

**Law of Policing Conference**  
**Police Governance: Making it Work**  
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One of the most significant features of municipal policing in Canada is the system of civilian oversight and governance. With a few exceptions, municipal policing in most parts of the country is overseen by a civilian board or commission. The composition, role, responsibility and authority of the board or commission as well as the separation of powers between the board and the chief of police are delineated in the police service acts for each province. In an effort to balance the interests of civilian oversight and the police service, the law creates a checkerboard on which there must be constant negotiation and calibration with respect to the relationship between the two parties for the system to work effectively. In this paper, I will deal with eight issues related to civilian oversight and governance.

**I. Some features of a successful relationship between a police commission or board and a police service**

Formally, the relationship between a police board and a chief of police is governed by the *Police Services Act*. However, the division of responsibilities between the board and the chief is not based strictly on the so-called Carver model and its notion of a policy board there being several areas where a police board plays a hands-on role. At the same time, while the chief is the board's employee, accountable to the board and subject to the board's performance management, the chief is also the holder of public office and derives certain powers directly from the *Act*. As a result, the relationship between a police board and a chief of police is not the classic employer-employee relationship.

Therefore, I would argue that while the law places certain specific requirements on both parties, a successful relationship between them depends, to a significant degree, on collaboration. This is because, as the law stands, in its role of prescribing policy for the operation of the police service and of ensuring its efficient management, the board relies on the chief of police as its primary source of information and assistance.

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Whether a board will succeed in achieving its vision depends very crucially on the quality of the collaboration that exists between it and the chief of police. As the person in charge of operational matters, it is the chief who has the power and the ability to put into effect the board's vision. The power is not unbridled, of course. It is exercised within the framework of the board's authority under the *Police Services Act* to establish the service's business plan and priorities, set the chief's performance objectives, manage the chief's performance, develop the annual budget and formulate all policies.

Clearly, public interest is best served when the two parties work in a climate of trust, respect for each other's jurisdiction and shared goals. It is served best when each side recognizes the specific interests of the other. Above all, it is served best when the Service accepts and embraces civilian oversight as the underpinning for municipal policing in a democratic society.

Conversely, the interests of the public and of good governance are best served when the board uses its statutory powers judiciously, acting neither as a rubber stamping body nor capriciously, and while seeking a collaborative relationship, is not hesitant to hold the chief and the police service appropriately accountable.

Over the years in Toronto, the relationship between the police service and the board has varied wildly – characterized sometimes by tension, sometimes by cooperation, sometimes by mutual respect and sometimes by outright distrust!

As a result, the course of civilian oversight in Toronto is marked by highlights and low lights due, on one hand, to the internal dynamics of a particular board and, on the other, to the relationship between the board and the chief. I would suggest to you that, given the extremely inter-dependent nature of the respective roles and responsibilities of the two, how the parties practice their relationship is the key to the quality of civilian oversight provided.

There are instances of a complete lack of mutual respect and trust, of unwanted intrusion and interference by one side in the affairs of the other. There are instances of the two sides working at cross purposes and of a total breakdown in communication. And there are instances where the board made itself completely subservient to the chief.

But there are high points also. These include periods of common vision, great productivity and creativity, tremendous mutual respect, open communication and significant achievements.

A review of these high and low points suggests that board-service relationship is at its best when it is marked by creative tension. I believe that creative tension is simply the result of the fact that, while the board and the service do not have identical interests, responsibilities and authority, they cannot function without each other. Indeed, each party benefits when the other is working effectively.

There is bound to be difference and disagreement. But whether difference and disagreement will lead to a breakdown in relationship and dysfunctional behaviour on both sides, or to a commitment to finding workable solutions in the public interest, depends on each side recognizing and respecting the interest of the other, making a commitment to resolving differences through respectful communication, and never, to the best of their ability, undermining each other's credibility or authority by engaging in public denigration. This is what I mean by relationship marked by creative tension.

Key to maintaining such a relationship is a clear understanding, recognition and acceptance of each other's formal as well as informal role and responsibility. A chief must, for example, accept that she or he is not accountable to the people but to the board that is his or her employer. Likewise, a chief must recognize that the law prevents him or her from advocating for or recommending legislative changes. That is the preserve of the board. And, finally, a chief must respect the fact that it is the board's responsibility to deal with the municipality on budget and other matters, and not engage in direct negotiation without knowledge or approval of the board.

At the same time, the board must recognize that the chief is a public figure and is sought out for advice and recommendation by different orders of government and for comment on policing and public safety issues by representatives of the media and the public. The board must also recognize that dictates of efficiency and timely decision-making may require that, on certain matters, it is expedient for the municipality to deal directly with the chief. As a practical solution to these realities, the board should put in place appropriate reporting mechanisms so that the chief keeps the board informed and advised.

In other words, a successful relationship between a board and a chief depends not on a rigid adherence to the letter of the law by the parties but on the establishment of practical, respectful, transparent and accountable channels of communication, information-sharing as well as methods of dispute resolution. This is not to say that formal, statutory processes must never be used; rather, they should be used when appropriate and necessary, and not as the norm.

## **II. Decision-making authority in respect of various issues**

A fully functioning relationship is critical for the proper exercise of decision making authority.

In respect of municipal policing, Ontario's *Police Services Act* distributes decision-making authority among three entities. First, it is the municipality, which must decide the form of policing it wants – that is, whether it wants to establish its

own police service, rely on a neighbouring municipality for policing in its jurisdiction or contract out to the Ontario Provincial Police. If the municipality decides to have its own police service, it is responsible for providing the financial and material resources for the delivery of services. The municipality has no further role; it cannot be involved in day-to-day decision-making, nor can it have any say in the specifics of the police operating and capital budgets. The municipality can only deal with the total amounts requested by the board.

Submission of annual budgets to the municipality is but one of the areas in which the board has decision-making authority. It is the board that approves the budgets for the municipality's consideration. It is an important part of a board's role in ensuring and overseeing the provision of adequate and effective police services

In Ontario, the *Police Services Act* provides a board's legislated duties.

In general terms, the legislated mandate of a police services board in Ontario can be summarized as general management and the establishment of policing policy. In effect, the board's role in shaping the structure of policing is very broad, limited by legislation only in the realm of daily operations, which are the sole responsibility of the chief of police.

According to section 31 of the province's *Police Service Act*, the board "is responsible for the provision of adequate and effective police services." The *Act* gives the board the following responsibilities:

- (a) appoint the members of the municipal police force;
- (b) generally determine, after consultation with the chief of police, objectives and priorities with respect to police services in the municipality;
- (c) establish policies for the effective management of the police force;
- (d) recruit and appoint the chief of police and any deputy chief of police, and annually determine their remuneration and working conditions . . .;
- (e) direct the chief of police and monitor his or her performance;
- (f) establish policies respecting the disclosure by chiefs of police of personal information about individuals;
- (g) receive regular reports from the chief of police on disclosures and decisions related to secondary activities;
- (h) establish guidelines with respect to the indemnification of members of the police force for legal costs;
- (i) establish guidelines for dealing with complaints; and,

- (j) review the chief of police's administration of the complaints system and receive regular reports from the chief of police on his or her administration of the complaints system.

The board is the employer, and, as such, has a key role in labour relations. It negotiates collective agreements with police associations. The board is a legal entity and, as such, is the party that enters into contracts and takes legal action. And, as mentioned already, it is the board that submits operating and capital budget estimates to City Council each year and defends the amounts requested.

The *Police Services Act* gives the board a major role in setting priorities and objectives, establishing policy and providing governance. The board assumes these responsibilities on behalf of all members of the public. It represents the city, the community, the public. And, through it, the public oversees the police.

The chief of police is the third entity when it comes to the exercise of decision-making authority. The chief is the operational head of the police service and, in this role, is responsible for the delivery of effective policing services on the ground as well as for the efficient functioning of the organization. As such, the chief is responsible for day-to-day management, for managing resources appropriately, for ensuring the implementation of the board's priorities and policies through necessary procedures, orders, training and deployment of personnel, and for the performance and conduct of members of the organization. The board may not interfere with the chief's discretion in these areas.

### **III. Boundaries between the commission/board's roles and responsibilities and the Chief's roles and responsibilities**

The boundaries of the respective roles and responsibilities of a board and a chief are implicit in the comments I have made above. In my view, the precise boundaries between operations and policy can be, and sometimes are, a question of interpretation. There can be, and is, great debate about where operations end and policy or governance begins. And much depends on the nature of a board's relationship with the chief as well as the degree of its sophistication.

Thus, for instance, in Toronto, the board has played a very active role in the introduction of mandatory name tags for all members of the police service, handling of sexual assault investigations and persons with mental illness, adherence to the requirements of the province's *Human Rights Code*, installation of police CCTVs in the city and the use of Tasers by police personnel. There are human rights tribunal and arbitration hearings as well as Coroner's inquests

where the board is a direct and active participant in the proceedings that often involve what may be considered operational matters.

Most recently, in the aftermath of the G20 Summit, the board has established an independent review on governance and oversight issues whose terms of reference are derived from the board's overall responsibility to ensure the provision of adequate and effective police services.

It could be argued that these are largely or explicitly operational matters, and therefore, the sole responsibility of the chief. I suggest that the divide between the roles and responsibilities of a board and a chief of police is porous rather than watertight, and very much subject to the nature of their relationship. However, some guidance in this regard is provided by judicial and quasi-judicial authorities. For instance, in the matter of *Odhavji*, the Supreme Court clearly stated that the board cannot be a silent bystander in matters of great public interest.

On the other hand, a recent arbitral decision by arbitrator Paula Knopf takes the view that there are certain areas where a chief of police derives authority directly from the *Police Services Act* and, as a result, these areas are outside the purview of a labour arbitrator. This decision places a restriction on which matters can be dealt with as labour relations which, as I have said before, is one of the responsibilities of a board. In another matter involving the chair of a police services board, the Ontario Civilian Police Commission decided that this individual's act of writing a character testimony for an officer who had been charged by the chief of police under the *Police Services Act*, constituted interference in day-to-day operations.

What becomes clear from a reading of the *Act* and these decisions is that day-to-day operations in regard to such strictly operational policing matters as deployment, policing strategies, investigation, handling of law and order situations, conduct of members of a police service, decisions with respect to police equipment, etc. are strictly the role and responsibility of a police chief. A board must tread very carefully in these areas when interpreting its authority under the *Act* to direct the chief.

Of course, the board does have the authority to hold the chief accountable even in respect of these matters. I suggest that where operational issues such as the ones enunciated above are concerned, the board exercises this authority after the fact.

Just as areas of responsibility such as those named above are largely the sole preserve of the chief, similarly, there are areas where the chief must defer to the board and enjoys only the ability to recommend. These include, for instance, the organizational structure, the size or strength of the workforce, the ranks, incumbents to those ranks, terms of the collective agreements, the size of the

annual budgets, choice of providers of goods and services and so on. Most importantly, the development of policy is very much the board's responsibility.

In short, the boundaries delineating the respective roles and responsibilities of the two parties are laid out in the laws of the land, the board's policies and the contracts entered into by the board.

#### **IV. Requirements for the chief to follow commission/ board directions**

The question as to when a chief has to follow the directions given by a board implies that the chief has discretion in the matter. So long as the directions are in accordance with the law, pertain to subjects within the board's jurisdiction and are properly given, the chief is required to follow them.

Most often, direction to the chief takes the form of a policy established or a resolution adopted by the board.

Policies or resolutions are derived from a variety of sources. These include, for example, the provincial government's Adequacy Standards Regulations, documented community needs, board priorities and judicial or quasi-judicial tribunal decisions. Directions resulting from these sources are part of the board's overall management responsibility as laid out in the *Police Services Act*.

In addition, there are directions that take the form of the chief's annual performance objectives and those that result from the board's consideration and approval of the annual operating and capital budgets or contractual agreements into which the board enters.

All directions emanating from these types of sources are mandatory and must be followed.

That being said, there is much public discussion regarding the provision in the *Act* which empowers the board to direct the chief and the circumstances under which the board may exercise this power.

It should be recognized that this is not an unfettered power. The board's authority to direct precludes matters that are strictly and manifestly operational. The board cannot direct the chief in relation to day-to-day policing, police investigations, policing strategies and tactics, assignment of duties and shifts to police officers, handling of the conduct of individual police officers, dealing with public complaints, matters before the Special Investigation Unit and the like.

In regard to all such matters, while the board may hold the chief accountable for following board policies, it does not have the authority to direct the chief.

## **V. Distinction between what falls under “budget” and what falls under “operations,” and how the two intersect**

Notwithstanding the separation between policy and operations, there is one area where the two may intersect, namely the budget.

Section 39 of the *Police Services Act* requires that “[t]he board shall submit operating and capital estimates to the municipal council” showing the amounts needed to maintain the police service and to pay the board’s operating expenses.

Typically, the board does not merely transmit to the municipality budgets proposed by the chief of police. The board considers and approves them before submitting them. That process of consideration involves, in Toronto, a line-by-line examination of the budgets, extensive discussions as to the justification for particular line items and several iterations. During this process, the board may, and does, ask questions about matters that would otherwise be considered operational. The board may, for example, decide to defer new hiring, freeze promotions, and reduce or delay program or capital expenses.

Further, the board may make policy decisions that have an impact on the budgetary aspect of operations. As examples, I refer to the Toronto Police Services Board’s decisions with respect to name tags, in-car cameras and use of force options. With respect to the last, it can be argued that the use of force options provided to officers fall under the chief’s jurisdiction as it is the chief who decides operational matters related to uniform and equipment. However, it can also be argued that there may be a public interest aspect of a budgetary decision to purchase new use of force options, which brings it into the realm of policy.

Our board has seen this before, for example, when the matter of purchasing Conducted Energy Weapons (CEWs), or Tasers, was considered by the board as part of a larger budget item. There was significant community discussion about the use of Tasers by the police service and thus, some believed that the board had a legitimate policy role to play in budgetary considerations about purchasing this item.

It is evident that the distinction between budget and operations is by no means settled, and there are many situations where the two intersect.

## **VI. Difference between oversight and governance**



As the foregoing discussion makes clear, a police services board has two distinct functions, namely, oversight and governance. These words tend to be used interchangeably; however, though inter-related and sometimes overlapping, they are distinct.

In their literal sense, “oversight” is defined as watchful and responsible care as well as regulatory supervision, whereas “governance” means the way that an entity is controlled by the people who run it.

In the context of policing and police services boards, the term “oversight” refers to the regular and ongoing monitoring of the services provided by the police to ensure accountability in terms of services, policies and conduct of service members. Civilian oversight ensures that public accountability is paramount and that the priorities of the community are reflected in the activities of our police officers. It also ensures that standards of adequate and effective policing are set and met, and that the actions of police officers are fair, equitable and transparent.

By contrast, the term “governance” refers to the processes and structures employed to provide direction to management for the operations and activities of a police service. It includes aspects such as decision-making processes, policy development, establishment of an organizational structure and risk management.

To be effective, a board must pay attention to both of these functions.

## **VII. Implications of political appointees on the board/ commission**

How well a board carries out these functions depends, quite clearly, on its composition and the quality of knowledge, understanding, expertise and political sophistication that it brings to its role.

In Canada, police boards are made up of elected local politicians and members of the public appointed by the municipality and the province. In my mind, this composition is a further example of the effort to balance different interests and there is considerable merit in it when compared to the composition of police oversight bodies elsewhere. In Scotland and the Netherlands, for example, these bodies consist entirely of municipal politicians.

The Canadian version, typically, includes a minority of municipal politicians and a majority of members of the public. The presence of a sizeable body of municipal representatives is recognition of the fact that the municipality, being responsible for financing the police service, has a direct interest in its management. As well, municipal politicians represent the interests of the public who elect them and who look to them for provision of needed services.

The blended nature of the boards and the presence of a majority of ordinary members of the public, on the other hand, attempts to ensure that management of the police service will not be overly or totally politicized. The board, as an entity, is intended to prevent direct political control of local policing or making the police service subject to the prevailing political or ideological preferences.

In this way, the board represents a balancing of interests.

In reality, of course, there are obvious benefits as well as risks associated with this blended nature of the board. While the law provides certain safeguards by delineating the distinct roles of the municipality and the board and by providing for a statutory mechanism to deal with any breach of conduct by a board member, it is incumbent upon a board to put into place effective policies regarding the role, responsibilities and conduct of board members to ensure that all members alike serve the public interest.

## **VIII. Conclusion: Legal distinctions vs. political reality**

By way of conclusion, let me reiterate the point I have made earlier. The relationship between the board and the service, though defined by a legal framework, is not, and cannot be, absolutely precise or watertight. As a result, there is bound to be ambiguity. What matters is whether we are suspicious and intolerant of ambiguity or whether we turn it to our mutual advantage and make it work. As we negotiate our way through this ambiguity, we are required to constantly juggle between legal distinctions and political realities. What is required is pragmatism rather than a purist aversion or refusal to recognize and work within the various political realities.