Establishing Police Accountability: How Do We Stop *Charter* Violations from Happening?

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ABSTRACT

In response to public criticism and protests to defund police, this article seeks to analyze a few of the problems facing Canadian policing today and tackle the question: how do we stop police *Charter* violations from happening in the first place? This article begins by laying out a number of the general concerns facing policing. First, it shows that the current remedies available under section 24 of the *Charter* are imperfect tools for tackling larger systemic policing misconduct. This problem is compounded by the fact that police forces lack formal systems to track or follow up on judicial rulings that find their officers have violated Canadians' *Charter* rights. This inevitably leads one to wonder whether those officers – who have been found to have violated the *Charter* – are actually facing the consequences or re-training for their misconduct. In the face of these concerns, this article seeks to make two recommendations that could help improve police accountability and re-establish public trust. First, it suggests that the laws surrounding what the police are legally authorized to do need to be clarified and solidified. This requires the courts to stop expanding the scope of police powers on a case-by-case basis and leave the task to Parliament to work with police and the public to legislate police powers. Second, this article suggests that policing needs to evolve from an occupation into a formal profession by establishing a "College of Policing"

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in each province and territory. The College would be responsible for protecting the public from police malpractice and misconduct. The College would accomplish this goal by providing education and licensing of officers, ensuring police practices respect Canadian *Charter* rights, and responding to public complaints and *Charter* violations.

Keywords: *Charter* Violations, Police Misconduct, Common Law Police Powers, Police Accountability, Section 24 Remedies, College of Policing, Police Training & Education, Rebuilding Public Trust

I. INTRODUCTION

In the early hours of May 12th, 2004, the RCMP received a tip about an intoxicated driver in the town of Leduc, Alberta.[1] When the patrolling officers came across Lyle Nasogaluak, a 24-year-old man of Inuit and Dene descent, they attempted to pull him over. Rather than comply, Mr. Nasogaluak sped up, and a short yet high-speed chase ensued before he abruptly stopped his vehicle. Constables Dlin and Chornomydz approached his truck, revolvers drawn, loudly instructing Mr. Nasogaluak to get out of his vehicle. The young man initially complied but grew hesitant as the police approached with guns drawn. Concerned that Mr. Nasogaluk would drive away, Constable Chornomydz grabbed the young man — who was now clutching onto the steering wheel and door frame — and punched him several times in the process of bringing Mr. Nasogaluk to the ground.[2] It was fairly obvious by this point that he neither had weapons nor were there any other passengers in the car. With Mr. Nasogaluk lying on the ground, Constable Dlin coaxed him to cooperate further with several heavy punches in the rib area - blows that were so forceful they cracked ribs and punctured his lung.[3]

Mr. Nasogaluak was taken to the police detachment, where tests revealed he was well over the legal blood alcohol limit. In their report, the Constables made no mention of the force used to arrest or the fact that they drew their weapons; and stated that Mr. Nasogaluak had no obvious signs of injury and did not require medical assistance.[4] However, the truth is that the young man repeatedly pleaded with the Constables saying that he was hurt, spending most of his time at the police station leaning over in

1 *R v Nasogaluak*, 2010 SCC 6 at para 10 [*Nasogaluak*].
2 *Ibid.*
3 *Ibid* at para 11.
4 *Ibid* at para 12.

pain and struggling to breathe.[5] When Mr. Nasogaluak was released the following morning, he immediately sought medical treatment, requiring life-saving surgery to treat his broken ribs and collapsed lung.[6]

Even though this incident occurred over fifteen years ago, it is a familiar refrain, not that dissimilar from interactions between police and young men of colour occurring today. While instances of police brutality and the use of deadly force been widely scrutinized in the United States, Canadian police services have been largely able to avoid the same pointed criticisms. This is not because Canadian police officers are not engaging in this type of behaviour. There is a subset of law enforcement officers abusing their power and flagrantly violating the rights protected in the *Canadian Charter of Rights & Freedoms* ("*Charter*") as a normal part of their daily interactions with Canadians.[7]

In July 2022, the Toronto Star released an investigation that identified 600 cases of "police brutality, callousness and ignorance" that occurred across the country between 2011 and 2021.[8] The judges found that conduct displayed by the officers in these cases not only constituted a violation of the suspect's *Charter* rights but that the misconduct was so serious that the judges excluded the evidence acquired by the police to protect the reputation and integrity of the justice system. For in repeatedly violating *Charter* rights, unwittingly or not – police are demonstrating that *Charter* rights and freedoms are not important. The public is left feeling that their rights do not matter and that police are above the rule of law. It is a long way from the principle that suggests "the police are the public, and the public are the police."[9]

The police are the most visible and direct manifestation of the government with which everyday citizens interact. Since the 1980s, these police interactions have increased exponentially, a change which can be attributed to the Supreme Court of Canada's gradual expansion of common law rules defining police powers and authority.[10] Over the last thirty years, the courts have endeavoured to balance the freedoms and

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5 *Ibid.*

6 *Ibid* at para 13.

7 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

8 Rachel Mendleson & Steve Buist, "Unchartered Part 1: Rights Wronged" (9 June 2022), online: *Toronto Star* <www.thestar.com/news/investigations/police-rights-violations.html> [perma.cc/F2AK-6WDZ] [TorStar].

9 Susan Lentz & Robert Chaires, "The invention of Peel's principles: A study of policing 'textbook' history" (2007) 35:1 J Crim Justice 69-70 online: *ScienceDirect* <doi.org/10.1016/j.jcrimjus.2006.11.016> [perma.cc/7VNQ-X92S].

10 Richard Jochelson & David Ireland, *Privacy in Peril: Hunter v Southam and the Drift from Reasonable Search Protections* (Vancouver: UBC Press, 2019).

rights of Canadians with the state's need to instill social order and investigate crime. However, in this balancing act, the Court has been more willing to give the police greater powers and flexibility when it comes to roadside stops, detentions, searches, seizures, and arrests. This is a *Charter* problem for Canadian citizens.

Most notably, a place where the public has seen a substantial increase in invasive police interactions is on the road. In light of the highly regulated nature of driving, police officers have essentially been granted the power to pull over any driver at any time to ensure public safety.[11] Over the last decade, we have seen instances where officers had inadequate knowledge of the laws they are tasked with enforcing or were unaware of how their actions violated constitutionally-protected *Charter* rights. Low-level infractions are met with intense, invasive, and unnecessarily aggressive responses: "They treat those that they encounter with fear and hostility and attempt to control them rather than communicate with them."[12] Although these stops are intended to be undertaken in the interest of public safety, they are often abused as an opportunity to investigate Canadians who are deemed suspicious. These tactical stops may lead to charges such as drunk driving, drug trafficking, or possession of weapons – but in many cases, they jeopardize the trust of the Canadians they claim to protect.

By carving out the scope of police powers on a case-by-case basis, the Supreme Court's jurisprudence is complex for legal scholars, police, and regular Canadians to understand. Although these rules are often difficult for police to implement – Parliament and the provincial legislatures have been reluctant to get involved. Many have called to "defund the police" and suggested that we should dismantle the police entirely. Others suggest that we need to impose harsher punishments on police to keep them accountable. I am not convinced either of those strategies are going to help.

The main goal of this paper is to address the question: <u>how do we stop these habitual *Charter* violations from happening?</u> I will first lay out the current measures available to the courts under section 24 of the *Charter* for remedying *Charter* violations and scrutinize the effectiveness of those remedies in addressing larger systemic police misconduct. I will then consider a recent Toronto Star investigation which shows that police forces are not being notified or following up on judicial rulings that find their officers have violated Canadians' *Charter* rights. With these findings in mind, the paper will question whether those officers – who have been found to have violated the *Charter* – are actually facing the consequences or

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11 *Dedman v The Queen*, [1985] 2 SCR 2, 20 DLR (4th) 321 2; *R v Orbanski*, 2005 SCC 37; *R v Elias*, 2005 SCC 37.

12 Alex Vitale, *The End of Policing*, (New York: Verso, 2017) at 9-10.

re-training for their misconduct. Finally, I will make two recommendations that could help improve police accountability and re-establish public trust. First, the laws surrounding "what the police are legally authorized to do" need to be clarified and solidified – this requires the courts to stop expanding the scope of police powers on a case-by-case basis and leave the task to Parliament to work with police and the public to legislate police powers. Second, policing needs to evolve from an occupation into a formal profession by establishing a "College of Policing" ("College") in each province and territory. The College would be responsible for protecting the public from police malpractice and misconduct. This goal would be accomplished by the College through providing education and licensing of officers, ensuring police's practices respect Canadian *Charter* rights, and responding to public complaints and *Charter* violations. While it will be hard not to blame the police administration and seek to punish individual officers, I believe that credibility is only going to be developed through fair, accessible, and community-focused regulation and independent external oversight.

II. CURRENT APPROACHES TO ADDRESSING *CHARTER* VIOLATIONS

How does the *Charter* currently deter the police from misconduct and provide remedies for claimants whose constitutional rights have been violated?

Remedies for violations are mostly found under section 24 of the *Charter*.[13] In seeking a remedy, a *Charter* claimant first must demonstrate that the state's conduct breached their constitutional rights. Once this breach has been established, the challenge passes to the government to demonstrate that it is a "reasonable limit in a free and democratic society" under section 1 of the *Charter*.[14] Using the *Oakes* test, the courts are able to conduct a proportionality analysis weighing the impact of the police's actions on the claimant, the individual's interests, and broader societal values. If the court has concluded that the *Charter* breach cannot be justified, the court must then decide what practical measures should be taken to remediate this infringement. This is consistent with the long-held legal principle that states, "for every right, there is a remedy; where there is no remedy, there is no right."[15] Namely, when lawmakers claim to provide

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13 *Charter, supra* note 7, s 24.

14 *Ibid*, s 1; *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

15 David Paciocco, Palma Paciocco & Lee Stuesser, "Chapter 8: Improperly Obtained Evidence" in *The Law of Evidence,* 8th ed (Irwin Law, 2020) at 466.

and protect rights, there must be appropriate redress when those rights have been withheld or violated.

A. Section 24(2): Remedial Provision for the Exclusion of Evidence

Section 24(2) is the most commonly relied on remedial tool for addressing *Charter* breaches in criminal proceedings. Under a section 24(2) application, an accused argues that the court should exclude evidence acquired in connection with the violation. The most recent iteration of section 24(2) analysis comes from the Supreme Court's 2009 case of *R v Grant*.[16] Beyond demonstrating that the police's actions constituted a violation of their rights, the claimant must show that the evidence was "obtained in a manner" that violated their rights and that the "admission of the evidence would bring the administration of justice into disrepute."[17] Most of the analysis occurs in the second stage of the test. The majority in *Grant* suggested that courts should consider the assessment of the following factors: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests; and (3) society's interests in the adjudication of the case on its merits.[18]

The first line of reasoning invites judges to evaluate and gauge the "blameworthiness of the conduct, the degree of departure from *Charter* standards, and the presence or absence of extenuating circumstances."[19] This assessment focuses on the officers' state of mind when they committed the violation and extends to include institutional failures in *Charter* compliance. Since police conduct can vary in seriousness, the Supreme Court has held that judges must evaluate the conduct of the police in each instance and place it along a spectrum of fault: "police conduct can run the gamut from blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for *Charter* rights."[20]

Over the years, the Supreme Court has stated that section 24(2) operates to "oblige law enforcement authorities to respect the exigencies of the *Charter*."[21] However, the Court has explicitly said that this provision is not intended to punish illegal police conduct.[22]

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16 *R v Grant*, 2009 SCC 32 [*Grant*].
17 *Ibid* at paras 67-73.
18 *Ibid.*
19 *Ibid* at paras 72-75.
20 *R v Harrison*, 2009 SCC 34 at para 23 [*Harrison*].
21 *R v Burlingham*, [1995] 2 SCR 206 at para 25, 124 DLR (4th) 7 [*Burlingham*]; *R v Buhay*, 2003 SCC 30 at para 71.
22 *Grant*, *supra* note 16 at para 70.

As noted by the majority in *Grant*, the fact that we are conducting this kind of exclusionary review means that a *Charter* breach has already occurred and that damage has already been done to the administration of justice. Chief Justice McLachlin (as she then was) and Justice Charron stated in *Grant* that "Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through the breach does not do further damage to the reputation of the justice system."[23] They further described how the focus of section 24(2) is societal, long-term, and prospective and that "Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns."[24]

I can certainly appreciate how the exclusion of evidence in these types of situations could be a best-case scenario from many perspectives. The accused, having narrowly avoided prison time, will hopefully be deterred from getting involved in other criminal activities in the future. Canadians will hopefully be comforted by the courts' careful diligence in protecting important *Charter* rights. Finally, the exclusion of evidence and the loss of a conviction could hopefully encourage police to update their training and implement investigatory techniques that will not violate Canadians' rights. However, I have doubts that this is a realistic outcome.

I respect the court's difficult balancing and efforts to protect the "administration of the justice system" on a case-by-case basis; however, I have concerns about whether excluding the evidence actually offers an effective remedy that addresses larger systemic concerns about the administration of justice and police investigative techniques beyond an individual accused's case. The administration of justice does not start with the trial. The process starts when an individual is investigated, charged, and tried. If the courts want to protect the long-term reputation of the legal system, they should focus on ensuring that justice and due process is followed from the start – so that *Charter* rights violations and state misconduct do not occur in the first place. The Court in *Grant* acknowledged that it was a "happy consequence" that *Charter*-infringing police conduct would be deterred due to the risk of exclusion.[25] However, should the court not be striving for more than that? The justices spend a significant amount of time dwelling on the blameworthiness and often illegal nature of police conduct in the first stage of *Grant*. But by only excluding the evidence to protect the court's legitimacy, it seems like a missed opportunity to meaningfully address the risk of police repeating the same mistake in the future.

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23 *Ibid* at para 69.
24 *Ibid* at para 68.
25 *Ibid* at para 73.

While I understand the desire not to use section 24(2) to punish police officers for their *Charter*-violating actions, I believe that there is insufficient motivation for police to take accountability and legitimately change their conduct. I believe that when it comes to police, what we are seeing is that there is too much after-the-fact accountability.

B. Section 24(1): General Remedial Provision for *Charter* Violations

Section 24(1) operates as the *Charter*'s general remedial provision against unconstitutional government action – stating that "[a]nyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."[26] Given the broader and more flexible nature of this provision, section 24(1) may be better positioned to address the larger systemic issues of policing. This provision is designed for the courts to be mindful of the past – giving attention to the nature of the violation and the inflicted harm. More importantly however, section 24(1) also grants the courts the opportunity to be forward-looking – working to ensure that government agents comply with the *Charter* in the future. Justice McLachlin once described section 24(1) as the "cornerstone upon which rights and freedoms guaranteed by the *Charter* are founded" and a "critical means by which they are realized and preserved."[27]

This section gives the court discretion to pursue remedies such as awarding damages, making a judicial declaration, issuing a stay of proceedings, or providing injunctive relief. Perhaps the most telling example of the Supreme Court of Canada's generous interpretation of section 24(1)'s broad remedial guarantee is its decision in *Doucet-Boudreau v Nova Scotia (Minister of Education)*.[28] In that case, the trial judge applied section 24(1) to remedy a breach of the appellants' minority language rights under section 23 of the *Charter* by requiring the Province of Nova Scotia to use its "best efforts" to provide French school facilities. The court additionally sought to retain jurisdiction after the order to hear reports from the Province regarding the status of its efforts. When the case went to the Supreme Court over the use of this section 24(1) remedy, the majority of the Court upheld the trial judge's flexible and creative application of section 24(1) – despite the dissenting justices' complaints that the majority was going beyond its jurisdiction and breaching the separation of powers.

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26 *Charter, supra* note 7, s 24(1).

27 *R v 974649 Ontario Inc,* 2001 SCC 81 at para 20.

28 *Doucet-Boudreau v Nova Scotia (Minister of Education),* 2003 SCC 62 [*Doucet-Boudreau*].

The majority held that under section 24(1), a superior court could craft any remedy that it considers "appropriate and just in the circumstances." In doing so, a court must exercise its discretion based on its careful perception of the nature of the right and the infringement, the facts of the case, and the application of the relevant legal principles. The court must also be sensitive to its role as judicial arbiter and not fashion remedies that usurp the role of the other branches of governance. The boundaries of the courts' proper role will vary according to the right at issue and the context of each case.

This leads one to consider whether the court could use section 24(1) to complement the decision to exclude evidence under section 24(2). A suggestion made by law professor Kent Roach recommends that the court could ask the police officer to state in open court "what, if anything, they have done to prevent a repetition of the violation of the suspect's rights."[29] Roach suggests that this could provide the police with more incentive to take reasonable training, employment, and deployment measures to prevent repetitive rights violations and acts of over-policing. If the court is unsatisfied with the efforts taken by or failed to be taken by the officer, perhaps the court could refer the matter directly to the police forces and require the officer to take further steps to address the behavioural misconduct. I think that section 24(1) could offer a promising and more direct way of addressing police behaviour when compared to the limited focus and purpose of section 24(2).

However, some scholars are concerned that the Supreme Court has become more reluctant to award remedies as broadly as it did in *Doucet-Boudreau*.[30] In the case of Mr. Nasogaluak, highlighted at the beginning of this article, the trial judge found that the police had violated Mr. Nasogaluak's section 7 rights.[31] The trial judge, however, refused to grant the requested remedy of a stay of proceedings and, using section 24(1) – chose instead to reduce the accused's sentence to a conditional discharge. The Supreme Court of Canada agreed that the police had used excessive force in arresting Mr. Nasogaluak but held that the remedy of a sentence reduction under section 24(1) had to be constrained by the mandatory minimum sentences imposed by Parliament in all but "exceptional

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29 Kent Roach, "The Limits of Legalized and After-the-Fact Accountability" in *Canadian Policing: Why and How it Should Change* (Irwin Law, May 2022) at 55 [Roach].

30 Gerald Chan, "Remedial Minimalism under Section 24(1) of the Charter: Bjelland, Khadr and Nasogaluak" (2010) 51:1 SCLR, online: *Osgoode Hall Law School* <digitalcommons.osgoode.yorku.ca/sclr/vol51/iss1/14> [perma.cc/MA42-RQ33] [Chan].

31 *Nasogaluak*, *supra* note 1.

circumstances." The Court did not define "exceptional circumstances" but simply held that they did not exist in this case.

In his article, *Remedial Minimalism under Section 24(1) of the Charter*, Gerald Chan notes that in the *Nasogaluak* case – as well as *R v Bjelland and R v Khadr* – we have started to see the Court shift the analytical focus of section 24(1) from the promotion of remedial efficacy toward the minimization of remedial burdens imposed on the government. From a rights-protection perspective, this is a worrisome trend.[32]

It is perhaps also important to examine the SCC's approach to awarding monetary damages under section 24(1) in relation to police misconduct. In *Vancouver (City) v Ward*, the Court found that the police violated Mr. Ward's section 8 *Charter* right when they mistakenly identified him as the individual who attempted to throw a pie at the Prime Minister during a speech and, as a result, strip-searched him at the police station and seized his vehicle.[33] The Supreme Court described the plaintiff's injury as "serious" and the violation as "egregious." However, the Court held that $5,000 was a sufficient remedy to compensate Mr. Ward and to achieve the remedial objectives of vindication and deterrence.

It is difficult to see how any potential plaintiff would decide that an action for a breach of *Charter* rights is worth pursuing when even a victory would likely not offset the cost of legal fees. Moreover, to the extent that such actions are pursued, it is difficult to imagine the government viewing a potential damages award as anything more than a "licence fee" to pursue state interests aggressively at the expense of individual *Charter* rights. This deterrent effect on individual officers is eroded by the fact that statutory rules in many provinces require that governmental authorities pay damages awarded against individual officers.[34] So, even if an officer is found civilly liable for professional misconduct, it is unlikely that they are facing financial or professional repercussions for their actions.

As the Supreme Court held in *Grant*, the difference between sections 24(1) and 24(2) is that the first provides for an "individual remedy," whereas the second focuses on the "societal interest in maintaining public confidence in the administration of justice."[35] As discussed earlier, section 24(2) is mainly focused on ensuring the court's legitimacy rather than the legitimacy of the police. In trying to "distance themselves from the misconduct of police" or being concerned about placing too onerous

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32 Chan, *supra* note 30 at 3.

33 *Vancouver (City) v Ward*, 2010 SCC 27 [*Ward*].

34 In Manitoba, *The Police Services Act*, CCSM c P94.5, s 40(2); In Alberta, *Police Act*, RSA 2000, c P-17, s 39(8); In British Columbia, *Police Act*, RSBC 1996, c 367, s 22.

35 *Grant*, *supra* note 16 at para 201.

burdens on the government – without taking further steps to address the roots of these issues – are not the courts enabling *Charter* violations? If the courts are (1) continually identifying flagrant *Charter* violations and systemic patterns of abuse; (2) readily admitting that the law they are laying out is so complex and confusing that it would be impossible for the police to implement in the field; and (3) not taking steps to address these infringements on Canadian's *Charter* rights – how can this be acceptable to Canadians?

III. AFTER-THE-FACT ACCOUNTABILITY & EROSION OF PUBLIC TRUST

The court's warnings for the police to "do better" are falling on deaf ears. In the summer of 2022, the Toronto Star conducted an investigation to uncover cases where the courts had found that the police violated the *Charter*.[36] Their main goal was to determine whether courts are notifying police forces of these rulings and whether the officers involved are facing any consequences. With the help of Western University's law school, the Toronto Star uncovered 600 court rulings from 2011 to 2021, where judges found that officers committed *Charter* violations that resulted in the evidence being excluded under section 24(2).[37] From 2017 to 2021, the Star reported that "the court rulings came down at a rate of two per week," resulting in almost 400 of the 600 cases occurring in the last five years.[38] This investigation revealed a number of very concerning problems.

A. Problem #1: No Systems in Place to Track Police Violations of the *Charter*

The Toronto Star found that none of the 40+ police forces that were consulted had a way of tracking cases. Upon further research, the Star also discovered that neither the courts nor provinces were required to keep systemic track of *Charter* breaches.[39]

B. Problem #2: No Systems in Place to Notify Police Forces of *Charter* Violations

There are also no formal systems in place to notify police forces of court rulings. Across the country, police forces rely on the Crown to inform them

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36 TorStar, *supra* note 8.
37 *Ibid.*
38 *Ibid.*
39 *Ibid.*

when their officers are found to have committed serious *Charter* violations. However, this "informal line of communication" between the Crown prosecution and police leadership is either broken or non-existent.[40] In many cases, what happens in the courtroom never reaches the police station.

The Toronto Police Service said it was unaware of 94 cases of *Charter* breaches in their force until the Star told them about the rulings — this was two-thirds of the cases identified where Toronto police officers were involved.[41]

The article showcased that this lack of communication also extends to the individual officers themselves. In October 2020, Officer Salomon Gutierrez was cross-examined in relation to an unlawful search he had conducted. In questioning the officer, the defence attorney brought up a previous case where a judge had found that Officer Gutierrez had arbitrarily detained another individual and had failed to inform him of his right to counsel. At this point, Officer Gutierrez admitted to the court that it was the first time he had heard of the results of the 2018 ruling. He said that "when he testified in that case, no one ever told him which way it went after he left the witness stand. No one told him his conduct concerned the judge and led to key evidence being excluded."[42]

This corresponds with what many officers said in response to a survey conducted by Troy Riddell and Dennis Baker for their article *The Charter Beat: The Impact of Rights Decisions on Canadian Policing.*[43] Most commentators stated that:

> [Officers] usually received no feedback whatsoever about what happened to the evidence or the case: the officers were left wondering whether the Crown proceeded, whether the evidence collected was used or avoided because of potential *Charter* problems, or if the case ended in a plea bargain. Only in exceptional cases – perhaps a major crime in which key evidence is excluded – was it possible that officers might be made aware of any mistakes they had made. Minor transgressions were likely to go unidentified and uncorrected.[44]

However, many respondents expressed a desire for more regular feedback from the prosecution: "I am aware that many cases can get pled out because of other circumstances, but it would be helpful to know if it was something we did incorrectly or could refer to case law to improve

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40 *Ibid.*

41 *Ibid.*

42 *Ibid.*

43 Troy Riddell & Dennis Baker, "The *Charter* Beat: The Impact of Rights Decisions on Canadian Policing" in *Policy Change, Courts, and the Canadian Constitution* ed by Emmett MacFarlane (University of Toronto Press, 2018) [Riddell].

44 *Ibid* at 179.

upon."[45] This systemic failure to provide behaviour-shaping feedback is a seemingly glaring oversight in policing protocols.

C. Problem #3: Public Concerns over Police Discipline & Investigation

Many factors contribute to citizens' views of the police. Yet one that has substantial influence is a sense that police officers are not always held accountable for their behaviour. A survey conducted by the Angus Reid Institute in September 2020 found that 73% of respondents believed that "the police are not held accountable when they abuse their power."[46]

This distrust arises because of a few reasons. The first is that there is generally a lack of transparency when it comes to disciplining police. Often, investigations concerning police *Charter* violations take place internally in the police force as "personnel matters." Due to the informal nature of these reviews and privacy concerns, the results of those investigations (or any discipline that might occur) are kept hidden from public view.

There are concerns that *Charter* violations or public complaints regarding police officers are not taken seriously. The public may question how police can be held accountable for their actions – when the officers or their forces fail to keep track of *Charter* violations committed by their members.

In his review of Independent Police Oversight in Ontario, Justice Michael Tulloch noted, "[m]embers of the public have also told me that the internal prosecution and adjudication of complaints about police by police is one of the main reasons they would not make a complaint…Reasonable members of the public worry that officers are not being vigorously or fairly prosecuted when the officers' peers and co-workers are managing the prosecutions."[47] Interestingly, Justice Tulloch also discovered that individual officers, who potentially stand accused of misconduct, felt that they had "no confidence in the fair adjudication of their matter…and that the process was rigged."[48]

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45 *Ibid.*

46 "Defend or Defund? One-in-Four Support Cutting Local Police Budgets: Most Back Social Welfare Over Hiring More Cops" (26 October 2020) at 8, online (pdf): *Angus Reid Institute* <www.angusreid.org/wp-content/uploads/2020/10/2020.10.24_Policing2.pdf> [perma.cc/F223-8KGY].

47 Honourable Michael H Tulloch, "Report of the Independent Police Oversight Review" (2017) at 187, online (pdf): <www.policeoversightreview.ca/ReportoftheIndependentPoliceOversightReview.pdf> [perma.cc/LS37-SYLS] [Tulloch] [emphasis added].

48 *Ibid.*

In the cases where police were criminally prosecuted in court proceedings, officers are often not found liable for their transgressions. Kent Roach has remarked that "the police, better than other suspects, know when to 'lawyer up' and exercise their right to silence."[49] Roach also pointed to a 2004 study that found that Ontario's Special Investigation Unit prosecutions had a "conviction rate five times less than ordinary criminal prosecutions."[50] When police are held liable, the public often concludes that they receive light to mild penalties: "disciplinary penalties often involve temporary demotions and/or docking of pay or days off."[51]

These three identified problems – lack of tracking, lack of notification, and lack of transparent and unbiased discipline – undoubtedly lead members of the public to question whether enough is being done to address problematic behaviour and illegal conduct exhibited by the police.

These identified problems raise more general concerns about how police are implementing *Charter* decisions into their policies and practices. Even though the law regarding police powers changes from each court ruling to the next, there is nothing that legally orders the police to change their policies and practices to reflect new *Charter* rules. In fact, we have very little empirical data on the impact of *Charter* decisions on police behaviour. In 1998, legal scholar Alan Young remarked, "we can only speculate whether or not police are trying to live up to the constitutional obligations imposed upon them by the *Charter*."[52] I think that comment still holds true today.

In his recent book, *Canadian Policing: Why and How it Must Change*, Kent Roach argues that this "massive investment in legalised, after-the-fact accountability and due process is no guarantee that our police forces will be effective or law abiding."[53] He demonstrates this point by providing an example of the after-effects of the Supreme Court's 2001 decision of *R v Golden*. Within the case, the SCC described strip searches as "one of the most extreme exercises of police power" and an "inherently humiliating and degrading" experience.[54] The Court set out eleven questions that police must consider in determining whether performing a strip search (without

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49 Roach, *supra* note 29 at 51.

50 Kent Roach, "Models of Civilian Police Review" in *Issues in Civilian Oversight of Policing* (Toronto: Canada Law Book, 2014), at 330-31, citing Ian D Scott, "Addressing Police Excessive Use of Force: A Proposal to Amend the Mandate of the Special Investigation Unit." [emphasis added]

51 Roach, *supra* note 29 at 51.

52 Riddell, *supra* note 43 at 170, citing Alan Young, "Search and Seizure in 2004 – Dialogue or Dead End?" (2005) 29 SCLR 351-84.

53 Roach, *supra* note 29 at 52.

54 *R v Golden*, 2001 SCC 83 at para 83.

a search warrant) was necessary. However, in trying to minimize the use of this tactic by police, the decision ultimately had the opposite effect. Roach reports that before the judgment – Toronto police only strip-searched a quarter of those they arrested. In the three years following the decision, this percentage increased to 37.5% and resulted in the Toronto Police Service conducting 50,000 searches in that three-year period.[55] This percentage rose higher in 2014 and 2015 when the Toronto police strip-searched 40% of the people they arrested. Interestingly, during the period between 2014-2016, only 3% of those strip searches actually resulted in evidence being found.[56] In 2019, the Ontario Police Complaints System found that twenty years after *Golden*, the provincial policing standards still had not been updated to reflect the SCC's decision.[57] Only ten out of fifty-three of the police forces defined strip searches as per the Court's description.[58] Even more worrisome was that only a handful of the police services offered an annual refresher course on the limits of searches of this nature.

However, perhaps the blame should not be held entirely by the police. Hearing from officers themselves, through Riddell and Baker's survey, they commented that their biggest challenge was "keeping up to date with the judicial interpretations of police actions" due to its ever-changing nature.[59] In the survey, a majority of respondents took the opportunity to highlight how "*Charter* decisions have made investigations lengthier, more difficult, and uncertain."[60]

Interestingly enough, the officers were not upset with the impact of the *Charter* on their policing practices. In fact, one officer indicated, "if it makes our job more difficult [,] then I'm fine with that. It slows us down and compels us to think critically."[61] Many officers voiced that the truly frustrating aspect was the lack of consistency in the court's interpretations of the *Charter* or areas in the law that were left unresolved. In particular, a number of respondents argued that the expanded requirements for search warrants in the cases of *Feeney*, *Spencer*, and *White* were incredibly difficult to understand, follow in practice, or presented arbitrary obstacles to an investigation.[62] Other concerns were that the courts were not considering the limits of police resources when they made decisions.

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55 Roach, *supra* note 29 at 52.
56 *Ibid.*
57 *Ibid.*
58 *Ibid.*
59 Riddell, *supra* note 43 at 177.
60 *Ibid* at 175.
61 *Ibid.*
62 *Ibid.*

While I believe that the courts have tried their best to fill gaps in the law relating to policing, it seems they have failed to provide both the police and Canadians with clear rules and proper feedback on what officers can and cannot legally do. As we have seen, the various tests for determining when a warrant is needed or not needed fail to provide adequate guidance and strategies for police to use when they are in the field. Overall, I believe the biggest mistake has been that Parliament and the legislatures have chosen to abdicate this task to the courts.

I think it is fair to say that what is currently happening does not seem to be diminishing the occurrence of repetitive acts of aggressive over-policing or *Charter* violations. The Toronto Star reported that there were nine police forces in particular, where judges were finding that police officers were repeatedly breaching the same *Charter* rights in successive cases. In highlighting the 600 most recent cases of police *Charter* violations across Canada, the Toronto Star shows that there is an increasingly disturbing trend of brutality, callousness, and ignorance among police. How do we take steps to meaningfully change this type of behaviour?

IV. SOLUTIONS & REFORMS FOR BETTER POLICE ACCOUNTABILITY

If the objective is to proactively stop police from infringing on Canadian's *Charter* rights, many things must happen. Most importantly, public trust in policing needs to have increased support, not the opposite. Ironically, this is important because eroding confidence in police services is an existential threat to policing and Canadian's *Charter* rights.

What does the Canadian public need from our police? We need officers who are critical thinkers and who understand the diverse and complex natures of the communities and people they serve. They must have a temperament and empathy that support their role as both law enforcement and civil service professionals. Finally, we need police who fully understand the law and have the appropriate tools to protect the rights afforded to Canadians.

If we are ever going to achieve these things, we need to work towards establishing objective, fair, accessible, and community-focused regulation and oversight. We need to clarify and legislate the laws governing what police can and cannot do and provide better governance, oversight, and feedback to police operations – with the main goal of protecting the public from police malpractice and misconduct. While I admit that these are ambitious suggestions, perhaps it is best to look to the British for inspiration, like we have traditionally done when it comes to policing.

A. Recommendation #1: Legislate Clearer Rules Regarding Police Powers

In 1984, British Parliament enacted *The Police and Criminal Evidence Act* ("PACE"), a legislative framework that sought to unify police powers under one code of practice and to carefully balance the rights of the individual against the powers of the police in England and Wales.[63] This legislation offers a comprehensive and realistic "rulebook" on how police must conduct stops, searches, arrests, detentions, identifications, and interrogation practices. PACE requires that Codes of Practice governing particular police powers are regularly issued and updated. For example, the Code of Practice on the treatment and questioning of detained persons is almost 100 pages long – but it provides detailed, plain-language directions to the police on what is expected of them and guidance on what to do in related situations.

The enactment of new laws or amendments in Canada would allow the police to provide input on what will work in the "field," mindful of the resources available. Legislating these procedures would give police more time to train their officers on new requirements as opposed to reactively adjusting policies every time a judicial decision comes out.

The courts need to stand firm and say that they are no longer going to recognize police powers that are derived from the common law. This would force Parliament to codify and hopefully solidify the rather vague and complex rules surrounding police powers. I believe there needs to be a clear, definitive transfer of responsibility from the courts to Parliament. Considering the power and impact that policing can have on Canadians' lives, there should not be any ambiguity in the rules governing what officers are legally allowed to do.

B. Recommendation #2: Professionalize the Police & Establish College of Policing

With growing public distrust, the time has come for the police to evolve from an occupation into a formal profession. In order to do this, the creation of provincial regulatory "Colleges of Policing" should be established with the key objective of protecting the public from police malpractice and misconduct. This suggestion was implemented by the United Kingdom in 2012, where the College of Policing was established as a professional body to regulate those involved with police work.[64] It

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63 *The Police and Criminal Evidence Act 1984* (PACE), c 60.

64 "About Us" (2022), online: *College of Policing (UK)* <www.college.police.uk/about> [perma.cc/Q2NV-NLDM].

operates as an independent, arm's length body of the Home Office – the governmental department in charge of immigration, security, and law and order – and has seen positive results.

In the article, *Peeling the Paradigm: Exploring the Professionalization of Policing in Canada,* the authors believe that the current governance and organization of Canadian policing fall short of the traditional definitions of a formal profession – that is, "an occupation directed by a government registered body that establishes the scope of practice, minimum educational credentials, continuing education requirement, and oversight process."[65] This idea of professionalizing the police and creating an independent regulatory body has been endorsed by a number of legal scholars and police leaders in Canada. In fact, one of the top recommendations of Justice Tulloch's report was the establishment of a College of Policing in Canada.[66] A College of Policing in each province and territory could better help provide education and competence of officers, the regulation of police practice, and a means of responding to complaints. However, what would professionalizing the police mean in practice?

(i) Help develop training and education

Currently, officers receive most of their training through short-duration classroom instruction and on-the-job learning from experienced officers. This type of training focuses on helping new officers acquire job-specific technical knowledge and the skills to perform effectively. Police organizations invest heavily in this type of training; however, "education" – which focuses on the continuous process of developing knowledge, critical thinking skills, empathy, and judgment – is left up to the individual officers to pursue. Unfortunately, there are not many options available to officers who want to gain a better understanding of what the law means and how it impacts their practices. In fact, in Riddell and Baker's survey, the respondents showed a considerable desire for "additional training with respect to the *Charter* and its impacts on police practices."[67]

The College would ensure that policing services recruit and develop more educated, comprehensively trained, and socially diverse officers. While working to improve the training, the College would help create continuing education and training initiatives for both new recruits and current officers. The College could require that all police participate in a

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65 Kelly Sunberg et al, "Peeling the Paradigm: Exploring the Professionalization of Policing in Canada" (2021) 6:4CSWB at 187, online: <doi.org/10.35502/jcswb.227> [perma.cc/LJ72-3UXZ] [Sunberg].

66 Tulloch, *supra* note 47 at 257.

67 Riddell, *supra* note 43 at 176.

certain number of workshops or seminars each year and may even require competence testing throughout an officer's career. This would be similar to how other regulated professions, such as Law Societies or College of Physicians and Surgeons, require mandatory continuing education for their members. In the context of a College of Policing, education could be tailored to address the problems that police are most often encountering in the field and could help provide skills that officers need – sensitivity and mental health training, etc. The College could adopt the task of informing officers on how new legislation would affect policing practices by creating easy-to-understand bulletins that lay out the facts, reasonings, and rules derived from each case as well as practice scenarios for police to think through.

(ii) The College could also assist in the development of policing practices

In addition to providing educational resources and support for officers, the College could be a hub for researching the best police practices. They could be responsible for collecting a variety of different statistics related to activities performed by the police – looking at things such as the demographic of individuals who the police interact with, the success of police tactics, and the challenges that officers face. With this information, the College would be in a position to help police forces and the government craft the best approaches to a number of policing issues.

(iii) The College could help facilitate open communication between the courts, police, and public

Perhaps one of its best features is that the College could act as an independent entity – facilitating communication between the courts, prosecution, government, police, and public. For example, the College could be in charge of tracking judicial decisions regarding *Charter* breaches and notifying police forces and officers of these rulings. This could be similar to how the Law Society of Manitoba releases a newsletter that includes summaries of important decisions or issues that lawyers need to be aware of to meet competence ethical standards. With this information, the College could follow up on *Charter* breaches by commencing an investigation and disciplinary proceedings or provide further training programs and resources to address behavioural problems. The College could also gather feedback from the Crown – dispersing it to individual officers and providing supplementary instruction if needed.

If lawmakers were to codify the rules governing police powers, the College would be in an excellent position to share research about best practices, facilitate conversations with the police forces on the "workability"

of proposed amendments, and survey the public for their thoughts and concerns.

(iv) Licensing of police officers

The College of Policing could also assume the role of licensing police officers. Currently, a police officer's badge is the symbol of authority granted by both the government and the police profession. However, if policing was transitioned to a licensed profession, an individual's badge could essentially be the "professional license" – an indicator that the officer's conduct, training, and education have satisfied the established guidelines and standards of the profession. The risk of falling below those standings could result in an officer having their license suspended or withdrawn. As suggested by Justice Tulloch, the College of Policing could maintain a public register of licensed police officers in the same way as the regulated health and legal professions.[68]

(v) Help keep police accountable to the Canadian public

Where a judge finds that police misconduct was sufficiently serious to put the "administration of justice into disrepute" and exclude the evidence – it is also imaginable that those same actions would bring equal disrepute to the profession of policing. As suggested above, one of the main tasks of the College would be to identify instances of *Charter* violations, take the necessary steps to remediate behaviour, and proactively stop these types of violations from occurring. The College would similarly be the entity receiving and reviewing public complaints of misconduct, carrying out investigations, and adjudicating disciplinary hearings.

In his report, Justice Tulloch argued that a College of Policing should not replace the public oversight bodies – but rather, the College should seek to complement through the development of a culture of professionalization.[69] However, one of the main motivators behind Justice Tulloch's report was to reduce the overlap and inefficiencies in each service.

I believe these oversight agencies would be better situated and supported under the larger operations of the College. This would be important considering that the College's ultimate responsibility would be to restore the relationship between the police and the public. Many members of the public do not understand how police oversight functions, who works for the oversight bodies, and what are the consequences that officers face when charged and convicted. The College could inform the public of what the police do, how the police are required to respect

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68 Tulloch, *supra* note 47 at 259.

69 *Ibid* at 20.

Canadian's rights, and how officers are kept accountable if they fail to abide by the standards and expectations laid out by the profession. The College can help transform policing from a largely reactive to a proactive profession.

(vi) Requirement for the College to be an independent regulator rather than a self-regulator

The biggest challenge that the College would face would be its independence. There have been a number of criticisms of self-regulating professions.[70] By having practitioners be in charge of regulating the profession, there is a genuine concern that the interests of the profession could supersede the goal of protecting the public. Given the growing public distrust, it would be critical for the College to be an independent entity – free from the influence of both the police and the government. In order to inspire trust and public support, the College would need to be capable of delivering its services to its stakeholders in an impartial and objective way.

This would be no easy task. Essentially acting as a "referee," the College would be required, at times to balance the competing wants and needs of the police, government, and public. The College could seek to elect board representatives from a variety of groups, including the police, members of the provincial government, lawyers, leaders from the communities, representatives from social services, and members of the general public. The College's executives may come from a variety of different backgrounds, but their main goal would be to ensure the protection of the public in the delivery of policing services.

The Organisation for Economic Cooperation and Development ("OECD") suggests that a regulator's independence "does not imply that regulators are anonymous, silent or above and beyond the policy arena."[71] Rather, the OECD encourages "[r]egulators to interact with ministries, who are ultimately responsible for developing the policies for the regulated sector; with parliament, who approve those policies and often evaluate/assist in their implementation; with the regulated industry, which needs to comply with the decisions of the regulator; and with citizens, who are the ultimate beneficiaries of the actions of government and regulators. These interactions are inevitable and desirable."[72] The biggest challenge will

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70 Alison Motluk, "Self-regulation in health care professions comes under scrutiny" (2019) 191:33 CMAJ, online: <doi.org/10.1503/cmaj.109-5790> [perma.cc/77B4-RD7Y]; Andrea MacGregor, "Conflicts of Interest in Self-Regulating Health Professions Regulators" (2021) 44:1 Dal LJ 339, online: <canlii.ca/t/t9g6> [perma.cc/84KB-AS5K].

71 "The Governance of Regulators" (2016), online: *OECD iLibrary* <doi.org/10.1787/9789264255401-en> [perma.cc/2NAW-AJBQ].

72 *Ibid.*

be to ensure that the College is not swayed too much one way or the other by these stakeholder interests – but endeavours to respect what the police need and the concerns that the public voice.

V. CONCLUSION

If we are going to tackle the problems, each stakeholder is going to have a role to play. Parliament would be required to draft and codify clear rules governing police powers; they would have to "professionalize" the police through legislation; and would need to help establish the College of Policing as an Independent Regulator in each province. The courts would have to refrain from expanding common law police powers and become more actively involved in referring concerns over police misconduct to the College, perhaps under section 24(1). The police would have to be open-minded to working with the College of Policing and accepting the help and constructive criticism they would receive. The public would have to move past the urge to punish the police for the harm they have caused and actively work to create a profession of policing that truly serves to protect the *Charter* rights of Canadians.