POLICE-GOVERNMENT RELATIONS IN THE CONTEXT OF STATE-ABORIGINAL RELATIONS

By
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Abstract

Common debates over government-police relations share a certain structure – the main realm of contention revolves around questions about how to resolve tension between the concern that the police should be free to act independent of political interference and the concern that the police should, in a liberal democracy, be held accountable for their actions. This paper looks at this tension in the context of state-Aboriginal relations, a process of contextualization that casts a critical eye on the efficacy of the typical forms of analysis that arise from this debate.

The first stage of analysis provides a contrast for the process of critical contextualization, as the question of police-government relations in the context of Aboriginal policing issues is treated as if the context introduced no particular or unique problems. At this first stage Aboriginal peoples in Canada are conceptualized as 'minority populations' within a liberal democracy, possessed of the rights enjoyed by other disadvantaged minority groups.

The second two stages progressively critique this position, introducing first factors related to Aboriginal people's unique legal and constitutional status in Canada, and then factors relating to Aboriginal people's distinctive historical (and thereby necessarily political) status in relation to the Canadian state.

This form of contextual analysis is critical to making sense of the appropriate relation between the police and the Canadian government when these two bodies intersect with the interests of both Aboriginal nations and Aboriginal individuals within Canada. It is also critically important when attention is turned to particular disputes, for no scenario played out in the arena of Canadian-Aboriginal relations can be adequately understood apart from its place within the larger legal, constitutional, historical and political landscape.

Introduction

The debate about the appropriate relationship between the police and the government in a liberal democracy centres on the tension between the value placed in an independently operating police force (which would be seen as an original source of action, responsible only to the law and good conscience for its actions) and the value

in having police forces accountable to a representative governing body (which could set policy, and monitor – potentially even control – the actions of the police).

The value in an independent police force is grounded in the freedom from unwarranted political interference this promises. This freedom, one could argue, is essential to the rule of law, as it both (i) allows for police discretion in relation to police operations and (ii) opens the door to the possibility of the police applying the rule of law to those who might otherwise seem to be their political superiors[2]. The value in police accountability is grounded in recognition of the role police play in liberal democracies, recognition which demands that the police be both (a) directed by the public good, and (b) overseen in its efforts to promote that good. Political direction is essential, for the police function as an arm of the state, necessarily accountable to the public (and the governing body charged with both ensuring that the interests of the public are being met, and that state institutions are constantly and consistently directed by the public's interests). Forms of oversight are essential in providing protection from 'rogue' police elements and in fostering democratic notions of accountability.

The notion of a fully independent police force is antithetical to that of a police controlled and directed by political forces, and so some synthesis is demanded – some arrangement within which a reasonable measure of police independence is preserved

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[2] On a practical or functional level one could also suggest that an independently operating police – being a self-contained institutional structure – can be much more efficient in promoting public safety and stability.

in the face of the need for the police to be publically accountable. One fundamental debate about police independence is about how to arrive at such an arrangement.

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

Viewed simplistically through a demographic lens, Aboriginal peoples in Canada can be said to constitute 'minority populations'. In liberal democracies such as Canada (in which multiculturalism is highly valued) mechanisms exist to protect minority rights[3]. Part of this protection requires that individual members of minority communities be protected from unwarranted actions from either the police or the state. Insofar as the rights of minorities are accorded legal protection, and the actions of the state and all its manifestations are governed by the rule of law, the law will rule over both police and the government, assuring that neither can undercut the legal

[3] See, for example, Reference re Secession of Quebec, [1998] 2 S.C.R. 217, [hereinafter *Quebec Secession Reference*] where protection of minority rights is said to constitute a fundamental constitutional principle, one of four principles said to "dictate major elements of the architecture of the Constitution itself and [which] are as such its lifeblood" (at 248).

protections afforded without due consequences.

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

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

Let us consider first those rights individual members of minority populations enjoy on the basis of their being citizens or residents of Canada. There are fundamental rights and interests held by all Canadians that must be equitably and fairly recognized and protected, no matter the personal characteristics of the person(s)

claiming such rights. Many of these rights are articulated in the *Charter of Rights and Freedoms*[4]. Within the framework of the *Charter*, section 15 operates to ensure that governmental practices unjustifiably discriminating on the basis of race (or ethnicity) can be found unconstitutional, and the situation rectified. Under this broad category of 'minority rights', then, individual members of minority populations can reasonably expect to be treated by and under the law in the same manner as all other Canadians.

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

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

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

So, for example, in Canada certain Francophone rights are legally recognized, especially in relation to language[5] and education[6]. While these particular rights have

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[5] For example, section 16 of the *Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11] states:

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

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

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

[6] The *Charter of Rights and Freedoms*, *supra* note 4, states under section 23:

(1) Citizens of Canada

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

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

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

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

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

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

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

their origins in the unique historical dynamic that developed over time between the British and French colonies in North America, their contemporary grounding arguably now rests in the liberal democratic understanding that linguistic and educational rights are essential to the preservation of groups and group-identities[7]. English-speaking Canadians enjoy a world within which the use of their language and the existence of their educational structures are unquestioned, and this very same dominance operates as a key element going into the apprehension that a constant threat looms over Francophone cultural institutions. The dominance of English language institutions and the threat this poses to French language counterparts necessitates the protection of language and education rights for Francophones[8].

While it is discriminatory policing that commonly generates disputes over the proper way in which the police and the government should interact in relation to minorities, it is possible to imagine a situation in which minority group rights would be in the background of the policing action itself. For example, a provincial government in Canada might consistently and continually act to minimize the provision of French language-based educational programs, potentially inciting members of that province's Francophone community to engage in some form of

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

[8] The Supreme Court also endorsed this line of reasoning in the *Quebec Secession Reference, supra* note 2: "[A] constitution is entrenched beyond the reach of simple majority rule [because] ... a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority." [at 259]

physical protest. This protest, in turn, might be met with inappropriate police action, which itself might be prompted by either (a) unacceptable (potentially ethnocentric) attitudes on the part of some members of the police force involved, or (b) unacceptable political interference with the policy or operations of the police force.

The first sort of problem (unacceptable police attitudes) would bring to the fore concerns about discrimination, as the police involved would most likely be prone to reasonable charges of bias and intolerance. The second sort of problem is more interesting, as it may be traced back to either (a) discriminatory attitudes held by the government (or government officials involved), or (b) potentially unwarranted policy positions which deny or downplay the legal protections that should be accorded minority rights.

Aboriginal peoples in Canada can be said to enjoy both forms of 'minority rights'. They enjoy rights on the basis of their being Canadians, rights which are protected from unjustifiable discriminatory governmental action. They may also be said to enjoy certain rights in virtue of their being racial/cultural minorities – rights, for example, to the preservation and protection of their languages.

For the purposes of this study, however, little of import comes from this, as Aboriginal peoples would share these sorts of rights with other minority groups in Canada (and indeed in the case of the first sort of rights, with every Canadian). Furthermore (as we noted just above), policing disputes which engage minority rights will most likely rest on claims about discriminatory practices – completely

unacceptable practices to be certain, but certainly not unique to the situations of Canada's Aboriginal peoples.

It will be necessary in the next stage of discussion, however, to re-introduce the second sort of problem – that which arises when particular disputes that draw the attention of the police and the state can be causally traced back to potentially unacceptable political (or policy) decision-making (where the relevant executive members reach decisions which essentially deny or ignore the importance of rights that should enjoy legal protection). We must reconsider this sort of problem when we introduce particular sorts of rights – distinct from 'minority rights' – that Aboriginal peoples possess[9].

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

What makes the question about how to mediate the tension between police independence and political oversight particularly powerful and intriguing in the context of disputes involving Aboriginal peoples is the fact that Aboriginal peoples *do not* simply constitute minority populations within Canada. While it is open to Aboriginal people to appeal to section 15 of the *Charter*, demanding the government treat them without bias, and while they may even enjoy minority rights in virtue of the

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

liberal democratic push to protect group identities from the threat of immersion in the larger dominant cultural milieu, Aboriginal peoples also enjoy the recognition and affirmation of existing Aboriginal and Treaty rights under section 35 of the *Constitution Act, 1982*[10].

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

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[10] Section 35 (1) of the *Constitution Act, 1982*, supra note 4, states that:

> The existing [A]boriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

grounded in recognition by the state, reach back in Canada at least as far as the grant of what amounts to a monopoly business licence to the Hudson's Bay Company in its Royal Charter of 1670[11].

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

1. Aboriginal (and treaty) rights are group rights, held exclusively by Aboriginal peoples of Canada. Not only are the rights not attached to Aboriginal peoples as individual citizens of Canada, but also they are not restricted to contemporary Aboriginal communities. They are rights that reach out to future generations of Aboriginal peoples, protecting their interests alongside those of people now living in Aboriginal communities[12].

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

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

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

2. They have been accorded *explicit* constitutional protection: While section 15 protects minority groups from governmental discriminatory action, fundamental rights that might be threatened are not articulated in this provision – indeed, the test for determining whether section 15 has been respected speaks of the protection of 'interests' and as much as it does rights[13]. Furthermore, only in relation to Francophone rights do we find in the law explicit and detailed recognition of minority group rights (besides that explicit recognition, the only other implicit mention of such rights in the *Constitution Act, 1982*, is found in section 27, which speaks vaguely of the promotion of 'multiculturalism'[14], while jurisprudence only speaks of a constitutional convention or principle concerning the protection of minority rights[15]).

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

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[13] See, for example, Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497. In this decision the Supreme Court gathered together threads of analysis that had developed around issues of discrimination and advanced a 'guide' to future jurisprudence around section 15. The heart of this approach is the focus on human dignity – if action by the government is found to treat a group differentially in such a manner as to negatively impact on the dignity of individual members of that group, a court may find that this group has been treated unequally in such a manner as to constitute an affront to constitutional values and principles. This sort of analysis can protect members of minority groups from discrimination, but the analysis does not rest on the notion that members of minority groups have particular rights that warrant protection – in any particular dispute only a right to 'equal treatment' would be at issue.

[14] The *Constitution Act, 1982, supra* note 4, at section 27:

> This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

[15] See again, for example, *Quebec Secession Reference, supra* note 2.

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

Gladstone[17], and applied to treaty rights in R. v. Badger[18] and R. v. Marshall[19]).

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

5. Aboriginal (and treaty) rights are not grounded in recognition of the need to preserve Aboriginal culture or heritage (though Supreme Court jurisprudence may be mistakenly taken at times to have suggested that this is so[20]).

6. They are grounded in the need to reconcile the prior presence of organized Aboriginal societies to the assertion of Crown sovereignty[21].

7. The very content of these rights, then, is grounded in the *prior existence* of organized Aboriginal societies. As such they cannot be thought of as based in any fashion on grants from the state. Aboriginal title cannot be thought of as any sort of granted interest in land[22], and Aboriginal rights cannot be thought of as forms of licence to do one thing or another.

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

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

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

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

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

[21] *Van der Peet*, *supra* note 19.

[22] *Delgamuukw*, *supra* note 11.

8. They are marked by and intertwined with a complex fiduciary relationship that binds the Crown and Aboriginal peoples[23]. This entails recognition of a relationship which precludes the Crown from viewing its obligations to Aboriginal peoples as merely 'political' – its obligations, in many instances, will be entirely legal in nature.

9. In light of this historically grounded relationship, with its trust-like quality, the *honour* of the Crown is engaged when dealing with the legal and practical interests of Aboriginal peoples[24].

With the overview of the ways in which Aboriginal (and treaty) rights differ essentially from any other rights held by minority populations in Canada, we can now turn to the question of the form the discussion around the tension between police independence and political oversight should take in the context of disputes involving Aboriginal communities.

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

To highlight the impact contextual matters have on this debate we can work our way through several contrasting situations.

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[23] The existence of a fiduciary relationship (as opposed to a political relationship, or a pure trust relationship) was introduced in the context of land surrenders in R. v. Guerin, [1984] 2 S.C.R. 335. In *Sparrow*, *supra* note 15, the general relationship between the Crown and Aboriginal peoples was characterized as fiduciary in nature (which structured the sort of process of justification in which the Crown would have to engage when it acted to infringe Aboriginal rights).

[24] This was especially highlighted in *Marshall*, *supra* note 18.

On one hand, consider policing problems that might arise when police interact with protestors voicing political dissent, while on the other hand, consider a policing problem that might arise when police interact with Aboriginal protestors voicing dissatisfaction with the government's treatment of their particular situation, involving potential Aboriginal and/or treaty rights. The right to engage in political protest is protected in Canada under the right to free expression[25] (and as well under the rights to peaceful assembly and to association[26]). This sort of activity receives constitutional protection (afforded on the basis of the importance of the rights to free expression and to gather with others of like mind – especially in protest against government policy and action – in a free and democratic society[27]). The Aboriginal protestors could also be said to be exercising their constitutionally protected right to free speech, but their protest itself revolves around claims about government inaction in regards to *other* constitutionally protected rights – Aboriginal (and perhaps treaty) rights. At first glance, however, would one be tempted to say that this contextual difference would have any impact on the debate about police-state relations?

Inappropriate police activity in relation to the non-Aboriginal political protest may lead to calls to re-evaluate the relationship between the police and the

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

[26] The *Charter of Rights and Freedoms*, *supra* note 4, sections 2 (c) and (d).

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

government in power (especially, of course, if it appears that the police action was driven by government directive, which would call into question the strength of what many see as a necessary 'firewall' between the police and the state[28]). Similarly, inappropriate police activity in relation to the Aboriginal protest may lead to questions about the relationship between the police and the government in power (especially, once again, if it appears the government inappropriately directed the police in this matter). In both types of situations a re-evaluation of the relationship would likely indicate the need for a stronger firewall between the police and the government (especially in relation to particular police operations, when such operations are following established policy which seems to further the public interest, but partisan political concerns apparently intrude in the situation). Constitutionally protected rights are at issue, and the movement of the state as it attempts to essentially rise above the rule of law (facilitated through what many might see as its unwarranted use of the police) would seem to call for a greater measure of police independence.

Is there, then, no discernible impact on the debate when Aboriginal or treaty rights are the issue at hand behind the policing action itself? To see if this is so we need to consider a slightly different pair of scenarios. At the level of generality at which we were operating the non-Aboriginal political protestors were merely exercising their right to free speech, while in the case of the Aboriginal protestors we were witness to an exercise of a right to free speech in relation to protests over *other*

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

constitutionally protected rights. We must particularize the non-Aboriginal protest, for example by contrasting the protest of an Aboriginal community with a type of situation introduced earlier – that wherein a Francophone population in a province protests over a systematic government policy of disregarding their language rights, where that protest is met by inappropriate police action, likely driven by political directives.

Very little would seem to change, however, if we contrast these two sorts of situations: re-evaluating the police-government relationship would once again seem to point to the same outcome: a greater degree of police independence is called for, especially in relation to particular police operations already guided by policy aimed at promoting public interests.

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

The right to free expression is grounded in a conception of a liberal democracy, and of the conditions necessary for the promotion of values and ideals highly esteemed

by those living in and through a liberal democratic structure. Francophone rights, on the other hand, can be defended today as necessary for the protection of French culture in a nation dominated by English peoples and their institutions. These are rights arrived at, however, historically, and their nature has already been broadly set out in constitutional instruments that have their origins in the early 19th century. Aboriginal and treaty rights, in contrast to these two sorts of rights, are only very recently recognized as rights protected within Canada, and their place within the legal and constitutional landscape is by and large unsettled. Indeed, the next chapter in Canadian history will be one wherein the nature of these rights – which are grounded in an existence pre-dating the Crown – is worked out across Canada.

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

On the one hand, there are what might be termed negative reasons for the promotion of each position: greater police independence is promoted as a way of protecting the public from undue political interference in what should be even-handed policing matters, while greater political control (especially in regards oversight) is promoted as a means of protecting the public from potentially unfettered inappropriate police activity. On the other hand, there are what might be termed positive reasons for the promotion of each position: a police force operating free of political interference is

more effective in working under its mandate to further the safety and well-being of the citizenry (which includes acting as a pillar in the maintenance of the rule of law), while political control is essential to the task of ensuring the police continue to operate in the direction of the public's interests (where one of the government's essential functions is that of representing the public and its interests).

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

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

which promote the reconciliation envisioned.

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

The outcome of this analysis would seem to be, then, an endorsement of something like the third model of police-government interaction explored by Kent Roach, that of democratic policing, or Lorne Sossin's model of an autonomous and non-partisan political force[29]. A core of policing functions should be by and large removed from government interference, but the government should have a large monitoring role (especially in relation to policy-laden operations), and should play an active role in developing and implementing policing policies.

Calling Into Question the Parameters of the Debate

The analysis, however, has introduced elements that reach unavoidably beyond

[29] Kent Roach, "Four Models of Police-Government Relations", *supra* note 27, and Lorne Sossin, "The Oversight of Executive Police Relations in Canada: The Constitution, the Courts, Administrative Processes and Democratic Governance", prepared for the Ipperwash Commission, 2004.

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

In the context of Aboriginal (and treaty) rights the government is not free to develop and implement policy as it sees fit. This is essentially what it means to say that "federal power must be reconciled with federal duty"[30], the notion that lies at the heart of the imposition of fiduciary obligations on the Crown. The government is not bound to merely political obligations, as fiduciary doctrine has been introduced to reflect the fact that the Crown's hands are tied by the law (and not by politics). This fact does not trace simply back to the content of Aboriginal (and treaty) rights, but to their source – in their being grounded in organized societies pre-dating the arrival of the Crown to present-day Canada. Until the process of reconciliation has run its course in a fair and just fashion the Crown cannot treat Aboriginal peoples as nothing more than groups of citizens within society, their rights contained entirely within the ambit of the

social contract forming the nation-state. In a sense, a fully formed social contract (which will complete the process of welcoming Aboriginal peoples into Canadian society) would be the outcome of this process.

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

Consider a 'traditional' fiduciary-beneficiary relationship, one wherein the fiduciary has discretionary control over the legal and/or practical interests of the beneficiary, such that the fiduciary is in a position to act unilaterally to either positively or negatively influence those interests[31]. While there may be some discretion available in how this fiduciary can work with (and further) the beneficiaries' interests, there are strong guiding principles (a) laying out general restrictions on how the fiduciary can act, and (b) guiding the fiduciary toward a narrow range of acceptable options for acting. Ranging over the particular principles and guideposts is one over-arching fiduciary principle: the fiduciary must act in the best interests of the beneficiary (in relation to the interests at stake).

The very same sort of situation must confront the government as it sets out how to approach Aboriginal issues, even when the particular problem is about how to direct

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[30] *Sparrow*, *supra* note 15.

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

the police either when they are engaged in policing a particular dispute about Aboriginal (and treaty) rights or when the question is about how to set general policing policy. Fiduciary responsibilities intrude, constraining the government as it goes about exercising its powers.

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

This implicates the courts in the debate over the appropriate relationship between the police and the government, for the judiciary must function to measure the degree to which the government has met its legal obligations, dispensing remedies as warranted. In some sense the courts must take on the role of overseers, monitoring and measuring the success of the relationship established by the government between the government and the police, where the measuring stick is provided by fiduciary doctrine and the jurisprudence around Aboriginal and treaty rights. The courts have

(somewhat reluctantly) taken on this role in relation to the government's treatment of Aboriginal and treaty rights, and in the context of government-police relations they must come to see that the constitutionally mandated task they have fallen under carries with it the need to constantly assess both (a) how the government has responded to the legal interests of Aboriginal peoples, and (b) (where the government has systematically ignored or denied the existence of rights which, prima facie, seem plausibly established) the response of the government to the policing of disputes that might arise. Not only must the government be seen not to be unjustifiably interfering with the particular operations of the police once the police are engaged in policing a dispute over Aboriginal and/or treaty rights, but it must be seen as establishing policies for the police to follow in such situations which themselves respect the fiduciary position of the government.

Some Problems With the Use of Fiduciary Doctrine in This Context

The most obvious difficulty with the suggestion that the government should be ever-mindful of its fiduciary obligations to Aboriginal peoples when it is working out its relationship with the police is that it is exceedingly difficult to say anything with a reasonable measure of precision about the nature and content of the fiduciary relationship between the Crown and Aboriginal peoples (and about the fiduciary obligations this relationship might generate). At the heart of this problem is the 'sui generis' status of the fiduciary relationship the Supreme Court has introduced and (minimally) mapped out.