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# Police Accountability: The OIPRD as a Technology of Zero Risk

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**POLICE ACCOUNTABILITY: THE OIPRD AS A TECHNOLOGY OF ZERO  
RISK**

By

**Curtis LaBute**

A Thesis  
Submitted to the Faculty of Graduate Studies  
through the Department of Sociology, Anthropology, and Criminology  
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**Police Accountability: The OIPRD as a Technology of Zero Risk**

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November 24, 2017

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## ABSTRACT

Drawing on Ericson's (2007a) theory of precautionary logic, this thesis analyzes the Office of the Independent Police Review Director (OIPRD), a civilian oversight agency in Ontario. This thesis focuses on the rationalities that constitute and shape police accountability in OIPRD disciplinary hearing decisions. It is argued the public precaution and risk-adverse officer precaution rationalities shape hearing outcomes. The expansion of public fear of the police in the 21<sup>st</sup> century led to the formation of the OIPRD, which then implemented zero risk procedures to govern uncertainties about the police. This thesis examines how various components of the OIPRD complaints process are precautionary and contributes to Ericson's (2007a) theory by displaying how counter-law concepts created a multi-agency approach to monitoring the public police in Ontario.

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## 1. INTRODUCTION

Accountability is a concept that refers to the need to provide a valid explanation for one's conduct and to be held responsible for one's actions (see Chan, 1999; Ericson, 1995; Goldsmith, 1995). As police brutality and misconduct have emerged as highly publicized social issues, the accountability of public police officers has developed into a controversial topic of discussion amongst media outlets, social institutions, and the public. The Rodney King incident in 1991 is a historical example of a critical event that resulted in mass public outrage and a demand for greater police accountability (Goldsmith, 2010: 914). In Ontario, the public is still demanding an explanation for questionable police conduct years after the G20 protests in Toronto in 2010 (see Mendleson & Poisson, 2015). Most recently, the public has reiterated to the police they must provide an adequate account of what happened to Andrew Loku, who was shot and killed by a Toronto police officer at his apartment because he was threatening a woman with a hammer (Benzie, 2016). Even after the officer was cleared of charges by Ontario's Special Investigations Unit (SIU), significant public outcry for accountability remained (see Benzie, 2016). When perceived police misconduct is broadcasted by media it enhances public desire to receive a clear and concise answer for questionable police behaviour (see Ericson, 1995). This entails a legitimate explanation of police conduct that demonstrates their actions are justifiable (Ericson, 1995: 136).

### 1. Accountability

Police accountability can occur in multiple forms including judicial oversight, administrative oversight, civilian oversight agencies, and fourth estate checks. Judicial oversight administers accountability through the court system as citizens can pursue civil or criminal



charges against the police (see Smith, 2004). Litigation can occur if the police severely harm a citizen and can alter police conduct because of the threat of financial loss (Ransley et al., 2007: 147). Administrative oversight refers to internal disciplinary procedures by police services that are usually conducted in private, alienating the public from disciplinary proceedings (see Walsh & Conway, 2011). Incidents of misconduct, public complaints, and disciplinary procedures are managed by assigned officials who are usually supervising officers (Prenzler, 2015: 4). Civilian oversight or external review boards promote public participation, as civilians assist with analyzing police conduct (see Hryniewicz, 2011). Accountability through the fourth estate occurs in the media, as police misconduct is exposed and critiqued by journalists and reporters (see Schultz, 1998). Media has the power to stigmatize the police and mobilize the public due to poor police conduct (Bonner, 2009: 297). Civilian oversight, the subject of this thesis, entails special agencies investigating police conduct, facilitating disciplinary proceedings, and overseeing police investigations to ensure appropriate practices transpire (Prenzler & Ronken, 2001: 161-162)

## 2. Civilian Oversight

Beginning in the 1950s, public concerns over police misconduct led to an effort to hold public police officers accountable for poor conduct through civilian oversight agencies in Western countries (see Goldsmith, 1995). The first civilian oversight agencies were formed in Washington in 1948 and Philadelphia in 1958 (see Barton, 1970). Civilian bodies are intended to assist managing, overseeing, and auditing the police objectively and fairly (Walsh & Conway, 2011: 65). A key element of police governance and accountability is impartial investigation of a citizen's complaint that evaluates the facts of a confrontation (Barton, 1970: 455). Civilian oversight agencies composed of unbiased citizens were thought to help facilitate equitable

investigations that promote police accountability to satisfy the public and misconceptions they might have about the police. Citizens can evaluate complaints objectively because they do not have personal or workplace relationships with police officers. In principle this can help create or maintain trust and legitimacy. The public perceiving the police as a legitimate institution helps preserve a law-abiding society (Tyler, 2004: 96).

Disciplinary procedures traditionally conducted internally by police services have slowly shifted to the hands of civilian oversight agencies to assist with administering accountability. This migration of governance entails a shift from total internal disciplinary control by police services to an aggregation of civilian oversight and internal discipline (Chan, 1999: 255). Although internal mechanisms of discipline and control still remain, regulation of the police has shifted to a great extent to civilian oversight agencies to control public belief that the police are deviant social actors incapable of self-governance. Goldsmith and Lewis (2000: 1-2) argue that civilian involvement in the complaints process has experienced three separate waves of critique and revision. The initial wave entailed the introduction of agencies composed of civilians with an array of duties exclusive to each agency; followed by the second wave in which police resistance to external oversight ensued; and the third wave that has been subject to governing agents seeking to improve civilian oversight agencies and the complaints process (Goldsmith & Lewis, 2000: 1-2).

In North America public demand for civilian oversight began during the 1950s, mainly due to racial issues and mass public distrust; however, civilian bodies were only formed in major American cities by the 1970s after a great deal of public protest (Barton, 1970; Goldsmith, 1995: 118). In Canada the Marin Commission of 1976 established guidelines for civilian oversight for the Royal Canadian Mounted Police (RCMP) (see Marin, 1976). Values established in the Marin

Commission eventually influenced the formation of the RCMP Public Complaints Commission (PCC) and the External Review Committee in 1988 (Deukmedjian, 2003: 335). By the 1990s civilian oversight began to expand across North America. In the United States by the early 1990s, varying forms of civilian review had been implemented by two-thirds of police departments in the 50 largest cities (Walker & Bumphus, 1992: 1). In the 21<sup>st</sup> century, modifications to complaint systems ensued and new agencies were implemented due to the expansion of risk.

### 3. Risk

This thesis examines civilian oversight through the theoretical lens of risk. Risk refers to the calculation of hazards, dangers, and harms followed by measures to avoid calculated threats (see Beck, 1992; Ericson & Haggerty, 1997; Garland, 2003; O'Malley, 2002). After Beck's (1992) work in particular on risk society an extensive collection of risk literature has developed. Ericson (2007a: 6-7) claims "risk is the term which we imagine and act as if we know the future and can do something about it." Ericson's theory of precautionary logic examines risk in an intensified framework, stating society is infatuated with the notion of zero risk (Ericson & Doyle, 2004a: 40). For this Ericson introduces two concepts, counter-law I and counter-law II. Counter-law I is the formation of new laws to manage calculated risks, while counter-law II entails the formation of surveillant assemblages to oversee perceived threats to social order (Ericson, 2007a: 24). Through each form of counter-law, risk technologies are developed to control the public's obsession with avoiding perceived threats and dangers.

There is a major prioritization on risk technologies and products that promise a superior well-being (Ericson & Haggerty, 1997: 116). Risk technologies regarding the police are no different. Skepticism and distrust surrounding the police create a mass desire for technologies

that manage the risk of police brutality and misconduct. Civilian oversight agencies are risk technologies that provide individuals with a feeling of personal security. They are in place to subdue angst about the police by unbiasedly explaining accounts of policing (Ericson, 1995: 137). Civilian oversight agencies promise to increase personal safety amongst civilians from police and to maintain prosperity. They help preserve individual well-being because potential misconduct will not be overlooked, which protects against the police disregarding conduct that has caused harm to a civilian.

#### 4. The OIPRD

The *Independent Police Review Act* (IPRA) passed in Ontario in 2007 led to the formation of the Office of the Independent Police Review Director (OIPRD) in 2009, a civilian oversight agency (OIPRD, 2015: 4). As the 21<sup>st</sup> century unfolded, the notion of risk and uncertainty heightened which led to the formation of the OIPRD. In a recent oversight report by the Ontario Ombudsman, Dube (2016: 16) states, civilian oversight emerged due to public distrust in the police conducting internal investigations. This lack of faith exploded in coordination with the emergence of risk and precautionary values.

The OIPRD falls under the Civilian External Investigatory model of civilian oversight (Goldsmith, 1988: 64). In this model, the key purpose of the civilian oversight agency is to handle and monitor complaints, and engage in investigations; however, the agency does not have the power to impose disciplinary measures against police officers (Goldsmith, 1988: 64). Complaint investigations are conducted by the oversight agency and police services. The OIPRD adheres to this model and is the gatekeeper for all public complaints in Ontario. After complaints are received and screened by the OIPRD, substantiated complaints are investigated by the police service subject to the complaint, another police service, or the OIPRD (OIPRD, 2011: 20). Less

serious complaints are resolved through a type of informal resolution, which is a meeting between the complainant and police service to facilitate resolution or discipline (OIPRD, 2010: 29). Complaints that are deemed to be serious receive a further investigation. The OIPRD monitors all investigations as the Director “can direct the chief to deal with a complaint in a specific manner, assign the investigation to another service, take over the investigation or take or impose any action necessary” if an investigation is being conducted inefficiently (OIPRD, 2010: 27).

If a complaint is substantiated after a thorough investigation it can progress to the disciplinary hearing stage. Complaints that progress to a disciplinary hearing in the OIPRD complaints process are serious allegations that have been substantiated as potential misconduct by a member of the OIPRD network, meaning reasonable grounds are present.

The concept of *Reasonable Grounds* is the standard by which all complaints must be judged. Reasonable grounds are facts or circumstances of a case that would lead an ordinary and cautious person to believe that misconduct has occurred. This belief must be more than just suspicion of misconduct and must be based on factual evidence. If reasonable grounds do not exist, the complaint will be deemed to be unsubstantiated (OIPRD, 2010: 29).

Informal resolution is not permitted for complaints that are of serious nature such as harassment, conduct that may be criminal, a breach of confidentiality, and discrimination (OIPRD, 2011: 25). Once a complaint is investigated by a police service, OIPRD investigators, or an alternate police service, the police chief determines if the complaint is substantiated or unsubstantiated (OIPRD, 2013: 18). The purpose of the hearing is to determine if the officer’s behaviour is misconduct or to impose a punishment relative to the magnitude of the misconduct.

The OIPRD does not have the power to discipline officers. Disciplinary and penalty hearing decisions are conducted by a police officer, retired officer with the rank of inspector, judge, or retired judge, and discipline is imposed by police chiefs (OIPRD, 2016: 34). In

principle, if a police chief fails to concur with a disciplinary decision they have the power to disregard the hearing officer's decision or impose an alternate penalty. However, it is assumed police chiefs will follow through with decisions made by hearing officers because "the prosecutor and hearing officer are both designates of the chief" (OIPRD, 2016: 34).

After investigations, OIPRD investigators occasionally produce finding with which police services disagree. In these instances, police chiefs are still in control of disciplinary proceedings, since "the OIPRD does not manage discipline or disciplinary hearings and is not a party to disciplinary hearing" (OIPRD, 2016: 34). For example, after investigating a complaint about an unlawful entry into a residence, the OIPRD concluded that a Feeney warrant was required to enter the home (Harris v. The Ontario Provincial Police, 2016: 3). The Ontario Provincial Police's (OPP) Professional Standards Bureau (PSB) also investigated and determined the officer lawfully entered the residence because he was in hot pursuit of a suspect (Harris v. The Ontario Provincial Police, 2016: 3). This hearing resulted in a not guilty verdict.

To convict an officer during a disciplinary hearing, clear and convincing evidence must be present (OIPRD, 2016: 34). This standard of proof is higher than the proof required in criminal courts and breaches the threshold that is required to substantiate complaints and bring them to a hearing (OIPRD, 2016: 34). The clear and convincing threshold makes it extremely difficult to convict officers of charges during a hearing if the officer elects to plead not guilty. In 2009, when the OIPRD first opened, disciplinary decisions began to be released to the public (OIPRD, 2010: 3). This allows civilians to understand the rationalities that are being used to convict officers of misconduct and justify penalty decisions.

Drawing on Ericson's (2007a) approach to risk, the overarching research question of this thesis study is: what is the rationality that constitutes and shapes accountability in OIPRD

disciplinary hearing decisions? This thesis also asks three sub-questions: (1) What is the rationality behind the implementation of the OIPRD? (2) How does the notion of incivility correspond with risk and precautionary concepts in the OIPRD complaints process? (3) How and to what extent does the OIPRD adhere to precautionary logic's notion of zero risk and counter-law? This thesis focused on the notion of risk and Ericson's (2007a) precautionary logic and counter-law to examine risk and precautionary discourses in various components of the OIPRD.

## **2. THEORETICAL FRAMEWORK**

In the late 20<sup>th</sup> century neo-liberalism became “hegemonic as a mode of discourse” and has altered the way citizens interpret Western society (Harvey, 2007: 23). Neo-liberalism deviates from welfare state liberalism, which promotes a collective social well-being through shared objectives (Jenson, 2010; Rose, 1996). Neo-liberalism is about maximizing individual liberty through entrepreneurial freedoms and personal responsibility and has led government to solve social problems by augmenting individual autonomy and freedom (Harvey, 2007: 22; Rose, 1996: 335). Governments attempt to solve social problems through different rationalities, which can be called governmentality (see Foucault, 1991). Governmentality refers to systematic ways of governing a social problem or the creation of governmental technologies that subdue imagined problems (O'Malley, 2008: 454). Governmentality is the rationality<sup>1</sup> of government and how governing is thought about and made possible (see Foucault, 1991). Rationality is a way of reasoning, responding, or calculating a social problem from elite forms of knowledge (Dean,

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<sup>1</sup> Academic literature has also used the term “mentality” (see Lippert & Stenson, 2010; Wood & Shearing, 2013) to explore social problems and how governing is thought about. Rationality and mentality are often used interchangeably when discussing practices of government and dominant modes of thinking. This thesis will use the term rationality to explore the OIPRD.

2010: 24). Since the emergence of neo-liberalism the rationality of risk has emerged as an extensively explored theoretical framework in criminology literature.

Beck's (1992) theory of the risk society is at the forefront of risk literature and the foundation of examining society through a risk lens. Since Beck's early work on risk society, a vast literature that explores risk in many aspects of social life has developed. Beck (1992: 21) defines risk as "a systematic way of dealing with hazards and insecurities induced and introduced by modernization itself." Anxiety due to potential dangers causes individuals to contemplate whether they should do something based on an envisioned level of uncertainty in the result of an action (Tulloch & Lupton, 2003: 17). Risk is essentially an attempt to anticipate threats based on estimations and probability calculations (Garland, 2003; Ericson & Haggerty, 1997). It involves principles that assist with identifying and reducing potential harms (O'Malley, 2002: 17). In the 21<sup>st</sup> century, this anticipation has intensified substantially as new theories of risk have materialized from Beck's risk society.

According to Priest (1990: 210) "the development of risk control as the central function of the law has been most prominent; however, in fields involving personal injury." Priest (1990: 214-215) also contends that courts inflict control over social activities that contribute to risk as managing risk within legal hearings flourishes during the proceedings. Legal actors must determine if applying the notion of risk during a legal proceeding will serve the long-term interest of one of the parties involved in the decision (Priest, 1990: 209). Regarding the OIPRD, controlling risks took place in disciplinary hearing decisions when the police were perceived as a threat to civilians or public confidence, and when hearing officers were protecting against the police becoming risk-adverse. Governing agents applied risk to decisions to serve the long-term interests of the public. By controlling risk in OIPRD disciplinary hearing decisions, governing



agents used risk based measures to maintain public trust and safety. Beck (2009: 7) highlights how the risk society has resulted in the emergence of laws that focus on managing reactions to risk. Risk discourse questions the limitations of social institutions as the public, media, governments, and legal experts have successfully acquired the right to have a say in major social decisions (Beck, 2009: 7). After the OIPRD was implemented, it provided an array of social actors with power to express their opinions in decisions about police discipline.

Risk and precaution are different concepts. Risk is about predicting future outcomes or behaviours through probability calculations (see Garland 2003; Ericson & Haggerty 1997; O'Malley, 2002), while precaution enhances the notion of risk to include highly unlikely circumstances and imagined worst-case scenarios (see Ericson, 2007a; Haggerty, 2003). Ericson's (2007a) theory of precautionary logic exemplifies an enhanced risk based framework in which individuals navigate through social life adhering to a zero risk mentality. When individuals attempt to completely eliminate dangers or imagined worst-case scenarios through preventative measures a zero risk mentality is present (Ewald, 2002: 282).

Precaution is about individuals imagining deviance exists in every dimension of social life, which results in constant security-enhancing behaviours. Ericson (2007a: 216) defines security as freedom and safety from conceivable dangers. Security creates certainty and reduces fear about potential catastrophes because citizens can be confident dangers have been eliminated (Ericson, 2007a: 216). Citizens have become actors of caution and feel it is imperative they are equipped with risk knowledge and technologies of risk to function as neo-liberal subjects (Ericson, 2007a: 7). Risk as a contemporary discourse relates directly to the police and risk management technologies surrounding the institution of policing (Ericson & Haggerty, 1997).

Ericson's (2007a: 22) precautionary logic is based on the notion of uncertainty as precautionary logic fuels overwhelming levels of suspicion. This and other logics are discourses that can be defined "as an interrelated set of texts, and the practices of their production, dissemination, and reception, that brings an object into being" (Phillips & Hardy, 2002: 3). Precautionary logic promotes distrust as Ericson (2007a: 21) argues "the politics of uncertainty, conducted through the sciences and in law, expresses increasing doubt about the capacity of liberal governments to govern the future and provide security." In relation to policing, society has progressed to the point whereby the public expresses an extensive amount of uncertainty towards the police. Precautionary logic intensifies uncertainty as citizens are frightened by what they do not know and suspect will occur, which induces individuals to imagine worst-case scenarios (Ericson, 2007a: 22). Citizens are sometimes fearful of the police, persistently acting in a cautious manner when confronted by public police officers.

The events of September 11, 2001 (9/11) intensified the risk-based society. 9/11 was framed as a massive attack on liberty as neo-liberal subjects now extensively maneuver through social life in fear that their liberty is in jeopardy in every societal domain (Ericson, 2007a; Hacking, 2003: 41). In the post-9/11 era, individuals only feel comfortable operating under a zero risk mentality as the accumulation of deviant knowledge escalates uncertainty (Ericson & Doyle, 2004b: 145). The events of 9/11 had a global impact on social interactions and set the foundation for a knowledge-based intensification of universal uncertainty and precaution. Ericson's (2007a) enhancement to the notion of risk and the idea of avoiding worst-case scenarios magnified risk throughout every social institution and instigated subjective uncertainty in Western countries.

After 9/11, risk and precautionary measures were aggravated by mass media outlets which have created a collective fear in society (Beck, 2006: 332). Technological developments have augmented the power to promote risk and fear within mainstream news outlets. The increase in subjective power to share video footage has led to an inescapable visibility in every aspect of social life (see Goldsmith, 2010). Citizens can now share images and video footage of deviant acts through technologies, which enforces social anxiety and a collective social commitment to act in a precautionary manner (see Goldsmith, 2010). Consequently, the public police are subject to social anxiety and the notion of zero risk. Acts of police brutality can spread to a global audience instantaneously and can result in exponential public outcry.

Ericson's (2007a: 22) precautionary logic refers to when imaginative fear is taken to the most extreme, when subjects imagine the absolute worst-case scenarios and out of precaution, need risk technologies to function in daily life. Due to sensationalized images of police brutality in the media that persistently explore police accountability, individuals constantly navigate through social life imagining they will be victims of police brutality. If citizens can complain to a civilian oversight agency about every alleged act of police misconduct, they are provided with the peace of mind that the police are being governed by an outside agency and will not engage in major acts of misconduct.

In Ericson's (2007a) theory of precautionary logic individuals are deemed criminal through the developments of two forms of counter-law, counter-law I and counter-law II. Counter-law I entails the formation of new laws that eradicate existing legal principles to obstruct perceived dysfunctions and sources of risk (Ericson, 2007a: 24). Counter-law II encompasses surveillant assemblages that utilize newly established networks to extinguish existing legal standards that deviate from fantasized sources of harm (Ericson, 2007a: 24).

Ericson's (2007a) counter-law identifies risky individuals who are pre-emptive threats to social order and criminalizes their behaviour.

According to Ericson (2007a: 160) "anti-social" behaviour laws, which began to emerge at the beginning of the 21<sup>st</sup> century, are obvious forms of counter-law I. Anti-social behaviour legislation can be defined as counter-law I because the term "ant-social" is a very ambiguous concept that has never received a formal legal definition (Ericson, 2007a: 160). The vagueness of the term "anti-social" is used to criminalize individuals who appear to be sources of social disorder because criminalizing these individuals eliminates the uncertainty they will engage in harmful behaviour (Ericson, 2007a: 207). The *USA Patriot Act* is also a powerful form of counter-law I that emerged after 9/11 (see Ericson, 2007a). In Canada, the most recent legal magnification that exemplifies Ericson's (2007a) counter-law I is the implementation of the *Anti-Terrorism Act* in 2015. The *Anti-Terrorism Act* empowers the government to legally observe citizens who potentially threaten national security (see Roach & Forcese, 2015). For example, the Canadian Security Intelligence Service (CSIS) is a government organization that persistently observes citizens. Surveillant assemblages that are used by CSIS under the *Anti-Terrorism Act* are forms of counter-law II because advanced technologies are being applied to monitor risky populations (see Ericson, 2007a). In recent years, the institution of policing has experienced Ericson's (2007a) counter-law framework as the police have been deemed by the public as a potential risk to individual security.

As risk and precaution have emerged in various areas of social life, this thesis framed the police as a potential public safety threat to examine risk and precautionary discourses in the OIPRD complaints process. Using Ericson's (2007a) work on risk, this thesis explores police accountability and analyzes rationalities in OIPRD disciplinary and penalty hearings. By

examining OIPRD annual reports and hearings, this thesis also seeks to determine the extent of zero risk and counter-law in the OIPRD.

### **3. LITERATURE REVIEW**

A vast literature has explored many aspects of civilian oversight in Canada, Australia, the United States, and the United Kingdom (Walker & Bumphus, 1992: 3). Past literature has focused on myriad topics such as social crises and police conduct that led to the formation of review boards, effectiveness of oversight agencies, public confidence, and functions of various agencies. However, research on civilian oversight has yet to explore rationalities in hearing decisions and disciplinary proceedings. This neglect is partially because most civilian oversight agencies release only a limited amount of data to the public, such as annual complaint totals and types of complaints received (Brereton, 2000: 107). Past studies have considered complaint totals to examine the effectiveness of oversight agencies by displaying the number of public complaints that lead to some form of police discipline. But what previous research on civilian oversight has failed to account for are qualitative rationalities in disciplinary hearing decisions. Success rates and functions of oversight agencies can partially be determined by evaluating public confidence, complaint outcomes, and structural components of review boards. It was important for this thesis to investigate rationalities in hearing decisions to discover how serious allegations of police misconduct are evaluated.

Hudson (1971: 522) conducted a comparative study of two oversight agencies, the New York City Civilian Complaint Review Board (CCRB) and the Philadelphia Police Advisory Board (PAB). Hudson (1971: 527) illustrated structural elements of these introductory civilian-run boards as both the CCRB and PAB were implemented because of public concerns regarding civil rights issues and the police administering excessive force. Hudson's (1971) study is an early

contribution to research on civilian oversight, but is limited because it was based upon minimal data released by the CCRB and PAB. In Hudson's (1971: 534) analysis, 52 percent of complaints to the CCRB pertained to unnecessary force while 45 percent of complaints to the PAB related to police brutality. Only 5 out of 440 complaints to the CCRB were sent to the Police Commissioner for disciplinary purposes, while 16 percent of complaints to the PAB led to hearings (Hudson, 1971: 533-534). Of the complaints to the PAB that resulted in a hearing, 35 percent of hearings suggested an officer be disciplined (Hudson, 1971: 534). While not without merit, quantitative analysis of outcomes like this fails to explore civilian oversight in depth and does not provide insight into why hearings occurred or rationalities that shaped outcomes.

According to Goldsmith (1988: 60) civilian oversight agencies almost always emerge in response to a major social catastrophe or crisis to legitimize the police, which previous research has continued to explore since the formation of the CCRB and PAB. In the United States, Barton (1970: 458-459) notes how in 1970 functioning civilian review boards were located in Rochester, Washington D.C, and Philadelphia as these review boards were formed in response to social crises and lack of public faith in internal complaint systems overseen by the police. Drawing from information on complaint systems in the United States, Barton (1970: 465) also suggested that because local police forces in Ontario are amalgamated, it would be beneficial to the province to devise an external oversight agency similar to the agencies operating in major U.S cities. After the first civilian oversight agencies were formed research continued to focus on social factors leading to the implementation of review boards. However, there has not been discussion of rationalities that shape disciplinary decisions for serious allegations of police misconduct.

Prenzler (2000) applies the notion of “capture” to evaluate the failure of police involvement in disciplinary proceedings in Australia which led to changes in civilian oversight. Capture refers to “poor performance in regulation with reference to techniques by which the group being regulated subverts the impartiality and zealousness of the regulator” (Prenzler, 2000: 662). The influence of capture diminishes authority due to personal relationships and can lead to serious instances of extortion and minor inappropriate occurrences (Prenzler, 2000: 662). As a result of poor police performance and major scandals due to capture, changes to civilian oversight and police disciplinary mechanisms were implemented. Forming new civilian oversight agencies and implementing new complaints procedures in response to corruption and social crises exemplifies the emergence of risk management in the 21<sup>st</sup> century. Prenzler (2011: 296) notes how in the 21<sup>st</sup> century, five jurisdictions in Australia experienced considerable institutional changes to complaint systems as a result of political and police corruption. While it is clear agencies are formed to prevent corruption or social crises from reoccurring, research lacks coherent investigation into how civilian oversight agencies prevent the reoccurrence of crises when serious allegations of misconduct arise.

Like previous research on civilian oversight, Porter and Prenzler (2012) analyzed social crises that led to the formation of three major oversight agencies in the United Kingdom. The Independent Police Complaints Commission (IPCC) for England and Wales, the Police Ombudsman for Northern Ireland (PONI), and the Police Complaints Commissioner for Scotland (PCCS) were explored, as all three agencies have contributed to police reform (Porter & Prenzler, 2012: 166). After the agencies were formed, complaint culture shifted to favour responsibility and the police and public learning from altercations as opposed to blame (Porter &

Prenzler, 2012: 166). Coinciding with democratic trends, each of these agencies emerged in response to social crises and criticisms from government officials.

The Independent Police Complaints Commission for England and Wales was formed in 2004 after the Stephen Lawrence Inquiry of 1999 examined institutional racism and a shortage of internal discipline in the Metropolitan Police Service (MPS) (Foster et al., 2005: 24; Porter & Prenzler, 2012: 154). The racially motivated murder of Stephen Lawrence in 1993 followed by an inadequate police investigation that failed to convict a suspect led to the inquiry (see Foster et al., 2005). In response to public outrage, the IPCC was implemented to subdue public chaos. In Northern Ireland, the PONI was established in 2000 after decades of intense altercations between the police and the Catholic community (McNulty, 2001; Porter & Prenzler, 2012: 154). In a 25 year period beginning in 1969, over 3,000 people were killed in political altercations, Catholics accounting for the majority of deaths (McNulty, 2001: 223). After years of the police justifying misconduct against Catholics, a report by Conservative politician Chris Patten advocated for the formation of a civilian review board and suggested police services increase the number of Catholic hires (McNulty, 2001: 238). In Scotland the PCCS was formed in 2007 to prevent social crises after public outrage led to several inquiries in England and Wales (Porter & Prenzler, 2012: 154). Previous research has clearly stated civilian oversight agencies surface because of social crises and public demand. Civilian oversight agencies are implemented to manage various risks such as internal corruption, police brutality, and the threat of a social catastrophe. But to fully understand civilian oversight, this thesis analyzes risk in disciplinary hearings. Investigating hearings displayed the rationalities that are being used to prevent a social crisis from emerging.



As civilian oversight agencies are implemented to obtain public trust in the police and complaint systems, much research has been conducted on public confidence. Civilian oversight agencies function as institutions that manage distrust in positive ways because civilians are handling public distrust in the police and are assisting with accountability (Goldsmith, 2005: 461). Prenzler (2004: 87) argues that a civilian control model is an effective method of obtaining public confidence based on stakeholder perspectives. In this model when serious allegations of police misconduct occur, the oversight agency investigates complaints and makes disciplinary decisions (Prenzler, 2004: 87). Less serious complaints should be dealt with by the police to maintain relationships with communities and build trust, while allegations of serious misconduct should be managed by a civilian oversight agency to promote fairness in disciplinary decisions (Prenzler, 2004: 106-107). While Prenzler clearly highlights opinions supporting a civilian control model, advocating for reform based on personal opinions is highly questionable. Prenzler examined perspectives from complainants, police officers, oversight agencies, civil liberties groups, government bodies, and various inquiries. Making recommendations based on empirical evidence from disciplinary decisions in an oversight agency is more exhaustive. Examining rationalities in disciplinary hearing decisions would enhance Prenzler's analysis because rationalities display how accountability is constituted and shaped. Complaint systems could be altered if the rationalities being used are perceived as illegitimate and unfair. Implementing changes based on various opinions fails to account for inefficiencies in a current system.

In a study by Weitzer (2002) on police misconduct and public opinion, the author shows how major incidents of police misconduct in Los Angeles and New York City deteriorate public confidence in the police. Incidents such as the Rodney King beating in Los Angeles in 1991 completely disintegrate public trust (Weitzer, 2002: 398, 402). After multiple instances of police

misconduct that gained national media attention, there was extensive public support for a civilian review board in Los Angeles (Weitzer, 2002: 405). Public trust in civilian oversight can also determine if an individual is going to file a complaint. If civilians are not provided with sufficient guidance and support when filing a complaint, public confidence in a civilian review board decreases significantly (Smith, 2009: 263). Public confidence and the performance of civilian oversight agencies can be altered if hearing decisions are analyzed. This thesis displays how hearing officers justify decisions to substantiate or dismiss serious allegations of misconduct. Examining accountability rationalities should enhance public confidence and trust in oversight agencies because hearings serve as another form of communication.

Clarke (2009: 25) argues the shortcomings of the CCRB in New York were exposed at the beginning of the 21<sup>st</sup> century when complaint totals escalated due to mass inflation of stop and frisk encounters. The CCRB's annual budget and resources could not accommodate a massive increase in complaint totals (Clarke, 2009: 30). Consequently, a lack of resources resulted in a plunge in the number of proven cases of excessive force and there was also a significant increase in closed cases with no further investigation (Clarke, 2009: 37). Rather than provide the CCRB with additional resources and expand the review board, policy changes occurred that reduced the number of complaints the CCRB had to manage and made the agency more compliant to the police (Clarke, 2009: 37). The inability of the CCRB to manage an increase in complaints and adapt to changes in police practices displays the flaws of civilian oversight, which leads to a deterioration of public confidence. Although Clarke's research examines various issues in the CCRB, investigation totals, conviction rates, budget issues and an increase in excessive force complaints do not capture every component of the CCRB. Lower conviction rates and an increase in closed cases fail to demonstrate deficiencies in the CCRB.

The rationalities being used to dismiss complaints are crucial. Analyzing rationalities could lead to changes regarding the evaluation process and dismissal of complaints in CCRB. A more thorough understanding of the CCRB could have been obtained if Clarke evaluated rationalities in decisions to close cases and convict officers.

Filstad and Gottschalk (2011: 98) conducted a study of performance indicators in the Norwegian Bureau for the Investigation of Police Affairs (NBIPA), an independent agency formed in 2005. The NBIPA is responsible for investigating and prosecuting allegations of criminal behaviour by the police and investigating police shootings (Filstad & Gottschalk, 2011: 97-98). To measure the effectiveness of the NBIPA, the authors evaluated public confidence in the agency, quality and quantity of complaints, complaint durations, conviction rates, and learning experiences that emanated from complaints (Filstad & Gottschalk, 2011: 104). In Filstad and Gottschalk's (2011: 106) analysis, the NBIPA was performing poorly in every aspect other than conviction rates. As previously stated, conviction rates fail to display success. What is important is if decisions are justified. If the rationalities used to dismiss cases and convict officers were examined, a comprehensive understanding of the performance of the NBIPA could have been achieved.

In Ontario, research on civilian oversight has followed the trend of exploring reasons for implementing review boards. Civilian oversight materialized through the *Metropolitan Toronto Police Force Act* in 1984, which was developed to strengthen public confidence in the police after an array of major acts of police misconduct during the 1970s (Goldsmith, 1988: 65; Landau, 2000: 66). After being deemed a tremendous success, the Toronto Pilot Project expanded its values and was the foundation of the Ontario *Police Services Act* (PSA) in 1990, which set the structure for public complaints against all municipal police services and the

Ontario Provincial Police (Landau, 2000: 67). This major alteration to the complaints process experienced significant resistance for decades to come by the police and policy makers.

In 2009 the OIPRD was formed to enhance accountability and transparency within the framework that was set by the Toronto Pilot Project approximately 25 years prior. The OIPRD serves as the gatekeeper for all public complaints about the police and manages, oversees, and reviews all investigations and disciplinary proceedings that arise from public complaints (Brannagan, 2011: 73). Similar to previous research on civilian oversight, a recent study on public confidence in the OIPRD concluded that involving citizens in the complaints process can enhance relationships between police services and communities (Schulenberg et al., 2015: 15). The authors suggest community leaders discuss the complaint system with the public and the police train community volunteers to help with investigations (Schulenberg et al., 2015: 15). As the OIPRD provides the public with disciplinary and penalty hearing decisions, this thesis explores how accountability is shaped and constituted in decisions, which communicates disciplinary criteria to the public.

Many aspects of civilian oversight have been studied in previous criminological literature such as the effectiveness of oversight agencies, quantitative outcomes, public confidence, and social crises that led to the formation of civilian bodies. It is evident various agencies have emerged due to social crises and that public trust and stakeholder perspectives have impacted the procedures in an array of oversight bodies. Past literature has analyzed police accountability via civilian oversight by exploring the functions of numerous agencies and complaint totals. However, there is no work that has considered this form of oversight in relation to risk and related literature or how accountability is constituted and shaped in disciplinary hearing decisions. To fill this void in previous research this thesis uniquely analyzes the civilian

oversight agency, the OIPRD, using risk as a theoretical framework. This thesis study was guided by the overarching research question: what is the rationality that constitutes and shapes accountability in OIPRD disciplinary hearing decisions? This thesis also asks three sub-questions pertaining to the OIPRD complaints process and precautionary logic's notion of zero risk and counter-law. The emergence of risk and precautionary discourses in disciplinary hearing decisions and OIPRD procedures provide a better understanding of how police accountability is constituted and shaped.

#### **4. METHODOLOGY**

##### 1. Data Sources

To answer to my research question(s) about the OIPRD as a tool of zero risk and how accountability is constituted and shaped in OIPRD hearing decisions, I investigated two data sets provided by the OIPRD. The first data set consisted of the seven annual reports published by the OIPRD and was examined to discover what types of complaints the OIPRD manages and the rationality behind the implementation of the OIPRD. This presented the structural framework and criteria the OIPRD is required to follow and demonstrated its role as a civilian oversight agency that assists with administering police accountability. As the OIPRD is a relatively modern civilian body, discovering the logic behind its implementation and legal power was crucial in examining contemporary police accountability. It was also essential to understand the discretionary powers of the OIPRD to explore its function as a zero risk complaint system and to examine the extent of precautionary logic in this civilian body.

I then collected my second data set: OIPRD disciplinary and penalty hearing decisions posted on the OIPRD website beginning in April, 2010 to March, 2017. The IPRA mandates that all disciplinary and penalty hearings decisions be available to the public via the OIPRD website.

My data set included the entire collection of disciplinary and penalty hearing decisions since the formation of the OIPRD in 2009. Disciplinary and penalty hearing decisions are categorized alphabetically by surnames of police officers in groups within the OIPRD's fiscal year of April 1<sup>st</sup> to March 31<sup>st</sup> (for example April, 2016 to March, 2017). There are 133 names of police officers posted on the OIPRD website accompanied by their disciplinary and penalty hearing decisions if a penalty was imposed. If multiple officers are subject to a single complaint, one disciplinary hearing involving multiple officers can take place, which results in the OIPRD posting a hearing decision for each officer involved on their website. In instances which an officer has pled guilty, both the hearing officer's disciplinary and penalty decisions are included in a single document. Overall, there are 113 hearing documents on the OIPRD website: 57 disciplinary hearing decisions, 19 penalty hearing decisions; and 37 single documents that include a disciplinary hearing followed by a penalty decision.

## 2. Data Limitations

This thesis was guided by data that was publicly available on the OIPRD website; however, there are limitations to this data set. As noted above there are several stages to the OIPRD complaints process. Data pertaining to a number of OIPRD complaints procedures is not released to the public or accessible via the OIPRD website. Qualitative rationalities that shaped outcomes in the investigations and resolutions processes were publicly inaccessible and not explored in this thesis. To examine qualitative rationalities that constitute and shape accountability in the OIPRD, this thesis could only draw from rationalities in formally resolved disciplinary and penalty hearing decisions, which were complaints that progressed through the OIPRD complaints procedures and resulted in a hearing. The analysis of complaint outcomes

external to formal disciplinary hearings was shaped by quantitative data in OIPRD annual reports.

When the OIPRD receives a complaint it has the legislative authority and discretionary power to screen out the complaint for a number of reasons (OIPRD, 2012: 20). The reasons the OIPRD screened out complaints and quantitative outcomes that display the total number of complaints that are screened out are available in OIPRD reports, which this thesis analyzed. Complaints that are screened in by the OIPRD receive a further investigation (OIPRD, 2011: 20). Rationalities that shaped decisions to screen in complaints are also publicly inaccessible. Once a complaint is screened in and investigated it may be unsubstantiated and dismissed from the OIPRD complaints procedures. Qualitative rationalities that discuss why investigated complaints are unsubstantiated are not made available to the public. Complaints that are substantiated based on the notion of reasonable and probable grounds after being investigated progress to a form of resolution or disciplinary hearing. Rationalities that shaped outcomes or forms of discipline for various types of resolution are not available on the OIPRD website. What this thesis was able to account for are quantitative outcomes for each type of resolution, although the focus of this thesis was the rationalities that shaped decisions in formal disciplinary hearings.

Complaints progress to the formal disciplinary hearing stage because they have been substantiated as a potentially serious act of misconduct after an investigation. However, rationalities that shaped decisions to substantiate investigations were also unavailable. If an officer is convicted of misconduct after a hearing; penalties and disciplinary measures are imposed by the police chief (OIPRD, 2016: 34). The OIPRD does not state on its website if disciplinary decisions in hearings are enforced by police chiefs. As previously stated it can only be assumed police chiefs impose discipline because they are in charge of assigning professionals

to conduct disciplinary hearings (OIPRD, 2016: 34). Overall, to explore the OIPRD through a risk-based lens this thesis analyzed the transparent data that was publicly accessible via the OIPRD website. This data consisted of the annual reports and formal disciplinary hearing decisions, which are complaints that have advanced through the entire OIPRD complaints process.

### 3. Data Analysis

After collecting data, I examined the seven OIPRD reports and conducted a brief quantitative analysis of the screening process and the number of complaints the OIPRD annually receives to demonstrate the evaluation process being used. Documenting the screening process displayed the number of complaints that lead to an investigation or disciplinary hearing after being screened. As the OIPRD categorically reveals to the public the number of complaints it annually receives, this disclosed what types of complaints the OIPRD determined require further investigation. Investigations can occur from allegations of harassment, misconduct that may be criminal, discrimination, an unlawful use of force or authority, or a breach of confidentiality as these five types of complaints are regarded as serious by the OIPRD (OIPRD, 2010: 29). Analyzing complaint totals displayed what types of conduct citizens feel are improper forms of police behaviour. Acknowledging the types of complaints that led to disciplinary hearings also contributed to a thorough understanding of the OIPRD's screening power from a risk management and precautionary perspective.

I then conducted a discourse analysis of all disciplinary and penalty hearing decisions. These texts are discursive units comprising discourses that construct social phenomena (Chalaby, 1996: 688). These texts are produced in various forms such as spoken words, transcripts of social interactions, and formal written records (Bondarouk & Ruel, 2004; Chalaby,



1996: 688; Phillips & Hardy, 2002: 6). A composition of interconnected individual texts is valuable “because it is the interrelations between texts, changes in texts, new textual forms, and new systems of distributing texts that constitute a discourse over time” (Phillips & Hardy, 2002: 6). I investigated discourses by developing and using thematic coding on the interrelated set of disciplinary and penalty hearing decisions (Boyatzis, 1998: 5; Phillips & Hardy, 2002: 3). By conducting a detailed qualitative analysis, rationalities that constitute and shape police accountability in OIPRD hearing decisions emerged (Boyatzis, 1998: 5). I explored hearing decisions and discovered key thematic signifiers of risk and the precautionary logic. Language that refers to future danger (risk) and precaution corresponds with protecting the public from the threat of the police and the deterioration of public confidence. Risk and precautionary language also corresponds with preventing future misconduct and protecting against the threat of the police becoming risk-adverse while performing their duties.

## **5. ANALYSIS**

### **1. Implementing a Zero Risk Complaint System**

The model for the OIPRD was developed by the Honourable Patrick Lesage in 2005 (OIPRD, 2010: 6). After engaging in public consultations throughout Ontario with nearly 200 groups, Lesage published a report that highlighted issues surrounding the complaints system and recommended a model he felt would satisfy public concerns (OIPRD, 2010: 6). Lesage’s research led to the formation of the OIPRD which was implemented based on risk and precautionary principles. It was formed to manage the risk that the public would lose all confidence in the police. Moreover, precautionary logic’s notion of zero risk (see Ewald, 2002) was evident in the OIPRD complaints process. To reassure the public and manage their concerns about the police, zero risk complaints procedures were implemented.

Lesage's inquiry revealed there was "an overwhelming consensus among the groups he met that police officers are no more likely to engage in misconduct than any other group of professionals" (OIPRD, 2010: 3). Even though police do not commit misconduct at alarming rates when compared to other professions, "concerns were raised about the legitimacy and integrity of investigations" (OIPRD, 2010: 3). The OIPRD was also established to discourage police misconduct (OIPRD, 2013: 1). This exemplifies the notion of precaution since resources are being directed at preventing future misconduct to reduce future complaints and to maintain the legitimacy of the police. The police have become a suspect population by the public that must be managed by an external institution (Ericson, 2007a: 210).

The visibility of the police has been drastically enhanced in the 21<sup>st</sup> century which has led to controversies about police accountability, as previously stated (see Goldsmith, 2010). Individuals are exposed to police brutality and questionable police conduct through media outlets and social media forums daily, which can lead to considerable public outcry (see Goldsmith, 2010; Thompson & Lee, 2004; Weitzer, 2002). Extensive distrust in the police, which continues to expand in the 21<sup>st</sup> century (see Goldsmith, 2005), posed the risk the police would become an illegitimate institution. The OIPRD displays how the media has the power to shape public perceptions about the police and complaints systems in a recent report:

2015–16 saw an increase in public interest in policing issues. The media published stories on police use of force incidents, police involvement with people with mental health issues, police street checks, allegations of racial bias by police and the role of civilian oversight of police (OIPRD, 2016: 10).

Hearing officer Deputy Chief Terence Kelly explains how the media has the power to amplify police misconduct and aggravate public displeasure:

The higher standards for police conduct accounts for why the media pays very close attention to what police do and how well they do it. It is precisely because police officers have more power than any other institution in our society that they are

exposed to the glare of the media and the closer the scrutiny, the greater the magnification of any problems that are found (Trudeau v. The Sault Ste Marie Police Service, 2013: 2).

Substantial media coverage also leads to the growth of public pressure, which OIPRD Director

Gerry McNeilly affirms:

In fact, now more than ever, the public is concerned that there is sufficient oversight of public institutions, especially police. Citizens are putting greater pressure on police, not only to control crime but to treat everyone they come into contact with fairly and respectfully (OIPRD, 2014: 1).

Extensive exposure caused the public to lose confidence in police services. The government was held responsible for the decaying confidence in Ontario, resulting in alterations to complaints procedures.

Public confidence is a key component of police legitimacy (see Murphy & Cherney, 2012; Schulenburg et al., 2015; Tyler, 2004; Wells & Schafer, 2007). The decreasing public confidence at the beginning of the 21<sup>st</sup> century was threatening the institution of policing. If citizens do not have confidence in the police they will disobey the law, which threatens police authority (Sunshine & Tyler, 2003: 526; Tyler, 2004: 89). The most highly unlikely circumstance that could emanate from the erosion of public confidence is that the entire public will disregard police authority and make police power irrelevant.

The rationality for the OIPRD's implementation aligns with risk management principles because it was established to obtain public confidence and build trust in police services throughout Ontario (OIPRD, 2012: 4). Its mandate is to:

Deal with all public complaints regarding the conduct of a police officer, the policies of a police service or the services provided by the police. We work cooperatively with both complainants and police to investigate and resolve complaints. We make our decisions independently of the police, the government and the public (OIPRD, 2010: 4).

When the OIPRD was implemented it stated its aim was to maintain public confidence in the police via the mandate:

On October 19, 2009, the OIPRD officially opened for business with a focus on creating a fair, transparent, accountable, accessible, effective and efficient civilian police oversight system that is independent and neutral. Since then we have been working hard to uphold confidence of the public and police in our mandate and services (OIPRD, 2010: 4).

The OIPRD also communicated to the public it was the most ideal and practical model of civilian oversight (OIPRD, 2010: 3, 8). In an effort to maintain police legitimacy, the OIPRD attempted reassure the public that police accountability would be drastically enhanced.

Prior to the OIPRD, public complaints about the police were managed internally by the police service subject to the complaint, a system established after the Police Complaints Commissioner was discontinued in 1997 (OIPRD, 2010: 5). Police were also not required to provide complainants with investigative updates or any information about the complaints process (Landau, 2000: 75). Police chiefs could neglect complaints and grievances deemed irrational or that did not equate to misconduct after an initial review. This system where police services are responsible for investigating themselves without any form of oversight created a great deal of uncertainty. There was public apprehension about the legitimacy behind unsubstantiated complaints and complaints being disregarded without analysis or investigation (OIPRD, 2010: 3). Concerns about who was reviewing complaints also arose; the public was skeptical police workplace relationships were causing biased investigations (OIPRD, 2010: 3). As suspicion and uncertainty surrounding the institution of policing escalated in the 21<sup>st</sup> century, uncertainty regarding complaints procedures also intensified, which the OIPRD sought to eradicate.

Precautionary logic's notion of uncertainty was evident in the new OIPRD complaints system (Ericson, 2007a: 22). Precautionary measures were taken to manage the public's

ambiguity and eliminate uncertainty through the implementation of the OIPRD's zero risk complaints procedures. Aspects of the OIPRD complaints process that entail the notion of zero risk include the screening and communicative processes. The OIPRD screening process sought to eliminate the risk that police services could disregard complaints without any acknowledgement. The OIPRD adopted the role of gatekeeper for all public complaints about the police and a major change to the complaints process was the OIPRD's new screening powers (OIPRD, 2012: 12). All complaints submitted to the OIPRD were to be initially screened and reviewed by a civilian investigator (OIPRD, 2010: 3). This removed the uncertainty of a complaint going unacknowledged or being unfairly reviewed by a police service. If complaints are dismissed or screened out of the OIPRD complaints process the public is now provided with information about why complaints are dismissed, even for the most illogical complaints. Under the previous system, if a police chief determined a complaint was unsubstantiated they could do so without notifying the complainant (Landau, 2000: 74). After a civilian submits a complaint, uncertainty regarding the investigative status of a complaint was also to be eradicated through the OIPRD's communicative procedures.

New communicative procedures included periodic status updates and standardized investigative reports (OIPRD, 2010: 20; OIPRD, 2011: 20). When an individual submits a complaint, they could check the status of their complaint via the OIPRD website (OIPRD, 2010: 20). When a complaint has progressed to the investigative stage, the OIPRD provides complainants with status updates to eliminate uncertainty regarding investigative procedures. According to Ericson (2007a: 1) the "politics of uncertainty leads to enormous expenditures on risk assessment and management." When the OIPRD was formed its annual budget was \$5,394,622 (OIPRD, 2011: 41). This demonstrates an enormous expenditure on risk assessment

because millions of dollars were being spent to protect against the risk of public confidence completely disintegrating. Enormous expenditures were also directed at eliminating uncertainties surrounding the acknowledgement and investigation of public complaints through the OIPRD's screening and communicative processes. Overall, public uncertainty about complaints being disregarded and unsubstantiated was eliminated by OIPRD.

## 2. Presence of Counter Law

### *2.1 Counter- Law I*

Ericson (2007a: 24) contends “precautionary logic leads to criminalization through counter-law,” which is evident in the OIPRD mandate. The police are not directly criminalized through counter-law; it takes an alternate form. The OIPRD enhanced the acknowledgement of police behaviour that is merely perceived misconduct. Police behaviour that clearly fails to meet the required threshold to be deemed misconduct was now being acknowledged.

Counter-law I is the eradication of legal principles to form new laws that monitor potential sources of harm (Ericson, 2007a: 24). Laws are implemented because of a possible “catastrophic failure in a risk management system for which the government is held responsible” (Ericson, 2007a: 24). To manage extensive distrust and a complete lack of confidence in the police, Ontario policy makers modified the *Police Services Act* to eliminate uncertainty surrounding police services managing public complaints.

According to Ericson (2007a: 207) adjustments to legal principles that entail counter-law I are primarily through criminal law; however, Ericson argues new forms of civil and administrative law that can be defined as counter-law I have emerged too. To manage public suspicion about the police, the IPRA was passed in 2007 to monitor the police and recognize every act of perceived misconduct, with seriousness being irrelevant (OIPRD, 2010: 7).

Implementing the OIPRD aligns with the notion that counter-law I primarily reshapes laws without sufficient evidence or justification (Ericson, 2007a: 25). As noted above, the police do not commit misconduct at alarming rates when compared to other professionals, which was a consensus among the 200 groups Lesage consulted (OIPRD, 2010: 3, 6). Even though legitimate evidence about high rates of police misconduct was absent, the OIPRD was formed due to public anxiety about serious police misconduct.

Another aspect of counter-law I in the OIPRD materializes through the vagueness of legal definitions that allows for suspect populations to be criminalized due to uncertainty and suspicion as discussed earlier (Ericson, 2007a: 160). Vagueness and uncertainty appear in the OIPRD complaints process through the acknowledgement of minor complaints. Most complaints to the OIPRD relate to incivility (OIPRD, 2011: 21). Attempting to resolve these complaints is precautionary and corresponds with the notion of ambiguity. Incivility is an immensely loose term that could relate to a wide array of behaviours and forms of potential misconduct. Instances of incivility are primarily based on civilian perspectives and are extremely difficult to prove (OIPRD, 2014: 15). The OIPRD states a large portion of incivility complaints are misunderstandings and occur during traffic stops (OIPRD, 2013: 21). Naturally, civilians will be disgruntled when stopped for a traffic violation and negatively perceive the encounter. The OIPRD's commitment to review and resolve every complaint also eliminates any uncertainty that a police service is going to disregard minor, ill-advised complaints.

Moreover, the notion of creating new crimes without justification exhibited in counter-law I coincides with the creation and acknowledgement of incivility complaints (Ericson, 2007a: 25). The IPRA sought to control incivility and unwanted police behaviour (Ericson, 2007b: 369). Incivility complaints, which police chiefs had the discretion to disregard in the previous system

(see Landau, 2000), are now being acknowledged as a legitimate form of misconduct, regardless of whether incivility was present during an encounter. This is evident through the implementation and growth of the customer service resolution (CSR) and mediation programs (OIPRD, 2014: 13). The OIPRD also recently hired a mediator to help facilitate discussions and assist with resolving complaints through informal resolution (OIPRD, 2014: 45). Acknowledging incivility and attempting to resolve every complaint, regardless of the seriousness, aligns with precautionary principles and the expansion of suspicion about the police. Incivility is based on public perception and at times unavoidable; however, the OIPRD aims to resolve these complaints to avoid public uproar and protect against the police becoming illegitimate. Overall, counter-law I was present in the formation of the OIPRD and through the creation of vague types of misconduct.

## *2.2 Counter-Law II*

Counter-law II is the second aspect of Ericson's counter-law framework that is linked to precautionary logic. It refers to the formation of new surveillance networks and the refinement of existing surveillance structures to manage imagined sources of harm (Ericson, 2007a: 24). Suspect populations are observed because they have been deemed a potential threat (Ericson, 2007a: 210). The rapid growth of technology in the 21<sup>st</sup> century has resulted in risky populations being observed through various forms of advanced technology; however, surveillance still occurs through human contact (Haggerty & Ericson: 2000: 611). Haggerty and Ericson (2000: 610-611) state "in situations where it is not yet practicable to technologically link surveillance systems, human contact can serve to align and coalesce discrete systems." Surveillance is achieved through a multi-agency approach because individuals from an array of institutions are linked to evaluate potential risks or threats that certain individuals pose (Haggerty & Ericson: 2000: 611).



Individual police officers are now observed by the OIPRD network because they are a perceived risk to public safety and communities (Deukmedjian & Cradock, 2008: 381). The OIPRD's structure and daily operations seek to establish an extensive human network (see Haggerty & Ericson, 2000; Wilkinson & Lippert, 2012), which coincides with Ericson's counter-law II. The IPRA empowered the formation of the OIPRD assemblage. This assemblage is "highly dependent on intellectual and physical human labour" because a network of professionals are assessing minor instances of potential misconduct and investigating serious complaints (Wilkinson & Lippert, 2012: 324). To maintain police legitimacy (see Walby, Wilkinson & Lippert, 2016), the public must be confident actors in the OIPRD network are enhancing the complaints process. Prior to the formation of the OIPRD, police services managed minor complaints; however, the OIPRD surveillance network is now involved in overseeing and directing components of the complaints process.

In risk society, professional aptitude is persistently critiqued because an abundance of individuals are now involved in important social decisions (Beck, 2009: 7; O'Malley, 2000: 461). Police chiefs and services are now receiving assistance on how to handle and resolve public complaints by an abundance of individuals in the OIPRD network. Previously, the SIU handled all major investigations about police behaviour that resulted in death, alleged sexual assaults, and other extremely serious allegations, while police services handled minor complaints (Landau, 2000). Evaluating police expertise regarding minor complaints began with Lesage's public consultations whereby civilians could opine on how the police should handle minor infractions and perceived misconduct. The entire citizenry engaged in a form of surveillance (see Lippert, 2002) and helped alter complaints procedures, which led to the formation the OIPRD.

Once the OIPRD was formed, this surveillance network was assigned to monitor the police throughout Ontario.

Members of this network include the OIPRD director and investigators, along with police officers, judges and police services outside the services that are subject to complaints. Each citizen has an exclusive role in the OIPRD network and assists with monitoring police services. Ericson (2007a: 181) claims an objective of counter-law II “is to prevent crime and disorder from festering by monitoring every imaginable sore point.” Regarding the OIPRD, these sore points are complaints about incivility, minor infractions, and perceived misconduct, which the OIPRD recommends be resolved to alleviate fears about the police.

The OIPRD is a multi-agency risk management organization because its duties involve an integrated system, which displays counter-law II.

During our inaugural year, we secured the required financial and human resources and incorporated our various processes into an integrated system receiving, screening and processing public complaints, investigating complaints, managing and overseeing referred investigations, conducting reviews, providing customer service and generating timely information for decision-making (OIPRD, 2010: 3).

Monitoring the police begins with the screening process. As the OIPRD is the gatekeeper for all public complaints, receiving them allows the OIPRD to be aware of the police services and officers posing a potential threat to the public. After complaints are screened, this network expands based on the OIPRD’s discretionary powers.

Conduct complaints may be investigated by the OIPRD, the police service in question, or another service. It is the Independent Police Review Director’s (IPRD) decision who will investigate, but regardless our office’s oversight continues until the completion of the complaint (OIPRD, 2010: 26).

Police-managed investigations can also be distributed in this network if the OIPRD is under the impression an investigation is lacking credibility.

If the OIPRD does not agree with the way the investigation is handled, it may give direction or may choose to investigate itself. Under s.72 of the PSA the IPRD can direct the chief to deal with a complaint in a specific manner, assign the investigation to another force, take over the investigation or take or impose any action necessary (OIPRD, 2010: 27).

The OIPRD's goal is to ensure all investigative reports have the required information and to affirm a thorough investigation has occurred (OIPRD, 2010: 27).

When a complaint is substantiated and reaches the disciplinary hearing stage, various individuals in the OIPRD's multi-agency network become involved in hearing decisions. These hearings can be held by a judge, retired judge, police officer from another police service, or a retired police officer with the rank of inspector (OIPRD, 2016: 34). This subdues the risk that a police service will exhibit bias during a disciplinary hearing. The notion that professionals external to police services are now making decisions and heavily involved in disciplinary decisions demonstrates a multi-agency approach to police accountability and creates an assemblage that monitors the police (Haggerty & Ericson, 2000: 611).

Counter-law II also emanated in a technological form in OIPRD hearing decisions. Although the OIPRD uses a human network to monitor the police, the OIPRD confirms video evidence can be examined when serious allegations of misconduct arise.

Independent evidence, such as video, is extremely important for complaint investigations. There have been situations where a video recording confirmed the complainant's account, and situations where a video confirmed an officer's account. Complaints that are filed as soon as possible after an incident occurs can benefit from independent evidence from video, especially because businesses do not keep recordings for very long (OIPRD, 2014: 22).

Ericson (2007a: 52) contends the 21<sup>st</sup> century has been subject to an array of integrated surveillance technologies to monitor the population. In OIPRD investigations and hearings numerous forms of video evidence were analyzed. Evaluating evidence from various

technologies aligns with counter-law II principles because the technologies are monitoring police conduct.

In a hearing decision two officers pursued a group of mischievous youth and entered a residence to extinguish a boisterous house party as the officers were monitored through an individual's cell phone upon entry (see *Mulville & Azaryev v. The York Regional Police Service*, 2015). The officers entered based on the notion of hot pursuit; however, the video surveillance only captured interactions inside the residence and depicted the officers acting in a discreditable manner. The officers argued they were executing their duties lawfully and in good faith; however, their argument was diminished by the video. In the decision, the hearing officer suggests that surveilling the police has become accepted practice.

In relation to taking the video or pictures of officers in the performance of their duties there is no law in Canada that prevents a member of the public from taking photographs or video of a police officer executing his or her duties in public or in a location where the photographer is in a location lawfully (in fact, police officers have no privacy rights in public when executing their duties) (*Mulville & Azaryev v. The York Regional Police Service*, 2015: 36).

The hearing officer illustrates that police can be surveilled by citizens when performing their duties. Later in the hearing, Superintendent Graeme Turl states:

An officer who conducts him or herself reasonably has nothing to fear from audio, video or photographic record of his interaction with the public. In this instance, those making the recordings are in the residence lawfully, therefore they can film as much as they want (*Mulville & Azaryev v. The York Regional Police Service*, 2015: 36).

The hearing resulted in the officers being found guilty of discreditable conduct and an unlawful arrest. The hearing officer's rationality exemplifies counter-law II principles because the police are being recognized as risky subjects that pose a threat to the public when in private space but also beyond.

In Ericson's (2007a) counter-law II framework surveillant assemblages intersect with criminal proceedings. According to Ericson (2007a: 207) legal procedures become unnecessary because video makes "suspicious signs and harmful behaviour visible in ways that make exclusion and punishment seem obvious and necessary." In an altercation in Windsor, Ontario, an officer kicked a civilian on multiple occasions while he was lying on the ground in the stairwell of a low-income apartment building (see Rice v. The Windsor Police Service, 2015). Video footage captured the incident which led to public outcry and skepticism about the police. The video only showed the conclusion of the encounter after the officer chased the complainant into the stairwell to make an arrest. Retired Inspector Brian Fazackerley discussed how the video had a major impact on the hearing:

This matter began with a publically available video featuring a uniformed police officer kicking a smaller suspect who was on the floor. There was some public reaction to this which was generally negative, and included a few suggestions of racial bias (Rice v. The Windsor Police Service, 2015: 21).

The video made the hearing officer aware of the negativity surrounding the incident and the public's reaction to the altercation.

On September 14, 2015, while this decision was on reserve, I performed a Google internet search for "Windsor police video kick suspect 2012." The first item returned was titled "Windsor police officer punches, kicks man on floor-YouTube," with subtext "Published on Jun 6, 2012- Watch this video, obtained by The Windsor Star, of a Windsor police officer striking and kicking a man in the hallway of a McDougall Avenue apartment building." The entire video is there. There are 24 public comments that have been uploaded in response, all negative, including one but only one that notes that Mr. Chinyangwa is black and saying "so much racism." PC Rice is white (Rice v. The Windsor Police Service, 2015: 14).

Although the video failed to capture the entire confrontation and testimonies from the officer and complainant differed, the video evidence shortened the legal proceedings and caused an instantaneous guilty plea. Hearing procedures were eroded based on the video surveillance

images, which supports Ericson's notion of counter-law II. The hearing officer's rationality demonstrates how surveillance impacted the decision and nullified witness testimonies.

In the end we have varying stories. We have certain angles from Cst. Rice. We have certain angles from Gladson Chinyangwa but the video is its own tie breaker as it were. The video camera is making its own story and the story there points to an assault in my view with the kicks (Rice v. The Windsor Police Service, 2015: 8).

The hearing resulted in the officer being demoted for 18 months.

Ericson (2007b: 393) also notes how counter-law networks can counter their intended purpose. The police use these networks to surveill the population; however, police conduct can be watched and critiqued too (Ericson, 2007b: 393). In the Windsor incident, the surveillance video being used to monitor the stairwell to detect crime captured police conduct and led to negative public scrutiny. Even though surveillance can be subjective and only capture a limited portion of an encounter, the enhanced visibility of the police in the 21<sup>st</sup> century has drastically impacted police accountability (see Goldsmith, 2010), in this case by combining with the OIPRD procedures.

Counter-law weakens traditional legal standards and burdens of proof due to the increase of uncertainty (Ericson, 2007a: 25). Regarding the OIPRD, uncertainty surrounding the mismanagement of complaints by police services, the threat of police services disregarding complaints and unfair investigations are eradicated through the OIPRD's procedures and surveillance network. To subdue the threat of police authority becoming illegitimate, out of precaution, traditional legal standards were suppressed. The standard for resolution has dwindled to the concept of "perceived misconduct" by the public, which encompasses any type of negative contact with the police, regardless of proof or if an incident legitimately occurred (OIPRD, 2011: 23). Police services in Ontario have the potential to engage in serious act of misconduct as the OIPRD attempts to eliminate this threat and maintain public confidence.

### 3. Managing Incivility

After the OIPRD was implemented, principles of risk and precaution continued as the civilian oversight agency began to receive complaints and communicate its progress to the public. Prior to the 21<sup>st</sup> century some complaints procedures aligned with alternate rationalities (see Deukmedjian, 2003). For example, in the 1990's the RCMP reshaped public complaints procedures to align with neo-liberalism and community policing (Deukmedjian, 2003: 331-332). As previously stated, the OIPRD's focus is to uphold public confidence (OIPRD, 2010: 4). The OIPRD is about precaution because it seeks to maintain confidence through procedures that attempt to acknowledge all forms of perceived misconduct and most complaints the OIPRD receives are about incivility (OIPRD, 2013: 21). According to the OIPRD (2013: 21), "on the surface, many complaints about incivility seem to be minor. However, underlying that is the reality that many of these complaints are legitimate and deserve to be taken seriously." Expressing that incivility complaints are legitimate is precautionary. If incivility complaints are deemed irrational, the legitimacy of the police could be threatened in the 21<sup>st</sup> century.

Incivility refers to rude or insulting behaviour by a police officer or any contact with the police that a citizen feels has influenced them in a negative manner (OIPRD, 2014: 15). Complaints about an officer's attitude are extremely difficult to prove because these types of complaints are subjective and often based on the complainant's attitude and opinions about the police (OIPRD, 2014: 15). The OIPRD (2011: 23) states "for the law-abiding citizen, negative contact with the police, whether real or perceived, can have a profound impact on their confidence in the police service as a whole. These types of complaints can often be avoided." Disregarding incivility complaints could motivate law-abiding citizens to neglect the law and police authority, which coincides with Ericson's (2007a) notion of a worst-case scenario.

Incivility complaints are very subjective and a citizen can still complain when an officer may have been sincere throughout an encounter. Precaution is expressed because the OIPRD attempts to acknowledge and resolve every minor complaint to discourage future misconduct and complaints.

In principle, these complaints will not end in discipline. Rather than inform citizens incivility complaints are irresolvable, out of precaution, the OIPRD has implemented programs to acknowledge these types of complaints to eliminate public doubt. Types of resolution via the OIPRD include local resolution, informal resolution, CSR, and mediation (OIPRD, 2015: 10). These procedures enhance public participation in the complaints process which is a key component of police legitimacy (Tyler, 2004: 94; Wells & Schafer, 2007: 4). Augmenting participation provides citizens with the power to voice their perspectives about police conduct (Tyler, 2004: 94). Each form of resolution adheres to precautionary measures by ensuring complaints will be acknowledged, even for minor occurrences and uncivil confrontations.

Local resolution can occur for less serious complaints and transpires when civilians file their complaint directly to the police service, rather than sending their complaint to the OIPRD (OIPRD, 2011: 7). Local resolution involves a face-to-face meeting whereby the officer and the complainant exchange perspectives (OIPRD, 2010: 18). Complaints that end in local resolution are usually resolved with an apology (OIPRD, 2010: 18). After the meeting, an agreement form is signed and the police inform the OIPRD the complaint has successfully been resolved (OIPRD, 2010: 17).

Informal resolution entails a meeting between two parties to exchange dialogue and perspectives to facilitate resolution (OIPRD, 2010: 29). Informal resolution is deemed successful when the chief, officer subject to the complaint, and the complainant all agree to the form of



resolution (OIPRD, 2010: 29). Informal resolution can occur prior to a complaint being investigated or at any time during an investigation, upon approval by the OIPRD (OIPRD, 2013: 22). Informal resolution can ensue for less serious complaints such as incivility, unnecessary force that does not result in an injury, and any conduct that leads to damaged clothing or property (OIPRD, 2014: 25). Options for resolution include an explanation by a senior member of the police service, training for the officer, education, or an apology (OIPRD, 2010: 29).

Another form of resolution that embodies precaution is the customer service resolution (CSR) program, which was implemented in 2013 (OIPRD, 2014: 13). CSR attempts to acknowledge every complaint, misunderstanding, and perceived act of misconduct (OIPRD, 2014: 1). Before a complaint is formally screened, the OIPRD can recommend CSR, which is simply a conversation between the complainant and officer subject to the complaint (OIPRD, 2013: 11; OIPRD, 2014: 1). This method of resolution is precautionary because officers and police services must explain encounters that have no potential to be misconduct; rather they are perceived acts of incivility. Recommending CSR prior to formally screening a complaint signifies the OIPRD is aware an act of misconduct has not occurred; however, discussing police actions the public disagrees with aligns with a precautionary rationality and a clear attempt to satisfy the public's uncertainty.

Much like CSR, mediation is a discussion between the complainant and officer subject to the complaint. A third party that is approved by the OIPRD is also in attendance to help facilitate problem-solving and ensure the complainant is comfortable during the process (OIPRD, 2014: 1). The mediation program was launched in 2013 and is an alternate form of resolution that adheres to precautionary principles (OIPRD, 2015: 19). If civilians are uncomfortable with discussing their incivility complaint, a mediator will aid the complainant in voicing their

disapproval about an officer's behaviour. Complaints that end in mediation pertain to incivility and misunderstandings between citizens and police officers (OIPRD, 2013: 2).

Each form of resolution for minor complaints suggested and facilitated by the OIPRD corresponds with a precautionary rationality because the OIPRD helps acknowledge complaints about incivility and negatively perceived experiences. The OIPRD is assisting discussions about police behaviour that could be civil encounters; however, precautionary measures are being taken to satisfy public concerns about the police. The formation of the CSR and mediation programs express the notion that perceived acts of negative behaviour must be taken seriously and attempted to be resolved, or the public will lose faith in the police and identify the police as a corrupt institution. These programs are a means of minimizing or preventing the risk of public confidence eroding (O'Malley, 2009: 13). The implementation and growth of an array of resolution programs allows more complaints to be acknowledged to satisfy the public's uncertainty and fears about the police.

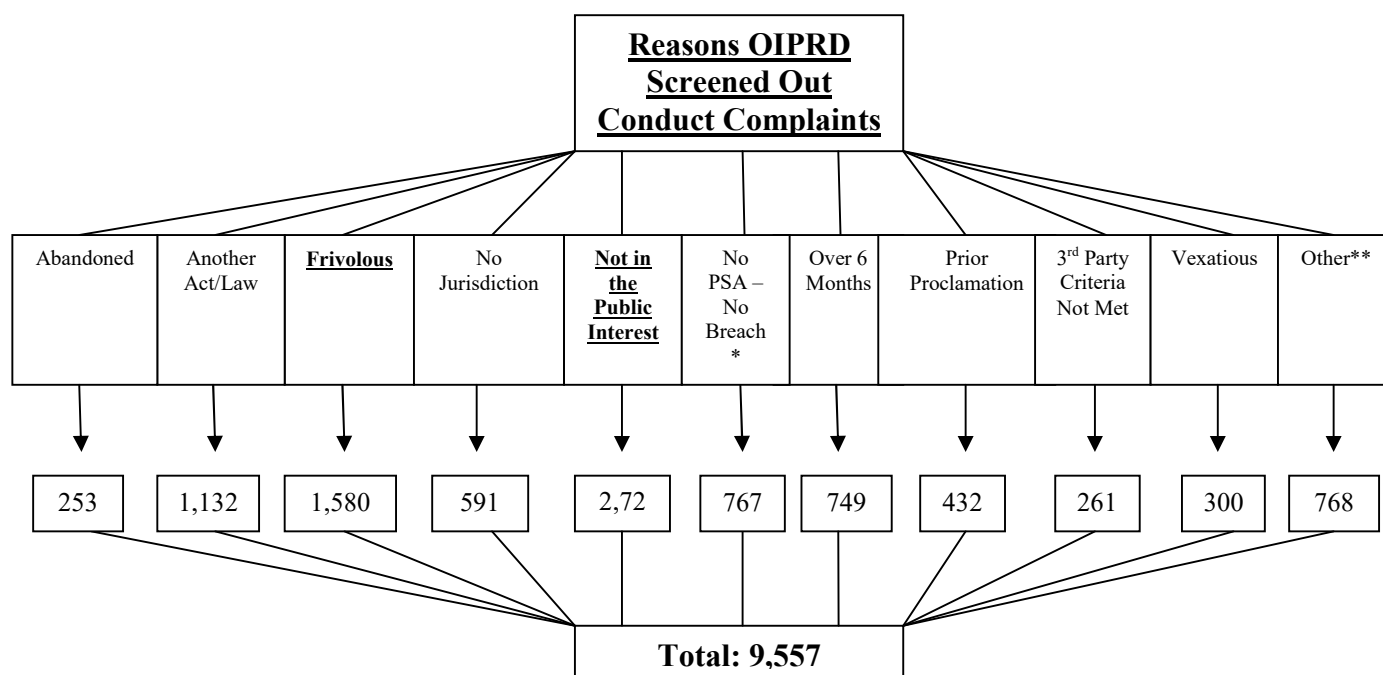
As the gatekeeper of all public complaints, the OIPRD releases complaint totals in its annual reports. Most complaints pertain to police conduct, signifying the public is concerned with police behaviour (OIPRD, 2012: 19). Table 1 documents the number of conduct complaints the OIPRD has received since its implementation in 2009 and the number of complaints screened in for further investigation.

**Table 1: OIPRD Complaint Totals**

<b>Year</b>	<b>Total Complaints Received</b>	<b>Conduct Complaints Received</b>	<b>Conduct Complaints Screened in For Investigation</b>	<b>Conduct Complaints Screened Out</b>
October 19, 2009 to March 31, 2010	1,103	1,037	560	N/A
April 1, 2010 to March 31, 2011	4,083	3,818	1,584	1,937
April 1, 2011 to March 31, 2012	3,468	3,242	1,643	1,600
April 1, 2012 to March 31, 2013	3,316	3,087	1,436	1,651
April 1, 2013 to March 31, 2014	3,114	2,715	1,209	1,506
April 1, 2014 to March 31, 2015	2,926	2,481	1,183	1,394
April 1, 2015 to March 31, 2016	3,135	2,697	1,273	1,469

The OIPRD annually receives an abundance of complaints. It analyzes over 3,000 complaints each fiscal year and has received more than 20,500 complaints since 2009 (OIPRD, 2016: 21). Complaint outcomes displays how the OIPRD mandate of screening and managing every complaint is a more than rational approach to risk (see Ericson, 2007a). Over half of complaints fail to pass the initial screening process each year, meaning these complaints are dismissed as potential acts of misconduct. Flowchart 1 displays the reasons the OIPRD has screened out conduct complaints since 2009.

### Flowchart 1: Conduct Complaints Screened Out



\*Reason only included in the 2012 & 2013 OIPRD annual reports

\*\*Includes a number of reasons complaints were screened out such as: bad faith, duplicate complaints, incomplete form, unable to contact complainant & withdrawn after classification

Complaints that are frivolous or not in the public interest account for a large portion (45% or 4,304 out of 9,557) of the reasons complaints are initially screened out of the OIPRD complaints process. According to the OIPRD (2016: 27-28) a frivolous complaint “does not reveal any allegation of misconduct or breach of the Code of Conduct, or is trivial, lacks substance or an air of reality.” The OIPRD’s screening power is demonstrated when complaints are screened out because they are not in the public interest.

A broad range of factors are considered including the nature of the misconduct alleged, whether the action appears to be a proper exercise of police discretion, the circumstances in which the conduct occurred and whether the conduct could bring the police force into disrepute. Other factors considered ... public’s confidence in the accountability and integrity of the complaints system. Whether the issues are of systemic importance or there is a broader public interest is at stake (OIPRD, 2016: 28).

This contributes to the notion the OIPRD is a more than rational approach to risk because civilian investigators are using their discretionary power to screen out complaints. Complaints are evaluated by civilians and the police's conduct is determined to be legitimate.

Complaints that are screened in for investigation because they could be potential acts of misconduct are usually unsubstantiated after a thorough analysis by the OIPRD or a police service. Table 2 depicts complaint outcomes after they are screened in for investigation by the OIPRD.

**Table 2: OIPRD Conduct Complaints**

<b>Year</b>	<b>Conduct Allegations Unsubstantiated</b>	<b>Conduct Allegations Substantiated Serious (Less Serious)</b>
October 19, 2009 to March 31, 2010	75	1(1)
April 1, 2010 to March 31, 2011	1,755	26(81)
April 1, 2011 to March 31, 2012	3,596	137(181)
April 1, 2012 to March 31, 2013	2,484	194(21)
April 1, 2013 to March 31, 2014	2,516	72(109)
April 1, 2014 to March 31, 2015	2,595	84(123)
April 1, 2015 to March 31, 2016	1,924	92(87)

After being investigated, a very low number of complaints are substantiated as serious or less serious, which demonstrates that the OIPRD is a risk management tool for the public. Ericson (2007a: 1) states "the politics of uncertainty leads to enormous expenditures on risk assessment." In its most recent report, the OIPRD stated its annual budget was \$6,738,649 (OIPRD, 2016: 9). The OIPRD budget is a more than rational approach to risk because an abundance of resources are being administered to manage perceived misconduct and to have civilian investigators

dismiss numerous complaints rather than the police. Citizens can receive an explanation about police behaviour even though very few instances of legitimate misconduct occur. Although complaints are substantiated and resolved at a very low rate, the OIPRD eliminates uncertainty surrounding the acknowledgement of complaints. Table 3 illustrates the types of resolutions that transpire for conduct complaints.

**Table 3: OIPRD Complaint Resolutions**

<b>Year</b>	<b>Local Resolutions</b>	<b>Informal Resolutions</b>	<b>Successful Customer Service Resolutions (CSR)*</b>	<b>Requests for Mediation (Successful)*</b>
October 19, 2009 to March 31, 2010	30	18	N/A	N/A
April 1, 2010 to March 31, 2011	55	323	N/A	N/A
April 1, 2011 to March 31, 2012	47	225	N/A	N/A
April 1, 2012 to March 31, 2013	61	273	N/A	N/A
April 1, 2013 to March 31, 2014	63	147	130	N/A
April 1, 2014 to March 31, 2015	69	233	143	N/A
April 1, 2015 to March 31, 2016	56	243	133	19(7)

\*CSR and Mediation programs were implemented in 2013-2014

Overall, the OIPRD's continuous attempt to acknowledge all forms of perceived misconduct and incivility displays a precautionary rationality. As public fear of the police continues to expand in the 21<sup>st</sup> century, it is expected procedures will regularly be altered to enhance communication with the public.

#### 4. Disciplinary Hearing Decisions

The major precautionary enhancement to the complaints system was that the OIPRD began to release decisions from disciplinary proceeding via the OIPRD website. In prior years, disciplinary proceedings remained internal to police services and the public was unaware of the decision-making process (see Landau, 2000). To reassure the public that disciplinary decisions are logical and fair, decisions made after October 19<sup>th</sup>, 2009, the day the OIPRD officially opened, began to be released to the public (OIPRD, 2010: 4).

According to Ericson (2007a: 17-18) “law makes risks and controversies about them public and visible.” Public controversy surrounding police accountability and police services internally managing public complaints resulted in the IPRA mandating formal disciplinary decisions be released to the public as explained earlier. To control public belief that disciplinary decisions were misguided, the OIPRD makes decisions readily available to the public to eliminate controversies about ill-advised decisions. Releasing decisions was an attempt to build confidence and legitimacy because police investigations have traditionally been concealed from the public (Wells & Schafer, 2007: 4).

Rationalities that shape hearing decisions are discourses. In decisions, the components which hearing officers focus on to determine the outcome of hearings signify the rationalities. In the following sections I argue two discourses pertaining to risk and precaution shape police accountability in OIPRD disciplinary hearing decisions. In this chapter I differentiate among the public precaution and risk-adverse officer precaution rationalities. Table 4 breaks down the number of hearing decisions that were shaped by the two rationalities.

**Table 4: Disciplinary Hearing Rationalities**

<b>Total Hearing Documents</b>	113
Public Precaution	42
Risk-Adverse Officer Precaution	62
No Rationality	9

Ericson's (2007a) precautionary logic is exemplified when the hearing officer's rationality shapes the decision to protect the public. The public precaution rationality focuses on safeguarding the public against the threat of the police and a complete decay of public confidence, which coincides with the threat of the police becoming an illegitimate institution. A precautionary nuance is exemplified in the risk-adverse officer precaution rationality because precaution is being directed at the police, who are risky subjects (see Ericson, 2007a). Precaution is distributed in an alternate form because the rationality supports the police's behaviour. In Ericson's (2007a: 207) theory of precaution logic the conduct of risky populations is limited based on their criminal potential. However, in OIPRD hearing decisions the police are being empowered to take risks. Precaution is taken to ensure the police do not become defensive or hesitant when performing their duties. Hearing officers also shaped decisions to prevent future misconduct in this rationality, which is risk management. Hearings which rationalities are absent are very brief and lack detail. They simply communicate a decision has been reached, dismiss a complaint, state a penalty, or mark a hearing stayed. For example, a hearing stated the complaint had been resolved informally and the OIPRD had been notified. In the following sections I discuss how these two rationalities shape OIPRD disciplinary hearing decisions.



#### *4.1 Public Precaution Rationality*

The public precaution rationality emerged when hearing officers were concerned with shielding the public from the threat of the police, preventing future misconduct and subduing the threat of a complete disintegration of public confidence. This rationality focuses on the public in the hearing rather than the officer or police service. The hearing officer is concerned the officer's conduct will drastically affect the public, not just the individual subject to the misconduct. Shaping decisions via the public precaution rationality signifies that hearing officers believe serious misconduct has the potential to spread throughout a community (see *Behan v. The Ottawa Police Service*, 2014; *Kent v. The Toronto Police Service*, 2013).

There are two components of the public precaution rationality. The first aspect focuses on controlling the police and protecting the public. The second element refers to the erosion of public confidence and trust in police services. The two components frequently intersect in hearings; however, occasionally only one will shape a decision. Protecting the public and controlling the police is risk management because the rationality is about the threat of future misconduct. In decisions the police are framed as risky subjects that the public must be protected from. Public confidence is precautionary because it correlates with the legitimization of the police. High public confidence legitimizes the police and helps the police maintain social order (Tyler, 2004: 85, 90).

The important role played by legitimacy in shaping people's law-related behaviour indicates the possibility of creating a law-abiding society in which citizens have the internal values that lead to voluntary deference to the law and to the decisions of legal authorities such as the police (Tyler, 2004: 96).

If citizens lack confidence in the police they will disobey police authority, which jeopardizes a law-abiding society (Murphy & Cherney, 2012: 182; Tyler, 2004: 96). In a hearing, Inspector

Todd Rauller discusses how the public's perceptions of the police shape police authority and legitimacy:

The public's perceptions about the lawfulness and legitimacy of law enforcement are important principles for judging policing in a democratic society. Lawfulness means that police comply with constitutional, statutory and professional norms. Legitimacy is linked to the public's belief about the police and its willingness to recognize police authority (Irving & Sebaally v. The Durham Regional Police Service, 2017: 30).

The threat of the police becoming an illegitimate institution displays precautionary logic's notion of a worst-case scenario (Ericson, 2007a). Although it is highly unlikely the entire public will lose all confidence in police services and disregard police authority, this threat is managed in OIPRD hearing decisions nonetheless.

A public focused rationality coincides with Ericson's (2007a) precautionary principles because it displays the notion of uncertainty and frames the police as a major threat to the public. Hearing officers are attempting to protect against the threat of losing public confidence, when public confidence has yet to deteriorate. This rationality attempts to forecast the disintegration of public trust in the police. The OIPRD functions as a risk technology and promotes public well-being because civilians are being reassured they are safeguarded from the major public safety threat: the police (Ericson & Haggerty, 1997: 116). Although misconduct primarily affects a single individual or a small group of people, hearing officers are anticipating the misconduct will extend to the public and deteriorate public confidence. The behaviour of one police officer has the power to aggravate the growing culture of suspicion surrounding the police, extending fear and anxiety to a broader population (Ericson, 2007a: 214).

This rationality aligns with the OIPRD mandate, which is to build, maintain, and enhance public confidence through the complaints process to increase the effectiveness of police services throughout Ontario, as previously stated (OIPRD, 2015: 4). If accountability is

administered fairly and effectively, the public should trust police services (see Goldsmith, 2005). When discussing public complaint systems, Schulenburg et al. (2015: 3) suggest “perceptions of fairness and justice are related to police legitimacy whereby a PCS must possess integrity and equitability to increase confidence in the system for citizens.” Public confidence could decay if citizens perceive the OIPRD as illegitimate, which would threaten the institution of policing.

The public precaution rationality appears in all types of disciplinary decisions. In decisions which an officer has pled guilty, a summary of the officer’s actions and the altercation is analyzed, followed by an in-depth evaluation of the misconduct to determine a penalty. When an officer pled not guilty, the public precaution rationality surfaced when the hearing officer imposed a guilty verdict because they completely disapproved of the officer’s conduct. This rationality also materialized in penalty decisions which an officer has pled not guilty in a separate hearing and has been convicted of a serious offence.

Allegations of discreditable conduct, insubordination, and neglect of duty are the forms of misconduct that correspond with the public precaution discourse. When this rationality emerged, one of these three types of misconduct was generally present. Allegations of officers unlawfully or unnecessarily exercising their authority or complaints pertaining to use of force were generally absent from this rationality. In hearings which the public precaution rationality shaped the decision only six percent of decisions pertained to use of force or an unnecessary arrest (7 out of 42). This deviates from police misconduct the media targets and allegations that lead to public outcry (see Goldsmith, 2005; Goldsmith, 2010; Thompson & Lee, 2004; Weitzer, 2002; Wilson & Serisier, 2010).

Media is infatuated with police violence and acts of brutality, which shapes public perception (Goldsmith, 2010: 920). Thompson and Lee (2004: 384) state public attitudes towards

police are transformed when police brutality is broadcasted by media. One allegation of excessive force in the media can deteriorate public confidence and threaten police legitimacy. In public, citizens attempt to protect themselves from the police abusing use of force privileges. According to Goldsmith (2010: 926), “many instances highlighted by the new visibility relate to police use of force.” When discussing the public’s motive for monitoring the police through video technologies, Wilson and Serisier (2010: 169) contend “getting ‘beaten up’ was one of the foremost hazards of video activism.” High-profile cases that shape the police as a public safety threat are primarily allegations of police brutality and excessive force (Weitzer, 2002). Media depicts police brutality and excessive force as a threat to the public; however, OIPRD hearing decisions are different from media accountability (see Bonner, 2009) because precaution is present for other forms of misconduct. OIPRD hearing decisions are about directing public precaution towards allegations of discreditable conduct, insubordination, and neglect of duty.

Misconduct that is deemed a threat to the public and pertains to a precautionary rationality usually has a technological form of hard evidence that clearly proves the officer has intentionally committed misconduct. As the standard to convict an officer at a hearing is clear and convincing evidence, the technological component or form of hard evidence proves an officer is guilty. These technologies include the Canadian Police Information Centre (CPIC), emails, mobile workstations, and tracking devices. Other forms of technology the public can access are audiotapes, Facebook data, and videos. Misconduct occurs when officers use the equipment for personal reasons, or when officers have misused technologies in ways that are detrimental to the public. For example, an officer received CPIC information from another officer to use in family court and in another instance, an officer used CPIC and mobile workstations to gather information on an individual for the officer’s cousin to use in family court

(see *Clough v. The Peel Regional Police Service*, 2013; *White v. The Toronto Police Service*, 2013). Regarding public accessible technologies, an officer was found guilty of misconduct after she harassed her former boyfriend's wife by sending her intimidating messages over Facebook under various aliases (see *Kent v. The Toronto Police Service*, 2013). The officer also used CPIC and the Toronto police search systems to inquire about the female on numerous occasions.

As the first aspect of the public precaution rationality refers to risk management and preventing future misconduct, expressing police are a public safety threat deviates from the intended purpose of the police. If officers are not substantially penalized in these instances, they may continue to act in a manner that threatens the public. For example, a hearing officer states a main objective of police discipline is to “assure the public that the police are under control” after an officer circulated confidential information about a young individual throughout a community (*Finnis v. The Ottawa Police Service*, 2015: 5). The desire to assure the public the police are under control aligns with the notion a future threat has been subdued. In a hearing decision Superintendent Thomas Carrique of the York Regional Police Service highlights how a key objective of discipline in the *Police Services Act* is to protect the public (*Ford v. The York Regional Police Service*, 2011: 7). Risk management is signified through language that suggests the public will be protected in the future. Carrique focuses on protecting the public after an officer illegally attached a tracking device to his former brother-in-law's vehicle (*Ford v. The York Regional Police Service*, 2011: 5). Retired Superintendent Elbers also illustrates this rationality by suggesting “the Windsor Police Service must deliver a penalty that not only prevents recurrence, but also adequately protects the public” (*Bernardon v. The Windsor Police Service*, 2012: 8). Shielding the public from recurring misconduct signifies risk management because the hearing officer is concerned about future behaviour.

The second component of the public precaution rationality is about the highly unlikely scenario that the public will lose all confidence in the police. Precaution is signified through the hearing officer's intense language in relation to public confidence. The hearing officer firmly emphasizes public confidence has been eroded, shattered, betrayed, or undermined, which jeopardizes police legitimacy (see *Barber v. The Ontario Provincial Police*, 2013; *Crouse v. The Peel Regional Police*, 2013; *Finnis v. The Ottawa Police Service*, 2015; *Ho v. The York Regional Police Service*, 2014; *Kneeshaw v. The Ontario Provincial Police Service*, 2016; *Mallett v. The Ottawa Police Service*, 2015; *Wilson v. The Toronto Police Service*, 2013). Precaution is present because if public confidence fails to exist the police could become an illegitimate institution. Intense language signifies the misconduct is serious and has negatively affected the public.

For example, a hearing officer states "in regards to public interest, Crouse's misconduct has clearly betrayed the public's trust and shattered their confidence" (*Crouse v. The Peel Regional Police Service*, 2013: 10). The hearing officer later states the officer's behaviour must change because the public's trust "is too high to risk losing" (*Crouse v. The Peel Regional Police Service*, 2013: 11). The hearing officer was focused on the risk of public confidence decaying as opposed to other factors. In a hearing where an officer attempted to coerce a complainant into withdrawing their complaint by offering to expunge a speeding ticket, Superintendent Anna McConnell expresses how serious misconduct can have negative effect on the public's confidence:

There must be a clear message this kind of misconduct that goes to the heart of public confidence will not be tolerated. Specifically, for the officer, he needs to understand that this kind of decision-making and behaviour affected the public trust and is directly contrary to his oath of office and the penalty for such conduct will be severe (*Barber v. The Ontario Provincial Police*, 2013: 12).

The officer received a six month demotion, which displays the seriousness of the offence.

Dispensing precaution towards public confidence in decisions aligns with the OIPRD's mandate because decisions are shaped to protect against a total loss of faith in police services.

As a precautionary rationality often emerges when the police use technologies for personal reasons, the potential to decay public confidence and the notion the police are a public safety threat is articulated by Deputy Chief Don Sweet of the Ottawa Police Service:

The public expects police officers to safeguard private and confidential information. ... The community ... would be shocked to find that an officer accessed a confidential report, in which the officer had no involvement, and then provided the information ... to the public. The facts of this incident would affect the confidence of community members who trust police officers to maintain private and confidential information and respect privacy laws (Finnis v. The Ottawa Police Service, 2015: 5).

Superintendent Dave Downer of the Peel Regional Police service also highlights the seriousness of a CPIC breach: "the misuse of the CPIC system for personal or any other unauthorized reason can be a serious violation of a person's right to privacy" (Clough v. The Peel Regional Police Service, 2013: 4). Rationalizing a privacy violation threatens to disintegrate public confidence signifies OIPRD precaution is directed towards the police misusing technologies. Thompson and Lee (2004: 382) suggest "the issue of police brutality is important for those concerned with the preservation of liberties." However, in OIPRD hearing decisions allegations of discreditable misconduct, insubordination, and neglect of duty threaten individual liberty. These forms of misconduct are about the police intentionally failing to perform their duties or using their powers for personal reasons. Complaints about the police unnecessarily exercising their authority or using excessive force arise because the police were attempting to perform their duties in good faith.

Penalties that impose a forfeiture of hours are on the high end of the spectrum when the public precaution discourse is present because the misconduct has been deemed very serious.

Superintendent David Downer states “penalties for CPIC breaches range from reprimand to dismissal” (Clough v. The Peel Regional Police Service, 2013: 7). As a precautionary rationality exists for misconduct that generally involves the misuse of police equipment such as CPIC, extensive penalties display the seriousness of the misconduct. A reprimand or a minor forfeiture of hours was not present in decisions shaped by this rationality. For example, an officer was ordered to forfeit 88 hours of pay for unlawfully placing a tracking device on a civilian’s vehicle, while another officer was ordered to forfeit 208 hours pay for using CPIC to assist his cousin in family court (Ford v. The York Regional Police Service, 2011; White v. The Toronto Police Service, 2013). Demotion is also frequently used in this rationality. In the instance which an officer sent harassing Facebook messages to an innocent civilian and performed numerous CPIC inquiries, the officer received a one-year demotion (Kent v. The Toronto Police Service, 2013).

In Ottawa, an officer was convicted of one count each of insubordination, discreditable conduct, and an unlawful exercise of authority (see Mallett v. The Ottawa Police Service, 2015). In this instance the officer, who was an assigned School Resource Officer (SRO), was contacted by the vice-principal of the school regarding two students who had not returned to school after lunch (Mallett v. The Ottawa Police Service, 2015: 4). The officer performed a CPIC search of a student and proceeded to the student’s grandmother’s home, where he entered the residence and discovered many students smoking marijuana. The officer then arrested the student, charged the student for possessing the marijuana, and escorted the student to the police station. The officer’s conduct was deemed unlawful and extremely discreditable to the police service. As the hearing officer’s penalty decision was shaped by the public precaution rationality, the officer received a one-year demotion. In the decision the hearing officer states:

It is imperative that the public have faith in the police service ... for the police to effectively carry out its function. Public interest requires that all persons’ interests



must be protected. ... The actions of Cst. Mallett seriously erode at the public's need to have confidence. ... They are looking to have that faith restored in this discipline process and in my role as applying the appropriate penalty in this case. There is little doubt that they would find the actions ... as shocking and disheartening (Mallett v. The Ottawa Police Service, 2015: 6-7).

The rationality demonstrates how the misconduct threatens the public and could negatively affect public confidence.

Overall, the public precaution rationality shapes hearing decisions for misconduct charges pertaining to discreditable conduct, neglect of duty, and insubordination. This demonstrates the police are a perceived threat to public safety because their misconduct could potentially shatter public confidence. The dissolution of public confidence threatens to erode police authority and delegitimize the institution of policing. Police technologies and other publicly accessed technologies are forms of evidence that help solidify the threshold of clear and convincing evidence. As public precaution in OIPRD hearing decisions is about officers abusing their privileges and failing to perform their duties, unnecessary force and use of authority allegations pertain to the risk-adverse officer precaution discourse.

#### *4.2 Risk-Adverse Officer Precaution Rationality*

In OIPRD hearing decisions, the risk-adverse officer precaution rationality is about safeguarding against the risk of the police being hesitant when performing their duties and preventing officers from committing future misconduct. Risk and precaution are directed at the individual officer rather than the public. Although it is highly unlikely police officers will intentionally neglect to perform their duties when dangerous situations arise, hearing officers want to eliminate the uncertainty that police will hesitate or fail to sufficiently uphold the law and protect the public. Hearing officers attempt to legitimize the notion police are risk-takers as

opposed to risk-avoiders. The worst-case scenario is that the police will witness a crime in progress and fail to fulfill their duties, which would be a significant threat of harm to the public.

The risk-adverse officer precaution rationality materialized in all types of disciplinary decisions. In decisions which officers have pled not guilty, the hearing officers must examine the allegations and evidence to decide if officers are guilty of misconduct. In decisions which an officer is deemed not guilty, risk-adverse signifiers help justify a not guilty verdict. When guilty verdicts were imposed there was clear and convincing evidence the officer's actions equated to misconduct. However, the penalty and the officer's conduct were mitigated. All types of misconduct were present in this risk-adverse officer precaution rationality; however, allegations of unnecessary exercises of authority or unnecessary force were present in 61 percent of decisions (38 out of 62). When police are faced with difficult circumstances they must be willing to take risks to protect the public. This suggests hearings decisions about officers unnecessarily exercising their authority or applying excessive force are generally shaped by the risk-adverse officer precaution rationality.

There are two components to the risk-adverse officer precaution rationality. The first element, which predominantly shaped decisions that adhere to this rationality, is precautionary and about protecting against the police becoming risk-adverse. This component is signified by inconsistencies or discrepancies in hearings, the notion of willfulness, and situational factors associated with altercations and police conduct, such as dangers or difficulties. Ericson (2007a: 217) states that in the precautionary age consumed by uncertainty, "the neo-liberal subject becomes a risk-avoider rather than a risk-taker." If the police are unwilling to take risks when dangerous situations arise they could become risk-avoiders and their purpose and authority could become illegitimate. The second component of the risk-adverse officer precaution rationality,

which rarely emerged, pertains to risk management and preventing future misconduct. The focus in a hearing is the individual officer and the decision is shaped to improve the officer's future career. This is risk management because the rationality is about altering an officer's behaviour to prevent them from committing future misconduct. In the following section I discuss how the two components of this rationality shaped decisions to prevent future misconduct and protect against the threat of the police becoming risk-adverse.

When the precautionary component of this rationality is present the standard of clear and convincing evidence needed to convict an officer of misconduct was thoroughly evaluated (OIPRD, 2016: 24). Clear and convincing evidence sets a higher standard for the police to be convicted of misconduct when compared to a civilian in a criminal trial (Goetz & Sloan, 2007: 2). If the standard is too low the police will become risk-adverse because a high number of convictions will be administered (Goetz & Sloan, 2007: 2). Clear and convincing evidence is also difficult to prove because it is the responsibility of the complainant to mitigate any discrepancies. This is a challenge if multiple officers present similar perspectives regarding the details of an altercation because one of the unwritten rules of policing is to never "blow a whistle on deviant colleagues" (Ericson, 2007b: 378). OPP Superintendent Robin McElary-Downer illustrates how the concept of clear and convincing evidence is applied in hearings when misconduct is analyzed, which displays how hearing officers must protect against the risk of the police being overly defensive (see *Hogue v. The Ontario Provincial Police*, 2015).

If the bar is set too high, too many legitimate complaints will be dismissed, which would tend to breed public cynicism. Public trust and confidence is essential to policing. *At the same time, of course, the bar must not be set too low.* Police and other regulated professionals are themselves members of the public and, as such, inadequate regard for their rights and interests as individuals cannot be in the public interest. Moreover, if complaints are too easily substantiated, *it could lead police and other professionals excessively defensive, reactive and risk-adverse approach to their*

*duties. Clearly, this would be too highly detrimental to public interest (Goetz & Sloan, 2007: 2, as cited in Hogue v. The Ontario Provincial Police, 2015: 9-10).*

In these decisions hearing officers rationalize that substantiating complaints would be disadvantageous to the public's safety.

Focusing on inconsistencies and willfulness adheres to the risk-adverse officer precaution rationality because these concepts are being used to dismiss allegations when doubt emerges. These concepts contribute to the higher standard required to convict an officer of misconduct and help maintain police effectiveness. If an officer is acting in good faith and recklessness is absent, imposing a guilty verdict or severe penalty could lead to officers being hesitant when performing their duties because they are afraid to make a mistake. If a high number of complaints are substantiated the police will become hesitant and avoid performing their duties because they will fear their actions could be deemed misconduct. The risk-adverse officer precaution rationality empowers the police to take willful risks to protect the public.

Three officers from the Chatham-Kent Police Service were alleged to have neglected their duties by failing to thoroughly investigate an assault (Helbin, Misik, & Myers v. The Chatham-Kent Police Service, 2015). After the OIPRD investigated, it was concluded the officers were probably guilty of misconduct.

The OIPRD investigators found that Staff Sergeant Myers and Sergeant Misik were likely guilty of misconduct in that they did not take appropriate action in relation to the file, even when there were red flags indicating that review and follow-up were required (Helbin, Misik, & Myers, v. The Chatham-Kent Police Service, 2015: 9).

Although the investigation suggested misconduct occurred, the emergence of risk-adverse concepts led the hearing officer to dismiss the charges, which is displayed in the rationality.

When assessing and interpreting evidence in matters such as these where an officer or officers have done something or failed to do something that brings about allegations of misconduct, I must be mindful that the conduct or behaviour that is alleged to have occurred needs to have some element of willfulness or recklessness,

or a degree of neglect that moves the matter across the line that differentiates poor performance (Helbin, Misik, & Myers v. The Chatham-Kent Police Service, 2015: 14).

The hearing officer concluded the decision by assigning precaution to the notion of willfulness:

One *area of caution* of which tribunals ought to remain vigilant is to refrain from assessing a situation in the light of the hearing room and substituting the tribunal's own judgement for the judgment of the individual whose conduct or behaviour is being assessed (Helbin, Misik, & Myers v. The Chatham-Kent Police Service, 2015: 16).

The hearing officer's rationality focuses on the concept of willfulness and directs precaution at the officers. The hearing officer was cautious when assessing willfulness because convicting the officers when willfulness is absent could potentially lower the standard for misconduct.

Precaution was taken to ensure the high standard to convict an officer was not jeopardized.

When a hearing officer shapes a decision based on inconsistencies, discrepancies often come from the complainant because issues relating to untruthfulness, credibility, fabrications, and contradictions arise. A hearing officer can also criticize the complainant's behaviour, suggesting the altercation and an officer's risk could have been avoided. Retired Deputy Chief Terence Kelly demonstrates how varying witness testimonies and an error by the complainant can help justify the decision to dismiss a complaint:

Having listened to these witnesses testify, one thing is consistent: Brodie Timms-Fryer ... was told numerous times to remove his hands from his pockets. However, there seems to be considerable confusion to what they observed and heard between the interactions of Brodie Timms-Fryer and Police Constable Challans. Throughout this process I kept in mind the presumption of innocence and the requirement that defendants are entitled to an acquittal unless the case against them is proved on clear and convincing evidence (Challans v. The Windsor Police Service, 2014: 76).

Kelly later notes how he must be cautious when inconsistencies emerge:

Weighty, cogent and reliable upon which a trier-of-fact, with ... *caution*, can come to the fair and reasonable conclusion that an officer is guilty of misconduct. My definition of "weighty" is important, material and deserving consideration as compelling or convincing (Challans v. The Windsor Police Service, 2014: 78).

Kelly concludes the hearing by stating “in the viewing of conflicting evidence, a reasonable doubt exists as to where the truth of the matter lies. In such cases the benefit must go to the officer” (Challans v. The Windsor Police Service, 2014: 78). Precaution was directed at the individual officer. Doubt emerged which led Kelly to be cautious when evaluating the officer’s behaviour. The hearing officer’s rationality demonstrates how inconsistencies can shape a hearing decision. Imposing a guilty verdict when witness testimonies contrast could lower the standard to convict an officer of misconduct and potentially result in the police becoming risk-adverse when performing their duties.

Another aspect of the risk-adverse officer precaution rationality refers to situational components of an encounter. This discourse is signified when the hearing officer focuses on danger and situational difficulties or the officer’s conduct. The hearing officer’s rationality empowers the police to continue to be risk-takers when similar situations arise. When an officer perceives a potential risk or public safety threat is present, the officer’s actions attempt to subdue the threat. If guilty verdicts or high penalties are imposed when officers take risks the police could become risk-avoiders when they are exposed to difficult circumstances. Deputy Chief Terence Kelly describes how police officers must take risks when they suspect danger is present:

We require as a routine part of their duties that police officers enter dwellings and use force. *Police officers seldom have the luxury or relaxed contemplation when determining whether an emergency is unfolding* behind closed doors or what degree of force is necessary to subdue an aggravated subject (Guertin v. The Timmins Police Service, 2016: 21).

Kelly later notes how the officer’s decision to subdue a potentially dangerous circumstance was about public safety and the officer’s colleagues:

The observations/interactions of the officers with Ms. Sebalj, the grounds were clearly established for Constable Guertin to arrest and control Ms. Sebalj for the purpose of preventing the continuance or renewal of the Breach of Peace, and for her own safety along with the safety of the attending officers (Guertin v. The Timmins Police Service, 2016: 22).

The officer was responding to an inquiry about domestic violence and the hearing officer approved of the officer's risk to enter the home. A guilty verdict in this instance could lead to the unlikely circumstance that the police will become risk-adverse when similar situations emanate.

In a hearing decision discussing allegations about an unnecessary arrest, an officer for the Thunder Bay Police Service followed a vehicle from a home that was under police surveillance and forcefully arrested an individual that was not the target of the surveillance in the parking lot of a Money Mart (Wowchuck, Bernst & Popowich v. The Thunder Bay Police Service, 2012: 2). At first glance this misconduct appears to be serious since the officer used force to arrest an innocent civilian, who also had to seek medical attention days after the altercation. However, the hearing officer's logic mitigated the officer's actions.

*I truly believe the street team was doing a tough job in an area that could not be easily surveilled. That makes the job more difficult and I believe you must be more cautious.* The officers in this incident made a rushed decision. They had only been there one and one half hours (Wowchuck, Bernst & Popowich v. The Thunder Bay Police Service, 2012: 12).

The hearing officer focused on the officer's risk rather than the citizen's injury or the potential damage to public confidence that could ensue. The decision was shaped by the notion that police must be cautious when difficult circumstances arise and that the officer's rushed decision was because the officer was doing a tough job. In the penalty decision a forfeiture of 8 hours was imposed. If a substantial penalty was administered the police may fail to react in difficult situations when conducting future surveillance.

Deputy Chief Jill Skinner of the Ottawa Police Service shaped a decision by approving of an officer's risk, which adheres to the risk-adverse officer precaution rationality. After the police received a call about a boy being pulled on a skateboard by a motorcycle, two officers entered the complainant's backyard because the boy was nowhere to be found when they arrived. The officers heard a noise on the roof of the house, which led the officers to climb a ladder to assess the situation. The officers stated they entered the backyard and climbed to the roof to investigate suspicious activity, which the hearing officer felt was a legitimate claim.

Based on this collection of facts, as known by the officers at the time of this event it is my findings that a reasonable police officer would be suspicious and continue to investigate to satisfy the concern that this was a person who did not belong on the property (Batson v. The Ottawa Police Service, 2014: 9-10).

The homeowner was cleaning leaves on his roof top. When the police arrived on the roof an altercation ensued because of a misunderstanding and language barrier. One of the officers used force to arrest the homeowner, which led to a complaint about an unnecessary arrest. However, entering the backyard and the arrest was justified via the risk-adverse officer precaution rationality. The officers took a risk when confronted with suspicious activity, which the hearing officer supported.

In a hearing which two officers were charged with neglect of duty after they attended a mischief call, Inspector Bruce Townley discusses how danger shaped their conduct. The officers were in the complainant's apartment inquiring about the mischief when a heated encounter emanated. Townley highlights the difficulty of the assignment:

The officers were dispatched to a priority call that involved ... the use of a knife. These types of calls ... are *highly volatile*. ... Officers Lawrence and Foran were at an elevated level of awareness due to the information that came in, including the potential threat of a weapon. They continued on and completed a thorough investigation (Lawrence & Foran v. The Durham Regional Police Service, 2016: 18).



The altercation led to a forceful arrest and emanated because the complainant was furious the two officers were not investigating his claim that his cousin had threatened to kill him. Although the officers did not investigate the complainant's concern, the hearing officer shaped the decision based on the highly volatile situation. The hearing resulted in the officers being found not guilty of the charges. The hearing officer's rationality enforces the notion the officers had to be cautious when attending the call.

The Toronto G20 Summit in 2010 resulted in a considerable amount of media attention and public outcry (see Mendleson & Poisson, 2015). An abundance of citizens claimed to be illegally assaulted, arrested, and detained by members of the Toronto Police Service (see Mendleson & Poisson, 2015). The G20 Summit was one of the most high-profile events involving police misconduct in 21<sup>st</sup> century Canada. Public confidence in the police crumbled and a downpour of public protest and clamor ensued (see Perkel, 2012). However, the rationality that shaped the penalty decision for the officer who ordered the mass amount of arrests mitigated the officer's actions. Several risk-adverse components intersected. The hearing officer established "the evidence suggests that Fenton came up with the plan to detain and arrest everyone in short order, absent time to think it through" (Fenton v. The Toronto Police Service, 2016: 10). The hearing officer also states:

This case is unique. A Superintendent dealing with an *unprecedented situation*. Under immense pressure. Fenton took the helm on both days following the failure of a more seasoned Incident Commander to stop the violence and mass destruction in the streets. ... The Tribunal must look to general principles of disposition recognized in other cases, and consider the circumstances Fenton faced and the context in which the misconduct occurred (Fenton v. The Toronto Police Service, 2016: 7).

Discussing Fenton's lack of time to evaluate his decision and the unprecedented situation are risk-adverse principles. Moreover, the hearing officer highlights that Fenton's actions also displayed a lack of willfulness: "Fenton's intent was protection of the public, property and the

G20 delegates. He decided to make the orders and worry about the fallout later” (Fenton v. The Toronto Police Service, 2016: 7). The hearing officer focused on the notion that Fenton took a risk to protect the public as opposed to the public’s confidence.

Fenton’s actions exhibit a risk-based agenda because he acted to protect against the threat of mass destruction at the protest. Although a profusion of individuals were unlawfully arrested, the hearing officer highlighted the difficulties surrounding Fenton’s risk. Fenton was convicted of one count of discreditable conduct and two counts of exercising authority causing an unlawful arrest (Fenton v. The Toronto Police Service, 2016). For the discreditable conduct charge, he received a reprimand, while the two counts of exercising authority causing an unlawful arrest resulted in Fenton forfeiting a total of 30 thirty days pay (Fenton v. The Toronto Police Service, 2016: 18). In one of the most controversial forms of police misconduct in the 21<sup>st</sup> century that assaulted public confidence, the officer in command received a penalty that was shaped by the risk-adverse officer precaution rationality.

When the second component of the risk-adverse officer precaution rationality emerged, risk was directed at the individual officers and decisions were shaped to prevent officers from committing future misconduct. In a hearing decision for the Ottawa Police Service an officer pled guilty to abundance of discreditable conduct, neglect of duty, and insubordination charges. The officer engaged in an array of inappropriate conduct over a long period of time. The officer sent sexual pictures to women who were involved in investigations, made inappropriate comments to victims, and excessively engaged in sexual activity on duty (see Bond v. The Ottawa Police Service, 2016). The officer received a one year demotion and was ordered to complete therapy and a number of training programs. The hearing officer claims “rehabilitation

is a key factor to be taken into consideration when a penalty is imposed” (Bond v. The Ottawa Police Service, 2016: 23-24). The hearing officer also states:

Any risk of relapse of PTSD can be mitigated by appropriate medications and ongoing therapy. It was concluded by Dr. Booth that given the lack of inappropriate behaviour in the past, the consequences for him with the current hearing, the losses incurred and his insight, he would be at low risk of future inappropriate behaviours in the workplace (Bond v. The Ottawa Police Service, 2016: 23-24).

The rationality pertains to risk management because the decision is shaped to prevent the officer from committing future misconduct. The hearing officer contends the penalty will drastically reduce the risk the officer will engage in future wrongdoings. The aim of the therapy and training programs are to help the officer reacquire the status of a legitimate police officer and to prevent deviant behaviour.

An officer for the Durham Regional Police Service was charged with unnecessary force, unlawfully or unnecessarily exercising his authority, and two counts of neglect of duty (see Wiles v. The Durham Regional Police Service, 2012). The officer engaged in a physical altercation with a civilian during a traffic stop, which resulted in the civilian being injured, and intentionally neglected to complete a report about the encounter (Wiles v. The Durham Regional Police Service, 2012: 2). It was also noted how the officer had a lengthy history of misconduct.

He has had numerous criminal complaints lodged against him. He has been involved in four assault offences, has been convicted criminally, been suspended and demoted for one year. He has also served at the front desk to keep him off the road for six months (Wiles v. The Durham Regional Police Service, 2012: 3).

The officer received a 15-month demotion, training sessions, and counselling for the incident. The risk-adverse officer precaution rationality shaped the decision because the hearing officer focused on rehabilitating the officer: “the proposed penalty submissions submitted by Counsel in this matter suggest to me that this officer can be rehabilitated with an appropriate penalty disposition” (Wiles v. The Durham Regional Police Service, 2012: 6). The hearing officer also

suggested a plan be developed to help the rehabilitate the officer: “I believe it is now time for Management of the Service to sit down with the officer and develop a plan where it is monitored closely” (Wiles v. The Durham Regional Police Service, 2012: 9). Developing a plan demonstrates the hearing officer is attempting to alter the officer’s behaviour to prevent future misconduct.

Shaping decisions via the risk-adverse officer precaution rationality clearly displays a precautionary nuance. This notion contributes to Ericson’s (2007a) theory of precautionary logic because risk and precaution are distributed in an alternate manner. Although in the 21<sup>st</sup> century the police’s power to use force and arrest citizens has been increasingly perceived as a threat to public safety due to media, this is not the case in OIPRD hearings. Unnecessary arrest and use of force decisions are shaped to prevent the police from committing future misconduct and to protect against the risk of police becoming defensive and hesitant when performing their duties, which would also pose a threat to public safety.

### 5. Reshaping the OIPRD

The OIPRD has served as the gatekeeper for all public complaints about the police since 2009 in Ontario; however, in recent years the OIPRD experienced a drastic increase in public scrutiny about its procedures and decision-making processes (OIPRD, 2016: 10). Public confidence in the OIPRD began to severely diminish, which urged the government to revise the complaints system to maintain police legitimacy. Ericson (2007a: 18) notes how in the precautionary age of uncertainty, the response to a crisis involves assembling a new accountability organization to restore public confidence.

As public trust in the OIPRD began to weaken, the crisis that sparked the reshaping of the OIPRD was the death of Andrew Loku. Loku was shot and killed by a Toronto police officer

because he was aggressively advancing towards the police in the hallway of his apartment building with a hammer (Benzie, 2016). Loku's death triggered a crisis because his building housed individuals with mental illnesses, which the police were unaware of, and Loku was a visible minority. After an SIU investigation, the officer who shot Loku was cleared of all charges, which profusely dissatisfied the public (Benzie, 2016). Black Lives Matter groups expressed their displeasure through public protest. Benzie (2016) states "Loku's death and the secrecy surrounding it sparked outrage across Ontario, triggering an upcoming coroners' inquest and the two-week Black Lives Matter Toronto protest outside Toronto police headquarters." Once it was clear a public crisis threatened police legitimacy, the Ontario government responded: "On August 13, 2015, the Ontario government announced public consultations on a new Strategy for a Safer Ontario that will include updating the *Police Services Act*" (OIPRD, 2016: 10). Like Lesage's assignment at the beginning of the 21<sup>st</sup> century, the Ontario government appointed Justice Michael Tulloch to conduct the review (Benzie, 2016). Deeming the project a Strategy for a "Safer" Ontario displays that the police are still perceived as a major public safety threat.

According to Ericson (2007a: 219), "while counter-law offers the promise of certainty and security, this is an impossible mandate because catastrophic harms are inevitable, and each loss reveals the failure of the counter-law regime." The OIPRD attempted to extinguish uncertainty and abolish public skepticism about complaints being disregarded and unfairly evaluated by police services. However, the loss of a life during a heated encounter, which the SIU deemed lawful, resulted in the disintegration of public confidence and the restructuring of the OIPRD, which was originally created based on Ericson's counter-law principles. Although the death of Andrew Loku was justified after being investigated by a civilian oversight agency,

his death signaled the failure of the OIPRD and led the public to demand for a transformation of Ontario's oversight bodies and complaints procedures.

After Tulloch's public consultations, a report was published with an abundance of recommendations on how to enhance Ontario's civilian bodies (see Gillis, Gallant & Benzie, 2017). Tulloch recommended the OIPRD be reshaped to incorporate greater civilian involvement in the complaints and investigative processes to augment transparency and accountability of police services (see Tulloch, 2017). Moving forward, refinements to the OIPRD can be expected to further align with principles of risk and precaution.

## **6. CONCLUSIONS**

This thesis sought to analyze the civilian oversight agency, the OIPRD, through a risk-based lens to obtain a better understanding of police accountability. Drawing on Ericson's (2007a) theory of precautionary logic, this thesis framed the police as risky subjects who are a perceived threat to social order and public safety. Based on the notion media outlets and the increased visibility of the police in the 21<sup>st</sup> century has aggravated public fear, this thesis has demonstrated how the OIPRD emerged as a risk technology to suppress public fear and uncertainty. The OIPRD equipped the public with the power to complain about every form of perceived misconduct and continues to attempt to acknowledge and resolve every negative encounter the public has with the police.

The main aim of this thesis was to answer the overarching research question: what is the rationality that constitutes and shapes accountability in OIPRD disciplinary hearing decisions? Key findings pertain to the distribution of risk and precaution in hearing decisions. Two types of precaution materialized. The first type pertained to the public via the public precaution discourse and the second related to the individual police officer via the risk-adverse officer precaution

discourse. Public precaution emerged when hearing officers shaped the police as a threat to public confidence and safety. Outcomes were based on the notion that the public must be protected from the police; coinciding with the growth of public distrust and the escalated belief the police are risky subjects. Moreover, protecting against the deterioration of public confidence aligns with the OIPRD's focus and signifies the OIPRD is safeguarding against an officer's misconduct spreading to communities. Although the police have been increasingly framed as risky subjects in the 21<sup>st</sup> century, their focus is to protect the public and uphold the law.

The risk-adverse officer precaution rationality was also present. This rationality shaped outcomes in decisions and implies the risk of the police becoming indecisive is a major threat to the public. Decisions are shaped to prevent future misconduct and to protect against the risk of the police becoming hesitant and defensive when performing their duties. This type of precaution contributed to Ericson's (2007a) theory of precautionary logic because precaution is distributed in an alternate form, signifying a nuance. This also suggests that precaution itself and an organization's practices (in this case decisions) need to be closely scrutinized rather than relying on analysis of its mission statements and stated goals, to determine how and the extent to which it is precautionary. Put differently, while the OIPRD is shown to be about precaution in the foregoing thesis, when one drills deeper into its workings and its actual decisions precaution begins to look more complex (thus two rationalities (the public and risk-adverse officer rationalities) that are actually in tension) than first assumed.

Additionally, this thesis asked three sub-questions: (1) What is the rationality behind the implementation of the OIPRD? (2) How does the notion of incivility correspond with risk and precautionary concepts in the OIPRD complaints process? (3) How and to what extent does the OIPRD adhere to precautionary logic's notion of zero risk and counter-law? The formation of the

OIPRD was precautionary because it was implemented based on a lack of legitimate evidence and to control public fear and uncertainty. Incivility and perceived misconduct then began to be acknowledged and resolved, which demonstrates a more than rational approach to risk. Zero risk and counter-law were also certainly evident in the implementation of the OIPRD and its function. Zero risk was present in OIPRD procedures and duties rather than hearing decisions. The OIPRD eliminated an abundance of risks pertaining to public uncertainty about the complaints process and the acknowledgement of complaints. The IPRA empowered the formation of the OIPRD's multi-agency network, which demonstrates Ericson's (2007a) notion of counter-law. Professionals external to police services are now monitoring the police and this network extends to resolutions, investigations, and hearing decisions.

Elements of Ericson's (2007a) analysis of neo-liberalism also emerged in these findings. As neo-liberal politics are infatuated by the notion of uncertainty, the OIPRD eliminated uncertainties in multiple aspects of the complaints process because the police are a perceived threat to neo-liberal subjects (Ericson, 2007a: 1). Future research could evaluate new complaints procedures to discover if a greater number of uncertainties are being eliminated and explore how hearing decisions are shaped in these procedures.

Ericson (2007a: 217) contends the notion of uncertainty has reshaped the neo-liberal subject in the 21<sup>st</sup> century.

The problem of uncertainty creates the urge to hunker down, avoid risk, and limit the freedom of others in the name of security. These measures limit the entrepreneurial risk taking that liberalism needs for prosperity. Ironically, the neo-liberal subject becomes a risk-avoider rather than a risk-taker and thus not so neo-liberal after all (Ericson, 2007a: 217).

OIPRD hearing officers shape decisions via the risk-adverse officer precaution rationality to protect against the police becoming risk-avoiders while performing their duties. If police are



hesitant during heated encounters because they fear their actions will be subject to immense scrutiny, it is thought they will become a threat to the public because their public safety duties will be jeopardized. The risk-adverse officer precaution discourse is a guide for future research to explore police accountability. Interviews could be conducted to examine if complaints procedures or other factors are causing the police to become risk-adverse. Incivility has also emerged as a new form of misconduct that is being analyzed, evaluated, and resolved. Future research should examine the notion of incivility to determine if it is causing the police to become risk-adverse. Future research should also investigate future complaints procedures to discover if the concept of incivility is being expanded to acknowledge and attempt to resolve a greater number of complaints.

After an extensive review by the Ontario government, the OIPRD will be reshaped soon and most likely be subject to greater civilian involvement. Future research should analyze the modifications to civilian oversight procedures in Ontario and the goals associated with refining oversight bodies. As risk and precaution are evident in the OIPRD, future research should also examine if risk and precaution materialize in different types of misconduct and analyze if risk is distributed in an alternate form. In the 21<sup>st</sup> century, the police have been subject to extensive public scrutiny. Public confidence in the police has increasingly diminished. The police must manage public distrust daily to maintain legitimacy. In the future, it is expected civilian oversight agencies and complaints procedures will be continuously refined when public doubt begins to escalate or a high-profile event causes a public crisis. In the heavily mediated and immensely visible society we live in, complete public trust in the police may be an unattainable goal. However, police services must continue to adapt to new procedures to enhance transparency to satisfy the public.

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## APPENDIX

**Table 1: OIPRD Complaint Totals**

<b>Year</b>	<b>Total Complaints Received</b>	<b>Conduct Complaints Received</b>	<b>Conduct Complaints Screened in For Investigation</b>	<b>Conduct Complaints Screened Out</b>
October 19, 2009 to March 31, 2010	1,103	1,037	560	N/A
April 1, 2010 to March 31, 2011	4,083	3,818	1,584	1,937
April 1, 2011 to March 31, 2012	3,468	3,242	1,643	1,600
April 1, 2012 to March 31, 2013	3,316	3,087	1,436	1,651
April 1, 2013 to March 31, 2014	3,114	2,715	1,209	1,506
April 1, 2014 to March 31, 2015	2,926	2,481	1,183	1,394
April 1, 2015 to March 31, 2016	3,135	2,697	1,273	1,469

**Table 2: OIPRD Conduct Complaints**

<b>Year</b>	<b>Conduct Allegations Unsubstantiated</b>	<b>Conduct Allegations Substantiated Serious (Less Serious)</b>
October 19, 2009 to March 31, 2010	75	1(1)
April 1, 2010 to March 31, 2011	1,755	26(81)
April 1, 2011 to March 31, 2012	3,596	137(181)
April 1, 2012 to March 31, 2013	2,484	194(21)
April 1, 2013 to March 31, 2014	2,516	72(109)
April 1, 2014 to March 31, 2015	2,595	84(123)
April 1, 2015 to March 31, 2016	1,924	92(87)

**Table 3: OIPRD Complaint Resolutions**

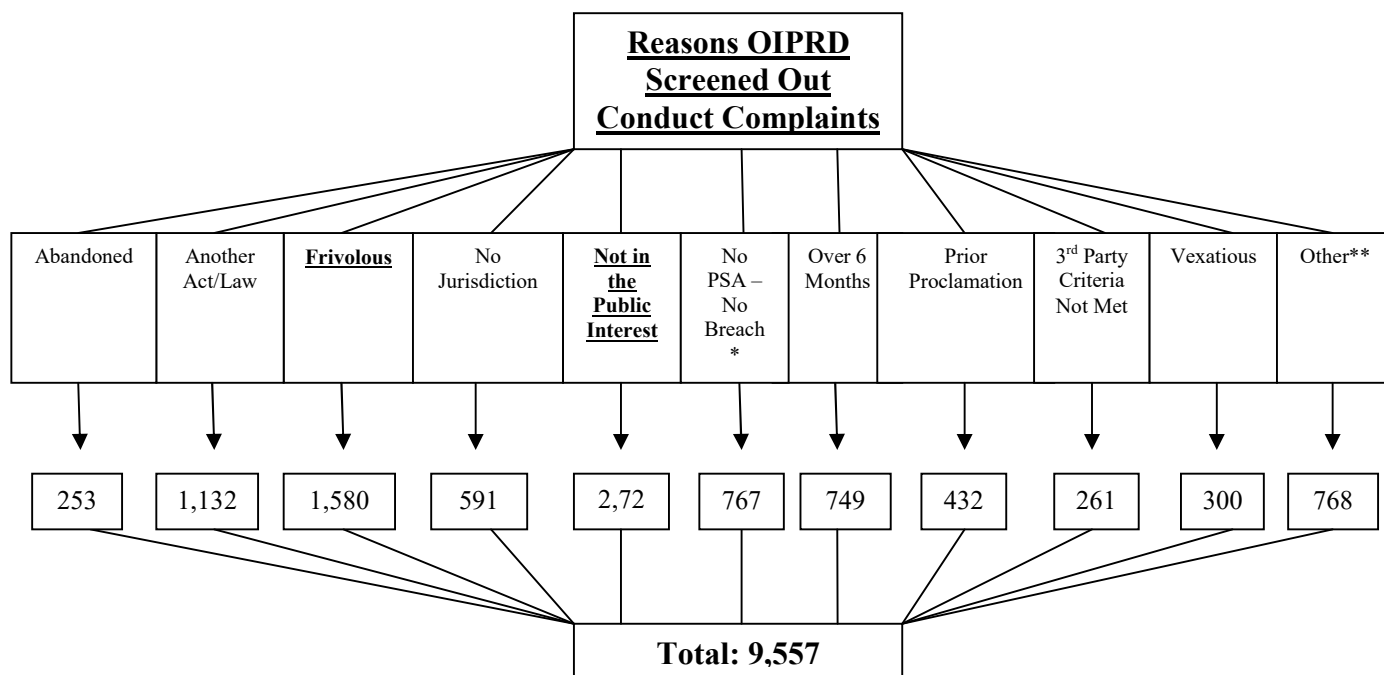
<b>Year</b>	<b>Local Resolutions</b>	<b>Informal Resolutions</b>	<b>Successful Customer Service Resolutions (CSR)*</b>	<b>Requests for Mediation (Successful)*</b>
October 19, 2009 to March 31, 2010	30	18	N/A	N/A
April 1, 2010 to March 31, 2011	55	323	N/A	N/A
April 1, 2011 to March 31, 2012	47	225	N/A	N/A
April 1, 2012 to March 31, 2013	61	273	N/A	N/A
April 1, 2013 to March 31, 2014	63	147	130	N/A
April 1, 2014 to March 31, 2015	69	233	143	N/A
April 1, 2015 to March 31, 2016	56	243	133	19(7)

\*CSR and Mediation programs were implemented in 2013-2014

**Table 4: Disciplinary Hearing Rationalities**

<b>Total Hearing Documents</b>	113
Public Precaution	42
Risk-Adverse Officer Precaution	62
No Rationality	9

**Flowchart 1: Conduct Complaints Screened Out**



\*Reason only included in the 2012 & 2013 OIPRD annual reports

\*\*Includes a number of reasons complaints were screened out such as: bad faith, duplicate complaints, incomplete form, unable to contact complainant & withdrawn after classification

### **VITA AUCTORIS**

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