

# THE OVERSIGHT OF EXECUTIVE POLICE RELATIONS IN CANADA: THE CONSTITUTION, THE COURTS, ADMINISTRATIVE PROCESSES AND DEMOCRATIC GOVERNANCE

By  
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## *Abstract*

*This chapter critically examines two central questions. First, what are the mechanisms which constrain and define executive accountability and police oversight in Canada? Second, can the need for the police to remain above partisan politics and beyond manipulation by the government of the day be reconciled with these mechanisms of governance and accountability? Sossin argues that an apolitical and autonomous model is best suited to the dynamics of policing in a constitutional democracy such as Canada, and has the potential to balance the need for political input into policing while countering inappropriate political interference in policing.*

*The executive-police relationship is shaped by multiple and overlapping forms of oversight, from internal review and disciplinary investigations to judicial and public inquiries. These multiple and overlapping forms of executive oversight are often criticized as unwieldy, incoherent and ineffective. The problem with the present system of executive-police oversight is its lack of overarching vision and coherence. Police commentators tend too easily to fall into pro-police and anti-police camps and these polarized groups tend to talk at each other rather than too each other. Governance and institutional structures reflect this bipolar situation.*

*This bipolar political backdrop is complicated by the policy/operational distinction on which the involvement of the executive in policing often turns. Sossin argues that the policy/operation dichotomy is maintained not because it accords with a readily identifiable boundary but rather because we have yet to discover any other way of distinguishing legitimate government interests from illegitimate ones. The “apolitical and autonomous” model of policing represents an alternative framework for discerning the boundary between legitimate and illegitimate executive involvement in policing. The goal of this ideal type to create a legal, administrative and political framework in which neither the police nor the executive can unilaterally impose its will on the other, and in which, as a result, avenues for deliberation and dialogue must be pursued.*

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## **Introduction**

This paper will consider the issue of police-executive relations principally from the executive perspective. The paper will critically examine two central questions. First, what are the mechanisms which constrain and define executive accountability and police oversight in Canada? Second, can the need for the police to remain apolitical and autonomous be reconciled with these mechanisms of governance and accountability? In seeking to address these competing demands, I will sketch what I term an “apolitical and autonomous” ideal type of executive-police relations.

I suggest this model is best suited to the dynamics of policing in a constitutional democracy such as Canada, and has the potential to reconcile the need for political input into policing while countering inappropriate political interference in policing. Further, as I elaborate below, the apolitical and autonomous model does not rely on the often unstable boundary between police policy and police operations upon which the present model depends. Finally, a significant impediment to an apolitical and autonomous police is the lack of transparency with respect to the political, legal and administrative relationship between the executive and the police. It is to redressing this transparency gap that this analysis is directed.

The executive-police relationship is shaped by multiple and overlapping forms of oversight. In the Spring of 2004, a snapshot of this oversight would include three formal, judicial inquiries investigating undue executive interference in police matters in Ontario (Ipperwash Inquiry) and with respect to the RCMP (Sponsorship Inquiry and Arar Inquiry), inquests and

inquiries into wrongful convictions and police conduct in Saskatchewan (Commission on First Nations and Métis Peoples and Justice Reform) and Newfoundland (Lamer Inquiry), internal reviews of police accountability in Toronto (Ferguson Report), province wide task forces on civilian oversight in Ontario (Chaired by former Chief Justice of the Ontario Superior Court, Patrick LeSage), all this in addition to the ordinary business of municipal, provincial and federal governments deciding on police force budgets, internal investigations departments (e.g. SIU in Ontario) and the activities of specialized police-related tribunals (civilian and police complaints tribunals, police services boards, internal police disciplinary panels, etc). These multiple and overlapping forms of executive oversight are often criticized as unwieldy, incoherent and ineffective. These criticisms are often justified. On the other hand, there is a persuasive case to be made that the more perspectives (not just within the executive but through judicial, legislative and community groups as well) brought to bear on police conduct, the more likely abuses of the rule of law will be addressed or deterred and public confidence in the police will be enhanced.

The problem with the present system of executive-police oversight is its lack of overarching vision and coherence. Police commentators tend too easily to fall into pro-police and anti-police camps and these polarized groups tend to talk at each other rather than too each other.<sup>2</sup> Governance and institutional structures reflect this bipolar situation. Some mechanisms appear designed to ensure the police implement the direction of the government of the day while other mechanisms appear designed to ensure the police remain insulated from political

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<sup>2</sup> This dynamic is of course not new. See, for example, Alan Grant, "The Control of Police Behaviour" in Tarnopolsky (ed.), *Some Civil Liberties Issues in the Seventies* (Toronto: Osgoode Hall Law School, 1975), p.75.

interference. Some mechanisms view the police as a central instrument of enforcing the rule of law while others view it as a potential source of violations of the rule of law. In the debate surrounding executive-police relationships, it is crucial not to conflate concepts such as independence and autonomy or accountability and oversight. Oversight, for example, does not require independence. Independence, on the other hand, does require autonomy. Autonomy may or may not be inconsistent with accountability depending on the forms of governance, funding and transparency involved. Neither oversight nor accountability suggest control. Below, I attempt to disentangle these related but meaningfully distinct concepts in the context of executive-police dynamics.<sup>3</sup>

This paper is divided into three sections. In the first section, I sketch the apolitical and autonomous ideal type of executive-police relations as the best suited model for a constitutional democracy such as Canada. In the second section, I explore how this ideal is furthered or hindered by the current executive-police terrain in Canada, with special emphasis on the respective role of courts, administrative bodies and ministerial responsibility in the oversight of the executive-police relationship. The boundaries between the police and other aspects of the executive branch of government often turns on the distinction between police policy and police operations. I argue below that the policy/operation dichotomy is maintained not because it accords with a readily identifiable boundary but rather because we have yet to discover any other way of distinguishing legitimate government interests from illegitimate ones. In the third section, I take up the challenge of sketching the apolitical and autonomous police model as an alternative framework for discerning the boundary between legitimate and illegitimate executive

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<sup>3</sup> Philip Stenning also includes a discussion of some of these terms in his contribution to this symposium.

involvement in policing. The goal of the ideal type I sketch is to create a legal, administrative and political climate in which neither the police nor the executive can unilaterally impose its will on the other, and in which, as a result, avenues for deliberation and dialogue must be pursued.

## I. In Search of an Ideal Type of Executive-Police Relations

Kent Roach, in his helpful typology of four models of police independence, contrasts the “democratic policing” and “governmental policing” models, which imply close government supervision with models of “police independence”, which implies little or no government supervision.<sup>4</sup> In this paper, I argue these do not have to be understood as opposing ends of a spectrum of government control. Indeed, I would suggest they should not be. The police are part of the political order, not above it or beneath it. Democratic concerns both motivate and confine the legitimate bounds of police independence. The fourth model of policing, presented as the most extreme example of governmental policing, in which “the police are conceived by and large as civil servants subject to Ministerial control”, implies a degree of direct control over the police by the political executive. There are good reasons to blanch at the suggestion that the police ought to be seen as civil servants. As Wes Pue has observed:

The difference between “bureaucrats with guns” and law enforcement officers is simple: police are supposed to be prohibited equally from pursuit of their own desires and from acting on the whim of politicians. Unlike civil servants, they are not supposed to respond to “political masters”. Their job, simply, is to enforce the law.”<sup>5</sup>

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<sup>4</sup> See Kent Roach’s contribution to this symposium. For a related attempt at a typology of political accountability over the police, see Philip Stenning, “Someone to Watch over Me: Government Supervision of the RCMP” in Wes Pue (ed.), *Pepper in Our Eyes: The APEC Affair* (Vancouver: UBC Press, 2000), p.97.

<sup>5</sup> Wes Pue, “The Prime Minister’s Police? Commissioner Hughes APEC Report” (2001) 39 Osgoode Hall L.J. 165 at 167.

While this statement captures an important concern regarding political direction in police activities, it glosses over important constitutional norms of bureaucratic independence, which establish the public service as “apolitical” and constitutionally protect a public servant’s right to decline direction or expose confidential communications where the rule of law has been violated or public safety is imperiled.<sup>6</sup> While, as a general proposition, public servants may take direction from the government of the day, this should not be taken as an indication that they are the instruments of political whim, vulnerable to political interference or without means to resist political pressure. That said, the police are certainly no ordinary public servants.

The constraints on the kind of direction government may appropriately give, and the amount of functional autonomy civil servants (or executive boards, tribunals and agencies) enjoy are matters to be worked out through constitutional principle and political practice. Policy advisors are public servants who work hand in glove with the government of the day, for example, but front-line decision-makers are civil servants who make judgments and exercise discretion according to a range of non-partisan considerations. Consider Crown prosecutors, who are both public servants (subject to the relevant public service acts, accountable to the relevant minister) and functionally autonomous in the exercise of prosecutorial discretion.<sup>7</sup> Crown

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<sup>6</sup> For an elaboration on these constitutional norms, see L. Sossin, “Speaking Truth to Power? The Search for Bureaucratic Independence” (2004) *University of Toronto Law Journal* (forthcoming).

<sup>7</sup> There is of course significant variation across different jurisdictions of the prosecutorial branch’s relationship to the executive. In Nova Scotia, for example, there is greater prosecutorial independence due to the Director of Public Prosecutions being constituted as a separate office. See also *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, where, Iacobucci and Major JJ. speaking for the court at para. 43 held that “prosecutorial discretion” is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General’s office and which are protected from the

prosecutors are not independent of government but their freedom from political interference is well-accepted and jealously guarded (which is not to say it is not challenged from time to time nor to say that those challenges are not sometimes successful). By contrast, judges, while paid from the public purse, subject to statutory direction, and vulnerable to government funding and management of the administration of the courts, are constitutionally independent and expressly not accountable to the government for adjudicative decision-making.<sup>8</sup>

It is important to remember why we understand the Courts to be a separate and independent branch of government and prosecutors and police to be a part of the executive branch. The police are not and should not be viewed as a separate branch of government, nor of course, are they simply part and parcel of the executive branch of government. We should not lose sight of the fact that attempts to use police forces as an arm of “political administration” of the government of the day has a long and unsettling history in Canada,<sup>9</sup> nor should we gloss over the equally long and equally unsettling history of the police acting as a law unto themselves,<sup>10</sup> particularly in the context of aboriginal communities.<sup>11</sup> This is the classic double-bind of executive-police relationships – how to guard against one extreme without inviting the other.

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influence of improper political and other vitiating factors by the principle of independence." See also the discussion of the executive-judiciary division of powers in *R. v. Felderhof*, [2003] O.J. No. 4819 (C.A.) at paras. 46-55.

<sup>8</sup> On the comparison between police and judicial independence, see Geoffrey Marshall, *The Government and the Police* (London: Methuen, 1965) at pp.117-18.

<sup>9</sup> See Nelson Wiseman, “Hand in Glove? Politicians, Policing and Canadian Political Culture” in W. Pue, *Pepper in Our Eyes: The APEC Affair* (Vancouver: UBC Press, 2000), p.125. Wiseman points to the long history of government calling on police to thwart union organizing in various parts of Canada in the 1930s and 1950s and the RCMP’s activities against the PQ in Quebec in the 1970s.

<sup>10</sup> See Kent Roach “Four Models of Police-Government Relationships” for this symposium. See also Martin Friedland, *Controlling the Administrators of Criminal Justice* (1988-89), 31 *Crim. L.Q.* 280.

<sup>11</sup> See Gordon Christie’s contribution to the symposium.

With these caveats in mind, I suggest an alternative model to the typology presented by Kent Roach, one which takes as its ideal type an “apolitical and autonomous police.”<sup>12</sup> I am certainly not the first to suggest both terms capture an aspiration of executive-police relations. Maurice Martin, for example, has referred to the importance of the police remaining apolitical and autonomous. He suggests that “apolitical” and “autonomous” are “near synonymous”. By contrast, I use the terms to suggest different orientations. Apolitical is an orientation of detachment from partisan considerations in the political process. Autonomy relates not to an administrative orientation but to a set of administrative practices, arrangements and structures which constitute a functional separation from the government. These two concepts are related but reflect different aspects of the executive-police relationship and are elaborated below.

Like Max Weber’s ideal type of “rational-legal administration,” which he asserted to be the most effective model of bureaucracy and the most suitable form of bureaucracy for democratic society,<sup>13</sup> I advance the concept of an apolitical and autonomous police both as the most effective form of executive-police relations generally and the form most consistent with Canada’s political, administrative and legal values, which include both accountability, governance and rule of law concerns.

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<sup>12</sup> Maurice Martin, in *Urban Policing in Canada: Anatomy of an Aging Craft* (Toronto: University of Toronto Press, 1995), p.142.

<sup>13</sup> The “ideal type” is commonly associated with Max Weber, who created a typology of bureaucracy with three ideal types: traditional authority, charismatic authority and legal-rational authority. He demonstrated how legal-rational authority was the ideal type among the three capable of attaining the highest degree of effectiveness. See Max Weber, *The Theory of Social and Economic Organization*, trans. A.M. Henderson (New York: The Free Press, 1947). The ideal type is a “theoretical construct, combining several features of a phenomenon in their purest and most extreme form... it is a conceptual tool which simplifies and exaggerates reality for the sake of conceptual clarity.” See Eva Etzioni-Halevy, *Bureaucracy and Democracy: A Political Dilemma* (London: Routledge, 1985), p.29. This is not to say, of course, that Max Weber’s claims regarding the ascendancy of hierarchal, impersonal bureaucracy have not been challenged. I review this critical literature in L. Sossin, “The Politics of Discretion: Towards a Critical Theory of Public Administration” (1993) 36 *Canadian Public Administration* 364.

There are two central characteristics which in my view typify this model. These characteristics address, from different perspectives, the double bind discussed above. They are not intended to be exhaustive of the characteristics by which one might elaborate this model.

### **1) Political but not Partisan**

First, an apolitical and autonomous police model reflects a culture and orientation of non-partisanship and a mindset of detachment from partisan concerns. Underscoring this sensitivity to partisanship is the recognition that the traditional bonds of ministerial responsibility in Canada no longer provide sufficient accountability (either of the police to the government or of the government to the citizenry).<sup>14</sup> An apolitical and autonomous model of police-executive relations recognizes that police forces are and should be interested in, affected by and connected to political institutions. However, the model also recognizes the necessary limitations of police engagement in the political process and suggests an approach by which appropriate limits may be negotiated. The ideal type of an apolitical and autonomous police is meant to convey a posture of engagement with the political process that need not and should not result in capture of police decision-making by that process, nor the converse use of political powers for illegitimate political ends.

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<sup>14</sup> For a discussion of the limitations of ministerial responsibility, see the discussion below. See also D. Savoie, *Breaking the Bargain: Public Servants, Ministers and Parliament* (Toronto: University of Toronto Press, 2003); and S. Sutherland, "Responsible Government and Ministerial Responsibility: Every Reform Is Its Own Problem" (1991) 24 *Canadian Journal of Political Science*.

## 2) **Autonomous but not Independent**

This ideal type is also meant to convey a vital separation between the government and the police which does not presuppose formal independence or hindrances to accountability. An apolitical police, while by definition not independent of government, must be subject to effective internal, intra-executive and external oversight mechanisms, in order to ensure functional autonomy and the highest standards of professionalism. These mechanisms also should ensure predictable and principled ways/means to monitor police compliance with the rule of law on the one hand and freedom from political interference on the other hand.

In this ideal type, these mechanisms do not act at cross-purposes but rather serve as complementary constraints on executive-police relations. An example of internal oversight mechanism would be police disciplinary investigations into the activities of individual officers. Intra-executive forms of oversight ideally include both arm's length bodies such as a civilian oversight board or police services board as well as oversight by other arms of the government responsible for monitoring police activities such as a special investigations unit where individuals are harmed while in police custody. In addition to internal and intra-executive oversight, police authority must also be subject to external oversight from an independent judiciary through criminal and civil adjudication. Finally, safeguarding the apolitical and autonomous model of police may depend on review by a Parliamentary officer as well (along the lines of an Auditor General or Information and Privacy Commissioner). This may require a separate entity or may simply dictate the means of appointment and funding for existing entities.

This mix of oversight and governance relationships is discussed in more detail in the second section below.

## **Conclusion**

There is no jurisdiction in Canada where executive-police relations and their oversight mechanisms attain the apolitical and autonomous ideal sketched above. The purpose of an ideal type is to provide an overarching vision for police-executive relationships, an aspiration by which to measure the present structures and arrangements and a framework for future reform. In the next section, my goal is to analyze the current executive-police terrain in Canada with this normative approach in mind.

## **II. The executive-police relationship in Canada**

What is the government of the day's interest in policing activities and structures?

Arguably, the executive branch's priorities with respect to policing fall into one of three broad categories.<sup>15</sup> First, the executive is interested in articulating those policing policies and practices which are in the "public interest." Decisions to lay hate crimes charges in individual cases, which by statute require the approval of the Attorney General, represent an example of this public

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<sup>15</sup> By "executive" in this context, I refer to the political executive. The political executive (i.e. cabinet and political staff) must be distinguished from the bureaucratic executive (i.e. the civil service). Further, the political executive itself is a product of complex relationships, which may involve tensions between responsible ministries and the political "centre" (i.e. PMO, POs, etc) and tensions between cabinet members and the PM/Preimer on the one hand and between cabinet members and the party caucus and leadership on the other. For a discussion of these tensions, see Donald Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999).

interest motivation.<sup>16</sup> Second, the executive is interested in developing and implementing the government's own policy preferences in the policing context, or more generally on "law and order" and criminal justice issues. This second interest includes decisions about the share of scarce public resources which should be allocated toward the police sector. Third, because the executive is drawn from the political party which controls the legislature, the executive is invariably interested in currying positive publicity while avoiding negative publicity for its policies. These are not watertight compartments of interests. The decision to call for a task force review or public inquiry into a police controversy, for instance, may involve dimensions of all three interests. Similarly, one could say that establishing executive-police structures and arrangements which enhance public confidence in the government and the police (for example, civilian complaints bodies) also reflect the fruition of all three motivations.

Conventional wisdom suggests the executive has an abiding interest in "policy" matters and no interest in "operational" matters. In some cases, this distinction is clear and compelling. A government might want to "crack down" on gun violence, for example, and the police become the means by which this policy goal is achieved. How the police execute this policy, however, is properly the concern of the police (within the budgetary, legal and other constraints which shape operational decisions). In other cases, the executive's interest will shade indirectly into operational issues. For example, the government may want to demonstrate its commitment to the gun violence policy by devoting more resources to a "guns and gangs" police and prosecutor task force with an understanding that this should lead to more arrests, charges, prosecutions and

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<sup>16</sup> This distinction is discussed in Kent Roach's contribution to this symposium at pp.18-19. See also John Edwards, *Ministerial Responsibility for National Security* (Ottawa: Supply and Services, 1980)

convictions. Or, the government's interest might be directly operational, as in the case of a government which wishes to trumpet a "zero-tolerance" initiative for gun related infractions, which involves directing the police to take action on laying charges they might otherwise exercise their discretion not to lay. To suggest that the government's interests may be neatly packaged into a "policy" compartment and not spill over into an "operational" compartment is a dubious claim which appears to resonate with few people who have even a passing acquaintance with policing or government.

In this section, in order to better understand the terrain across which the boundary between the police and other parts of the executive branch of government must be mapped, I discuss the various sites of executive involvement in policing and their implications for the apolitical and autonomous model.

The executive-police terrain in Canada is complex and multi-faceted. Different executive and different policing bodies interact in overlapping ways. Municipal, provincial and federal governments have distinct relationships with city police, provincial police (in Quebec and Ontario) and the RCMP, respectively. The relationship between these governments and these police forces may be statutory or may involve contractual agreements. These executive and policing bodies also may interact across jurisdictional lines (for example, the RCMP was called in to investigate charges of corruption against the Toronto Police. Finally, all of these police forces may also interact with private security firms on the one hand or military or security intelligence forces on the other, which may be subject to separate legal regimes, duties and authority. Take hate crime as an example. Hate crime laws are the product of the federal

government's justice policy; pursuant to the *Criminal Code*, however, prosecutions require the approval of a provincial Attorney General, and the investigation of a hate crime may involve local, provincial and RCMP investigations. This set of relationships has both policy and operational implications – for example, is the decision to create a special "hate crimes" unit within a police force a policing decision, a policy decision or a political decision? When the Chief of Police attends a town hall meeting organized for religious and ethnic groups to lobby government for greater hate crimes enforcement, is she or he there as part of government, or as a stakeholder of government. If the outcome of the meeting is a governmental decision to deploy public resources to provide additional private security at religious institutions, what should the response of the Chief of Police be? Should she or he be thinking of what is good for the police? What is good for the government of the day? What is good for the affected communities facing the possibility of violence? Or what is good for the public at large?

As the following cursory review of executive oversight bodies reveals, there is considerable variation in their mandate, authority and resources. But how are we to assess their effectiveness? Should they be measured by outcomes (e.g. the more complaints made/investigated/resolved/reported, the better)? Should they be measured by their independence from police control? Or should they be measured globally by the extent to which public confidence rises or falls in the police, or by the extent to which police morale and community relations improve or deteriorate? I have suggested an ideal type of an apolitical and autonomous police to provide a normative framework for such assessments. The two questions I would pose, in other words, are: how have these bodies ensured the proper balance between political engagement on the one hand and detachment from partisan pressures and concerns on the other?

And, how have these bodies ensured the police can discharge their distinctive duties to the Crown and the public in upholding the rule of law with appropriate political input but without undue political interference? I attempt to address questions such as these through a brief review of the administrative, legal and political dynamics defining the police –executive relationship. I will discuss each of these dynamics in turn.

## **2) Administrative dynamics**

In addition to this jurisdictional complexity, there is significant administrative complexity in the executive-police relationship. A plethora of administrative bodies have been established in Canada with the goal of providing venues for the regulation and redress of police conduct.<sup>17</sup> Most prominent among these have been civilian complaints bodies, police services boards and internal investigating bodies such as Ontario's Special Investigations Unit. All of these bodies exercise powers pursuant to legislative mandates which also limit the scope and consequences of their oversight over police conduct. Governance and oversight of police conduct and services may reside in a number of executive bodies. In Ontario, for example, this web of executive supervision consists of police services boards made up of provincial and municipal officials, special investigations units which review police conduct in specified circumstances, civilian oversight boards, internal disciplinary bodies, ministry and minister's staff (both Solicitor General and Attorney General), central agencies and in some cases coroner's inquests and ad hoc public inquiries, all of which are creatures of the executive branch in one form or another, but

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<sup>17</sup> Beyond the scope of this review are a host of other administrative bodies which, while not established specifically to perform police oversight, nonetheless may be involved in police oversight indirectly, such as human rights commissions and human rights tribunals.

each of which often must remain, to some degree, autonomous from both the police leadership and other executive bodies.

Each of these bodies operates in the context of the legal and political complexity discussed below. The application of the apolitical and autonomous ideal type allows for the assessment of these bodies based on the degree to which they further or hinder the police's non-partisan orientation and the ability to distinguish legitimate from illegitimate political input.

### **A. Civilian Oversight**

One of the most innovative and controversial executive bodies charged with police oversight are civilian complaints commissions. As Tammy Landau has observed,

While there are numerous mechanisms both inside and outside police organizations to achieve “accountability”, the precise arrangements for handling public complaints against the police have emerged as a flashpoint for assessing both police accountability to the public and “progress” in the reform of policing.<sup>18</sup>

The Ontario Civilian Commission on Police Services (OCCPS) is an example of this type of executive vehicle for community oversight and has been the subject of fairly intense scrutiny.<sup>19</sup> As critics have made clear, the present incarnation of civilian oversight in Ontario

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<sup>18</sup> Tammy Landau, “Back to the Future: The Death of Civilian Review of Public Complaints Against the Police in Toronto” in A. Goldsmith and C. Lewis (eds.), *Civilian Oversight of Policing: Governance, Democracy and Human Rights* (Portland: Oxford, 2000), p.64.

<sup>19</sup> For a history of civilian complaints commissions in Ontario, see Claire E. Lewis, Sidney B. Linden, Q.C. and Judith Keene, “Public Complaints Against Police in Metropolitan Toronto – The History and Operation of the Office of the Public Complaints Commissioner” [insert cite] Criminal Law Q. 115. See also Brief prepared by the CCLA for the Attorney General for Ontario, on “Proposed Amendments to the Police Civil Complaint System” (January

fails to ensure the functional separation of executive oversight and police interests by providing too much discretion to the Chief of Police to dismiss complaints without further review both on procedural and substantive grounds, and to conduct investigations where they are deemed warranted. The primary role of the OCCPS appears to be receiving reports from the Chief of Police. A recent audit disclosed that of the 700 complaints made about police conduct, only two were referred to a formal disciplinary hearing. 200 complaints were withdrawn, 200 were dismissed as unsubstantiated and 150 were informally resolved. As the CCLA noted, “Such numbers are bound to create suspicion.” The CCLA, along with numerous other bodies, have submitted proposals for reform as part of the Ontario Attorney General’s overhaul of the civilian complaints policy (which, as indicated above, is now under review by a task force headed by former Chief Justice of the Ontario Superior Court, Patrick Lesage).

## **B. Police Boards**

Police boards act as a buffer between political direction from government on the one hand and the operational control of police investigations by the Chief of Police on the other. Under the Ontario *Police Services Act*,<sup>20</sup> for example, the boards, which are appointed jointly by the provincial government and the municipality for all municipal police forces, are responsible for policies for effective management of the police and can direct and monitor the performance

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28, 2004). See also Dianne Martin’s contribution to this symposium, “Legal Sites of Executive-Police Relations: Core Principles in a Canadian Context”.

<sup>20</sup> RSO 1990 c.P-15.

of the Police Chief, although not with respect to “specific operational decisions” or with respect to the “day-to-day operation of the police force”.<sup>21</sup>

While the provision of a buffer (even one based on the problematic policy/operational dichotomy) would appear to be consistent with an apolitical and autonomous police model, police boards in several jurisdictions have become simply the focal point for political disputes involving the police. This characterization is particularly apt in the case of the Toronto Police Board. In January of 2004, the Toronto police launched an investigation when news of an investigation into the Chair of the Police Services Board for allegedly inappropriate sexual comments about a child leaked to the press.<sup>22</sup>

By May of 2004, the Chair of the Toronto Police Services Board was on the verge of asking the province to take over the civilian oversight functions and launch a review of “supervision and accountability” among police management, but was prevented from doing so when some members of the Board literally left the table to deprive the body of the quorum necessary for decision-making.<sup>23</sup> The tensions and dysfunctions characterizing the Toronto

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<sup>21</sup> Ibid., s.31.

<sup>22</sup> Katherine Harding, “Child-porn controversy hits police board” *The Globe and Mail* (15 January 2004). Catherine Porter, “Lawyer to probe Heisey’s comments; Background of memo at issue Police board decision attacked” *Toronto Star* (16 January 2004). Rosie DiManno, “Heisey should step aside” *Toronto Star* (17 January 2004) E01. John Barber (Globe Toronto Column), “Alan Heisey? It’s just plain scary” *The Globe and Mail* (17 January 2004) M1. Katherine Harding, “Heisey cleared of breaching rules; Report concludes memo was released to harm reputation of board chairman” *The Globe and Mail* (26 March 2004) A13. Catherine Porter, “Police probe fails to find who leaked Heisey memo; Case now closed, Fantino says Board presses chief for report” *Toronto Star* (15 May 2004).

<sup>23</sup> See Katherine Harding, “City Police Board in Disarray” *Globe and Mail* (28 May 2004).

Police Services Board in 2004 were exacerbated further by the decision by a divided Board not to renew the contract of Chief Julian Fantino.<sup>24</sup>

The example of the Toronto Police Services Board illustrates that an apolitical and autonomous police model requires not only structures and arrangements but personal commitment to this ideal on the part of those charged with implementing it. This example also places a spotlight on how members of intra-executive oversight or governance bodies are appointed and what constituencies, if any, those members are selected to represent. This point is discussed below in another context.

### **C. Public Inquests, Inquiries, Reviews, Task Forces and Advisory Panels**

Because many executive bodies lack or are seen to lack sufficient separation from the government of the day, credible oversight of the executive-police relationship will sometimes require an arm's length interloper. The classic arm's length interloper is the independent judiciary, but where the issue is systemic or where the questions do not break down into discrete legal thresholds or where legal remedies are insufficient to address executive concerns or restore public confidence in the police system, courts may prove ineffective. In such circumstances, public inquests, inquiries, reviews and task forces examining police structures, activities and/or accountability are the most common recourse for the executive. They arguably have become the norm rather than the exception in Canada in the past generation. This is true at all levels of government and even within many policing organizations.

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<sup>24</sup> See Royson James, "Police Board Paralyzed Again" Toronto Star (31 July 2004).

It is important to keep in mind that the decision to launch an inquiry, and the determination of its terms of reference, are political choices. Once an inquiry is launched and its terms of reference are set, however, it operates mostly independent of government involvement. The only control the government retains is to shut the inquiry down entirely (e.g. Somalia Inquiry). Inquiries into policing questions of various dimensions are called for differing reasons. Some are forward looking catalysts for policy reform. Others are backward looking, and aimed primarily at truth-finding. Some are launched in order to serve political ends by extricating the government of a thorny controversy; other inquiries themselves become thorny controversies for the government (e.g. Somalia Inquiry).<sup>25</sup> Launching an inquiry entails risk for the executive. Declining to launch an inquiry, of course, entails risk for the executive as well.

One of the central oversight functions performed by inquiries, inquests and reviews are disentangling problems relating to individual police officers and leaders from problems relating to structures, arrangements and systems. Was excessive force used by the RCMP on peaceful protestors during the APEC summit because of a failure of particular officers, a failure of police leadership, a failure of political or bureaucratic leadership, a failure of autonomous bodies (e.g. the University of British Columbia) to act autonomously or a failure of all of the above? Questions which cross individual and systemic lines are particularly well suited to public inquiries.

Notwithstanding these limitations, which I return to below, it is clear that the ideal type of an apolitical and autonomous police is significantly enhanced by the recourse to public

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<sup>25</sup> See P. Desbarats, *Somalia Cover-Up: A Commissioner's Journal* (Toronto: McClelland & Stewart, 1997).

inquiries where the executive-police relationship is alleged or believed to have broken down. The McDonald Commission, the Marshall Inquiry and the APEC Inquiry, while called under different auspices for different reasons in different places at different times, all led to significant exposure to and deliberation over executive-police relationships. Aside from independent or quasi-independent inquiries, both the police and the executive have also availed themselves of less independent but more confidential external reviews by impartial sources. For example, Geroge Ferguson, a retired judge, undertook a 2 year review of police governance and made numerous recommendations arising from allegations of police misconduct and corruption on the Toronto Police drug squad.<sup>26</sup>

In addition to the inquiries, inquests and reviews, Canada also has a tradition of executive task forces advising on particular aspects of policing. To take a recent example, consider the recent Mayoral Task Force on Community Safety launched by Toronto's Mayor David Miller.<sup>27</sup> Miller described the mandate of the panel, chaired by the Chief Justice of Ontario (and former Attorney General/ Solicitor General for the province) Roy McMurtry, in the following terms:

The police are responsible for enforcing, and I think they do a good job, and that they deserve our support. The City, though, can and must play different role from the police.

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<sup>26</sup> The Report was made public on February 26, 2004. The full text is available on the Toronto Police website: <http://www.torontopolice.on.ca/modules.php?op=modload&name=News&file=article&sid=916> . For commentary, see Kirk Makin, "Plan would require disclosure of past misconduct to civilians" *The Globe and Mail* (27 February 2004) A11, and Betsy Powell and Catherine Porter, "Police board gets action plan; 33-point report aimed at curbing misconduct Chief sought probe after allegations against drug squad" *Toronto Star* (26 February 2004), B02.

<sup>27</sup> The mayor announced the creation of the Mayor's Advisory Panel on community safety in this speech: Mayor David Miller, Address to North York, Etobicoke, and Scarborough Chambers of Commerce (March 9, 2004) [[http://www.city.toronto.on.ca/mayor\\_miller/speeches/c\\_of\\_c\\_030904.htm](http://www.city.toronto.on.ca/mayor_miller/speeches/c_of_c_030904.htm)]. See also <http://www.toronto.ca/legdocs/2004/agendas/committees/pof/pof040224/it023a.pdf> Katherine Harding, "Panel on youth crime praised; McMurtry took job on the condition that police weren't involved, Miller says" *The Globe and Mail* (20 February 2004).

The city must emphasize the prevention aspect. We can advocate with senior levels of government and the City can play a coordinating role.<sup>28</sup>

Curiously, however, the police themselves are not represented on this particular advisory panel.<sup>29</sup>

Drawing the boundary between the legitimate and illegitimate executive role in policing is not simply a matter of administrative or institutional design. It also dovetails with the constitutional and legal environment within which executive-police relations take place. It is to this set of dynamics that I now turn.

### **3) Legal dynamics**

The executive-police terrain is shaped by a complex legal topography. The legal constraints include written and unwritten constitutional principles, including the rule of law, federalism and the *Charter of Rights*, aboriginal rights, statutory standards, common law administrative and private law duties, internal codes, rules and guidelines. Together, these constraints constitute a roadmap for judicial intervention in the executive-police relationship. This judicial role includes the articulation of the boundaries of police autonomy and political accountability.

Courts constrain the executive-police relationship in several important respects. Most importantly, the independent judiciary, relatively free from political interference, provides a

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<sup>28</sup> Ibid.

<sup>29</sup> The excuse given for this omission was the discomfort of Chief Justice McMurtry at police involvement – this discomfort did not extend, revealingly, to the involvement of provincial Ministers, whose representatives serve on the advisory panel.

meaningful form of accountability on police conduct to ensure it comports with constitutional, statutory and common law standards, and more generally, with the rule of law. Typically, the courts exercise this oversight through adjudication in the criminal justice system. Thus, as a practical matter, this oversight arises only when police irregularities are raised by defence counsel seeking to exclude evidence, create reasonable doubt and avoid convictions. Crown counsel typically stand in as advocates for the police although their relationship is more nuanced than this suggests and the police have no role in directing counsel in the prosecution of a criminal charge. My point here is merely that judges do not have a mandate for any independent investigation into police activities, and are constrained by the individual facts and circumstances of the case before them from developing or implementing system-wide solutions.

There are many legal and constitutional principles which may animate judicial intervention in the police context. Below I discuss what I take to be the most significant of these, including the constitutional principle of the rule of law, the doctrines of federalism, the *Charter of Rights* and civil liability (I do not cover aboriginal rights which, while significant, is the subject of Gordon Christie's contribution to this symposium).

#### **A. Rule of Law**

The rule of law is, it has been said, easy to invoke but virtually impossible to apply. It may mean considerably different things to considerably different observers.<sup>30</sup> In Canadian

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<sup>30</sup> In the policing context, see Margot E. Young, "'Relax a Bit in the Nation': Constitutional Law 101 and the APEC Affair" and W. Wesley Pue, Wes Pue "Policing, the Rule of Law and Accountability in Canada: Lessons from the APEC Summit" in W. Wesley Pue, ed. *Pepper in our Eyes: The APEC Affair* (Vancouver, UBC Press, 2000) at pp.45-47. For recent appraisals outside the policing context, see A. Hutchinson, "The Rule of Law Revisited:

administrative law, it has taken on special resonance in settings where judicial review is used to call the government to account.<sup>31</sup> This focus on providing a check against unfettered executive authority arises in part from the circumstances of the leading case elaborating its content, *Roncarelli v. Duplessis*.<sup>32</sup> In *Roncarelli*, the Supreme Court quashed an attempt by the Premier, acting through the Liquor Commissioner, to revoke a liquor license of a tavern owner who was a supporter of Jehovah's Witnesses. Because the revocation had nothing to do with actual liquor offences, and was instead related to a political interest on the part of the government, the Court found that the decision had been taken on ulterior grounds. Using the apparatus of the state for political ends, in other words, was held to be an arbitrary and unlawful exercise of public authority.

The rule of law has occupied a central place in Canada's constitutional firmament ever since. It appears in the Preamble to the *Charter* (alongside the "supremacy of God") and has been held to form a part of the guarantees imported from the U.K. through the Preamble to the *Constitution Act, 1867*. In the *Secession Reference*, the Court described the importance of the rule of law in the following terms:

The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142, is "a fundamental postulate of our constitutional structure". As we noted in the *Patriation Reference*, *supra*, at

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Democracy and Courts" in D. Dyzenhaus, ed., *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart Publishing, 1999) 196; J. Jowell, Q.C., "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] Pub. L. 671; and T.R.S. Allen, "The Rule of Law as the Rule of Reason: Consent and Constitutionalism" (1999) 115 L.Q.Rev. 221.

<sup>31</sup> See, for example, D. Dyzenhaus & M. Moran (eds.), *Calling Power to Account* (Toronto: University of Toronto Press, 2004) (forthcoming).

<sup>32</sup> [1959] S.C.R. 121.

pp. 805-6, “[t]he ‘rule of law’ is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority”. At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.<sup>33</sup> (Emphasis added.)

Following *Roncarelli*, the rule of law also has come to embrace the principle that no discretion is “untrammelled”. No matter how wide a grant of statutory authority (or how broad a prerogative power), all government decision-making must conform to certain basic tenets, such as being rendered in good faith, and not for ulterior or improper motives. Given that some of the widest discretion in our legal system is afforded to police officers, the significance of the idea that all discretion is structured and constrained by constitutional standards has enduring appeal in the policing context. As Professor Wade has stated:

The powers of public authorities are . . . essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. [...] This is unfettered discretion. But a public authority may do none of those things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest . . . The whole conception of an unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.<sup>34</sup>

While I emphasize that the police should be seen generally as autonomous rather than independent of the executive, there are clearly settings where the police must act independently,

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<sup>33</sup> *Supra* note , at para. 70.

<sup>34</sup> This passage was cited with approval by Laws J. in *R v. Somerset County Council, ex parte Fewings*, [1995] 1 All ER 513 at 524. Wade emphasized that the police in the UK, while not a law unto themselves, do not take direction from any executive authority. He observed, “The truth is that a police officer holds a public position, that of peace officer, in which he owes obedience to no executive power outside the police force.” Wade, *Administrative Law* (Oxford: University of Oxford Press, 2000), p. 153.

and be seen to act independently, in order to protect the rule of law. What amplifies this necessity is that the police are sometimes put in the position of enforcing the rule of law against the very political bodies to which they are accountable. Charges of political interference are the most complicated and contentious when they arise in the context of police investigations of executive officials. The recent drug-related investigation in British Columbia which involved searches and seizures at the offices of senior political staffers is a case in point.<sup>35</sup> Initially, the RCMP indicated that the seizures were related to money-laundering aspects of a drug investigation. Later, the Crown suggested that staffers may have been offered or had taken bribes to trade in secret government information.<sup>36</sup> The staffers, it turns out, were involved in the \$1 billion privatization sale of BC Rail, which was also in due course tainted by the police investigation. With national media attention focused on the RCMP activities, and political fortunes and futures hanging in the balance, how can the public be confident that the police can resist political interference in their investigative decision-making (and that the executive can resist the temptation to interfere in the first place)?

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<sup>35</sup> See RCMP News Release dated December 29<sup>th</sup>, 2003, "Search Warrants Executed on BC Legislature: News Release"; online at <http://www.rcmp-bcmedia.ca/printablepressrelease.jsp?vRelease=4218> (RCMP Media Relations Website)

Robert Matas, "Mounties target B.C. ministers' staffers; Police swoop on legislature, seize files from finance and transportation offices" *The Globe and Mail* (29 December 2003) A1. Jane Armstrong, "B.C.'s Campbell left reeling from liberal dose of sleaze" *The Globe and Mail* (1 January 2004) A1. Brent Jang, "Police probe won't disrupt B.C. budget, minister says" *The Globe and Mail*, (1 January 2004) A4. Peter O'Neil, Jim Beatty and Lori Culbert, "B.C. legislature raid involved possible fraud, source says: Liberals' offices searched" *National Post* (14 January 2004) A7, and Mark Hume, "Bribery suspicions prompted B.C. raid; Police suspected officials might have been trading in secret information" *The Globe and Mail* (3 March 2004) A5.

<sup>36</sup> Mark Hume, "Judge Gives First Insight into BC police Raid" *Globe and Mail* (2 April 2004), A9.

The allegation of political interference into the leak of the federal budget in 1990 represents another case in point.<sup>37</sup> Journalists obtained copies of budget documents and released their content prior to the introduction of the budget in the House of Commons. The R.C.M.P. investigated and initially the responsible officer declined to bring charges, in part because the prosecution seemed selective as it involved only some of the people who had control of the leaked material but not others. Finally, the investigating officer was removed from the case and another officer ultimately swore the informations in the case. While inappropriate influence from the PMO or PCO was never established in the case, the charges were stayed and the undertone of political interference was clear.

The incidence of interference by the PMO in policing matters was more clearly established in the APEC affair. This incident arose out of police conduct in clearing protestors from the site of the 1997 Asia-Pacific Economic Cooperation meeting in Vancouver.<sup>38</sup> In his report as a member of the Commission for Public Complaints against the RCMP, Justice Ted Hughes concluded that the RCMP providing security for the 1997 APEC Summit in Vancouver had “succumbed to government influence” in its efforts to coercively sequester protestors from the view of the summit delegates.<sup>39</sup> In particular, there were various links between Jean Carle, then the Prime Minister’s Director of Operations, and policing decisions made before and during the summit in relation to protestors.<sup>40</sup>

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<sup>37</sup> See *R. v. Appleby, Belisle and Small* (1990) 78 C.R. (3d) 282.

<sup>38</sup> See the chronology of events in Pue, *Pepper in Our Eyes*, supra at xii-xxii.

<sup>39</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. See also Pue, “Prime Minister’s Police”, supra.

<sup>40</sup> These links are detailed in Pue, “Prime Minister’s Police?”, supra.

Finally, the “sponsorship” affair reflects the awkwardness for police agencies themselves caught up in investigations into wrongdoing. The auditor general turned over to the RCMP evidence of potential wrongdoing arising from improper sponsorship contracts. At the same time, a Parliamentary committee and public inquiry have been investigating potential RCMP involvement in the very same scandal.<sup>41</sup> The fact that the RCMP charges against senior public servant, Chuck Guite, just days prior to the Liberal election call, led to speculation that political interference might have played a part in the timing of the charges. The RCMP spokesperson asserted that, “Our investigation is totally independent from whatever is going on in politics.”<sup>42</sup>

These cases<sup>43</sup> raise the question not just of the police’s obligation to uphold the rule of law in the face of political interference, but also the legal status of police officers themselves. Are they “employees” in a “master and servant” relationship with their “employer” (whether a municipality, region or the provincial/federal Crown) or an “office-holder” with direct obligations to discharge legal duties irrespective of the direction which might be received from the supervising authority. There is case law supporting both positions and the answer appears to depend on the context. In labour relations settings, the police are more likely to be seen as

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<sup>41</sup> Andrew McIntosh, “Mounties conducted secret probe of spending: Auditor-General not told” *National Post* (13 February 2004). Daniel Leblanc, “More charges likely to be laid in ad sponsorship scandal; Mounties send Crown prosecutor 5 boxes of evidence related to current probe” *The Globe and Mail* (10 March 2004), A4, and Andrew McIntosh, “Senior Mountie queried sponsorship funds in '98: Concerns of top RCMP officer in Quebec were apparently ignored” *National Post* (2 June 2004).

<sup>42</sup> Les Whittington, “Opposition questions timing; Ad executive, former public servant arrested. Advertising probe continuing, RCMP” *The Toronto Star* (11 May 2004) A01. See also Susan Delacourt, “To serve and protect its political bosses; does politics influence RCMP? There’s no doubt, says one critic” *The Toronto Star* (17 April 2004) F03.

<sup>43</sup> For a more comprehensive review of political interference cases involving the police, see Kent Roach’s contribution to this symposium, pp. 12-38, and Stenning, “Someone to Watch over Me”, supra.

employees,<sup>44</sup> while in rule of law settings, the police are more likely to be seen as office-holders beholden to no “master” save the law.<sup>45</sup>

Thus, for the police, the rule of law must serve as a two-way street (or perhaps more accurately a four-way intersection with no stop-signs). The police must be called to account for their adherence to the rule of law through various forms of oversight (SIU, civilian complaints, the criminal justice process, internal discipline, etc) but must also be unfettered by political interference or direction so as to serve as a mechanism by which other political and legal entities are held to account. This is a tall order. Since no entity has the legitimacy and capacity to hold itself to account, the only real option is for multiple and overlapping oversight (both of the police and of the executive conduct in relation to the police). The rule of law in this sense should be seen as reflexive and dynamic rather than linear and static.<sup>46</sup> While this general approach strikes me as inevitable, and perhaps even desirable, the coherence of how it has unfolded in Canada is open to debate.

## B. Federalism

It is impossible to approach the executive-police relationship in Canada without acknowledging the constraints and complexities imposed through federalism. As David Smith

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<sup>44</sup> See, for example, *Re Prue*, [1984] A.J. No. 1006 (Q.B.) which discusses this case law at paras. 10-20.

<sup>45</sup> This principle was most explicitly articulated in *R. v. Metropolitan Police Commissioner, ex parte Blackburn*, [1968] 1 All E.R. 763. For an analysis of this judgment in the Canadian context, see Kent Roach’s contribution to this symposium and especially his analysis of *R. v. Campbell* at pp.29-30.

<sup>46</sup> B. Archibald, “Coordinating Canada’s Restorative and Inclusionary Models of Criminal Justice: The Legal Profession and the Exercise of Discretion under a Reflexive Rule of Law” Presentation to the Canadian Association of Law Teachers, June 1, 2004. For the classic exposition of “reflexive” systems, see G. Teubner, *Law as an Autopoietic System* (London: Blackwell, 1993).

has written, “There is no subject more central to the study of Canadian politics than that of federalism.” He went on to observe, “At one level of analysis, policing would seem to confound the pre-eminence of federalism. Along with courts and the legal system, the policy as instruments of the state appear to violate the division of power that is the hallmark of Canadian federalism.”<sup>47</sup> What Smith had in mind was the fact that the RCMP provides one-third of all public police officers in Canada (including the RCMP’s federal police duties and 8 of 10 provinces where the RCMP has contractual arrangements to provide police services).

Apart from this centralizing force in Canadian policing, federalism also generates a complex set of federal-provincial/municipal dynamics in the mandate, funding and governance of the police. For example, the federal government, while it has no jurisdiction over local policing, may modify, expand or contract local police mandates through amendments to the *Criminal Code*. Whether local police and provincial prosecutors have a constitutional duty to investigate and prosecute all offences designated by the federal government remains a heated and unsettled issue. This arose recently with respect to amendments to the *Criminal Code* dealing with firearms offences which Attorneys General in Alberta, Manitoba, Saskatchewan and Nova Scotia expressed reservations regarding whether they would instruct prosecutors to enforce the new provisions.<sup>48</sup> At least in Manitoba, the Attorney General also speculated as to whether the

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<sup>47</sup> D. Smith, “The Police and Political Science in Canada” in R.C. McLeod and D. Schneiderman (eds.), *Police Powers in Canada: The Evolution and Practice of Authority* (Toronto: University of Toronto Press, 1994), at p.187. See also Marie-France Bich, “Organisation des forces de police au Canada” (1989) 23 R.J.T. 279.

<sup>48</sup> Since most firearm’s violations would be prosecuted by federal prosecutors, the provincial role would in most cases consist mostly of cooperation between provincial and federal counterparts. For discussion, see Mark Carter, “Current Tensions in the Federation: Provincial Prosecution Policy,” Presentation to the Canadian Association of Law Teachers, May 31, 2004.

federal government should be billed for any costs associated with prosecuting firearms cases if compelled to do so.<sup>49</sup>

Is it open to provincial governments to direct police and/or prosecutors to decline to enforce compliance with particular criminal provisions? Or, do provincial Attorneys General and/or police officers have an independent duty to the Crown to enforce validly enacted penal provisions? There is no clear answer to this question in Canada's constitutional system. In the absence of hard and fast constitutional rules, political practices and constitutional principles form the foundation for negotiation. Federalism provides few solutions for executive-police oversight, but does provide a framework and venue for deliberations on important questions. As Smith noted, "in the exercise of the discretionary power that the police have to lay charges in criminal matters lies the potential for the practices of law enforcement to sustain societal and, in turn, political federalism."<sup>50</sup>

The form and content of political oversight over police activities varies sharply across provinces and territories and between those jurisdictions and the federal government. This is so without even addressing other special policing relationships such as aboriginal band police departments and military police which entail special forms of federal accountability and control.<sup>51</sup> Federalism remains a meaningful constraint on executive-police oversight, but also

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<sup>49</sup> See "Manitoba Refuses to Prosecute Firearms Registration Offences" (at <http://www.gov.mb.ca/chc/press/top/2003/04/2003-04-15-02.html>)

<sup>50</sup> Supra note .

<sup>51</sup> See Martin Friedland, *Report on Somalia Inquiry* [insert cite]; and Bryan David Cummins, *Aboriginal policing : a Canadian perspective* (Prentice Hall, 2003); and Gordon Christie's paper for this symposium.

ensures a potentially constructive balance between centralizing and decentralizing tendencies in the development and implementation of oversight mechanisms.

### *C. Charter Rights*

It is now impossible to speak of the autonomy of the police without considering the constraints (and protections) imposed by the *Charter*.<sup>52</sup> The central mechanisms by which Courts regulate police conduct, in particular, sections 7-14 and 24(2).<sup>53</sup> These provisions collectively put the police in the vital but awkward position of discharging a public duty to seek the arrest, charge and conviction of those they believe responsible for crimes while at the same time discharging a constitutional duty to protect the rights of the accused, including most importantly the right to be presumed innocent, with all the assumptions and guarantees that flow from this right.<sup>54</sup> It is significant to note in these cases that in these cases, both police conduct and the laws which authorize that conduct are “defended” by Crown counsel – in other words, by the executive branch. There is no suggestion that the interests of the police are in any sense divorced from the interest of the executive in the criminal justice context.<sup>55</sup>

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<sup>52</sup> For a discussion of the remarkable change in policing following the enactment of the *Charter*, see M. Friedland, “Reforming Police Powers: Who’s in Charge?” in McLeod and Schneiderman, *supra* note , at pp.100-118.

<sup>53</sup> D. Stuart, “Policing under the *Charter*” in *ibid*.

<sup>54</sup> For a more detailed review of *Charter* cases involving police conduct and a discussion of the extent to which these cases “curb” police activities, see Dianne Martin’s contribution to this symposium.

<sup>55</sup> Even in public inquiries investigating possible political interference in police activities where *Charter* rights are at stake, the interests of the police are represented by government lawyers. This is noted by Wes Pue in his discussion of the government’s strategy during the APEC inquiry – see “The Prime Minister’s Police, *supra* at fn. 10.

While the police establishment was leery of the *Charter*'s introduction,<sup>56</sup> the studies to date suggest both that the *Charter* has had a meaningful impact on police operations and that the police have adapted to the *Charter* without significant operational disruptions or attempts at evading the consequences of Court decisions.<sup>57</sup> Further, the mere fact that the police are now so enmeshed in the protection of *Charter* rights makes the specter of political interference in policing even more troubling. The executive interest in *Charter* litigation involving the police is multi-dimensional. There is a clear "public interest" role in the executive's defence of police conduct in particular prosecutions. There may also be a policy element where the *Charter* litigation arises from an initiative with a policy dimension (e.g. roadside screening for drunk drivers). Finally, there are often partisan concerns at stake for the government of the day if the *Charter* litigation attracts a public or media spotlight.

#### D. Civil Liability for Misuse of Police Power

Judicial involvement in executive-police oversight does not always come in the form of constitutional litigation. More often of late, it has manifested itself in adjudication of civil claims by and against the police.<sup>58</sup> Civil claims are particularly compelling as forms of public accountability as they permit aggrieved individuals to call police officers, police authorities and boards and executive bodies directly to account for their police activities. For example, in *Jane*

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<sup>56</sup> See Canadian Association of Chiefs of Police, "A Brief Concerning the Proposed Resolution Respecting the Constitution of Canada" (presented by the Law Amendments Committee of the Senate/House of Commons Special Joint Committee on the Constitution of Canada, Ottawa, November 27, 1980) (in which the Chiefs of Police expressed concern over accountability for policing standards shifting from Parliamentary to judicial control under the then proposed *Charter of Rights*).

<sup>57</sup> See, for example, Reginald A. Devonshire, "The Effects of Supreme Court Charter-based Decisions on Policing: More Beneficial than Detrimental?" (1994) 31 *Crim. R.* (4<sup>th</sup>) 82, and Kathryn Moore, "Police Implementation of Supreme Court Charter Decisions: An Empirical Study," (1992) 30 *Osgoode Hall L.J.* 547.

<sup>58</sup> This discussion builds on the survey of civil police liability presented in Dianne Martin's contribution to this symposium.

*Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*,<sup>59</sup> a woman was able to establish that the police owed a duty of care toward potential victims of a rapist in circumstances where the police did not warn women in the community who fit the profile of the rapist's victims.<sup>60</sup>

In *Odhavji Estate v. Woodhouse*,<sup>61</sup> the Supreme Court considered whether the family of a person who was shot dead during a police investigation could bring an action for negligence and the tort of misfeasance in public office against the police based on the failure of the officers involved to cooperate with the Special Investigations Unit. The Supreme Court held that the claim of misfeasance in public office could proceed. Iacobucci, writing for the Court, clarified the relationship between the tort of misfeasance in public office and the obligations of public officials to uphold the rule of law:

As is often the case, there are a number of phrases that might be used to describe the essence of the tort. In *Garrett, supra*, Blanchard J. stated, at p. 350, that "[t]he purpose behind the imposition of this form of tortious liability is to prevent the deliberate injuring of members of the public by deliberate disregard of official duty." In *Three Rivers, supra*, Lord Steyn stated, at p. 1230, that "[t]he rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes." ... The tort is not directed at a public officer who is **unable** to discharge his or her obligations because of factors beyond his or her control but, rather, at a public officer who **could** have discharged his or her public obligations, yet willfully chose to do otherwise.<sup>62</sup>

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<sup>59</sup> (1990), 74 O.R. (2d) 225.

<sup>60</sup> Interestingly, the policy relied on the policy/operation distinction to immunize its decision not to warn the plaintiff from judicial scrutiny. The Court rejected the notion that the decision not to warn potential victims was a policy choice. However, the reasoning of the Court implied that even if the decision had been characterized as one of "policy," it might still give rise to civil liability if it could be shown to be arbitrary or unreasonable in the circumstances. For an analysis of this aspect of the decision, see Mayo Moran, Case Comment on *Jane Doe* (1993) 6 CJWL 491-501.

<sup>61</sup> [2003] 3 S.C.R. 263.

<sup>62</sup> *Ibid.* at para. 26.

Iacobucci J. also makes clear in his reasons the special accountability relationship between the Chief of Police and members of the community affected by potential police misconduct. He observes that, “members of the public reasonably expect a chief of police to be mindful of the injuries that might arise as a consequence of police misconduct.”<sup>63</sup> By contrast, Iacobucci J. held that the nexus between members of the public and the Police Services Board or the provincial Solicitor General was insufficient to ground a claim in negligence and these aspects of the claim were dismissed.

The executive interest in civil challenges against police activities is equally complex as its interest in constitutional litigation. The government may be liable for damages in such cases and also may be hurt by negative publicity (this was particularly apposite for municipal government in the decision whether to appeal or settle the *Jane Doe* case). Additionally, civil liability is, as with the other legal constraints discussed above, also a recourse for the police, at least for individual officers and police associations. In 2002, when the Toronto Star published an empirical analysis of police reports disclosed pursuant to a freedom of information request, and concluded the Toronto police engaged in racial profiling, the police association responded with a \$2.7 billion dollar civil defamation class action on behalf of all officers and civilian members of the Toronto Police Services against the Toronto Star.<sup>64</sup> The suit was dismissed by the Ontario Superior Court in July of 2003 on the grounds that the articles in question did not relate to the entire police force but rather to a group of officers.<sup>65</sup>

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<sup>63</sup> Ibid. at para. 57. This obligation of the Chief is reinforced by s.4(1)(b) of the Police Services Act which creates a “freestanding” obligation on the Chief to ensure that members of the police force carry out their duties in accordance with the Act and the needs of the community.

<sup>64</sup> P. Small, “Police union sues Star over race-crime series” *The Toronto Star* (18 January 2003), A06.

<sup>65</sup> *Gauthier v. Toronto Star Daily Newspapers Ltd.*, [2003] O.J. 2622 (Sup. Ct.), affirmed [2004] O.J. 2686 (C.A.).

## **Conclusion**

The above review of the grounds on which courts may be called upon to intervene in police activities is intended as illustrative rather than exhaustive. The examples cited are also intended to demonstrate that the legal doctrines and remedial instruments available to courts to address accountability for police activities are limited. Judges can quash decisions, strike out evidence and award damages. It is unlikely that any of these remedial options will modify police conduct. The limits of litigation to produce systemic solutions have also been highlighted. That said, the importance of judicial intervention, especially on constitutional grounds, should not be underestimated or undervalued. Judicial application of constitutional and other legal remedies in police contexts also reiterates that civil liberties and fundamental human rights are always at stake in police decision-making (another dimension which the policy/operation dichotomy tends to gloss over).

The enduring significance of the judicial role is not in behaviour modification of police officers but in articulating the broad parameters of the executive-police relationship. Courts provide one of the few venues, in other words, for deliberation about the political roles and responsibility of governmental and policing bodies.

### **4) Political dynamics**

Finally, the executive-police terrain cannot be navigated without a political compass. Virtually every municipal, provincial and federal government is elected with a specific “law and order” policy agenda and scarce public resources with which to fulfill that agenda. As alluded to above, the distinction between the executive’s view on the “public interest” and its own partisan interests may often appear blurred. All three levels of government have differing tools to implement that agenda. Municipal leaders often have a lead role in selecting police chiefs, for example, while provincial ministers often have a lead role in selecting civilian oversight bodies. The Federal cabinet appoints the RCMP Complaints Commissioner Chair, for example.

The executive is responsible for critical decisions regarding the funding, structure and in some cases, the mandate of policing bodies. The police leadership must be deft negotiators with these various governments, while at the same time maintaining the support of their own political constituencies, whether police associations or community groups. Further complicating this political terrain is the important and often influential role of third parties, including police associations and unions, victims advocacy groups, political parties, interest group organizations of various stripes and the media.

In a Westminster political system, all executive activity, including that of the police and Crown prosecutors, must be subject to ministerial responsibility, whether under the rubric of an Attorney General, Solicitor General or some other member of cabinet. As discussed above, this does not mean, of course, that the RCMP Commissioner or any Police Chief is subject to ministerial direction, nor is the head of a police investigation a “servant or agent of the government.” Police officers exercising criminal investigation functions are said to be

“answerable to the law” and their “conscience” alone.<sup>66</sup> Therefore, while ministers are responsible for the police, police leadership is not necessarily accountable to ministers.<sup>67</sup> As discussed above with respect to the constitutional principle of the rule of law, the police are not the servant of anyone “save the law itself.”<sup>68</sup> Without at least the aspiration of ministerial responsibility, however, the police would become a law unto itself.

Paradoxically, the law to which police owe their loyalty appears expressly to validate the supervision of the political executive over the police. As Kent Roach highlights, most of the statutory authority empowering police commissioners stipulates that the responsibility for “direction” resides with the Minister. For example, 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>69</sup> (Emphasis added.)

Section 17(2) of Ontario’s 1990 *Police Services Act*<sup>70</sup> also contemplates Ministerial direction of the provincial police force by providing that:

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<sup>66</sup> See *Campbell* [1999] 1 S.C.R. 565. See also *Blackburn*, infra note .

<sup>67</sup> In *Odhavji Estate v. Metropolitan Toronto Police* the Supreme Court of Canada explained the relationship between the minister and police chief in the following terms: “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.

<sup>68</sup> *R. v. Metropolitan Police Commissioner, ex parte Blackburn*, [1968] 1 All E.R. 763 at 769.

<sup>69</sup> *Royal Canadian Mounted Police Act* R.S.C. 1985 c.R-10.

<sup>70</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;

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. (Emphasis added.)

Unlike some aspects of the justice system (court or prison administration, for example) issues involving the police attract significant political constituencies. Campaign pledges on “law and order” often have a direct impact on police, setting out policies for community policing or the hiring of new officers or the purchase of new equipment or anti-crime initiatives. Perhaps in part because of this, it has become more common to see police forces themselves express preferences for one party's political vision or another. This issue rose to the forefront of the 2003 Toronto mayoral campaign, when the Chief of Police appeared to endorse the “pro-police” John Tory candidacy,<sup>71</sup> and may arise again as Tory seeks the leadership of the Ontario Progressive Conservative party.<sup>72</sup> Equally controversial has been the support of police associations and unions for specific parties and candidates.<sup>73</sup>

The government's responsibility for the police extends to police budgets, which must be approved by the applicable municipal, provincial or federal government. The fiscal levers

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<sup>71</sup> Nick Pron, John Duncanson and Kerry Gillespie, “Tory gets police union's support; Mayoral rivals slam group's flexing of political muscle Association's new head insists endorsements are legal” *Toronto Star* (29 October 2003). Jonathan Fowlie, “Fantino lashes out as Liberals cancel helicopter funds; A ‘fundamental tool’ for police work in major city like Toronto, chief argues” *The Globe and Mail* (6 November 2003). Jack Lakey, “Probe requested of chief's words; Lawyer suggests Fantino endorsed candidate Board asked to determine if law was broken” *Toronto Star* (12 December 2003).

Katherine Harding, “Mayor gets Fantino's apology” *The Globe and Mail* (21 February 2004).

<sup>72</sup> Robert Benzie, “John Tory vows boost for cities; Joins bid to lead Ontario PCs Says party needs fresh approach” *Toronto Star* (7 May 2004).

<sup>73</sup> See Robert Benzie, “Police role in politics examined; Union has backed candidates Province seeks legal opinion” *Toronto Star* (5 February 2004) A04, Bruce DeMara, “Officers Defend Endorsements, *The Toronto Star* (30 April 2004) Catherine Porter, “Union stays out of federal race; Police association involved with internal crisis, official says Still disagrees with board, province over right to get involved” *Toronto Star* (3 June 2004) B03.

available in budget-setting provide the government of the day with another important (and often subtle) mechanism for influencing police conduct. Is it legitimate to use the budgetary process to affect police policy? Does this question of resources inevitably influence operational decisions by police as well?

The political nature of police issues, coupled with the centrality of the police in the justice system, has the potential to erode the already porous boundary between the dual hats worn by Attorneys General (and Solicitors General) as law officers on the one hand and politicians in cabinet on the other.<sup>74</sup> The problem is not only that these ministers have the dual interests *per se*, and the potential for conflicts, but also the lack of transparency about which hat is on at any given time (this is even more apparent in the remaining jurisdictions which combine the functions of Attorney General and Solicitor General in one minister (e.g. Manitoba).

When Ontario's Attorney General decided to establish a "guns and gangs" task force, for example, was this a decision taken as Chief Law Officer or as political cabinet minister. Even if a decision such as this was taken on "public interest" as opposed to partisan grounds, does it

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<sup>74</sup> As the Supreme Court observed in *R. v. Power*, [1994] 1 S.C.R. 601, "the Attorney General is a member of the executive and as such reflects, through his or her prosecutorial function, the interest of the community to see that justice is properly done. The Attorney General's role in this regard is not only to protect the public, but also to honour and express the community's sense of justice. See also the discussion in Ian Scott "Law, Policy and the Role of the Attorney General: Constancy and Change in the 1980s" (1989) 39 U.T.L.J. 109, See John Edwards "The Attorney General and the *Charter of Rights*" in Robert Sharpe ed. *Charter Litigation* (Toronto: Butterworths, 1987), John Edwards "The Office of the Attorney General- New Levels of Public Expectations and Accountability" in P. Stenning ed. *Accountability for Criminal Justice* (Toronto: University of Toronto Press, 1995), Mark Freiman "Convergence of Law and Policy and the Role of the Attorney General" (2002) 16 S.C.L.R.(2d) 335, and most recently, Kent Roach, "The Role of the Attorney General in Charter Dialogues Between Courts and Legislatures" Paper prepared for conference in honour of Ian Scott (Queen's University, Fall 2003).

become a partisan initiative when the government of the day highlights this initiative as it seeks support on the campaign trail?

Just as with the dispersal of executive accountability for policing through police boards, disciplinary panels and civilian complaints mechanisms, the multiplicity of political accountability relationships for policing can be beneficial. The overlapping mandate of the Attorney General, Minister of Justice (in those jurisdictions where the two are distinct) and Solicitor General (often now referred to under the rubric of minister for “public safety”), in this light, perhaps is salutary. While inter-agency squabbles and incoherent policies are possible, it is more likely that the result of overlapping jurisdiction over policing is greater political oversight and enhanced police accountability. To highlight but one example, in Ontario, the fact that the SIU are accountable to the Attorney General rather than the same Minister (Public Safety) as the police force, reinforces the appearance and reality of its separation from the police hierarchy (which is not the same, of course, as ensuring its independence from political interference).

This dynamic also arises in the sphere of court backlogs. Politicians are called upon to deal with the situations of delay in criminal accused reaching trial. Court backlogs are an example of a criminal justice issue which requires integrated and systemic responses. It is not merely a matter of appointing more judges and building more courthouses (although both have been announced recently in Ontario as strategies to address backlogs), but also must involve policies aimed at Crown prosecutors, legal aid lawyers and court staff. One strategy adopted by provincial governments has been to direct that certain minor offences not be prosecuted by local

police (i.e. vagrancy). This policy also assumes a degree of political control and influence over the justice system which is rarely interrogated.

There is, as I alluded to above, an important distinction between accountability and oversight. In the apolitical and autonomous police model I have identified, the line of accountability formally is to the political executive (ie. the responsible Minister who in turn is responsible to Parliament and by extension to the public). While other institutions may provide an important oversight role (courts, complaints bodies and administrative tribunals, for example) the police must be accountable to a single Crown authority. If the police are accountable to everyone in theory, they are accountable to no one in practice. However, notwithstanding that they are accountable only to the Crown in theory (and in part because of this fact), their activities may and should be subject to public scrutiny by a range of other judicial, administrative, political and community bodies in practice.

The need for multiple oversight arises from the reality that accountability through a ministry may lead to ineffective supervision and exacerbate the vulnerability of the police to political interference. The main principles underlying ministerial responsibility in its original formulation now appear outdated or naïve. For example, the principle that ministers should resign in response to errors or misdeeds of public servants, and that the civil servants involved in committing those errors or misdeeds should remain anonymous seems to have lost currency in Canada (the sponsorship scandal is a case in point).<sup>75</sup> The notion that the Minister may be personally responsible for all the decisions taken in the ministry presumes a level of knowledge

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<sup>75</sup> The relationship between the sponsorship affair and principles of ministerial responsibility is discussed in Sossin, "Speaking Truth to Power", supra note .

and control over the actions of government that simply has been outstripped by the volume and complexity of government action. In lieu of strong confidence in ministerial responsibility, those seeking to call government to account are far more likely now to call for a public or judicial inquiry or at least Parliamentary committee hearings than in the past, and governments are far more likely to grant such requests (the Sponsorship Inquiry and Arar Inquiry represent two recent examples). The fact that inquiries remain the prerogative of the government of the day to call, and that the government controls the budget and terms of reference of such inquiries, significantly limits the ability of such inquiries to hold policing forces accountable.<sup>76</sup> That said, inquiries can and do provide a pivotal form of oversight for allegations of police misdeeds and have served as the catalyst for significant shifts in police structures and policies.<sup>77</sup>

As these inquiries demonstrate, the executive-police relationship is mediated by the political currents of the day and events outside the control of both groups. The line between legitimate implementation of government policy and undue political interference is not and should not be viewed as fixed and immutable. As I elaborate in the final section below, the dynamic nature of this boundary, shaped both by constitutional principle and political practice, can be a constructive and animating feature of executive-police relations.

### **III. Reconciling Political Accountability with the Rule of Law: Toward an Apolitical and Autonomous Police Model**

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<sup>76</sup> See A. Manson and D. Mullan (eds.), *Commissions of Inquiry: Praise or Reappraise* (Toronto: Irwin, 2003). See also Robert Centa and Patrick Macklem, "Securing Accountability through Commissions of Inquiry: A Role for the Law Commission of Canada" (2001) 39 Osgoode Hall L. J. 117.

<sup>77</sup> See, for example, the McDonald Commission, the Marshall Inquiry and the APEC Inquiry as examples.

The tension between police autonomy and accountability in a constitutional democracy is both familiar and vexing. If the police must report to political authorities or bodies appointed by political authorities, the potential for political interference always is present. It may be blatant. It may be subtle. It may be intentional or inadvertent. If the police are insulated from review, on the other hand, then the police ultimately may become an authority unto themselves, which may in turn give rise to the appearance that the police can and may exempt themselves from the rule of law. Is there a way out of this enduring conundrum? Perhaps not. In the third and final section of the paper, however, I sketch several areas where progress toward an apolitical and autonomous model of policing would at least be desirable. The goal of this ideal type is to create a legal, administrative and political climate in which neither the police nor the executive can unilaterally impose its will on the other. In other words, the executive and the police are expected, in this model, to engage in deliberative and transparent debate over policing matters.

The discussion below is divided into five brief sections. Each in different ways seeks to counter the tendency to compartmentalize executive-police relations within artificial categories or boundaries. In the first section, I emphasize the importance of moving beyond the policy/operation dichotomy. In the second section, I explore the separation of powers and the importance of judicial and Parliamentary oversight as a complement to intra-executive forms of oversight. In the third section, I highlight the need for objective structures to ensure the government's authority over budgets and appointments do not lead to inappropriate influence over police activities. In the fourth section, I argue that executive-police relations need to be situated more clearly within the broader criminal justice system. Finally, I attempt to consider, in

each of the four areas discussed, what approaches and arrangements would be consistent with an apolitical and autonomous ideal type of executive-police oversight.

### **1) moving beyond the policy/operation distinction**

As I have argued above, I believe that it is desirable to move beyond the policy/operation distinction, which obscures more than it reveals about the executive-police relationship. In lieu of certainty with respect to the policy/operational boundary, the most we can demand, in my view, is transparency and authenticity. Rather than try to classify various police activities into artificial categories such as “policy” or “operational”, I believe we must articulate better what is at stake in these determinations, both for the executive and for the police.

I would advance an alternative, contextual framework to replace the policy/operational dichotomy as a means of determining when political input into police decision-making is legitimate. This framework could be comprised of three steps: 1) First, does executive have a legitimate public interest goal to advance; 2) Second, would pursuing that goal respect the functional autonomy and apolitical status of the police; and 3) third, is there an overriding interest, either of individual rights or public safety, which is inconsistent with political involvement? If the answer to any of the above questions is “yes”, then political involvement would be inappropriate (this framework relates to settings of police direction – it could be applied equally where the issue is “upstream” reporting to political authorities of police actions). That executive input may be appropriate, however, does not mean that it necessarily trumps the police’s own view of what is desirable and in the interests of the public.

Context, of course, holds the key to the legitimacy analysis. The decision whether to pursue criminal charges lies at the core of police autonomy and political involvement in such decisions should be rare and subject to a high threshold of justification. It should be rare, however, not because we classify the laying of charges as “operational” but rather because there are few, if any, political considerations which may legitimately justify intervention in the laying of charges under an apolitical and autonomous police model. Are there any? Consider once again “zero tolerance” directives in certain areas (gun violence, domestic assaults, etc) which governments develop pursuant to their policy agendas. Rather than debate whether “zero tolerance” initiatives are policy or operational interventions, we ought to debate whether they are legitimate political preferences to which policing should be subject. Applying the framework set out above, I believe there may be cases where political input in the form of zero tolerance initiatives would be legitimate. But I do not believe all cases would meet this threshold.

How are the inevitable disputes regarding the application of this kind of framework to be resolved? Whether one prefers judicial involvement, public inquiries and reviews or other inter-institutional arrangements, it is vital that a record be in existence of the competing approaches to policing issues, if any. In this vein, I share Kent Roach’s belief that 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. This, of course, is easier said than done.

Roach raises the issue of putting more political guidance and direction in writing. This could take many forms. For example, ministerial directives could be issued as confidential or public memoranda to police chiefs and/or police service boards or they could be disseminated through soft law instruments such as police manuals and training materials. Such measures may well be desirable, but the uncertain status of these instruments may also simply move the same problem to a new venue. Are ministerial directives contained in memoranda “law” and, if so, where they are designed to structure and constrain police discretion, can they be subject to judicial oversight such as challenge under the *Charter*?<sup>78</sup> If they are not considered law but rather “policy” must they be made public?

While distinctions such as policy/operational tend to suggest right answers to the question of executive’s role in police matters, the framework of contextual legitimacy tends to suggest a more relational analysis. Executive action is not viewed in isolation but rather is situated within particular circumstances and principles. Below, I suggest how this might change the way we assess how executive-police tensions play out.

## **2) coming to terms with the separation of powers and Parliamentary oversight**

I also have suggested that an apolitical and autonomous police ideal type requires a distinct oversight relationship with each branch of government, one which builds on a maturing

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<sup>78</sup> For discussion, see Sujit Choudhry and Kent Roach, “Racial and Ethnic Profiling: Statutory Discretion, Democratic Accountability and Constitutional Remedies,” (2002) 40 *Osgoode Hall L.J.* 1 and Lorne Sossin “Discretion Unbound: Reconciling Soft Law and the *Charter*” (2002) 45 *Canadian Public Administration* 465.

separation of powers doctrine in Canada. Canada's separation of powers doctrine does not have the rigorous checks and balances of the American constitutional order but rather fluid and overlapping roles for the legislative, executive and judicial branches of government remains a cornerstone of democratic and legal accountability in Canada. Executive tribunals adjudicate constitutional rights, courts provide advice to the executive through answering reference questions and so forth.

In this context, there is a distinctive and vital role for each branch of government in attaining the ideal of an apolitical and accountable police. As indicated above, it is important that the police should be subject to robust judicial oversight for compliance with constitutional, administrative and civil legal norms. The police should also be subject to oversight from a range of executive bodies of varying degrees of autonomy from control by the government of the day and from the police, whether civilian complaints bodies, special investigative units or police boards. The judicial and executive role in police oversight is relatively well-accepted (although there is significant debate as to the effectiveness of such oversight). The role for the legislative branch is less clear.

In the discussion on federalism, I have already alluded to the key role of Parliament in establishing the mandate and authority for the police through its supervision over the *Criminal Code* and its amendments. Does the legislative branch also have a role in ongoing oversight of police activities? If so, how is this role distinct from the judicial and executive oversight of those same activities (especially where at least some of the executive oversight bodies appear to derive their legitimacy from their representative mandate for community interests).

In my view, there are two possible areas where there is a potential role for Parliamentary oversight. First, standing committees of Parliament or provincial legislatures are an underutilized mechanism for giving a public hearing to allegations of political influence over the police (recent examples include the hearings into the sponsorship affair, which included allegations of RCMP involvement). This kind of public forum for examining the propriety of executive-police relations represents a unique and potentially valuable form of political accountability (the conduct and outcome of the recent sponsorship hearings, however, may also serve as a cautionary tale on the limitations of this kind of accountability).

There is a persuasive case to be made that the police should also be subject to the oversight of a complaints body appointed (and funded) by, and reporting to the Legislature. This is in keeping with the recommendations of the McDonald and Marin Commissions.<sup>79</sup> As demonstrated by Auditors General, Privacy Commissioners and Ombudsmen in Canada, Parliamentary bodies are better able to provide an autonomous and apolitical effective check on executive conduct than agencies which derive their budget from and report to the executive. One option would be simply to transfer the existing civilian complaints bodies from executive to legislative control.

The exact modalities chosen are of course significant but not the point. An apolitical police is enhanced both by other non-partisan forms of oversight (judicial and through public

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<sup>79</sup> [insert cite].

inquiries) and by all-party forms of oversight, where public and political deliberation about police actions and arrangements, ideally, can occur.

### **3) new approaches to budgets, appointments and other political levers of influence**

I have asserted that the goal of a system of effective, multiple and overlapping oversight is to achieve an autonomous and apolitical police force (in which its apolitical posture reinforces its autonomy and its autonomy reinforces its apolitical nature). There are, of course, political challenges to achieving such an apolitical institutional posture. To take an obvious example, police budgets are set by municipal, provincial and federal governments, and typically require a “champion” at the cabinet/council table to justify new initiatives or significant capital infusions. Similarly, a major challenge to an apolitical model is that the appointment power for the Chiefs of police or heads of police boards remains with government, either directly or indirectly.

Here, too, the analogy to the judiciary or to other “apolitical” bodies such the Auditor General or Information and Privacy Commissioner might be helpful (which also are subject to public budgeting and appointments). In these settings, public confidence in the independence of Parliamentary officers and judges requires objective guarantees of freedom from political interference. For this reason, judicial salaries must be set by an independent commission rather than by executive fiat, and Parliamentary offices require an appointment to have all-party support or to involve a credible nominating committee all may be mechanisms to remove the appointment power from being perceived as an expression merely of the policy preferences or ideological inclinations of the government. This leads to the question of what objective

guarantees could or should be put in place to ensure police budgets and appointments are not merely levers of political influence.

The question of budgets and appointments in the police context varies significantly across the country because of different statutory environments, contractual arrangements and whether there is a role for local police boards. Certainly, appointments to these boards and to the police leadership which are viewed as “merit” driven rather than “patronage” or “political” appointments will be more consistent with an apolitical and autonomous ideal. With respect to budgets, the question of political choice in the face of competing needs and scarce resources is more central and more critical. Rather than seek to turn political questions into objective calculations, the priority here, in my view, should be on the transparency of the budgetary process and the substantive quality of the deliberations surrounding that process. A more robust system of independent audits of police budgets and government expenditures on policing more broadly would signal a positive step in this direction.

#### **4) toward an integrated approach to executive-police oversight**

The issue of police budgeting raises broader questions about where policing fits within the broader justice sector. As James Robb has pointed out, we should view questions of the executive-police relationship as integrated into the broader questions of the executive’s role in criminal justice, which includes its influence over Crown prosecutors, the legal aid system, the structure and mandate of police boards and civilian oversight agencies, the launching of public

inquiries and reviews, the administration of the Courts and decisions flowing from the Attorney General and Solicitor General's "law officer" functions.<sup>80</sup>

All of these components of the criminal justice system enjoy varying degrees of autonomy on various issues, and derive their legitimacy from various legal and political sources, but none can perform their mandate effectively without some support from other components of the system. The executive-police relationship, in other words, cannot and should not be seen in isolation, whether from other parts of the criminal justice system or from other social and economic structures more generally.

That the police are embedded not just in the criminal justice system but in the social fabric of the community is not a controversial claim but has been illustrated dramatically in recent years by the issue of profiling – whether it is local police forces engaging in racial profiling in decisions to stop vehicles for inspection or the decision at borders and airports to detain members of ethnic and religious groups for secondary searches.<sup>81</sup>

Such polycentric police settings both demonstrate the futility of the policy/operational dichotomy and highlight the importance of legitimacy and public confidence both in the police and the executive. Both the legitimacy of the police and of the executive in settings which raise questions of systemic racism in policing depends on the role of mediating forms of executive and

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<sup>80</sup> See J. Robb, "The Police and Politics: The Politics of Independence, in McLeod and Schneiderman, *supra* note , at 177.

<sup>81</sup> For a general discussion, see Choudhry and Roach, *supra*.

judicial oversight discussed in this paper (including constitutional and civil court cases,<sup>82</sup> public inquiries,<sup>83</sup> and human rights code challenges).<sup>84</sup> Additionally, proposals to address racial profiling cannot ignore the views of police associations, victims groups, and multicultural groups, among other stakeholders. The profiling context is also one where neither the police nor the executive can achieve their goals in isolation from one another or from the other stakeholder groups (which in turn raises the importance of the media both in consultation initiatives and communicating outcomes). Whether the solution lies with police training, court orders, civil damages, internal discipline, funding for cameras on police cruisers, more inquiries and reviews or a more arm's length civilian complaint system, or some combination of all of the above, I have suggested that the ideal of an apolitical and autonomous police may chart a constructive course toward more transparent and deliberative relations with the executive.

## Conclusion

In this paper, I have reviewed the nature of the executive-police relationship in Canada, the respective roles of the courts and administrative agencies and advanced the ideal type of an apolitical and autonomous police as a means of reconciling the tension between police accountability and the rule of law. This ideal type is predicated on a dynamic rather than static relationship between the executive and the police, where complex relationships of individuals,

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<sup>82</sup> See, for example, *R. v. Golden*, [2001] 159 C.C.C. (4<sup>th</sup>) 449 (S.C.C.), *R. v. Brown* (2003), 173 C.C.C. (3d) 23 (Ont. C.A.) and the other cases discussed in Dianne Martin's contribution to this volume.

<sup>83</sup> See G. Smith, "Saskatchewan Police Probe Finds Anti-Native Prejudice" *Globe and Mail* (22 June 2004), A1.

<sup>84</sup> In December 2003, adjudicator Philip Girard ruled that Johnson was the victim of racial discrimination at the hands of Halifax Regional Police Constable Michael Sanford during a traffic stop in April 1998. In its decision, the board of inquiry recommended that the Halifax Regional Police re-examine its internal complaints mechanism to ensure it is sensitive to the diversity of the local community. *Johnson v. Halifax (Regional Municipality) Police Service*, [2004] N.S.H.R.B.I.D. No. 4.

structures and ideologies do not fit easily into policy/operational boxes and the boundary between legitimate and illegitimate political input is to be continuously worked out rather than predetermined by artificial “bright lines”.

Transparent deliberations between executive and police leadership, augmented with internal and external forms of oversight, provide venues where these contextual boundaries may be contested and resolved. The success of this apolitical and autonomous ideal in policing lies not in submerging executive interests in police matters nor in submerging police interests in political matters but in providing frameworks where both interests are seen as valid and where neither is able to entirely subjugate the other. My claim in this analysis is that where the police and the executive are engaged in working out their relationship in public view, the safety of the public, needs of communities and rights of individual are likely to be more effectively safeguarded. The Canadian legal and political system is characterized by a strong set of constitutional and democratic norms – translating those norms into practical realities which take into consideration political realities, however, remains an elusive and vital goal.

**COMMENTARY BY ALAN BOROVOY**

**on**

**“The Oversight of Executive Police Relations in Canada” by Lorne Sossin**

In my view, the center-piece of Professor Sossin’s paper is his welcome repudiation of the long-time conventional wisdom in Canada: that there is a significant distinction between police policies and their operations. According to this distinction, the government may direct the former but must avoid the latter. Not infrequently, however,

there is no clear distinction between these concepts. And not infrequently, the distinction, even if clear, is not very helpful.

One of the most revealing examples of the difficulty emerged in the aftermath of the Ipperwash incident itself. In the Ontario legislature, the opposition parties were pummeling the government with questions regarding the government's role in the decision of the Ontario Provincial Police (OPP) to remove the aboriginal protesters by force. The attorney general replied that there was no government interference. In his view, such interference would have been 'highly inappropriate'. The premier said that the government did not know of the OPP-buildup; he insisted that such activity was "not our business". The opposition MPP's accused the government of misleading them.

Of course, it would be very bad if the government had not told the truth. But, in this situation, it would be even worse if it *had*. How can there be political responsibility for the police if the government cannot involve itself in, or even *know about*, an operation of such magnitude and importance? Suppose there were a question of our country deploying a contingent of troops (the same number as the OPP used) for possible conflict with a group (the same number as the aboriginal protesters) from a foreign power? Who would ever suggest that anyone but the government should make such a decision? Why should it be so different if we are risking a battle with our own citizens?

In his quest for the right balance, Professor Sossin nicely states the dilemma. He says that this country has "a long and unsettling history" of governments using the police as an arm of the political administration *and* of the police becoming a law unto themselves. Greater government involvement risks the former; less government involvement risks the latter. At one point, Professor Sossin says that the goal of the exercise is to create the kind of climate where neither government nor police can unilaterally impose their will on the other. Surely, however, that depends on what is involved. Suppose, for example, one

of the parties was about to commit an unlawful act? I would regard it as incontestable that the other party must be able to stop it.

That's an easy case. Suppose, however, the activity involved is obviously lawful but arguably awful? Remember, for example, the Fort Erie search-and-strip drug raid of 1974 and the bath house raids of 1981. At Fort Erie, the police wound up physically searching the more than one hundred patrons they found in the lounge; in the case of the women, they had them herded into washrooms, stripped, and subjected to vaginal and rectal examinations. In Toronto's bath house raids, the police arrested some three hundred adult patrons whose offence involved nothing more than consensual sex—albeit of the homosexual variety—with other adults. At least as things stood before the Charter when these incidents occurred, the behaviour of the police was likely lawful. But wasn't it nevertheless awful?

The key question, however, is: whose view of 'awful' should prevail, that of the police or that of the government? Suppose the relevant ministers found out beforehand what the police were going to do? Would it be so 'highly inappropriate' for these civilian masters to telephone the police chiefs and direct them to desist? After all the politicians, not the police, are elected.

As indicated, it is argued that a key reason to keep the government out of police operations is to reduce the risk of politicizing the police. A democratic society does not want the police to perform partisan duties at the behest of any politicians. But why should we assume that only the government has improper political motives? So do many police officials. And what about all the other police prejudices that could influence their behaviour? It was suggested, for example, that the bathhouse raids were motivated by

homophobia. As between the appointed police and the elected government, why should it be the police who have the right to make the last mistake?

Professor Sossin has rightly said that the main problem is the lack of transparency in the relationship. In response, he has made the helpful suggestion that the instructions of the civilian masters to the police should be put in writing. To this, I propose another safeguard: independent auditing. An independent agency should be given continuing access to police records, facilities, and personnel so that it can conduct on-going, self-generated audits of this pivotal relationship as well as police policies and practices in general. The agency should have no decision-making power. Its sole function should be to disclose and propose.

Anyone who has lived in the real world for more than an hour knows very well that civilian decision-makers, such as cabinet ministers, tend to shrink from confrontations with the police. The genius of audits is that those performing them don't face this problem. Since they have no decision-making role, there is much less reason for them to hide. But, since they have only one function, they have every incentive to be thorough. To whatever they extent they miss something that surfaces later, they will incur a considerable risk of winding up with egg on their faces.

At the same time, the publicity from an audit subjects the decision-makers to a new and potent pressure. This is what can produce changes in police policies and practices. Canada is already experiencing this concept in national security matters. The independent Security Intelligence Review Committee (SIRC) performs such audits of the Canadian Security Intelligence Service (CSIS). A SIRC audit a number of years ago pressured the government into disbanding CSIS's counter-subversion unit.

The mere existence of such an audit system would help to ensure that the politicians do not misuse any new power to supervise police operations. Audits can be instrumental in deterring, detecting, and correcting any propensity for undue politicization.

### COMMENTARY BY WES PUE

on

***“The Oversight of Executive Police Relations in Canada: The Constitution, the Courts, Administrative Processes and Democratic Governance” by Lorne Sossin***

Two incidents help to frame the idea of police independence:

- During Premiership of Joh Bjelke Peterson, Queensland state police assigned significant resources to raid Brisbane’s three universities, removing condom vending machines from the campuses.<sup>85</sup>

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<sup>85</sup> The remarkable political career of Premier Joh Bjelke Petersen is chronicled in a number of books including John Harrison, *Faith in the Sunshine State : Joh Bjelke-Petersen and the religious culture of Queensland* (University of Queensland. School of History, Philosophy, Religion, and Classics, Ph.D. Thesis, St. Lucia, Qld., 1991); Rae Wear *Johannes Bjelke-Peterson: The Lord's Premier* (UQP); Allan Patience., editor, *The Bjelke-Petersen premiership 1968-1983 : issues in public policy* (Melbourne : Longman Cheshire, 1985); Derek Townsend, *Don't you worry about that! : the Joh Bjelke-Peterson memoirs* (North Ryde, N.S.W. : Collins/Angus & Robertson, 1990); Derek Townsend, *Jigsaw : the biography of Johannes Bjelke-Petersen : statesman - not politician* (Brisbane ; London : Sneyd & Morley, 1983), Hugh Lunn, *Joh : the life and political adventures of Johannes Bjelke-Petersen* (St. Lucia : University of Queensland Press, 1979); Hugh Lunn, *Johannes Bjelke-Petersen : a political biography* (St. Lucia ; London ; New York : University of Queensland Press, 1984 2nd ed.); Rae Wear, *Johannes Bjelke-Petersen : a study in populist leadership* (St. Lucia, Qld., 1998); Rae Wear, *Johannes Bjelke-Petersen : the Lord's Premier* (St Lucia, Qld. : University of Queensland Press, 2002). Various reminiscences of the event are to be found at the blogsite <http://troppoarmadillo.ubersportingpundit.com/> while the National Library of Australia has collected newspaper clippings of the events in MS 8915 - Papers of Greg Weir Volume Number 21: A.I.D.S. Issues & Queensland Parliamentary Leadership 1987 ([http://www.nla.gov.au/ms/findaids/8915\\_21.html](http://www.nla.gov.au/ms/findaids/8915_21.html)): 1987.09.01 *Sydney Morning Herald* “Qld police remove condom machines”; 1987.09.01 *Courier Mail* “Police tear out Uni condom machines”; 1987.09.01 *Daily Sun* “Police seize condom sales machines”; 1987.09.02 *Australian* “Students plan legal action after police raid machines”; 1987.09.03 *Courier Mail* “Police raid Townsville university, but condom machines have gone”; 1987.09.07 *Canberra Times* “Police seize campus condom machines”.

- In a British proceeding observed by criminologist Doreen McBarnet a young man was tried on the charge of jumping on and off a curb in a disorderly fashion.<sup>86</sup>

While the first illustrates the absurdity of misdirecting police resources, the second reveals the degree to which discretion gives life to criminal law. The rights of citizens turn significantly on the discretion of police officers, Crown attorney's or judges to intervene, arrest, charge, prosecute, convict – or not.

Dr. Sossin's contribution to this symposium usefully locates police issues within wider frameworks of thought about the legal regulation of discretion. This helpfully corrects a common tendency to divorce questions relating to the police-politics interface from larger issues of constitutional governance, reducing complexly nuanced matters to the misleadingly simple questions of "who should be in charge" or "who should have the final say". Put so bluntly and in disregard of the larger constitutional background, it provokes responses that flow directly from the questioner's assumptions as to whether "police" or "politicians" are most likely to produce substantively agreeable outcomes.<sup>87</sup> In reinserting constitutional principle into this otherwise

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<sup>86</sup> Doreen J. McBarnet *Conviction: law, the state and the construction of justice* (London: Macmillan, 1981) p. 33: "... in some public order offences there need not even be evidence that the accused was doing or intending to do anything, merely being part of an offensive crowd is enough. Hence Case 30, where the charge was a breach of the peace, involving 'jumping on and off a pavement in a disorderly fashion', and the accused was the only one of a small group of youths who pleaded not guilty."

<sup>87</sup> Kent Roach's contribution to this volume includes a delightful account of the changing views of Geoffrey Marshall on police "independence":

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

starkly pragmatic calculation Professor Sossin provides valuable service. “Independence”, it turns out, is an ancient legal term of art that suffuses the entire field of common law constitutionalism.

Though it is also helpful, Professor Sossin’s emphasis on the rule of law is discomfiting. The idea of law sits ill at ease with a criminal justice system so shot-through with discretionary powers as to seemingly vanish into a mere “rule of persons”. The awkwardness associated with personal exercises of discretion is accentuated in our era when the background ideology of managerialism vies mightily with the rule of law for our loyalty. From the second we inherit the notion, famously articulated by Dicey, that no person is to be punished in body or in goods except for a distinct breach of law, established before the ordinary courts in the ordinary way. Though much criticized, this idea remains, as E.P. Thompson put it, “an unqualified human

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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’.

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.

See: 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. Roach observes also that in 1984, during the period of high Thatcherism, Marshall “elaborated on this thesis by arguing that ‘despite its uncertain legal foundations...it is now necessary to defend’ what has been described here as full police independence ‘as a constitutional and administrative convention.’”: Geoffrey Marshall *Constitutional Conventions* (Oxford: Oxford University Press, 1984) at 144. See also, G. Marshall, *Police and Government: The Status and Accountability of the English Constable* (London: Methuen & Co. Ltd., 1965); Marshall, G. & B. Loveday “The Police: Independence and Accountability”, in Jowell, J. & D. Oliver (eds.) *The Changing Constitution* (Oxford: Clarendon Press, 1984), pp. 295-321.

good”.<sup>88</sup> Managerialism’s predilection for efficiency<sup>89</sup> over the values of fairness, propriety, rights, duties, constitutionalism or “law’s” proceduralist values reflects a culture that prizes “getting things done”. The two live in inevitable tension. They always have.

“Getting things done” is not, however, the whole story when it comes to the management of a domestic armed force denoted as “police”. It bears emphasis that police-government relations ought always to be constrained within the parameters of legality. This is so *not* because efficiency in any managerial sense demands it but because the *grundnorm* of our civil society requires it. No *unlawful* executive direction of police is acceptable. It matters not how or by whom it is communicated, to whom it is addressed, or whether it is analytically “operational” or “policy” in nature. No argument derived from efficiency concerns can justify unlawful instructions, orders, deployment or actions.

Discretion muddies even these analytically clear waters. Unlawfulness typically arises in one of several ways. Police actions such as the arrest of law-abiding individuals, harassment of political opponents of the government, the use of unnecessary force, or turning a blind eye to the crimes of well connected individuals<sup>90</sup>, would be clearly unlawful. Even in such clear cases, however, the reality that police need to make choices as to the allocation of their resources, cannot prosecute all wrong-doers, must exercise discretion, and sometimes make thoroughly honest mistakes, renders assessment of particular circumstances a complex, multi-faceted matter.

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<sup>88</sup> See, for example, the discussion in Daniel H. Cole, 'An Unqualified Human Good: E.P Thomson and The Rule of Law', *Journal of Law and Society* (2001) Vol 28, (2), pp. 177-203.

<sup>89</sup> Janice Gross Stein’s *The Cult of Efficiency* (House of Anansi/Canadian Broadcasting Corporation, 2001) usefully points to the frequently misleading invocations of “efficiency” in policy making,

<sup>90</sup> For suggestions that this has happened at the highest levels in Canada, see Paul Palango: *Above the Law* (Toronto : McClelland & Stewart, 1994.); Paul Palango, *The last guardians : the crisis in the RCMP-- and in Canada* (Toronto : McClelland & Stewart, 1998).

What is essential is that fear or favour must never flow from political connection or influence.

The “playing field” of law enforcement discretion must remain level.

Beyond the realm of the blatantly unlawful, one can imagine situations in which the executive branch of government would wish to direct the use of otherwise lawful powers in situations where constitutional propriety would dictate otherwise. It can be extraordinarily difficult to mark precisely where one constitutional right – freedom of expression or aboriginal entitlement, for example - must give way to another – the preservation of the peace, perhaps. Such boundaries fuzzily demarcate the frontier between lawful and unlawful police conduct. But, for all their “fuzziness” they define the character of our democracy. The “playing field” tilts strongly in the direction of political command any time police forces lack access to independent legal advice.<sup>91</sup>

Finally, a police power used in pursuit of *improper goals* is unlawful even if the same power, used in pursuit of proper goals and in closely similar circumstances, would be appropriate. The pretense of proper motivation should not serve to uphold state action that is in substance directed to improper ends. The intent or effect of state action can render it “colourable” and, hence, ultra vires, and unlawful.<sup>92</sup>

Though the principle of colourability is clear enough, its application is less so. If mundane police wrong-doing is notoriously well concealed behind an all-but-impenetrable blue

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<sup>91</sup> The RCMP, for example, can obtain no legal advice other than from government lawyers.

<sup>92</sup> In *Ladore et al. v. Bennett al.* [1939] 3 D.L.R. 1 the Judicial Committee of the Privy Council (Lords Atkin, Russell of Killowen, Macmillan, Wright and Romer) articulated the relevant principle in a somewhat different context as follows: per Lord Atkin “... the Courts will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping within the statutory field. A colourable device will not avail.” The Supreme Court of Canada observed in *Reference re: Firearms Act (Can.)* that “[i]n some cases, the effects of the law may suggest a purpose other than that which is stated in the law .... a law may say that it intends to do one thing and actually do something else. Where the effects of the law diverge substantially from the stated aim, it is sometimes said to be “colourable” (*Reference re: Firearms Act (Can.)* [2000] 1. S.C.R., 783, The Court, para.18)

curtain, the problem is compounded where possibly inappropriate police-politician relations are concerned.<sup>93</sup> Institutional inertia weighs heavily against those who would challenge high level impropriety. Direct evidence of what was said or done in the course of government communications with police is often lacking, quite possibly by design. Witnesses can be hard to identify - and harder to compel. There are few incentives encouraging willing testimony that runs contrary to the interest of either police or government hierarchies - that way career suicide lies. The evidentiary bar to be overcome in proving the colourability of state actions in court is extraordinarily high and judicial habits of deference to officialdom have become well entrenched during the past half century. Difficult questions are rarely put, the executive commands effectively infinite resources in protecting itself from effective inquiry. Government officials often have more or less unreviewable ability to restrict access to precisely the evidence most likely to prove their colourable intent<sup>94</sup> and presumptions of constitutional propriety conveniently prevent the drawing of logical inference in any circumstances falling short of admitted impropriety.

Human nature being what it is, it seems inevitable that influential persons will wish to improperly influence the police.<sup>95</sup> They will want to do so for reasons of “corruption” (often no more ill-intended than “don’t put so-and-so through a prosecution; he’s a good guy”) or for

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<sup>93</sup> *R. v. Appleby* (Between Her Majesty The Queen, and John Appleby, Normand Belisle, Douglas Small) [1990] O.J. No. 1329; 78 C.R. (3d) 282; *Re: Royal Canadian Mounted Police Public Complaints Commission*, (Federal Court of Appeal), Hugessen, Decary and Linden, J.J.A. 1994 N.R. LEXIS 1362; 173 N.R. 290

<sup>94</sup> Such factors conspired against a full review of the circumstances leading up to Canada’s APEC inquiry - possibly the best documented case of public event policing in Canadian history. See: W. Wesley Pue, “The Prime Minister’s Police? Commissioner Hughes’ APEC report” 39(1) *Osgoode Hall Law Journal*, 2001, 165-185; Pue, “Executive Accountability and the APEC Inquiry: Comment on ‘Ruling on Applications to Call Additional Government Witnesses’” (2000) 34 *University of British Columbia Law Review*, 335-344; W. Wesley Pue, ed., *Pepper in Our Eyes. The APEC Affair* (Vancouver: University of British Columbia Press, 2000); Pue, “Why the APEC allegations are so serious” *Globe and Mail*, October 5, 1998.

<sup>95</sup> Internal “police politics” are also of concern, of course. That, however, is properly the subject matter of another paper.

reasons related to political grandstanding ranging from a sort of orchestrated “photo-op-by-cop”<sup>96</sup> through to the tough-guy peacock displays of politicians seeking electoral advantage through displays of “law and order” machismo.<sup>97</sup> If the police as individuals or organizations are to rise above partisanship they must be demonstrably impartial (committed to Joseph’s “Queen’s Peace”) *and* enjoy a degree of structural independence that is up to the task of sustaining impartiality over the long term. We should not confuse the two. Institutional integrity can survive human failing but the converse is not true. The conditions under which impartiality can exist is a central concern of administrative law and this too points to the need for a broad-based analysis of just the sort that Professor Sossins seeks to develop.

Finally, it bears noting that Kim Murray’s remarks at this symposium emphasized the importance of recognizing that the “law in the books” is often at variance with what *actually* happens. This is a centrally important insight. “Rights” solemnly declared at the rarefied levels of the Supreme Court of Canada or trial courts in Snow Drift, Northwest Territories (*all* courts are at a rarefied level) mean little if not respected in daily practice. It is there that police – politician propriety is most likely to go off the rails. To Sossin’s public law insight, then, must be added Murray’s measure of legal realism. Combining the two leads, in turn, to two observations. First, if they are to be effective, schemes derived from sophisticated legal analysis need to be translated into language *both* readily intelligible to politicians and constables alike *and* capable of being rendered operational in real life. A finely expounded doctrine has little worth in real life if it is unintelligible to those called upon to put it into practice. Secondly, in

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<sup>96</sup> Seemingly a powerful factor motivating much political influence on the policing of so-called “public order” events.

<sup>97</sup> See, for example, J. Simon, “Governing through Crime” in L.M. Friedman & G. Fisher, eds., *The Crime Conundrum: Essays on Criminal Justice* (New York: Westview Press, 1997) 171.

developing rules to govern the police-politician relationship, attention needs to be directed to procedural law, the law of evidence, and to the institutional capacities of the courts. A legal structure incapable of identifying colourable intrusions upon rights that it purportedly protects has limited worth. A system organized around deference to occupants of high office can hardly qualify as “legal”.

Little in the history of police-government relations over the past three decades justifies complacency in these respects. And *that*, as Professor Sossin’s emphasizes gives cause for concern about the integrity of both police and the democratic apparatus itself.<sup>98</sup>

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<sup>98</sup> Text following note 22 of draft circulated pre-symposium: “Thus, for the police, the rule of law must serve as a two-way street (or perhaps more accurately a four-way intersection with no stop-signs). The police must be called to account for their adherence to the rule of law through various forms of oversight (SIU, civilian complaints, the criminal justice process, internal discipline, etc) but must also be unfettered by political interference or direction so as to serve as a mechanism by which other political and legal entities are held to account. This is a tall order.”

