CONFERENCE DRAFT

Police-Government Relations in the Context of State-Aboriginal Relations

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Introduction

The debate about the appropriate relationship between the police and the government in a liberal democracy centres on the tension between the value placed in a independently operating police force (which would be seen as an original source of action, responsible only to the law and good conscience for its actions) and the value in having police forces accountable to a representative governing body (which could set policy, and monitor – potentially even control – the actions of the police). The value in an independent police force is found in both (a) the freedom from unwarranted political interference this promises, a freedom which promotes the even application of the law to all, including those in the government, as well as in (b) the efficiency in promoting public safety and stability such a self-contained institutional structure can potentially deliver. The value in political oversight, on the other hand, is found in both (a) the protection this provides from 'rogue' police elements and (b) the fact that the police do constitute an arm of the state, necessarily accountable to the public (and the body which is charged with both ensuring that the interests of the public are being met, and that state institutions are constantly and consistently directed by the public's interests). The notion of a fully independent police force is antithetical to that of a police controlled and directed by political forces, and so some synthesis is demanded – some arrangement within which a reasonable measure of police independence is preserved in the face of the need for the police to be publically accountable. The debate is about how to arrive at such an arrangement.

This paper problematizes this debate by placing it in the context of disputes involving Aboriginal peoples in Canada. The discussion passes through three stages. The first sets out how one could attempt to conceptualize Aboriginal peoples and their situations in Canada in such a manner that the debate could proceed essentially unhindered by troublesome contextual matters. The second two stages progressively critique the parameters within which the debate commonly transpires, first by introducing the unique position of Aboriginal peoples within currently unfolding domestic jurisprudence, the second by questioning certain key assumptions that underlie this jurisprudence.

Aboriginal Peoples as Minority Populations

Viewed simplistically through a demographic lens, Aboriginal peoples in Canada can be said to constitute 'minority populations'. In liberal democracies such as Canada (in which multiculturalism is highly valued) mechanisms exist to protect minority rights[1]. Part of this protection requires that members of minority communities be

[1] See, for example, Reference re Secession of Quebec, [1998] 2 S.C.R. 217, [hereinafter *Quebec Secession Reference*] where protection of minority rights is said to constitute a fundamental constitutional

protected from unwarranted actions by either the police or the state. Insofar as the rights of minorities are accorded legal protection, and the actions of the state and all its manifestations are governed by the rule of law, the law will rule over both police and the government, assuring that neither can undercut the legal protections afforded without due consequences.

Ensuring that the rights of minorities are protected could have an impact on the appropriate balance that must be struck between (a) the need for the police to be free from political interference (when that political intrusion might run counter to the protections required for minorities in a liberal democracy), and (b) the need for the state to monitor (and perhaps to some extent control) policing activity (where an unfettered police force might act counter to the protected rights of minorities). It cannot be a simple matter of the police and the government negotiating a mutually satisfactory arrangement between themselves, for whatever balance they strike it must function to protect (or at the very least not endanger) minority rights in Canada.

Minority rights in Canada can be said to fall into two broad categories: rights that members of minority populations enjoy on the basis of their being Canadians, and rights they enjoy on the basis of their inclusion in a minority population. The latter are clearly rights held by minority groups, and the former can be classified as such because while it can be said that all Canadians enjoy the protection of their individual rights, any mechanism for protecting individual rights will primarily function to protect the interests of non-dominant groups, those that would most likely suffer the effects of discriminatory action.

Let us consider first those rights individual members of minority populations enjoy on the basis of their being citizens of Canada. There are fundamental rights and interests held by all Canadians that must be equitably and fairly recognized and protected, no matter the personal characteristics of the person(s) claiming such rights. Many of these rights are articulated in the *Charter of Rights and Freedoms*[2]. Within the framework of the *Charter,* section 15 operates to ensure that governmental practices unjustifiably discriminating on the basis of race (or ethnicity) can be found

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principle, one of four principles said to "dictate major elements of the architecture of the Constitution itself and [which] are as such its lifeblood" (at 248).

[2] Other fundamental rights may be articulated and recognized in statutes (such as human rights statutes and the Canadian Bill of Rights), in the common law, and under constitutional conventions and principles.

unconstitutional, and the situation rectified. Under this broad category of 'minority rights', then, members of minority populations can reasonably expect to be treated by and under the law in the same manner as all other Canadians.

In interacting with the police, the rights that individual members of minority groups enjoy on the basis of their being Canadians fall prey to two basic threats. First, the police might enjoy, in their sphere of authority, the ability to ignore or overrun non-discriminatory requirements. Second, concern might also lie with political direction behind either (a) particular policing operations, or (b) general policing policy (where the implementation of some policy might have the effect of discriminating on the basis of race or ethnicity). Herein lies the principal motivation (from within the context of minority group interests) for locating an appropriate structure which can operate to provide checks and balances capable of monitoring and controlling the power of both the police and the government – members of minority populations are primarily concerned with what might appear to be the seemingly unchecked ability of either the police, or a political force behind the police, to single them out for unwarranted policing attention.

The second set of minority rights are less often invoked in policing disputes in Canada. These are rights held by minority groups to the exclusion (it would seem) of other collectives. While these are commonly classified as 'special' rights, this is best seen as rhetorical flourish, for they are merely those recognized rights that minority populations must enjoy if they are to be treated equitably in a liberal democracy (in relation to the members of the dominant racial/cultural group).

So, for example, in Canada certain Francophone rights are legally recognized, especially in relation to language[3] and education[4]. While these particular rights have

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[3] For example, section 16 of the *Charter of Rights and Freedoms* states:

(1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

[4] The *Charter of Rights and Freedoms* states under section 23:

(1) Citizens of Canada

a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

their origins in the unique historical dynamic that developed between the British and French colonies in North America, their contemporary grounding arguably now rests in the liberal democratic understanding that linguistic rights are essential to the preservation of groups and group-identities[5]. English-speaking Canadians enjoy a world within which the use of their language and the existence of their educational structures are unquestioned, and this very same dominance operates as a key element going into the apprehension that a constant threat looms over Francophone cultural institutions. The dominance of English language institutions and the threat this poses to French language counterparts necessitates the protection of language rights for Francophones[6].

While it is discriminatory policing that commonly generates disputes over the proper way in which the police and the government should interact, it is possible to imagine a situation in which minority group rights would be in the background of the policing action itself. For example, a provincial government in Canada might consistently and continually act to minimize the provision of French language-based educational programs, potentially inciting members of that province's Francophone community to engage in some form of physical protest. This protest, in turn, might be met with inappropriate police action, which itself might be prompted by either (a) unacceptable (potentially ethnocentric) attitudes on the part of some members of the police force

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have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

[5] See, for example, Denise Reaume, *The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?* (2002) 47 McGill L.J. 593; *Official Language Rights: Intrinsic Value and the Protection of Difference*, in Will Kymlicka, ed., Citizenship in Diverse Societies: Theory and Practice, (New York: Oxford University Press, 2000); and, *The Constitutional Protection of Language: Security versus Survival*, in David Schneiderman, (ed.), Language and the State: The Law and Politics of Identity (Montreal: Yvon Blais Ltéée., 1991).

[6] The Supreme Court also endorsed this line of reasoning in the *Quebec Secession Reference, supra* note 1: "[A] constitution is entrenched beyond the reach of simple majority rule [because] ... a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority." [at 259]

involved, or (b) unacceptable political interference with the policy or operations of the police force.

The first sort of problem (unacceptable police attitudes) would bring to the fore concerns about discrimination, as the police involved would most likely be prone to reasonable charges of bias and intolerance. The second sort of problem is more interesting, as it may be traced back to either (a) discriminatory attitudes held by the government (or government officials involved), or (b) potentially unwarranted policy positions which deny or downplay the legal protections that should be accorded minority rights.
Aboriginal peoples in Canada can be said to enjoy both forms of 'minority rights'. They enjoy rights on the basis of their being Canadians, rights which are protected from unjustifiable discriminatory governmental action. They may also be said to enjoy certain rights in virtue of their being racial/cultural minorities – rights, for example, to the preservation and protection of their languages.

For the purposes of this study, however, little of import comes from this, as Aboriginal peoples would share these sorts of rights with other minority groups in Canada (and indeed in the case of the first sort of rights, with every Canadian). Furthermore (as we noted just above), policing disputes which engage minority rights will most likely rest on claims about discriminatory practices – unacceptable to be certain, but certainly not unique to the situations of Canada's Aboriginal peoples.

It will be necessary in the next stage of discussion, however, to re-introduce the second sort of problem – that which arises when particular disputes that draw the attention of the police and the state can be causally traced back to potentially unacceptable political (or policy) decision-making (where the relevant executive members reach decisions which essentially deny or ignore the importance of rights that should enjoy legal protection). We must reconsider this sort of problem when we introduce particular sorts of rights – distinct from 'minority rights' – that Aboriginal peoples possess[7].

The Legal and Constitutional Status of Aboriginal Peoples: Not Just Minority Populations

What makes the question about how to mediate the tension between police

[7] Thinking of Aboriginal peoples as minority groups (with particular rights legally protected) draws them into a particular conceptual circle. Understandably, then, under this conceptualization recommendations about what to do if policing problems arise would be the same whether the policing targets were urban blacks in Toronto or Aboriginals on reserve anywhere in Canada. Numerous commissions of inquiry have looked into policing problems within the context of minority concerns, and many recommendations have been tabled.

independence and political oversight particularly powerful and intriguing in the context of disputes involving Aboriginal peoples is the fact that Aboriginal peoples *do not* simply constitute minority populations within Canada. While it is open to Aboriginal people to appeal to section 15 of the *Charter*, demanding the government treat them without bias, and while they may even enjoy minority rights in virtue of the liberal democratic push to protect group identities from the threat of immersion in the larger dominant cultural milieu, Aboriginal peoples also enjoy the recognition and affirmation of existing Aboriginal and Treaty rights under section 35 of the *Constitution Act, 1982*[8].

[8] Section 35 (1) of the *Constitution Act, 1982* [being schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11], states that: "The existing [A]boriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed."

As we noted above, individuals in Canada enjoy constitutionally protected rights (with section 15 of the *Charter* operating to ensure that members of minority groups are considered equal before and under the law), while minority groups enjoy rights which serve to protect their cultural identities. Aboriginal (and treaty) rights are distinct from any of these sorts of rights. In fact, Aboriginal (and treaty) rights are distinct from any sort of right that any other party in Canada might enjoy. Besides those rights persons in Canada might enjoy on the basis of their being people (fundamental human rights) and citizens (fundamental political rights – which some might argue are themselves grounded in human rights), persons in Canada also enjoy rights granted by the state. More specifically, they can enjoy what we can generally classify as property rights. Individuals (and corporations) can hold fee simple title to land, corporations (and more rarely individuals) can have licences to cut and harvest trees on Crown land, individuals and corporations can enjoy patents protecting innovative products they have developed, and so forth. These rights, created by the state and grounded in recognition by the state, reach back in Canada at least as far as the grant of what amounts to a monopoly business licence to the Hudson's Bay Company in its Royal Charter of 1670[9].

Aboriginal (and treaty) rights are distinct in origin and nature from *any* of these sorts of rights. The following chronicles some of the more visible ways in which Aboriginal (and treaty) rights differ from rights held by other Canadians, either individually or collectively. While some of these differences may be shared with some of the other recognized rights Canadians enjoy, together they paint a picture of distinct and unique Aboriginal and treaty rights.

1. Aboriginal (and treaty) rights are group rights, held exclusively by Aboriginal peoples of Canada. Not only are the rights not attached to Aboriginal peoples as individual citizens of Canada, but they are not restricted to contemporary Aboriginal

[9] I am distinguishing between the right to hold property, which may be argued to be a human or political right, and the particular rights to property that may be held by parties in Canada.

communities. They are rights which reach out to future generations of Aboriginal peoples, protecting their interests alongside those of people now living in Aboriginal communities[10].

[10] This is the only way to make sense, for example, of the 'inherent limit' placed on Aboriginal title in Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*]. Lamer C.J., in describing the nature of Aboriginal title, held that while it encompasses the power to use the land in ways which are not tied to traditional practices, traditions and customs, this power is limited in that the title-holders can not use the land in a way which might break the traditional connection to the land which established the title in the first place. The reason for this limit, Lamer C.J. stated, was to preserve the ability of future generations of Aboriginal peoples to continue to enjoy their title rights, in ways which reflect the interests the community traditionally has in the land.

Furthermore, the language of treaties makes perfectly clear their prospective nature, reaching out endlessly into the future, protecting the future interests of Aboriginal treaty nations.

2. They have been accorded *explicit* constitutional protection: While section 15 protects minority groups from governmental discriminatory action, fundamental rights that might be threatened are not articulated in this provision – indeed, the test for determining whether section 15 has been respected speaks of the protection of 'interests' and as much as it does rights[11]. Furthermore, only in relation to Francophone rights do we find in the law explicit and detailed recognition of minority group rights (besides that explicit recognition we only find section 27 of the *Constitution Act, 1982* speaking vaguely of the promotion of 'multiculturalism', and jurisprudence speaking only of a constitutional convention or principle concerning the protection of minority rights[12]).

3. This constitutional protection precludes the extinguishment of Aboriginal (and treaty) rights by the government – at most the legislative branch can justifiably infringe these rights (through a test introduced in R. v. Sparrow[13], modified in R. v. Gladstone[14], and applied to treaty rights in R. v. Badger[15] and R. v. Marshall[16]).

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[11] See, for example, Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.

[12] See again, for example, *Quebec Secession Reference*, *supra* note 1.

[13] R. v. Sparrow, [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*].

[14] R. v. Gladstone, [1996] 2 S.C.R. 723.

[15] R. v. Badger, [1996] 1 S.C.R. 771.

4. By implication, the executive cannot infringe upon these rights – only legislative action meeting the test for justification can do so.

5. Aboriginal (and treaty) rights are not grounded in recognition of the need to preserve Aboriginal culture or heritage (though Supreme Court jurisprudence may be mistakenly taken at times to have suggested that this is so[17]).

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[16] R. v. Marshall ,[1999] 3 S.C.R. 456 [hereinafter *Marshall*].

[17] In R. v. Van der Peet, [1996] 2 S.C.R. 507 [hereinafter *Van der Peet*], Lamer C.J. developed a test for the establishment of Aboriginal rights which demands of the claimant that they demonstrate that the present activity said to fall under the right be continuous with an practice, tradition or custom integral to the culture of the people claiming the right at the time of contact with Europeans. While this suggests a cultural grounding for these rights, this test is meant not to suggest *why* these rights are accorded protection in section 35, but rather *how to identify* rights which are so protected. Elsewhere Lamer C.J. states that the reason for the protection accorded these rights lies in the need to reconcile the prior presence of organized Aboriginal societies to the sovereignty of the Crown (see the discussion beginning at paragraph 39).

Clearly any sort of 'cultural' grounding would make no sense for treaty rights, which come out of sacred agreements establishing fundamental ways in which two sets of peoples would co-exist over one territory.

6. They are grounded in the need to reconcile the prior presence of organized Aboriginal societies to the assertion of Crown sovereignty[18].

7. The very content of these rights, then, is grounded in the *prior existence* of organized Aboriginal societies. As such they cannot be thought of as based in any fashion on grants from the state. Aboriginal title cannot be thought of as any sort of granted interest in land[19], and Aboriginal rights cannot be thought of as forms of licence to do one thing or another.

8. They are marked by and intertwined with a complex fiduciary relationship that binds the Crown and Aboriginal peoples[20]. This entails recognition of a relationship which precludes the Crown from viewing its obligations to Aboriginal peoples as merely 'political' – its obligations, in many instances, will be entirely legal in nature.

9. In light of this historically grounded relationship, with its trust-like quality, the *honour* of the Crown in engaged when dealing with the legal and practical interests of Aboriginal peoples[21].

With the overview of the ways in which Aboriginal (and treaty) rights differ essentially from any other rights held by minority populations in Canada, we can now turn to the question of the form the discussion around the tension between police

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[18] *Van der Peet, supra* note 17.

[19] *Delgamuukw, supra* note 10.

[20] The existence of a fiduciary relationship (as opposed to a political relationship, or a pure trust relationship) was introduced in the context of land surrenders in R. v. Guerin, [1984] 2 S.C.R. 335. In *Sparrow, supra* note 13, the general relationship between the Crown and Aboriginal peoples was characterized as fiduciary in nature (which structured the sort of process of justification in which the Crown would have to engage when it acted to infringe Aboriginal rights).

[21] This was especially highlighted in *Marshall, supra* note 16.

independence and political oversight should take in the context of disputes involving Aboriginal communities.

Police-Government Relations in the Context of Aboriginal and Treaty Rights

To highlight the impact contextual matters have on this debate we can contrast two situations which may seem fairly similar, but which rest on fundamentally different premises: on the one hand, consider policing problems that might arise when the police interact with protestors voicing political dissent, while on the other hand, consider a policing problem that might arise when the police interact with Aboriginal protestors voicing dissatisfaction with the government's treatment of their particular situation, involving potential Aboriginal and/or treaty rights.
The right to engage in political protest is protected in Canada under the right to free expression[22] (and as well under the rights to peaceful assembly and to association[23]). This sort of activity receives constitutional protection (afforded on the basis of the importance of the rights to free expression and to gather with others of like mind – especially in protest against government policy and action – in a free and democratic society[24]). The Aboriginal protestors could also be said to be exercising their constitutionally protected right to free speech, but their protest itself revolves around claims about government inaction in regards to *other* constitutionally protected rights – Aboriginal (and perhaps treaty) rights.

Inappropriate police activity in relation to the non-Aboriginal political protest may lead to calls to reevaluate the relationship between the police and the government in power (especially, of course, if it appears that the police action was driven by government directive, which would call into question the strength of what many see as a necessary 'firewall' between the police and the state[25]). Similarly, inappropriate police activity in relation to the Aboriginal protest may lead to questions about the relationship between the police and the government in power (especially, once again, if it appears the government inappropriately directed the police in this matter).

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[22] See, for example, remarks in R. v. Keegstra, [1990] 3 S.C.R. 697. At page 728 the Court also noted that prior to the arrival of the *Charter* and the rights protected in section 2, political expression formed the core of expressive content protected under the right to free speech (as valued in democratic societies). The *Charter* continues to protect political expression, but broadens the scope of application of the right to free speech protected under section 2(b).

[23] The *Charter of Rights and Freedoms*, sections 2 (c) and (d).

[24] See, for example, Committee for the Commonwealth of Canada v. Canada, [1990] 1 S.C.R. 139.

[25] See, for example, the discussion of certain authorities (for example, Pierre Elliot Trudeau) who take this side of the issue in Kent Roach's "Four Models of Police-Government Relations" [prepared for the Ipperwash Commission, 2004].

In both types of situations a reevaluation of the relationship would likely indicate the need for a stronger firewall between the police and the government (especially in relation to particular police operations, when such operations are following established policy which seems to further the public interest, but partisan political concerns apparently intrude in the situation). Constitutionally protected rights are at issue, and the ability of the state to rise above the rule of law (facilitated through what many might see as its unwarranted use of the police) would seem to call for a greater measure of police independence.

Does it matter that we are considering structurally different scenarios? After all, in the case of the non-Aboriginal political protestors we may be witness to nothing more than an exercise of their right to free speech, while in the case of the Aboriginal protestors we are witness to an exercise of a right to free speech in relation to protests over other constitutionally protected rights. We might do well, then, to contrast the protest of an Aboriginal community with a type of situation introduced earlier – that wherein a Francophone population in a province protests over a systematic government policy of disregarding their language rights, where that protest is met by inappropriate police action, likely driven by political directives. Very little changes, however, if we contrast these two sorts of situations: reevaluating the police-government relationship would once again seem to point to the same outcome: a greater degree of police independence is called for, especially in relation to particular police operations already guided by policy aimed at promoting public interests.

Some fundamental distinctions exist, however, between the two sorts of non-Aboriginal situations imagined (in regards to basic rights to free speech and association and to constitutionally protected language rights) and the situation surrounding Aboriginal (and treaty) rights. The key differences lie not in the fact that Aboriginal and treaty rights are group rights, nor in their having a different set of requirements for the government to meet should the government attempt to justify infringement, but rather in the source of these rights in non-Canadian *original* societies, and their being embedded in a fiduciary context, with the honour of the Crown engaged.

What impact, however, do these fundamental differences have in regard to the debate over the proper relationship between the police and the government? To see and appreciate the impact they generate we need to refocus on the reasons commonly brought in to bolster arguments for either greater police independence or more political control.

On the one hand, there are what might be termed negative reasons for the promotion of

each position: greater police independence is promoted as a way of protecting the public from undue political interference in what should be even-handed policing matters, while greater political control is promoted as a means of protecting the public from potentially unfettered inappropriate police activity. On the other hand, there are what might be termed positive reasons for the promotion of each position: a police force operating free of political interference is more effective in working under its mandate to further the safety and well-being of the citizenry (which includes acting as a pillar in the maintenance of the rule of law), while political control is essential to the task of ensuring the police continue to operate in the direction of the public's interests (where one of the government's essential functions is that of representing the public and its interests).

While the two sets of negative reasons serve to create and underscore the tension between police independence and political control, the positive reasons actually converge and mutually reinforce each other around the notion of the public's interests. The positive reasons focus our attention on the fundamental interest that lies at the heart of the relationship between the public, the government, and the police: the need to create in a liberal democratic society an institutional framework within which the police are best able to function as protectors of the public, promoting safety and ensuring a free and peaceful civil atmosphere.

At this point in Canada's history, however, Aboriginal (and treaty) rights are being introduced into the legal and political landscape, a task charged with tremendous responsibility, responsibility which falls exclusively to the government. A process of reconciliation (between the prior presence of Aboriginal societies and Crown sovereignty) is only just beginning, and will be ongoing for some time to come, and it requires of the Crown that it work out how Aboriginal peoples and their interests will be worked into the fabric of society. Part of this will require that direction be provided to police forces, as they must be directed (a) away from actions which potentially interfere with Aboriginal (and treaty) rights, and (b) toward actions which promote the reconciliation envisioned.

In such an environment police independence must, then, be tempered, as the government ought to be *constantly* and *actively* involved in the task of establishing and implementing policing policy which can adequately uphold the honour of the Crown and which satisfactorily meets its fiduciary requirements. While it remains true that some measure of police independence should be maintained in relation to particular policing operations, even in the case of particular operations government monitoring ought to be expected, as its responsibilities extend to all contexts in which the legal and practical interests of Aboriginal rights-holders might be unduly threatened.

The outcome of this analysis would seem to be, then, an endorsement of something like the third model of police-government interaction explored by Kent Roach, that of democratic policing[26]. A core of policing functions should be by and large removed from government interference, but the government should have a large monitoring role (especially in relation to policy-laden operations), and should play an active role in developing and implementing policing policies.

Calling Into Question the Parameters of the Debate

The analysis, however, has introduced elements which reach unavoidably beyond the constraints of the debate over appropriate police-government relationships. This has the effect of 'problematizing' the debate, calling into question the adequacy of its parameters given the context in which it is here being carried out. In short, the very same aspects of this context that pointed toward a particular model of appropriate police-government relations – the source of Aboriginal (and treaty) rights, and their nature in Canadian law as bringing with them notions about the honour of the Crown (as it functions to temper its own power with legally-mandated fiduciary duties) – also serve to place the debate itself into a particular and unique context.

[26] Kent Roach, "Four Models of Police-Government Relations", prepared for the Ipperwash Commission, 2004.

In the context of Aboriginal (and treaty) rights the government is not free to develop and implement policy as it sees fit. This is essentially what it means to say that "federal power must be reconciled with federal duty"[27], which is the notion that lies at the heart of the imposition of fiduciary obligations on the Crown. The government is not bound to merely political obligations, as fiduciary doctrine has been introduced to reflect the fact that the Crown's hands are tied by the law (and not by politics). This fact does not trace simply back to the content of Aboriginal (and treaty) rights, but to their source – in their being grounded in organized societies pre-dating the arrival of the Crown to present-day Canada. Until the process of reconciliation has run its course in a fair and just fashion the Crown cannot treat Aboriginal peoples as nothing more than groups of citizens within society, their rights contained entirely within the ambit of the social contract forming the nation-state. In a sense, a fully formed social contract (which will complete the process of welcoming Aboriginal peoples into Canadian society) would be the outcome of this process.

What this means in the context of police-government relations should be clear. While some discretionary leeway around the exercise of decision-making power will still be unavoidably present, in broad terms the decisions of the government about how to set appropriate police policy are by and large settled.

Consider a 'traditional' fiduciary-beneficiary relationship, one wherein the fiduciary has discretionary control over the legal and/or practical interests of the beneficiary, such that the fiduciary is in a position to act unilaterally to either positively or negatively influence those interests[28]. While there may be some discretion available in how this fiduciary can work with (and further) the beneficiaries' interests, there are strong guiding principles (a) laying out general restrictions on how the fiduciary can act, and (b) guiding the fiduciary toward a narrow range of acceptable options for acting. Ranging over the particular principles and guide-posts is one over-arching fiduciary principle: the fiduciary must act in the best interests of the beneficiary (in relation to the interests at stake).

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[27] *Sparrow*, *supra* note 13.

[28] See, for example, Frame v. Smith, [1987] 2 S.C.R. 99, Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, and Hodgkinson v. Simms et al., [1994] 3 S.C.R. 377.

The very same sort of situation confronts the government as it sets out how to approach Aboriginal issues, even when the particular problem is about how to direct the police either when they are engaged in policing a particular dispute about Aboriginal (and treaty) rights or when the question is about how to set general policing policy. Fiduciary responsibilities intrude, constraining the government as it goes about exercising its powers.

It is clear, then, that what must dominate the discussion over the proper relationship between the police and the state in the Aboriginal context is the rule of law. Both the police and the government must be firmly ensconced under the rule of law, and the nature and ambit of the law under which they must fall must be adequately understood and acknowledged. In this context the substance of the law is provided by fiduciary doctrine, and more particularly by the principles which guide fiduciaries as they exercise control over the legal and practical interests of beneficiaries. Aboriginal peoples have reposed trust in the government that it will deal fairly and honourably with their interests, and it is this trust that is protected by the rule of law, which acts to ensure that the honour of the government manifests into appropriate policy and direction.

This implicates the courts in the debate over the appropriate relationship between the police and the government, for the judiciary must function to measure the degree to which the government has met its legal obligations, dispensing remedies as warranted. In a sense the courts must take on the role of overseer, monitoring and measuring the success of the relationship between the government and the police established by the government, where the measuring stick is provided by fiduciary doctrine and the jurisprudence around Aboriginal and treaty rights. The courts have (somewhat reluctantly) taken on this role in relation to the government's treatment of Aboriginal and treaty rights, and must see that this constitutionally mandated task carries with it the need to constantly assess both (a) how the government has responded to the legal interests of Aboriginal peoples, and (where the government has systematically ignored or denied the existence of rights which, prima facie, seem plausibly established) (b) the response of the government to the policing of disputes that might arise. Not only must the government be seen not to be unjustifiably interfering with the particular operations of the police once the police are engaged in policing a dispute, but it must be seen as establishing policies for the police to follow in such situations which themselves respect the fiduciary position of the government.

Further Problematizing the Debate: Aboriginal Peoples' Positions on the Margins of Society

An examination of the debate over the proper relationship between the police and the government in the context of state-Aboriginal relations would not be complete without

consideration of questions about the very nature of state-Aboriginal relations. Much of the discussion in the previous section hinged on the unquestioned acceptance of a particular judicial conceptualization of the relationship between the state and Aboriginal peoples, and yet the conceptualization employed is extremely contentious, especially as viewed from within many Aboriginal communities. The last section of this work introduces the nature of the conceptualization used, focusing on key assumptions upon which it rests. The nature of the conceptualization is itself problematic, but equally so is the notion that the judiciary is the appropriate body to be charged with the task of constructing a conceptualization of state-Aboriginal relations. As we will see, problematizing in this manner the debate around the appropriate relationship between the police and the state in the context of state-Aboriginal relations leads to radically different suggestions about how the debate itself be altered (and thereby resolved).

The central assumption structuring the judicial conceptualization of the Aboriginal-state relationship is that the relationship is one essentially internal to the state. While earlier we noted that the purpose of section 35 has been held to be to reconcile the prior presence of Aboriginal societies to the sovereignty of the Crown, this has been understood (in the minds of both the state and its courts) as not implying that Aboriginal peoples do not fall under the sovereignty of the Crown. The reconciliation envisioned by the state and its courts is seen as working out how Aboriginal peoples, *who already fall under the sovereignty of the Crown*, are to have one fact of their existence (that the lineage of their communities pre-dates the arrival of the Crown to Canada) acknowledged and respected within Canadian society.

In the minds of many Aboriginal peoples, however, it is this central assumption that is most contentious. While it is difficult to contend with the fact that some form of reconciliation between Aboriginal and non-Aboriginal peoples is necessary, many Aboriginal people do not view the process of reconciling as a matter of working out an arrangement under the *pre-condition* that the issue is seen as inherently internal to Canadian society, but rather as a matter of working out how an arrangement can be arrived at between these two broad sets of communities. While the outcome of this process may very well be that Aboriginal communities come to be fully encompassed within Canadian society, many Aboriginal communities are opposed to the notion that debate over how they will fit within Canadian society must *begin* with the notion that they are already under and subject to Canadian sovereignty.

This central assumption colours the rest of the debate over how the police and the state are to appropriately interact, even when that debate is 'problematized' as it was in the previous section. Since the judicial vision of reconciliation begins with the 'unquestioned' fact of Crown sovereignty[29], the demands of reconciliation are all one-

[29] *Sparrow*, *supra* note 13.

sided, with Aboriginal communities having to submit to the power of the government (and its third arm, the judiciary) to determine their place in Canadian society. The rest of the jurisprudence around Aboriginal (and treaty) rights illustrates the impropriety in this move, as Aboriginal (and treaty) rights have gradually settled into the status of being linked to 'traditional practices and customs', with the vitality of powers of self-determination entirely removed from their core, and their nature and strength determined under unique principles of fiduciary doctrine.

Some might suggest that fiduciary doctrine was meant to counteract the vestiges of colonialism in domestic law, for it elevated the government's interaction with Aboriginal peoples from the political plane to the legal arena. The fiduciary relationship defined by the Court, however, actually pays a key role in the perpetuation of what amounts to a modern-day form of colonialism, now firmly entrenched in domestic law in Canada. While the government is held to the legal requirements attendant on its being a fiduciary, the reason it is said to be in this position is keyed to the contentious view Aboriginal peoples have of the law – the Crown is held to be in a fiduciary position as a result of its *having control over* the legal and practical interests of Aboriginal peoples in Canada. Under this conceptualization, while Aboriginal (and treaty) rights are rights attached to Aboriginal communities, they are controlled by the state and its courts, both purportedly acting 'in the best interests' of Aboriginal communities.

It is not just that fiduciary doctrine is employed to subvert Aboriginal interests, removing them from the control of Aboriginal communities, and thereby maintaining – indeed reinforcing – the subordinate role these communities have found themselves in vis-a-vis the state over the last 150 years. If it were only a problem with the legal doctrine propounded by the Supreme Court, one could argue that the road out of colonialism lay in simply replacing this doctrine with another legal conceptualization of the state-Aboriginal relationship, one which would grant Aboriginal peoples better control of their own interests. The problem, however, lies in the larger framework within which exists the mechanism churning out a process to determine how Aboriginal issues can be dealt with.

Once again, the central problem (which sets the larger framework) lies in the initial presumption that state-Aboriginal relations are a matter internal to Canadian society. It is this initial presumption which lies behind the role the courts then play in determining the legal characterization they construct of state-Aboriginal relations. Only if we begin with the notion that Aboriginal peoples are already subject to Crown sovereignty can we move on to the notion that the courts of Canada can legitimately take upon themselves the task of conceptually constructing the contours of the legal relationship between the state and Aboriginal peoples.

It is in this sense, then, that a problem exists not only with the judicial conceptualization

of the relationship between the state and Aboriginal peoples, but also with the fact that the courts of the state have been charged with the task of developing such a conceptualization. If the conceptualization they develop and work under were a 'given' there would be no problem, for it would legitimate their work in developing such a conceptualization. But since they develop the notion that Aboriginal peoples are already subject to Crown sovereignty (and that working out a relationship between the Crown and Aboriginal peoples is a problem internal to Canadian society), the legitimacy of their work is called into immediate question.

This problem is not mitigated by the language of the rule of the law. That is, one cannot say that since the vision of police-state relations developed in the previous section places the rule of law in a dominant position the vision is thereby unassailable on these grounds. We noted that the rule of law plays a prominent role in the unfolding of the judicial determination of the relationship between the state and Aboriginal peoples, as the government is held to legal requirements set out under the unique fiduciary relationship said to exist between the Crown and Aboriginal peoples.
This entire structure, however, begins with the determination of the place Aboriginal interests will have within domestic law, a determination made by courts constituting an arm of the Canadian state. Any appeal the position drawn enjoys rests upon prior unreflective acceptance of the notion that it is appropriate for the institutions of domestic law to arrive at conceptualizations of the state-Aboriginal relationship which can inform the legal apparatus which will rule over all[30]. This ignores the problem with

[30] This is not to say that the application of the rule of law is not entirely welcome in the context of state-Aboriginal relations, for the prominence of the rule of law may act to assuage a valid and central concern of Aboriginal communities. These communities are distrustful (and rightfully so) of the motives and plans of both federal and provincial Crowns. If the governments of Canada are constricted in their activities in relation to Aboriginal communities and their interests, this can act to displace some of the accumulated distrust. Given that the position we are discussing in this last section is unlikely to have a practical effect upon the state and its courts, at least one can hope that the prominent role accorded the law acts to channel government action into paths more respectful of Aboriginal peoples.

We also noted in the previous section, however, that under this model of police-state interaction the courts take

legitimating the role Canadian courts play in (a) setting out what the rule of law entails, (b) monitoring the governments as they function in relation to the legal obligations they are found to fall under, and (c) working to hold governments to the requirements established under these obligations.

While it is entirely commendable that Canada, as a liberal democracy, is committed to the rule of law, one has to be clear on the fact that the appropriate application of the rule of law rests on certain preconditions. An appropriate application of the rule of law presupposes the existence of a substantive positive body of rules and principles (the body of law which is to rule evenly over all in society). An appropriate application of the rule of law also presupposes the existence of an established society, one which enjoys boundaries recognized and (at least tacitly) accepted by those who make up its citizenry. And finally, an appropriate application of the rule of law presupposes the existence of institutions rightly charged with the task of generating legal rules, principles and tests recognized and (at least tacitly) accepted by those who make up the society in question.

Questions swirl around these preconditions in the context of state-Aboriginal relations, even in the form in which this relationship has been conceptually constructed by the governments and courts of Canada. In regards to police-government relations in the context of Aboriginal issues, for example, we have seen that the part of the substantive positive body of law that would govern over the actions of the government in this context would be a uniquely constructed body of fiduciary doctrine. The courts have

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on an important role, for they must (a) monitor the degree to which the governments of Canada act to respect their fiduciary obligations, and (b) work as best they can to hold the governments to the task of meeting their duties. The courts themselves, though, cannot fall under a similar body of substantive law, one which could constrict their activities in relation to Aboriginal communities and their interests, unless they put themselves into such a box. Presumably, then, they would also then have to undertake to monitor their own activities, and to hold themselves accountable to the law they introduced to govern the relationship between the judiciary and Aboriginal peoples.

introduced onto the scene fiduciary doctrine, and taken upon themselves the task of laying out how the contours of this doctrine would develop in this unique situation. But while this picture can be commended when the liberal and democratic society over which the rule of law governs is safely 'given', in the context of Aboriginal issues it is the very nature of the presence of Aboriginal peoples in society that is unsettled. In a liberal democracy there must be an assurance that the body of law which rules over all parties is appropriately arrived at, and when the question is about how societies which have an existence pre-dating the liberal democracy will be reconciled to the existence of this new arrival, the answer cannot be to begin with the notion that institutions of the liberal democracy have the authority to decide how the relationship will be understood.

Implications for the Discussion of the Appropriate Relationship Between the State and Police in the Context of Aboriginal Issues

Challenging the parameters of the debate around police-government relations in this manner radically alters what can be meaningfully said about how the two bodies should interact in the context of Aboriginal protests and disputes. While in the previous section we noted that domestic jurisprudence points us toward a democratic policing model supplemented with the notion that the state must operate under restrictions imposed by their falling under fiduciary obligations in relation to Aboriginal peoples, this model cannot be simply amended upon reflection on the factors we have considered. What the discussion points to, rather, is a much larger and more fundamental challenge, that of working out a fair and just relationship between the state and Aboriginal peoples (one which does not begin with the presumption that Aboriginal peoples are subject to Crown sovereignty and the authority of the state's courts).

Faced with this challenge little can be said about how the state and police should interact when the police are interacting with Aboriginal people. Something can be suggested along lines which run roughly parallel to those which drove the previous discussion, but this suggestion could be little more than suggestive. As we noted earlier, the rule of law is an empty vessel, presupposing for its appropriate application a given collective over which it can legitimately govern, institutions which can be properly charged with the task of developing legal rules, tests and principles, and appropriate mechanisms for monitoring and enforcing adherence to the rules, tests and principles constructed. In a situation in which two distinct collectives meet and mingle one can imagine (a) a larger collection built out of the two, but within which the two maintain their integrity and distinctive powers and entitlements, (b) an institutional body which could set out rules and principles guiding the interactions of these two collectives (an institutional body acceptable to both collectives), and (c) mechanisms for monitoring and enforcing adherence to the rules and principles constructed (again, acceptable to both collectives).

If these imagined structures could be constructed around the worlds of Aboriginal and non-Aboriginal societies, the question of how the police should interact with the state

might begin to come into focus, and some resolution attained.

Conclusion: The Three Stages of Analysis

In the first section of this work the notion that Aboriginal peoples can be characterized as 'minority populations' was examined in relation to the task of finding an appropriate balance between police independence and government oversight in the context of Aboriginal issues. Jurisprudence around Aboriginal (and treaty) rights, however, clearly demonstrates that Aboriginal peoples, while numerically minority populations, possess constitutionally protected rights which cast the debate into a particular light. The means by which Aboriginal (and treaty) rights are legally protected from unjustifiable government interference (and the means by which the Crown must act in order to justify certain infringements) dictates that a democratic policing model be adopted in the Aboriginal context, though one which is itself overseen by the law (with the judiciary ensuring, for example, that in setting policing policy the government act in concert with its fiduciary obligations to Aboriginal peoples). In the last section of this work certain key assumptions that lie at the heart of this jurisprudence were explored, the result being the charge that neither the legal framework developed, nor the institutional body tasked with developing this framework (the courts of Canada), is appropriate in the context of Crown-Aboriginal relations.

One might wonder, however, at the necessity of entering into the third stage of analysis. Since the discussion in the last section is unlikely to play a role in settling the debate 'on the ground' around the proper relationship between the government and the police in the Aboriginal context, what purpose could it possibly serve?

The response to this sort of challenge is two-fold. On the one hand, this sort of discussion must be presented simply because it lays out axiomatic problems which will forever plague relations between the state and Aboriginal peoples, no matter how 'generous' and 'liberal' judicial and governmental action might become. With the failure to take the first few necessary steps down a fair and just path to reconciliation, the rest of the journey is doomed. On the other hand, and more immediately pressing for the sort of project undertaken in this work, presenting this form of analysis lays out the topography against which the debate over the proper relationship between the state and the police in the Aboriginal context must take place.

Without the landscape laid out in this fashion some might imagine that the conceptualization of the relationship developed by the Supreme Court is a 'radical' or extreme position from which concessions must be (and most likely would) follow. This, as we noted, is far from the case. Indeed, the position taken by the Court carries with it a demands that Aboriginal peoples across Canada make a fundamental concession, a concession that runs so deep as to potentially undermine the ability of Aboriginal

communities to work out any sort of acceptable arrangement within Canadian society. Seen juxtaposed against the true relationship between the Crown and Aboriginal peoples, it can be seen for its being essentially an attempt to cut off Aboriginal aspirations at the root. In the very least, this can show that those who would argue that no unique contextual matters requiring special legal protections arise in conjunction with the debate in the Aboriginal context around police-government relations are either ignorant of Canadian history, or attempting to deploy a tactic only possible within a colonial state.