [1986] B.C.W.L.D. 437 (S. C.); *rev'd* (1986) 9 B.C.L.R. (2d) 99, 34 D.L.R. (4th) 50, [1987] 2 W.W.R. 97, 23 Admin. L.R. 166 (C.A.); leave to appeal refused *sub nom. Vancouver Police Board v. Carpenter*, [1987] 1 S.C.R. xv (14 May 1987), 44 D.L.R. (4th) vii; (1988) 33 B.C.L.R. (2d) 183 (S.C.) [hereinafter *Carpenter*].
10. *Re Iron Ore Co. of Canada and United Steelworkers of America, Local 5795* (1983), 11 L.A.C. (3d) 53 (Bruce).

11. *Re Millhaven Fibres Ltd, Millhaven Works, and Oil, Chemical and Atomic Energy Workers Int'l, Local 9-670* (1967), 1 (A) Union-Management Arbitration Cases 328 (Anderson) at 329 [hereinafter *Millhaven*].
12. Palmer, *supra*, note 4 at 385.
13. Brown & Beatty, *supra*, note 4 at para 7:3010.
14. *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10 [hereinafter old *RCMP Act*], as am. R.S.C., 1985, c. 8 (2d supp.) [hereinafter *RCMP Act*].
15. S.A. c. P-12.01 [hereinafter *Alberta Police Act*].
16. *Calgary Police Association et al. v. Calgary Police Commission and Chief of Police City of Calgary*, [1986] A.W.L.D. 809 (O. B.); aff'd (1988), 57 Alta L.R. (2d) 8, [1988] 2 W.W.R. 741 (C.A.) [hereinafter *Calgary Police Association*].
17. See, for example, *Carpenter*, *supra*, note 9.
18. S.N.S. 1974, c. 9, sub. 40(2), repealed by S.N.S. 1985, c. 33, s. 22.
19. P. Stenning, Legal Status of the Police, Study Paper prepared for the Law Reform Commission of Canada (Ottawa: Minister of Supply and Services Canada, 1982).
20. See, for example, *R. v. Johnson et al.*, [1966] 1 C.C.C. 226 (Ont. C.A.); *Adrian Messenger Services and Enterprises et al. v. The Jockey Club et al.*, [1972] 2 O.R. 369 (H.C.); *Police Services Act*, 1990, S.O. 1990, c. 10, sub. 42(2) [hereinafter *Ontario Police Services Act*].
21. K. Brophy, "Department Civil Liability for Officer's Off-Duty Acts" (Feb. 1982) 49:2 Police Chief 16 at 16-17 [hereinafter Brophy].
22. (1974), 54 D.L.R. (3d) 407 (Sask. Q.B.).
23. See *Short v. Henderson Ltd* (1946), 174 L.T. 417 (H.C.).
24. See, for example, *Alberta Police Act*, *supra*, note 15, s. 39.
25. See, for example, "Models for Management" (Dec. 1988) 55:12 Police Chief 71.
26. Brophy, *supra*, note 21.
27. R.S.N.S. 1989, c. 348, s. 21 [hereinafter *NS Police Act*].
28. *Ibid.* sub. 21 (1).

29. Albert J. Reiss Jr., Private Employment of Public Police, (Washington, D.C.: National Institute of Justice, 1988).
30. *Supra*, note 14, s. 25.
31. B.C. Reg. 330/75 [hereinafter *BC Regulation*].
32. R.S.B.C., c. 331.1 [hereinafter *BC Police Act*].
33. *Supra*, note 31, Appendix A, para. 1 (a).
34. See, for example, *Re Coates and Ontario Police Commission* (1979), 23 O.R. (2d) 568, 95 D.L.R. (2d) 560 (Div. Ct.).
35. R. Ericson, "Rules For Police Deviance" in C. Shearing (ed.) Organizational Police Deviance (Toronto: Butterworths, 1981) 83-110.
36. There would appear, though, to be an emerging legislative tendency to change this situation. Section 105 of the *Ontario Police Services Act*, *supra*, note 20, provides:
 105. (1) This section applies to a police officer who resigns from the police force after a hearing is ordered under section 90 or 91.
 - (2) If the police officer resigns before a board of inquiry is constituted under section 93, the following rules apply:
 1. No board of inquiry shall be constituted unless the police officer, within twelve months of the resignation, applies for employment with a police force or is employed by a police force.
 2. In that case, the board acquires jurisdiction over the police officer despite the earlier resignation.
 - (3) If the police officer resigns after a board of inquiry is constituted, the following rules apply:
 1. The board of inquiry loses jurisdiction over the police officer.
 2. If the police officer, within twelve months of the resignation, applies for employment with a police force or is employed by a police force, the board's jurisdiction is revived.

Similarly recent amendments to the *Québec Police Act*, L.R.Q. 1977 c. P-13, create a new

system of dealing with ethical misconduct by police officers and provide:

53. Any police officer who resigns remains subject to the jurisdiction of the commissioner with respect to any act he committed while he was a police officer.

An Act respecting police organization and amending the Police Act and various legislation, L.Q. 1988, c. 75, as am. L.Q. 1990, c. 27, s. 53.

For a complete discussion of the provisions of the Ontario *Police Services Act* and the new Québec legislation, see, RCMP External Review Committee, Disciplinary Dismissal -- A Police Perspective, Discussion Paper 6, (Ottawa: Minister of Supply and Services Canada, 1991).

37. Correctional Services Canada, "Report on Termination of Employment for Off-Duty Criminal Acts", (unpublished, 1990).
38. *Supra*, note 15, subs. 37(2).
39. N.S. Reg. 101/88. See page 30.
40. See, for example, R.R.O. 1980, Reg. 791 (made under the Police Act, R.S.O. 1980, c. 381 [hereinafter the *Ontario Police Act*]), para. 27(e) [hereinafter *Regulation 791*].
41. RCMP External Review Committee, Medical Discharge -- A Police Perspective, Discussion Paper 3 (Ottawa: Minister of Supply and Services Canada, 1989).
42. RCMP External Review Committee, Employee Assistance Programs -- Philosophy, theory and practice, Discussion Paper 5 (Ottawa: Minister of Supply and Services Canada, 1990).
43. In order to protect the identity of this and other unreported cases, all identifying elements have been removed.
44. R.S.C., 1985, c. H-6.
45. *Central Alberta Dairy Pool v. Human Rights Commission (Alta)*, [1990] 2 S.C.R. 489, 113 N.R. 161, [1990] 6 W.W.R. 193.
46. See, M. Conrod, "Ont. WCAT allows youth worker to collect for stress" [*Ontario*] *Lawyers Weekly*, 23 November 1990, at 13.
47. *RCMP Act*, *supra*, note 14, sub. 45.35(1).
48. *An Act respecting police organization and amending the Police Act and various Legislation*,

supra, note 36.

49. See, for example, *BC Police Act*, *supra*, note 32, s. 49.
50. See, for example, *Alberta Police Act*, *supra*, note 15, sub. 43(1); *NS Police Act*, *supra*, note 27, sub. 23(1); *Ontario Police Services Act*, *supra*, note 20, s.75.
51. *Municipal Police Disciplinary Regulations*, Alta Reg. 179/74, as am. *Municipal Police Disciplinary Amendment Regulation*, Alta Reg. 79/78, para 17(a). See now *Police Service Regulation*, Alta Reg. 356/90, para. 5(2)(e).
52. (1983), 11 L.A.C. (3d) 53 (Bruce) [hereinafter *Iron Ore*].
53. *Supra*, note 39, para. 4(3)(c).
54. *Ibid.*, para. 5(1)(j).
55. *Trumbley and Pugh v. Metropolitan Toronto Police*, [1987] 2 S.C.R. 577, 45 D.L.R. (4th) 318.
56. *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, 45 D.L.R. (4th) 235.
57. O.C. 467-87, s. 5 2nd para. [hereinafter *SQ code of ethics*]. There is no similar provision under the new *Code of ethics of Québec police officers*, O.C. 920-90 [hereinafter *Québec Code*].
58. *Fedoriuk v. Commissioner of the RCMP*, [1989] 2 F.C. 400, 54 D.L.R. (4th) 168 (C.A.).
59. Stenning, *supra*, note 19.
60. *Supra*, note 40, s. 62.
61. *Public Service Act*, R.S.O. 1980, c. 428, s.12.
62. *Re Mahlberg and Ferguson et al.* (1983), 44 O.R. (2d) 239, 3 D.L.R. (4th) 755 (Div. Ct.).
63. *Municipal Act*, R.S.O. 1980, c. 302.
64. *Supra*, note 20, s. 46.
65. *Supra*, note 57, s. 21. There is no similar provision under the *Québec Code*, *supra*, note 57.
66. "Policemen allowed to run for county board of education" The [*Toronto*] *Globe and Mail*, 23 October 1980.

67. W. Muir, Jr., "Police and Politics", (Summer/Fall 1983) 2:2 Criminal Justice Ethics 3.
68. *Supra*, note 61, see *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, 41 D.L.R. (4th) 1 and *OPSEU v. Ontario (Attorney General)*(1988), 65 O.R. (3d) 689 (H.C.J.).
69. [1988] 3 F. C. 219, 52 D.L.R. (4th) 241 (C.A.).
70. R.S.C., 1985, c. P-33.
71. *Supra*, note 57, s. 22. There is no similar provision under the *Québec Code*, *supra*, note 57.
72. *Supra*, note 40, s. 29. See *Ontario Police Services Act*, *supra*, note 20, s. 49.
73. *Supra*, note 27, sub. 21(3).
74. As in most provinces, the involvement of police officers in the provision of private contract security services (i.e. through private firms) is prohibited by legislation respecting such services. See, *Private Investigators and Private Guards Act*, R.S.N.S. c. 356, sub. 20(2); *NS Police Act*, *supra*, note 27, para 21 (2) (c).
75. *Supra*, note 16, at 743 (W.W.R.).
76. R.S.M. 1987, c. R20.
77. *Partridge v. Securities Commission (Manitoba)*(1986), 61 Man. R. (2d) 301 (Q.B.) at 308.
78. *Ibid.*, at 307.
79. *Ibid.*, at 307-8.
80. *Supra*, note 16, at 743 (W.W.R.).
81. *Ibid.*
82. "Delay sought in sex bias case" *The [London] Independent*, 20 December 1990, at 3.
83. See, for example, *Re Coates and Ontario Police Commission*, *supra*, note 34.
84. *Re Lutwick and Town of Nackawic* (1987), 43 D.L.R. (4th) 746 (N.B.Q.B.).
85. *Wool v. The Queen and Nixon* (1985-86), 28 Crim. L.O. 162 (F.C.T.D.).
86. *Supra*, note 51, para 17(e), now *Police Service Regulation*, *supra*, note 51, para 5(2)(a).

87. *Ibid.*
88. R. Williams, "Legal Aspects of Discipline by Police Administrators", Paper, (Chicago: Traffic Institute, Northwestern University, 1977) at 6.
89. R. Norton-Taylor, The Ponting Affair (London: C. Woolf, 1985).
90. See, J. Baxter, State Security, Privacy and Information (London: Harvester/Wheatsheaf, 1990).
91. [1985] 2 S.C.R. 455, 23 D.L.R. (4th) 122.
92. (1981), 3 L.A.C. (3d) 140 (Weiler).
93. *Supra*, note 51, para 17(g) now *Police Service Regulation*, *supra*, note 51 para. 5(2)(i).
94. R.S.M. 1987, c. L75, para. 29(a).
95. S.O. 1984, c. 63, repealed.
96. *Supra*, note 20, s. 75.
97. *See, Marks v. Lewis and Wilcox* (1 December 1987) unreported, Ont. Div. Ct. 483/87.
98. Commission of Inquiry Relating to Public Complaints, Internal Discipline and Grievance Procedure within the Royal Canadian Mounted Police, Report (Ottawa: Information Canada, 1976) at 137.

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NOTES