

# **The Concept of Governance as Forward Oversight as Applied to Police Agencies in Canadian Municipalities**

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### **Abstract**

This paper will explore why policing agencies can be seen as arms-length agencies of government and why they need special forms of oversight and governance through the lens of principal/agent theory. It will explore the distinction between oversight and governance and argue for a conceptualization of governance as a distinct type of oversight, labelled forward oversight. Finally, it will explore the Canadian experience in exercising this forward governance, focusing on the policing of Canadian municipalities. The Canadian experience would clearly indicate that, while there is a strong framework for oversight mechanisms, the forward governance capacity in municipal policy governance, while articulated in law and long-standing, can only be effective when certain circumstances come together. The Canadian experience suggests that, in many ways, the capacity for independent police governance to work is restricted and, as such, the results are mixed.

### **Police as an Arms-Length Agency of Government**

The policing responsibilities of government are generally not characterized a state-owned enterprise. However, there are certain characteristics of the work of police that would certainly, at least in democratic environments, make it easy to designate the police function as an arms-length function of government that must be able to act free of political interference while at the same time being fully accountable to government for its performance. In that regard, the issue of effective governance of this arms-length agency becomes very important as police agencies exercise considerable power in society and must be held to account for that. To that end, governance takes on a complex set of roles, some dealing with past behaviour and some dealing with future direction and orientation. This paper will argue that the notions of oversight and governance are different, but that both

are necessary in governing the police agency. Further, one, oversight, deals generally with past actions of the police agency and the other, governance, tries to set the future direction and allocation of resources based on past actions and direction.

The concept of arms-length agencies is a useful theoretical starting point for exploring the relationship between police and their governing and oversight entities. While it is not argued that police services in Canadian municipalities are agencies in terms of the so-called agentification movement within government (Pollitt, Talbot, Caulfield, & Smullen, 2004; van Thiel, 2004; Wettenhall, 2005; Torsteinsen, 2012a, 2012b, 2012c), they do bear some interesting characteristics that draw useful parallels, especially when defining how governments exercise control over them while respecting the need for their independence. Further, as more recent research has shown, the application of agency theory in the municipal context presents some interesting challenges in keeping the balance between independence and control (Anderson, Torsteinsen, 2017).

Policing presents an interesting example of a part of government that has many of the characteristics of an arms-length entity, but that is often situated organizationally as a department of local government. To frame the discussion, I would take the definition of an Arms-Length Entity (ALE) as posited by Chris Aulich of the University of Canberra as one which:

- Has a separate legal identity to government – that is, its own independent legal standing or charter with either a legislative or regulatory base,
- Has a degree of autonomy such that government has muted influence in its day-to-day affairs, and
- Remains under some degree of government control or influence, whether through whole or partial ownership, Board representation or another mechanism. (Aulich, 2013)

It can be argued that police services in Canadian municipalities meet all of these criteria.

While ALEs are prevalent forms of delivering public services, they also come with certain risks that are relevant to this examination of police agencies in Canadian municipalities, ones that we will return to later in the paper. Some of those identified in various publications are:

- The risk of strategic misdirection, moving the entity away from its intended purpose, or adding business elements not envisaged in public policy,<sup>1</sup>

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<sup>1</sup> A glaring example of that in the Canadian context is the creation of ORNGE, a special purpose entity of the Government of Ontario to provide air ambulance services that rapidly became an international entrepreneur and marched its financial statement right of the provincial entity, to much scandal. Reference: Kevin Donovan, “The Star Investigation that broke the story of ORNGE” The Toronto Star Accessible at [https://www.thestar.com/news/stardispatches/2012/11/08/star\\_dispatches\\_ornge\\_the\\_star\\_investigation\\_that\\_broke\\_the\\_story.html](https://www.thestar.com/news/stardispatches/2012/11/08/star_dispatches_ornge_the_star_investigation_that_broke_the_story.html)

- Fragmentation of services,
- Failure to respond to legitimate policy direction from either the government or its governance body,
- Loss of linkages to other services or failure to collaborate across government (Audit Scotland 2011, Rutter et al 2012),
- Insularity and protectionism, resistance to external criticism and loss of broader public policy focus,
- The opposite risk, however, is a loss of independence and capacity to act through excessive interference by governance bodies.

In setting out the framework, the final element is the identification of factors leading to the success of ALEs. Aulich cites a report for the Wellington City Council on factors of success. These are adapted here to fit the context for discussion later in the paper:

- Adoption of a clear purpose and strategic direction for the entity,
- Clarity of roles for the entity, the government and the various oversight and governance bodies,
- Having the right people with the requisite skills in place within the entity's leadership, within the governing and oversight entities and within government.
- Effective systems of reporting and accountability,
- Effective communications and relationships that build a culture of trust. (Plimmer Consulting, 2012, Ernst & Young 2012)

These criteria will serve to inform the conclusions of this paper and will be reflected in the Canadian experience in municipal police governance.

Given the extensive application of the ALE concept in government, it is worthwhile considering, in the context of this paper, how policing in Canadian municipalities might meet these criteria. While the usual rationale for creating an ALE is to give greater flexibility to the management of the entity and depoliticize decision-making (Gash et al 2010; Manning and Shephard 2009), with respect to police, the argument centers on its core *raison-d'être* and the need to establish operational independence and discretion while exercising effective oversight and governance.

Canadian municipal police services are part of the municipal government. However, the requirement to establish a police service with a specific set of responsibilities is mandated by the provincial government in which the municipality is created. This is generally put in place through public safety legislation, most commonly *The Police Act*. Most provinces in Canada also mandate a separate form of governance, known as a police Board or commission. This separate legal foundation establishes the first criterion of agency as outlined above.

The foundation of police independence lies with the nature of the powers that police as individuals must exercise, the need to ensure that there is no political interference in those actions and the heavy burden of accountability for the powers to use force, restrain

individuals and make arrests and criminal charges. Further, that independence must ensure that judicial review of individual charges is unfettered. This means that individual police officers and their internal operational command systems are not subject to direction from the municipality that funds them or the governance body that creates policies for the police service. This separation of the policy setting and operational direction meets the second criterion of agency as outlined above. It also sows the seeds of a vexing conundrum of what is policy and what is operations.

A persistent theme of this paper will be the need to balance the independence of the policing function, free of political or inappropriate interference in its core activity of enforcing the law and the need for that same police function to operate within the law and legal direction and be held to account for doing so. In this regard, the police function represents an arms-length relationship with government and a continued accountability to it. This accountability takes many forms, as will be outlined in this paper. There are oversight bodies such as police complaints organizations as well as ombudsmen, as well as the courts themselves. As already noted, there are governance bodies with considerable powers to hold the police to account and to set policy and strategic direction for the service. It is a complex set of accountabilities, all intended to constrain the illegitimate use of the policing powers. This would meet the third criterion of agency as outlined above.

There are limitations of applying the agency theory to policing. Police are not separate persons or corporate bodies capable of raising funds or acting autonomously. While they do have independence in terms of their operations, they do account to unique oversight and governance mechanisms. In that sense they are subject to Van Thiel's concept of *internal autonomization* which gives parts of government considerable freedom (van Thiel, 2004). Further, the application of the agency model in the whole of the public sector can fail to recognize the complex and legitimate role of politics and public policy. Deals are made and compromises are reached in order to get things done. That is part of the normal give and take of political decision-making where resources are always constrained and interests are in conflict. As we will see with respect to even the so-called separation of policy and operations, issues can move rapidly from individual incidents to major social issues (Black Men Matter), especially at the local level. At that point the operational becomes a policy matter. In the end, there has to be a link of this independence and accountability. As Martin, points out, "few dispute the proposition that in a democratic society, police must be...accountable to civilian authority and the 'tool' of no political master" (Martin, 2004)

A further flaw in the application of agency theory is that it implies some form of stability and formality will govern the relationship between the agent and the principal, while the reality of police governance has been the relative instability of the governing body, with turnover dictated by the two sources of appointment – the municipality itself and the province. In addition, the number of stakeholders associated with policing, all with legitimate claim to a voice in the processes, ensure that the principal is often dragged into operational matters of agency and that the agents are often intervening to affect the

principal's decision-making, or, at times, even challenge it. And, pertinent to this case, it also assumes that the principal and agent understand their own and each other's roles, respect them and do not seek to subvert them.

### **Complex Field of Accountability and Independence**

The existence of extended agencies (ALEs) of government is intended to meet a mix of public policy objectives:

- Permit greater flexibility of operations and management,
- Develop new means of funding and incentivize innovation,
- Protect the agency from political interference,
- Provide an independent public profile for the agency.

While much of the literature focuses on the creation of ALEs as quasi-commercial enterprises, the scope of such entities is much greater than that. For the purposes of this paper, it is argued that the police agency is at arms-length to protect it from undue interference in the exercise of its investigative and restraint powers while ensuring accountability through oversight and governance. Like many ALE-type entities, however, a police agency is not unfettered from government direction and accountability. As Anderson & Torsteinsen (2017), point out, "To reach a balance between autonomy and accountability, which prevents over-steering as well as fragmentation is demanding and tension-filled... At least, one may ask whether an ambiguous or hybrid structure is emerging in which features like devolution and hierarchy will co-exist in a tension-filled way."

Governments therefore establish a number of ways to ensure that the ALEs do what they are intended to do. The limits of control will vary and the public sector landscape is crowded with many instances of agencies gone wrong, either through corruption, the poor management of public funds, mission diversion or poor governance. It is therefore not without some good reason that political leaders and central government bureaucratic officials will concern themselves about their capacity to reign in those agencies that they are also trying to free up to be more independent. That is why all Canadian provinces provide police agencies with specific legislative mandates that both enable and constrain their actions. Similarly, in all provinces, there are a range of complaint and quality oversight bodies at the provincial level to address police operational overreach. Specialized governance is intended to provide policy, resource and strategic direction.

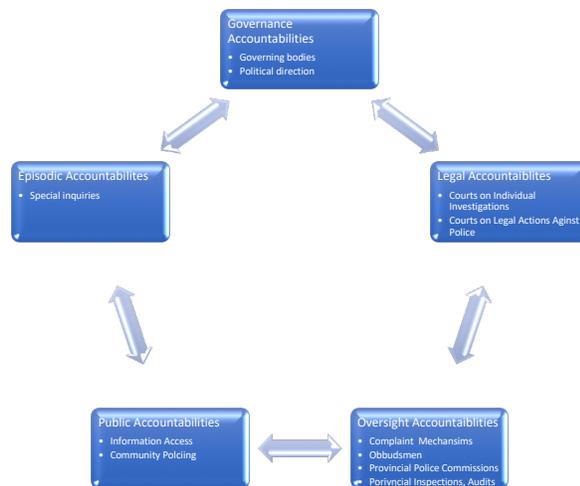
Caul points out that "Given the essential role and "awesome power" of police to mediate the delicate relationship between the state and civil society, the *nature* of the police relationship with each, and the *form* in which such mediation occurs, is critical to democracy." (Caul, 2009) As such, we see a continuum of accountabilities for such agencies, often driven by the nature of the activities that they undertake, the inherent risks and consequences of error. The history of policing around the world has led to a vast array of oversight tools being put in place. It is of interest that formally independent governance

mechanisms such as the police Boards and commissions in Canadian municipalities are actually quite rare in other countries.

The relationship of the state to police is complex, one that entails a balance of independence and control. Layered onto this is a persistent public policy concern to restrain the abuse of the delegated force that police exercise, be it driven by reaction to individual police actions or an underlying concern in broader public policy to ensure that the quasi arms-length relationship that policing has been placed in must remain under control. To that end, a number of controlling mechanisms can be found in most countries:

1. Tools of legal restraint and review, often found in legislation and regulation and in the creation of complaint and review mechanisms, such as ombudsmen, complaints commissions and special investigative units.
2. Creation of empowered governance bodies, such as the police Boards focused upon in this paper, that can direct, at a policy level, the direction of the police service and to which it must account.
3. The creation of internal organizational rules, processes and resources to ensure that individual members of the organization operate within the legal and police framework, e.g. internal training, audit, inspection, clearly established policies on the conduct of investigations and human rights.
4. Effective organizational tools to provide information on performance at the organizational level, e.g. performance targets and at the individual level, e.g. internal audit, complaints, review of cases.

Police face such a complex accountability environment. The Law Commission of Canada (2006) portrayed these accountabilities in Figure 1. Police Boards, as a primary form of governance in these instances, are not the only way in which police are held to account. The legal and oversight frameworks mean that police are accountable to courts when they present evidence of a crime. Oversight means that various bodies can examine police actions to determine their appropriateness and legality. These accountabilities centre on individual police actions in the exercise of their legal mandate. What police Boards provide is a different form of accountability, one that centres on the organization and not on the individual actions. It holds the organization to account, usually through the Chief of Police, for achieving certain results in certain ways outlined in various policies and plans. It requires information on the performance of the service as a whole, sufficiently detailed to permit the Board to determine to its satisfaction if what was agreed to is being achieved. It hires and terminates the Chief based on a set of performance expectations as well as personal qualities. It also secures the resources that the Chief needs to do the work of the service to its satisfaction, or otherwise constrains budgets and plans to comply with the fiscal realities of the jurisdiction.



**Diagram 1: Police Accountabilities: Law Commission of Canada. (2006). In *Search of Security: The Future of Policing in Canada*.**

Police governance, if we take the theoretical framework of agency as a useful way of thinking about it, becomes something quite different than the web of retrospective controls offered by the law, regulations and the various oversight bodies that constrain police discretion and create transparency into its action. And, in the Canadian context, because Canadian municipal police are part of one level of government, but one that is created and directed by provincial legislation and in the case of policing specifically federal criminal law, governance becomes a balancing act of protecting police independence from political intrusion while ensuring police accountability. This is the heart of governance in this instance. Further, it does so, not by replacing the management of the police service but by directing it through forward-looking activities that set the future course for the service and hold the police administration to account for achieving and then securing the funds and authorities to realize that course.

Without suggesting an airtight distinction between oversight bodies and governance entities, there is one distinction that is useful for analytical purposes, but also touches on what each does well. Oversight bodies such as complaint commissions, ombudsmen and special investigation units all deal with incidents or complaints retrospectively. Their primary orientation is on events that have already transpired and about which there is some form of complaint, controversy or public policy interest. This retrospectivity is intentional in policy, even where the investigating body has the power to require corrective action or even charge individual police officers under criminal law. Something had to have happened that brought forward a complaint or the cause to investigate<sup>2</sup> Given the

<sup>2</sup> For example, if a police officer is involved in a use of firearms leading to a death, a provincial special investigation will investigate the incident to determine the appropriate use of force.

contentious nature of policing in many jurisdictions and the inherent powers they exercise; such oversight is justified.

This is a useful starting point. What we see in the oversight of police is the growth of a variety of review mechanisms that address either individual complaints or issues associated with police practice or more general audit and review processes that ensure the adherence of a particular police agency to established and desirable standards of behaviour. One principal element of these oversight bodies is that they actually do interfere by review and findings of responsibility into individual police operations. In instances where external police investigations units look into the actions of police in, for example, the discharge of weapons, the case may actually become a criminal case itself. But the over-riding characteristic of these oversight bodies is that they are retrospective in that they address complaints and performance that has already occurred. There is no doubt that their findings may alter future behaviour of individual officers and the police agency as a whole, in order to rectify problems or establish a greater alignment to standards.

Governance, on the other hand, takes a more prospective orientation. In all the legislation in Canadian provinces creating police Boards and commissions, some form of the theme that these bodies will ensure the provision of public safety in their community prevails. In order to meet its basic role, this form of governance of an arms-length agency must set the direction for that agency, must secure the resources to achieve it and must hold the agency to account for delivering that direction. Governance is in this context then becomes the continual review of the performance of the agency, taking into account many aspects of operations relevant to its ability to assess overall performance, with an eye to the future direction, capacity and sustainability of that agency. Murphy and McKenna (2007: 38) made clear the distinction between the terms police governance and police oversight: “Police governance is more closely aligned with the approaches taken to the overall guidance and direction of a police service, including the formulation of organizational strategic goals and objectives. Police oversight is commonly associated with the mechanisms and methods established for the handling of complaints against a police service, including those pertaining to policy or individual officer behaviour.”

Another approach, but consistent with the notion of temporal orientation is that of Chief Justice Morden, in this wide-ranging Report in 2012, **Independent Civilian Review into Matters Relating to the G20 Summit**<sup>3</sup> for the Toronto Police Board. Morden breaks down oversight into a governance component and an accountability component. While terminology varies, this parallels the argument that I am putting forward in this paper.

“In the policing context, civilian oversight comprises two essential components that work in tandem:

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<sup>3</sup> Disclosure: The author was a witness to this Inquiry and provided advice on governance theory and practice.

- **The Governance Component:** this represents the authority and responsibility for the development of policies that become the framework within which decisions will be made and actions will be taken by the police service. This is intended to ensure that the police service fulfills its legislated function with due respect to community norms.
- **The Accountability Component:** the process by which actions and activities already carried out by the police service are evaluated to ensure they are consistent with existing policies. This is intended to ensure that decisions which have been taken can be evaluated and addressed in a transparent manner and that lessons learned can be applied to future decisions.

One way to understand each of these components is by reference to when each becomes engaged.

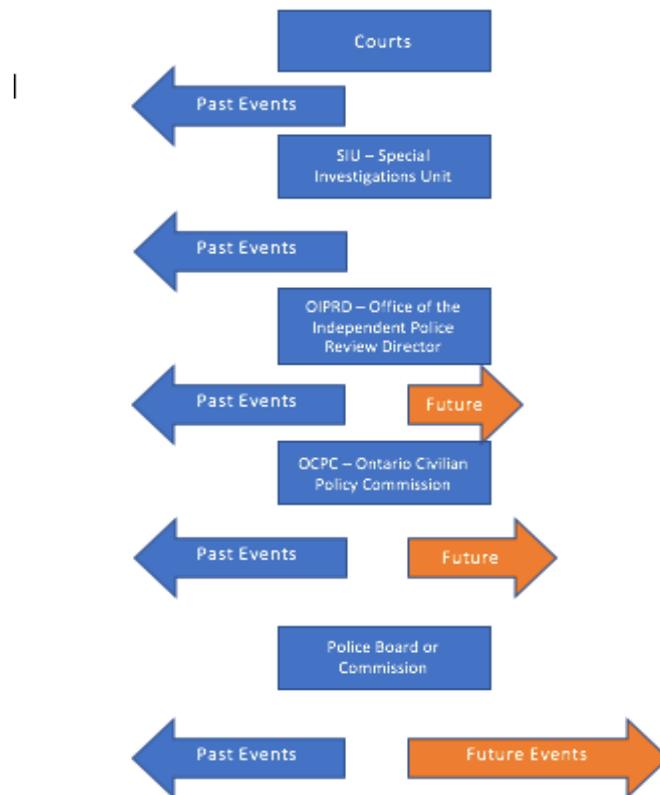
The Governance Component is a proactive, forward-thinking process in which a civilian oversight body makes policies and decisions for the adequate and effective operation of a police service. While certain policies may be created in response to a particular issue, this policy-making work should be an ongoing process in which civilian oversight bodies are continually engaged. A police Board's collection of policies should create the arena in which all aspects of a police service's statutory and common law responsibilities are carried out. Put differently, "[a] policy is a deliberate plan of action to guide decisions and achieve rational outcome(s)."

The Accountability Component is an after-the-fact review process in which particular decisions or acts are examined once they have already occurred. Civilian oversight bodies can examine decisions made or sometimes particular conduct (i.e. when a police Board reviews a complaint about a Chief of police or deputy Chief of police under section 61(8) of the Police Services Act) with reference to existing policies and procedures to determine whether adequate and effective policing was in fact delivered." (Morden, 2012)

To reconcile this formulation with what has been suggested before, I have adopted the approach that sees governance of an agency such as the police as a form of forward oversight. The intention is not to suggest that the oversight agencies that I describe are solely focused on the past. They investigate these in order to affect future actions and policies, to correct errors and, in some instances, discipline those involved. Similarly, a governance body such as a Police Board or Commission cannot carry out its duties without an awareness of past events, information on the agency's performance with respect to past directions set and a sense of the historical development of policy matters. **Figure 2** is an

attempt to show the orientations of a variety of oversight and governance mechanisms in one Canadian province, Ontario. Forward oversight as a conceptual means to adequately differentiate police Boards and commissions from other forms of oversight also entails a much greater degree of directing the future of the police service through its main activities, which will be shortly described. The power of forward oversight is considerable as it involves setting direction, resourcing the agency and holding it to account for achieving that direction. It also means taking on the difficult task of providing these governance functions for an agency that is often involved in controversial public matters, often forcing the governors to engage in detailed reviews of operational matters normally delegating to the agent, in this case the Chief.

**Figure 2: Temporal Orientation of Various Police Oversight Bodies, Ontario**



What then are the activities that define agency governance as forward governance? The provincial legislation creating police Boards and commissions has historically been vague. Usually it has been cast at a very high level such as providing for public safety in the

municipality through a police service. However, one trend has been in more recent legislation to try to provide greater clarity of governance, which will be discussed below. In looking at the roles that an agency governance body would be expected to perform, the literature is extensive (Gill & Reissing (2005), Coglianese (2005), Carver (2006,2009). Usually it focuses on the role of the Board of Directors, but it applies equally to Police Boards and Commissions in this context. In general, the governance functions that a Board performs to achieve its role are:

- Setting strategic direction for the agent through tools such as strategic planning,
- Determining resource levels and sources through budgets,
- Creating policies to guide the management in its activities,
- Assessing performance of the agency through regular reporting,
- Assessing the risks to the agency, both internal and external, and ensuring mitigation where needed,
- Hiring and firing of the CEO,
- Interacting with external stakeholders, regulators and government authorities on behalf of the agency.

To conclude, making a distinction between oversight and governance is not spurious. Functions differ, especially in dealing with the delivery of police services through organizations that are both arms-length but integral to the public policy of most jurisdictions. It is important to understand the differences between oversight bodies that deal with complaints or standards and governance bodies that provide direction, policy and resources to the policing agency and then hold it to account for delivering in an appropriate manner. Key tools that the governance bodies have are the power to direct policy and the power to allocate resource levels. Interestingly, added to this in recent legislative changes in two provinces (Manitoba, Ontario) is the requirement that the police Board prepare strategic plans for the delivery of public safety services and also prepare an annual review of the performance of the Chief. Taken together, these form keys instruments of effective governance.

### **Agent/Principal Tensions in Governing Police Services**

In spite of the existence of defensible public policy accountability and governance frameworks, the governance of police in Canadian municipalities is fraught with continuing tension and imbalances. The capacity of Boards to effectively govern and provide forward oversight seems continually limited by member unwillingness to actually govern in terms of the core elements of such governance as outlined just above, the police Chief's resistance and reinterpretation of all direction as operational interference and a muddle of poor capacity, rapid turnover and lack of the use of the instruments of effective accountability. The reality is that their performance has, at best, been mixed and one not generally affirmed as effective as it might be. As Griffin points out, "It is ironic that after 150 years of the creation of police Boards to separate policing from political partisanship, interference, and control, and all the tinkering that has occurred since that time, today's

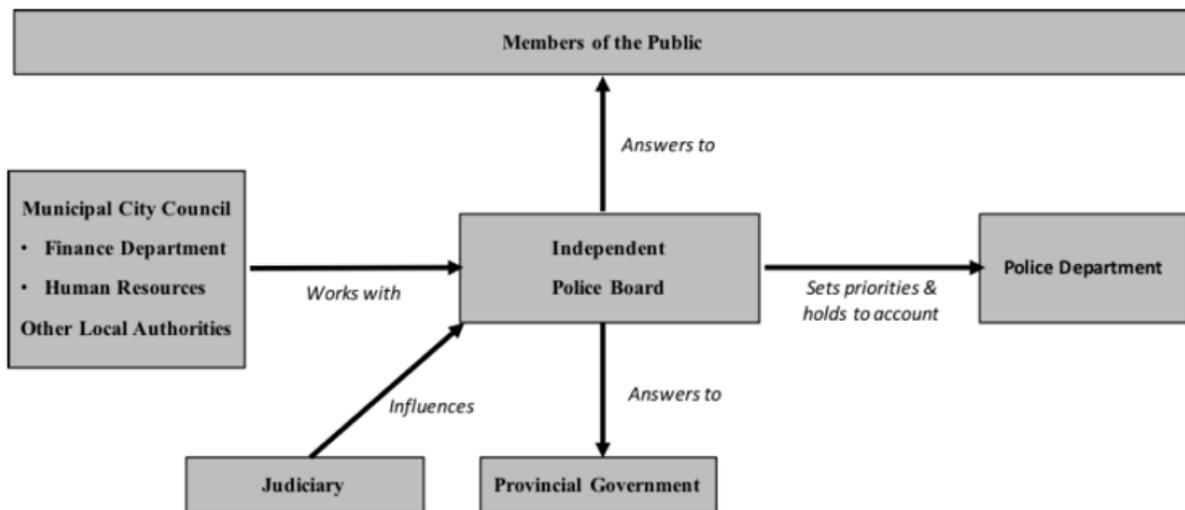
police service Boards are still very much perceived as political organs controlled by municipal councils (Griffin, 2006: 17).

What then are the issues of effective governance here? Clearly there is a long history of public policy efforts to establish effective governance of this central arms-length agency of government – the police. And, there remains with all that a sense that the ideal of effectiveness has been, at best, a hit and miss affair, with some glaring examples of governance failure. The issues that arise in the literature and in direct contact with governance practitioners have centered on the following:

1. Legal ambiguities,
2. Board composition and turn-over,
3. Board resourcing and capacity – individual, training,
4. The expertise gap, and
5. Police Chiefs resistance – interpreting policy versus operations.

### **Legal Mandate Ambiguities**

The legislation creating Police Boards or Commissions varies from province to province. For the most part, the language outlining the role of these entities follows the line of empowering them to ensure public safety through the provision of police services. As noted, more recent legislation does outline some specific activities that they must perform. However, the reality is that the specific powers of direction remain vague, creating an ambiguous culture with respect to both roles and powers. Additionally, the Police Board is structurally part of the municipal government, which is responsible ultimately for the policing budget, a major portion of the overall municipal budget. The Board's activities are overseen by provincial legislation and the provincial police oversight bodies. Michael Sheard provides, in **Figure 3**, a useful schematic of the legal and bureaucratic relationships in which the Board finds itself.



**Figure 3: Structural Relationships between Police Boards and their Stakeholders**

Very few Board or Commission members would describe themselves as experts in policing. In fact, the genesis of the Board’s composition, to be discussed below, is that the membership represents citizen interests, along with those of the provincial and municipal governments that appoint them. From a legal authority perspective, the capacity of the Board to exercise its authority is unclear. It is constrained in law to not interfere with operational matters, another contentious issue to be discussed further. Municipalities seldom willingly give up their financial authorities to plan, budget and limit spending. The province sets provincial laws in place that govern all aspect of policing.

Many Boards and Commissions have successfully navigated their way to effective governance through a complex balancing act of stakeholder engagement, having the benefit of experienced and long-serving members and establishing the key tools of governance such as Chief selection and performance review, strategic planning, an effective policy suite and active community outreach. However, the challenge of doing this is immense and made more so by the open-ended legal framework for this governance. As Sheard points out, “In terms of power and who exercises it, police Boards have the sole legitimate authority for governance over the ethical behaviour of the police. The legitimacy of their authority, it is argued, is reflected by their political position, and is the basis for their relationship with the police. The concern is in the way many Boards relinquish this power to the police themselves, acting more as a supporting actor instead of a governing one. As a result, what should be the seat of power, in many cases, is often seen as a mere veneer; a symbolic entity that represents power without really exercising it.” (Sheard, 2016)

## **Board Composition**

Police Boards and Commissions are made up a mix of appointees from the municipal government, the provincial government and some community representation appointed either by the province or municipality. In one province, the mayor of the municipality is designated the Chair of the Commission, an issue of some contention. For the municipal appointees, normally these are municipal councilors, the elected Council members who then serve two roles, one of the broadly based municipal government and the other to govern the police service.

Over the history of this form of governance, a number of issues have arisen because of this composition. The first is that the municipal representatives are often in a conflict over budgeting issues. Police services take up a significant part of the municipal budget and councilors are eager to constrain the growth in these services, while at the same time sitting on a Board that it responsible for effective public safety services for the community. Such a conflict has often resulted in a dysfunctional relationship between the Board and the municipality but also between the Board and the police service itself. Most of the cost drivers for policing are not under the control of a single police service, but rather driven by a range of factors such as wage competition among police services, increasing cost of crime investigation and excessive mission creep in policing, with new forms of crime emerging such as terrorism, cybercrime and child pornography.

The second area of concern that affects effective governance is the turnover rate of Board or Commission members. For municipal councilors, this can be rapid, as committee memberships change or electoral results mean the departure of some from the scene. Community representatives often only serve a single term. In all of this, the development of a corporate member and acquisition of an understanding of policing issues, a complex field, is lost in this turnover.

## **Board Resourcing and Capacity**

To be effective, governance bodies must be able to act competently in areas of oversight, planning and policy creation. With rare exceptions, Canadian municipal Police Boards and Commissions members are doing this work part-time, with little time to devote to the in-depth work of research, inspection, policy-writing and report reading. In addition, these bodies are seldom separately funded from the police service budget, creating a dependency upon the organization they oversee in terms of resources and expertise that, at times, appears to conflict directly with their role. In normal corporate governance, it is certainly the role of the CEO to support the Board of Directors and do a considerable amount of the preparatory work for the Board's decision-making. In addition, Boards do not – and should not – aspire to the expertise of the management team that they have put in place. However, they do need to be able to spend the resources, time and energy to provide effective governance.

A number of Police Boards and Commissions in larger cities in Canada have an executive director who provides support to the Board. A considerable amount of the work of that position, however, is administrative rather than policy-oriented. This is simply a matter of time constraint as the regular meetings of the Board are public events requiring logistical support. Some Boards and Commissions have policy capacity, but this is rare. In terms of planning and strategy setting, there is a heavy dependence on the police agency itself. While this is to be expected as the police service has the resources, in many instances, the governance elements of strategy setting, for example, are also taken up by the service, with the Board or Commission only providing formal approval or concurrence if that. As has been pointed out, the recent legislation in a number of provinces has made it clearer that such planning is the responsibility of the Board or Commission. How they deliver that will determine the degree of strategic forward oversight can be effective.

Over the past two decades, various Boards and Commissions and their national organization, the Canadian Association of Police Governance (CAPG) have recognized the need to address another important element of effective governance: the competencies of the members and the mix of skills needed to govern. As the composition of the governing body is based generally on representivity rather than skills, this is a challenge and a fault line in the design of the members of these entities. To this end, some Boards or Commissions have petitioned the appointing governments to appoint persons with certain expertise such as financial and legal. There have been no studies of these efforts or the results that ensued.

### **The Expertise Gap**

Policing is a complex business around the world. It is difficult to understand that complexity in a way that permits effective governance no matter what form it may take. In the case of the Police Boards and Commissions in Canadian municipalities, that expertise gap can be exacerbated by some of the factors already enumerated, such as legal ambiguities, terms of office and appointment processes. However, layered onto this is the expertise gap. Governors cannot, without the help of the CEOs or Chief in this case, adequately assess proposals, events or policies on their own. Often this will mean that a Board will defer readily to the Chief's views or recommendations, not feeling competent to challenge them for lack of in-depth knowledge of the matter. This flies in the face of effective governance and accountability, leaving the policing agency with a much wider margin of discretion, often couched as operational direction as noted below. It also leads to ineffective governance.

Oppal points to the resulting failure of the Board or Commission to understand the broader significance of specific events that accumulate into a major social phenomenon that challenges the entire justice system in Canada, that of missing Indigenous women and girls. Oppal points to the difficulties for Boards or Commissions to analyze and fully appreciate the impact of events. As he says with respect to the Vancouver Board of Police Commissioners, "These practical limitations were reinforced by a Board culture of

deferring to the VPD (Vancouver Police Department), which still further limited the ability of the Board to act as an effective accountability mechanism with respect to the missing women investigations. I conclude that the cumulative inadequacies of the accountability framework amount to a critical police failure. The missing and murdered women situation clearly constituted a public safety risk warranting effective oversight, but this effective oversight was wholly lacking due to systemic weaknesses.” (Oppal, 2013)

As Morden points out, ““It is apparent that neither the Board nor the Chief can fulfill their respective roles to serve the public without the support and cooperation of each other. The Chief is the expert who has the information, tools, visibility, and people to effectively develop and execute policy. To limit the role of the Chiefs to day-to-day operations without them being a strong influencer in the setting of policy would be a mistake. This requires the Chief to establish their credibility with the Board as being trustworthy and competent and ultimately this puts the Chief in the role of educating the Board. Accepting the role of being, at least in part, responsible for educating the Board will require Chiefs to take the lead in assuring that the Board has the information they need to make informed decisions. A Board that has confidence in their Chief will listen to the Chief.” (Morden, 2012) The most effective relationship is one of mutual understanding and respect for roles.

### **Police Chief’s Resistance to Governance: A Complex Relationship**

In the governance model for Canadian policing, the Chief is not a simple and compliant agent and the Board a clearly mandated and empowered principal. Indeed, the notion of the principal is muddled in that the municipal governing body has a considerable interest in the police function both for fiscal and or service delivery reasons. So too does the province. Further, the Chief is a clearly identified community leader. That uniform, so often strategically donned, is a powerful metaphor for the role of the police and for the implicit power and assurance that it conveys. Chiefs, bred within the fairly closed environment of their craft, are nonetheless smart users of their various levers to be much more than a passive recipients of strategic direction. In so many instances in Canada and over the years it has been the Chief driving the strategy and the Boards and municipalities falling into lines – the tale can clearly wag the dog in this case.

This relationship is similar to that of a corporate CEO to her Board of Directors. It is complex and there will always be pushes and pulls concerning strategy, power and discretion. In the context of police governance in Canada, there is also the conceptual and legal constraint on the governing body, one that has taken on a much Boarder meaning in this relationship. This is the core of much of the performance issues associated with Canadian police governance – the need to respect police independence in carrying out their duties with the need for accountability. This has been translated into the controversies associated with operations versus policy.

As Justice Morden has said, “In establishing objectives and priorities for the police service, a police Board must be mindful of only one, albeit one very specific prohibition: not to

direct the Chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police service. Unfortunately, despite the clear wording of the Police Services Act, the Board has defined its responsibilities in terms of a separation between matters of policy and operational matters. The Board has limited its consultative mandate and has viewed it as improper to ask questions about, comment on, or make recommendations concerning operational matters.” (Morden, 2012) He clearly sees this distinction as problematic and poses a strong view that governance bodies must have sufficient understanding of operational matters to form judgements about their consistency with policy and strategy.

This issue is fraught with many nuances. Chiefs have successfully used it to stop Board questions and to withhold information on specific events. As Ellis points out, “The imprecise definition of police operations contributes to what Christie (2007) describes as a necessary tension between police leaders, “who strongly guard their operational autonomy and the governing bodies who actually hire the police leaders, have to set policy that impacts on operations, and has to acquire the funding necessary to carry out police operations” (Ellis, 2014). This is a major fault line in the application of the principal/agent concept successfully in this situation. Chiefs have resisted direction and have rendered many Boards or Commissions powerless or unwilling to confront them. Dr. Alok Mukherjee, former Chair of the Toronto Police Service Board, has noted that his Board has been criticized over the years from not adequately addressing key operational issues, while focusing exclusively on policy matters, thereby accepting this distinction. He stated, “As the Board moved in the direction of policy governance, it gave up, consciously or otherwise, significant oversight responsibility to the Chief of Police. Matters that, in the early days of this Board were treated as belonging to the Board’s jurisdiction, are now deemed or claimed to be operational and outside the Board’s purview. At least twice, the Board has been taken to task for failure to exercise oversight as statutorily required.” (Mukherjee, 2013)

Here is the heart of the substantive need to view police as an arms-length agency of government. The need for independence as defined by the 1968 decision of Lord Denning in *R v. Metropolitan Police Commissioner, Ex parte Blackburn* which defined in precise terms what constitutes police independence (Beare, 2004), however, focuses on a very specific band of responsibilities, i.e., the exercise of the decision to investigate and charge an individual for a crime. It has, over time, been expanded to mean police independence in its operations must not be fettered by external control such as the governance entity. This is wrong. Policing is much more than the aggregate of the individual policing actions of its officers. This also points to the continued restraint that governance bodies feel in this area, a legitimate concern to neither interfere nor appear to interfere in police operations while providing direction, assessing performance and assigning resources. This often leaves these Boards literally sitting on their hands when action is called for. From the perspective of arms-length governance, there is no clear-cut division of operations and policy. They are part of the dynamic continuum, beginning with the conceptualization of realistic policy and then its execution through operations and the adaptation of policy to the challenges

and changing circumstances of continuing implementation. To effectively control arms-length agencies, the governors must engage in the operations without actually doing them. This is the heart and challenge of governance.

Another issue in relationship to the Chief is that Boards and Commissions often develop personal opinions, negative or positive, about the Chief and thus taint all their relationships with the policing service with that light. As Sossin notes, “The problem with the present system of executive-police oversight is its lack of overarching vision and coherence. Police commentators tend too easily to fall into pro-police and anti-police camps and these polarized groups tend to talk at each other rather than too each other.” (Sossin, 2004) This problem persists to this day. The ultimate impact in situations where this becomes a divisive issue within a Board is to either turn the Board into a group of cheerleaders for the Chief or a form of warfare that makes all issues personal. Police service Boards and Commissions are not alone in experiencing this problem.

## **Conclusion**

In spite of the uniqueness of the governance model for Canadian municipal police agencies, the overall view of the effectiveness of this model must be, at best, muted. It has some characteristics that highly recommend it as a form of forward oversight of arms-length agencies. However, the design flaws in certain areas limit its effectiveness. The actual results and impacts have not been systematically measured or assessed although anecdotal evidence based on interaction with governors across the country and specific engagement in training and planning sessions indicate that there has been considerable success, a few notable failures, but a persistent sense that more can be done.

In conclusion, the first question to ask is whether it has been established that the form of arms-length governance outlined here benefits from the principal/agent analysis outlined above. The case would appear to support the application of the theory, at least in theory. That policing is a unique public service, one that must act with considerable independence of political direction, is well established. However, this independence is defined within the framework of the criminal law and the instruments of force that police are permitted to use by law. However, it is not enough to say that police are simply accountable to the law. The reality is that policing is a complex set of activities that require public financing and that there are over-riding performance expectations that have little to do with the unique powers police exercise on the street every day.

As such, the police service as a whole is an arms-length agency of government, one that is highly constrained not simply by criminal law but by a public policy concern that police act within the context of the society they serve, within the financial constraints in government and exercise a very high level of accountability. As a consequence, governments impose a number of oversight and governance instruments as well as specific legislation and regulations to direct and constrain the power of this agency. In return, the agency has considerable flexibility in the way it operates on a day-to-day basis and in

making decisions to mobilize its resources to respond to incidents, trends within society and new demands in the ever-evolving world of criminal activity and near-criminal challenges that police face. This is the core bargain of the principal/agent framework.

This paper argues that this framework is not a static instrument, but a very dynamic one in which the tools of the principal – policy, resources, strategy– and those of the agent – implementation, control, response – are in interaction and often in flux. Further they are linked by the need for a continued review by the principal of the actions of the agent to ensure they are in compliance with the forward direction set by the principal. Added to this, the annoyingly unpredictable real world will offer up a certain series of events that will affect policy and redirect operational resources. These events will further affect strategies. What binds this process together is accountability, the need to assess performance against expectations based on performance information and other evidence, make adjustments to policy and operations, assess individual performance at key points, most notably for the Chief and take action. This is the heart of governance.

The model of governance as forward oversight was put forward as, first, a means of distinguishing the work of police Boards and Commissions from the array of other oversight bodies created to address police issues and, second, as a means of focusing the core work of these Boards and Commissions. Forward oversight takes into account past performance, community concerns, the historical development of the organization, but only as instruments to direct future behaviour through policy, strategy and accountability. The paper suggests certain key activities that an effective governance body would take in exercising forward governance.

Is the governance model for Canadian police services in its municipalities the panacea for the effective governance of all arms-length agencies? The evidence would suggest not, but that there are important lessons to be learned from them. Further, the model does present some intriguing potential, subject to good policy design, for how governments can use such Boards to govern important agencies that demand extensive forms of oversight. That being said, the paper points out a number of policy design flaws that have limited the effectiveness of police governance. This includes the members and the terms of office of members. The Board or Commission is part of a complex set of relationships with the authorizing governments (provincial and municipal) that often leads to conflicts and incapacity to achieve strategic results. In addition, while this is evolving, the legislative framework has left open key questions of the responsibilities of the governing bodies. These include the questionable distinction between policy and operations, the level of expertise needed to govern in these instances and the understanding of the support role that the Chief plays in the governance process. It should be noted again that these issues are in evolution. As provinces modernize their policing legislation, they are trying to give great clarity. Each effort moves the bar but none has yet to provide full clarity. The question might well be posed whether, given the complexity of the situation, if full clarity can ever be achieved.

A further concern is that Boards and Commissions have self-regulated themselves to limit their capacity. This occurs often when they are reluctant to engage in what they believe to be or, more often, are told by the Chief are operational matters and, hence, none of their business. This is a serious error, one that has been criticized in inquiries. “The significance of this issue should not be understated. Perhaps in its desire not to be seen as treading on the territory of the Chief of police, the Board has, wrongly, limited its consultative mandate such that it has come to view it as improper to engage in a discussion that involves the Board asking questions about, commenting on, or making recommendations concerning operational matters.” (Morden, 2012). The sources of this reluctance are documented in this paper: Board composition, training, the expertise gap and legal mandate ambiguities. As Sheard points out, citing a number of cases where Boards or Commissions had been criticized for weak or passive governance, “These cases make it clear that there is an expectation that there needs to be an increase in the level of responsibility undertaken by police Boards, many of whom hitherto saw their role as largely bureaucratic and symbolic.” (Sheard, 18) As noted, the distinction between operations and policy has reinforced this retreat. The reality is that police administer a series of sanctions and powers that have vast social implications. Further, the way in which they administer the powers they have will have an impact on the outcomes and the impacts, especially in complex environments such as large cities. They are anything but apolitical.

The process of governance of agencies is dynamic and filled with many fault lines, both in terms of Board capacity building and core democratic principles. As Anderson & Torsteinsen in their general review of the oversight of municipal agencies point out, “Our findings substantiate that our doubts were justified; after more than 10 years of “training,” the practicing of the model still leads to fumbling, negotiations, and disputes between the actors. On one hand, local politicians experience that their role as principals is being challenged. The model, designed to separate administration from politics, seems to accentuate fundamental issues of political democratic control of local government and service provision. It is seldom clear in this type of model where the discretionary power of agents ends and where the power of the principals starts. The model seems to have accentuated fundamental issues of what democratic governance actually means, beyond settling main goals, prioritizing use of resources, and so on.” (Anderson & Torsteinsen, 2017). Both of these issues play themselves out in the example of the Canadian municipal Police Boards and Commissions. The expertise gap cannot be fully overcome with training alone, but those Boards with longer-serving members show a greater capacity to interact with the police executive on an informed basis. However, they also experience the democratic push and pull because of their position between the provincial and municipal governments responsible for policy and budget and the police service itself, responsible for delivering. It often becomes an issue of balance between strategic management and operational autonomy. In the case of police governance, the first question might be whose strategy – that of the municipality which tends towards financial restraint first and public safety second or the police and its governing body which take public safety as the first line in the song. As well, the potential success of this form of governance depends on all parties working together. As Ellis points out, “It is apparent that neither the Board nor the Chief

can fulfill their respective roles to serve the public without the support and cooperation of each other. The Chief is the expert who has the information, tools, visibility, and people to effectively develop and execute policy. To limit the role of the Chiefs to day-to-day operations with them being a strong influencer in the setting of policy would be a mistake. This requires the Chief to establish their credibility with the Board as being trustworthy and competent and ultimately this puts the Chief in the role of educating the Board. Accepting the being, at least in part, responsible for educating the Board will require Chiefs to take the lead in assuring that the Board has the information they need to make informed decisions. A Board that has confidence in their Chief will listen to the Chief.” (Ellis,2104)

While the theoretical concept of forward oversight is a useful way to look at the governance roles of Boards overseeing public agencies, are there ways to assess their performance? Many Boards have internal evaluation processes, often led by the Chair. These may occur annually and are intended to serve the need for Board efficiency and effectiveness. These do not speak to the impact that Boards and Commissions have on the core mandate of ensuring public safety and in governing the police service itself. This invites further research in this area.

The aspirational quality of attempting to provide effective governance of an arms-length agency, especially one that is so central to public order and rich with controversy is admirable. As Sossin argues this unusual form of governance of municipal policing in Canada has evolved out of an abiding desire to create what he calls “an apolitical and autonomous ideal type of executive-police relations” which “has the potential to reconcile the need for political input into policing while countering inappropriate interference in policing.” (Sossin, 2004). The match between aspiration and achievement is contestable and certainly not well researched.

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