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Taking the *Police Act* Seriously

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Case Commented On: *Conlin v Edmonton (City) Police Service*, 2021 ABCA 287 (CanLII)

In *Conlin v Edmonton (City) Police Service*, 2021 ABCA 287 (CanLII) [*Conlin*], a 5-panel court of appeal refines the threshold standard by which public complaints against the police are assessed by the Chief under s 45(3) of the *Police Act*, RSA 2000, c P-17. In doing so, the court clarifies past appellate decisions but stops short of fully expressing the Chief's authority to send an allegation to a disciplinary hearing under the Act. As part of this power, the Chief exercises a screening function under s 45(3). If the Chief is of the "opinion" that the complaint constitutes a contravention, the allegation is then subject to a disciplinary hearing. Even when an allegation passes this threshold bar, s 45(4) allows the Chief to dismiss an allegation of misconduct when it is "not of a serious nature."

It is the interplay of these two subsections, ss 45(3) and (4), which describe the Chief's discretionary exercise of authority in sending complaints to a disciplinary hearing. The scope and nature of the Chief's discretion in dismissing complaints by the public inevitably impacts the relationship between the police and the public. Too much discretion could erode public confidence in the police and undermine police legitimacy. Too little discretion could diminish policing morale and undermine the ability of the police to keep the community safe.

Public trust and engagement are crucial to the legitimacy of the police. This symbiotic relationship has been integrated into policing from its conception. Sir Robert Peel, twice UK Prime Minister and known as the founder of modern policing, ensured this was so when he established the London Metropolitan Police Force on September 29, 1829. The creation of this police organization was not particularly novel; Glasgow had its own police force since 1800. But Peel's venture was different. In creating an organized police network, he provided the 1000 newly appointed police officers, or "Bobbies", with the tools they needed to become a professional body. It provided the police with principled authority for effective, fair, and just community policing. It underlined the extraordinary powers the police wielded in fulfilling their duties and the dire need for police to use restraint in exercising those powers. Although the principles were by no means exhaustive, Peel created an ethical code of conduct still in use today.

These "Peelian Principles" outline the role of the police and their relationship with their community. The most famous principle highlights the centrality of community by affirming "the police are the public, and the public the police." This somewhat sparse statement encapsulates the concept of policing by consent whereby police power is effectively derived from the public. Additionally, the principle underscores the need for public support and legitimacy of the police through transparent and accountable use of police power that is based on integrity. It is this

principle that continues to guide and define the police force, or as many organizations now self-describe, the police service. In the 129 years since the Bobbies walked the streets, it is this one Peelian Principle that attracts the most commentary and reflection.

Although the public-policing relationship is engaged in many facets of policing and community safety, the more difficult conversation arises when police conduct, or misconduct, is considered. It is easier to understand the nature of the relationship when the public and police are working together to promote safety than when the police and public come into conflict. We have seen this problem firsthand as issues of racial profiling [R v Le, 2019 SCC 34 (CanLII)], use of force, and misuse of authority have spotlighted the tenuous and at times fractious relationship between the police and the public. However, it is those very areas of friction that highlight the crucial need for clarity and trust in that relationship. Although trust and clarity can come from understanding the statutory parameters, it also requires an honest and open discussion on public expectations and needs. If the police are there for the public, then the public must inform and enhance the statutory framework and the Peelian Principles. Indeed, the inclusion in the *Police Act* of the public complaints regime is a reflection of this need.

The *Conlin* decision partly clarifies those statutory parameters. In reviewing the discretion given to the Chief in disciplinary matters through ss 45(3), (4) and 47(4), the court of appeal found that together, these sections give the Chief "wide discretion" (at para 29) over a public complaint. As earlier mentioned, a wide discretion is not always welcome, particularly when it comes to public confidence. The court then clarifies the threshold standard for the Chief's opinion under s 45(3). Although not the subject of this post, the court also clarifies the standard of review on appeal to the Law Enforcement Review Board (LERB).

First, some context is needed before the legal principles are discussed. The *Conlin* style of cause is a misnomer. There is not one case but four appeals arising from 3 different factual situations (*Conlin* and *Barton*, *Power*, *and Sharma*) (at para 3). Each case engages different kinds of police behaviour and involve differing outcomes. All cases were assessed by the Chief pursuant to s 45(3) of the *Police Act*. In all cases, the Chief did not send some of the allegations to the hearing stage and the complainants appealed. The LERB allowed some appeals and dismissed others. The issue on appeal for all cases was whether the Chief properly exercised his threshold discretion in not finding "the actions of a police officer constitute a contravention" under s 45(3).

The *Conlin* and *Barton* appeal involved police conduct in the execution of a warrant. There were fifteen allegations, four of which were sent to a disciplinary hearing. The Chief, in fulfilling his screening function under s 45(3), dismissed the other allegations as having "no reasonable prospect of establishing the facts for conviction" (See *Conlin and Barton v Edmonton (Police Service)*, 2018 ABLERB 30 (CanLII) at para 10).

The *Power* appeals involved complaints against Constable Power and two other officers. The incident involved traffic stops, which resulted in Street Check Reports suggesting the occupants of the cars, Vuong and Shah, were known drug dealers. The Chief dismissed all the complaints as "there was no reasonable prospect of a conviction" (at para 12). The LERB, on appeal, found the Chief's decision unreasonable and sent the matters back for hearing (at para 16).

The final appeal involved an incident between Sharma, a corrections officer who was defending against a ticket received for distracted driving, and the investigating police officer. The incident occurred in the halls of the courthouse prior to trial. The Crown prosecutor asked the officer to "speak to the complainant about the charges, the court procedure, and the evidence" the officer would give in court (at para 20). According to Sharma, when the officer heard Sharma was fighting the ticket, the officer became overly aggressive, intimidating and threatened to complain to Sharma's employer (at para 21). The officer disagreed with this version of events and recalled Sharma intimated that he would lie in court. The officer challenged Sharma on this and his ethical requirements as a corrections officer (at para 20). The Acting Chief of Police dismissed the complainant on the basis that "there was no reasonable prospect of establishing the facts necessary for conviction" (at para 22). On appeal, the LERB found the disposition was reasonable (at para 24).

Although the factual underpinnings in all cases differ, the issue raised for all appeals considers "the test to be applied when the chief of police is forming 'an opinion that the actions of a police officer constitute a contravention' under s. 45(3) and deciding what 'action. . . the chief of police . . . considers proper in the circumstances' under s. 47(4)" (at para 31). However, the issue runs deeper and invokes the nature of s 45(4) as well. As noted above, s 45(4) permits the Chief to dismiss a complaint, even if the conduct amounts to a contravention, if the conduct is "not of a serious nature." This suggests that conduct that is of a serious nature must go to hearing. How that descriptor – serious or not serious – impacts the nature of the conduct under s 45(3) is an important question. Indeed, the seriousness of the allegation is, according to *Conlin*, a factor the Chief may rely on in coming to the screening decision under that section. The two subsections are intertwined, and both need clarity to be properly applied.

Instead, Justice Frans Slatter, on behalf of the court in *Conlin*, focuses on the standard of the Chief's review and how the Chief makes the assessment under s 45(3). It should be noted that the section requires the Chief to be "of the opinion" that the police actions contravened the regulations. In *Conlin*, the Court does not specifically discuss what is meant by this phrase but does comment on the need for the Chief to exercise authority under the section through the lens of policing (at para 49). This permits the Chief to approach the assessment through their own expertise and knowledge, almost like a subject matter expert. This view is consistent with tribunal decision-making in other areas (see e.g., *Gould v Yukon Order of Pioneers*, [1996] 1 SCR 571, 1996 CanLII 231 at para 104). This makes sense considering the assessment is being made in a specific context. But the policing perspective cannot be the only lens. The Chief's opinion must also be viewed through the public lens to properly account for Peelian Principles and to fulfill the underlying objectives of the *Police Act*. That public interest lens is vitally important as recognized in the earlier court of appeal decision in *Newton v Criminal Trial Lawyers' Association*, 2010 ABCA 399 (CanLII) at para 59. It is the basis for the relationship between the police and the public. The Chief's assessment must also consider the public interest in police misconduct and in having public complaints of misconduct assessed through the disciplinary regime.

The public trust and confidence is also at the core of the statutory regime. In the legislative debates of 2005, when the Alberta *Police Act* public complaint regime was revised, the then Solicitor-General, Harvey Cenaiko, spoke of the need for "fair, objective, and complete" public complaints to "enhance the credibility of the process" and to enable a "proper review" of complaints (see "Bill

36, Police Amendment Act, 2005", 2nd reading, *Alberta Hansard*, 26-1, (7 April 2005) at 630). Five years later, when the Act was further amended to ensure timely complaint investigations, Frank Oberle Jr., the then Solicitor General, recognized the evolving public expectations of police accountability and that "public confidence in the police complaints system is of paramount importance" (see "Bill 27, Police Amendment Act, 2010", 2nd reading, *Alberta Hansard*, 27-3, Issue 39 (4 November 2010) at 1133). These sentiments stress the importance of the public and police relationship.

In this context, the *Conlin* decision grapples with the standard of review, which the Chief in all cases applied as a "reasonable prospect of a conviction." Two issues flow from this test. First, is the issue of the meaning of "prospect" and whether it is akin to "likelihood" or "probability" or, as the Court of appeal found in an earlier decision, is it a lower standard, closer to "reasonable basis" or "arguable merit" (at para 38). Second, what is the evidentiary threshold needed to fulfill the standard. This question raises the issue of sufficiency of the evidence and whether the threshold requires "some" evidence of misconduct or simply "evidence" of a contravention (at paras 45, 46 & 49(c)). Moreover, previous case law tried to draw analogies between the standard of review and other standards of review for other threshold matters such as the preliminary inquiry and the law society's threshold to send a matter for a conduct hearing.

In the end, the court found favour with a refined test from *Land v Law Enforcement Review Board*, 2013 ABCA 435 (CanLII) (*Conlin* at para 49). Generally, the test "is whether there is a 'reasonable prospect of establishing the facts necessary for a conviction'" (at para 49(a)). Notably, this is the test used by the Chief in the cases on appeal. However, "reasonable prospect" is not to be equated with probability or likelihood. The test should not be articulated as "enough evidence, if believed." That, according to the court, is "less helpful" and should be "avoided" at para 49(a)). Instead, the test requires "a reasonable basis in the evidence" (at para 49(a)).

The "reasonable basis" is to be found in the totality of the evidence before the Chief including "direct and circumstantial" and "inculpatory and exculpatory" (at para 49(b)). Limited weighing of the evidence is appropriate but not to the extent of a final weighing of the evidence that would be required at the hearing level. At the threshold stage, the allegations need not be proven. Additionally, the Chief should refrain from comparing the reliability of the evidence. Conflicting or inconsistent evidence need not be resolved at the threshold stage. However, limited weighing of the evidence includes "an assessment of plausibility, reliability and credibility" of the evidence (at para 49(b)). In fulfilling their screening function, the Chief "is entitled to take a realistic view of the evidence using the lens of his experience with policing" (at para 49(c)).

Finally, the court enumerates factors the Chief might consider in coming to the threshold opinion (at para 50) and in finding the reasonable basis for sending a matter to hearing. The foremost factor is the strength or cogency of the evidence, but the chief can consider "any other relevant" factors (at para 50). This includes the "seriousness of the allegation," the "overall context" of the incident, the incident itself, the complainants, the officers, and an objective observer's perceptions of what happened, and the "validity or appropriateness of an officer's explanation" as well as the decisions made by the officer and the "pressures and limitations on the police officers inherent in the performance of their duties" (at para 50). All factors are to be viewed through the Chief's

experience as a police officer and their knowledge of the police service, policies, and policing standards (at para 50).

The seriousness of the incident factor may provide for the consideration of the public interest in sending the matter to hearing, and the factor involving the objective perception of the event may account for the public view of the incident. However, none of the factors listed by the court directly and clearly reference the public interest in fair, objective, and transparent policing. None of the factors truly express the prime Peelian Principle of public trust and confidence in policing nor do they account for the relationship between the public and the police. As these factors provide the reasonable basis in the evidence for the Chief's threshold decision, the standard is necessarily filled in by these factors.

Moreover, the "seriousness" factor begs the question of what exactly "serious" means. It is a descriptor also used to divert allegations from the disciplinary hearing regime even if the police conduct is, in the opinion of the Chief, a contravention of the regulations. Once diverted, the decision is final according to s 45(4.1). To be clear, diversion does not mean the police officer is not reprimanded. However, in the context of internal discipline as opposed to independent arms-length regulation of conduct, diversion should be used sparingly and only in the clearest of cases.

Another concerning aspect of this refined test is how these factors are to be assessed by the Chief. Here the weighing is broadly based involving not only potential circumstantial evidence but also the "plausibility, reliability and credibility" of the evidence (at para 49(b)). Thus, all testimonial factors are open to scrutiny, which are notoriously difficult to gauge without hearing and seeing the evidence. Certainly, in other threshold tests, limited weighing is permissible, particularly where the evidence is circumstantial and therefore is subject to the drawing of inferences (see e.g. *R v Arcuri*, 2001 SCC 54 (CanLII) in the context of the preliminary hearing, and *R v Pappas*, 2013 SCC 56 (CanLII) in the context of the air of reality test).

Also, in exercising the gatekeeper function at trial, the judge will engage in limited weighing to ensure the introduction of relevant evidence whose probative value does not outweigh its prejudicial effects, or in the case of defence-led evidence that the probative value does not substantially outweigh its prejudicial effects (see *R v Grant*, 2015 SCC 9 (CanLII) at para 44). This weighing is an integral aspect of assessing the costs and benefits of introducing the evidence with the goal of ensuring trial fairness and advancing the truth-seeking function of the trial. The weighing is done in the context of a balancing of factors, looking at the value and costs of using the evidence at trial. At paragraph 48 of *Conlin*, Justice Slatter describes the Chief's role as performing "a gatekeeper function with respect to complaints." If so, then the Chief's limited weighing is limited indeed. In *R v Humaid*, 2006 CanLII 12287, 81 OR (3d) 456 (ON CA) an Ontario Court of Appeal decision endorsed by the Supreme Court in *R v Blackman*, 2008 SCC 37 (CanLII), Justice David Doherty permitted limited weighing of credibility or reliability at the gatekeeper stage but in those circumstances where the evidence "is so deficient that it robs the out-of-court statement of any potential probative values" (*Humaid* at para 57). In other words, the weighing of reliability and credibility is a low bar, tied to the relevancy of the potential evidence. Evidence that is "so deficient" in value becomes irrelevant as it is unable even to tend to prove a fact in issue (see *R v Hart*, 2014 SCC 52 (CanLII) at para 94). The Chief's function is therefore confined to determine whether the evidence is "worthy" to be considered at hearing. Although this

may overlap with the hearing function, the Chief must not determine the "ultimate question" of whether the evidence will be accepted or rejected at the hearing stage (*Hart* at para 98).

Importantly, Justice Slatter does caution that in this weighing of "plausibility, reliability and credibility" the Chief must not "proceed on an assumption that complaints generally are not believable or that the evidence of the police officers will always be preferred" (at para 55). Notably, this cautionary tone is *not* tempered by a further admonishment that the Chief, because they are not arms-length independent decision-makers, must also be aware of their own potential bias as a police officer. Although the Chief is a subject matter expert and enjoys some deference in their decision-making, in weighing the evidence, the Chief's decision must be informed by this commonsensical self-awareness.

This leads nicely to the court's discussion of how the Chief is to approach inconsistent or contradictory evidence without independent corroboration as in the *Sharma* case. Justice Slatter properly reiterates a basic legal concept that "the law does not require proof based on uncontradicted evidence" (at para 54). The law also does not abide a "credibility contest" (see *R v S (WD)*, [1994] 3 SCR 521, 1994 CanLII 76). Even so, there are difficulties in assessing such evidence at the screening stage, particularly as the weighing of evidence must be restricted. There should not be more weighing done in the face of inconsistent or contradictory evidence. According to Justice Slatter, where the complainant's version is "capable of belief" the "overall" context must be reviewed including "the seriousness of the allegations, the context in which the events occurred, how an objective observer might perceive the events, the need to maintain confidence in the police discipline process, and the need for the chief of police to ensure that appropriate cases are sent to hearing" (at para 56). These factors seem to mirror the factors upon which the Chief may consider in coming to the threshold opinion (at para 50) and in finding the reasonable basis for sending a matter to hearing, but there is a key difference. In this review, the Chief does consider the public interest and the "public" part of the Peelian equation, while in considering the general threshold opinion, that dimension is not mentioned (at para 50). The only specific comment arises from Justice Slatter's reference to the *Cody* decision and the "policy" proviso giving the Chief the discretion to refrain from sending a matter to hearing if it was not "in the public interest" (at para 51). Justice Slatter found this to be a rare event that could preclude a hearing, not a factor that would assist in sending a matter to hearing (at para 51). In any event, public trust and confidence should be clearly part of the entire screening function, not just when the evidence poses difficulty upon review.

Even with this direction on assessing inconsistent or contradictory evidence, Justice Slatter finds not all "difficult scenarios" should be sent to hearing (at para 56). The *Sharma* case is just such an example (at para 82). However, this fact scenario does seem questionable. In that instance, the LERB found the Chief's decision not to send the matter to hearing reasonable "because the evidence was weak and unsatisfactory" (at para 82). Justice Slatter confirms this finding as also reasonable considering the "several possible interpretations" of the incident (at para 83), which seem to crystalize into one interpretation that the incident was merely an unfortunate "miscommunication, misunderstanding and misperception" (at para 83). Justice Slatter cautioned that such a finding "does not imply that the complainant's evidence would not have been believed, simply that those involved in adversarial conversations or events can perceive those events quite differently" (at para 84) but that such concerns were a matter for hearing. However, as the standard

of review is reasonableness, Justice Slatter found "no reviewable error in the Board's decision" (para 84). There is no discussion in the *Sharma* case of the public perception and the public confidence in policing in assessing this scenario, even though it was one of conflicting evidence. The reality is that the appellate review of discretionary decision-making is limited and very much attached to principles of deference.

The bottom-line of this decision is that an additional clarity about the use of s 45(4) and how that section impacts the screening function under s 45(3), as well as the clear inclusion of the public interest in that screening assessment would benefit the policing community. Policing is a difficult and often dangerous career. Police officers take pride in their integrity and their reputation in the community. The police need and want the support and trust of the public. For policing to be effective, police misconduct must be dealt with promptly and in a fair, objective, and transparent manner. When police misconduct is not taken seriously, public trust and confidence is at risk. The presence of public trust and confidence in policing creates a relationship that works towards the common goal of community safety. It is that relationship which must be nurtured and protected. To properly fulfill the principle that "the police are the public, and the public the police", allegations of misconduct need to be viewed through that defining relationship.

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