

## Conference Draft – June 29, 2004

### Four Models of Police-Government Relationships

Kent Roach\*

#### Introduction

The contested issue of whether and to what extent the police are independent from the government can pop up at any time. When it does, it will often raise the temperature and the profile of the public debate, but the result can often be more heat than light. One need not look far back in time to find examples of recent controversies in Canada concerning the relationship between the police and the government. They include the conclusion of Justice Hughes in the 2001 APEC report that there had been “improper federal government involvement” in the RCMP security operation and that the police had “succumbed to government influence and intrusion in an area where such influence and intrusion were inappropriate.”<sup>1</sup> Most recently, we have seen statements by Canada’s Leader of the Opposition that the laying of criminal charges just before an election call seemed suspicious. The Minister responsible for the RCMP responded that such allegations were “appalling and profoundly unacceptable”.<sup>2</sup> Controversy can at times serve the purpose of prompting and clarifying thought, but these recent events appear to have done relatively little to generate a consensus about the appropriate relationship between the police and the government. Indeed, the relationship between the police and the government appears “murky”<sup>3</sup> to many even though it is a matter of considerable civic and constitutional significance.

It is, however, difficult to be too critical of the state of public understanding about the relationship between the police and the government. As Professor Philip Stenning has concluded there is “very little clarity or consensus among politicians, senior RCMP officers, jurists..., commissions of inquiry, academics, or other commentators either about exactly what ‘police independence’ comprises or about its practical implications...”<sup>4</sup> Indeed, one can find support in some statutes, cases and commentary for opposite conclusions on

---

\* Professor of Law, University of Toronto. I thank Lynne Weagle for her diligent research assistance.

<sup>1</sup> Commission Interim Report Following a Public Inquiry into Complaints that took place in connection with the demonstrations during the Asia Pacific Economic Cooperation Conference in Vancouver (Ottawa: Commission of Public Complaints, RCMP, 23 July 2001) [www.cpc-cpp.gc.ca/defaultsite/](http://www.cpc-cpp.gc.ca/defaultsite/) at 30.4

<sup>2</sup> Susan Delacourt “Flurry of civil suits expected within days” *Toronto Star* 11 May, 2004.

<sup>3</sup> Susan Delacourt “To serve and protect its political bosses” *Toronto Star* 17 April, 2004.

<sup>4</sup> Philip Stenning “Someone to Watch over Me: Government Supervision of the RCMP” in Wes Pue ed. *Pepper in Our Eyes: The APEC Affair* (Vancouver: University of British Columbia Press, 2000) at 113.

## Conference Draft – June 29, 2004

whether the police are independent from governmental direction and the ambit of any independence. For example, there is some support for a broad understanding of police independence that would extend beyond the freedom of the constable to decide whom to investigate and whom to charge to cover a broad range of other policing decisions. At the other extreme, there is some support in statutes and cases for a thin to non-existent doctrine of police independence that sees the police in Canada as civil servants subject to Ministerial control and direction. There are, of course, a variety of views in between these two extremes. There is confusion about whether police-government relations should be funneled through the responsible Minister or should include discussions with central agencies and political staff. Finally, there is the critical question of whether a distinction between the government informing itself about police matters and influencing the police is sustainable in the minds of politicians, police and the public at large.

The relationship between the police and the government is a matter of fundamental constitutional significance in any state. It is particularly challenging in a country such as Canada which is free and democratic and committed to the rule of law. On the one hand, the idea that the police are a law unto themselves is unacceptable in a democracy that prides itself on restraint in the use of coercive state-sponsored force and on accountability for the use of such powers. On the other hand, the idea that the police are directed by the government of the day raises concerns about improper partisan concerns influencing or appearing to influence the machinery of justice. There is a need to respect and balance both the principles of independence and accountability and to do so in a manner that advances our aspirations to be a democratic nation that is governed by law. The competing values were well summarized by an RCMP spokesperson who in response to allegations of political interference in policing recently commented that “police have a unique role to play in our democratic system. On the one hand, their criminal investigations must be absolutely free of political influences. Yet on the other, they must not become the law unto themselves.”<sup>5</sup>

---

<sup>5</sup> Tim Cogan as quoted in Susan Delacourt “To serve and protect its political bosses” *Toronto Star* 17 April, 2004

## Conference Draft – June 29, 2004

The first part of this paper will briefly trace the history of police independence with an emphasis on Lord Denning's views in *Ex parte Blackburn*<sup>6</sup> that a police constable is independent and answerable only to the law. Although this case is often favourably cited in Canadian law and commentary, it will be seen that Lord Denning's understanding of police independence was contested both before and after its articulation in the United Kingdom. Although it purported to establish a broad and absolute relationship of independence between the police and the government, both *Blackburn* and the cases it relied upon actually dealt with very different issues such as whether the government was civilly liable for police actions and whether the courts could review decisions by the police not to enforce laws. The Quebec Court of Appeal concluded in 1980 that the British common law concept of police independence was thoroughly inappropriate in the Canadian context of national and provincial police forces responsible to Cabinet Ministers.<sup>7</sup> Although the Quebec Court of Appeal's decision has largely been ignored, it finds some support in legislation governing Canada's two largest police forces, the RCMP and the OPP. As will be seen, in both cases the relevant laws contemplate that the police are subject to the direction of an elected Minister who sits in Cabinet.<sup>8</sup> The modern concept of police independence was born in controversy in the United Kingdom and its applicability to Canada has been contested from the start.

The second part of this paper will examine the Canadian experience with police independence with an emphasis on the multiple controversies that have occurred over the last 45 years. These controversies range from the resignation of a Commissioner of the RCMP because his Minister refused his request to send re-enforcements to a volatile labour strike to the most recent allegations by the Leader of the Opposition that the timing of charges arising from the sponsorship scandals just before an election was suspicious. Various law reform proposals including those made by the McDonald Commission into the RCMP, the Royal Commission on the Prosecution of Donald Marshall Jr. and the APEC report will be examined, as will the findings of those inquiries about governmental involvement in policing. The Supreme Court of Canada's discussion of police independence

---

<sup>6</sup> [1968] 1 All E.R. 763.

<sup>7</sup> *Basailon v. Keable and Attorney General of Quebec* 1980 Carswell 22 (Que.C.A.) (1980) 17 C.R.(3d) 193 rev'd on other grounds [1983] 2 S.C.R. 60.

## Conference Draft – June 29, 2004

in *R. v. Campbell and Shirose*<sup>9</sup> will be examined, as will the question of whether that case has elevated police independence from a constitutional convention that in practice restrains the exercises of Ministerial powers to a component of one of Canada's organizing constitutional principles, namely the rule of law.<sup>10</sup>

The third part of this paper will attempt to identify the fundamental principles and interests at stake, as well as the range of reasonable disagreement, by constructing four models of police-government relationships. Given the lack of consensus about the proper ambit of police independence, the complexity of the subject, and the tacit assumptions that lie behind different understandings of police independence, it is my hope that the identification of models will facilitate debate about this important subject. The first model of full police independence is one in which the police are immune and isolated from governmental intervention on a wide variety of matters including the policing of demonstrations. This model is best associated with Lord Denning's views in *Ex parte Blackburn* about the independence of the police constable. The second model of quasi-judicial or core police independence restricts police independence to core functions such as decisions to start criminal investigations and lay charges. This model finds some support in *Campbell* as well as the reports of the McDonald, Marshall and APEC inquiries. The third model of democratic policing protects police from direction by the government on core law enforcement functions, but maintains the ability of the responsible Minister to be informed about policy-laden elements of criminal investigations and to shape all other policy or public interest matters in policing. This model is best associated with the recommendations of the McDonald Commission which stressed the importance of democratic control and accountability for policing. The fourth model of governmental policing is one in which the police are conceived by and large as civil servants subject to Ministerial control and protected only by their ability to refuse to obey unlawful orders. This

---

<sup>8</sup> *Royal Canadian Mounted Police Act* R.S.C. 1985 c.R-10 s.5(1) and *Police Services Act* R.S.O. 1990 c.P-15 s.17(2).

<sup>9</sup> [1999] 1 S.C.R. 565

<sup>10</sup> *Reference re Secession of Quebec* [1998] 2 S.C.R. 217. In that case, the Supreme Court recognized the rule of law, federalism, minority rights including the rights of Aboriginal peoples and democracy as the organizing albeit unwritten principles of the Canadian constitution that could in some cases prevail over even the constitutional amendment formula. This approach can be contrasted to earlier decisions that recognized constitutional conventions grounded in similar values as rules of propriety that generally restrained the exercise of powers in law but could not invalidate legal powers. *Reference re Amendment of the Constitution of Canada* [1981] 1 S.C.R. 753.

## Conference Draft – June 29, 2004

model finds some support by the wording of police acts which suggest that the police are “under the direction of the Minister”<sup>11</sup> and the Quebec Court of Appeal’s rejection of the common law understanding of police independence as inconsistent with such statutes.<sup>12</sup> The governmental policing model could also embrace developments in government which stress the importance of Cabinet and central agencies in co-ordinating or dominating the multi-faceted work of government and the increasing erosion of traditional notions of Ministerial accountability.

The fourth and final part of this paper will outline some of the key questions that will inform the choice of models. The first critical issue is how the ambit of police independence should be defined. Should it be confined to core or quasi-judicial functions related to criminal investigations or does it also cover other matters such as the methods of police deployment at demonstrations? As will be seen, the answer to this critical question may depend on the respective trust given to the police and politicians and whether there is transparency and accountability for political interventions in policing. Another fundamental issue is whether distinctions that some scholars and some royal commissions have drawn between governmental requests for information and explanations from the police and governmental attempts to control, direct and influence the police are sustainable? At issue is not only the ability to make intellectual distinctions, but whether these distinctions are sustainable in the real world of police, politics and public cynicism that places politicians below used car salespeople in terms of public respect and trust.<sup>13</sup> Related issues concern the appropriate timing of political interventions either before or after the police have made preliminary decisions and whether political interventions should be reduced to writing. Another crucial issue that will affect the choice of any particular model of police independence is whom exactly constitutes the government? Is it limited to the Minister responsible for the police or does it extend to the senior civil service, political staff, the Cabinet and central agencies. One challenge in developing a 21<sup>st</sup> century approach to police-government relations is to account for increased centralization within government that can allow even the responsible Minister to be by-passed in favour of central agencies and their

---

<sup>11</sup> *Royal Canadian Mounted Police Act* RSC 1985 c.R-10, s.5(1).

<sup>12</sup> *Bisaillon v. Keable* supra

<sup>13</sup> Donald Savoie *Breaking the Bargain Public Servants, Ministers and Parliament* (Toronto: University of Toronto Press, 2003) at xi.

## Conference Draft – June 29, 2004

political apparatus.<sup>14</sup> Important questions remain about the quality of political direction that the police might receive from government. Is the distinction between permissible political intervention in the public interest as opposed to impermissible partisan concerns sustainable? Is it realistic to expect that Ministers will impose standards on the police that are more respectful of the right to dissent in a democracy than the minimum standards imposed by the Constitution? Is it possible to design systems to promote greater accountability for political directions to the police or will requirements that political directions to the police be reduced to writing and made public be circumvented and/or dismissed as too unwieldy? The ultimate and difficult goal should be to design understandings and processes that will promote fidelity to both democracy and the law and to produce the optimal balance between independence and accountability.

### **I. A Short History of the Contested Birth of Police Independence**

The most famous articulation of the idea of police independence was made in 1968 by Lord Denning. It was made in a rather odd case brought by Mr. Blackburn challenging a confidential instruction by the Commissioner of the London police to his officers not to enforce certain gambling laws.<sup>15</sup> The police had decided to revoke their blanket policy not to enforce the law, which might have rendered the case moot. This did not deter Lord Denning who stated:

I have no hesitation in holding that, like every constable in the land, [the Commissioner of the London Police] should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act, 1964, the Secretary of State can call upon him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see

---

<sup>14</sup> Donald Savoie *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999) at 125.

<sup>15</sup> Mr Blackburn brought a subsequent case charging that the police were not enforcing laws against pornography. *R. v. Metropolitan Police ex parte Blackburn* [1973] Q.B. 241. This challenge was rejected but as in the 1968 case, the courts left the door open to judicial intervention in an extreme case of police refusal to enforce the law.

## Conference Draft – June 29, 2004

that it is brought. But in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.<sup>16</sup>

In support of the above categorical propositions, Lord Denning cited two cases that held that there was no master and servant relationship between the Crown and the police for the purpose of determining civil liability.<sup>17</sup> Writing in 1965, Geoffrey Marshall, a distinguished constitutional scholar, argued that the cases relied upon by Lord Denning rest “almost entirely upon fairly recent inferences from the law of civil liability”. The cases were not concerned with general constitutional principle, but only that “there is no master and servant relationship between constables and their employers in the rather special sense which has been given that phrase in the law of torts.”<sup>18</sup> At their highest, the civil liability cases relied upon by Lord Denning in Professor Marshall’s opinion stood for the proposition that the police, like the military, could reject illegal orders. This limited form of independence, however, “does not entail independence in the sense of an immunity from subjection to lawful orders.”<sup>19</sup> Professor Marshall, however, worried that “the exaggerated and inconsistent” idea of police independence “has almost taken on the character of a new principle of the constitution while nobody was looking.”<sup>20</sup>

Lord Denning’s expansive and absolutist approach ignored that police conduct had frequently been discussed in Parliament. As far back as 1888, it had been explained that the Secretary of State for Home Affairs should be held “fully responsible, not for every detail of the management of the [London] police force, but in regard to the general policy of the police in the discharge of their duty.”<sup>21</sup> It also ignored the distinction that a 1962 British Royal Commission had drawn about the need to avoid political interference in the “quasi-judicial” decisions of police officers related to criminal investigations and other “public

---

<sup>16</sup> *R. v. Metropolitan Police ex parte Blackburn* [1968] Q.B. 116 at 135-136.

<sup>17</sup> *Fisher v. Oldham Corporation* [1930] 2 K.B. 364; *Attorney General for New South Wales v. Perpetual Trustee Company* [1955] A.C. 457

<sup>18</sup> Geoffrey Marshall *Police and Government* (London: Methuen, 1965) at 34; Geoffrey Marshall *Constitutional Conventions* (Oxford: Oxford University Press, 1984) ch. 8.

<sup>19</sup> Marshall *Police and Government* at 45.

<sup>20</sup> *Ibid* at 120.

<sup>21</sup> As quoted in John Edwards *Walking the Tightrope of Justice* (Halifax: Queens Printer, 1989) at 20.

## Conference Draft – June 29, 2004

interest” policing decisions including the manner in which a Chief Constable “handles political demonstrations or processions and allocates and instructs his men when preventing breaches of police arising from industrial disputes [and] the methods he employs in dealing with an outbreak of violence or of passive resistance to authority”.<sup>22</sup> It also ignored that 1964 *Police Act* enacted in the wake of that Royal Commission gave both the Secretary of State and local police authorities responsibilities for providing for “efficient” police and powers to request reports from Chief Constables and even to dismiss Chief Constables. From its modern birth, the doctrine of police independence was contested.

Lord Denning did not bother to cite a Canadian master and servant case, but he could have. The Supreme Court in the recent *Campbell* case relied upon the same master and servant cases as Lord Denning relied upon, but added one decided by the Supreme Court in 1902, well before the cases relied upon by Lord Denning. In that case, Strong C.J. stated:

Police officers can in no respect be regarded as agents or officers of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government, but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are entrusted are derived from the law, and not from the city or town under which they hold their appointment.<sup>23</sup>

My point is not to argue that police independence is illegitimate because it rests on civil liability cases decided for very different purposes. It is only to suggest that it was born under

---

<sup>22</sup> Royal Commission on the Police *Final Report* Cmnd 1728 at paras 87- 93. The Commission suggested that “a chief constable, in dealing with these quasi-judicial matters, should be free from the conventional processes of democratic control and influence” *ibid* at para 87. With respect to other public interest matters, the Chief Constable would be immune from orders, but would “be exposed to advice and guidance” from the relevant political authorities. Persistent disregard and flouting of such advice would raise questions about possible dismissal of the Chief Constable. *Ibid* at para 93. For further discussion of the origins and evolution of the concept of police independence in the United Kingdom and of this Royal Commission see Philip Stenning “The Idea of the Political ‘Independence’ of the Police: International Interpretations and Experiences” in this volume.

<sup>23</sup> *McCleave v. City of Moncton* (1902), 32 S.C.R. 106 at 108-109. For an examination of other early Canadian civil liability jurisprudence see Stenning *Legal Status of the Police* (Ottawa: Law Reform Commission of Canada, 1981) at 102-112. Professor Stenning concludes that “none of these cases, however, determines the implications of the constitutional status of the police in terms of their liability to receive direction of any kind with respect to the performance of their duties.” *Ibid* at 110.



## Conference Draft – June 29, 2004

somewhat dubious circumstances. The reliance on civil liability cases means that the concept of police independence has been under-theorized from the start from a constitutional or administrative law perspective. Courts and sometimes commentators have been too quick to cite extraneous statements from cases as opposed to thinking through the rationale and implications of police independence from government.

Although the Supreme Court of Canada in the 1999 case of *R. v. Campbell*<sup>24</sup> has found support for the principle of police independence in the above civil liability cases and *Ex Parte Blackburn*, not all Canadian courts have so readily accepted such authorities. In 1980, a three judge panel of the Quebec Court of Appeal in *Basillion v. Keable* rejected the common law principle of police independence and made statements that may seem heretical to many proponents of police independence. Although the case was reversed on appeal by the Supreme Court of Canada, the Supreme Court reversed the case on other grounds<sup>25</sup> and did not confirm or deny the Court of Appeal's categorical dismissal of the common law concept of political independence. Even if the Court of Appeal's decision has been overtaken by *Campbell*, it should be examined here because it reminds Canadians of the need to adapt the English common law to Canadian circumstances and in particular the statutory framework of Canadian police acts.

The lead judgement in the case was written by Turgeon J.A. He stressed that that in contrast to the English history “notre système d'administration de la justice est tout à fait différent, et le rôle et le statut de la police à l'intérieur de ce système est clair et bien défini par des textes législatifs.”<sup>26</sup> The Minister of Justice in Quebec had at the time statutory powers over the police in Quebec and the Solicitor General had statutory powers over the Royal Canadian Mounted Police. There was strong streak of legal positivism and legislative supremacy in Turgeon J.A.'s judgment, but he also suggested that the national policing model used in Canada could be contrasted with a more local policing model in the United

---

<sup>24</sup> This case is discussed infra part 2.

<sup>25</sup> It could be argued that the Canadian fixation on federalism and now the Charter in relation to policing may have distracted attention from general constitutional principles concerning the relation between the police and the government. Compare Peter Hogg *Constitutional Law of Canada* 3<sup>rd</sup> ed (Toronto: Carswell, 1992) ch. 19 with William Wade and Christopher Forsyth *Administrative Law* 8<sup>th</sup> ed (Oxford: Oxford University Press, 2000) ch. 5.

<sup>26</sup> *Basillion v. Keable and Attorney General of Quebec* 1980 Carswell 22 at para 28 (Que.C.A.) rev'd on other grounds [1983] 2 S.C.R. 60.

## Conference Draft – June 29, 2004

Kingdom. In his 1965 book, Geoffrey Marshall had made a similar point, observing in the English context that:

Feelings about the political undesirability of directing constabulary forces from a single administrative centre have perhaps overlapped with the notion that the members of such forces ought to be under no form of external direction at all. If the nineteenth-century statutory regulation of police forces had taken the form of setting up a single national force it seems doubtful whether so much would have been heard about the autonomous common law powers of constables. Such a doctrine would cut across the necessities of public accountability to Ministers and Parliament.<sup>27</sup>

The suggestion here is both that the statutes trump and overtake the common law, but also that questions of accountability need to be formalized when policing is done at the national or provincial as opposed to the local level.

L'Heureux-Dube J.A. concluded that “comme mon collègue Turgeon et pour les raisons qu'il invoque, j'estime que l'appelant exerce une fonction de l'état en matière d'administration de la justice. En ce sens, l'appelant doit être considéré comme un fonctionnaire de l'état, même si son statut au sein de la fonction publique peut différer de celui d'autres fonctionnaires.”<sup>28</sup> Her idea that police officers are civil servants, even with the qualification that they exercise different functions than other civil servants, would, rightly or wrongly, be viewed as heresy by believers in Lord Denning's views of the constable as independent from the executive and answerable only to the law. A year later, albeit without reference to the case, the McDonald Commission similarly commented that Lord Denning's comments had unfortunately been “constantly transposed to the Canadian scene with no regard to those essential features that distinguish Canadian police forces from their British counterparts” and that statutory reference to the RCMP being subject to Ministerial direction “has to that extent made the English doctrine expounded in *Ex parte Blackburn* inapplicable to the R.C.M.P.”<sup>29</sup>

The Quebec Court of Appeal's decision is of more than historical significance because it finds some support in current legislation governing Canada's two largest police

---

<sup>27</sup> Marshall *Police and Government* supra at 25.

<sup>28</sup> *Basillon v. Keable* supra para 130

<sup>29</sup> Commission of Inquiry Concerning Certain Activities of the RCMP *Freedom and Security under the Law* (Ottawa: Supply and Services, 1981) at 1011. (henceforth McDonald Report)

## Conference Draft – June 29, 2004

forces, the Royal Canadian Mounted Police (RCMP) and the Ontario Provincial Police (OPP). Section 5(1) of the *Royal Canadian Mounted Police Act* provides:

The Governor in Council may appoint an officer, to be known as the Commissioner of the Royal Canadian Mounted Police, who, under the direction of the Minister, has the control and management of the Force and all matters connected therewith.<sup>30</sup>

From 1959<sup>31</sup> to 1966, the relevant Minister was the Minister of Justice of Canada; from 1966 to 2003, it was the Solicitor General of Canada and from the end of 2003 to the present, it is the Minister of Public Safety and Emergency Preparedness. As will be discussed in the second part of this paper, the Supreme Court of Canada has appeared to read down this reference to Ministerial direction of the RCMP in the *Campbell* case to exclude direction in matters of criminal investigation. Nevertheless, s.5 of the *RCMP Act* continues on its face to lend some support to the Quebec Court of Appeal's conclusions that the common law concept of police independence has been altered by the Canadian statutory framework governing police-governmental relations.

Section 17(2) of Ontario's 1990 *Police Services Act*<sup>32</sup> also contemplates Ministerial direction of the provincial police force by providing that:

Subject to the Solicitor General's direction, the Commissioner has the general control and administration of the Ontario Provincial Police and the employees connected with it.

As in the federal sphere, the responsible Minister has recently been re-named and is now called the Minister of Community Safety and Correctional Services.<sup>33</sup> In contrast to the *RCMP act* and even though there was little discussion of police independence and police-governmental relations at the time of its enactment, the Ontario legislation does define the duties and powers of the Solicitor General or now the Minister of Community Safety. In

---

<sup>30</sup> *Royal Canadian Mounted Police Act* R.S.C. 1985 c.R-10.

<sup>31</sup> *Royal Canadian Mounted Police Act* S. C. 1959 s. 5 . Before that time, the *North-West Mounted Police Act* of 1873 36 Vict c.33 s. 33 also contemplated that the Department of Justice would be responsible for the "control and management" of the force.

<sup>32</sup> RSO 1990 c.P.15. Other provincial policing acts also follow this model of recognizing the power of the responsible Minister, usually the Solicitor General, to direct the police. See *Police Act* R.S.B.C. 1996 c.367 s.7, *Police Act* R.S.A. 2000 c. P-17 s.2(2) and *Police Act* S.Q. 2000 c.12 s.50;

<sup>33</sup> O.C. 497/2004.

## Conference Draft – June 29, 2004

addition to a variety of educational, informational<sup>34</sup> and inspection matters, these duties include monitoring police forces to ensure that adequate and effective police services are provided; monitoring police boards and police forces to ensure that they comply with prescribed standards of service; assisting in the co-ordination of police services, issuing directives and guidelines respecting “policy matters”. Conspicuous in their absence is any reference to providing direction on matters of criminal investigation or indeed direction in individual cases as opposed to “directives and guidelines respecting policy matters”.<sup>35</sup> The Ontario act may implicitly recognize some degree of police independence from government more by what it omits than what it includes. This may be an improvement from the *RCMP Act* which on its face contemplates unrestricted Ministerial direction of the police, but it is not as explicit or as precise as it could be in spelling out the exact ambit of police independence or the proper relationship between the Minister and the police. One of the reasons for controversy and confusion about police independence in Canada is the general absence of clear statutory definitions of the concept.

### II. A Canadian History of Police Independence as an Idea

The reception of police independence in Canada has been both uneven and controversial. The issue of police independence has most often surfaced in public discourse in Canada at times of scandal. In this part I will provide a brief history of police independence as an idea in Canada. Fortunately, much of this work has been done by a valuable essay published by Professor Philip Stenning in 2000.<sup>36</sup> As will be seen, however, in the four years that have passed since that publication, there has been continued controversy in Canada about the appropriate relationship between the government and the police.

#### The Nicholson Affair

The origins of debate about police independence in Canada pre-date Lord Denning’s famous declarations in *ex parte Blackburn*. In 1959, the head of the RCMP, Commissioner

---

<sup>34</sup> For example, s.3(I) contemplates that the Minister may “provide to boards, community policing advisory committees, and municipal chiefs of police information and advice respecting the management and operation of police forces, techniques in handling special problems and other information calculated to assist.”

<sup>35</sup> Section 31(4) of the *Police Services Act* is more explicit with respect to the powers of municipal police services boards and states that “the board shall not direct the chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police.” Nevertheless, it must be noted that the controversy rages over the extent of “operational” autonomy. The choice of the “operational” definition may not be ideal. The McDonald Commission’s concluded that operational decisions can often raise policy issues. See McDonald Commission *supra* at 868-869 discussed *infra*.

<sup>36</sup> Stenning “Someone to Watch over Me” *supra*

## Conference Draft – June 29, 2004

L.H. Nicholson resigned in protest after the Minister of Justice refused to follow his recommendation that 50 officers be sent to Newfoundland to deal with a heated labour dispute after the Smallwood government had passed a law decertifying an American union. It bears noting that Commissioner Nicholson is a hero to the RCMP and its main building in Ottawa which houses the Commissioner's office is named after Nicholson.

Commissioner Nicholson justified his resignation on the following terms: "I feel most strongly that the matter of law enforcement should be isolated and dealt with on its own merits. This is the attitude the force has taken throughout. It has not concerned itself with the issues back of the strike but has merely tried to maintain law and order in the area."<sup>37</sup> These comments demonstrate a tendency to define even possibly policy-laden decisions about whether a larger police presence was in the public interest in terms of a technical exercise of law enforcement expertise. Although Commissioner Nicholson's refusal to consider issues in "back of the strike" manifests an impartiality that is admirable in terms of laying charges, it also demonstrates a certain lack of concern with the larger public interest issues that are engaged in an escalation of the police presence during volatile times of political protest. It is an important and difficult issue whether issues relating to the deployment of forces during demonstrations and strikes should be left to the police or be decided by the responsible Minister or perhaps the Cabinet.

The Minister responsible for the RCMP at the time of the Nicholson affair was the Minister of Justice, Davie Fulton. He justified his refusal to approve the re-enforcements on a number of grounds. One was that "after consulting with my colleagues", he had concluded that "it was not possible to send the additional men requested without prejudicing the other responsibilities and duties of the force". This explanation smacks of second-guessing the Commissioner who has the responsibility and the expertise to manage the police force. Such second-guessing might justify a Commissioner's resignation, albeit more as a matter of having lost the confidence of the Minister and less as a matter of constitutional principle.

Minister Fulton gave a second explanation of his refusal to agree with the Commissioner's request for re-enforcements. It was a concern that sending the extra officers

---

<sup>37</sup> as quoted in *ibid* at 89.

## Conference Draft – June 29, 2004

“might only act as provocation to further incidents of violence and provocation.”<sup>38</sup> This is the type of policy and public interest considerations that Commissioner Nicholson believed were part of the issues behind the strike and as such not of concern from a law enforcement perspective. Nevertheless, they are issues that can be of concern to the responsible Minister and the government of the day. The manner in which a government responds to protests—whether it treats protesters as concerned citizens entitled to respect or as common criminals—is a matter of intense political controversy and engagement. The Minister’s statements raise the important issue of the nature and quality of the direction that the police may receive from their political masters. Prime Minister Diefenbaker later explained the decisions in political terms that may strike some as partisan: “I was not prepared to sacrifice the reputation of the RCMP to save either Mr. Smallwood or the reactionary corporations which owned the Newfoundland forest industry.”<sup>39</sup> The decision not to send RCMP re-enforcements was also part of a larger political decision by the federal Cabinet that included discussion about whether it would disallow Newfoundland’s de-certification legislation.<sup>40</sup> This background raises the question whether the Minister was genuinely concerned about provoking more violence or whether there were also partisan concerns in back of the decision. These questions will undoubtedly be explored at length by historians, but they raise immediate and pressing issues about whether Ministerial involvement is to be desired and whether the distinction between public interest and partisan concerns is sustainable.

The Minister of Justice was ambiguous about whether the ultimate decision was made by him alone or by the government of Canada. This raises the important issue of whether political intervention in policing can be channeled through the responsible Minister or whether it will extend throughout government. Professor Stenning reports that the decision not to send in RCMP re-enforcements was actually made by the Cabinet and the Prime Minister after being discussed at no less than five Cabinet meetings.<sup>41</sup> In addition, the Minister of Justice was opposed to this decision and would have supported the request of the RCMP Commissioner to send re-enforcements. The Minister of Justice as Attorney General and the Solicitor General are both law officers of the Crown who with respect to certain

---

<sup>38</sup> *ibid* at 90.

<sup>39</sup> John Diefenbaker *One Canada: The Years of Achievement 1957 to 1962* (Toronto: Macmillan, 1976) at 317.

<sup>40</sup> Robert Bothwell, Ian Drummond and John English *Canada Since 1945: Power, Politics and Provincialism* (Toronto: University of Toronto Press, 1981) at 240-241.

## Conference Draft – June 29, 2004

decisions may be able to assert independence from the Cabinet in making decisions about particular cases. At the same time, this convention, especially with respect to policing, is far from clear or universally supported.<sup>42</sup> Policing decisions made at the Cabinet level will be made subject to Cabinet solidarity and confidence. This raises questions about the transparency of political involvement in policing. If political intervention can be justified in policing matters, then there is a strong argument that it should be done in a transparent manner that ensures that the politicians who intervene are held accountable for such decisions whether in the court of public opinion or in a court of law.

The Nicholson affair is a particular rich source for thinking about police independence. It reveals how the police may claim independence not only with respect to quasi-judicial or core functions such as the laying of charges, but over deployment issues that may involve larger policy issues about the proper approach to political demonstrations. If the Minister had acceded to the Commissioner's request to send the extra officers, who would have been accountable had the additional deployment resulted in violence between the police and the strikers? The Nicholson affair also reveals how political explanations for decisions involving policing may not always be clearly or consistently explained or promote full responsibility for the particular decision. The Minister of Justice attempted to explain the decision at first in somewhat technical terms relating to the staffing obligations of the RCMP only to later hint that a policy decision had been made to take a less confrontational approach to the strike by refusing to send in more police. As discussed above, the public interest and partisan dimensions of such policy decisions can sometimes be blurred. Finally, the Minister of Justice respected the confidentiality of Cabinet deliberations, but did so in a manner that obscured the role that the Cabinet and the Prime Minister played in the decision. In short, the Nicholson affair raises difficult issues about whether police independence extends to deployment issues; whether the public interest can be separated from partisan interests in policy decisions related to the policing of protest; whether governmental decisions with respect to deployment will be made by the Prime Minister, the Cabinet or the responsible Minister; and whether political decisions will be made in a manner that promotes transparency and accountability.

---

<sup>41</sup> Stenning "Someone to Watch Over Me" at 95.

## Conference Draft – June 29, 2004

### Trudeau v. McDonald

Another major controversy over government involvement in policing arose over the activities of the RCMP security services in the wake of the 1970 October crisis. This episode resulted in sustained public debate about the appropriate relationship between the police and the government as well as important recommendations by the McDonald Royal Commission. For our purposes, the end result was the production of differing yet articulate and enduring understandings of police independence.

At one end of the spectrum were comments made by Prime Minister Pierre Trudeau during a press conference held in 1977. These comments by a former Minister of Justice and constitutional law professor deserve to be quoted at some length because they represent the fullest and most considered statement by an active Canadian politician on the issue of police independence. Mr Trudeau stated:

I have attempted to make it quite clear that the policy of this Government, and I believe the previous governments in this country, has been that they...should be kept in ignorance of *the day-to-day operations of the police force* and even of the security force. I repeat that is not a view that is held by all democracies but it is our view that and it is one we stand by. Therefore, in this particular case it is not simply a matter of pleading ignorance as an excuse. It is a matter of stating as a principle that the particular Minister of the day *should not have a right to know* what the police are doing constantly in their investigative practices, what they are looking at, and what they are looking for, and the way in which they are doing it....

I would be much concerned...if the Ministers were to know and therefore be held responsible for a lot of things taking place under the name of security or criminal investigation. That is our position. It is not one of pleading ignorance to defend the government. It is one of keeping the government's nose out of the operations of the police force at whatever level of government.

---

<sup>42</sup> See generally John Edwards *Ministerial Responsibility for National Security* supra and John Edwards *Walking the Tightrope of Justice* supra



## Conference Draft – June 29, 2004

On the criminal law side, the protections we have against abuse are not with the government. They are with the courts. The police *can go out and investigate crimes*...without authorization from the Minister and indeed without his knowledge.

What protection do we have then that there won't be abuse by the police in that respect? We have the protection of the courts. If you want to break into somebody's house you get a warrant, a court decides if you have reasonable and probable cause to do it. If you break in without a warrant a citizen lays a charge and the police are found guilty. So this is the control on the criminal side, and indeed the ignorance, to which you make some ironic reference, is a matter of law. The police don't tell their political superiors *about routine criminal investigations*.

On the security side,...the principle has been that the police don't tell their political superiors about the day to day operations. But they do have to act under the *general directions and guidelines laid down by the government of the day*. In other words, the framework of the criminal law guides the policy of the police and on the criminal side the courts check their actions.<sup>43</sup>

Although Trudeau's statement is obviously influenced by Lord Denning's comments about police independence in *Ex Parte Blackburn*<sup>44</sup>, it goes beyond it by asserting not only police independence from control or direction by the government, but also police independence from requests for information by the government. As will be seen, the McDonald Commission took issue with Prime Minister Trudeau's views on this matter. At the same time, the Trudeau statement does seem to limit the ambit of police independence to matters of "criminal investigation". Although Trudeau makes some reference to independence from Ministerial direction and knowledge in "day to day operations", it is not clear that this is a broader concept than the process of criminal investigation. In contrast, Lord Denning in *Ex parte Blackburn* seemed to include some issues of police deployment within the ambit of police independence.

---

<sup>43</sup> As quoted (emphasis added) in J.L.I.J Edwards *Ministerial Responsibility for National Security* (Ottawa: Supply and Services, 1980) at 94-95.

## Conference Draft – June 29, 2004

It is possible that Prime Minister Trudeau would not go as far as Lord Denning or Commissioner Nicholson in including police deployment within the ambit of police independence. This is also supported by some evidence that even before the October Crisis of 1970, the Trudeau Cabinet had directed the RCMP to pay more attention to the dangers of separatism, as opposed to externally sponsored subversion,<sup>45</sup> as well as a 1975 Cabinet directive that was issued in response to the disclosure that the RCMP had been monitoring the activities of the Parti Quebecois. This 1975 Cabinet directive appeared to restrict the RCMP Security Service to acts such as espionage, foreign espionage, terrorism, governmental change by force or violence. It was discussed in the House of Commons in 1976 and 1977 and declassified in 1978.<sup>46</sup> It was, however, not the last word on the matter as the Cabinet in 1976 responded to confusion about the 1975 directive by indicating to the RCMP that “information that a candidate for appointment to a sensitive position in the public service, or a person already in such a position, is a separatist or a supporter of the Parti Quebecois, is relevant to national security...”<sup>47</sup> The evidence of a variety of messages and directives from Cabinet to the RCMP raises similar questions to the Nicholson affair about the lack of transparency and accountability for political guidance to the police. Should the police receive instructions through the responsible Minister or Cabinet or in a more roundabout fashion? Should the public be aware of the directions given to the police so that they may, in theory at least, hold the government accountable for such directions?

As mentioned above, the McDonald Commission took issue with Prime Minister Trudeau’s expansive views about police independence. Much of the groundwork for the Commission’s eventual views is found in a research study prepared for it by the late John Edwards. Professor Edwards’ approach was based on his firm belief that it was possible to separate public interest from partisan considerations when the responsible Minister intervened in policing or prosecutorial matters.<sup>48</sup> Some might argue that in matters relating

---

<sup>44</sup> Stenning “Someone to Watch Over Me” *supra* at 100.

<sup>45</sup> *Ibid* at 100-101; Edwards *Ministerial Responsibility for National Security* *supra* at 91. In the summer of 1967 a security panel of civil servants under the Privy Council Office “encouraged the RCMP to make a greater effort to keep the government informed about the separatist movement in Quebec- its democratic and constitutional manifestations and its connection with foreign interference activities.” McDonald Commission at 90.

<sup>46</sup> Edwards *Ministerial Responsibility for National Security* at 91-93.

<sup>47</sup> McDonald Commission at 77-78.

<sup>48</sup> Professor Edwards defined improper partisan political considerations as those “designed to protect or advance the retention of constitutional power by the incumbent government and its political supporters”. He

## Conference Draft – June 29, 2004

to separatism, it would be difficult if not impossible for the Trudeau government to separate the public interest from partisan considerations.

Professor Edwards also maintained that Prime Minister Trudeau was wrong to treat “knowledge and information as to police methods, police practices, even police targets, as necessarily synonymous with improper interference with the day to day operations of the police.” Indeed, he argued that “undue restraint on the part of the responsible Minister in seeking information as to police methods and procedures can be as much a fault as undue interference in the work of police governing bodies and individual chiefs of police.”<sup>49</sup>

Professor Edwards raised in stark relief the dilemmas of on the one hand avoiding political interference in policing while on the other hand avoiding political shirking of responsibility for police activities. The McDonald Commission itself adopted a similar view when it stated that “a police force with an arm’s length relationship to government- may produce problems as serious as the partisan misuse of the security intelligence agency.”<sup>50</sup>

The idea that the responsible Minister was entitled and indeed under a duty to be informed about police practices that raised general issues of policy was reflected in the final report of the McDonald Commission. It noted that the common law principle of police independence was qualified in Canada both by the reference to Ministerial direction in the *RCMP Act* as well as the role of the Commissioner of the RCMP in supervising the actions of individual constables. The McDonald commission defended Ministerial involvement on the basis of democratic principles. Here much of the groundwork was laid by its director of research, Peter Russell. In a preliminary paper for the commission, Professor Russell stressed that a “security service accountable only to itself is incompatible with democracy” which in our constitutional system involved “a government whose activities are directed by Ministers and officials responsible to elected representatives and whose policies are open to

---

added that “This does not mean the Attorney General in the realm of prosecutions, or the Solicitor General in the area of policing, should not have regard to political considerations in the non-partisan interpretation of the term ‘politics’. Thus, it might be thought that there are legitimate political grounds for taking into account such matters as the harmonious international relations between states, the reduction of strife between ethnic groups, the maintenance of industrial peace and generally the interests of the public at large....” Edwards *Ministerial Responsibility for National Security* supra at 70.

<sup>49</sup> Ibid supra at 96-97.

<sup>50</sup> McDonald Commission supra at 762

## Conference Draft – June 29, 2004

informed public discussion.”<sup>51</sup> Building on these themes, the McDonald Commission stated that:

We take it to be axiomatic that in a democratic state the police must never be allowed to become a law unto themselves. Just as our form of Constitution dictates that the armed forces must be subject to civilian control, so too must police forces operate in obedience to governments responsible to legislative bodies composed of elected representatives.<sup>52</sup>

As will be discussed in the third part of this paper, the McDonald Commission represents a democratic vision of policing based on Ministerial accountability.

Although its singular contribution was in articulating a vision of democratic policing, it would be wrong to conclude that the McDonald Commission rejected the concept of police independence from government in its entirety. It clearly stated that:

The Minister should have no right of direction with respect to the exercise by the R.C.M.P. of the powers of investigation, arrest and prosecution. To that extent, and to that extent only, should the English doctrine expounded in *Ex parte Blackburn* be made applicable to the R.C.M.P.<sup>53</sup>

Even with respect to such core or what the Commission called “quasi-judicial” functions, however, the Minister should have a right to be “informed of any operational matter, even one involving an individual case, if it raises an important question of public policy. In such cases, he may give guidance to the Commissioner and express to the Commissioner the government’s view of the matter, but he should have no power to give *direction* to the Commissioner.”<sup>54</sup>

---

<sup>51</sup> Peter Russell *Freedom and Security: An Analysis of the Police Issues before the Commission of Inquiry* (Oct. 1978) at 17. Professor Russell elaborated that “a system of responsible government requires not only that the major agencies of government be under the direction of responsible ministers, but also that there is adequate opportunity to make the responsible Minister accountable to the representative legislature.” Ibid at 21-22.

<sup>52</sup> McDonald Commission at 1005-1006.

<sup>53</sup> Ibid at 1013

<sup>54</sup> Ibid at 1013 (emphasis in original). The Commission rejected Pierre Trudeau’s distinction between policy matters that the government could be involved in as opposed to “the day to day operations of the Security Service” on the basis it would result “in whole areas of ministerial responsibility being neglected under the misapprehension that they fall into the category of ‘operations’ and are thus outside the Minister’s purview. This neglect has become apparent in what might be called the policy of operations....” These included “important policies questions concerning the distinction between legitimate dissent and subversive threats to the security of Canada” that “will arise in the context of deciding whether or not to initiate surveillance of a particular individual or group. Similarly, questions will arise about the legality and propriety of a particular method of collecting intelligence in the context of a particular case.” Ibid at 868-869.

## Conference Draft – June 29, 2004

The McDonald Commission process represents Canada's most sustained and considered examination of the proper relationship between the government and the police. Both Prime Minister Trudeau and the McDonald Commission seemed to restrict the concept of police independence to the process of criminal investigation, although the Prime Minister did refer to the potentially broader concept of the day-to-day operations of the police. Where they differed was whether police independence included independence from requests for information with Trudeau defending governmental ignorance as a matter of principle. In contrast, the McDonald Commission argued that democracy required Ministerial knowledge of even operational and investigative matters if it affected matters of policy that were the proper preserve of a democratic government. The McDonald Commission stands as an eloquent statement of the need for democratic responsibility and direction of policing with the exception of criminal investigations. Nevertheless, the democratic principles that were at the core of the McDonald's Commission's proposal have come under assault in the subsequent decades by increased centralization within government and the erosion of principles of Ministerial responsibility.<sup>55</sup> Its recommendations were also based on a number of crucial but debatable assumptions. One was that governments could receive and impart information and views to the police without assuming control or direction of the activities. Another assumption was that partisan considerations could be excluded from a broader category of public interest considerations when Ministers intervened in policing matters. As will be seen, subsequent cases have put these distinctions between information and influence and between partisan and public interest considerations sorely to the test.

### **The Richard Hadfield Case**

This case involved meetings between Richard Hadfield, a Progressive Conservative Premier of New Brunswick, and Elmer MacKay, the Progressive Conservative Solicitor General of Canada, when the former was under investigation by the RCMP in relation to a small quantity of marijuana found in the Premier's luggage. The Liberal opposition repeatedly raised concerns in Parliament about political interference with the police investigation, but Solicitor General MacKay relied upon assertions that he did not "have prosecutory jurisdiction or jurisdiction to instruct the RCMP to lay charges, whom to charge, or indeed whether charges should be laid. My responsibility is the practice, and

---

<sup>55</sup> Savoie *Governing from the Centre* supra; Savoie *Breaking the Bargain* supra

## Conference Draft – June 29, 2004

procedures and policies.”<sup>56</sup> This was an interesting statement of the Solicitor General’s role, but it did not really respond to the propriety of a meeting with the subject of an ongoing criminal investigation or any policy matters that might have been at play in such a meeting. The extensive Parliamentary debates on this case are replete with colourful language, but reveal more heat than light on the proper relationship between the government and the police.

Commissioner R.H. Simmonds of the RCMP stated that the Solicitor General only conveyed information about his meetings with Premier Hadfield and had “not in any way influenced our work or our decision-making”. Commissioner Simmonds took the position that any attempt by the Solicitor General to interfere with the investigation and the decision whether to lay charges “would have been an unacceptable interference with the principle of police independence and discretion”.<sup>57</sup> Premier Hadfield was subsequently charged with possession of marijuana and was acquitted on the basis that the Crown had not proven actual possession of the substance.<sup>58</sup>

The Hadfield affair reveals some of the difficulties in maintaining distinctions between exchanges of information and perceptions of improper influence. Although both the Solicitor General and the Commissioner of the RCMP maintained that there was nothing improper, the prospect of a private meeting between the Solicitor General and the subject of a criminal investigation raised suspicions of interference, not only among the opposition but in the media. It also suggests how a Solicitor General could invoke the principle of police independence as a shield against allegations of improper influence while at the same time taking actions that must have made it clear to the police that the case was very much on the political radar screen. It raises the importance of personal integrity of all involved in police-governmental relationships as ultimately both Parliament and the public had to trust both the Minister and the police when they stated that there was no improper influence brought to bear on the case. The Hadfield affair also reveals how Commissioner Simmonds limited police independence to decisions involving a peace officer’s conduct of a criminal investigation and the decision whether to lay charges whereas Commissioner Nicholson had

---

<sup>56</sup> Hansard 11 Feb. 1985 at 2201. MacKay subsequently seemed to agree that he should not descend in the arena of day to day operations but “that it is another thing to elicit information that any person wants to give to a Solicitor General if the circumstances are proper.” Ibid at 2207

<sup>57</sup> as quoted in Stenning “Someone to Watch Over Me” at 105

## Conference Draft – June 29, 2004

previously defined the ambit of police independence more broadly to include what Commissioner Simmonds characterized as administrative matters related to the deployment of the police.

### The Douglas Small Case

Another controversy in the relationship between the police and the government was the RCMP's decision to lay theft charges against a television reporter and others who had obtained budget documents before the budget was announced in Parliament. Prime Minister Mulroney responded to the leak by saying that "Canadians are concerned with the criminal and not with the honourable minister", the Finance Minister responsible for budget secrecy. The RCMP was called in to investigate with the Minister of Justice explaining "We said 'Something's happened, we don't like it, get on it' adding "what they find in the course of their investigation (is not determined by the government). It is up to them to decide to lay charges". The Solicitor General also stated that he "had absolutely nothing to do whatsoever" in the decision to lay charges.<sup>59</sup>

The accused moved to stay the charges alleging political interference in the charging decision. This allegation was supported by the testimony of Staff Sergeant Jordan, the original investigating officer, who had refused to lay charges. He testified that charges that were eventually laid by other police officers "were intended to please elected officials."<sup>60</sup> Stenning reports that there was also testimony that the political chief of staff of the Solicitor General had contacted the Deputy Commissioner of the RCMP 12 to 15 times during a 34 day investigation stating that he wanted a "status report", but did not want to interfere with the investigation.<sup>61</sup> In the court judgment, the trial judge reported two calls between the Chief of Staff of president of the Treasury Board and the Assistant Commissioner of the RCMP "for the purpose of obtaining information to advise the minister". The trial judge characterized these contacts as "entirely normal, routine and proper to the day-to-day functioning of government."<sup>62</sup> The trial judge accepted testimony that information only

---

<sup>58</sup> *R. v. Hadfield* (1985) 85 N.B.R.(2d) 208 (N.B.Prov.Ct.).

<sup>59</sup> "Ottawa admits it intervened before budget charges laid" *Toronto Star* 1 June 1989; "Charge of reporter may signal tougher stand on secrets" *Globe and Mail* 1 June, 1989; "Leak charges not political, Tories say" *Globe and Mail* 31 May 1989;

<sup>60</sup> *R. v. Small* (1990) 78 C.R.(3d) 282 at para 57 (Ont.Prov.Ct.)

<sup>61</sup> Stenning "Someone to Watch Over Me" *supra* at 107-108; Stenning "Accountability in the Ministry of the Solicitor-General" at 54.

<sup>62</sup> *R. v. Small* *supra* at para 79

## Conference Draft – June 29, 2004

“flowed upward” to the Prime Minister’s Office, but that it did not “flow downward” or amount to “pressure” or direction to lay charges.<sup>63</sup> The trial judge dismissed the allegations of political interference or even “justifiable perception of political interference” stressing that there was no evidence of such interference “from the top down”.<sup>64</sup>

At the same time, the judge did stay the charges concluding that “the zeal of superior law enforcement police officers” in pushing ahead with the laying of charges despite evidential concerns and legal concerns whether the appropriation of confidential information could be the basis for a theft charge “suggests an objective unfairness and vexatiousness, particularly with regard to the accused Douglas Small, which is indeed inappropriate to criminal proceedings.”<sup>65</sup> The charges were thus stayed not on the basis of political interference but overzealousness by police officers who reversed the investigating officer’s decisions that charges of theft were not warranted. The question, however, remains whether this overzealousness and intervention by senior officers would have occurred in a case that had not embarrassed the government of the day and attracted repeated requests for information and status reports.

The Small case, like that of Richard Hadfield, reveals some of the practical difficulties of maintaining the distinction between requests for information about a criminal investigation as opposed to attempts to influence over that investigation. To be sure, the trial judge ruled that it was permissible for information to flow “upward” from the police to the Prime Minister Office, but it would not be permissible for such information to flow “downward” in the form of influence or direction. To this extent, the Small case does confirm the distinction between information and influence. Nevertheless, the trial judge’s decision to stay proceedings suggests that not all was right in the way the police handled this politically sensitive case. The distinction between exchanges of information and of influence or between upward flows of information from the police and downward flows of information from the government can be questioned. Communication, unlike water, generally flows both ways. Moreover, tacit signals of approval or disapproval from important people who receive information can have a significant effect on those who are imparting the information. The Small case also reveals the increasing complexities of

---

<sup>63</sup> *ibid* at para 72

<sup>64</sup> *ibid* at para 82



## Conference Draft – June 29, 2004

modern government. Unlike in the earlier Hadfield case, it was a member of the political staff of the Treasury Board as opposed to the Solicitor General who interacted with the police. Although the judge reviewing the matter ultimately rejected this perception, the Small case also reveals how police officers down the line may react to perceptions that the Minister or his or her staff are on the case. Finally, the Small case also raises the intriguing possibility that political interference may be subject to judicial review on an abuse of process application and that as a consequence, trial judges may hear considerable evidence about political involvement in policing.<sup>66</sup> Although subsequent legal developments make it much less likely that a stay of proceedings would be entered should a trial judge accept evidence of political interference,<sup>67</sup> the Small case does suggest that the transparency of political intervention in policing may in some cases be a matter of interest for the courts as well as the public.

### **The Marshall Commission and the Nova Scotia Cabinet Ministers**

Although it is best known for its examination of the wrongful conviction of Donald Marshall Jr., the Marshall commission also examined two cases where Nova Scotia cabinet members had been the subject of RCMP criminal investigations, but were not criminally charged after interventions by the Attorney General and his officials. The Commission concluded that in one case, the RCMP decided not to lay charges even though they believed there was a *prima facie* case. The Commission found that a letter from RCMP Commissioner Simmonds was “seriously misleading” because it suggested that the RCMP would have laid charges even if the Attorney General’s department was not prepared to prosecute them. The Commission concluded that

what the RCMP failed to do was to follow through on their stated ‘principle that police officers have the right to lay charges independent of any legal advice received

---

<sup>65</sup> *ibid* at para 112.

<sup>66</sup> The judge commented that “owing to the unique and somewhat startling grounds for the motion- that is the allegation, in the generic sense, of political interference in the criminal law process- the hearing necessarily assumed some of the flavour of a public inquiry, in order to ensure a full and probing examination of the allegation. Rules of criminal evidence were relaxed; hearsay and opinions were received (albeit from competent persons) and privileges were waived. It would not have served the public good to suppress evidence and testimony by the strict application of the rules of criminal evidence such as would be appropriate in the course of the trial.” *Ibid* at para 4.

<sup>67</sup> See generally Roach “The Evolving Test for Stays of Proceedings” (1998) 40 *Crim.L.Q.* 400 and *R. v. Regan* [2002] 1 S.C.R. 297 for cases where improprieties by Crown counsel and judges were held not to be egregious enough to merit a stay of proceedings.

## Conference Draft – June 29, 2004

if they are convinced that there are reasonable grounds to do so'...the RCMP failed in its obligation to be independent and impartial. It was improperly influenced by factors unrelated to the investigation itself, but it attempted to explain the decision not to proceed in evidentiary and discretionary terms. The RCMP put its working relationship with the Department of Attorney General ahead of its duty to uphold the law.<sup>68</sup>

In the second case, the Commission concluded that the RCMP's refusal to proceed with an investigation without authorization from the Department of the Attorney General was "a dereliction of duty" and "a failure to adhere to the principle of police independence. It reflects a double standard for the administration of criminal law, contributes to the perception of a two track justice system and undermines public confidence in the integrity of the system."<sup>69</sup> These are some of the strongest findings ever in Canada about an improper relationship between police and government.

The Marshall Commission, like the McDonald Commission, limited police independence from government to the process of criminal investigation. It concluded that "inherent in the principle of police independence is the right of the police to determine whether to commence an investigation". The police should in an appropriate case be prepared to lay a charge, even if it was clear that the Attorney General would refuse to prosecute the case. Such an approach in the Royal Commission's views "ensures protection of the common law position of police independence and acts as an essential check on the power of the Crown."<sup>70</sup> Consistent with the McDonald Commission's approach, the Marshall Commission indicated that "the responsible ministry can set general policies with respect to all policing matters, including investigations". The Commission also contemplated that the police and Crown prosecutors could exchange information and views about whether charges should be laid in the individual case with the ultimate decision whether to lay charges being made by the police as a matter of police independence.

The Marshall commission's finding of double standards underlines that relation between police independence and a rule of law that applies equally to all without regard to

---

<sup>68</sup> *Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: Queens Printer, 1989) at 212-214.

<sup>69</sup> *Ibid* at 216

<sup>70</sup> See for example *Campbell v. Attorney General of Ontario* (1987) 31 C.C.C.(3d) 289 (Ont.H.C.); *Dowson v. The Queen* (1983) 7 C.C.C.(3d) 527 (S.C.C.).

## Conference Draft – June 29, 2004

status. Its finding of interventions by the Attorney General's department in favour of two Cabinet ministers at the same time as a young, poor Aboriginal man was wrongfully accused and convicted of murder underlines how the rule of law and police independence from government can advance the important values of equality before the law. Although it could be argued that principles of police independence are perhaps overly dominated by the dangers of favouritism or the appearance of favouritism when members or friends of the government are subject to criminal investigation, the unequivocal and highly critical findings of the Marshall Commission suggest that such cases do arise. Moreover, they suggest that failures of police independence from government can threaten the equal and impartial application of the rule of law.

### **The Airbus Affair**

Another controversy about the appropriate relationship between the police and the government was the Airbus affair in which former Prime Minister Mulroney was named in a letter of request to Swiss authorities with respect to an RCMP criminal investigation. He brought a defamation suit against the RCMP commissioner, the RCMP investigator, Minister of Justice Allan Rock and the Justice official who signed the letter of request, a suit that was eventually settled with money being paid to the former Prime Minister. For our purposes what is most significant is the hands-off attitude displayed by both Solicitor General Herb Gray and Minister of Justice Allan Rock towards the police investigation. When asked about his role, Herb Gray admitted that he was informed of the request by the RCMP for the assistance from the Swiss authorities but he:

played no role whatsoever in the decision to seek their support. I played no role in the formulation of the request or its content. ...the minister or the solicitor general does not get involved in operational matters. The investigation carried out by the RCMP are at arm's length from ministers, and, therefore I don't think there's anything inappropriate in a request being sent through the Department of Justice to Swiss authorities which mentions somebody..."<sup>71</sup>

---

<sup>71</sup> As quoted in William Kaplan *Presumed Guilty Brian Mulroney, the Airbus Affair and the Government of Canada* (Toronto: McClelland and Stewart, 1998) at 147

## Conference Draft – June 29, 2004

Allan Rock also indicated that he was not personally aware of the letter of request before it was sent and was supported by some experts who argued that a Minister of Justice should not interfere in an ongoing police investigation.<sup>72</sup>

The Airbus affair is significant because it shows the Ministers responsible for both the police investigation and the letter of request taking less of an interest in a case as compared to the Hadfield, Small and Nova Scotia cabinet ministers cases discussed above. Indeed, the case may represent a growing consensus about police independence from Ministerial direction and perhaps even Ministerial requests for information about a particular criminal investigation. At the same time, some have raised concerns that the hands off approach of the Ministers<sup>73</sup> came at the high price of a lack of Ministerial accountability for the investigative actions of the police.<sup>74</sup> Whether such concerns would have been raised had the letter of request not have been leaked, however, is an important consideration. The balance between police independence with respect to criminal investigations and claims that Ministers should be accountable for any abuses of those investigative powers should factor in the confidential nature of criminal investigations.

### **The Campbell and Shirose Case**

The case involved two people, Campbell and Shirose, who were charged with drug offences as a result of a reverse sting operation in which RCMP officers sold them drugs. The Crown sought to defend the police conduct on the basis that the police were part of the Crown or agents of the Crown and protected by the Crown's public interest immunity. Binnie J. for the unanimous Supreme Court emphatically rejected such an argument:

The Crown's attempt to identify the RCMP with the Crown for immunity purposes misconceives the relationship between the police and the executive government when the police are engaged in law enforcement. A police officer investigating a crime is not acting as a government functionary or as an agent of anybody. He or she

---

<sup>72</sup> Stenning "Someone to Watch over Me" at 111

<sup>73</sup> Kaplan *Presumed Guilty* supra at 289. Even as the settlement of the suit was announced, Minister of Justice Rock defended the principle that "police decide...when to start and when to stop investigations". He did, however, accept responsibility for inadequacies in the system of accepting requests for foreign assistance. Ibid at 315.

<sup>74</sup> An editorial in the *Toronto Star* argued "Rock says he is accountable to Canadians, but in this instance justice officials simply followed normal procedures. Solicitor General Herb Gray acknowledges he's responsible for the RCMP, but, of course, he can't interfere in police probes. RCMP Commissioner Philip Murray says he is 'deeply disturbed' that a member of his force blabbed to the press, but he is convinced the leak did not jeopardize the investigation. Everyone is sorry. But the buck stops nowhere." As quoted in *ibid* at 321.

## Conference Draft – June 29, 2004

occupies a public office initially defined by the common law and subsequently set out in various statutes.<sup>75</sup>

The Court noted that the police “perform a myriad of functions apart from the investigation of crimes” and that “[s]ome of these functions bring the RCMP into a closer relationship to the Crown than others.” Nevertheless the Court stressed that “in this appeal, however, we are concerned only with the status of an RCMP officer in the course of a criminal investigation, and in that regard the police are independent of the control of the executive government.”<sup>76</sup> The Court noted that this principle “underpins the rule of law” which it noted “is one of the ‘fundamental and organizing principles of the Constitution’”.<sup>77</sup>

The principle of police independence derived in *Campbell* from the constitutional principle of the rule of law seemed to qualify even the terms of s.5 of the *RCMP Act* which, as discussed above, assigned control and management of the Force to the Commissioner “under the direction of the Minister”, namely the Solicitor General. Binnie J. explained:

While for certain purposes the Commissioner of the RCMP reports to the Solicitor General, the Commissioner is not to be considered a servant or agent of the government while engaged in a criminal investigation. The Commissioner is not subject to political direction. Like every other police officer similarly engaged, he is answerable to the law and, no doubt, to his conscience. As Lord Denning put it in relation to the Commissioner of Police in *R. v. Metropolitan Police Comr., Ex parte Blackburn*, [1968] 1 All E.R. 763 (C.A.), at p. 769:

I have no hesitation, however, in holding that, *like every constable in the land, he [the Commissioner of Police] should be, and is, independent of the executive*. He is not subject to the orders of the Secretary of State, save that under the Police Act 1964 the Secretary of State can call on him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their

---

<sup>75</sup> *R. v. Campbell* [1999] 1 S.C.R. 565 at para 27

<sup>76</sup> *Ibid* at para 29

<sup>77</sup> *Ibid* at para 18

## Conference Draft – June 29, 2004

affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; *but in all these things he is not the servant of anyone, save of the law itself*. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone. [Emphasis added.]<sup>78</sup>

The *Campbell* case constitutes the Supreme Court's most extended discussion of the principle of police independence.

The Supreme Court indicates that the principle of police independence will not be engaged in all of the functions performed by the police, but that it will apply when the police are engaged in the process of "criminal investigation". The case-by-case common law method is such that *Campbell* cannot be taken as a definitive pronouncement about the outer limits of police independence because the Court only had to resolve whether the police were agents of the Crown on facts that involved a criminal investigation. As Justice Hughes commented about the *Campbell* case in his APEC report: "In respect of criminal investigations and law enforcement generally, the *Campbell* decision makes it clear that, despite section 5 of the RCMP Act, the RCMP are fully independent of the executive. The extent to which police independence extends to other situations remains uncertain."<sup>79</sup>

The Court derived the principle of the independence of the police from the constitutional principle of the rule of law which stresses the importance of impartially of applying the law to all and especially to those who hold state and governmental power. Indeed, the case raises the possibility that courts might enforce the principle of police independence as part of the unwritten constitutional principle of the rule of law. The case was decided in the wake of previous decisions by the Court relying on such unwritten principles to require that governments not negotiate salaries with the judiciary in order to respect the unwritten principle of judicial independence and the Court's statement that the unwritten constitutional principles of democracy, federalism, minority rights and democracy should guide any decision involving the secession of Quebec from Canada. The Supreme

---

<sup>78</sup> Ibid at para 33

<sup>79</sup> APEC Interim Report at 10.2

## Conference Draft – June 29, 2004

Court has indicated that “underlying constitutional principles may in certain circumstances give rise to substantive legal obligations which constitute substantial limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be specific and precise in nature. The principles are not merely descriptive, but also involve a more powerful normative force.”<sup>80</sup> In this sense, an unwritten principle of the Canadian constitutional is more powerful than a constitutional convention which may restrain the exercise of statutory powers but does not override them.

In the *Campbell* case, the Supreme Court seemed to indicate that the principle of police independence would qualify the clear statement in s.5 of the RCMP Act that the Commissioner controlled the police “under the direction of the Solicitor General”. In general, only constitutional law could displace such clear statutory authority. In this respect, the Supreme Court decision in *Campbell* may displace the Quebec Court of Appeal’s decision in *Basillon v. Keable* which stressed that the Canadian statutory framework had displaced the common law concept of police independence derived from English law. In other words, *Campbell* suggests that the principle of police independence taken from the common law of *Ex parte Blackburn* may now have been elevated from a matter of common law or even constitutional convention to become part of the constitutional principle of the rule of law that is capable of restraining the statutory authority granted to the Minister over the police.

Although the Supreme Court relied on *Ex parte Blackburn* and civil liability cases upon which it is based, the Court defined the ambit of police independence in *Campbell* in a more limited fashion that related only to the process of criminal investigation as opposed to the deployment of the police. At the same time, *Campbell* did not purport to decide the outer limits of the principle of police independence from the police.<sup>81</sup>

---

<sup>80</sup> *Quebec Secession Reference* [1998] 2 S.C.R. 217 at 249. See also *Judges Remuneration Reference* [1997] 3 S.C.R. 3. See generally Robin Eliot “References, Structural Argumentation and the Origin of Principles of the Constitution” (2001) 80 Can. Bar Rev. 67. The Ontario Court of Appeal has also used similar unwritten constitutional principles to govern its interpretation of statutes. *Lalonde v. Ontario* (2001) 56 O.R.(3d) 505 at para 174 (C.A.). See also *Polewsky v. Home Hardware* (2003) 66 O.R. (3d) 600 (Div. Ct.).

<sup>81</sup> The latest word from the courts on the matter do not particularly clarify the legal status of police independence. In the *Odhavji Estate* case, the Ontario Court of Appeal held that a tort against the Solicitor General of Ontario in relation to the refusal of police to co-operate with the SIU was properly struck because it was the Chief of Police “who has the sole authority to deal with the day-to-day operational conduct of police officers. The duties of the Solicitor General with respect to policing matters are contained in s. 3(2) of the Act and do not impose any duty concerning the day-to-day supervision of municipal police

## Conference Draft – June 29, 2004

### APEC

Second perhaps only to the McDonald Commission process, the APEC affair resulted in sustained discussion and reflection on the relationship between government and the police. A series of inquiries were held under the public complaints provisions of the *RCMP Act* regarding the treatment of protestors during an APEC summit held at the University of British Columbia in November 1997. There were many allegations of improper police conduct, but for our purpose the most important were allegations that the Prime Minister's Office had intervened and interfered with the RCMP security operations. After one aborted inquiry, Justice Ted Hughes held hearings and issued a report on the matter.<sup>82</sup>

After reviewing the McDonald Commission report and the *Campbell* case discussed above, Justice Hughes articulated the following propositions concerning police independence:

- When the RCMP are performing law enforcement functions (investigation, arrest and prosecution) they are entirely independent of the federal government and answerable only to the law.
- When the RCMP are performing their other functions, they are not entirely independent but are accountable to the federal government through the Solicitor General of Canada or such other branch of government as Parliament may authorize.
- In all situations, the RCMP are accountable to the law and the courts. Even when performing functions that are subject to government direction, officers are required by the RCMP Act to respect and uphold the law at all times.
- The RCMP are solely responsible for weighing security requirements against the Charter rights of citizens. Their conduct will violate the Charter if they give

---

officers.” *Odhavji Estate v. Metropolitan Toronto Police* (2001) 194 D.L.R.(4<sup>th</sup>) 577 at para 43 This part of the decision was upheld by the Supreme Court of Canada which observed that “whereas the Police Chief is in a direct supervisory relationship with members of the force, the Solicitor General's involvement in the conduct of police officers is limited to a general obligation to monitor boards and police forces to ensure that adequate and effective police services are provided and to develop and promote programs to enhance professional police practices, standards and training. Like the Board, the Province is very much in the background, perhaps even more so.” *Odhavji Estate v. Metropolitan Toronto Police* [2003] 3 S.C.R. 263 at para 70 This decision strikes a somewhat different note than *Campbell* because the Supreme Court focused on the statutory language of the *Police Services Act* and did not make resort, as it did in *Campbell*, to the principle of police independence to limit references to Ministerial direction in the relevant act.

<sup>82</sup> For an excellent collection of essays on the matter which were written without the benefit of Justice Hughes' 2001 report see Wes Pue ed. *Pepper in Our Eyes* supra



## Conference Draft – June 29, 2004

inadequate weight to Charter rights. The fact that they may have been following the directions of political masters will be no defence if they fail to do that.

- An RCMP member acts inappropriately if he or she submits to government direction that is contrary to law. Not even the Solicitor General may direct the RCMP to unjustifiably infringe Charter rights, as such directions would be unlawful.<sup>83</sup>

This discussion of police independence builds on the McDonald Commission to the extent that police independence is restricted to the core functions of criminal investigations. Given that the issue of protest was central to the mandate of the APEC inquiry, it is unfortunate that there was not more discussion about whether police deployment and tactics in dealing with demonstrations were included in the scope of police independence. On the one hand, such arrangements seem to lay outside of the core law enforcement functions of investigation, arrest and prosecution and thus fall within “other functions” of the police. These are matters in which, according to Justice Hughes, the police are not entirely independent but are accountable to the government through the Solicitor General. At the same time, however, the matter is somewhat muddled by the fact that Justice Hughes recommended that the “RCMP should request statutory codification of the nature and extent of police independence from government” with respect not only to “existing common law principles regarding law enforcement” as articulated in *Campbell*, but also “the provision of and responsibility for delivery of security services at public order events.”<sup>84</sup> It is difficult to know exactly what to make of this last and crucial recommendation by Justice Hughes. It could suggest that police independence extends to security at public order events so that the government could not instruct the police to increase their security deployments at these events or to decrease them. If so, Justice Hughes would have embraced a broader definition of police independence than articulated by the McDonald Commission or in the *Campbell* case. On the other hand, Justice Hughes does distinguish security at public order events from the common law core of police independence and his recommendation may be more that the government and the police should codify in advance the respective responsibilities of the police and the responsible Minister for the conduct of such events. This interpretation would be more consistent with the McDonald Commission’s recommendations that the responsible

---

<sup>83</sup> APEC Interim Report at 10.4

<sup>84</sup> Ibid at 31.3.1

## **Conference Draft – June 29, 2004**

Minister must be able to direct police operations with policy consequences if the police are not to become a law unto themselves.

One change from the 1981 McDonald Commission was, of course, the advent of the Charter. Justice Hughes seems to suggest that the need to consider the Charter may expand the ambit of police independence. He stated that “weighing security requirements against the Charter rights of citizens” is exclusively a matter for the police and that they should refuse to follow “the directions of political masters” if the result is to violate the Charter. One interpretation of this statement may be that because Charter considerations are central restraints on security operations at public order events that police independence now extends to police deployment and tactics at such events. This would be a significant expansion of police independence beyond its law enforcement core. On the other hand, Justice Hughes’ comments may be consistent with political direction concerning protests so long as the direction does not violate the Charter. Even those who are sceptical about police independence accept that the police can always refuse to obey an illegal order. The Charter is now the supreme law and it would be proper for the police to stop obeying orders if they believed that the order would require them to violate the Charter. This caveat has implications for the content of the direction that responsible Ministers could give the police about policing demonstrations. The Minister could not direct the police to act in a manner that would result in an unreasonable limit on constitutional rights, but the Minister could direct the police to show more restraint and respect for dissent than required by the minimum albeit important standards of the Charter. To return to the Nicholson affair, the Minister could direct the police to back off and not provoke protestors, but could not direct the police to do something that would violate the constitutional rights of the protesters.

Although it is impossible to disagree with the simple proposition that the police should not violate the Charter, matters are considerably more complex than this seemingly simple admonition. Issues of constitutional compliance will often be difficult to determine especially in real time as an event unfolds. Will the police be able to receive independent legal advice on whether a political direction violates the law? Will this advice also consider whether the order invades the imprecise boundaries of police

## Conference Draft – June 29, 2004

independence? A further danger here is that the police may not unreasonably see the courts as the ultimate arbitrator of whether their conduct is consistent with the law. The police might then follow orders that were close to going over the legal line. And in many cases, the ultimate legal call by the courts may never come. Although the Charter has undoubtedly increased judicial scrutiny of police conduct, the McDonald Commission's caution that most police conduct is not reviewed through the expensive and time-consuming process of litigation still merits consideration.

In terms of the *RCMP Act*, Ministerial responsibility is clearly assigned to the Solicitor General. Unfortunately, the APEC report does not address the propriety of Ministerial powers being delegated or taken over by a central agency, the Prime Minister's Office. This omission is regrettable because the principle of responsible democratic government and Ministerial accountability figured prominently in the McDonald Commission's discussion of democratic policing. The McDonald Commission was certainly not blind to the important role that central agencies including the PMO might play in matters of national security, but their dominant philosophy was one that stressed respect for the tradition of Ministerial responsibility. The McDonald Commission would have agreed with Joe Clark who argued in 1977 that "if we destroy the principle of Ministerial accountability, we destroy the system of government which we have in this country."<sup>85</sup> Much water has passed under the bridge since that time and many would view such sentiments as quaint given the increasingly centralization of government and the erosion of Ministerial accountability.

On the merits of the allegations of political interference, Commissioner Hughes found that "the Canadian government did not signal to the RCMP, either overtly or subtly, that they ought to perform as they did to curtail demonstrations and stamp out visible dissent."<sup>86</sup> He did, however, make the following findings under the heading "improper federal government involvement":

The federal government's role in the removal of the tenters from the grounds of the Museum of Anthropology on November 22 was one of two instances of its improper involvement in the RCMP security operation. I am satisfied that it was

---

<sup>85</sup> as quoted in Savoie *Breaking the Bargain* supra at 4.

<sup>86</sup> APEC Interim Report at 9.7.

## Conference Draft – June 29, 2004

because of the government's intervention that the tenters were removed that evening. Were it not for that involvement, the contrary view of Site Commander Thompsonett would have prevailed. As it happened, his view did not carry the day because of the acquiescence of other RCMP personnel, principally Supt. May, who had succumbed to government influence and intrusion in an area where such influence and intrusion were inappropriate.<sup>87</sup>

The other instance of improper and inappropriate federal government involvement in the RCMP's provision of security services was with respect to the size of the demonstration area adjacent to the law school. In that case, the government's efforts did not prevail due to the intervention of others, including Site Commander Thompsonett, on behalf of the protesters. Had those intervenors not prevailed, the security challenges the RCMP faced on November 25 may well have been increased.<sup>88</sup>

The above findings were made in a context that focussed on the complaints against the RCMP as opposed to the conduct of the Prime Minister or his staff. Indeed, Justice Hughes concluded that he did not have jurisdiction to call Prime Minister Chretien as a witness and the Prime Minister refused the Commissioner's invitation to testify.<sup>89</sup> Professor Pue has argued that Jean Carle, then director of operations at the Prime Minister's Office, was at the centre of both of these findings and that like all individuals he "had no inherent authority and no right to act outside of the law." He suggests that the principle of Ministerial responsibility should require the Prime Minister either to endorse and accept responsibility for Jean Carle's actions or to have "rebuked him for misuse of his position in the Prime Minister's Office". As of the summer of 2001, however, the Prime Minister had done neither, something that Professor Pue argues was "an unacceptable constitutional outcome".<sup>90</sup> The APEC affair certainly underlines the need to address the position of central agencies and political staff in determining both the

---

<sup>87</sup> Elsewhere in the report, Justice Hughes concludes that he was "of the view that the RCMP's conduct in removing the tenters was directly attributable to the actions of the federal government. It was Mr. Carle of the Prime Minister's Office, who through Mr. Vanderloo of ACCO, directed the RCMP to remove the protesters, apparently out of a concern about potential vandalism. However, Supt. Thompsonett, the man in charge of security, was less concerned about potential vandalism than that removing the protesters might lead to more serious security problems. The federal government has no authority to make decisions which may have compromises an RCMP security operation, particularly given that such decisions, although consistent with the License Agreement and the Criminal Code, were unjustifiably inconsistent with the Charter. I am satisfied that, in this instance, the federal government acting through the Prime Minister's Office, improperly interfered in an RCMP security operation." Ibid at 11.7.

<sup>88</sup> Ibid at 30.4

<sup>89</sup> Wes Pue "Executive Accountability and the APEC Inquiry: Comment on *Ruling on Applications to Call Additional Governmental Witnesses* (2000) 34 U.B.C.Law.Rev. 335.

## Conference Draft – June 29, 2004

appropriate ambit of police independence and of political responsibility for directions to the police. It also indicates that the topic cannot be separated from larger questions concerning the health of Ministerial accountability in our democracy.

### The Sponsorship Scandal

On May 11, 2004, the RCMP laid 12 fraud charges against Chuck Guite, a retired bureaucrat and Jean Brault, president of Groupaction Marketing Inc. The charges arose from a scandal over government spending that threatened the re-election prospects of the Liberal government and led to both Parliamentary committee hearings and the appointment of a royal commission led by a judge. For our purposes, the focus is on what the episode reveals about the relation between the police and government.

A number of people around the government had commented on the on-going RCMP investigation. Jean Lapierre, a prominent Liberal often described as Prime Minister Martin's "Quebec Lieutenant", stated in an interview in April, 2004 that charges in the sponsorship scandal "would provide relief, because I think people want to see people found guilty. They want to see people accused and eventually found guilty, that's clear...I think people say 'Wait a minute, if something improper happened here, why hasn't someone paid for it?'. These comments led the Justice Critic of the Official Opposition to allege that "By the Prime Minister's silence he is allowing his political friends to direct and influence the RCMP criminal investigation." Anne McLellan, the Minister of Public Safety with responsibility for the RCMP, stated that Lapierre's comments were "totally irrelevant" to the police investigation and that "the honourable member is very aware that no one pushes the RCMP." The Commissioner of the RCMP also denied that there was any political pressure on the police force.<sup>91</sup> In light of the APEC findings, however, others were not convinced. Professor Pue for example stated "the question is still hanging out there. Can Canadians be assured that the RCMP is absolutely free of political interference from its political masters. The answer, broadly, is no."<sup>92</sup>

After the charges were laid, the leader of the Opposition, Stephen Harper, stated: "I think the timing of the charges after Mr. Lapierre demanded pre-election charges is more

---

<sup>90</sup> Wes Pue "The Prime Minister's Police? Commissioner Hughes APEC Report" (2001) 39 Osgoode Hall L.J. 165 at

<sup>91</sup> Darren Yourk "Lapierre politicizing RCMP and probe: Opposition" *Globe and Mail* 22 April 2004/

<sup>92</sup> Susan Delacourt "To serve and protect its political bosses" *Toronto Star* 17 April 2004.

## Conference Draft – June 29, 2004

than a little suspicious...I would not want to speculate. It just seems to me that the timing is suspicious.” A RCMP spokesperson again denied any political interference, stating “Our investigation is totally independent from whatever is going on in politics. We’re just going step by step and turning over almost every stone we can to make the best investigation possible.”<sup>93</sup> Anne McLellan responded that allegations of political interference in the charging decision was “appalling and profoundly unacceptable”<sup>94</sup> and also denied that the laying of charges in the political scandal would affect the calling of the election. The Quebec Attorney General also participated in the laying of the charges because of a decision to proceed by way of direct indictment. Somewhat surprisingly, the issue of police independence was not subsequently discussed in Parliament. The focus was not on constitutional principle but political matters relating to the sponsorship scandal. It remains to be seen whether allegations of political interference will be litigated. The *Small* case suggests that even if such allegations are justiciable, they may be difficult to prove. In the absence of such litigation or careful probing in Parliament, almost nothing is known about whether or how the police and the government interacted on this matter.

The controversy over the timing of the police charges in the sponsorship scandal reveals the persistence of the problem of police-governmental relationships in Canada. Allegations of political interference can do damage both to the government and the police, but little has been done to clarify the basic principles of police independence or ensure transparent processes and protocols to prevent such allegations. The calls made by Justice Hughes in 2001 for codification of the principles of police independence have not been heeded despite the Supreme Court’s 1999 *Campbell* decision suggesting that police independence, at least with respect to criminal investigations, can be derived from the constitutional principle of the rule of law.

### III. Four Models of Police-Government Relationships

Models provide a convenient means of highlighting different policy options and the value choices and assumptions that are implicit in the choice of those policies. Starting with Herbert Packer’s famous contrasting crime control and due process models, models of the criminal process have spawned a generation of normative and positive debate about the

---

<sup>93</sup> Les Whittington and Miro Cernetig “Fraud charges rock Liberals” *Toronto Star* 11 May, 2004 A1, A7

<sup>94</sup> Susan Delacourt “Flurry of civil suits expected within days” *Toronto Star* 11 May, 2004 A6

## Conference Draft – June 29, 2004

criminal process.<sup>95</sup> Models need not be stark alternatives, as multiple models may operate at the same time on different levels. Thus Packer's due process model may describe the few criminal cases that are the subject of adversarial challenge and appeal, but his crime control model describes the routine case that results in a guilty plea. Models can also be mapped on a continuum so as to highlight both their similarities and differences. All of Packer's models presume an adversarial system, but they posit different roles for judges and other actors. Although models may potentially limit the range of debate, this shortcoming can be overcome by developing new models, as has occurred with respect to a plethora of third models of the criminal process that have attempted to add to Packer's models. Although the models identified here may not exhaust all the possibilities, it is hoped that they will provide a foundation for subsequent debates about the precise meaning of police independence and the range of policy choices in determining and structuring the relationship between the police and government.

### Full Police Independence

This model of full police independence is based on Lord Denning's famous comments in *Ex parte Blackburn*. In that case, Lord Denning seemed to suggest that the police were not only independent from government with respect to law enforcement decisions such as starting a criminal investigation and laying charges, but also with respect to issues of police deployment. Thus, Lord Denning stated that the constable "must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace"<sup>96</sup> without governmental interference. Supporters of full police independence would also argue that the policing of public order events would fall under the exemption in s.31(4) of Ontario's *Police Services Act* that municipal boards "shall not direct the chief of police with respect to specific operational decisions" and that there is no reason in principle why the same understanding of independence should not apply to the OPP's relationship with the responsible Minister or others in government.

---

<sup>95</sup> The most influential models have been Herbert Packer's contrasting crime control and due process models. See Herbert Packer "Two Models of the Criminal Process" (1964) 113 U. Penn.L.Rev.1. For attempts to add to Professor Packer's models see John Griffith "Ideology in Criminal Procedure or a Third Model of the Criminal Process" (1970) 79 Yale L.J.359 ; Kent Roach "Four Models of the Criminal Process" (1999) 89 J.Crim.L and Criminology 691. For an assessment of the methodology of models as a form of scholarship see Kent Roach "The Criminal Process" in P. Cane and M. Tushnet *The Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003).

<sup>96</sup> *Ex parte Blackburn* supra at 135-136

## Conference Draft – June 29, 2004

Supporters of full police independence would also read Justice Hughes' recommendation in the APEC report that there should be "statutory codification of the nature and extent of police independence from government with respect to...the provision of and responsibility for delivery of security services at public order events"<sup>97</sup> as support for the proposition that police independence extends to deployment at public order events. Following Justice Hughes, they might argue that the police, assisted by their own lawyers, should be entitled to decide whether security arrangements at such events respect the Charter and other constitutional standards. Finally, supporters of full police independence would argue that the *Campbell* case has constitutionalized police independence as a constitutional principle that prevails over even clear statutory recognition of Ministerial authority over the police.

Proponents of police independence would also cite Prime Minister Trudeau's 1977 statements as the definitive political statement about the proper relationship between the government and the police and would be sceptical about arguments that it is possible to distinguish improper attempts by the government to control the police from legitimate attempts by the government to obtain information necessary to hold the police accountable. They would argue that Trudeau's defence of governmental ignorance of the day-to-day operations of the police as a matter of principle has been born out by subsequent developments such as the Hadfield and Small cases in which attempts by government to be informed about ongoing police investigation resulted in serious allegations of impropriety. Even if these allegations are eventually found not to be warranted, much of the damage was done by perceptions that information cannot be disassociated from influence. The hands-off approach articulated in the Airbus case would also be cited as an example of an appropriate manifestation of full police independence.

The model of full police independence is based on a faith about the expertise and professionalism of the police. Proponents would argue that the confidence displayed by Lord Denning when he declared in 1968 that the police should only be answerable to the law should only be increased by the development of new legal instruments since that time. These instruments include the Charter, abuse of process doctrine, civil litigation against the police claiming malicious prosecution or abuse of public office and increased review of

---

<sup>97</sup> APEC Interim Report at 31.3.1.



## Conference Draft – June 29, 2004

complaints against the police. If the police misuse their independence, there are more legal remedies available today for that abuse than ever before. Enhanced legal accountability supports the idea that in a wide variety of matters, the police should only be answerable to the law.

The more candid proponents of full police independence might also point to increasing public cynicism about whether elected politicians will act in a publicly spirited manner. The distinction drawn by some between public interest and partisan politics will be dismissed as untenable in an age which assumes that politicians always act in their partisan self-interest. Cynicism about politicians, perhaps even more than confidence in the police, can push people in the direction of the full police independence model. Writing in 1977, only 12 years after he published a book that was extremely critical and almost dismissive of the concept of police independence, Geoffrey Marshall candidly conceded that the case for full police independence had become stronger in the subsequent years because “nobody’s faith in councilors or Congressman or Members of Parliament can now be as firmly held as it was fifteen years ago”. He argued that “many liberal democrats” would trust the police more than the responsible Minister to protect civil liberties. Professor Marshall even went so far as to suggest that a constitutional convention was emerging that:

would suggest that direct orders, whether of a positive or negative kind, whether related to prosecution or other law-enforcement measures, and whether related to individual cases or to general policies, ought to be avoided by police authorities even when they involve what the Royal Commission [on Policing in 1960] called ‘police practices in matters which vitally concern the public interest’.<sup>98</sup>

Full police independence is supported not only by cynicism about politicians, but despair at the erosion of principles of Ministerial accountability. As seen above, some commentators expressed concerns that Prime Minister Chretien was not held accountable for the role of his office in APEC. If Ministers and others in government can escape responsibility for their interventions in policing, or the interventions by their staff or civil servants, then the case for full police independence is strengthened.

---

<sup>98</sup> Geoffrey Marshall “Police Accountability Revisited” in D. Butler and A.H. Halsey *Policy and Politics Essays in honour of Norman Chester* (London: MacMillan, 1978) at 60-61. In 1984, he elaborated on this thesis by arguing that “despite its uncertain legal foundations...it is now necessary to defend” what has been

## Conference Draft – June 29, 2004

Proponents of full police independence might also argue that in a post-APEC environment, most politicians would be happy to let the police take full responsibility for policing public order events that might result in controversy. They would cite in support the following comments made by Sir Robert Mark, a former Commissioner of the London Police, who argued:

I do not mean to give offence when I assert that in matters of public order, demonstrations, political, industrial or racial, the public trust the police a great deal more than politicians in government or opposition and I think it significant that all of the Home Secretaries that I have known have been only too glad disclaim any responsibility for police operations in that sphere.<sup>99</sup>

The doctrine of full police independence is supported by a faith in the expertise and professionalism of the police and a scepticism about the motives and optics of political intervention in policing and about whether politicians can or will be held accountable for their interventions in policing.

### Quasi-Judicial or Core Police Independence

This model of quasi-judicial or law enforcement police independence is based on the recognition in the *Campbell* case that while the police may be under the direction of the responsible Minister on many aspects of policing, they should be immune from Ministerial or other forms of government direction with respect to core law enforcement functions such as starting or ending a criminal investigation and deciding whether to lay charges. The Marshall Commission's strong conclusion that the RCMP was improperly influenced in its criminal investigation of two ministers in the Nova Scotia cabinet is particularly dramatic evidence of the need for police independence in this area. It also supports the equation of police independence with the rule of law in the *Campbell* case by underlining the dangers of political interference to the impartial application of the law to all. Core police independence is a consensus position that would be supported by *Ex parte Blackburn* and *Campbell*, as well as the reports of the McDonald, Marshall and APEC commissions. It has also arguably been constitutionalized as a part of the rule of law in *Campbell*. As suggested by the APEC

---

described here as full police independence "as a constitutional and administrative convention." Geoffrey Marshall *Constitutional Conventions* (Oxford: Oxford University Press, 1984) at 144.

<sup>99</sup> Sir Robert Mark *In the Office of the Constable* (London: Collins, 1978) at 157-158.

## Conference Draft – June 29, 2004

commission the “existing common law principles regarding law enforcement”<sup>100</sup> should be codified as a qualification to the general requirements of Ministerial direction and responsibility found in Canadian police acts.

Proponents of core police independence may have differing views about whether the principle should be extended beyond activities involving criminal investigation. Some may follow the McDonald Commission in believing that police independence should not be extended beyond its core because of our commitment to responsible government and democratic control and accountability of the police. Supporters of the McDonald Commission might well argue that Ontario’s *Police Services Act*<sup>101</sup> already goes too far in recognizing police independence from directions by municipal boards with respect to all “operational decisions” and “day to day operations” as opposed to directions with respect to criminal investigations. Other supporters of core police independence, however, may be less optimistic about political involvement in the policy laden aspects of policing, but nevertheless conclude that the law and the consensus of informed opinion does not at this time support extending the principle of police independence beyond the law enforcement core. Codification of core or quasi-judicial police independence might be a first step towards a broader understanding of police independence. If confidence grows in the police and legal accountability structures and/or confidence diminishes about the prospects for transparent and helpful political interventions in policing, then it may be advisable to extend core police independence into full police independence. Core police independence could evolve into full police independence.

Proponents of core police independence may also extend the principle to governmental requests for information about law enforcement decisions. The controversies surrounding attempts to obtain or impart information in the Hadfield and Small cases suggest that exchanges of information may be perceived as exchanges of influence. This perception may be especially strong if information is exchanged before the police make their decision. A more hand-offs approach is supported by the conduct of both the Solicitor General and the Minister of Justice in the Airbus affair and the controversy that would have been created had it been discovered that responsible Ministers or their staff had been

---

<sup>100</sup> APEC Interim Report at 31.3.1.

<sup>101</sup> RSO 1990 c. P-15, s.31.4

## **Conference Draft – June 29, 2004**

requesting status reports on the RCMP's investigation of the sponsorship scandal.

The model of core police independence is based on a conclusion that Ministers and their staff have no business attempting to influence criminal investigations. On such matters, there is a confidence in the professionalism and expertise of the police. There is also a recognition that both prosecutors and the courts should act as a check on police powers, at least in cases that result in the laying of charges. These review mechanisms will have less application when the police decide that a charge is not warranted. It is still possible in some cases, however, for private citizens to lay a charge and police complaints and civil suits could serve as some checks on abusive investigations that do not result in charges.

### **Democratic Policing**

This model of policing is supported by the recommendations of the McDonald Commission. As described above, it accepted the need for core or quasi-judicial police independence, but was firm that police independence should not be expanded beyond this limited domain. In this respect the McDonald Commission's model of democratic policing is consistent with the above model of core police independence.

The model of democratic policing differs from the model of core police independence described above, however, in maintaining the importance of allowing the responsible Minister to be informed and to discuss even ongoing criminal investigations with the police if the investigations raise more general policy matters. This position is based on an assumption that the relevant actors- the Ministers, their staff, their civil service, the police and the public - will understand the distinction between seeking information about a criminal investigation and seeking to influence the police conduct of the investigation. The Hadfield and Small cases discussed above constitute precedents where information was sought. Although allegations of influence were made in both cases, they were dismissed by the Solicitor General in the case of Hadfield and dismissed by the trial judge in Small. The democratic policing model would oppose the attitudes of both Prime Minister Trudeau and the responsible Ministers in the Airbus affair that Ministers should remain ignorant of the day-to-day operations of the police. The democratic policing model affirms the importance of the Minister being informed about important cases least they reveal policy issues or structural defects that should be reformed.

The democratic policing model sees Ministerial responsibility for policing matters as

## Conference Draft – June 29, 2004

a fundamental feature of responsible government and as a necessary means of ensuring that the police do not become a law unto themselves. A variation on this theme would place a police board between the Minister and the police, as is done with the local police in Ontario and many other jurisdictions. A police board could represent a larger cross section of the community than the Minister and constitute its own democratic forum on issues of police policy. Gordon Chong has recently called for enhanced capacities and powers for local police boards in Ontario as a means to ensure “civilian ‘control’ of the police.” He also has argued that “a far greater concern today” than the traditional concern about politicians abusing “their power by attempting to influence specific police activities” is “the intensified political activity on the part of police- especially through their militant union- to unduly influence police policy.”<sup>102</sup> The democratic policing model accepts that there is much policy in policing and argues that those responsible to the people and not the police should be able to determine police policy.

The democratic policing model defines the ambit of police independence narrowly and would resist suggestions by Commissioner Nicholson that the deployment of additional officers was a matter of police independence or any suggestions in the APEC report that security operations at public order events fall within the ambit of police independence. This does not, however, mean that the democratic policing model would accept what happened at APEC as a proper example of governmental-police relations. The McDonald Commission, for example, stressed the importance of Ministerial responsibility for policing. From this perspective, it is disturbing that the Solicitor General and his civil service were non-players in the APEC affair. The model of democratic policing would support attempts to channel political direction of the police through the responsible Minister, albeit after that Minister had consulted other relevant Cabinet ministers.<sup>103</sup> There might also be acceptance of attempts to formalize political direction of the police in the form of written and public guidelines and directives. Such channeling would help promote greater accountability of the responsible Minister for a broad range of policing decisions and could provoke more public debate about policing policy. It could also ensure that directives from the government to the

---

<sup>102</sup> Gordon Chong “Who controls police?” *Toronto Star* 6 May 2004.

<sup>103</sup> In the context of policing Aboriginal people, this might require consultation with the Minister of Native Affairs and the Attorney General and perhaps the federal government in order to assess policing decisions in

## Conference Draft – June 29, 2004

police in individual cases were exposed to public and judicial scrutiny.

An important issue that will be discussed in the last part of this paper is whether the traditions of responsible government and democracy celebrated by the McDonald Commission in its 1981 report are vibrant enough almost a quarter of century later to inform and discipline democratic policing. The democratic policing model is premised on optimistic assumptions that political intervention in policing will more often than not result in a restrained and just police response and a faith that the people will learn about and hold the government accountable if they abuse their powers over the police. Geoffrey Marshall is an example of a person who by the late 1970's had lost faith in politicians and democracy and was prepared to abandon democratic policing for full police independence. Many would argue that the responsible government and democracy have only declined since Professor Marshall's change of heart.

If the democratic policing model is based on what some might see as a nostalgic faith in the integrity of politicians and their willingness to accept responsibility for making difficult policy decisions for the police, it is also based on a more limited faith in police expertise and professionalism. The McDonald Commission was quite critical of the institutional culture of the RCMP and recommended the creation of a civilian security intelligence agency in part to ensure more respect for dissent and better Ministerial and Parliamentary oversight. The democratic policing model limits police expertise to the process of criminal investigation and is based on the belief that the police should be subject to democratic direction in all other matters. Indeed, the McDonald Commission seemed to believe that the politicians might be less likely to countenance the policing of legitimate dissent than the police themselves. More than two decades later, this assumption needs to be re-examined in light of changes in policing and developments such as the Charter.

The democratic policing model is also based on scepticism that courts and complaints bodies provide an adequate check on police decisions outside of the core activities that result in charges. The scepticism about the adequacy of these checks is both procedural and substantive. Procedurally, most police activity is not subject to the expensive and lengthy process of either complaint or litigation. Substantively, proponents of

---

the context of other developments and the Crown's fiduciary responsibilities to Aboriginal peoples. See Gordon Christie "Police-Government Relations in the Context of State-Aboriginal Relations" in this volume.

## Conference Draft – June 29, 2004

democratic policing would argue that the Charter only provides minimum standards for police conduct and that the government of the day is entitled to demand that police go beyond these standards in their dealings with protestors and vulnerable groups. They would argue that the Minister of Justice and perhaps the Cabinet were entitled in the Nicholson affair to refuse to allow the RCMP to send more officers to police a strike even though the additional deployment might not in itself violate the law. Finally, the democratic policing model is built of the premise that the government of the day should bear some responsibility for police conduct and can be held accountable for policing policy decisions by the electorate.

### Governmental Policing

This model of policing is supported by a literal reading of Canadian police acts which generally provide that the police is managed by a commissioner subject to direction from the responsible Minister. It follows the Quebec Court of Appeal's decision in *Basaillon v. Keable* in holding that police independence is at most a common law concept that can be and has been displaced by clear statutory language. This model is also based on considerable scepticism about the whole notion of police independence. Stress is placed on the dubious origins of the concept of police independence in civil liability cases holding that there is not a master and servant relationship between the Crown and the police. Police independence is not as recognized a concept as judicial independence. Judges have to attempt to apply pre-existing standards and give reasons for their decisions whereas the police exercise considerable discretion and do not have to give reasons for their decisions.<sup>104</sup> Even the Supreme Court's recent decision in *Campbell* would in this model be restricted to its narrow holding. The facts that the police are not protected by Crown immunities and are subject to the rule of law should not in itself justify police independence from governmental direction. At most, police independence in this model refers to the ability of the police to refuse to follow blatantly illegal orders from their political masters and the protections that any civil servant may enjoy with respect to direction from the relevant Minister and their

---

<sup>104</sup> Geoffrey Marshall concluded that "the analogy with judicial independence is defective" in large part because of the greater range of discretion available to police as opposed to judges. Marshall *The Government and the Police* supra at 117-118. Perhaps a better distinction is that judges only act after hearing from the parties and must give reasons for their decisions.

## Conference Draft – June 29, 2004

political staff.<sup>105</sup>

Although Canadian police acts vest authority in responsible Ministers, the model of governmental policing would be sensitive to developments within government that affect the relationship between civil servants and the government of the day. Thus the involvement of central agencies such as the Cabinet in the Nicholson affair or the Prime Minister's Office in the APEC affair would not be seen as unusual given the important role of such central agencies in government. Political scientist Donald Savoie has observed in his important study *Governing from the Centre* that the relationship between the RCMP commissioner "and the prime minister through the PCO...has become so close over the past twenty years or so that the minister responsible- the Solicitor General-...is now effectively cut out of some of the most important discussions and decisions."<sup>106</sup> Thus the model of governmental policing would also accept that post-September 11 changes in governance through the creation of a new Ministry of Public Safety, a national security advisor within the PCO and a Cabinet Committee on security matters, may require a fundamental re-orientation of older models of the RCMP being accountable to government through the Solicitor General. The fact that the formal title of Solicitor General, with its claim to be a Law Officer of the Crown with some independence from Cabinet on some matters<sup>107</sup>, has been re-named both federally and in Ontario would also be accepted by proponents of governmental policing as a sign that government and the police alike must respond to changes in society. Policing in this model is not fundamentally different from any other governmental service and as such is subject to the re-organization and direction that may be provided to any group of civil servants. The main difference between the models of democratic and governmental policing is that the later does not insist that all governmental direction to the police be channeled through the responsible Minister.

The governmental policing model is based on a more limited faith in the expertise and professionalism of the police than the models of full or core police independence. If forced to accept some idea of police independence, proponents of government policing, like

---

<sup>105</sup> For an argument that all civil servants enjoy some independence from their political masters and are to some extent "apolitical" see Lorne Sossin "The Oversight of Executive-Police Relationships in Canada" in this volume

<sup>106</sup> Donald Savoie *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999) at 125.

<sup>107</sup> John Edwards *Ministerial Responsibility for National Security* *supra*



## Conference Draft – June 29, 2004

proponents of democratic policing, would opt for the more limited law enforcement core. The governmental policing model shares a faith in government with the democratic policing model, but it places less importance on traditions of Ministerial responsibility. It is recognized that policing issues frequently cross ministerial boundaries and that the police are entitled to the best information from all departments in government. Once the interministerial, intergovernmental and international nature of policing is recognized, the desire for centralized co-ordination is more understandable. Policing can be subject to the same trends as other parts of government including those of privatization and business plans.<sup>108</sup> The world changes, and the McDonald Commission's vision of Ministerial responsibility may not fit the demands of modern governance.

### IV. Crucial Questions for Choosing Between the Models

The above models are designed to outline the range of policy positions and options concerning the appropriate relationship between the government and the police. In this concluding section, I will outline some of the key issues that separate the models. The emphasis will be more on the questions that policy-makers and commentators should ask rather than the answers. The point is not to declare a winner between the competing models but to get a better handle on the value choices in a variety of complex relationships that may exist between the police and the government at any one point in time. Indeed, the optimal model of police-government relations may combine features from more than one model and some models may be appropriate for some police functions while others are appropriate for others. For example, police independence may be required with respect to criminal investigations, but democratic policing may be appropriate for other matters.

The choice of models may also change over time. For example, a democratic model for policing protests could be established, but it could evolve into de facto full police independence should the responsible Minister not wish to take responsibility for devising written and public guidelines or directives for the policing of protests. Alternatively, a democratic policing model that places clear and transparent responsibilities on the responsible Minister could be developed, but the Minister may subject his or her discretion

---

<sup>108</sup> Robert Reiner has observed a “calculative and contractual” trend in British policing that “is a new mode of accountability, side-stepping without displacing the constabulary independence doctrine”. Reiner “Police Accountability: Principles, Patterns and Practices” in Reiner and Spencer eds. *Accountable Policing* (London: Institute for Public Policy Research, 1997) at 19.

## Conference Draft – June 29, 2004

to the demands of the governmental policing model with its emphasis on central agency control and co-ordination.

Finally, the models can be viewed through a critical perspective. Just as some have argued that the due process model of the criminal process facilitates and legitimates the reality of the crime control model, it can be argued that the model of either full or core police independence could facilitate governmental policing if they believe that the police will anticipate and follow the desires of the government with respect to policing. In this sense, police independence could be a legitimating veneer for governmental policing. Similarly the democratic model of policing based on Ministerial accountability could be said to facilitate governmental policing if the Minister takes direction from the cabinet and other central agencies. Police independence may be justified on the basis of rule of law values but in practice it could facilitate repressive practices without the government having to take responsibility. The idea that the police are only answerable to the law could often mean that they are answerable to no one.

### **The Ambit of Police Independence: Criminal Investigation or Beyond?**

Perhaps the most important question that will determine the proper relationship between the government and the police is the ambit of the principle of police independence. The main options are to restrict police independence to the process of criminal investigation as contemplated by the McDonald Commission and affirmed in the *Campbell* case or to extend police independence to include issues of police deployment. As discussed above, there is some suggestion in the APEC report that police independence extends to such decisions and it will be recalled that Commissioner Nicholson resigned because the government would not approve of his decision that extra officers should be sent to Newfoundland to deal with labour unrest. The matter is plagued by uncertainty and inconsistency. As discussed above, Professor Geoffrey Marshall of Cambridge argued in 1965 that police independence was limited to at most the ability of police officers to refuse to obey unlawful orders. In 1978, however, he published an essay suggesting that there was an emerging constitutional convention that the police were immune from directions in individual or general guidelines not only with respect to prosecutions, but “other law-

## Conference Draft – June 29, 2004

enforcement measures.”<sup>109</sup>

The choice between full and core police independence will depend in large part on one’s views of the comparative dangers of allowing the police or the politicians decide policing matters beyond the core of criminal investigations. There is a danger, seen in the Nicholson affair, that the police will define policing of protests solely in terms of their professional judgment about what is tactically necessary and legally permissible to maintain order. The police may be inclined to ignore, as Commissioner Nicholson did, the “issues in back” of the demonstration or the effects of a large para-military presence on political protest. At the same time, it can be argued that the police have evolved since Commissioner Nicholson’s time and they may be more inclined to take a softer approach that involves consultation and perhaps even negotiation with the protesters.

There are also grounds to be skeptical about whether an independent police will truly be answerable to the law. Although the police will be subject to possible criminal prosecution, civil and Charter litigation, and police complaints for any abuse of power, these forms of accountability all operate after the fact. They all demand considerable time, expense and trust in the justice system on the part of those who will have grounds to believe that they have already been let down by that system. The policy issues that will be shielded from political direction under full police independence may be particularly difficult to review through legal methods that focus on issues of liability.

Even if police independence is defined in a limited way that does not preclude political direction with respect to protest, it is not clear that elected politicians will be eager to take responsibility for high risk and high visibility decisions regarding the policing of protest. As discussed above, Sir John Mark argued that in his extensive experience as head of the London police, his responsible Minister was only too willing to leave difficult decisions concerning policy decisions to the police.<sup>110</sup> In other words, there may not be enough democracy to support a model of democratic policing.

The danger of excluding public order policing from police independence is that political power in directing the police will be abused and/or exercise in a sub rosa manner that inhibits accountability for whatever political direction the police receive. There is much

---

<sup>109</sup> Compare Marshall “Police Accountability Re-visited” at 61 with Marshall *The Government and the Police* *supra*

## Conference Draft – June 29, 2004

instinctive distaste for political involvement in policing. In the wake of APEC, for example, Professor Pue has argued that “countries where the police respond to political command are not democracies. They tend to be brutal, inhumane places.”<sup>111</sup> The danger here is that the politicians may be tougher on protest than the police. There is also a danger that it may be impossible for the government to divorce partisan from public interest concerns. For example, governments to the right of centre may conclude that it is in the public interest to be tough on labour, anti-globalization and Aboriginal protest while governments to the left of centre may conclude that it is in the public interest to be tough on anti-abortion, anti-gun control and anti-gay rights protest. In a pluralistic and conflicted democracy, there may be no middle and detached ground to determine the public interest.

Another danger of political intervention in protests is that governments will not be held accountable by the people and the media for whatever direction is provided to the police. In this vein, Professor Pue takes issues with the optimistic view of democratic policing articulated by the McDonald Commission by observing that “the theory of responsible government may well be at odds with the practice of modern executive”<sup>112</sup> in which Ministers rarely resign for misconduct in their Ministries and power is centralized in central agencies, most notably the Prime Minister’s Office. On this view, the problem at APEC was perhaps not so much the fact of political involvement, but the failure of responsible Ministers to be held accountable for the intervention. A related issue is the lack of transparency about what guidance is provided to the police. At various junctures, responsible Ministers and their staff have relied on the controversial idea that they were seeking and conveying information to the police as opposed to directing or even influencing their actions.<sup>113</sup> There is a danger that this distinction may be lost on the public and perhaps the police.

### **Who is the Government: Responsible Ministers, Police Boards or Central Agencies?**

A related question is whom represents the government in any model of democratic policing. Both the relevant federal and Ontario police acts, as well as traditional theory of

---

<sup>110</sup> John Mark *In the Office of the Constable* supra

<sup>111</sup> Wes Pue *Pepper in Our Eyes* supra at x

<sup>112</sup> Wes Pue “Policing, the Rule of Law and Accountability in Canada: Lessons from the APEC Summit” in *ibid.*

## Conference Draft – June 29, 2004

responsible Parliamentary government, are clear. The responsible Minister should represent the government to the police and be accountable for police actions as well as any direction that the police receive from civil servants in the Ministry or the Minister's own staff including their political staff. Even if one proceeds on the assumption that such a unilateral relationship between the government and the police can be maintained, some difficult questions remain. One is whether the responsible Minister takes direction from the Cabinet and the Prime Minister on how his or her powers should be exercised. As discussed above, there was a lack of clarity about whether the Minister of Justice or the Cabinet made the decision in the Nicholson Affair. Both the Attorney General and the Solicitor General are Law Officers of the Crown who by constitutional convention enjoy some degree of independence from the Cabinet with respect to some decisions. The exact nature of this convention is, however, unclear especially with respect to non-prosecutorial decisions. Even with respect to prosecutorial decisions, it is accepted that both Law Officers of the Crown can seek information from Cabinet colleagues and have discussions with them. This raises the problem to be discussed below of the somewhat illusive distinction, especially in the realm of public perception, between the exchange of information and the wielding of influence or control.

There is also the issue that the responsible Minister for policing both in Ontario and federally is no longer called the Solicitor General. Although some might argue that this is a cosmetic change, proponents of the governmental policing model might argue that it represents a more profound change in governance and policing. The new emphasis since September 11 on public security and the need for a multi-pronged and multi-ministerial response to a wide variety of threats places pressures on the idea that relations between the police and the government can and should be filtered through one responsible Minister. This change also builds on developments prior to September 11 which saw increasing centralization of power in central agencies and evidence that the traditional relationship between the Solicitor General and the Commissioner of the RCMP had at times been bypassed by intervention from central agencies.<sup>114</sup> Donald Savoie has argued that the

---

<sup>113</sup> In the APEC affair, Jean Carle of the PMO testified he only made "suggestions" to the police and did not make orders. *Wes Pue Pepper in Our Eyes* supra at xxi. Similarly, the responsible Minister and officials in the Hadfield and Small cases maintained that they sought information as opposed to influence.

<sup>114</sup> Donald Savoie *Governing From the Centre* at 125

## Conference Draft – June 29, 2004

multiplicity of departments and agencies involved in major files “may well have reached the point where accountability- in the sense of retrospectively blaming individuals or even departments for problems- is no longer possible or fair.”<sup>115</sup> The patterns of traditional Ministerial accountability and responsible government appear to have eroded to a significant extent since the McDonald Commission defended its vision of democratic policing based on Ministerial responsibility for all but the quasi-judicial functions of the police. The appropriate reaction to this change in government is, however, an open question. One possibility is to fight the tide and attempt to channel accountability back along Ministerial lines.<sup>116</sup> Others might give up on Ministerial responsibility and accept governmental policing as a reality. For others, the complexity and difficulties of governance may make the model of full police independence much more attractive.

A final complication is that the RCMP and the OPP are somewhat anomalous in Canada because they are not subject to direction from a police board as are many municipal forces. For example, the Ontario *Police Services Act*<sup>117</sup> provides for police boards appointed in part by the province and the municipality for all municipal police forces. Under s.31 of the act, the boards are responsible for policies for effective management of the police and can direct and monitor the performance of the Police Chief. At the same time, the board can only give orders and directions to the Chief and shall not direct him or her “with respect to specific operational decisions or with respect to the day-to-day operation of the police force.” The introduction of a police board may be a means to ensure more direct political oversight of the police than can occur in a large ministry. A properly staffed police board might be able to spend much more time on policing than a Minister with multiple responsibilities in an expanding security portfolio. Such a board might also be more inclined to develop protocols and guidelines to deal with issues such as the policing of protests. At the same time, it could be argued that adding another body in the complex relationships between the RCMP and the OPP might only cause confusion and diffuse accountability.

---

<sup>115</sup> Donald Savoie *Breaking the Bargain* at 268

<sup>116</sup> Professor Savoie appears attracted to this route as he argued “there is no need to abandon the doctrine of ministerial responsibility. The doctrine is not what ails institutions and doing away with it would accomplish very little. It would not strengthen the hand of political actors in their relation with career officials, increase accountability, improve policy making or government operations, or make government more responsive to Canadians.” Ibid at 256. Interestingly he proposes the greater use of “written instructions” from Ministers ibid at 259, an option that will be discussed below.

<sup>117</sup> RSO 1990 c.P-15.

## Conference Draft – June 29, 2004

### Information or Influence; Accountability or Control?

Another crucial question that will inform the choice of models is whether it is possible to maintain the distinction between exchanges of information between police and government in order to promote accountability as opposed to attempts by the government to exert control or influence over policing decisions. There is considerable support for such a distinction in the literature and the cases. Geoffrey Marshall has drawn a distinction between accountability based on a “subordinate and obedient” mode and that based on an “explanatory and co-operative mode”. He suggests that in England, the “Home Secretary’s responsibility for policing throughout the country is one that rests not on an ability to issue orders but on the capacity to require information, answers and reasons that can then be analysed and debated in Parliament and the press.”<sup>118</sup> Philip Stenning and Lorne Sossin have also argued that accountability need not be tied to control.<sup>119</sup> Those who support a distinction between accountability and control seem to envisage a process whereby the responsible Minister can demand information from the police in order to ensure accountability without purporting to control the decisions made by the police. The McDonald Commission also accepted the viability of such a distinction by concluding that the responsible Minister might in some instances have a responsibility to be kept informed about even quasi-judicial policing functions that could not be the subject of Ministerial control or direction. The judge in the Small case concluded that information had flowed upward from the police but influence did not flow downward from the government.

The analytical distinction between the exchange of information for accountability purposes and the actual exercise of influence and control certainly can be made. The more relevant question for policy-makers is whether it is sustainable in the real world. The sustainability of the distinction is premised on a wide acceptance by the relevant actors, as well as by the public, of the principle of police independence. Professor Edwards has argued that in extreme cases at least, a Minister who has access to information about a case that he

---

<sup>118</sup> Geoffrey Marshall “Police Accountability Re-Visited” in D. Butler and A. Halsey eds *Policy and Politics* (London: MacMillan, 1978) at 61-62

<sup>119</sup> Stenning “Accountability in the Ministry of the Solicitor General of Canada” supra; Stenning “The Idea of Political ‘Independence’ of the Police” in this volume; Sossin “The Oversight of Executive-Police Relations in Canada” in this volume.

## Conference Draft – June 29, 2004

or she believes is badly mishandled will likely be pressured into acting.<sup>120</sup> Information without the ability to act can be a severe political and perhaps even legal liability. Even if Ministers restrain themselves and do not attempt to influence a police decision, the police may either try to please the Minister or perceive that there has been influence. For example, the investigating officer in the Small case perceived political influence in the charging decision even though he was an experienced and legally trained officer. The lack of consensus and clarity about the ambit of police independence make it more likely that the public and the police will interpret requests for information as an implicit attempt to influence the police.

### **Political Involvement: Before, During or After the Police Have Made their Decisions?**

One distinction that may perhaps help to inform the above debate is the distinction between requests for information before the police have made the relevant decision and requests for information after the police have made the relevant decision. This mirrors a distinction sometimes found in the accountability literature between review which is retrospective in nature and oversight which is ongoing.<sup>121</sup> It also builds on a distinction drawn between by the Patten Inquiry into Policing in Northern Ireland between police independence from direction, but their accountability to “inquiry or review after the event”.<sup>122</sup>

Requests and exchanges of information after a decision has been made by the police can minimize the likelihood that the political intervention will influence the police decision. Even if a Minister intervenes and changes a preliminary decision made by the police, the

---

<sup>120</sup> John Edwards *Walking the Tightrope of Justice: An Examination of the Office of the Attorney General* (Halifax: Queens Printer, 1989) at 163.

<sup>121</sup> “Oversight means ‘supervision’...Review means a ‘survey of the past’...Oversight results in a sharing of responsibility, and as such, it somewhat blurs accountability. Review, on the other hand, is an important element of accountability because it provides an independent assessment of the way in which an organization has performed.” *A National Security Committee for Parliamentarians* 2004 at 8-9.

<sup>122</sup> Independent Commission on Policing for Northern Ireland *A New Beginning: Policing in Northern Ireland* September 1999. The Patten Inquiry rejected Lord Denning’s understanding of police independence and the very term itself in favour of a new term “police responsibility”. It wanted to stress that while police may be able to make decisions free from external direction “no public official, including a chief of police, can be said to be ‘independent’”, at least in the sense of being “exempted from inquiry or review after the event by anyone.” Independent Commission on Policing for Northern Ireland *Report* at 6.20-6.21. It recommended that a police board and ombudsman “actively monitor police performance in public order situations and if necessary seek reports from the Chief Constable and follow up these reports as they wish.” Ibid at 9.19. This contemplates after the fact accountability but no powers of direction and qualifies its categorical statement that “we disagree with Lord Denning’s view that the police officer ‘is not a servant of anyone, save of the law itself’”. Ibid at 1.14.



## Conference Draft – June 29, 2004

contrast between the police's preliminary decision and the Minister's final decision may help to promote transparency and accountability for the final decision. As will be discussed below, one of the more important issues in police-governmental relationship is providing optimal conditions for ensuring transparency and accountability for any political intervention in policing. What should be avoided is the too common murky middle ground in which the public and the media are not sure whether political influence has been brought to bear on the police. Accountability and transparency may be enhanced by allowing the police the opportunity to make a preliminary decision free from influence and then requiring that any political influence be conveyed in a deliberate and formal manner.

### **Political Intervention: Partisan or Public Interest?**

Another crucial question that will inform the choice between the models are assumptions and predictions about the quality and nature of political intervention in policing matters. Both John Edwards and the McDonald Commission argued that was possible and vital to distinguish between partisan and public interest considerations. Partisan matters such as support for the government and its supporters should never influence political intervention on policing matters but a broad range of public interest considerations should. These would include the effects of policing on group relations in Canada and matters of international relations.

Others argue that the distinction between partisan and public interest matters breaks down in the real world. The fortunes of the government are often linked with the manner in which police handle high profile matters. Even if the politicians were genuinely prepared to make the distinction, a cynical public might assume that they were nevertheless still motivated by partisan considerations. In addition, the assumption of a single public interest is increasingly questioned in our pluralistic and contested democracy. Reg Whitaker has criticized the McDonald Commission for adopting an overly optimistic view of Ministerial interventions and for downplaying the danger and reality that Ministerial interventions on issues involving Quebec separatism can and did serve the interests of the Liberal Party of Canada.<sup>123</sup> There was also controversy about whether the McDonald Commission adequately investigated allegations of infiltration and spying by the RCMP security service

---

<sup>123</sup> Reg Whitaker "Designing a Balance between Freedom and Security" in J. Fletcher ed *Ideas in Actions: Essays on Politics and Law in Honour of Peter Russell* (Toronto: University of Toronto Press, 1999) at 129.

## Conference Draft – June 29, 2004

on Aboriginal groups.<sup>124</sup> The point here is not to debate the shortcomings or virtues of the McDonald Commission, but to illustrate some of the difficulties of separating public interest considerations from the partisan fortunes of the government of the day. Arguments that police, like all civil servants, have a right to be “apolitical” are based on a similar confidence that partisan and public interest considerations can be separated.<sup>125</sup> This raises the question of whether the idea of a non-partisan public interest is based on a consensus view of politics that glosses over deep cleavages that have always existed in Canadian society but are perhaps more evident today than at any other time. Scepticism about the distinction between partisan and public interest considerations might increase support for police independence.

### **What is Worse: Political Interference or Political Shirking?**

Much of the literature and cases on police independence is driven by the fear that politicians will interfere in police decisions in a manner that adversely affects the impartial application of the rule of law to all. Such fears cannot be dismissed. The findings of the Marshall Commission of interference in police investigations of Cabinet ministers stand as an important reminder of the dangers of improper influence on criminal investigations. Once one moves away from criminal investigations, however, the danger of political interference should be balanced with the danger of political shirking.

Political shirking occurs when the responsible Minister refuses to assume responsibility and be held accountable for policing decisions that he or she could have influenced. Professor John Edwards made this point particularly well when he argued that “undue restraint on the part of the responsible Minister in seeking information as to police methods and procedures can be as much as a fault as undue interference in the work...”<sup>126</sup> As discussed above, Sir Robert Marks has stated that successive Home Secretaries were only too happy to leave controversial and difficult policing decisions to the Chief Constable. The prospect that responsible officials may avoid political responsibility suggests that the exact contours of police independence will be shaped by the willingness or unwillingness of responsible officials to intervene in policing matters. Thus a democratic model of policing could in practice evolve into one of full police independence should the politicians not enter

---

<sup>124</sup> “Mounties used dirty tricks against Indians: affidavits” *Globe and Mail* 7 March 1979.

<sup>125</sup> Lorne Sossin “The Oversight of Executive-Police Relations in Canada” in this volume. Professor Sossin also stresses the importance of various accountability mechanisms as a check on an “apolitical and autonomous” police.

## Conference Draft – June 29, 2004

the field. The prospect of political avoidance of difficult policing decisions also raises the questions of whether problems of democratic deficit that are said to affect other aspects of government also affect the relationship between the police and the government.

### **Political Involvement in Policing: Informal or Formal?**

A final important issue in selecting between the models is whether political involvement in policing will remain informal or whether it can be formalized reduced to writing so as to ensure transparency. Examples such as the Hadfield, Small and APEC cases suggest that politicians and those acting for politicians may often maintain that they were only making suggestions to the police and that the police maintained the ultimate power to make an operational decision. The Small case reveals how those within the police may differ on whether the political intervention has actually influenced the police decision. The question then becomes whether it is possible or desirable to formalize the relationships between the government and the police so as to ensure that political interventions in policing are reduced to writing and perhaps also made public.

Rene Marin has written approvingly of South Australian legislation which requires directives from the responsible Minister to the police Commissioner to be both reduced to writing and to be laid before Parliament and published. In his view such an approach can bring “the transparency necessary to avoid potential conflict” and unfounded allegations of interference in “the very sensitive relationship between the Minister responsible for the police and police authorities.”<sup>127</sup> Acting on the Australian example and the advice of

---

<sup>126</sup> Edwards *Ministerial Responsibility for National Security* at 97.

<sup>127</sup> Rene Marin *Policing in Canada* (Aurora: Canada Law Book, 1997) at 111. Section 6 of South Australia’s *Police Act, 1998* No 55 of 1988 provides that the Commissioner is responsible for the control and management of the police “subject to this Act and any written directions of the Minister”. Section 7 provides that there shall be no Ministerial directions in relation to internal matters of pay, discipline, hiring and firing. Section 8 provides that a copy of any Ministerial direction to the Commissioner shall be published in the *Gazette* within eight of the direction and laid before Parliament within six sitting days.

Section 4.6 (2) of Queensland *Police Services Administration Act* provides that the Minister may give direction to the Commissioner about “policy and priorities to be pursued in performing the functions of the police service” and “the number and deployment of officers and staff members and the number and location of police establishments and police stations” but s.4.7 provides that a copy of these written directions should be kept and provided annually to the Crime and Misconduct Commission and then referred to a Parliamentary Committee on Crime and Misconduct. Section 37(2) of the Australian Federal Police Act provides that “the Minister may, after obtaining and considering the advice of the Commissioner and of the Secretary, give written directions to the Commissioner with respect to the general policy to be pursued in relation to the functions of the Australian Federal Police.” For a full explanation of the genesis and reception of these and other international comparison see Philip Stenning “The Idea of the Political ‘Independence’ of the Police” in this volume.

## Conference Draft – June 29, 2004

Professor Edwards<sup>128</sup>, the Marshall Commission championed a similar approach to govern the relations between a Director of Public Prosecutions and the Attorney General. In its view “the right blend of independence and accountability”<sup>129</sup> was a system that would allow day-to-day prosecutorial independence while allowing the responsible Minister to intervene through general guidelines and specific directives that would be reduced to writing and published in the Gazette.

The implementation of the Marshall Commission’s recommendations, as well as subsequent amendments to Nova Scotia’s *Public Prosecutions Act*<sup>130</sup>, is a complex subject beyond the scope of this paper. It is relevant to note, however, that there are some signs that the Attorney General has become reluctant to intervene formally under the requirements of the legislation.<sup>131</sup> The Nova Scotia act also contemplates consultation and discussions between the Attorney General and the DPP about individual cases that do not have to be reduced to writing and published. This has raised fears in some quarters that informal political interventions in prosecutions will occur.<sup>132</sup> This experience transferred to the

---

<sup>128</sup> Professor Edwards concluded that in general federal legislation in Australia establishing a DPP that was subject to written and published directives from the Attorney General was an optimal means of “conferring upon any officer holder the maximum degree of independence when making prosecutorial decisions” but also maintaining “parallel regard for sustaining the principle of ministerial accountability.” Edwards *Walking the Tightrope of Justice* supra at 184-185.

<sup>129</sup> Marshall Commission Final Report at 229-230.

<sup>130</sup> S.N.S. 1990 c.s21 as amended by S.N.S. 1999 c.16. Note that s.6(2) of the *Canadian Security Intelligence Act* R.S.C. 1985 c.C-23 also contemplates more transparency than s.5 of the *RCMP Act* supra by providing that the Minister “may issue to the Director written directions with respect to the Service”. These directions are not published as statutory instruments, but a copy is provided to the Security Intelligence Review Committee.

<sup>131</sup> Professor Stenning has concluded that “the appropriate limits to an Attorney General’s intervention in particular cases appear still to be neither agreed upon nor well understood by the public and the media. This situation may perhaps have led Attorneys General to be overly reluctant to fulfill their responsibilities with respect to intervention in some individual cases and the public and the media to be overly suspicious of any such involvement by an Attorney General. On the other hand, it can readily be acknowledged that these shortcomings may be preferable to their opposites, as revealed by the Marshall Inquiry’s report.” Stenning “Independence and the Director of Public Prosecutions: The Marshall Inquiry and Beyond” (2000) 23 Dal.L.J. 385 at fn 46

<sup>132</sup> Section 6 ( c ) of the *Public Prosecutions Act* provides for consultations that do not bind the DPP and s. 6a added in 1999 provides that the Attorney General and the Director of Public Prosecutions shall “discuss policy matters, including existing and contemplated major prosecutions” at monthly meetings. Professor Edwards contemplated that the responsible Minister could still seek information and offer advice without triggering the formal requirements of written and public directives. He wrote: “There is no intention to limit the process of advice and consultation...I am not advocating that the contents of such advice be always reduced to writing and made the subject of public disclosures”. Edwards *Walking the Tightrope of Justice* supra at 189. The Opposition in Nova Scotia, however, argued that the 1999 consultation amendments compromised the arms-length relationship between the DPP and the AG and could defeat other provisions designed to ensure that political interventions were reduced to writing and made public so as to ensure transparency and accountability. Nova Scotia Legislative Debates 4 Nov. 1999 at 1667, 1683.

## Conference Draft – June 29, 2004

policing context raises the issues of whether formalized requirements might either inspire political avoidance of intervention and/or adaptive behaviour that results in informal consultations between politicians and the police without written and public directives being issued. These dilemmas may suggest that reliance on the integrity of the relevant actors and their understandings of the proper principles that should govern police-governmental relations is inescapable.

The South Australian policing model and the Nova Scotian DPP model might be an effective way to combine police independence with accountability. Expectations could develop that the responsible Minister would never intervene with respect to criminal investigations and would only intervene in the policing of specific public order events through general guidelines and in exceptional cases with written and public directives. A statutory requirement that both general guidelines and specific directives be reduced to writing and made public might help ensure that the responsible Minister is held accountable for any political intervention in policing. It could also be valuable as a means of channeling governmental intervention through the responsible Minister and not allowing central agencies or political staff to perform an end run around the traditional and statutory framework of Ministerial accountability for policing. At the same time, the possibility of adaptive behaviour cannot be precluded and there could be consultation between the Minister and the police that is not reduced to writing or made public. This would raise the issue discussed above about whether exchanges of information can be separated from attempts to influence the police. Cases such as Hadfield and Small suggest that requests for information by the responsible Minister or his staff may frequently be perceived, rightly or wrongly, as attempts to influence the decision of the police. One possible way to deal with such a danger would be that even less formal information requests not be made until the police have made preliminary decisions. As suggested above, waiting until preliminary decisions and plans have been made by the police responds to the dangers that earlier exchanges of information and views between the police and the government may unduly influence the police or create public perceptions of such influence. Once informed of the preliminary decision and the preliminary plan, the responsible Minister, perhaps after

---

## Conference Draft – June 29, 2004

consultation with the Cabinet and/or a central agency, could then decide either not to intervene or to issue a public directive to guide the police. Such a process would allow the police space and time to apply their professional judgment to difficult policing matters, but would also allow the responsible Minister to assume responsibility for either the police's plan or for a different plan or directive.

### Conclusion

One first step in clarifying relationships between the police and the government would be to codify basic and widely agreed upon principles of police independence. Although there is some dispute about its outer periphery, there seems to be growing consensus that the police should be protected from political direction in the process of criminal investigation. The only legal source that runs counter to this principle are the statements in various Canadian police acts that the police are subject to the direction of the police. As recommended by the APEC inquiry, the time may have come to amend those acts to codify the *Campbell* principle and to recognize police independence to that extent.

There is much more dispute about police independence beyond the criminal investigation sphere. In support of a broader understanding of police independence is considerable scepticism about all forms of political intervention in policing and of the distinction between exchanging information and exerting influence. The role of central agencies in events such as APEC also raise questions about whether traditions of Ministerial responsibility are viable given the complexity of modern governance. Geoffrey Marshall's striking change of position and his embrace in 1978 of a convention of full police independence is testimony to a growing lack of confidence in politicians and traditions of Ministerial accountability. Some might also argue that legal developments such as the Charter and police complaints bodies provide more of an accountability check on police decisions than when Lord Denning or Pierre Trudeau originally articulated the doctrine of police independence.

Nevertheless, there are still some reasons to be cautious about embracing a doctrine of full police independence. In support of limiting police independence to the criminal investigation core are the dangers of the police making questionable policy decisions in the name of police expertise and independence. There is also the democratic importance of promoting informed and meaningful debate about how the police interact with their fellow

## **Conference Draft – June 29, 2004**

citizens. Protesters might only become more alienated from electoral politics if they are told that elected Ministers have no responsibility for the way they have been treated by the police. The case for transparent and accountable democratic control and responsibility over policing may be particularly strong in the case of police relations with Aboriginal people. The case for democratic policing is also strengthened should legal methods of holding the police accountable for the way they police demonstrations prove to be inadequate. Police complaints, Charter and civil litigation and criminal prosecutions are blunt and after the fact methods to control police conduct. We should be cautious about giving up on democratic control of the police and the traditions of responsible government.

If the democratic policing model is to be viable, however, steps should be taken to ensure that political intervention in policing is less murky and more transparent so that the responsible Minister can be held accountable for guidance given to the police. Legislative reform to recognize police independence with respect to criminal investigations and providing for written and public guidelines and directives for other policy matters might strike an appropriate balance between the goals of police independence and the ultimate accountability of both the police and the responsible Minister to both the people and the law. Such a process could make clear for the public, the police and the courts, the exact influence elected politicians have had on policing decisions. Should such a process be dismissed as too onerous and too visible by the responsible officials or as inconsistent with the complexities of modern governance and policing, then much of the democratic justification for political involvement in policing would be taken away. If our elected representatives are to influence policing, they should be prepared to do so in an open and accountable manner. If transparently democratic policing (outside the core of independent police investigation) fails, then the alternatives are full police independence or governmental policing. In other words, we will have to decide whether to place our trust in the police or our trust in governments that may not be held accountable for their influence on the police. Such a choice would not be a happy one to have to make in a democracy.