

POLICE/GOVERNMENT RELATIONS

This chapter examines the legal, policy, and institutional arrangements with respect to government involvement in policing policy and operations. I focus in particular on the institutional understandings, structures, and processes that should apply both in advance of and during critical events, including the policing of Aboriginal protests and occupations.

Police/government relations have had a high profile in the public debate about Ipperwash. A large portion of the Part 1 evidentiary hearings were devoted to considering allegations of political interference in the events that led to the death of Dudley George. Volume 1 of this report therefore addresses the relationship between the OPP and the then-provincial government in some detail. Indeed, the hearings and evidentiary record provide an unprecedented case study of police/government relations in practice.

Police/government relations have also had a high profile in the policy phase of the Inquiry. Our first Part 2 event was a full-day symposium on this issue, organized in partnership with Osgoode Hall Law School. This symposium brought together academics, police and government officials, Aboriginal leaders, and virtually every party with standing in the Inquiry, to learn about and discuss this important topic. The University of Toronto Press is to publish a compilation of the symposium research papers in early 2007.¹ These papers are also available on our website.

Unlike many other topics considered in this report, there has been comparatively little advancement or reform in the legal and policy rules governing this fundamental constitutional relationship in the last twelve years. This is surprising given the significant and constructive progress on many other Ipperwash-related issues during this period, particularly in the areas of policing Aboriginal occupations and protests and police/Aboriginal relations.

The lack of progress or reform in police/government relations is unfortunate, because it means that the confusion and deficiencies so apparent in police/government relations at Ipperwash largely continue to this day.

It is no doubt true that government and police policy-makers have learned many lessons from Ipperwash. I suspect, for example, that police and government policy-makers involved at Caledonia are more acutely aware of the importance of both the perception and fact of political interference in police operational decision-making because of their collective desire to avoid another Ipperwash.

Nevertheless, the legislative debates and public information about the Caledonia occupation reveal that several important issues remain outstanding.

The accumulated wisdom and continuous learning of individual decision-makers cannot be underestimated. It is also not enough. Lessons can be forgotten and people inevitably move on. In the end, lessons and reforms must be institutionalized. The comparative lack of progress in this area stands in stark contrast to the lessons the OPP has learned about how to police Aboriginal occupations and protests. This is an area where lessons have been written down and new policies have been adopted, publicized, and trained upon.

Absent constructive reforms, allegations of political impropriety and partisan policing will very likely remain a frequent feature of politics in Ontario and Canada. For example, in the legislative debates over the policing of the Caledonia occupation, there have been allegations of both improper political interference and of government shirking.

The facts at Ipperwash and the policy research conducted in the Inquiry have led me to conclude that the concept or doctrine of police independence needs to be reconsidered in light of our evolving understanding of how police and governments can and should work together in a modern democracy. The increasing complexity of policing (and government, for that matter) means that the apparently simple and understandable dichotomies between police/government and policy/operations are no longer, by themselves, sufficient to guide policy-makers and decision-making on both sides of the issue. In my view, police and government decision-making will always intersect and policy and operations will always be fluid concepts, subject to reasonable interpretation and reinterpretation depending on the context. This is particularly true in the case of Aboriginal occupations and protests, where lines between policy and operations are often blurred.

Both police and government will benefit from clearer rules on police/government relations. Failing to address these issues will very likely mean that these issues will be addressed in yet another inquiry to consider police/government relations in the aftermath of a crisis or serious allegation of impropriety. This is an inefficient and unnecessary way to establish public policy. The police/government relationship cannot and should not be reduced to forensic examinations of public controversies.

I believe that it is possible and desirable to adopt reforms that will significantly reduce the perception and fact of inappropriate government interference. Yet this is just one of several reasons which justify making clearer rules for the police/government relationship. Clearer rules will also significantly promote accountability, transparency, and public confidence in key democratic institutions and leaders. Finally, clearer rules may also increase public safety and improve

police and government decision-making during potentially volatile public order incidents.

Care must be taken to ensure transparency and clarity in these matters so that police and governments can both be called to account for difficult and controversial decisions, irrespective of how we strike the balance between police and government. When something goes wrong, as it tragically did at Ipperwash, the public has a right to know who made the key decisions and why. In an ideal world, proceedings such as this Inquiry would not be necessary.

Subject to specified exceptions, Ontarians should expect that they have the same right to know about police/government issues as they have in any other area of important public policy. Police/government relations raise important public policy issues whether there is a public controversy or not. Clarity, transparency, and accountability are important at all times, not just during a crisis.

A close examination of the issues and practical exigencies of policing Aboriginal occupations reveals the fundamental importance of this issue to public safety, public accountability, and the peaceful resolution of occupations and protests. Aboriginal occupations and protests provide both police and government with a dynamic, tense, and challenging environment in which they must make many important decisions that may have a profound effect on the personal safety of police officers and protesters alike. These decisions may also have a profound effect on future relations with Aboriginal people. Thus, the issue of police/government relations has a vital connection to my mandate to make “recommendations directed to the avoidance of violence in similar circumstances.”

12.1 The Importance of Police/Government Relations

12.1.1 The Delicate Balance

The police/government relationship establishes limits and expectations for government involvement in policing policy and operations. The relationship is important because fundamental democratic principles and values are at stake.

The police provide some of the most basic functions in any state. The police have law enforcement powers that distinguish them from other public servants. They also have special skills and knowledge that quite rightly give them considerable discretion and autonomy in their work. As a result, Canadian democracy depends upon the ability of the police to fulfill their responsibilities to keep the peace and enforce the law equally, fairly, and without partisan or inappropriate political influence.

At the same time, the police must be responsible and accountable to the public through elected representatives. Governments, legislatures, and the public all

have a legitimate interest in the policies and performance of the police. Subject to some important exceptions, all Ontarians have a general right to know what the police are doing and why. This is especially true for the policing of Aboriginal protests and occupations.

Experience in Canada and elsewhere has proven that it is not always easy to reconcile competing principles of “police independence” with appropriate government intervention in police decision-making and activities. The Ipperwash Inquiry is the fifth major Canadian public inquiry in the last twenty-five years to address police/government relations in detail.² This issue has also been discussed at length in the United Kingdom, New Zealand, and Australia.³

The relationship between police and government is a delicate balance. Many things can go wrong if the balance is upset or tipped too far in one direction.

On the one hand, the police will have too much “independence” if they are not subject to legitimate direction from democratically elected authorities. Nor should the police be “independent” of requirements to explain and justify their actions. Tipping the balance too far in favour of police independence, therefore, could result in the police effectively becoming a law unto themselves.

On the other hand, the balance can be tipped too far in favour of government intervention or authority. Governments should not be allowed to influence specific law enforcement decisions or specific operational decisions of the police. These decisions are legitimately within the scope of police expertise and discretion. Government intervention in these areas risks both the appearance and reality of partisan or inappropriate political influences affecting the administration of justice and the rule of law. Sometimes, even a reasonable appearance of government influence can damage public confidence in the impartial and non-partisan administration of justice. Inappropriate government intervention can also jeopardize public safety if it is ill-considered or badly informed.

In short, it is equally dangerous for governments to become either too involved in policing or not involved enough. Yet the police/government debate is not simply about preventing police from becoming a law unto themselves or inappropriate government influence. It is also about ensuring public accountability and transparency for police and government decision-making.

12.1.2 The Special Case of Public Order Policing and Policing Aboriginal Occupations and Protests

It is not surprising that the police/government relationship was the subject of considerable controversy in the public debate about Ipperwash. Police/ government relations controversies often arise in the context of public order events in Canada and

internationally. This Inquiry is one example. The APEC Inquiry is another. That inquiry was called in part because of allegations of improper interference by members of the Prime Minister's staff in the policing of the APEC summit in Vancouver.

The persistence or frequency of police/government controversies during public order events does not mean that governments should be prohibited from getting involved in the policing of them. On the contrary, limited government intervention in public order events and Aboriginal occupations and protests is not just appropriate, but sometimes necessary. It is nevertheless helpful to understand why or how governments may become involved in order to better understand government interests and priorities during these situations.

Public demonstrations and other public order events may invite government involvement in police decision-making for a number of reasons. Demonstrations are often part and parcel of significant public controversies. Governments may also want to become involved because the demonstration could affect issues such as foreign relations or access to government services. Demonstrations and other public order events may also invite government involvement because they have significant consequences for non-protesting communities and/or third parties in close proximity to the event. Finally, governments may become involved because they believe that the demonstration puts public welfare or public order at risk.

Aboriginal occupations and protests often raise novel and complex questions even beyond those normally applicable to public order policing. Aboriginal protests, occupations, and blockades are a crucial category of public order events which often stand alone in their complexity, particularly where a colour of right, treaty right, or other Aboriginal right is alleged.⁴

Aboriginal occupations and protests are also distinct from a police/government relations perspective. Unlike a labour protest, governments are almost invariably the target or object of major Aboriginal occupations and protests.⁵ The research papers prepared for the Inquiry point to the roots of Aboriginal protests, particularly those over land and resources, in treaty and Aboriginal rights. Moreover, Aboriginal occupations and protests frequently occur off reserve on Aboriginal traditional lands owned by the federal or provincial Crown. These two factors alone give the provincial and federal government significant influence on the progress, duration, and potential outcome of an Aboriginal occupation or protest. An occupation on Crown land means, for example, that the federal or provincial government will itself decide whether and how to seek an injunction.

Aboriginal occupations and protests are also distinguished by the multiplicity of government agencies or ministries involved in them. The legitimate involvement of multiple actors, however, strains many aspects of police/government relations, particularly the concept of ministerial accountability for the police.

Finally, governments are also involved because major Aboriginal occupations and protests are generally policed by the provincial or national police services.

12.1.3 Why We Must Act

In this chapter, I recommend the basic elements of a new framework for police/government relations. I consider the principles and practical issues involved as well as the institutional structures or processes which, in my view, are best able to achieve this substantive objective.

In my view, these measures are needed to address the ongoing confusion and lack of clarity about the appropriate relationship between police and government. As noted above, I believe that the current situation encourages controversies and allegations of impropriety, increases the risk of inappropriate government influence in policing, makes it easier for governments to shirk their responsibilities, and potentially risks public safety and increases the potential for violence.

I stress the salutary benefits of transparent decision-making and public accountability because I believe that internal police or government policies are simply not enough. Public information, policies, procedures, and records of decision-making are needed as well. Publicly transparent and accessible information promotes not only democratic accountability, but also better decision-making. For example, transparent structures and procedures will promote freer and more constructive exchanges of information between police and government because they will reduce the perception or risk of allegations of political interference.

Transparent structures and processes allow the public to be better informed about government and police decision-making. Transparency also allows the public to hold both police and government accountable for their decisions. For that matter, transparency is also likely to have a positive effect on police and government decision-making. In sum, improved transparency should promote public confidence in impartial and sound law enforcement and government responsibility for the policies pursued by the police.

Some may not think that structural or systemic reforms are necessary. Many people likely believe that the most important safeguard in the police/government relationship is the personal integrity and professionalism of the individuals involved. They may also be skeptical about complex or costly institutional reforms which purport to clarify the real world of police/government relations. Or, they may simply believe that practical experience has demonstrated that the existing system works well for the most part. These are important objections, particularly when voiced by experienced observers.

The importance of integrity and leadership in police/government relations

cannot be underestimated. No process or institutional structure will work if the individuals making decisions within those institutions are unwilling to act ethically. Police/government relations will inevitably fail if police leaders cannot stand firm in the face of real or apparent political pressure. Police/government relations will also fail if government officials choose to shirk responsibility for hard or politically unpopular decisions. Personal integrity and leadership are absolutely essential to police/government relations.

Nevertheless, the integrity argument is essentially a response to only one of the concerns about police/government relations: partisan decision-making. Partisan decision-making is arguably the greatest risk of inappropriate government influence, but it is not the only one. I believe that successful police/government relations cannot rely exclusively on the personal character or qualities of key decision-makers. Personal integrity does not, for example, necessarily promote or guarantee public accountability. Nor does one person's integrity guarantee that the next person will act in the same way. Public accountability and the consistency of decision-making depend upon public policies, procedures, and records.

12.2 Learning from Ipperwash

As noted in the introduction to this chapter, police/government relations have had a high profile in the public debate about Ipperwash and at the Inquiry itself. The controversy surrounding Ipperwash included allegations of political interference in policing by the highest elected officials in the province.

My report on Part 1 of the Inquiry addresses police/government relations in considerable detail. The evidentiary hearings focused on several important issues of fact, including the following:

- The nature and substance of the relationship between police and government
- Whether or how directions and advice were given by political leaders and their staff members to the police
- The role and activities of various ministers, officials, and ministries
- How information was exchanged between government and police officials
- Whether the fact or appearance of improper political interference was present in police operations

Ipperwash is a cautionary tale about the difficulties of police/government

relations in practice. It is also a sobering case study, involving many of the themes and issues discussed in this chapter. I will not repeat the details of my findings in Part 1 here, but I will comment on the lessons and themes emerging from those findings.

The first lesson that emerges from Ipperwash is the need for a clear statutory and written policy framework to govern police/government relations. Most if not all of the politicians and governmental officials who testified in Part 1 had a general sense of the need for the police operations to be independent of government policy-making. However, many of the same witnesses admitted that there were many grey areas in their understanding and interpretation of police independence. It was also clear from the evidentiary hearings that most witnesses' understanding of police/government relations was based on unwritten rules or a kind of conventional wisdom. The decision-makers and participants did not have the benefit of clear principles, policies, or procedures to guide them.

The lack of agreement about basic principles in police/government relations and police independence is confirmed by the fact that while many parties in Part 1 alluded to the idea of “police independence” from government in their questions and submissions, there was often disagreement about what this meant.

The second lesson that emerges from Part 1 is the lack of transparency in and accountability for government decision-making. Much time at the evidentiary hearings was devoted to discovering what happened at several government meetings, including the “dining room meeting” on September 6, 1995. This was the meeting at which the Premier, several Cabinet ministers and deputy ministers, and other officials discussed the provincial government response to the occupation at Ipperwash Provincial Park. Witnesses at the Inquiry presented different and sometimes irreconcilable views about what decisions were made at these meetings, who said what, and how the government position was described. A reasonable person would be hard pressed to conclude that many of the important decisions about Ipperwash were either transparent or accountable. The controversy and uncertainty that surrounded the “dining room meeting” underlines the importance of reducing to writing, whenever possible, government dealings with the police.

A third lesson relates to the difficulty of maintaining a distinction between government “directions” and “guidance” in practice. In Part 1, I concluded that the OPP was not given improper directions by the Premier, other ministers, or political staff. However, I also concluded that the Premier and other political officials made their displeasure about the occupation and the performance of the police well known. While these actions did not constitute inappropriate government interference in police operations, they had the effect of putting

unnecessary pressure on the police and led to a perception of inappropriate interference. In certain circumstances, this perception may undermine confidence in non-partisan, fair, and professional policing.

A fourth general lesson that emerges from Ipperwash is the need to respect proper chains of command and divisions of responsibility. This is necessary to ensure accountability, to ensure accurate and appropriate exchanges of information, and to avoid the risks and perceptions of improper government direction of police operations. An important example was the overlapping and sometimes contradictory information provided to the government by the OPP and officials from the Ministry of Natural Resources (MNR), including provocative reports from MNR officials about gunfire in the park. MNR officials did not have the expertise or information necessary to assess the reliability or accuracy of these reports. This example and other examples underscore the importance of filtering and exchanging information through appropriate channels. MNR and other ministries have a legitimate role to play in resolving Aboriginal occupations and protests. However, their contributions should respect the limits of their expertise and authority. Blurring of responsibilities and lines of authority can lead to crossed signals, mixed messages, and inaccurate and contradictory information passing between government and the police.

A final lesson emerging from the evidence concerns the challenges to our traditional and legal understandings of ministerial responsibility presented by modern, centralized government structures. Ipperwash demonstrates the need for a clearer understanding of the respective roles and responsibilities of the many parts of governments that may have a legitimate role in resolving Aboriginal occupations and protests. The Interministerial Committee struck to address the Ipperwash occupation had representatives from several ministries. This is appropriate, and indeed, I suggest in Chapter 9 that involvement by the federal government is also often appropriate. Nevertheless, this holistic and centralized approach to public order policing strains the principle that the Solicitor General (or Minister of Community Safety and Correctional Services, as the office is now called) is the minister responsible for the OPP. Ministerial responsibility is not a legal technicality. It is crucial in ensuring democratic accountability for police actions.

The communication of information from the police to the government should be routed, whenever possible, through the proper channels at the Solicitor General's department and through the full chain of command in the OPP, including the commissioner or his designate. Proceeding through proper channels is necessary to ensure transparency and accountability and to protect against the risk or perception of improper government interference with police operations.

In the pages that follow, I attempt to clarify the proper ambit of police inde-

pendence, and even more importantly, to outline transparent and workable reforms and procedures that can be used to resolve continuing disputes and uncertainties about the proper conduct of police/government relations. I am confident that had these reforms and procedures been in place in 1995, we would have had a much clearer understanding of the relationship between the provincial government and the OPP at Ipperwash.

12.3 What is “Police Independence”?

One of the most difficult issues in police/government relations is the question of the scope of police independence from government. Statements are sometimes made that police are “independent from government” or “not subject to direction” from government. Statements at this level of generality are bound to be misleading, no matter how well intentioned.

It is worth noting at the outset that the doctrine of police independence is unique to certain common law jurisdictions, including England, Canada, Australia, and New Zealand. It is not recognized as a legal principle in the United States or Scotland.⁶

In this section, I briefly review and discuss the unsettled and sometimes contradictory history of the concept of police “independence.”

Professor Kent Roach observed that one can find support in the cases and statutes for several different models of police independence, ranging from virtually unfettered police independence to seemingly unlimited statutory powers of ministerial direction of the police.⁷

12.3.1 *The Blackburn Doctrine*

The starting point for contemporary discussions of police independence is the 1968 decision by Lord Denning in the case of *R. v. Metropolitan Police ex parte Blackburn*.

The *Blackburn* case is the genesis of the common law or judge-made doctrine of police independence. The decision is important because it sets out a very expansive view of police independence, which has cast a long shadow over Anglo-Canadian debates about police/government relations ever since.

The case involved an attempt by a Mr. Blackburn to challenge a confidential instruction by the commissioner of the London police to his officers to not enforce certain gambling laws. In the course of his decision, Lord Denning held:

I have no hesitation in holding that, like every constable in the land, [the Commissioner of the London Police] should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act, 1964, the Secretary of State can call

upon him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.⁸

Lord Denning supported these broad propositions by citing two cases which held that there was no master and servant relationship between the Crown and the police for the purpose of determining civil liability. The cases were not concerned with general constitutional principles—or even with police independence—but rather with the limited proposition that “there is no master and servant relationship between constables and their employers in the rather special sense that has been given that phrase in the law of torts.”⁹

The *Blackburn* decision, and the idea that governments have no right to intervene in a broad range of police matters, has been very influential in Canadian and British law and policy.¹⁰ The broad theory of police independence established by the *Blackburn* doctrine (as it is sometimes called) continues to resonate in legal and political debates today.

12.3.2 Campbell and Shirose

The Supreme Court of Canada decision in *Campbell and Shirose* in 1999 is the most extended discussion of the principle of police independence by the court.

The case is important to us because it revived and in some ways advanced the *Blackburn* doctrine, notwithstanding the clear wording of s. 5(1) of the *RCMP Act*, which describes the relationship between the RCMP commissioner and the minister:

5. (1) 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.¹¹

Campbell and Shirose were charged with drug offences as a result of a reverse sting operation in which RCMP officers sold them drugs. The Crown sought to defend the police conduct on the basis that the police were part of the Crown or agents of the Crown and protected by the public interest immunity of the Crown.

Justice Binnie for the unanimous Supreme Court emphatically rejected this argument:

The Crown’s attempt to identify the RCMP with the Crown for immunity purposes misconceives the relationship between the police and the executive government when the police are engaged in law enforcement. A police officer investigating a crime is not acting as a government functionary or as an agent of anybody. He or she occupies a public office initially defined by the common law and subsequently set out in various statutes.¹²

The Court noted that the police “perform a myriad of functions apart from the investigation of crimes” and that “[s]ome of these functions bring the RCMP into a closer relationship to the Crown than others.” Nevertheless, the Court stressed that “in this appeal, however, we are concerned only with the status of an RCMP officer in the course of a criminal investigation, and in that regard the police are independent of the control of the executive government.”¹³ The Court declared that this principle “underpins the rule of law,” which, it noted, “is one of the ‘fundamental and organizing principles of the Constitution’.”¹⁴

Justice Binnie further explained:

While for certain purposes the Commissioner of the RCMP reports to the Solicitor General, the Commissioner is not to be considered a servant or agent of the government while engaged in a criminal investigation. The Commissioner is not subject to political direction. Like every other police officer similarly engaged, he is answerable to the law and, no doubt, to his conscience.¹⁵

Campbell and Shirose has unquestionably renewed the doctrine of police independence, even though it defines police independence more narrowly than *Blackburn* does. Just as clearly, *Campbell and Shirose* does not discuss or establish the boundaries of police independence beyond the core of law enforcement.¹⁶

Campbell and Shirose is important to police/government relations because it confirms that police officers enjoy independence from government, in that the police should not be directed by the minister either to commence or to stop a criminal investigation. The case also demonstrates a judicial willingness to

interpret otherwise unqualified statutory provisions giving ministers wide authority to direct the police.

12.3.3 *The Ontario Police Services Act*

In contrast to the *Blackburn* doctrine, the Ontario *Police Services Act* and the *RCMP Act* both give the provincial and federal Solicitors General very broad powers to direct their respective police forces.¹⁷

Because the wording of s. 5(1) of the *RCMP Act* is substantially similar to s. 17(2) of the Ontario's *Police Services Act*, the Supreme Court decision and reasoning in *Campbell and Shirose* is very likely applicable to the OPP and the *Police Services Act* as well. This section gives the responsible minister unqualified powers to direct the OPP:

17(2) 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.¹⁸

The *Police Services Act* is important to this discussion of police independence because of what it includes and what it leaves out. For example, the reference to statutory direction by the minister recognizes the Canadian tradition of ministerial responsibility. Taken to its extreme, however, the unqualified ministerial power to direct the OPP could obliterate any meaningful concept of OPP independence from government. By way of contrast, section 31(4) of the *Police Services Act* is explicit on the subject of police independence with respect to municipal police services boards. This section states that “the board shall not direct the chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police.” There is no equivalent limitation on the provincial Solicitor General with respect to the OPP. As a result, it could be argued that the *Act* gives the provincial Solicitor General broad powers to intervene in OPP policy and operations. As a practical matter, however, it is likely that most provincial policy-makers believe that the s. 31(4) limitation also applies to the provincial Solicitor General in his or her dealings with the OPP as well.

Irrespective of any practical understanding of s.17 (2), the legal distinction between the provisions governing the OPP and municipal police services is potentially confusing.

Also confusing is the absence in the *Act* and its regulations of any definition of “police independence,” “directives and guidelines,” “operational decisions,” or “day-to-day operations of the police.” Nor is there any legislative or regulatory direction on questions regarding government intervention in what is

sometimes called the “policy of operations” or direction regarding the minister’s power to intervene in individual cases. Nor does the *Act* specify the process by which the Solicitor General is to give directions or how the public is to be informed of them.

These ambiguities and inconsistencies are not idle considerations. In the past, courts have used the plain language of similar legislation to reject the common law principle of police independence.¹⁹

The OPP submission in Part 2 emphasized several practical problems with the current legislative provisions. The OPP noted, for example, that in the context of policing Aboriginal occupations and protests

the conventional understanding that the police have independent authority for “operations” and government has authority to direct “policy” should not translate into prohibitions from information sharing that may reasonably advance informed policy making, on one hand, and informed operational decisions, on the other hand.²⁰

The OPP also noted that while the set of statutory provisions which prohibits police service boards from directing specific operations or the day to day operations of the police “undoubtedly cautions against obvious improprieties,”

[these provisions do not] ... in the absence of further clarity, address appropriate interventions where operational and policy decision-making are specific and made “day to day” in connection with an Aboriginal occupation or protest.²¹

12.3.4 Previous Commissions and Inquiries

As noted above, this Inquiry is the fifth major public inquiry or commission to consider the proper relationship between police and government.

12.3.4.1 The McDonald Commission

The earliest and perhaps most comprehensive review of police/government relations in Canada is included in the Commission of Inquiry Concerning Certain Activities of the RCMP (the “McDonald Commission”). This report was released in 1981.

The commission was called in response to a public controversy over government involvement in policing after it was revealed that the federal government was involved in directing activities of the RCMP security services in the wake of the 1970 October crisis. This episode resulted in sustained public debate about the appropriate relationship between the police and the government.

The McDonald Commission considered the balance between police independence and ministerial control at length in its report. The commission concluded that responsible ministers should have extensive authority to direct, comment upon, or be advised of a wide range of police activities, including areas traditionally considered police “operations.” The commission defended ministerial involvement in these areas on the basis of democratic principles:

We take it to be axiomatic that in a democratic state the police must never be allowed to become a law unto themselves. Just as our form of Constitution dictates that the armed forces must be subject to civilian control, so too must police forces operate in obedience to governments responsible to legislative bodies composed of elected representatives.²²

The commission rejected any distinction between “policy” and “operations” which would insulate “the day to day operations of the Security Service” from ministerial review and comment. To do so would result “in whole areas of ministerial responsibility being neglected under the misapprehension that they fall into the category of ‘operations’ and are thus outside the Minister’s purview.”²³

The commission agreed with *Blackburn* only to the extent that

[t]he Minister should have no right of direction with respect to the exercise by the R.C.M.P. of the powers of investigation, arrest and prosecution. To that extent, and to that extent only, should the English doctrine expounded in *Ex parte Blackburn* be made applicable to the R.C.M.P.²⁴

Even with respect to “quasi-judicial” police functions of investigation, arrest, and prosecution, the McDonald Commission drew a distinction between accountability and “answerability” on the one hand, and control and direction on the other. The commission concluded that the minister should have a right to be

informed of any operational matter, even one involving an individual case, if it raises an important question of public policy. In such cases, he may give guidance to the Commissioner and express to the Commissioner the government’s view of the matter, but he should have no power to give *direction* to the Commissioner.²⁵

The McDonald Commission also concluded that the federal government should have broad authority to establish “policies of operations” governing police operational procedures.

12.3.4.2 The Marshall Commission

The Royal Commission on the Donald Marshall Jr. Prosecution is best known for its examination of the wrongful conviction of Donald Marshall Jr. However, the Marshall Commission also considered police/government relations in the context of examining two cases where Nova Scotia Cabinet members had been the subject of RCMP criminal investigations but were not criminally charged.

The Marshall Commission limited police independence from government to the process of criminal investigation, concluding that “inherent in the principle of police independence is the right of the police to determine whether to commence an investigation.” The commission believed that, in an appropriate case, the police should be prepared to lay a charge, even if it was clear that the Attorney General would refuse to prosecute the case. This was necessary to “ensure protection of the common law position of police independence and acts as an essential check on the power of the Crown.”²⁶

12.3.4.3 The APEC Inquiry

The next major inquiry to consider police/government relations was the APEC Inquiry.²⁷ The APEC Inquiry is important in this context because one of the significant controversies at the inquiry involved allegations that the Prime Minister’s Office interfered with RCMP security operations at the APEC conference in order to keep protesters away from the Indonesian president.

The chair of the inquiry, Mr. Justice Ted Hughes, stated five principles or findings about police independence:

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

they may have been following the directions of political masters will be no defence if they fail to do that.

- An RCMP member acts inappropriately if he or she submits to government direction that is contrary to law. Not even the Solicitor General may direct the RCMP to unjustifiably infringe Charter rights; as such directions would be unlawful.²⁸

Justice Hughes also recommended that the “RCMP should request statutory codification of the nature and extent of police independence from government” with respect to “existing common law principles regarding law enforcement” and “the provision of and responsibility for delivery of security services at public order events.”²⁹

In the end, neither the *RCMP Act* nor the *Ontario Police Services Act* was amended following the APEC recommendations. However, the RCMP officially adopted the five principles which Justice Hughes advanced in his report to guide the force in its relations with government in public order policing. These principles are now included in the RCMP Tactical Operations Manual.

12.3.4.4 *The Arar Commission*

The most recent public inquiry to discuss the issue of police independence was the Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar (the “Arar Commission”). Justice Dennis O’Connor, Associate Chief Justice of Ontario, was the chair of the commission. In the policy part of his report dealing with a review mechanism for the national security activities of the RCMP, he discussed police independence at length:

The outer limits of police independence continue to evolve, but its core meaning is clear: the Government should not direct police investigations and law enforcement decisions in the sense of ordering the police to investigate, arrest or charge — or not to investigate, arrest or charge — any particular person. The rationale for the doctrine is the need to respect the rule of law. If the Government could order the police to investigate, or not investigate, particular individuals, Canada would move towards becoming a police state in which the Government could use the police to hurt its enemies and protect its friends.³⁰

Justice O’Connor also stressed that police independence was not absolute, and that “complete independence would run the risk of creating another type of police state, in which the police would not be answerable to anyone.”³¹ He stressed that

“the Minister has a responsibility to provide policy direction to the police,” ideally through public and written directives.³²

12.3.5 Where Are We Today?

I have set out this short history of police independence to demonstrate that many issues are still unresolved, even though it has been almost forty years since the decision in *Blackburn*. I also wanted to demonstrate that the fundamental legal and policy framework governing police/government relations in Ontario has remained largely unchanged since Ipperwash.

The most significant legal or policy development in the past twelve years was the Supreme Court of Canada decision in *Campbell and Shirose*. This case establishes that government should not direct the police on specific law enforcement decisions, including who should be investigated, arrested, and/or charged, and when. (I refer to the “law enforcement” function as the “core of police independence” in the balance of this report.) As such, *Campbell and Shirose* brings legal certainty to one vitally important question about police/government relations. However, *Campbell and Shirose* did not provide a full or even a partial answer to several outstanding issues that have vexed police/government relations since *Blackburn*, including the following:

The limits or boundaries of police independence outside the core area of law enforcement are either vague or confusing. It is not clear if, when, or how governments may intervene in areas beyond that core. Court decisions on police independence have never been reconciled with the Canadian statutory framework for police/government relations, resulting in important gaps in our understanding of the scope of police independence. These issues have not been resolved by the Supreme Court of Canada, legislation, regulations, or any internal government or OPP policies of which I am aware:

- Fundamental concepts including “police independence,” “policy,” and “operations” are not defined in any statute, regulation, or formal policy.
- There are no statutory, regulatory, or policy definitions of important provisions in the *Police Services Act*, including “subject to the Solicitor General’s direction,” “specific operational decisions,” or “day-to-day operations of the police” which might provide some guidance in the absence of general definitions.
- There is very little legislative, regulatory, or policy direction on questions regarding government intervention in the “policy of operations” or the minister’s authority with respect to individual cases.

It appears that ministerial accountability for the OPP needs to be strengthened:

- It is not clear *who* has the right to intervene in police activities. The *Police Services Act* gives the Minister of Community Safety and Correctional Services the authority to direct the OPP, yet it appears that other ministers or officials sometimes give direction or guidance to the police during specific incidents.
- Moreover, non-MCSCS ministers continue to speak on behalf of the OPP in the Legislature. There is also no apparent protocol or set of rules regarding the roles of political staff or non-MCSCS ministries or ministers, meaning that ad hoc or vague government directions may be given by people who may or may not have authority to speak on behalf of the government.

The *Police Services Act* does not specify the process by which the Minister of Community Safety and Correctional Services can give directions, nor how the public is to be informed of them, if at all. There is no established or transparent process for recording government directions or the police response during a crisis. Nor is there a transparent, public process for identifying disagreements about police/government relations.

There is no apparent policy setting out the process for or expectations of police/government relations during a crisis. This is true despite the increasing and significant acknowledgement that police and governments will often have to have to work together closely to resolve situations like Aboriginal occupations and protests peacefully. Indeed, sections of the *Police Services Act* arguably discourage attempts to exchange information.

There is very little public transparency or accountability for decisions made by either the police or government on police/government relations or during a crisis.

Quite frankly, this short list makes it apparent that the confusion and deficiencies so apparent in police/government relations at Ipperwash largely continue to this day. It appears that police/government relations in Ontario are still largely governed by informal conventions and understandings about the roles and responsibilities of key institutions and individuals. Police/government relations and police independence in Ontario continue to rely very heavily on the personal integrity and leadership qualities of key decision-makers.

12.4 Democratic Accountability

My analysis and recommendations in Part 2 are informed by certain guiding principles which, in my view, must be respected in order to avoid future tragedies

similar to the death of Dudley George. In the context of police/government relations, the most important guiding principles are related to democratic government and the need to promote transparency and accountability. These principles do not necessarily tell us what provincial policing policies should be. They do, however, tell us how the government should apply those policies. Simply put, these principles require that substantive provincial policies be implemented in a manner that is transparent, accountable, and consistent with the principles of democratic government.

Without transparency, there is no accountability. It is impossible to hold individuals or institutions responsible for their actions unless what happened and who participated in key decisions is clear. Secrecy or the lack of transparency is a breeding ground for abuse of power, public cynicism, and attacks on the legitimacy of important public institutions. Secrecy or lack of transparency in police/government relations may conceal inappropriate government interference in policing or give the appearance of inappropriate interference.

The policies and guidelines necessary to achieve accountability undeniably limit the power of the government or police to act unilaterally. Yet they also give the government and police more legitimacy when those powers are exercised.

Accountability is somewhat difficult to define. For some, there is no accountability without control and consequences. For others, accountability can be achieved simply by requiring those in power to explain their actions and to answer questions. The effectiveness of accountability is ultimately a matter of degree and context. At the same time, accountability of any kind will be impossible without transparency.

12.4.1 Ministerial Accountability

The principles of transparency and accountability are embedded in our democratic institutions. In our system, responsible ministers are expected to answer questions about the actions of the government in the legislature. When responding to questions, ministers are expected to explain the government position and to assume responsibility for government actions. The *Police Services Act* recognizes the principles of ministerial accountability by providing that the commissioner of the OPP is “subject to the Solicitor General’s direction.”

In Canada, the most extensive discussion of the concept of ministerial responsibility in the context of policing took place in the McDonald Commission. The McDonald Commission concluded that responsible ministers should have extensive authority to be advised of and to comment on a wide range of police activities. The commission defended ministerial involvement on the basis of democratic principles and ministerial accountability.

I believe that police and government policy-makers in Ontario share this view today. For example, Larry Taman, the Deputy Attorney General at the time of Ipperwash, spoke about the importance of governmental accountability for the police in his testimony at the Inquiry:

In my view, it's very important to keep up front the notion that the government is accountable for the actions of the police and when I hear people talk about the independence of the police or the police are independent, I think it's a statement that's too broad. I think that it's right to say that with respect to certain kinds of issues, that the government had best stay out of it and let the police do their job. For all I know, there may even be one or two issues where there is some legal impediment to the government being involved. But it's important to remember that overall, the police work for the government. They're accountable to the people through the Government and, in my view, this is critical. And it may be easy for people to say that the police should be independent when they wish something else had happened, but people don't like it very much when the police do other things and the government doesn't seem to be anywhere to be found.³³

The theory of ministerial responsibility is that every department of government, including the provincial and national police forces, has a responsible minister who can account for the activities of that department in the legislature and who can assume responsibility for its decisions.

Many commentators have argued that the principle of ministerial responsibility is outdated, because ministers cannot reasonably be expected to know or supervise the activities within large, modern bureaucracies. Many people have also observed that modern governments require strong central agencies that cut across ministerial lines to coordinate governmental activities and to ensure that the government as a whole can implement its policy objectives.³⁴

The complexities of modern government necessarily cast significant doubt on the effectiveness of ministerial accountability to govern police/government relations or to govern police activities. At the very least, the patterns of traditional ministerial accountability and responsible government have eroded to a significant extent since the McDonald Commission defended its vision of democratic policing based on ministerial responsibility.

Notwithstanding these difficulties, I believe that ministerial responsibility must remain the fundamental organizing structure to govern police/government relations.

Ministerial responsibility continues to impose a discipline or accountability

on individuals and activities within a government department, even if the minister is not personally involved in the activity. Ministerial responsibility requires the minister to answer for all activities in his or her department, even those that the minister cannot necessarily control or direct. This responsibility has a cascading effect throughout a ministry or agency which increases accountability, improves decision-making, and promotes consistent policies and activities throughout a government department. In many respects, ministerial responsibility is the glue that holds a ministry together.

The challenge to ministerial accountability in police/government relations is acute during the policing of Aboriginal occupations and protests. I have already mentioned the multiplicity of government agencies or ministries that can be involved in these incidents. Ipperwash itself is a prime example. Much of the government policy input at Ipperwash came through an interministerial committee, the Premier, or other members of Cabinet. Government information, advice and directions were not always channelled through the Solicitor General, who was, of course, the minister responsible for the OPP. Government decision-making and involvement in this manner significantly erodes ministerial responsibility and accountability.

12.4.2 Police Accountability

The police exercise special powers in our democracy. The police and the police alone have the authority to use coercive force in our society. We depend on the police to exercise their powers reasonably and lawfully to protect our personal safety and public order. Moreover, successful policing is dependent to a very large degree on public consent and legitimacy. Public consent, in turn, depends on public accountability.

Police independence is a crucial safeguard against those powers being used inappropriately or for political ends. However, police independence cannot be used to insulate the police from democratic accountability or the need to explain their actions. In a democracy, it is perfectly consistent to protect the core of police independence while at the same time requiring the police to explain and justify their activities and policies. The Patten Report articulated the fundamental connection between independence and accountability simply and eloquently:

The police are in a uniquely privileged position. It is their task to uphold the rule of law, exercising their independent professional judgement in doing so. That independence is rightly prized as a defence against politicization of policing and the manipulation of the police for private ends. The police do not serve the state, or any interest group:

they serve the people by upholding the rights and liberties of every individual citizen. But the proper assertion of independence should not imply the denial of accountability.³⁵

People need to know and understand what their police are doing and why. This is important if the police are to command public confidence and active cooperation. Secretive policing arrangements run counter not only to the principles of a democratic society but also to the achievement of fully effective policing.³⁶

Police accountability takes many forms. It can be “subordinate and obedient” or “explanatory and cooperative”:

In the subordinate sense, police are employed by the community to provide a service and the community should have the means to ensure that it gets the service it needs and that its money is spent wisely. Police are also subordinate to the law, just as other citizens are subordinate to the law, and there should be robust arrangements to ensure that this is so, and seen to be so. In the explanatory and cooperative sense, public and police must communicate with each other and work in partnerships, both to maintain trust between them and to ensure effective policing, because policing is not a task of the police alone.³⁷

Transparency is accountability in the “explanatory and cooperative” sense ... People need to know and understand what their police are doing and why. This is important if the police are to command public confidence and active cooperation. Secretive policing arrangements run counter not only to the principles of a democratic society but also to the achievement of fully effective policing.³⁸

I believe that democratic government and ministerial accountability depend on the responsible minister’s having a very expansive authority to ask questions about police policies and operations. Subject to very limited exceptions, I believe that this authority should extend to being informed of any operational matter, even one involving an individual case, if it raises important questions of public policy. In this respect, I agree with the Patten Report that “the presumption should be that everything should be available for public scrutiny unless it is in the public interest—not the police interest—to hold it back.”³⁹ Similarly, the Arar Commission report stressed the need for the responsible minister to be informed about RCMP conduct

and be answerable to Parliament and the Canadian public for conduct that is inconsistent with the rule of law or with public policy. Without such answerability, we run the risk, particularly concerning activities that are not reviewed by the courts, of the police not being accountable to anyone.⁴⁰

12.4.3 Transparency

The principles of transparency and accountability are closely related. Before any person or institution can be held responsible for a decision, it is necessary to know, as precisely as possible, what that person or institution did or did not decide.

Transparency is important not for its own sake, but to ensure that both the police and the government can be held accountable fairly for their decisions. In this way, transparency is a necessary precondition for accountability. In addition, both transparency and accountability promote democratic government by making clear to the public the respective decisions made by the police and the government. This allows the responsible minister and his or her government to be publicly questioned and evaluated on their activities and decisions.

Respect for democratic government, transparency, and accountability are fundamental to my analysis and recommendations concerning police/government relations. Indeed, most of my recommendations focus on improving transparency and accountability for police and government decision-making.

12.5 The Boundaries of Police Independence

We have already seen that *Campbell and Shirose* establishes that the core of police independence is that the government should not direct the police with respect to law enforcement decisions. The next issue is to determine the boundaries of police independence, including questions about government authority to intervene in police decision-making beyond that core of law enforcement.

The debate on this issue centres around four issues that tend to be crucial to the policing of Aboriginal occupations and protests and police/government relations generally:

- The distinction between “policy” and “operations”
- The “policy of operations”
- Whether police and government can or should exchange information during a police operation
- The distinction between government “guidance” and “direction”

My analysis will demonstrate that the apparently simple and understandable dichotomy between policy and operations and between police responsibilities and government responsibilities are not clear at all. I believe the better policy is to acknowledge that the police and the government have unique, complementary, and sometimes overlapping roles and responsibilities for policy and operations. In my view, the concept of police independence must be modernized in order to explicitly acknowledge the shared responsibilities of police and government for both policy and operations.

12.5.1 Policy and Operations

12.5.1.1 Law

The starting point for any discussion of the distinction between operational and policy matters is section 31(4) of Ontario's *Police Services Act*. This is the section of the *Act* governing police/government relations for municipal police services. It specifies that local police boards will not direct the chief of police "with respect to specific operational decisions or with respect to the day to day operations of the police."

The provisions of this section reflect the conventional and widespread understanding of police/government relations in which the police have independent authority to determine "operations" and governments have authority to direct "policy." This theory is a balance between the need to acknowledge police professionalism and expertise and the importance of non-partisan policing on the one hand ("operations") with the need for democratic input and control of public policy on the other ("policy"). This interpretation is reinforced by section 3(2)(j) of the *Act*, which gives the Solicitor General the authority to "issue directives and guidelines respecting policy matters." By way of contrast, the OPP has neither a police board nor any statutory provision explicitly restricting the minister's authority to direct the commissioner of the OPP.

Nevertheless, it is very likely that most if not all provincial policy-makers and police officials believe that the policy/operations distinction applies to the OPP as well. Indeed, the distinction between policy and operations is acknowledged widely. Virtually every senior provincial or police decision-maker who testified in Part 1 noted it in some fashion.

12.5.1.2 Definitions

The benefit of the policy/operations distinction is that it provides decision-makers with an apparent bright line where police independence ends and permissible governmental intervention can begin. Of course, the meaning of

terms “policy” and “operations” is not self-evident. They are more accurately considered terms used to “roll up” important ideas about when and how governments should intervene in policing decisions.

What, then, is the difference between “policy” and “operations?” I have already pointed out that the phrases are not defined in any statute, regulation, or policy of which I am aware. Nor is there any definitive judicial interpretation of the distinction between policy and operational matters under section 31(4) of the *Police Service Act*.

The *Canadian Oxford Dictionary* (2nd ed.) provides a less technical definition of “policy” as a “course or principle of action adopted or proposed by a government, party, business, or individual.” “Operation” is “1. (a) the action or process or method of working or operating. (b) the state of being active or functioning. (c) the scope or range of effectiveness of a thing’s activity. 2. an active process; a discharge of a function.” These definitions are very similar to those proposed by former Ontario Deputy Attorney General Larry Taman. He told the Inquiry that he considered policies to be “rules” and operations to be the “application of the rules.”⁴¹

12.5.1.3 *Drawing the Line*

Notwithstanding these helpful definitions, it is obvious that the distinction is often very difficult to apply in practice. Experience demonstrates that the line between a policy and an operational issue may be unclear or may be the subject of reasonable yet conflicting interpretations. This may be particularly true in a crisis, when important matters of policy may arise for the first time. What complicates matters further is that it is entirely possible for an “operational” issue to become a “policy” issue during the same event as circumstances, consequences, interpretations, or politics evolve.

The difficulty in drawing the line was quite rightly acknowledged by several witnesses at the Part 1 hearings, including Mr. Taman and Dr. Elaine Todres, the Ontario Deputy Solicitor General at the time of Ipperwash. Dr. Todres noted that even the statement “remove the occupiers from the park” could be characterized as either policy or operations.⁴² In her valuable study for this Inquiry, the late Professor Dianne Martin concluded that “conflicts about what is policy and what is an operation are unavoidable and difficult to resolve.”⁴³

The increasing complexity of policing (and government, for that matter) means that the dichotomies between police/government and policy/operations are no longer, by themselves, sufficient to guide policy-makers and decision-making on either side of the issue. Moreover, applying the distinction in practice

is more likely to be difficult if the police and the government do not have clear or settled expectations about how such events will be policed. In these circumstances, it is more likely that police and governments will be confronted by novel issues that will force them to decide quickly whether a matter is “policy” or an “operation.” Debates of this sort can only complicate what are often already dynamic and volatile situations.

Given these circumstances, some commentators have concluded that a definitive definition of “policy” and “operations” is both unwise and/or impossible, including, for example, the Patten Report:

One of the most difficult issues we have considered is the question of “operational independence.” Some respondents urged us to define operational independence, or at least to define the powers and responsibilities of the police We have consulted extensively in several countries, talking to both police and to those who are responsible for holding them accountable. The overwhelming advice is that it is important to allow a chief constable sufficient flexibility to perform his or her functions and exercise his or her responsibilities, but difficult if not impossible to define the full scope of a police officer’s duties.⁴⁴

Notwithstanding these obvious conceptual and practical difficulties, I am unwilling to abandon the policy/operations distinction. I believe that the basic objective of the distinction—to protect police expertise and non-partisan policing on the one hand while recognizing the legitimate role of democratic governments to establish policies on the other—is as relevant today as it was almost forty years ago when *Blackburn* was first decided. I am also influenced by the fact that the distinction is already incorporated in the *Police Services Act* and acknowledged by policy-makers and police officers across the province.

Having reached this conclusion, I want to stress that I do not believe that the existing legislative provisions or provincial policies are in any way sufficient. I believe that provincial policies must identify criteria that assist police and policy-makers to distinguish between policy and operational issues both during and in advance of critical incidents. This approach necessarily depends on trying to identify what values, interests, or objectives the words “policy” and “operations” are intended to represent in the first place.

It may be simpler to begin by describing what types of decisions would likely fall into the category of “operations.” These would certainly include decisions within the law enforcement core of police independence established by *Campbell and Shirose*.

Depending on the circumstances, “operational” decisions could also include decisions which the police alone, because of their expertise, have the competency to address. These may also be called “expertise” decisions which, in most circumstances, should be left to the police because of their professional training and knowledge. In some circumstances, these decisions could also be called “tactical” decisions. A final category of “operational” decisions might be called “implementation” decisions, where the police have been given the responsibility to execute the previously identified and agreed-upon policies or protocols intended to guide them.

“Policy” decisions, on the other hand, tend to arise when the normal police “operational” decision-making processes or structures are deemed to be inappropriate or insufficient to address an issue. In these circumstances, government policy intervention may be needed to choose between competing public priorities, to identify or resolve non-policing issues, to establish precedents for future decision-making, to vindicate important democratic principles or rights, or when the issues are otherwise within the realm of public policy. Governments will also always have the right to make policy decisions within areas of their legal authority. As a practical matter, an operational decision may require some kind of policy intervention if the operational decision

- Requires unexpected financial or other resources
- Could affect third parties or issues not directly involved in the situation/issue
- Is necessary to vindicate or balance legal/democratic principles or rights with policing priorities and practices
- Raises interjurisdictional issues
- Could set a precedent for similar operational situations in the future
- Requires intervention of higher-levels of authority to resolve the operational issue
- Must be made in a policy or operational vacuum, where operational decision-makers do not have existing policies or protocols to guide them

Another important criterion for determining whether something is “policy” or “operations” is whether the policy direction proposed by the government can be applied to other situations. For example, policies with respect to the use of force or to negotiation with protesters should be generally applicable to similar disputes, even when the policy was first made in the context of a specific dispute.

The general criteria for the policy interest of the government in policing are

also closely related to the values of transparency and accountability. In other words, to be transparent and accountable, government policies should generally be capable of being written down, circulated, and applied in similar cases. It is hard to justify giving governments the authority to issue “policy” directions that cannot or will not be written down and made available to the public at some point.

I want to emphasize that the criteria I have identified cannot and should not be considered definitive or exhaustive benchmarks for the demarcation between policy and operations. On the contrary, this approach assumes that policy and operations will always be fluid concepts, subject to reasonable interpretation and reinterpretation depending on the context. This approach is also conditional upon adopting measures to ensure that all government “policy” directions and most police “operational” decisions are transparent and accountable, irrespective of where the policy/operation line is drawn in specific circumstances.

I hasten to add that even when the government occupies the policy field, the police will still retain discretion and independence with respect to many operational matters in implementing the government policy. For example, the police would still retain the discretion to decide when to arrest people, even if the government issued a clear and transparent policy declaring that an Aboriginal occupation will be considered a simple matter of trespass. The core of police independence would be meaningless if the government could direct when and/or how to enforce the law. This means, for example, that neither the responsible minister nor anyone else in government should attempt to specify a time period in which to remove protesters. To do so would intrude on the law enforcement discretion of the police and their expertise about whether arrests can be made and how to arrest people safely.

12.5.2 Policy of Operations

An important category, or subcategory, of the government authority to establish policing policy concerns the “policy of operations.” The phrase is usually attributed to the McDonald Commission, because that commission discussed the concept at length in the course of its examination of the national security activities of the RCMP.

The McDonald Commission concluded that the government, through the responsible minister, had a legitimate interest in policies that guided operations. The commission defined “the policy of operations” as

those policies which ought to be applied by the Security Service in its methods of investigation, its analysis of the results of investiga-

tions and its reporting on those results to government. All policies of operations must receive direction from the ministerial level. For instance, whether or not a particular new foreign target ought to be the subject of surveillance and, if so, what methods of surveillance ought to be employed are a matter of policy even though such a decision could clearly be described as involvement in operations. Policy and operations in the security field are not severable and any attempt to make them so is doomed to failure.”⁴⁵

The commission discussed the “policy of operations” primarily in the context of its proposed new national security intelligence agency. However, the commission indicated that its recommendations concerning ministerial knowledge and direction of “policy of operations” were also applicable to the RCMP:

In our view, the methods, practices and procedures used by the RCMP in executing its criminal law mandate — the ‘way in which they are doing it’ to borrow the Prime Minister’s words — should be of continuing concern to the appropriate Minister. We believe that the Solicitor General of Canada has not only the right to be kept sufficiently informed but a duty to see that he is sufficiently informed.⁴⁶

The Arar Commission also affirmed the importance of ministerial involvement in the policy of operations in the area of national security law enforcement. More specifically, the Arar Commission commended the use of ministerial directives to provide policy guidance to the RCMP on operational matters related to the national security functions of the RCMP.⁴⁷

I agree that the provincial government should have the authority to establish a “policy of operations” for the OPP and other police services in Ontario. I believe that this is a legitimate and beneficial exercise of the policy-making function of the provincial government, as the McDonald and Arar commissions also concluded.

The three ministerial directives issued to the RCMP which were cited in the Arar Commission report provide a useful illustration of the scope and benefits of ministerial directives. These directives address information-sharing agreements between the RCMP and other agencies, RCMP investigations into sensitive sectors such as unions, religious institutions, and academia, and the requirement that the RCMP inform the minister of investigations likely to give rise to controversy. Each directive establishes the government’s general expectations for how the RCMP will perform its duties in certain sectors or situations. In so doing,

the federal government has transparently and prospectively stated its policy and operational objectives in these fields. Because the directives are transparent, accountability is enhanced. Because they are prospective, the possibility of controversy or inappropriate activities is reduced.

The RCMP has publicly acknowledged that these directives are helpful in establishing a policy framework for areas of RCMP activities requiring clarification by the political executive. The RCMP has also stated that the directives provide it with standards, in selected areas of policing activity, for achieving a balance between individual rights and effective policing practice. The RCMP has further stated that the directives are valuable because they inform the public about the character of the supervision of the RCMP provided by the political executive.⁴⁸

There are many examples of “policies of operations” at the federal and provincial levels. One notable “policy of operation” established by the Ontario government is the Interim Enforcement Policy (IEP).

Like the RCMP, the OPP agreed that it is appropriate and often beneficial for governments to establish “policies of operations”:

It is appropriate that government make policies that generally affect police operations ... Indeed, statutes and regulations that govern police conduct and standards (*Criminal Code, Highway Traffic Act, Police Services Act, Provincial Adequacy Standards* etc.) represent policy decisions by governments that directly impact upon operations. Policy decisions to prioritize enforcement against “guns and gangs,” illegal biker activities or terrorism represent choices that directly impact upon police operations. Accordingly, one must avoid oversimplifications that deny government’s legitimate policy role in operational matters. The phrases “specific operational decisions” and “day to day operations of the police” are no doubt designed — albeit imperfectly — to acknowledge government’s legitimate role in “policies of operations”, while avoiding interference in specific operations so as to induce partisan policing or its appearance.⁴⁹

My analysis so far has focused on *how* policy and operations intersect. I believe that it is equally important to emphasize that very often policy and operations *should* intersect. Sound government policy decisions are very often informed by police operational policies. Operational decisions by the police are, in turn, appropriately informed by government policy decisions.

12.5.3 *Exchanging Information*

Is it appropriate for the police and government to exchange information during an incident? Is it appropriate for government to ask the police to provide it with information about the conduct of an operation? Can these requests be distinguished from attempts to influence the police on operational matters?

The McDonald Commission concluded that the responsible minister should always have a right to be informed of any operational matter, even one involving an individual case, if it raises an important question of public policy.⁵⁰ The Arar Commission also affirmed that the minister should be informed about RCMP conduct.⁵¹ The Patten report similarly recommended that, in almost every case, the policing board should be able to require a report from the chief constable, even with respect to operational matters.⁵²

I agree that the government has a legitimate authority and often a significant interest in receiving information from the police about ongoing police operations. This authority is justified by the principle of ministerial accountability.

I have also concluded that the government very often has the responsibility to keep the police updated on relevant policy decisions if it can be reasonably foreseen that those decisions will affect police operations or public safety.

The need for full and frank exchange of information between police and government is very much a two-way street. Mutual information exchange promotes better policy *and* operational decision-making. I believe that it would be a mistake, therefore, to simply prohibit exchanges of information between the police and government. The OPP supported this view. The OPP told the Inquiry that the “ability of police to make sound operational decisions . . . require[s] that government communicate relevant policy decisions to the police, but do so in a timely way”.⁵³

Experience provides many illustrations of this point. For example, if a government decides to negotiate with occupiers, or having so negotiated, decides to terminate those negotiations, these decisions often impact upon public safety issues, and will generally compel the OPP to consider what resources should be available or what proactive steps should be taken to reduce the risk of violence when those government decisions are made known. A decision by government to terminate negotiations may require additional officers or the POU to at least attend the scene, or cause ART members to discuss with the occupiers their mutual expectations, and how the public safety issues might be addressed.⁵⁴

Information should flow both to and from the police. Care must be taken,

however, to ensure that the information exchanged is reliable and accurate. Care must also be taken to ensure that information exchanges do not become covert or veiled attempts to inappropriately direct police operations. Therefore, any direction given to the police must be given in a transparent and clear manner that is consistent with the statutory and political accountability of the minister responsible for the OPP. As a general rule, any and all directions provided to the police should be in writing. The police should also have access to processes by which they can request that any informal attempt by government to direct or influence them be directed through appropriate ministerial channels and be formalized in writing.

Ministerial accountability is particularly important in the context of Aboriginal protests and occupations. The complexity of interests and issues involved in these situations often means that the police need to give and receive information from many different parts of government. Be that as it may, ministerial accountability requires that exchanges of information generally should be filtered through proper ministerial channels in an accountable and transparent manner.

In the context of a crisis, information and directions are often exchanged through emergency meetings, telephone calls, or other fast-paced or spontaneous communications. It is easy for meetings and communications like this to raise concerns about inappropriate, undocumented government interference in police operations. The September 6, 1995 “dining room meeting” is a typical example.

It will not always be easy to strike the appropriate balance in a crisis. The best way to minimize the risks of the fact or perception of inappropriate political or governmental interference is to establish institutional and procedural protections which ensure that contacts generally occur within established lines of communication and within ministerial lines of authority. The details of any information exchanged between police and government must also be recorded as quickly and as accurately as possible.

12.5.4 Guidance and Directions

Can the government provide “guidance” to the police on an operational matter without giving “direction”? In other words, can a government give its opinion to the police on an operational matter without crossing over into impermissible interference?

The McDonald Commission concluded that the responsible minister could not only request information about police operations, but also that he or she could “give guidance to the [RCMP] Commissioner and express to the Commissioner the government’s view of the matter, but he should have no power to give *direction* to the Commissioner.”⁵⁵ This distinction and recommendation is incorporated

approvingly in at least one of the provincial government’s policy documents on police independence:

Although the Minister has, on this analysis, no right to intervene in particular cases where O.P.P. officers have exercised their quasi-judicial functions, the Minister may be informed of any particular operational matter, even in an individual case, if it raises an important question of public policy. In such cases, the Minister should be allowed to give guidance to the Commissioner and to express the government’s view of the matter, but he should have no power to direct the Commissioner.⁵⁶

In my view, the distinction between guidance and direction is neither sound nor sustainable. I believe that all attempts to influence the police should be unambiguous and transparent.

Professor Roach’s background paper for the Inquiry described the way many government actors in police/government controversies have defended their actions by arguing that they were either merely seeking information from the police or simply providing guidance to them:

At various junctures, responsible Ministers and their staff have relied on the controversial idea that they were seeking and conveying information to the police as opposed to directing or even influencing their actions. There is a danger that this distinction may be lost on the public and perhaps the police.⁵⁷

I accept the distinction frequently drawn between exchanging information and government attempts to influence the police. However, I do not accept the distinction between providing “guidance” and “direction” to the police. The prospect of “guidance” but not “direction” by the government almost inevitably creates an appearance of improper influence. It also creates an accountability-free zone in which governments would forever be able to plausibly deny responsibility for the reasonable interpretations of their actions. In my view, anything beyond the exchange of information between the responsible minister and the commissioner should take the form of clear and written directives to the commissioner. Anything less than that contradicts transparency and accountability—values that are central to this report. Interestingly, I am supported in this conclusion by helpful submissions made on behalf of the OPP:

If the government should not be *directing* the police in an operational sphere, it will generally follow that it should not be giving even

non-binding *advice* in that sphere. That is because any benefits associated with the sharing of those views will generally be outweighed by the danger that the non-binding advice will be perceived to constitute a direction or an attempt to improperly influence the police. As reflected below, if the communication takes place, concerns can be addressed through documenting the communication to enhance transparency and accountability.⁵⁸

12.6 Modernizing Police/Government Relations

My analysis of police/government relations has persuaded me that the concept or doctrine of police independence needs to be updated in light of a more contemporary understanding of how police and governments can and should work together in a modern democracy. In the remainder of this chapter, I will discuss and recommend a number of conceptual and institutional reforms which I believe will help modernize our law and policies on police/government relations.

12.6.1 Rethinking “Independence”

Any attempt to modernize police/government relations must begin with a reconsideration of the term “police independence.”

Simply put, the term “police independence” is misleading. The word “independence” suggests that the boundaries between police “independence” and government “authority” can be clearly articulated and understood. We have already seen that this is not always possible or advisable.

The word “independence” also implies a broad zone of independent, unfettered police discretion which is patently at odds with the fact that the police can be asked to explain their decisions and activities, even in the core area of law enforcement.

The term is also misleading and unrealistic because our democracy gives the responsible minister the right—and obligation—to decide policy matters, including “policies of operations.” The minister’s legitimate authority to intervene in these matters contradicts any pretence or suggestion of true “independence.”

Finally, it is not realistic or helpful to think of the government and the police as necessarily operating in clearly defined separate spheres. Rather, there are many overlapping areas where both the police and the government may have legitimate interests.

12.6.1.2 Police Operational Responsibility

The Patten Commission on Policing in Northern Ireland concluded that the term “police independence” should be abandoned in favour of the term “police operational responsibility” in order to emphasize the accountability of the police with respect to the exercise of their powers:

[L]ong consideration has led us to the view that the term “operational independence” is itself a large part of the problem. In a democratic society, all public officials must be fully accountable to the institutions of that society for the due performance of their functions, and a chief of police cannot be an exception. No public official, including a chief of police, can be said to be “independent.” Indeed, given the extraordinary powers conferred on the police, it is essential that their exercise is subject to the closest and most effective scrutiny possible. The arguments involved in support of “operational independence” — that it minimizes the risk of political influence and that it properly imposes on the Chief Constable the burden of taking decisions on matters about which only he or she has all the facts and expertise needed — are powerful arguments, but they support a case not for “independence” but for “responsibility.” We strongly prefer the term “operational responsibility” to the term “operational independence.”⁵⁹

I agree that the term “police operational responsibility” is generally a better way to conceptualize and describe our contemporary understanding of what is often referred to as “police independence.” The term “police independence,” to the extent that it is realistically descriptive at all, should not apply beyond the core of police decision-making in the exercise of law enforcement powers in individual cases. In my view, any broader conception of “police independence” is outdated and potentially misleading. I believe that the concept of “police operational responsibility” better emphasizes the core values I have identified in this report.

12.6.1.3 Ministerial Policy Responsibility

Although I agree with the Patten Report that “police operational responsibility” is a better term than “police independence,” I do not believe that the report went far enough. In my view, “police operational responsibility” must be matched and balanced with the complementary and contemporaneous concept of “ministerial policy responsibility.” “Ministerial policy responsibility” recognizes and emphasizes that Canadian democracy depends on the appropriate minister’s bearing ultimate responsibility for the policies pursued by the police.⁶⁰

Explicitly establishing ministerial “responsibilities” is important because it clearly states that the responsible minister and his or her government have positive, enduring obligations to both develop and/or review policing policies and to explain and defend those policies in the legislature. In so doing, the concept of “ministerial policy responsibility” confronts and (it is to be hoped) discourages abdication or shirking of appropriate oversight and policy responsibilities by ministers or the government.

Government and ministerial shirking is a serious risk in police/government relations. I wholeheartedly agree with the late Professor John Edwards that “undue restraint on the part of the responsible Minister in seeking information as to police methods and procedures can be as much as a fault as undue interference in the work.”⁶¹

In cases where there is a disagreement between the policies proposed by the police and those of the elected government, the responsible minister has the ability to direct the police to pursue his or her policies. The responsible minister must, of course, provide such policies in a transparent manner so that the minister and his or her government can be held accountable for those decisions.

In sum, I believe that the terms “police operational responsibility” and “ministerial policy responsibility” better represent the complex overlapping spheres of authority and responsibility that characterize the modern world of police/governmental relations. These terms also emphasize that both the police and the minister have a responsibility to explain and justify their actions to the public.

Another virtue of re-conceptualizing police independence is that the concept of complementary ministerial and police responsibility is already found in existing laws affecting both police and government. The police have a variety of peacekeeping and law enforcement duties under both the *Police Services Act* and the *Criminal Code*. Local police services boards also have a long list of “responsibilities” under section 31(1) of the *Police Services Act*. Finally, the minister has a variety of responsibilities with respect to policy-making and is subject to provincial standards which are implicit in the long list of obligations under s.3 of the *Police Services Act*. The acknowledgement of complementary responsibilities is, therefore, not only explicit in existing laws but it is also more consistent with the finest traditions of public service that should guide both the police and the government.

12.6.2 Four Models of Police/Government Relations

Professor Roach’s background paper for the Inquiry outlines four possible models of police government relations.⁶² Each model represents one stop on a spectrum

of alternative legal and institutional arrangements to govern police/government relations.

Models of this sort provide a convenient means of highlighting different policy options and the value choices and assumptions implicit in the choice of those policies. I analyze Professor Roach’s models to determine which model best fits the principles and priorities I have identified. That model will then become the theoretical or policy foundation for detailed recommendations which follow later in the chapter.

Professor Roach’s first model is “Full Police Independence.” It is based on a broad interpretation of the *Blackburn* doctrine and the broad understanding of police independence articulated by former Prime Minister Trudeau. This model essentially holds that police should be free from governmental direction on *all* operational matters. It finds some support in s. 31(4) of the *Police Services Act* which provides that municipal police boards cannot direct the chief of police “with respect to specific operational decisions or with respect to the day to day operations of the police.”

Many parties to the Inquiry made submissions and recommendations effectively supporting this model, likely premised on the belief that it creates an impermeable shield against the perception or fact of political or partisan influence. Support for this model is also likely based on a belief that the risks and consequences of inappropriate police behaviour are far fewer than the risks and consequences of inappropriate political interference.

Unfortunately, this model, taken to its logical extreme, could make the police a law unto themselves and significantly undermine ministerial responsibility. It could also encourage an abdication of political responsibility for the policy of policing. Full police independence also has the potential to defeat transparency and accountability if police accountability effectively becomes voluntary. The Canadian Civil Liberties Association (CCLA) raised a significant further objection to this model in its submission to the Inquiry:

Why should it be assumed that the government has a monopoly on political motivation? There is simply no reason to believe that police officials are bereft of such predispositions. And what about all the other prejudices that could shape police behaviour? It has been alleged, for example, that certain police operations have been influenced by racism or homophobia within the constabulary. As between the appointed police and the elected government, why should it be the police who have the right to make the last mistake?⁶³

Professor Roach's second model is "Core Police Independence." This model is based on a more limited interpretation of police independence, defined by Professor Roach as "core" or "quasi-judicial" police independence. The model is based on *Campbell and Shirose*. It defines police independence as independence from governmental direction with respect to the exercise of law enforcement decisions.

"Core police independence" has an impressive pedigree. It is consistent with the approaches taken by the McDonald Commission, the Marshall Commission, the APEC Inquiry, and the Arar Commission.

This model strikes a more attractive balance between the principles I have adopted, because it protects police discretion to enforce the rule of law while allowing ministerial direction on a wide variety of other matters, most notably those affecting the policy of operations. Thus, this model is, potentially, in harmony with the concepts of overlapping zones of police operational responsibility and governmental policy responsibility. As a result, the "core police independence" model appears consistent with the principles of constitutional democracy and accountability.

A third model of police/government relations is "Governmental Policing." It defines police independence from government very narrowly. This model also accepts that central agencies within government will play a very important role in directing the police.

Although "governmental policing" undoubtedly reflects pressures and trends towards centralized authority within federal and provincial governments, it is inconsistent with the principles of democratic government and the explicit language of both the *RCMP Act* and *Police Services Act*. "Governmental policing" also has the very real potential to create situations in which different parts of government can interact with and perhaps even direct the police without taking responsibility.

Professor Roach's final model of police/governmental relations is "Democratic Policing." The starting point for this model is an acknowledgement of core or quasi-judicial police independence from government direction on law enforcement decisions. This model recognizes, however, that the responsible minister should be informed of all aspects of police operations in order to encourage explanatory and cooperative forms of accountability and to ensure the minister's authority to intervene in policy matters. Professor Roach explains that the democratic model of policing takes challenges to ministerial responsibility seriously and attempts to strengthen it by placing a new emphasis on transparent ministerial directives. This model is consistent with the general framework of the *Police Services Act* and with the general consensus of Canadian inquiries on police/government relations.

“Democratic policing” is distinguishable from “core police independence” because “democratic policing” is explicitly intended to promote transparency and public participation in policing policy. It also goes further than “core police independence,” in that it aims to revitalize ministerial responsibility and counter trends toward increasing government centralization. As a result, it is consistent with the responsibility of the minister under the *Police Services Act*, the principles of democratic government, ministerial accountability, and transparency. For these reasons, I believe that the “democratic policing” model is the most appropriate conceptual framework for police/government relations in Ontario.

12.6.3 Principles in Practice: Democratic Policing

The democratic policing model balances the principles and objectives identified in this report most effectively. It also creates a flexible, transparent, and accountable framework in which police and government can exercise their respective responsibilities, even in a fast-paced crisis. Indeed, flexibility, transparency, and accountability are the fundamental attributes of this model.

This model of policing is inherently democratic, because it recognizes that it is both impossible and undesirable to have static policing policies. Different ministers and governments will inevitably adopt different policing policies. The democratic policing model explicitly encourages the use of ministerial directives to ensure transparency and accountability for those changes.

Democratic policing also recognizes that it will be impossible to reach a consensus about the dividing line between police and government responsibilities in every situation. The flexibility inherent in ministerial directives means that they could be tailored to specific situations.

The final virtue of the democratic policing model is that it acknowledges and promotes democratic participation by encouraging policing policy to be debated, evaluated, and established in a transparent and accountable manner.

Of course, the policy instruments utilized to further democratic policing need not be limited to ministerial directives. There may be other institutional, policy, or procedural initiatives that promote democratic policing.

12.7 Promoting Democratic Policing

There is no shortage of accountability mechanisms for police/government activities. In addition to ministerial oversight and police services boards, the OPP and other police services in Ontario are subject to a wide range of internal and external accountability mechanisms, including questions in the Legislative Assembly, scrutiny by legislative committees, public complaints, civil lawsuits and criminal

prosecutions, freedom of information requests, Special Investigations Unit (SIU) investigations, the media, and coroner's inquests.

One of the harsh realities of Ipperwash, however, is that each and every one of these processes was utilized, at some point, to hold individuals and institutions publicly accountable. Yet it still took a public inquiry to uncover some of the key decisions that would eventually help the public understand the facts and issues accurately. This is clearly unsatisfactory by almost any standard of democratic accountability.

Public accountability and democratic policing cannot depend on this kind of sustained, expensive and time-consuming effort to get to the bottom of police/government relations issues or controversies.

Several parties to the Inquiry recommended interesting and potentially valuable reforms to improve police/government relations. For example, Aboriginal Legal Services of Toronto (ALST) recommended that the province establish a police service board for the OPP. I discuss this proposal later in this chapter.

ALST also recommended that the province promulgate a "political interference protocol" that would establish a mandatory procedure to be invoked when allegations of political interference with the police are made. The political interference protocol and similar recommendations seek to create new institutional processes or mechanisms to scrutinize police or government behavior following some kind of allegation or proof of government interference.

I have reservations about the political interference protocol and related proposals. There are already many accountability mechanisms for the OPP and other police services, including SIU investigations, coroner's inquests, freedom of information requests, civil lawsuits, criminal trials, and public inquiries, which have the ability to scrutinize the police/government relationship *after* some kind of crisis or controversy.

There is no reason to believe that new or additional "post-incident" accountability mechanisms will be any better at promoting better police/government relations than are any of the tools already available. I think that the more important objective should be to promote better police/government relations *before* an incident occurs. Just as importantly, I believe that police/government relations raises important public policy issues, irrespective of whether there is a public controversy.

My reservations should not be confused with acceptance of the status quo. Reforms are needed. I am convinced that the *Police Services Act* should be amended and policies should be changed to provide a clearer and modernized framework to govern police/government relations in Ontario. The emphasis in the new framework should be on clarifying roles and responsibilities while ensuring transparency and accountability in OPP and provincial government

decision-making. An important additional benefit of these reforms is that they are likely to promote better decision-making and reduce the occurrence of police/government relations controversies in the first place. I discuss the elements of this new framework in the following sections.

12.7.1 Clarifying Police and Ministerial Responsibilities

My analysis in this chapter has been directed in large part to reconciling the appropriate relationship between police independence and the overlapping and potentially confusing roles and responsibilities of police and government.

I have already discussed why I believe that the existing powers in section 17(2) of the *Police Services Act*, which give the commissioner general control over the OPP “subject to the Solicitor General’s direction,” are at odds with the general consensus about the law enforcement core of police independence.

As a first step, therefore, I recommend that s. 17 be amended to provide that the power of the Solicitor General to direct the OPP does not include directions with respect to specific law enforcement decisions in individual cases, notwithstanding the minister’s authority to issue directives under s.3(j) of the *Act*. This provision would both enshrine the principles found in *Campbell and Shirose* and provide greater certainty about the core meaning of police independence.

By itself, however, this provision would not resolve fundamental questions regarding police independence and the relationship between police and government. I believe that the *Police Services Act* should be further amended to specify that the commissioner of the OPP has operational responsibility with respect to the control of the OPP, subject to written policy directives from the Minister.

This second provision would enshrine the distinction between “police operational responsibility” and “ministerial policy responsibility” which I discussed earlier in this chapter. The term “operational responsibility” would firmly establish, if not emphasize, that the police can be held accountable after the fact for the manner in which they discharged their operational responsibilities. This amendment would also more firmly establish the authority of the responsible minister to assume responsibility for policy directives, including directives with respect to the policy of operations.

These amendments, taken together, would go a long way toward establishing an appropriate statutory foundation for police/government relations in Ontario.

12.7.2 Promoting Ministerial Accountability

A second important area of legislative reform in police/government relations is the need to promote the accountability of the minister responsible for policing

decisions. This reform would address the concerns raised in Ipperwash and elsewhere about the diffusion of decision-making and accountability for important policing decisions. Accordingly, I recommend that the *Police Services Act* be amended to prohibit any person other than the Solicitor General or his or her delegate from giving directions to the OPP. This provision would make it clear that it is never proper for another minister, an MPP, or a political staff person to purport to issue directions to the OPP unless that person was designated to do so. On its face, this reform would promote personal accountability and reduce extraneous, unaccountable interventions while acknowledging that the minister often conveys directions through his or her officials.

For greater certainty, the *Act* should also specify that ministerial directions must be directed to the commissioner or his or her delegate. Section 31(3) of the *Act* provides a strong precedent for this approach. This section prohibits members of local police boards from giving directions to any members of the police force and requires any direction to go directly to the chief of police. This amendment would underline that directions should always be directed through the OPP chain of command and should never go directly to the incident commander or any other police officer. This amendment would also ensure that any and all ministerial directions were addressed to police officials with the requisite rank, training, and experience to consider them.

I recognize that interministerial and intergovernmental committees often play an important and necessary role in determining the government response to large public order events and Aboriginal occupations and protests. It is nevertheless important in our democracy that government directions be channelled through the responsible minister. This is necessary to ensure transparency and accountability and to respond to the danger that the police will be placed in the impossible position of being faced with conflicting directions. A requirement that the direction be made by the Solicitor General or his or her designate also ensures that the content of the direction will be measured against the statutory obligations of the Solicitor General to refrain from direct law enforcement decisions in individual cases, and in a manner that is sensitive to the history of police/government relations and within the proper confines of the *Police Services Act*.

12.7.3 Revitalizing Ministerial Directives

The amendments I recommend would not resolve the definitional or practical problems regarding the precise ambit of the respective powers of the police and the government. As discussed earlier, there are a number of difficult issues concerning the relationship between policy and operations, the policy of opera-

tions, information exchanges between police and government, and the murky distinction between government “direction” and “guidance.”

In my view, these issues are not amenable to statutory definition or codification.

The model of democratic policing I recommend recognizes that the precise ambit and content of police operational responsibilities and governmental policy responsibilities will evolve over time. I am persuaded that the best way to approach the difficulties of distinguishing policy from operations is not through attempts at a static or legalistic definition, but rather by providing a process to resolve difficulties in defining policy and operations which will promote transparency and accountability and will be consistent with ministerial responsibility.

It may well be that the responsible minister will agree with the way the police discharge their operational responsibilities in most cases. Nevertheless, it is important, as the McDonald Commission recognized, for the responsible minister to have the option of intervening. I would add, however, that it is absolutely crucial that such intervention be in the form of a written ministerial directive which, perhaps with restrictions necessary to protect ongoing investigations and confidential information, will be made public.

Ministerial directives are attractive for a number of reasons:

Ministerial directives are a flexible yet transparent and accountable method for providing government directions to the police. There is no statutory limit on their potential application: they can be prospective, general, or specific.

Ministerial directives are also public documents. As a result, they are not subject to arguments about Cabinet confidentiality, litigation, or privacy privileges such as arose during the controversy over Ipperwash. Ministerial directives promote accountability for decision-making because they must be promulgated and withdrawn in public. Ministerial directives are also likely to be enduring statements of government policy. The fact that they are written down and public encourages policies based on best practices, rather than on ad hoc or crisis-driven agendas.

Finally, ministerial directives are neither novel nor expensive. Section 3(j) of the *Police Services Act* already gives the minister the explicit power to issue directives to police services across the province. The directive process does not require any new or costly institutional reforms.

It goes without saying that any process to revitalize ministerial directives must be accompanied by a public, transparent process for issuing, circulating, and withdrawing them. Any directives must also make it clear who issued them and to whom they are applicable and that they represent government policy. A ministerial directive issued in this manner would be a considerable improvement on the manner in which policy directions were communicated at Ipperwash.

There are some promising international and Canadian examples of ministerial directives being used as instruments to promote both transparent government policy-setting and ministerial responsibility.

Professor Stenning's comprehensive study of recent international experience with police government relations described the growing international trend toward promoting police/government transparency through the use of directives.⁶⁴ He noted, for example, that the recent *Police Reform Act* in the United Kingdom contemplates that local police authorities will prepare action plans to be approved by the Home Secretary. The *Act* also empowers the Home Secretary to issue "codes of practice relating to the discharge of their functions." A code of practice has been issued with respect to the use of firearms.

Professor Stenning also outlined important developments in several Australian jurisdictions, including the 1998 South Australia *Police Act*. This *Act* states that "Subject to this Act and any written directions of the Minister, the Commissioner is responsible for the control and administration of the South Australian police." The *Act* also provides that any ministerial direction to the commissioner must be published in the *Gazette* within eight days of issue and laid before each House of Parliament within six sitting days. René Marin approved of this legislation in a published analysis. In his view, the directive approach can bring "the transparency necessary to avoid potential conflict" and unfounded allegations of interference in "the very sensitive relationship between the Minister responsible for the police and police authorities."⁶⁵

The Queensland *Police Services Administration Act* likewise provides that the minister may give direction to the commissioner about "policy and priorities to be pursued in performing the functions of the police service," subject to the provision that all written directions should be kept and provided annually to the Crime and Misconduct Commission and then referred to the Parliamentary Committee on Crime and Misconduct.

Finally, section 37(2) of the Australian *Federal Police Act* provides that "the Minister may, after obtaining and considering the advice of the Commissioner and of the Secretary, give written directions to the Commissioner with respect to the general policy to be pursued in relation to the functions of the Australian Federal Police." Professor Stenning concluded that the recent trend in Australia is

towards attempts to define and clarify the governance relationships between police commissioners and government ministers through legislative provision, rather than simply through recognition of constitutional convention A critical aspect of such provisions has been the requirement that ministerial directions that are given, must be in writing and must be published, and/or laid before the legislature for scrutiny and debate.⁶⁶

Professor Edwards similarly concluded that, in general, the federal legislation in Australia which established a Director of Public Prosecutions who is subject to written and published directives from the Attorney General was an optimal means of “conferring upon any office holder the maximum degree of independence when making prosecutorial decisions,” but also maintaining “parallel regard for sustaining the principle of ministerial accountability.”⁶⁷

In my view, these international reforms should be considered best practices.

There are also several Canadian examples of written directives to clarify and publicize government policy:

Acting on the advice of Professor Edwards, the Marshall Commission recommended that the Attorney General of Nova Scotia be given the authority to issue written guidelines and specific directives to the provincial Director of Public Prosecutions (DPP). The commission further recommended that these guidelines and directives be reduced to writing and published in the Gazette. The commission concluded that this system represented “the right blend of [day-to-day prosecutorial] independence and [ministerial] accountability.”⁶⁸

The Nova Scotia Act also contemplates consultation and discussions between the Attorney General and the DPP about individual cases which do not have to be reduced to writing and published. This has raised fears in some quarters that informal political interventions in prosecutions will occur.⁶⁹ These concerns must be acknowledged; however, in my view, they underline the fact that the success of any new institutional structure will depend in no small part on the integrity of the individuals who operate within that structure. I am confident that the directive model provides a sound institutional framework for police/government relations, which will promote transparency, accountability, and ministerial responsibility.

Key elements of the Nova Scotia DPP model have recently been adopted in the new federal *Director of Public Prosecutions Act*, including the requirement that

any specific or general directives from the Attorney General to the DPP be published in the Gazette.⁷⁰

The Arar Commission recently examined the important role of ministerial directives with respect to the national security activities of the RCMP. Justice O'Connor recommended that "the Minister responsible for the RCMP should continue to issue ministerial directives to provide policy guidance to the RCMP in national security investigations, given the potential implications of such investigations":⁷¹

Appropriate use of such directives does not interfere with the independence of the RCMP as a law enforcement agency, as the purpose of the directives is solely to provide policy guidance with respect to the overall operation of the RCMP. There is no attempt to encroach on the making of law enforcement decisions in individual cases, which comes within the legitimate ambit of police independence.⁷²

The Interim Enforcement Policy issued by the Ontario Ministry of Natural Resources can also be seen as a form of ministerial directive. Subject to some enumerated exceptions, it requires approval of the assistant deputy minister before planned enforcement procedures, including search warrants, are undertaken with respect to the exercise of Aboriginal harvesting rights. It also provides for consultation with Aboriginal chiefs before decisions are made to proceed with charges. This directive provides policy guidance and procedures to govern the exercise of law enforcement discretion. It helps provide a transparent policy structure to ensure that law enforcement discretion is exercised in a manner that takes Aboriginal and treaty rights into account.

A statutory requirement that both general guidelines and specific directives be reduced to writing and made public should help ensure that the responsible minister is held accountable for any political intervention in policing. It should also assist in ensuring that government intervention flows through the responsible minister. This, in turn, should discourage central agencies or political staff from performing an end run around the traditional and statutory framework of ministerial accountability for policing.

Government-wide consultation is perfectly acceptable, and indeed often desirable. The benefit of ministerial directives, however, is that they ensure that government policy is properly filtered and conveyed through the appropriate minister. This should help ensure that directions given to the police respect the core of police independence and the expertise of the police in operational and law enforcement matters.

It is always possible that government officials will be tempted to give advice

or directions which they are unwilling to reduce to writing or make public. A potential response to this danger would be to allow the commissioner of the OPP to request that directions from the minister be reduced to writing and tabled in a manner similar to formal ministerial directives. This would give the commissioner an option short of resigning if faced with what he or she believed to be improper or unwise direction from the responsible minister. The commissioner could also use this authority to resist attempt by officials other than the responsible minister to direct the police. The commissioner's power to require that directions be reduced to writing would undoubtedly encourage second thoughts within government about the propriety, content, and process of potential directions to the police.

Finally, ministerial directives should be, in my view, more formal than the advisory policy guidance provided in the present Policing Policy Manual. They should be treated as formal statements of government policy. Depending on their subject, they should also occasionally be promulgated as regulations under the *Police Services Act*.

Readers will note that the existing *Police Services Act* already gives the minister the authority to issue directives. The problem with the current *Act*, however, is that the process for issuing, circulating, and withdrawing ministerial directives is not transparent, systematic, or mandatory. By way of contrast, the practices adopted by the Nova Scotia and Australian jurisdictions outlined above meet these objectives. Accordingly, I recommend an equivalent process for Ontario. This process should be set out in a regulation to the *Police Services Act*.

These legislative and ministerial directive reforms will provide significant protection for the OPP from the risks of inappropriate government influence.

12.7.4 Institutional Structures and Processes within the OPP

In its Part 2 submission, the OPP recommended several additional measures the OPP could take to better insulate operational decision-makers, incident commanders, and front-line officers from inappropriate government direction or advice.⁷³

First, the OPP reported that it is developing a policy on access to the command post which would generally prohibit access to the command post by persons other than police officers.

Second, the OPP recommended that OPP officers (particularly Level 2 and Public Order Commanders) be trained in the OPP policy on access to the command post.

Third, the OPP recommended that it might be appropriate, in major incidents, for the OPP to assign an operational liaison officer designated as the contact

person for elected officials. The OPP further recommended, however, that there be no inflexible rule that commanders cannot directly communicate with politicians or other community leaders. The OPP submitted that an incident commander may have a relationship with community leaders which could be utilized to reduce the likelihood of violence.

These measures seem reasonable to me, and I recommend that the OPP pursue them actively. I also encourage the OPP to monitor the effectiveness of these measures and to adapt their policies based on this experience.

In order to promote further transparency, I also recommend that the OPP post its relevant policies, as well as any ministerial directives, on its website, circulate them to the OPP advisory committees I recommended earlier, and make them available to the public upon request.

12.7.5 Briefings, Policies, and Training

Experience at Ipperwash and elsewhere shows that MCSCS and the OPP should adopt complementary formal policies which set out their respective roles, responsibilities, and mutual expectations in police/government relations. This would provide policy-makers with a level of detail and explanation not available in legislation or regulations. These policies should adopt the principles and findings on police/government relations outlined in this report, including specific provisions on the following issues:

- The core of “police independence”
- The “policy of operations”
- Police operational responsibilities
- Government policy responsibilities
- Information exchanges between police and government
- Dedicated procedures to be used to manage police/government relations during a critical incident

All senior officials within MCSCS and the OPP should be briefed or trained in these policies as a matter of course. Other government officials should be briefed as necessary, depending on the circumstances. These policies should also be posted on the MCSCS and OPP websites and be made publicly available upon request. This would provide a level of transparency, accountability, and understanding of police/government relations above and beyond what was available at Ipperwash.

12.7.6 Police/Government Relations during a Crisis

Although a number of difficult issues with respect to police-governmental relations can be headed off by planning and mutual understandings between police and government, some issues will only emerge in the context of a critical incident. As the recent events at Caledonia demonstrate, there may also be intense media interest and ministers may find themselves subject to intense questioning, both in the Legislature and by the media. This may place enormous pressure on the police and the government to respond quickly and decisively.

As in other areas of police/government relations, I believe that decision-making during a critical incident should be guided by the need for transparency, accountability, and respect for ministerial responsibility. Wherever possible, exchanges of information and other interactions between the police and the government should be recorded, and joint minutes should be distributed and verified. Except in emergency circumstances, there should not be any direct communications from government to incident commanders and other officers on the ground. Requests for information and directions should be filtered through proper chains of command. If circumstances make these normal processes impossible, there should be an obligation to record in some form any direct dealings between government and the police. Special attention should be paid to explaining and justifying any departures from normal procedures.

There was some discussion in the Part 1 hearings about the use of “buffers” with respect to information exchange. I agree that the incident commander should generally be buffered and protected from direct knowledge of discussions within government which might affect or evaluate operational performance. As I have indicated in my Part 1 report, all communications to and from the incident commander at Ipperwash should have occurred through proper channels. At the same time, however, caution is required if buffers are extended beyond sheltering those responsible for operations. Indeed, there is a danger that the buffer concept, when applied to ministers, could run counter to the principles of ministerial responsibility and accountability which I have stressed in this report. In no way should the minister be buffered or sheltered from his or her policy responsibilities. That said, I also recognize that there are limits on a minister’s time, and many exchanges of information occur during meetings of the minister’s staff and government officials. In these circumstances, political staff and senior civil servants should take care to ensure that the minister is kept informed of events and has a full opportunity to discharge his or her policy responsibilities.

Although an interministerial and indeed an intergovernmental response will often be appropriate and necessary to respond to Aboriginal protests and occupations, policing issues should be channelled through the Ministry of Community

Safety and Correctional Services, as contemplated by the *Police Service Act* and by the traditions of constitutional democracy. Such channelling efforts should not be seen as matters of form or legal nicety. Rather, they are necessary to ensure transparency and accountability. The model of governmental policing in which the OPP is directed by all parts of government is, in my view, unworkable and it seriously undermines accountability. I would also add that channelling policing matters within the appropriate department would also ensure that the responsible policy-makers have the full benefit of the experience, expertise, and knowledge of the police. It should also ensure that the relevant representatives of both the government and the police are familiar with the history and principles of police/government relations.

12.7.7 Does the OPP Need a Police Services Board?

I am a strong supporter of the principle of civilian oversight of police services and of police service boards in a municipal context. There is no doubt that police services must be accountable to democratically elected governments or to representative bodies.

Several parties recommended that a province-wide police service board be created for the OPP as a means for addressing a number of issues that came to light during the Inquiry. Proponents of a province-wide police service board submitted that, among other benefits, a board would put greater distance between the provincial government and the OPP. For example, ALST submitted that a board “would act as a buffer between the government and the police, providing an extra layer of security against any perceived intentional or inadvertent government interference with specific day to day police operations.”

I believe that this proposal is based on an acceptance of the conventional dichotomy between policy and operations. It may also be based on a conclusion that government involvement necessarily amounts to inappropriate interference or an encroachment on police independence and therefore needs to be curtailed. In my view, taking this course would have the result of widening the scope of police independence by drawing a brighter, or wider, line between police operations and government intervention.

There is no reason to believe that a provincially elected government has a monopoly on political motivation. Municipally elected councillors or unelected appointed officials, who generally constitute the members of a local police service board, may also be politically motivated. The important principle in both contexts is that the police need to be accountable to a democratically elected civilian oversight agency.

I believe that the democratically elected provincial Cabinet minister respon-

sible for the provincial police could provide appropriate civilian oversight just as well as municipally elected councillors do, and perhaps even better than unelected, appointed officials do.

Our provincially elected officials have an obligation to be engaged with and aware of the activities of all public institutions, including our provincial police force. They have not always been so engaged in the past, and that is why, in this chapter, I recommend a closer relationship between the government and the OPP rather than a more distant one. However, it is critically important that this closer relationship be coupled with the mechanisms I described earlier in this chapter to ensure transparency and accountability for decisions made within the context of that relationship. I have concluded that the conventional dichotomy between policy and operations is insufficient to meet the objectives of contemporary police/government relations, and I believe that the new framework for police/government relations I have recommended in this report will significantly strengthen the democratic accountability and transparency of government activities in relation to the OPP.

Accordingly, notwithstanding some of the compelling arguments for establishing a province-wide police service board, I am concerned that, with its explicit objective of reinforcing the distinction between government policy and police operations, it could effectively reinforce what is already a problematic distinction.

A province-wide police service board, no matter how well organized or constituted, would add another layer of authority and potentially further diffuse ministerial accountability for the police service rather than improve it. It could lessen if not obstruct the potential benefits of the new framework I have recommended for police/government relations by further removing the provincial government, through the minister responsible for policing, from his or her oversight obligations. A province-wide police service board could also give the minister and provincial government a convenient, expansive, and permanent rationale for disavowing responsibility or accountability for the OPP.

Professor Roach discussed some of the merits of a province-wide police service board in his Inquiry background paper and concluded that

it could be argued that adding another body ... might only cause confusion and diffuse accountability.⁷⁴

In this report, I have taken the approach that immediate steps need to be taken to achieve greater clarity in responsibility and accountability. The minister responsible for policing and the provincial government should assume more responsibility for the OPP's activities rather than less, and this includes activities related to Aboriginal occupations, police/Aboriginal relations, and treaty and Aboriginal rights.

The Canadian Civil Liberties Association put it well:

Whether or not there is illegality in any protest activity, a strong element of free speech will invariably be involved, and often, of course, Aboriginal and treaty rights as well. The importance of these rights in the panoply of Canadian constitutional protections requires that government bear the total and obvious responsibility for any decisions to curtail what may occur.⁷⁵

Judged against this standard, I noted the testimony of Mr. Runciman, the Solicitor General at the time of Ipperwash. Perhaps stemming from a more traditional view that there is a clear boundary between government and police decision-making, he went to some lengths to distance himself from the activities of the OPP during the Aboriginal occupation of Ipperwash Provincial Park. Mr. Runciman characterized his role in 1995 as essentially a watching brief.

In my view, this perspective is no longer helpful. I believe that a “hands off” approach by the minister responsible for policing in the province is inappropriate during or following an Aboriginal occupation or protest.

Other reasons for and against the establishment of a police service board were shared with me over the course of the Inquiry. The OPP recommended against establishing an OPP police service board. Its position was based, in large part, on several practical challenges to establishing a workable board owing to the complexity of the OPP’s policing arrangements across the province:

[The OPP provides] direct policing services to approximately 182 municipalities not policed by another service, and to another 130 municipalities via 103 contracts. It provides direct policing to 19 First Nations and administers policing for 20 more First Nations. It delivers specialized police services pursuant to 135 specialized service framework agreements and on request from the Crown Attorney, a police services board, a Chief of Police or the Ontario Civilian Commission on Police Services. The OPP provides policing on highways, waterways, provincial parks and trail systems. It provides investigative assistance to municipal and First Nation police services, and is responsible for emergency response and resources for major incidents, emergencies or disasters.⁷⁶

Other experienced observers, notably former Deputy Attorney General Larry Taman and former Deputy Solicitor General Elaine Todres, did not believe that a province-wide police service board to govern the OPP was necessary or advisable—for both practical and financial reasons.

There are many difficult philosophical, organizational, and structural issues to be resolved before one could confidently recommend the establishment of a province-wide police services board. In its submission, the OPP articulated many of them, including the following: What would the relationship be between the province-wide police service board and local police service boards that already exist in many of the municipalities where the OPP provides police services? Depending on which of the 400 communities it polices was involved, would the OPP be answerable to two police service boards? What would the relationship be between the province-wide police service board and First Nations communities?⁷⁷

There was no consensus on these issues during the hearings or in the submissions by the parties.

I am in favour of any mechanism that has the potential to improve public participation in OPP decision-making, as were several senior OPP officials who testified at the hearings, including former OPP Commissioners Thomas O'Grady and Gwen Boniface. However, unlike municipal police service boards, a provincial board is more likely to be far removed from the local communities served by the OPP. It would be hard to replicate the dynamic, democratic participation of community groups that contributes so significantly to municipal policing policy and accountability. In the absence of that participation, a provincial police service board might offer the appearance but not the reality of democratic legitimacy.

In making its arguments for a province-wide police services board, ALST described the role of the Northern Ireland Police Services Board and its relationship to District Policing Partnerships (DPPs). My understanding is that, among other things, the DPPs are a means through which local community interests are channeled into local police planning, thus providing a forum for consultation on matters affecting the policing of the district.

In my view, Ontario could adapt this Irish practice to our own context and could benefit from it. For example, the provincial government could establish regional citizen advisory committees, reporting directly to the minister and advising the minister regarding his or her policy and oversight responsibilities. These committees could reflect the local communities they serve and include Aboriginal participation. In this way, they could provide many of the benefits of a province-wide police service board but still keep the responsible minister engaged and involved.

In conclusion, notwithstanding my strong support for the role played by local police service boards, my preference is for a revitalized model of democratic policing based on the recommendations set out in this report.

I want to emphasize that my analysis on this subject is premised on my expectation that the reforms I have recommended in this chapter will be implemented

fully by the OPP and the provincial government. It is also based on the premise that the OPP and the provincial government will adopt my recommendations, set out elsewhere in this report, regarding policing as it relates to Aboriginal peoples. In the absence of these changes, a province-wide police service board may well be the only means of achieving the desired objectives of transparency, accountability, and participation in police decision-making by Aboriginal peoples and other citizens.

Therefore, I recommend that this issue be reviewed two years from the date of this report, and if the recommendations I have made have not been implemented or have not had the desired effect, I urge the provincial government to reconsider the issue of the need for a province-wide police service board.

12.8 Role of the Deputy Minister of Community Safety and Correctional Services

At present, the commissioner of the OPP reports to the deputy minister of Community Safety and Correctional Services. This structure is intended, in part, to “buffer” or shield the minister from allegations of inappropriate political interference in police decision-making.

From a democratic policing perspective, the deputy minister’s “buffer” role is problematic. One of the main points I have made in chapter is that the provincial government and the OPP must carefully consider the manner in which they communicate with each other and then they must be prepared to be accountable for that communication in a manner as open and transparent as possible.

The insertion of the deputy minister between the minister and the commissioner encourages the minister to take a “hands-off” approach to policing matters. It also reduces accountability, because the deputy minister is clearly not publicly accountable for his or her decisions in the same manner as the minister is. Therefore, a direct reporting relationship between the minister and the commissioner of the OPP makes good sense and follows naturally from the transparency/accountability analysis set out in this chapter. It would also acknowledge that the relationship between the provincial government and OPP is governed by unique rules and considerations that are not applicable to other ministry operating divisions.

Changing the OPP commissioner’s reporting relationship in this manner would match the reporting relationship between the commissioner of the RCMP and the federal policing minister.

12.9 Other Law Enforcement Agencies

The police were obviously the focus of attention in Ipperwash, but I am well aware that many of the Aboriginal people who participated in Part 2 expressed serious concerns about possible confrontations between Aboriginal people and others in government, most notably MNR conservation officers. As a result, I believe that my Part 2 mandate to make recommendations to prevent violence means that I cannot ignore the possibility of confrontations between Aboriginal people and others in government who exercise police powers. The protest at Burnt Church is perhaps the most notable example of a confrontation involving a non-police enforcement agency, in that case the federal Department of Fisheries and Oceans.

The enforcement powers of conservation officers and their relationship to police independence raises unique issues: Do MNR conservation officers have the same independence as police officers, or do different considerations apply? What policies or practices, if any, should be implemented with respect to conservation officers in this area?

Unlike police/government relations or police independence, the issue of conservation officer or quasi-police independence does not appear to have been analyzed by any previous inquiry or report. Nevertheless, I have been assisted in this area by a number of helpful submissions or Part 2 projects, including from the Chippewas of the Nawash Unceded First Nation, the Union of Ontario Indians, the OPP, and the Ministry of Natural Resources. The background paper on regulatory regimes, commissioned by the Inquiry from Jean Teillet, was also very helpful.

My MNR-related analysis in the preceding chapters emphasized the need for consistency and coordination of police/MNR policies and processes. I also emphasized that the same general principles that apply to the police or provincial government generally should also apply to MNR.

It could be argued that conservation officers should have the same independence and discretion as police officers do, because they are involved in law enforcement. No doubt, many considerations justifying police independence apply equally to conservation officers. For example, there is no reason to believe that conservation officers exercising their enforcement powers should be any more subject to partisan influence than police officers are. As a result, it is certainly possible that a court could find that those who exercise powers as peace officers enjoy a limited degree of independence from government direction when they exercise their law enforcement discretion in individual cases.

It could also be argued that the role of the police is distinct from that of other public servants and that it would be dangerous to recognize that civil servants have the same independence as the police do in our democracy.

Both arguments have merit. Nevertheless, I continue to believe that it would be a mistake to reduce this issue to a simple question of whether conservation officers enjoy police independence. On the contrary, I believe that the principle of shared or overlapping operational and policy responsibilities which I have applied to the police should be applied to conservation officers as well. In practice, this would mean that conservation officers could have a limited “core” of independence in their law enforcement functions. It would also mean, however, that the government has both the authority and the responsibility to intervene in policy issues, to issue policy directives, and to identify policies of operations as may be appropriate.

The provincial government has developed an Interim Enforcement Policy to govern the application of the *Fish and Wildlife Conservation Act* to Aboriginal harvesting for personal or community use. As noted above, the Interim Enforcement Policy is an example of how the provincial government can establish a “policy of operations” in an accountable and transparent manner.

In the circumstances, I believe that it would be appropriate for the Ministry of Natural Resources and any other law enforcement agency to adopt and distribute a ministerial policy with respect to ministerial directives to enforcement officers which are consistent with the principles and findings in this report regarding police/government relations generally. I do not believe that this policy needs to be promulgated in legislation or regulations.

Recommendations

71. Section 17 of the *Police Services Act* should be amended to specify that the power of the responsible minister to direct the OPP does not include directions regarding specific law enforcement decisions in individual cases, notwithstanding the responsible minister’s authority to issue directives under s. 3(j) of the *Act*. This section should be further amended to specify that the commissioner of the OPP has “operational responsibility with respect to the control of the OPP, subject to written directives from the responsible minister.”
72. The *Police Services Act* should be amended to prohibit anyone but the responsible minister (or his or her delegate) from providing directions to the OPP. The *Act* should also specify that ministerial directions must be directed to the commissioner of the OPP (or his or her delegate).
73. A regulation should be issued under the *Police Services Act* specifying the procedure for issuing, circulating, and withdrawing ministerial directives.

This regulation should specify that

- a. all ministerial directives are to be in writing, subject to the limited exception of an extraordinary or exigent circumstance which prevents the directive from being written down. In these situations, the directive must be issued in writing at the earliest opportunity; and
- b. all ministerial directives should be publicly accessible, including being published in the *Ontario Gazette*, posted on the Ministry of Community Safety and Correctional Services website, and available to the public upon request within seven days of being issued. This provision is subject to the limited exception that the publication/circulation of the directive should be delayed if it would affect public safety or the integrity of an ongoing police operation. In these situations, the directive should be published/circulated at the earliest opportunity.

74. The regulation should also specify that

- a. the commissioner of the OPP should refuse to consider a government direction which is not in writing or not intended to be made public;
- b. the responsible minister does not have the authority to offer “guidance” as opposed to “direction” to the commissioner of the OPP; and
- c. government intervention with respect to “policies of operations” must be in the form of a written ministerial directive.

75. The OPP should post relevant ministerial directives on its website, circulate them to the OPP advisory committees, and make them available to the public upon request.

76. The Ministry of Community Safety and Correctional Services and the OPP should adopt complementary formal policies that set out their respective roles, responsibilities, and mutual expectations in police/government relations. These policies should adopt the principles and findings on police/government relations outlined in this report, including specific provisions on the following issues:

- The core of “police independence”
- The “policy of operations”
- Police operational responsibilities

- Government policy responsibilities
- Information exchanges between police and government
- Dedicated procedures that will be used to manage police/government relations during a critical incident

All senior officials within the Ministry of Community Safety and Correctional Services and the OPP should be briefed or trained on these policies. Other government officials should be briefed as necessary. These policies should also be posted on the Ministry of Community Safety and Correctional Services and OPP websites and be made publicly available upon request.

77. The OPP should establish policies and procedures to insulate operational decision-makers, incident commanders, and front-line officers from inappropriate government direction or advice.
78. The Ministry of Natural Resources should develop a policy respecting ministerial directives to its conservation officers which is consistent with the principles and findings on police/government relations generally as set out in this report.

Endnotes

- 1 Margaret E. Beare and Tonita Murray, eds, *Police and Government Relations: Who's Calling the Shots?* (Toronto: University of Toronto Press, 2007).
- 2 The McDonald Commission examining the activities of the RCMP, the APEC Inquiry, the Nova Scotia inquiry that examined Donald Marshall's wrongful conviction, and the Arar Commission all discussed police/government relations.
- 3 Philip Stenning, "The Idea of the Political 'Independence' of the Police: International Interpretations and Experiences" (Inquiry research paper).
- 4 See chapter 9 for my discussion of the police operational perspective on Aboriginal occupations and protests.
- 5 Please note my discussion of the three types of Aboriginal occupations and protests in chapter 2.
- 6 Stenning, p. 8. Professor Stenning pointed out that "there is no less concern to avoid undesirable partisan or special interest influence over police decision-making in the United States or Scotland or continental European countries than in countries like England, Canada, Australia and New Zealand Rather, what the governance arrangements in these countries demonstrate is that the common law doctrine of "police independence" is not the only mechanism through which such concerns may be addressed and such undesirable influences averted."
- 7 See generally Kent Roach, "The Overview: Four Models of Police/Government Relations" (Inquiry research paper), pp. 46-60.
- 8 *R. v. Metropolitan Police ex parte Blackburn* [1968] Q.B. 126 at 135-136.
- 9 Geoffrey Marshall, *Police and Government* (London: Methuen, 1965), p. 34.
- 10 J.L.I.J Edwards, *Ministerial Responsibility for National Security* (Ottawa: Supply and Services Canada, 1980), p. 94-5. For example, Prime Minister Pierre Trudeau (as quoted) responded to allegations of RCMP wrong-doing in the early 1970s in part by arguing that it was

[t]he policy of this Government, and I believe the previous governments in this country, has been that they ... should be kept in ignorance of the day-to-day operations of the police force and even of the security force. I repeat that is not a view that is held by all democracies but it is our view that and it is one we stand by. Therefore, in this particular case it is not simply a matter of pleading ignorance as an excuse. It is a matter of stating as a principle that the particular Minister of the day should not have a right to know what the police are doing constantly in their investigative practices, what they are looking at, and what they are looking for, and the way in which they are doing it The police don't tell their political superiors about routine criminal investigations.
- 11 *Royal Canadian Mounted Police Act* R.S.C. 1985 c.R-10.
- 12 *R. v. Campbell and Shirose* [1999] 1 S.C.R. 565 at para. 27.
- 13 *Ibid.*, at para. 29.
- 14 *Ibid.*, at para. 18.
- 15 *Ibid.*, at para. 33.
- 16 It is unlikely that *Campbell and Shirose* or the Supreme Court would even guarantee police independence in all criminal investigations. For example, a growing number of criminal offences, including those involving hate propaganda and terrorism, require the Attorney General's consent before the commencement of a prosecution. Some extraordinary police powers, such as the use of investigative hearings or preventive arrests in relation to terrorism investigations, also require the Attorney General's consent.
- 17 Other provincial policing acts 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.

- 18 O.C. 497/2004. As in the federal sphere, the responsible provincial minister has recently been renamed as the Minister of Community Safety and Correctional Services.
- 19 *Bisaillon v. Keable and Attorney General of Quebec* 1980 Carswell 22 at para 28 (Que.C.A.) rev'd on other grounds [1983] 2 S.C.R. 60.
- 20 OPP Part 2 submission, para. 167.
- 21 *Ibid.*, para. 169.
- 22 Canada. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security under the Law*, Second Report, vol. 2 (Ottawa: Supply and Services Canada, 1981), pp. 1005-6 [McDonald Commission report, vol. 2].
- 23 *Ibid.*, p. 868.
- 24 *Ibid.*, p. 1013
- 25 *Ibid.*
- 26 Roach, p. 35, quoting the Marshall Commission report (see note 68).
- 27 I discuss the public order policing findings of the APEC Inquiry in chapter 9.
- 28 Canada. Commission for Public Complaints Against the RCMP, The Honourable Ted Hughes, "Commission Interim Report" (2001), ch. 10.4, <http://www.cpc-cpp.gc.ca/DefaultSite/Reppub/index_e.aspx?ArticleID=376>.
- 29 *Ibid.*, ch. 31.3.1.
- 30 Canada. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. The Honourable Dennis O'Connor, Commissioner, A New Review Mechanism for the RCMP's National Security Activities (Ottawa: Public Works and Government Services Canada, 2006), p. 458 [Arar Commission report].
- 31 *Ibid.*, p. 460.
- 32 *Ibid.*, p. 463.
- 33 Larry Taman testimony, November 14, 2005, Transcript p. 227. My only qualification to Mr. Taman's comments is that police accountability is achieved through the responsible minister, not the government at large.
- 34 Donald J. Savoie, *Breaking the Bargain* (Toronto: University of Toronto Press, 2003), p. 268. Professor Savoie commented that the multiplicity of departments and agencies involved in major files may well have reached the point where "accountability—in the sense of retrospectively blaming individuals or even departments for problems—is no longer possible or fair."
- 35 Independent Commission on Policing for Northern Ireland, Rt. Hon. C. Patten, Chair, *A New Beginning: Policing in Northern Ireland* (London: 1999), p. 7 [Patten report].
- 36 *Ibid.*, p. 25.
- 37 *Ibid.*, p. 22.
- 38 *Ibid.*, pp. 24-5.
- 39 *Ibid.*, p. 36.
- 40 Arar Commission report, p. 463.
- 41 Larry Taman testimony, November 14, 2005, Transcript p. 45.
- 42 Elaine Todres testimony, December 1, 2005, Transcript p. 74.

- 43 Dianne L. Martin, “Legal Sites of Executive-Police Relations: Core Principles in a Canadian Context” (Inquiry research paper).
- 44 Patten report, p. 32.
- 45 McDonald Commission report, vol. 2, pp. 868-9.
- 46 *Ibid.*, pp. 1007-8.
- 47 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, “The RCMP and National Security: A Background Paper to the Commission’s Consultation Paper” (December 2004), pp. 41-3 <<http://www.ararcommission.ca/eng/RCMP%20and%20National%20Security.pdf>>.
- 48 Arar Commission report, p. 329.
- 49 OPP Part 2 submission, para. 157.
- 50 As quoted (with emphasis added) in J.L.I.J. Edwards *Ministerial Responsibility for National Security* (Ottawa: Supply and Services Canada, 1980), pp. 94-5.
- 51 Arar Commission report, p. 463.
- 52 Patten report, p. 33.
- 53 OPP Part 2 submission, para. 161.
- 54 *Ibid.*, para. 163.
- 55 McDonald Commission report, vol. 2, p. 1013 (emphasis in original).
- 56 Ministry of Community Safety and Correctional Services, *Roles and Relationships between the Minister, the Deputy Minister and the Ontario Provincial Police: A Summary*, undated slide presentation (on file with the Inquiry).
- 57 Roach, p. 65.
- 58 OPP Part 2 submission, para. 176.
- 59 Patten report, p. 32.
- 60 I prefer “ministerial policy responsibility” to “government policy responsibility” because it isolates the role of the responsible minister.
- 61 Edwards, *Ministerial Responsibility*, p. 97.
- 62 See generally Roach, pp. 46-62.
- 63 Canadian Civil Liberties Association submission, p. 4.
- 64 Stenning, p. 80.
- 65 René Marin, *Policing in Canada* (Aurora: Canada Law Book, 1997), p. 121. Section 6 of South Australia’s Police Act, 1998 No 55 of 1988 provides that the Commissioner is responsible for the control and management of the police “subject to this Act and any written directions of the Minister.” Section 7 provides that there shall be no ministerial directions in relation to internal matters of pay, discipline, hiring, and firing. Section 8 provides that a copy of any ministerial direction to the commissioner shall be published in the *Gazette* within eight days of the direction and laid before Parliament within six sitting days.
- 66 Stenning, pp. 59-60.
- 67 J.L.I.J. Edwards: *Nova Scotia. Royal Commission on the Donald Marshall, Jr., Prosecution, Volume 5: Walking the Tightrope of Justice - An Examination of the Office of Attorney General: A Series of Opinion Papers* (Halifax: Queen’s Printer, 1989).

- 68 Nova Scotia. Royal Commission on the Donald Marshall, Jr. Prosecution, Report of the Royal Commission on the Donald Marshall, Jr., Prosecution (Halifax: Queen's Printer, 1989), pp. 229-230.
- 69 Section 6 (c) of the Public Prosecutions Act provides for consultations that do not bind the Director of Public Prosecutions (DPP) and s. 6a, added in 1999, provides that the Attorney General and the DPP shall "discuss policy matters, including existing and contemplated major prosecutions" at monthly meetings. See Edwards, *Walking the Tightrope of Justice*, p. 189. I note that there are no informal consultation provisions in the new federal Director of Public Prosecutions Act.
- 70 Director of Public Prosecutions Act s. 10-12 in Bill C-2 as passed by House of Commons.
- 71 Arar Commission report, p. 329.
- 72 *Ibid.*, p. 330
- 73 See generally OPP Part 2 submission, paras. 191-8.
- 74 Roach, pp. 38-9.
- 75 Canadian Civil Liberties Association submission, p. 6.
- 76 OPP Part 2 submission, para. 183.
- 77 OPP Part 2 submission, p. 88.

