CHAPTER FOUR

Some Implications of the Modern Legal Status of the Police

In this Chapter we shall examine some of the implications of the legal status of the police that relate to their external and internal accountability. Specifically, we shall consider the implications of their legal status for: (1) the external control and governance of the police; (2) the liability of the police and their governing authorities for police wrongdoing; and (3) the relationship between the head of a police force and the other members of the force. Central to the modern debate concerning these important issues, however, is a concept that has been described by one authority on the subject as "a novel and surprising thesis, which is sometimes now to be heard intoned as if it were a thing of antiquity with its roots alongside Magna Carta" (Marshall, 1965: 33). The concept to which Marshall referred is that of the "independence of the police", and it is one that, as we shall see, has permeated judicial thinking about the status of the police in Canada for over one hundred years. It is in the context of this concept, therefore, that the three aspects of the accountability of the police will be considered.

A. The Concept of Police Independence

> The Chief Constable is accountable to the Board for the overall policy of the force and the level and quality of service provided to the community. It is important to stress, however, that day-to-day professional policing decisions are matters that are reserved to the force itself. The authority of the individual constable to investigate crime, to arrest suspects and to lay informations before a justice of the peace comes from the common law and the *Criminal Code* and must not be interfered with by any political or administrative person or body. Overall policies, objectives and goals, however are matters that properly belong to civilian authority and police boards have the duty to see that the force operates within established policy and has the right to hold the Chief Constable accountable for these matters. (British Columbia Police Commission, 1980: 13)

These words, quoted from a handbook prepared by the provincial Police Commission for the benefit of members of municipal police boards in British Columbia, represent a concise and accurate summary of the notion of police independence as it is commonly understood today. The notion, however, is one whose roots can be traced in judicial utterances in Canada for over one hundred years. It has been the subject of judicial, academic and political debate in this and other common-law countries for most of this century. It is only recently, however, that its content and implications have been thoroughly examined, rather than simply pronounced. Legal commentators in England (Marshall, 1960, 1965, 1973 and 1978; Gillance and Khan, 1975; Plehwe, 1974; Keith-Lucas, 1960; Chester, 1960), Australia (Milte and Weber, 1977; Waller, 1980; Haag, 1980; Plehwe, 1973; Wettenhall, 1977; Whitrod, 1976), Scotland (Mitchell, 1962), New Zealand (Cull, 1975) and, to a lesser extent, the United States of America (Robinson, 1975; Goldstein, 1977) have considered the concept of police independence as it applies to those countries. Royal Commissions in England and Australia (United Kingdom, Royal Commission ... 1928, 1962 and 1981a and b; South Australia, Royal Commission ... 1971 and 1978) have deliberated on the subject and generally endorsed it. The application of the concept of police independence in Canada, however, has not been the subject of much systematic inquiry, although it has not been totally neglected either by academic writers (e.g., McDougall 1971a and b; Tardif, 1974; Sharman, 1977; Edwards, 1970 and 1980; Ouellette, 1978; Grosman, 1975; Gregory, 1979) or by official bodies (e.g., Saskatchewan Police Commission, 1981; Ontario, Royal Commission ... 1977; Ontario, Waterloo Region Review Commission, 1978 and 1979; Ontario Police Commission, 1981; Alberta, Law Enforcement Division ... 1981).

The judicial exposition of the notion of police independence in Canada has been particularly influenced by two English cases and one Australian case. As developed in Canadian jurisprudence, however, the concept finds its roots in decisions of the American courts during the mid-nineteenth century relating to actions for damages against municipal corporations for the wrongful acts of municipal police officers. The first reported case of this kind in English Canada appears to be that of *Wishart* v. *City of Brandon* (1887), 4 Man. R. 453 (Q.B.). In that case, the plaintiff sued the defendant corporation for assault and false imprisonment by a member of the city's police force. The arrest that gave rise to the suit was purportedly made pursuant to a city by-law, but its unlawfulness was agreed upon by the parties. The question that had to be decided, therefore, was whether the city could be held vicariously liable for the wrongful act of one of its police officers. In order for the city to be found liable, the court had to find that the police officer was the "servant or agent" of the city, in the technical sense in which those terms are used in the law relating to vicarious liability.

Taylor J. held that the city was not liable for the acts of the police officer in this case. At the outset of his reasons for judgment, he commented that "(n)o case can be found in England or in Ontario in which such an action as the

present has been brought against a municipal corporation" (p. 455). He also noted, however, that "(t)he question raised in this case has frequently come before the courts of the United States, and there the weight of authority is in favour of the non liability of the corporation" (p. 456). He added that:

> The reason given for holding the corporation not liable is, that though a constable may be appointed by the corporation, yet in discharging his duty he is acting not in the interest of the corporation, but of the public at large. (p. 457)

In support of this proposition, the judge cited the following words of Chief Justice Bigelow in *Hafford* v. *City of New Bedford* (1860), 82 Mass. (16 Gray) 297:

> Where a municipal corporation elects or appoints an officer, in obedience to an act of the legislature, to perform a public service, in which the city or town has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community, such officer cannot be regarded as a servant or agent, for whose negligence or want of skill in the performance of his duties a town or city can be held liable. (p. 302)

He also cited the following comments made in *Maxmilian* v. *City of New York* (1875), 62 N.Y. 160, to the effect that where duties are imposed on a municipal corporation "as one of the political divisions of the State" and are "conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens",

> (t)hey are generally to be performed by officers who, though deriving their appointment from the corporation itself, through the nomination of some of its executive agents, by a power devolved thereon as a convenient mode of exercising a function of government, are yet the officers, and hence the servants of the public at large. They have powers and perform duties for the benefit of all the citizens, and are not under the control of the municipality which has no benefit in its corporate capacity from the performance thereof. They are not then the agents or servants of the municipal corporation, but are public officers, agents or servants of the public at large, and the corporation is not responsible for their acts or omissions. (p. 457)

The plaintiff in the *Wishart* case had argued that the principle laid down in the *Maxmilian* case could not apply to the situation in the City of Brandon, because the judge in the *Maxmilian* case had emphasized that the officers there "are not under the control of the municipality", whereas in Brandon the city "has entire control over them" and that "therein lay the difference as to liability". In response to this argument, Taylor J. held that "it is not the absence of control over such a force which relieves a corporation from liability, nor does the having such control render it liable" (p. 458). The essential reason for the non-liability of the corporation, he emphasized, was that the duties constables performed do not "relate to the exercise of corporate powers" and are not "for the peculiar benefit of the corporation in its local or special interest", but are for the general public welfare.

The plaintiff had also sought to distinguish the American cases on the ground that in the *Wishart* case the arrest had purportedly been made pursuant to a city by-law, which was of a purely local nature. Taylor J. also rejected this argument, citing the following remarks by Bigelow C.J. in yet another American case, *Buttrick* v. *City of Lowell* (1861), 83 Mass (1 Allen) 172:

> The authority to enact by-laws is delegated to the city by the sovereign power, and the exercise of the authority gives to such enactments the same force and effect as if they had been passed directly by the legislature. They are public laws of a local and limited operation, designed to secure good order, and to provide for the welfare and comfort of the inhabitants. In their enforcement therefore, police officers act in their public capacity, and not as the agents or servants of the city. (p. 459)

A number of important points need to be made about this decision in the *Wishart* case. First, it should be noted that the principle according to which the case was decided was not one which was alleged to apply especially to constables or police officers. Rather, it was a general principle of municipal non-liability which applied to all municipal employees who performed statutory duties which were not for the "peculiar benefit of the corporation in its local or special interest". Indeed, the two cases on which Taylor J. relied most heavily for his reasons for judgment (*Hafford* v. *City of New Bedford* and *Maxmilian* v. *City of New York*) involved torts committed by members of a city fire department and of an ambulance service respectively, and not police officers. Secondly, and because of this first aspect of the case, there was no suggestion made in the case that the non-liability of the corporation had any particular connection with the traditional common-law status of constables. In fact, the historical status of constables was not referred to at all in the reasons for judgment. And thirdly, there was no suggestion in the case that the decision as to vicarious liability of the corporation for the acts of its constables had anything to do with the constitutional responsibility for controlling or governing them. In fact, on the contrary, Taylor J. specifically denied that the matter of constitutional responsibility for control of the force was a determining factor in deciding whether the municipal corporation should be held vicariously liable for the acts of its police officers. As will become clear, these three points are of considerable importance in assessing the subsequent jurisprudence on this subject in Canada.

A year after the *Wishart* case was decided, a similar case arose in Québec. In *Rousseau* v. *La Corporation de Lévis* (1888), 14 Q.L.R. 376, the Superior Court of Québec, citing virtually the same American cases and texts as Taylor J. in the *Wishart* case, held that the Corporation of Lévis was not liable for the wrongful arrest committed by two of its police officers. During the course of delivering the judgment of the court, however, Casault J. cited nine cases in Québec in which municipal corporations had been held liable for the wrongful acts of their police officers, and distinguished them on the ground that in each of these cases the actions of the constables had been adopted or justified by the corporations themselves, and were therefore to be

considered the acts of the corporations. Casault J. noted that in the case at bar, the Corporation had not adopted the acts of the two police officers as its own acts, and that they had in fact acted contrary not only to the orders of their Chief of Police, but also to the town's police regulations. Two principles thus seem to have motivated the court in the *Rousseau* case: the principle adopted in the *Wishart* case, and the principle that the Corporation could not be held liable if it had not adopted the acts of the officers as its own acts. During the course of his judgment, however, the judge made some comments that are particularly relevant in tracing the origins of the notion of police independence.

Having noted that the charter of the town authorized the council to appoint, dismiss and replace constables and policemen, Casault J. commented on the fact that having said that these officers were "under the control of the mayor" (section 76), the statute added that they had "all the rights and privileges vested by law in constables and they shall be subject to all their responsibilities" (section 78). He then cited the duties prescribed for them by the statute, which included the duty to "arrest on view any person in the act of committing an infringement of the laws or by-laws in force of the said city" (section 81), and continued:

> [TRANSLATION]
> The duties of these constables, or policemen, are set forth and prescribed in the statute itself, and they are imposed upon them in the public interest. Under the statute the council is empowered only to provide for the appointment and removal of constables. The service for which they are appointed is public and the City of Lévis can have no special or private interest in it. This alone should make plain that these constables are neither the servants nor the agents of the council. *It has no authority to give them orders or instructions concerning the manner in which they fulfil their functions. They are employed under the authority of the Sovereign rather than by the council itself.* This higher authority has charged the council to appoint the constables to a function which serves the interests of the State rather than those of the council; it has, moreover, expressly defined their duties, even specifying their functions in some detail. (p. 378 — Emphasis added)

Although the emphasized comments do not seem to have been integral to the principles on which the court determined the *Rousseau* case, and must therefore be regarded as *obiter*, their inclusion is significant in tracing the origins of the modern notion of police independence. They directly associate a constitutional principle (concerning the right to control and give orders to the police) with a principle of the law of torts (concerning vicarious liability for torts committed by police officers). As we have noted, this association was expressly eschewed by Taylor J. in the *Wishart* case. In *Rousseau*, the court offered no authority or precedent for the constitutional principle that a municipality that employs a police officer cannot give him instructions or orders with respect to the manner in which he carries out his statutory duties. In this connection it is noteworthy that at the time this decision was rendered, the Québec *Municipal Code* (S.Q. 1870, 34 Vict., c. 68) contained the following provision:

1060. Any constable or police officer may, and must, if he is so required by the head or by any other member of the council, or by the council itself, apprehend or arrest at sight all persons found contravening the provisions of any municipal by-law punishable by fine, if it is so ordered by the by-law, and bring them before any justice of the peace to be dealt with according to law.

Despite this, the *Rousseau* decision clearly represents an important foundation for the modern concept of the constitutional independence of the police in Canada.

In 1895, a relevant case arose in Ontario. In *Kelly* v. *Barton, Kelly* v. *Archibald* (1895), 26 O.R. 608 (Ch. D.), the plaintiff sued the City of Toronto for damages for a wrongful arrest made by two of its police officers. There was evidence that the mayor, who was a member of the board of police commissioners, had stated that he had given instructions to the officers concerned "to stop all 'busses on the following Sunday, and that on these instructions the plaintiff and his family were arrested". The mayor had also asked the executive committee of the city council "to protect the police by having a lawyer authorized to defend the action", and the executive committee had accordingly ordered the city solicitor to defend the action on behalf of the officers. The court observed that:

> The plaintiffs must rest their claim upon ratification by the city of the alleged illegal act of the police officers, for these latter are not officers or agents of the corporation, but are independently appointed by the board of police commissioners, as an agency of good government, for the benefit of the municipality. (p. 623)

The court then stated its reasons for dismissing the action against the city in the following terms:

> These officers were acting in assumed vindication of the city by-laws, and it may be under the direction of the mayor who was also one of the board of police commissioners; but there is nothing to shew any adoption of the act of the officers by the city council, so as to fix the corporation with the consequences of that act. As the mayor directed and the officers acted, the executive committee may have been willing to undertake the expense of litigation (whether legitimately or not is not now under consideration), but something more is needed to shew ratification of the transaction as a whole. (*Ibid.*)

At no point in his judgment did the judge offer the slightest suggestion that the act of the mayor in issuing instructions to the police officers concerning the enforcement of the by-law in question could be considered in any way illegal or improper.

Six years later, another case arose in London, Ontario. In *Winterbottom* v. *Board of Commissioners of Police of the City of London* (1901), 1 O.L.R. 549 (Ch. D.), the plaintiff had been injured in an accident involving a police patrol wagon. She sued, not the city, but the statutory board of police commissioners, for damages. In a lengthy and instructive judgment, Robertson J. held that the defendants were not liable for the negligence of the driver

of the patrol wagon. Three factors in the case were singled out as justifying this decision, in a case that Robertson J., noted was "unique, so far as I can find, in England or Canada" (p. 556). First, he noted that

> although they, the policemen or constables, hold their office at the pleasure of the board, that does not, in my opinion, constitute them servants of the board of police commissioners: so that the doctrine of *respondeat superior* is not applicable. The policemen have a duty to perform as peace officers, and to exercise which, like any other constable, they are particularly appointed. (pp. 554-555)

In support of this proposition, he cited the *Wishart* case, and the American texts and cases cited therein. Robertson J. concluded on this point that:

> "The duties of policemen, like all other constables, are of a public nature," and their appointment by the board of commissioners is required by the Legislature as a convenient mode of exercising a function of government. (p. 558)

Robertson J.'s second point was that:

> Besides all this, the board is not their paymasters; the city provides the funds to pay them, over which the board has no control whatever. (p. 558)

As a result of this, he observed,

> . . . there are no funds out of which the police commissioners, who are appointed by statute, and who are compelled by law to perform the duties appertaining to their offices, just as a Judge is, can pay any damages or costs. (p. 560)

Finally, it was argued that since the board was not compelled by statute to establish a patrol-wagon system, but had done so voluntarily on their own initiative, they should be held liable for the negligence of those who operated the system. In support of this argument, the plaintiff cited the case of *Hesketh* v. *City of Toronto* (1898), 25 O.A.R. 449. In that case the city had been held liable for the negligence of firemen in the performance of their duties pursuant to a by-law of the city whereby the city had voluntarily (and not pursuant to any statutory duty) established a fire department. Robertson J. distinguished this case by pointing out that "(t)he creation of a fire department is wholly permissive — is not compulsory as is the creation of a police force" (p. 561). He concluded that "(t)he fact of the board having established a patrol waggon for the better carrying out of the duties of the policemen can make no difference" (p. 560). Throughout his judgment, Robertson J. made no comment about the right, or otherwise, of the board of police commissioners to control or govern the members of the police force.

A year later, in *McCleave* v. *City of Moncton* (1902), 32 S.C.R. 106, the Supreme Court of Canada held that the defendant city was not liable for an illegal search and seizure committed by one of its police officers. In an extremely short judgment delivered orally by the Chief Justice, the court relied on the decision of the Supreme Court of Massachusetts in *Buttrick* v. *City of Lowell* (as Taylor J. had done in the *Wishart* case), quoting verbatim almost the whole of the short judgment of Bigelow C.J. in that case. The Chief Justice also cited with approval however, the following passage from Dillon on *Municipal Corporations* (4th ed.):

> When it is sought to render a municipal corporation liable for the act of servants or agents, a cardinal inquiry is, whether they are the servants or agents of the corporation.... If ... they are elected or appointed by the corporation in obedience to a statute, to perform a public service, not peculiarly local, for the reason that this mode of selection has been deemed expedient by the legislature in the distribution of the powers of government, *if they are independent of the corporation as to the tenure of their office and as to the manner of discharging their duties*, they are not to be regarded as servants or agents of the corporation for whose acts or negligence it is impliedly liable, but as public or state officers with such powers and duties as the state confers upon them, and the doctrine of "*respondeat superior*" is not applicable. (p. 109 — Emphasis added)

The Chief Justice concluded his reasons for judgment in the *McCleave* case by stating that:

> I quite agree upon the question of fact with the court below that Belyea held his appointment from the corporation for the purpose of administering the general law of the land, and that the wrong complained of in this case was not committed by him while in the exercise of a duty of a corporate nature which was imposed upon him by the direction or authority of the corporation merely. (pp. 109-110)

He added that this decision, based on the English common law, could not be considered binding in any case arising in the province of Québec, where "such matters are governed wholly by the provisions of the Civil Code". Although the *Rousseau* case, in which Casault J. had justified his decision in terms of both the common law of England and the civil law of France, was cited in argument in *McCleave*, the Supreme Court of Canada obviously was not prepared to endorse Casault J.'s decision that such cases were properly governed by the common law, and not the civil law in Québec.

While the issue of control over the police force does not seem to have been a determining factor in the *McCleave* decision, the reference to Dillon's statement that a municipality will not be liable for the actions of its appointees "if they are independent of the corporation as to the tenure of their office and as to the manner of discharging their duties" raises the possibility that this was one of the issues considered by the court in rendering its decision, even though, as the *Wishart* case shows, such a decision could be reached without consideration of this issue. In this connection, it is worth noting the provisions of the *City of Moncton Incorporation Act* (S.N.B. 1890, 53 Vict., c. 60) respecting the police, which were in force at the time. Section 36 of the Act provided for the annual appointment of officers of the city (including policemen and constables) by the city council, and provided that the council also had power to

> remove or displace any of the said officers and appoint others in their stead, and to impose penalties for the non-performance of duties or the misdoings of such officers ... and to define their duties and their respective terms of office.

While it might be argued that constables appointed pursuant to this provision were "independent of the corporation ... as to the manner of discharging their duties", it could certainly not be said that they enjoyed such independence "as

to the tenure of their office". In the result, the precise relevance of the issue of control over the police to the decision of the Supreme Court in the *McCleave* case remains somewhat unclear.

The fact that the Supreme Court of Canada has pronounced on the issue of municipal liability for the torts of policemen does not seem to have put the matter to rest. Subsequently, there have been numerous cases reported, especially in Québec,[75] but also in Alberta,[76] Manitoba,[77] Ontario[78] and Saskatchewan,[79] in which the courts of those provinces, as well as the Supreme Court itself,[80] have been called upon to consider and apply the principles enunciated in these early cases. Cases arising in Québec extended the principle by holding that neither the provincial Attorney General nor the Crown in right of the province were liable for the torts of municipal police officers in the exercise of their public duties to enforce the law (see *Allain* v. *Procureur Général de la Province de Québec*, [1971] C.S. 407), or for the torts of members of the provincial police force acting in this capacity (*Fortin* v. *La Reine*, [1965] C.S. 168).[81] The Federal Court applied the same principle in *Schulze* v. *The Queen* (1974), 17 C.C.C. (2d) 241 (F.C., T.D.) to hold that municipal police officers could not be considered agents of the Crown in right of Canada for the purpose of rendering the latter liable for their negligence in the exercise of their public duties to enforce the criminal law, prevent crimes and apprehend offenders.

These cases seemed to establish beyond doubt that none of the three levels of government, nor a municipal police board or commission, are liable at common law for the torts that police officers commit while exercising their public duties as "peace officers", unless in some way they can be said to have adopted, or approved of, the conduct in question, either by prior authorization or subsequent ratification (see, in particular, *Fortin* v. *La Reine*, [1965] C.S. 168 at 176). Such authorization or ratification may be either expressed or implied from the conduct of the government concerned (see, in particular, *Cité de Montréal* v. *Plante* (1922), 34 B.R. 137 at 145 — subsequently approved by the Supreme Court of Canada in *Hébert* v. *Cité de Thetford-Mines*, [1932] S.C.R. 424 at 430). The basis for this non-liability is the status of a constable as a "peace officer" when performing his public duties with respect to the enforcement of the law and the preservation of the peace. When performing such duties, the constable acts not as the servant or agent of the municipality, board or government that appoints him, but as a public officer whose duties are owed to the public at large.

The whole of this line of jurisprudence, however, has been put in doubt by the decision of the Supreme Court of Canada in *Chartier* v. *Attorney General of Québec*, [1979] 2 S.C.R. 474. In this case, the provincial Attorney General was held liable for the torts committed by members of the Sûreté du Québec in the execution of their public duties. The court did not explain its

apparent departure from the principles of the earlier cases, perhaps because the province did not contest its liability on such grounds (see pp. 500-501 of the judgment).

None of these cases, however, determines the implications of the constitutional status of the police in terms of their liability to receive direction of any kind with respect to the performance of their duties. While most of these cases have little or nothing to say on this question, two of them are of particular interest in this regard. In *Bowles* v. *City of Winnipeg*, [1919] 1 W.W.R. 198 (Man. K.B.), the question of the independence of the police from control arose incidentally. In that case, the husband and father of the plaintiffs had been killed in an accident involving an ambulance that had been operated by the board of commissioners of police for the city, and driven by one of the city's policemen. The defendants were the city, the board, and the individual members of the board. The court held that the driver of the ambulance (named Fogg) was not the servant of the city because he was "not employed by the city, neither was he bound to obey any orders emanating from the city, nor had it any power to discharge him" (p. 205). Turning to the question of the liability of the board, however, Mathers C.J.K.B. noted that "(t)he city's police force must be appointed, managed and controlled by commissioners of police" (p. 208). Nevertheless, he held that the driving of the ambulance by Fogg was an act performed by him in the execution of his public duty as a police officer, and was not an act performed for special benefit of the board; for this reason, the board could not be held liable (pp. 213-214). He also noted, however, that Fogg had claimed to be driving the ambulance in conformity with general orders relating to the use of patrol and ambulance vehicles "issued by the chief of police upon his own responsibility". Mathers C.J.K.B. held that, at the time of the accident, Fogg was "acting pursuant to the orders of the chief of police" and was "under the immediate control of a sergeant of police who occupied a seat beside him and to whose orders he was bound to conform" (p. 215). He noted that under the provisions of the *Winnipeg Charter* constables of the police force were required to "obey all lawful directions, and to be subject to the government of the Chief of Police" (S.M. 1902, c. 77, s. 866). He also remarked upon the fact that "(t)here is no evidence that [the orders of the Chief of Police] were ever laid before the board or that the board was aware of their existence" (p. 215). For this reason, the board could not be said to have adopted the chief's orders, thereby incurring liability for Fogg's tort.

The fact that the court found that Fogg, in driving the police ambulance, was "discharging his public duty as a policeman" (p. 214), and that he was "acting pursuant to the orders of the chief of police" and was "bound to conform" to the orders of the police sergeant sitting next to him, is revealing in that it clearly indicates that the court recognized that a constable could be subject to orders in the performance of his public duties as a policeman. The orders of the chief of police involved in this case contained instructions to the effect that in emergency situations police vehicles could be driven in excess of

the speed limit, and for this reason they were said by the court to be beyond the Chief's authority. But the court seemed to be in no doubt that orders by the Chief that did not contain such instructions to break the law would not have been beyond the Chief's authority, and that the orders could legitimately be concerned with the manner in which constables should exercise their public duties as policemen. The case thus seems to suggest that where constables are required by statute to "obey all lawful directions, and be subject to the government of" a particular person or body, such directions will only be considered unlawful if they specifically involve instructions to break the law. It also suggests that such directions may lawfully encompass the manner in which constables shall perform their public duties as policemen. In *Buttrick* v. *City of Lowell*, which was cited with approval in almost all of these early cases on vicarious liability for police wrongdoing, such public duties were said by Chief Justice Bigelow to include "the detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers ... are intrusted" (83 Mass. (1 Allen) 172 at 173-174).

The *Bowles* case, like the *Wishart* case, seems to suggest that the constitutional position of the police (in terms of their liability to receive and duty to obey orders, instructions and directions from others) is an issue not determined by the principles that govern whether or not anyone who may or may not give such orders can be held vicariously liable in damages for the torts of the police. As with all the other cases cited, however, the observations of the court on this matter in the *Bowles* case must be regarded as *obiter dicta*, since the court was not required to decide the constitutional position of the police, but only the question of vicarious liability of others for police misconduct.

In *Compagnie Tricot Somerset Inc.* v. *Corporation du Village de Plessisville*, [1957] B.R. 797, a company sued the municipality for damages resulting from the alleged failure of the municipal police force to take appropriate action to prevent illegal behaviour during a labour dispute involving the company and its workers. Striking workers had prevented company officers from entering the company factory, and the company had requested the municipality and [TRANSLATION] "the constables whom it had dispatched to the scene" (p. 798) to put an end to what the court described as "this obstruction to the exercise of its right of access" *(ibid.)*. The municipality, "apparently believing that it was not its role to intervene in this labour dispute, refused to give the order sought by the appellant and awaited by the constables" *(ibid.)*. The court, following earlier jurisprudence already discussed above, held that in preserving order and keeping the peace during such a dispute, the police were exercising public duties that were not owed to the municipality that appointed them, but were for the benefit of the public generally. Accordingly, the municipality could not be held liable for the police action (or inaction) in this case. As a result, the municipal corporation could also not be held liable for having abstained from giving them orders.

[TRANSLATION]
As for the municipal corporation, it cannot be held responsible for not having given the order to intervene against the workers, any more than could the Crown if, officers of the provincial Sûreté having arrived on the scene in the same circumstances, their immediate commanding officer, or the Attorney General, had not wished to give the order asked for by the appellant. (p. 800)

Such language hardly seems compatible with the proposition that any such order, given by the municipality or the Attorney General under such circumstances, would be unlawful. Indeed, one might expect that, had the court felt this to be the case, it would have had no hesitation in saying so. However, nowhere in the reasons for judgment did it even hint at such a proposition.

The cases dealing with vicarious liability for the actions of police officers that have had the most influence on the development of the concept of police independence, however, have not been Canadian, but English and Australian. In 1930, McCardie J. of the King's Bench Division in England decided, in *Fisher* v. *Oldham Corporation*, [1930] 2 K.B. 364, that a municipality could not be held vicariously liable for a false imprisonment committed by its constables. McCardie J. laid great emphasis on the extensive powers of the Home Secretary in England with respect to regulating police forces there as the "central police authority", and on various earlier English cases, (*Mackalley's Case* (1611), 77 E.R. 824 (K.B.); *Coomber* v. *Justices of the County of Berks* (1883), 9 App. Cas. 61 (H.L.); *Stanbury* v. *Exeter Corporation*, [1905] 2 K.B. 838), the Canadian case of *McCleave* v. *City of Moncton* (1902), 32 S.C.R. 106, and the American case of *Buttrick* v. *City of Lowell* (see above p. 104). He relied upon these cases to support the proposition that for the purposes of vicarious responsibility, in performing the "duties of his office" a constable was not properly to be regarded as the servant or agent of the municipality that appointed him. He also, however, cited the following passage from the Australian case of *Enever* v. *The King* (1906), 3 C.L.R. 969 (Aust. H.C.), a judgment that McCardie J. described as "most weighty and most instructive":

Now, the powers of a constable, *quâ* peace officer, whether conferred by common or statute law, are exercised by him by virtue of his office, and cannot be exercised on the responsibility of any person but himself. ... A constable, therefore, when acting as a peace officer, is not exercising a delegated authority, but an original authority, and the general law of agency has no application. (p. 372)

After citing these cases, McCardie J. continued:

I may well take an illustration at this point. Suppose that a police officer arrested a man for a serious felony? Suppose, too, that the watch committee of the borough at once passed a resolution directing that the felon should be released? Of what value would such a resolution be? Not only would it be the plain duty of the police officer to disregard the resolution, but it would also be the duty of the chief constable to consider whether an information should not at once be laid against the members of the watch committee for a conspiracy to obstruct the course of criminal justice. (pp. 372-373)

McCardie J. concluded his judgment in *Fisher* v. *Oldham Corporation* with the following observation:

> If the local authorities are to be liable in such a case as this for the acts of the police with respect to felons and misdemeanours, then it would indeed be a serious matter and it would entitle them to demand that they ought to secure a full measure of control over the arrest and prosecution of all offenders. To give any such control would, in my view, involve a grave and most dangerous constitutional change. (pp. 377-378)

This conclusion has been criticized by commentators on two grounds. In the first place, it is argued that the kind of control to which McCardie J. referred is not a pre-condition to a finding of vicarious liability (see e.g., Atiyah, 1967: 75-78), and it does not therefore follow that, if vicarious liability is found to exist, such control must also necessarily exist. Second, it has been pointed out that plenty of evidence exists that such control was in fact frequently exercised by watch committees in England during the nineteenth and early twentieth centuries (see e.g., Nott-Bower, 1926: especially Chapter X; Parris, 1961: 251; Critchley, 1978: 131-133; and *Andrews* v. *Nott Bower*, [1895] 1 Q.B. 888 (C.A.)). To speak of giving such control as a "grave and most dangerous constitutional change", therefore, hardly seems justified by the facts (Marshall, 1965: Chapter 3).

Fisher v. *Oldham Corporation* is generally regarded as the progenitor of the concept of police independence in England, despite the fact that McCardie's observations on the subject of control of the police were clearly *obiter dicta*. The case is not, of course, binding on Canadian courts, which have on at least one occasion rejected the connection that McCardie J. sought to draw between the question of vicarious responsibility of municipalities for police misconduct on the one hand, and the issue of the control of the police on the other. There can be no question, however, that *Fisher* v. *Oldham Corporation* has had great influence on Canadian thinking about the constitutional status of the police. It has been cited with approval on several occasions by Canadian courts,[82] although not for the proposition for which it has become famous, and not, apparently, by the Supreme Court of Canada.

Even more influential on Canadian courts has been the decision of the Judicial Committee of the Privy Council in *Attorney General for New South Wales* v. *Perpetual Trustee Co. (LD.)*, [1955] A.C. 457 (P.C.). This was an action in which the tables were turned, so to speak. The government of New South Wales was attempting to obtain damages for the loss of services of one of its police officers, who had been injured in a collision between a motor vehicle and the tramcar in which he was travelling. In order to succeed, the government had to persuade the court that the police officer was its servant. The Judicial Committee rejected this contention and dismissed the suit. During the course of the reasons for judgment, Viscount Simonds made the following oft-quoted observation:

> . . . there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State which he is said to serve. The constable falls within the latter category. His authority is original, not delegated, and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory rights independently of contract. The essential difference is recognized in the fact that his relationship to the Government is not in ordinary parlance described as that of servant and master. (pp. 489-490)

This passage has frequently been cited with approval by Canadian courts including the Supreme Court of Canada.[83] Although this case had nothing to do with the question of the right of police-governing authorities to direct the members of their police forces, the passage just quoted has been cited subsequently to justify the proposition that such right is limited. As Marshall (1965: 44-45) has pointed out, however, such a conclusion cannot reasonably be deduced from the case. He notes that:

> The Privy Council did not dissent from the view expressed by the High Court of Australia that for the purposes of this particular action the service relationship of a constable was not in principle distinguishable from that of a soldier.

He also points out that according to the same principle as that advanced in *Attorney General for New South Wales* v. *Perpetual Trustee Co. (LD.)*, civil servants have also been held not to be "servants" for the purposes of an action for loss of services (*Inland Revenue Commissioners* v. *Hambrook*, [1956] 2 Q.B. 641 (C.A.)). Marshall concludes:

> One may conclude that the New South Wales case, though often quoted in works on police, is of no more relevance to them in the constitutional context than it is to the constitutional position of soldiers or civil servants. No one would think of inferring in the latter cases any general autonomy of action from the absence of a "service" relationship of the kind in question in the New South Wales case. Indeed it was part of the successful argument against the Crown in that case that persons who were not "servants" in the sense under dispute could be subject to the strictest discipline and orders. (1965: 45)

Such reasoning, however, did not dissuade Lord Denning M.R., three years after these words were written, from combining the dicta of *Fisher* v. *Oldham Corporation* and *Attorney General for New South Wales* v. *Perpetual Trustee Co:(LD.)* to form the "authority" for what is undoubtedly the most unambiguous judicial assertion of the concept of the constitutional independence of the police yet to be pronounced.

In *R.* v. *Metropolitan Police Commissioner, Ex parte Blackburn*, [1968] 1 All E.R. 763 (C.A.), a member of the British Parliament took action in the courts, seeking an order of mandamus requiring the Commissioner of the Metropolitan Police Force to enforce the gaming laws. The Commissioner had issued confidential instructions to senior officers of the force, underlying which was a policy decision not to take proceedings against clubs for breach of the gaming laws unless there were complaints of cheating or they had become the haunts of criminals. Blackburn sought mandamus to have this policy decision reversed. During the course of the hearing the Commissioner gave an

undertaking that the confidential instruction would be revoked. Despite this undertaking, and despite the fact that it had serious reservations as to whether mandamus was available in such a case and whether Blackburn had standing to bring such an action, the English Court of Appeal issued lengthy reasons for judgment, during the course of which Lord Denning M.R. made the following, now famous remarks:

> The office of Commissioner of Police within the metropolis dates back to 1829 when Sir Robert Peel introduced his disciplined Force. The commissioner was a justice of the peace specially appointed to administer the police force in the metropolis. His constitutional status has never been defined either by statute or by the courts. It was considered by the Royal Commission on the Police in their report in 1962 (Cmnd. 1728). I have no hesitation, however, in holding that, like every constable in the land, he should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act 1964 the Secretary of State can call on him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their 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. That appears sufficiently from *Fisher* v. *Oldham Corpn.*, the Privy Council case of *A.-G. for New South Wales* v. *Perpetual Trustee Co. (Ltd.)*.
>
> Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner of Police, or the chief constable, as the case may be, to decide in any particular case whether enquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter. He can also make policy decisions and give effect to them, as, for instance, was often done when prosecutions were not brought for attempted suicide; but there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere. Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than £100 in value. I should have thought that the court could countermand it. He would be failing in his duty to enforce the law. (p. 769)

The fact that these observations were all *obiter dicta* has not detracted one bit from their impact; as we shall see below, they have received a mixed reception from Canadian courts. They did, however, receive the support of one of his two fellow judges in the case (Salmon L.J.) who asserted that: "Constitutionally it is clearly impermissible for the Home Secretary to issue any order to the police in respect of law enforcement" (p. 771).

The imprecision and apparent ambiguity of Lord Denning's remarks in the *Blackburn* case leave considerable room for doubt as to the extent to which he felt that chief officers of police are constitutionally immune from

political direction with respect to their law enforcement responsibilities. Although certain of his remarks may seem to suggest that a chief of police has exclusive jurisdiction over all matters concerning the enforcement of the law, it is noteworthy that the examples that Lord Denning gave of matters on which a chief constable is not subject to direction from a minister or a police authority all relate to decisions in respect of particular cases. This leaves open the possibility that he did not intend to suggest that general directions as to law enforcement policy (e.g., as to the acceptability of particular methods or techniques such as wire-tapping or entrapment) would be similarly improper if issued by a minister or a governing authority (Marshall, 1978). If Lord Denning's remarks leave some doubts as to the extent of the autonomy of chief constables vis-à-vis their police authorities, however, they leave little doubt as to the ultimate subordination of constables and other members of police forces to the direction and orders of their chief constables in matters of law enforcement. The authority upon which Lord Denning rested his propositions on both these aspects of the legal status of the police with respect to law enforcement, nevertheless remains unclear.

The statement of Viscount Simonds in the *New South Wales* case to the effect that a constable's authority is "original, not delegated, and is exercised at his own discretion by virtue of his office" — to which Lord Denning was presumably referring when he cited the *New South Wales* case in support of his observations in *Blackburn* — is of particular interest in the light of the history of the office of constable (discussed in Chapter One of this paper). Descriptions of the constable's authority as being "original" have a long and respectable history in the literature relating to the office. The suggestion, however, that the constable has *only* original authority, and that this necessarily implies that he is immune to supervision or instructions from others with respect to his duties as a peace officer, runs contrary to the entire history of the office. Bacon, it will be recalled, had spoken of constables as having "original" *and* "subordinate" power (1608: 751-753), while Lambard had distinguished first, between their "ancient and first office" and their "latter made office", and second, between their duty concerning the peace which was "by their own authority", and that which was "under the authority of others" (1583: 10-11). No one reading these early authors could possibly come away with the impression that in the performance of their duties as peace officers, constables were not subject to direction or instructions from others. The fact that they were entitled by the common law to do certain things "by their own authority" was quite clearly not in earlier times regarded as in any way incompatible with their position of subordination to the justices of the peace. Nor, it must be remembered, were these justices of the peace purely judicial officers; rather, they were the embodiment of local government and remained so until well into the nineteenth century. If the concept of police independence propounded by Lord Denning and others is to be justified, therefore, it must seek such justification elsewhere than in the history of the office of constable in English common law. If the original office of constable is put forward as the basis for such a concept, it must also be explained why the chief constable is

immune to instructions from others, but other constables under him are not immune to orders from him and from their superiors in the force. This last point, however, is one to which we shall return shortly. For the moment, our review of Canadian case-law on this subject must be completed.

As we have noted in Chapter Three, the decade of the 1940s in Canada marked the beginning of an era of great reform in Canadian police forces and in the legislation under which they were established. With this reform, the courts quickly found new aspects of the situation of the police, to which the principle that had been developed in the vicarious liability cases could be applied. The drive towards unionization and collective bargaining, which took on serious proportions during this period (McDougall, 1971b), gave rise to the first of these new applications of an old principle. Courts found themselves having to decide whether policemen were "employees" for the purposes of labour relations legislation. Beginning with *Bruton* v. *Regina City Policemen's Association, Local 155*, [1945] 3 D.L.R. 437 (Sask. C.A.), a line of cases developed in which the concept of police as "public officers exercising public duties" was applied usually to exclude police officers from the right to unionize and bargain collectively as "employees". All of the jurisprudence that had been developed in relation to the vicarious liability of municipalities and boards of commissioners — except, of course, the exception arising from prior authorization or subsequent ratification — was duly pressed into service in order to decide these cases, and such cases surfaced in several provinces.[84]

When legislation was enacted to overcome this problem by providing for collective bargaining structures (see Arthurs, 1971), further problems arose concerning the scope of such bargaining and to what extent, if any, it could be allowed to impinge on the police in the performance of their public duties. Again, the principles evolved in the vicarious liability cases were invoked to support the argument that the performance of public duties by the police could not be made the subject of collective bargaining under the rubric of "working conditions". Chiefs of police and their governing authorities, it was argued, were under a public duty to ensure that their forces were efficient and effective in order to be able to fulfil their public duties of law enforcement, preservation of the peace and prevention of crime. Collective agreements could not be allowed to interfere with the fulfilment of these responsibilities (see Downie and Jackson, 1980).[85] These labour relations cases, while they helped to define the relationship between the rank and file and police management, did not contribute much to the jurisprudence on the constitutional independence of the police. In some cases, however, useful references to the issue can be found.

In *R.* v. *Labour Relations Board (N.S.)*, [1951] 4 D.L.R. 227 (N.S. S.C.), the court had to decide whether members of the Dartmouth Police Force were "employees" for the purposes of the Nova Scotia *Trade Union Act*. In holding

that the police were not employees, the court referred to their status as peace officers and the incompatibility of this status with a normal employee-employer relationship. In the course of his reasons, however, Doull J. offered the following comments:

> While policemen are appointed by the town under the terms of the *Towns' Incorporation Act*, 1941 (N.S.), c. 3, they certainly are in some respects employees. They receive their pay from the town, they are required to do certain work within the town such as is not required by the duty of a peace officer to the King, for example, the duty of patrolling and of attending and reporting at the police office are duties which are placed upon them by reason of the fact that the town appoints them and pays them. I find some difficulty in saying that they are not employees in a certain sense.
>
> They are, however, employees of a different kind from the street foreman or the janitor. They have powers which arise from their appointment and not from any delegation of authority from the town. For example, they make arrests. They do not make such arrests as servants or employees of the town, for the town itself has no authority to arrest, and the power cannot come from any delegation, it comes from the Crown as part of the office of constable. (pp. 229-230)

In *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association* (1974), 5 O.R. (2d) 285 (Div. Ct.), the issue was whether the assignment of one or of two men to a patrol car was a "working condition" that was arbitrable as a term of a binding collective agreement between the members of the force and the police board. The board argued that if it were arbitrable, it would interfere with the board's ability to fulfil its statutory responsibility for the policing and maintenance of law and order in the municipality, as well as with the chief's ability to deploy the force's resources in the most effective way. In his reasons for judgment, Henry J. held that the issue was properly embraced within the term "working conditions". He observed:

> There is nothing in the Act that absolves a member of the force from the obligation to obey the lawful directions of the Board, or of his superior officer and there is nothing that absolves him of the duty, and a very solemn duty it is, that is cast upon him by s. 55 (of the Ontario *Police Act*). In this respect, as a peace officer, he has the independent status and the positive duty described by Lord Denning, M.R., in *R.* v. *Metropolitan Police Com'r., Ex. p. Blackburn*, [1968] 1 All E.R. 763.
>
> An order of the police chief or other superior officer does not become unlawful merely because a collective agreement is entered into or an arbitration award is made defining and prescribing certain conditions of work. An order is unlawful if it requires the constable to do an act that would be unlawful, such as to enter premises without a search warrant, to assault a citizen and the like. It would also be an unlawful order if it is clearly not within the authority of the person issuing it under the Regulations governing the force, or if it contravenes a specific Regulation made under proper authority. An order does not become unlawful by reason only that it is in breach of a provision in the collective agreement. When given such an order, the constable must obey it and if he considers the circumstances warrant it, his recourse is to take advantage of the grievance procedure and such other relief as the collective agreement prescribes. (p. 297-298)

The Ontario Court of Appeal, in dismissing an appeal by the board against the decision, endorsed these remarks. In his reasons for disposing of this appeal, Brooke J.A. cited the passage quoted above from Lord Denning's judgment in the *Blackburn* case. At the end of his reasons, however, he also made the following observation concerning the role of the board (which he refers to as a Commission) in a situation of emergency:

> Emergency may be either large or small, subtle or startling, and involve one or many and is perhaps the daily business of police upon which normal staffing, patrolling and equipping is predicated. But a change in circumstances falling short of what some might call emergency could well cause a prudent Commission to respond in the public interest by calling into play other police methods which involve the use and services of police officers, so for the purpose of maintaining law and order and policing the community the Commission must issue its command. ((1975), 8 O.R. (2d) 65 at 75 (C.A.))

Brooke J.A. did not explain how this view could be reconciled with Lord Denning's. When read together, the two passages seem to suggest that while a board may lawfully give general directions concerning the police methods and deployment strategy to be used (even in a specific situation), it may not lawfully direct which officer shall be posted where, which persons shall be kept under surveillance, charged, prosecuted, etc. The two statements, however, are not easily reconciled, and even the most conservative interpretation of Brooke J.A.'s remarks would be hard to reconcile with the British Columbia Police Commission's position that "day-to-day professional policing decisions are matters that are reserved to the force itself" (B.C. Police Commission, 1980: 13).

Brooke J.A. also quoted extensively from another case that had been something of a *cause célèbre* in its time and is probably the Canadian case most frequently cited by those who favour a broad policy of police independence. The case, *Re a Reference under the Constitutional Questions Act*, [1957] O.R. 28 (C.A.), was a landmark for chiefs of police in Ontario. It arose out of an attempt by the Town of Grimsby to dismiss its chief of police without a hearing. The Chief had been asked to resign because of friction between him and the town council over negotiations concerning the collective agreement for the force. He refused, and was subsequently charged by the council with allegations of misconduct. A hearing was held, in which the council convicted him of three of the twelve charges laid, cautioned him, and then reinstated him. Three months later they dismissed him without giving any reason.[86] Regulations under the Ontario *Police Act* at the time stipulated that a chief could not be dismissed except pursuant to procedures laid down in the regulations, which included a requirement for a formal hearing. The council argued, however, that the provisions of the *Municipal Act* (which included a section providing that all officers appointed by a municipal council were to hold office during its pleasure) and of the *Interpretation Act* (which provided that words authorizing the appointment of any public officer included the power to remove him), took precedence over the regulations under the *Police Act*. The matter was referred to the Court of Appeal by a reference requiring an answer to the question:

> Has a Municipal Council power to dismiss a Chief Constable or other police officer appointed by the Council, without a hearing as provided by The Police Act and the regulations made thereunder? (p. 29)

The court, in a unanimous judgment delivered by Laidlaw J.A., held that there was no such power. The court began its reasons by saying that:

> In considering the question referred to the Court, it is essential at the outset to obtain a clear understanding of the status of a member of a police force and his relation to the Municipal Council, Board of Commissioners of Police, or other authority by whom he is appointed to office. (p. 29)

The court reviewed the provisions of the Ontario *Police Act* respecting the responsibilities of councils and boards in governing their police forces. In all material respects these provisions were the same then as they are now, and as described in Chapter Three of this Paper. On the role of a board, the court said:

> It is quite true that a board is expressly empowered to make regulations "for the government of the police force, for preventing neglect or abuse, and for rendering it efficient in the discharge of its duties". (s. 14). And further, The Police Act expressly provides that "the members of the police force shall be subject to the government of the board and shall obey its lawful direction" (s. 15). But the regulations which the board may make are expressly limited in scope. The board cannot make regulations inconsistent with regulations made by the Lieutenant-Governor in Council, pursuant to s. 60 of the Act (s. 14).
>
> Again, while members of a police force must obey "the lawful direction" of the board, neither the board nor a municipality not having a board can lawfully give directions to any member of a police force prescribing the duties of his office. Those duties are set forth in s. 45 of the Act...
>
> Those duties are of a public nature and are not owing to the municipality or a board by which a police officer has been appointed. The manner in which the duties imposed by statute on a member of a police force are performed is a matter of public concern. Thus, the Attorney-General may, as a matter of administration of justice in the province, with or without a request from a council of a municipality, require an investigation and report to be made to him "upon the conduct of any chief constable, constable, police officer, special constable or by-law enforcement officer ... of any municipality" (s. 46). (pp. 30-31)

Laidlaw J.A. noted that under the *Police Act* every policeman in the province had authority to act as a constable throughout the province, and concluded that "the relation of master and servant does not exist in law as between a municipality or a board and a member of a [municipal] police force appointed under ... The Police Act" (p. 31). The "true position" of such an officer, he said, was that stated by Viscount Simonds in *Attorney General for New South Wales* v. *Perpetual Trustee Co. (LD.)*. He then quoted the passage from that case cited above (see p. 114). Laidlaw J.A. concluded that it was because of this special status of police officers that regulations having "universal application to all members of police forces in the province" were justified and should prevail over general provisions of the *Municipal Act* and the *Interpretation Act*.

The observations of the Ontario Court of Appeal in the *Reference under the Constitutional Questions Act* case are of considerable significance to an understanding of the implications of the legal status of the police in that province.[87] Its applicability to the police in other provinces is problematic. It will be recalled that Laidlaw J.A. had concluded that a police board in Ontario could not lawfully direct a member of its police force in "prescribing the duties of his office", because such duties were clearly set out in the provincial *Police Act* (see now s. 57). As we have noted in Chapter Three, however, such reasoning cannot easily be applied to the situations in other Canadian jurisdictions (e.g., British Columbia, Québec, Newfoundland, Nova Scotia, Prince Edward Island and Saskatchewan) where police legislation specifically gives municipal police governing authorities and others the authority to "prescribe the duties" of members of their forces. This serves merely to emphasize the difficulty of generalizing not only about the legal status of the police in Canada, but also about its implications.

The later case of *Re Copeland and Adamson* (1972), 7 C.C.C. (2d) 393 (Ont. H.C.), illustrates further the ambivalence of the Ontario courts on the issue of the extent to which a police board can lawfully direct the operations of its police force. In that case, writs of mandamus and prohibition were unsuccessfully sought against the Board of Police Commissioners and the Chief of Police of the Toronto police force in connection with a directive of the board to the effect that wire-tapping and electronic listening equipment was only to be used by members of the force "with the approval in each case of the Chief of Police and only when in his opinion there is reasonable and probable cause to believe that a criminal offence has been or is about to be committed" (p. 395). The applicant (a solicitor in private practice who had not been the object of such surveillance) had argued that such use of surveillance equipment would constitute a violation of the Ontario *Telephone Act*, and that the Board's order could not therefore be considered to be a "lawful direction" under section 17 of the *Police Act*. In dismissing the application, Grant J. of the Ontario High Court held that the divulgence by a member of the force of information obtained from such electronic surveillance, far from being prohibited by the *Telephone Act*, was in fact required by the Code of Offences which formed part of the regulations enacted under the *Police Act*. He held that such surveillance, under the conditions prescribed by the Board's directive, could not be considered unlawful at that time (the *Protection of Privacy Act*, S.C. 1973-74, c. 50, not yet having been enacted). As a result of this finding, he concluded that:

> Where the Board of Commissioners of Police have decided upon a course of action which has all appearances of following a careful consideration in each individual case before audio surveillance is authorized by the Chief of Police, it is not for this Court to interfere with its decision.[...] To do so would be to interfere with the judgment of the Board of Commissioners of Police as to the methods which it feels essential to meet the task of retaining law and order and suppressing crime and a direction as to how it should carry out its statutory duty under the *Police Act*. (pp. 406-407)

Grant J. quoted extensively from the judgment of Lord Denning in the *Blackburn* case in support of his conclusion that the applicant did not have legal standing to challenge the Board's directive. Only the Attorney General could bring such proceedings, he concluded, and even he could do so "only in very exceptional circumstances" (p. 405).

The decision in *Re Copeland and Adamson*, despite its reliance on the *Blackburn* case, seems to provide authority for the proposition that a police board in Ontario can lawfully direct the members of its police force concerning methods to be employed in performing their law enforcement duties. This may not amount to "prescribing their duties", which Laidlaw J.A., in the *Reference under the Constitutional Questions Act* case, said that a police board could not lawfully do. But it clearly does involve prescribing the manner in which their duties are to be carried out. To this extent at least, the case seems to contemplate authority in the police board to control the members of its police force in the exercise of their duties as peace officers, and provides an illustration of the meaning of the assertion that while "day-to-day professional policing decisions are matters that are reserved to the force itself ... overall policies, objectives and goals are matters that properly belong to civilian authority" (B.C. Police Commission, 1980: 13). The case also seems to make it clear that in Ontario, members of a police force are recognized by the courts as being subject to the orders of their Chief of Police in the performance of their day-to-day duties as peace officers.

Although infrequently referred to, the concept of police independence propounded by Denning M.R. in the *Blackburn* case has thus received qualified approval in the Ontario courts. In the Québec courts, however, it has recently been soundly rejected. The case of *Bisaillon* v. *Keable and Attorney General of Quebec* (1980), 17 C.R. (3d) 193 (Qué. C.A.), involved an application by a member of the Police Department of the Montréal Urban Community for the equivalent of an injunction to restrain a provincial inquiry from divulging the names of police informants and their "handlers" in the police force, and to prevent it from further inquiring into the methods by which the force recruited such informants. The applicant put forward many grounds why such a remedy should be granted, only one of which is relevant here. This ground was described by the Québec Court of Appeal, which heard the applicant's appeal from the refusal of the Superior Court to grant the remedy sought, as follows:

> [TRANSLATION]
> The appellant submits that a peace officer, whose chief or director in a territory is independent from political power, should do his duty in accordance with the law and his awareness of the public interest as he sees it, subject only to the power of control and supervision of the superior courts.
>
> According to the appellant, the principle of confidentiality of sources of information is a principle of constitutional law or a principle of public order recognized and respected by all public organizations and by judicial and administrative tribunals throughout the country, by virtue of English public law. (p. 199)

Essentially, the appellant's claim was that responsibility for sources of police information was a police matter, which related to a policeman's public duties, and that neither the government nor a commission of inquiry established by it could lawfully inquire into or attempt to control it. In such matters, the police were answerable only to the law and the courts. In support of this proposition, the appellant cited the passages from the *New South Wales* case and the *Blackburn* case that are quoted above (see pp. 114-115). In rejecting this argument, Turgeon J.A. noted first that [TRANSLATION] "the general organization of the system of the administration of justice in the context of which the English police operate is fundamentally different from that of our system" (p. 202). In particular, he pointed out the absence of a Minister in England who has comparable powers and authority to those of the Minister of Justice in Québec, the absence of a prosecution service comparable to that in Québec, and the absence of a national police force or any police force similar to the Sûreté du Québec. "In this system", he noted,

> [TRANSLATION]
> English police officers enjoy a much greater autonomy with respect to the Crown than do our police officers. The majority of prosecutions are conducted by the police, the decision to prosecute is taken by local police forces acting under the control of the chief constable and the different police forces may apply diverse policies in this regard, at the discretion of the chief constable. (p. 203)

Concluding his brief review of the English system, Turgeon J.A. observed:

> [TRANSLATION]
> Several people maintain that this independence of the chief constable was the result of a historical accident, at least in the counties, consequent on the abandonment by the justices of the peace of the exercise of their power of control over constables. (p. 204)

He went on to state that [TRANSLATION] "(o)ur system for the administration of justice is quite different and the role and status of the police within this system is clear and well defined by legislative texts" *(ibid.)*. He noted that the Minister of Justice of the province of Québec, like his counterpart in the other provinces, [TRANSLATION] "has the supervision over all matters concerning the administration of justice" in the province (p. 205), including the administration and implementation of the laws relating to the police, and the duty to control and direct prosecutions. Referring to the Québec law respecting agents of the Attorney General, he went on:

> [TRANSLATION]
> From this it can be seen that in our system the Attorney General is responsible for prosecutions which must be launched with respect to the application of criminal laws. It is not the police who take this decision. These latter must submit the results of their investigations to the agent of the Attorney General who evaluates the evidence and decides whether or not to authorize charges against the offenders or to have the evidence submitted by the police completed further. (pp. 205-206)

Turgeon J.A. noted that the Attorney General in Québec [TRANSLATION] "possesses powers of direction over the Sûreté du Québec and of supervision over the application of all the laws governing the police, particularly with

respect to the Police Service of the Montréal Urban Community" (p. 206). From all this, he concluded:

> [TRANSLATION]
> One can see that the position of independence of a peace officer with respect to the executive power which the appellant claims by relying on English jurisprudence, has not been confirmed in our laws. (p. 206)

He noted, too, that the jurisprudence respecting civil liability also no longer supported the appellant's position, since the Supreme Court of Canada had decided that a peace officer of the Sûreté du Québec, acting in the execution of his functions, is a servant of the Crown and engages the latter's liability under the *Civil Code* (*Chartier* v. *Attorney General of Québec*, [1979] 2 S.C.R. 474). He concluded this part of his reasons by stating:

> [TRANSLATION]
> From a reading of these laws of Québec, I am of the opinion that the Director of the Police Service of the Montréal Urban Community is not an English "Chief Constable". (p. 207)

For these reasons, he held that in the absence of any objection on the part of the Attorney General, the provincial inquiry was entitled to receive testimony relating to the identity of informers. His comments on the status of the police in Québec were generally concurred in by Monet J.A. (p. 219) and L'Heureux-Dubé J.A. (p. 231) who sat with him on the case. At the time of writing, this case is on appeal to the Supreme Court of Canada.

Turgeon J.A.'s analysis, however, is open to serious criticism. In the first place, he gives insufficient emphasis to the extent to which the police in England are subject to the overriding authority of the Attorney General and the Director of Public Prosecutions, with their respective powers to stay and take over prosecutions (United Kingdom, Royal Commission ... 1981a: Ch. 5). In fairness, it must be acknowledged that the power of the Attorney General to stay proceedings in England is limited to cases prosecuted by indictment (which is not the case in Canada — see sections 508 and 732.1 of the *Criminal Code*), and in practice the intervention of the Director of Public Prosecutions in non-indictable cases is extremely rare (see United Kingdom, Royal Commission ... 1981a: Appendices 24-26). Secondly, his analysis ignores the fact that the case in which the independence of the police in England has been most forcefully declared (*Blackburn*) involved the Commissioner of the Metropolitan London Police, whose relationship to the Home Secretary ("from time to time directed by one of His Majesty's Principal Secretaries of State" — *London Metropolitan Police Act*, 1829 (U.K.), 10 Geo. IV, c. 44, s. 1) has historically been not very different legally from the relationship of the Sûreté du Québec to the Attorney General of the province ("under the authority of the Attorney-General" — *Police Act*, R.S.Q. 1977, c. P-13, s. 39). Evidently the English Court of Appeal did not feel that this relationship detracted from the principle of police independence as propounded in *Blackburn*. Thirdly, the authority of the *Bisaillon* case is considerably weakened by the fact that the court chose not to consider the admittedly

small amount of Canadian jurisprudence on the status of the police. While it is true that many of these cases have arisen in other provinces (notably Ontario) and involved *obiter dicta* rather than decisions bearing directly on the point under discussion in *Bisaillon*, it can hardly seriously be argued that the situation in Québec is legally so different from that in other provinces that such jurisprudence is not relevant at all, even by analogy, to Québec. The legal status of the police in Québec, is, after all, governed by the same public law as is the status of the police in other provinces (*Morantz* v. *City of Montréal*, [1949] C.S. 101 at 104). In choosing to ignore jurisprudence from other provinces on the question of the legal status of the police, the court in *Bisaillon* appears to have been following a long tradition of the Québec courts, as a review of earlier decisions of these courts on this subject clearly demonstrates.

It is ironic that the police force in respect of which the concept of police independence has been so flatly rejected by the courts is the Police Department of the Montréal Urban Community. The legislation governing this force, of all such legislation, gives the strongest cause to believe that the force was intended to have substantial autonomy. It is true, however, that the *Bisaillon* case says nothing about the relationship of the force to the Urban Community Council and the Public Security Council, and it is conceivable that had these local relationships been in question in the case, the judgment would have been very different. On this, however, one can only speculate. It does, however, raise the question as to whether there is any substantial justification for greater direct control over the police by provincial authorities than by municipal authorities.

It will be recalled that the appellant in *Bisaillon* argued that the responsibility of the police in matters of law enforcement should be to the courts and not to the political executive. It is perhaps worth noting in this connection that the same argument has been made by the Prime Minister of Canada, concerning the accountability of the R.C.M.P. In a press report on December 12, 1977, he was quoted as follows:

> On the criminal law side, the protections we have against abuse are not with the Government, they are with the courts. The police can go out and investigate crimes; they can investigate various actions which may be contrary to the criminal laws of this country without authorization from the minister and, indeed, without his knowledge.
>
> What protection do we have there that there won't be abuse by the police in that respect? We have the protection of the courts. If you want to break into somebody's house, you get a warrant. A court decides if you have reasonable and probable cause to do it. If you break in without a warrant, a citizen lays a charge and the police are found guilty.
>
> So, this is the control on the criminal side and, indeed, the ignorance to which you make some ironic reference, is a matter of law. The police don't tell their political superiors about routine criminal investigations.[88]

This position has been criticized by Edwards on the grounds that "the realities of the situation significantly diminish the theoretical controls by the courts and the citizenry to which the Prime Minister alluded" (1980: 96). Quite apart from the "realities of the situation", however, the available scant case-law on the subject makes it clear that the extent to which the courts will interfere to control police behaviour is very limited indeed. As Lord Denning M.R. pointed out in the *Blackburn* case, "(n)o court can or should give [a Chief of Police] direction" respecting professional police decisions; only in exceptional cases will the courts interfere with respect to policy decisions ([1968] 1 All E.R. 763 at 769). Subsequent unsuccessful attempts by Mr. Blackburn to persuade the courts to intervene in connection with policies propounded by the Commissioner of the Metropolitan London Police Force illustrate just how reluctant the courts tend to be in this regard (see *R.* v. *Metropolitan Police Commissioner, Ex parte Blackburn (No. 3)*, [1973] 1 All E.R. 324 (C.A.), and *R.* v. *Metropolitan Police Commissioner, Ex parte Blackburn, The Times*, Law Report, December 1st, 1979). The similar reluctance of the courts of Ontario to interfere in such matters has already been illustrated in the citations from the judgment of Grant J. in *Re Copeland and Adamson* (above, pp. 121-122). In *286880 Ontario Ltd.* v. *Parke* (1974), 6 O.R. (2d) 311 (H.C.), the applicant sought an interim injunction against the police to restrain them from what he alleged was continual harassment against it and its employees. In rejecting the application, Lerner J. held that:

> It is not the function of this Court to interfere by employment of the procedures of injunction in the performance of the work and duties of a municipal police....
>
> ... Interlocutory injunctions are an extraordinary procedure not to be lightly permitted except in exceptional circumstances. To exercise them in relation to policing duties would have this Court act in a supervising function by the instrument of injunction or a restraining order of police conduct. I do not consider that the function of this Court in these circumstances. (p. 318)

Clearly, under such an approach the courts can only be counted on to play a limited role in ensuring that the police perform their duties effectively and fairly, not to mention within the law. In no way can supervision by the courts be looked to as a substitute for effective democratic accountability of the police.

If the courts have had few occasions to make authoritative pronouncements on the implications of the legal status of the police for the relationship between police forces and their governing authorities, they have had fewer still in which to explore the legal relationship between a constable and his superior officers. The apparent anomaly of "equal but subordinate" that accompanied the introduction of the hierarchical structure of the "new police" of the nineteenth century, and still remains today, has already been noted in Chapter Two of this paper (at pp. 43-44 above). If anything, however, the emergence of the concept of police independence in the last one hundred years has simply compounded this anomaly. For if it is true that a constable has public duties as a peace officer that "cannot be exercised on the

responsibility of any person but himself" (*Enever* v. *The King* (1906), 3 C.L.R. 969 (Aust. H.C.) at 977), how can he be subject to the orders of his superior officers or his chief of police with respect to such matters? Does the authority of a chief of police to "direct and control" his police force include the authority to direct his officers with respect to the handling of particular investigations or prosecutions? Or would orders concerning such matters not be "lawful orders"? In practice these delicate questions have, not surprisingly, rarely come directly before the courts. In the *Blackburn* case, Lord Denning appears to have assumed that although a chief constable in England, "like every constable in the land", is "independent of the executive" with respect to his responsibility for enforcing the law, nevertheless the constables under his command are subject to his direction in such matters ([1968] 1 All E.R. 763 at 769 (C.A.)). Two more recent rulings of the English Divisional Court have addressed this issue obliquely.

In *Hawkins* v. *Bepey and Others*, [1980] 1 All E.R. 797 (Q.B.), a chief inspector who had preferred informations against the defendants died before an appeal against their dismissal could be heard. The defendants submitted that the chief inspector alone was the prosecutor in the case and, consequently, the appeal lapsed on his death. The Divisional Court rejected this argument. Citing the remarks of Lord Denning in the *Blackburn* case in support of his decision, Watkins J. noted that the chief constable pursuant to his statutory powers of "direction and control" over the police force, had issued instructions that "as a general rule ... all informations relative to proceedings in magistrates' courts shall be laid by the chief inspector or inspectors". No one, he observed, had suggested that such an instruction was "in any way improper", and in carrying out the instruction, the chief inspector in this case must be held to have been acting as the representative of the chief constable. The real prosecutor in the proceedings, in his view, was the chief constable or the police force itself. The case thus appears to lend very direct support to the view that a statutory power of "direction and control" over a police force includes a power to give directions and control as to when, and by which members of the force, criminal charges are to be laid.

In *R.* v. *Metropolitan Police Commissioner, Ex parte Blackburn* (*The Times*, Law Report, December 1st, 1979), the applicant was seeking an order of mandamus requiring the Commissioner to enforce the law against persons selling obscene publications. Among other arguments put forward in support of his application, Mr. Blackburn contended that the instruction that the Commissioner had issued with respect to the enforcement of such laws, which required all suspected cases to be referred by officers in the field to a centralized squad, had the effect of removing from constables the power of arrest in obscenity cases. The Queen's Bench Division (per Browne L.J.) dismissed this contention, saying:

> Apart altogether from the indisputable fact the commissioner had no authority to divest constables of their lawful powers of arrest and any attempt by him to do so would be of no avail, their Lordships were satisfied that the practical effect of the commissioner's instructions was not to remove their powers of arrest. (col. 4)

This ruling is not easily reconciled with the decision of the same court in the *Hawkins* case, except possibly on the ground that the power of arrest is one that is specifically recognized as belonging to a constable by virtue of his status as a peace officer, whereas his authority to lay an information is no different from that of any other private citizen. Although direct confrontation between a constable and his chief constable over the initiation of a prosecution has arisen in England (see "Constable May Face Discipline Proceedings after Private Prosecution of Tory M.P.", *Times*, July 6, 1974; Gillance and Khan, 1975), it has apparently never been resolved by the courts there.

Similar concerns have arisen in Canada, and in 1970 allegations that senior officers had been improperly intervening to withdraw charges laid by a constable of the Metropolitan Toronto Police Force were the subject of an inquiry held by the Board of Commissioners of Police of Metropolitan Toronto (Toronto, Board of Commissioners of Police, 1970). In its report on the inquiry, however, the Board specifically eschewed laying down any precise resolution of the proper relationship between a constable and his senior officers:

> The question of when, *by whom*, and under what circumstances, a decision not to prosecute is proper exercise of discretionary power, can never be satisfactorily defined in precise terms. Any attempt to lay down rules so that discretion could be exercised in a uniform manner does not seem to offer any hope that suspicions of its improper use would never arise in the future. Indeed, if some such rule was in existence, it could actually discourage the use of quite proper discretion under some circumstances. (p. 92 — Emphasis added)

Noting that such discretion had in fact been exercised by officers at various levels of the force (up to the level of deputy chief) in relation to the cases it had inquired into, the board concluded that:

> Criticizing a judgment must not be interpreted as a restriction on the ability of and the need at times for senior officers to use their judgment and their discretion. As long as it is exercised impartially, fairly, and with reason, it should not be discouraged. (*Ibid.*)

Not surprisingly, given the absence of judicial attention to such questions, the board did not cite a single authority in support of these conclusions. As a result, they remain legally uncertain (see e.g., "Police Quotas? Not Enough Tags a Ticket to the Boss's Office", Toronto *Globe and Mail*, December 13, 1980, p. 5). Most recently, however, the whole question of the relationship between a police officer and his senior officers has been brought directly before the Federal Court of Canada, and has been the subject of a preliminary ruling by that court.

In *Wool* v. *The Queen and Nixon* (Federal Court of Canada, Trial Division, Dubé J., June 8, 1981, not yet reported) a staff sergeant of the R.C.M.P. was seeking an interim injunction to restrain his commanding officer (in charge of an R.C.M.P. Division) from interfering with a criminal investigation which the staff-sergeant, in his capacity as co-ordinator for commercial crime

investigations in the Division, had been undertaking. The investigation involved allegations against the Premier and the Minister of Justice of the Yukon Territory. After the investigation had continued for a considerable time, involving the expenditure of substantial resources, and after legal advice had been obtained from R.C.M.P. headquarters, from the Assistant Deputy Attorney General of Canada and from a special prosecutor hired by the federal Attorney General, the commanding officer of the division had ordered the applicant to discontinue the investigation, had transferred him from a plain clothes to a uniform position, and had recommended his transfer from the Division. It was against these orders that the applicant sought the injunction. Wool contended that his commanding officer's order to discontinue the investigation was "not a lawful order in that it purports to limit his rights as a peace officer and a citizen under section 455 of the *Criminal Code*, and his duty under section 18 of the *Royal Canadian Mounted Police Act*" (p. 3). Section 455 of the *Criminal Code* provides that "(a)ny one who, on reasonable and probable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice . . .". Section 18 of the *R.C.M.P. Act* lists the duties of members of the force, including the "apprehension of criminals and offenders and others who may be lawfully taken into custody". The section, however, opens with the words: "It is the duty of members of the force who are peace officers, subject to the orders of the Commissioner, . . .". From this, the court, in dismissing the application, concluded that "whereas the plaintiff has a right to lay an information, that right is not absolute, but subject to the orders of the Commissioner" (p. 6). The court held that the commanding officer (Nixon) also had a duty to fulfil in relation to the investigation, and observed that:

> In my view, the duty of Nixon with reference to the investigation is towards the Crown, or the public at large. He owes no duty to the applicant, and the applicant has demonstrated no particular personal individual right, aside from whatever right he may hold as a member of the general public, to see that the administration of justice is properly carried out. A Commanding Officer is accountable to his superior and to the Crown, not to a staff-sergeant under him. He has the administrative discretion to decide what proportion of his resources will be deployed towards one particular investigation. Generally, the Court has no jurisdiction at the suit of a subject, or at the suit of a member of the force, to restrain the Crown, or its officers acting as servants, from discharging their proper discretionary functions. . . .
>
> . . . The view that the plaintiff, albeit a competent investigator, has been too long with the case and may have lost the proper perspective of it is a judgment call within the purview of the authority of a Commanding Officer (Vide *R.* v. *Commissioner of Police of the Metropolis, Ex parte Blackburn*). (pp. 6-7)

Observing that "(i)t is most certainly not for the Federal Court of Canada, upon an application of a non-commissioned officer, to order a Commanding Officer to proceed with the investigation of a case, merely because the former has reasonable and probable grounds to believe that an offence has been committed" (p. 8), the court concluded that "the plaintiff has no absolute right to continue the investigation without the orders of his superiors" (p. 9).

The decision in the *Wool* case is, to the author's knowledge, unique in squarely addressing these issues. Since it is only a preliminary ruling concerning a request for an interim injunction, the matter can be expected to occupy further judicial attention at trial, and possibly on appeal.

The difficulty of generalizing from Dubé J.'s decision in this case, of course, springs from his substantial reliance on the opening words of section 18 of the *R.C.M.P. Act*. As we have noted in Chapter Three of this paper, the legislation prescribing the duties of police constables in many jurisdictions in Canada does not specify that their duties are subject to the orders of superior officers. It remains a matter of speculation, therefore, as to whether the courts would necessarily reach the conclusions of the *Wool* case if they were interpreting provisions relating to the duty of police constables that were not qualified in this manner (see e.g., section 57 of the Ontario *Police Act*). The few relevant judicial *dicta* that can be gleaned from a review of Canadian case-law, however [see e.g., *Bowles* v. *City of Winnipeg*, [1919] 1 W.W.R. 198 (Man. K.B.) at 214-215; *Re Copeland and Adamson* (1972), 7 C.C.C. (2d) 393 (Ont. H.C.); and *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association* (1974), 5 O.R. (2d) 285 (Div. Ct.) at 297-298], would seem to suggest that they probably would.

B. Conclusions

By now, it will be apparent that he who ventures to generalize about the legal status of the police in Canada, and about its implications, does so at his peril. The police operate under a variety of statutes, which contain significantly different provisions respecting the status and accountability of the police. These statutory provisions, by themselves, leave many important questions unanswered. The courts have rarely had the opportunity to address these questions directly, let alone answer them. On those few occasions when the courts have suggested answers (almost always through *obiter dicta*), they have rarely agreed on them. Thus, while many police statutes provide that police governing authorities (be they Ministers or police Boards) may give "direction" to the police, the courts have not provided a clear answer as to what such terms comprehend. While we can say with confidence that the terms do not comprehend instructions or orders to break the law (*Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association* (1974), 5 O.R. (2d) 285 (Div. Ct.)) the courts have not provided clear answers as to whether, and to what extent, such directions may relate either to general or specific matters of law enforcement.

If we ask whether the police have an independent right to lay criminal charges or investigate criminal offences without interference, few clear answers are to be found. In some provinces (e.g., New Brunswick) this has been

made a matter of legislation, allowing the Minister of Justice to assume the direction of criminal investigations under certain circumstances (see *Police Act*, S.N.B. 1977, c. P-9.2, s. 6). In others, it has been the subject of court decisions [see e.g., *R.* v. *Edmunds* (1978), 16 Nfld. & P.E.I.R. 108 (Nfld. C.A.); *Edmunds* v. *R.* (1981), 121 D.L.R. (3d) 167], while in still others it has been left as the subject of express government policy (see e.g., Gregory, 1979), internal administrative regulation (e.g., paragraph E of Chapter 111.6 of the R.C.M.P. procedures manual), or of no express policy at all. As we have noted in this Chapter, the legal relationship between a constable and his superior officers with respect to the exercise of his duties as a peace officer is similarly unclear at the present time.

On the question of vicarious liability for wrongdoing by the police, the tortuous and confused state of the law as it has developed over the years has been described in this Chapter. In many jurisdictions, this problem has been cleared up by express legislative provisions,[89] but in others (Alberta, Nova Scotia, Prince Edward Island and Newfoundland) it has not. Generally, such provisions make either the municipality, the police Board, the chief of police or the head of a provincial police force vicariously liable, despite their common-law immunity. In Québec, the Attorney General is liable for the torts of members of the Sûreté du Québec and for municipal police officers acting in territories in which they are not employed by a municipality.

It must be emphasized that blame for the uncertainty of the law regarding the legal status of the police cannot be placed at the door of the courts. Development of a coherent jurisprudence reflecting consistent principles can only be achieved judicially when adequate opportunities for addressing the important questions arise. It cannot be said that such adequate opportunities have arisen in Canada. The modernization of policing legislation in Canada during the last thirty years has merely brought to the forefront the problems of building a jurisprudence suited to a modern police force on the foundations of an ancient office that bears little resemblance to its modern counterpart. In fashioning the law to meet such new circumstances, the judiciary can assist the legislators, but can never substitute for them.

To some, the relative infrequency with which these matters have come before the courts for decision may signify that all is essentially well. Such complacency can hardly be justified, however, and those who recommend it may do well to heed the words of Mr. Justice Krever who, after a long and systematic inquiry into abuses of the confidentiality of medical information by police and others in Ontario, observed in his report:

> In a democratic society, no police force, no matter how generally well respected, should be allowed to be a law unto itself. To rely solely upon a police force's integrity and self-discipline is to permit that force to become a law unto itself. (Ontario, Commission of Inquiry... 1980: Vol. II, p. 48)

Appendix

Summary of Provincial Statutory Limitations on Actions against Persons Performing Statutory Duties

Saskatchewan	**12 months (or longer at judge's discretion):** *Public Officers' Protection Act*, R.S.S. 1978, c. P-40, s. 2.
Manitoba	**2 years:** *Public Officers Act*, R.S.M. 1970, c. P230, s. 21.
Ontario	**6 months:** *Public Authorities Protection Act*, R.S.O. 1970, c. 374, s. 11, as amended by S.O. 1976, c. 19. See also *Public Officers Act*, R.S.O. 1970, c. 382, s. 12, re limitations on actions against sureties.
New Brunswick	**Complete immunity:** *Protection of Persons Acting under Statute Act*, R.S.N.B. 1973, c. P-20, s. 1.
Nova Scotia	**6 months:** *Constables' Protection Act*, R.S.N.S. 1967, c. 50, s. 4.
Newfoundland	**6 months, with 30 days' notice of action:** *Justice and Other Public Authorities (Protection) Act*, R.S.N. 1970, c. 189, s. 19.

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Endnotes

1. For a discussion of these, see Freedman and Stenning, 1977: Chapter 2.
2. E.g., *Reference re Alberta Statutes*, [1938] S.C.R. 100.
3. *Parish and Town Officers Act*, S.U.C. 1793, 33 Geo. III, c. 2.
4. See e.g., sections 22 and 57 of the *Toronto City Charter*, S.U.C. 1834, 4 Wm. IV, c. 23; sections 71, 74 and 99 of the *Municipal Corporations Act* (hereinafter referred to as the "Baldwin Act"), S.C. 1849, 12 Vict., c. 81.
5. For other examples of similar provisions, see e.g., section 182 of the *Vancouver City Incorporation Act, 1886*, S.B.C. 1886, 49 Vict., c. 32; section 2 of the *Police of Canada Act*, S.C. 1868, 31 Vict., c. 73; section 17 of the *Administration of Justice, North West Territories Act*, S.C. 1873, 36 Vict., c. 35.
6. The first such board was established by *An Act to Establish a Police in the Town of Brockville*, S.U.C. 1832, 2 Wm. IV, c. 17.
7. The *Municipal Corporations Act*, S.C. 1849, 12 Vict., c. 81, interestingly entitled an *Act to Provide, by One General Law, for the Erection of Municipal Corporations, and the Establishment of Regulations of Police, in and for the Several Counties, Cities, Towns, Townships and Villages in Upper Canada.*
8. For further discussion of the adoption of the word "police" in England, see Radzinowicz, 1956: Vol. III, pp. 1-8.
9. For a more elaborate discussion of the etymology of the term, see Burn, 1793: 394, where he traces the word back through a variety of continental languages, to ancient Latin and Greek roots.
10. A more detailed discussion of the origins of the concept of "peace" as the basis of early law and police will be found in Goebel, 1976: Chapter 1.
11. Max Weber wrote that the essential characteristic of the modern state is its monopoly on the legitimate use of physical force within a given territory: Garth and Wright Mills, 1958: 78.
12. The famous tales of Robin Hood and the Sheriff of Nottingham are, of course, but one well-known example of such struggles.
13. "[A] common Barrettor is he, who is either a common mover or stirrer up (or maintainer) of suits in Law, in any court; or else of quarrels in the country." (Dalton, 1619: 31)
14. Price's *The Wigginton Constables' Book 1691-1836* is one of the most vivid accounts in the literature of the nature and transformation of the office of constable in a rural community during this period.
15. "[I]n some shires, where every third borrow hath a Constable, there the officers of the other two be called Thirdboroes." (Lambard, 1583: 8)
16. As has been pointed out above, the available evidence suggests that the term "constable" was in fact applied to such local officers about one hundred years before the date mentioned by Lambard here; see Simpson, 1895: 630.

17. Lambard added that: "In which doing, if any such officer, or other person coming on his part, do take hurt, he shall have good remedy by action against him that did the hurt: but if any of them that made the Affray, be hurt by such officer, or by any of his company, then such hurt person hath no remedy at all for it" (1583: 15-16).

18. Under this heading, Bacon listed the powers to arrest, to make hue and cry, to search and to seize goods (1608: 752).

19. See footnote 16, above.

20. With respect to this last comment, it seems that Simpson (and Hawkins, on whom he relied) were quite simply in error. See e.g., Hale, 1778: 89-90; and Lambard, 1583: 17-18.

21. For a brief and readable summary, see Kelly and Kelly, 1976: Chapter 1.

22. Preserved by *The Quebec Act, 1774* (U.K.), 14 Geo. III, c. 83. See *Rousseau* v. *La Corporation de Lévis* (1888), 14 Q.L.R. 376 (Qué. S.C.).

23. In some provinces, special legislation was enacted to authorize this: see e.g., Ontario's *Dominion Commissioners of Police Act*, S.O. 1910, c. 38.

24. The Royal Irish Constabulary, on which our own North West Mounted Police Force was initially modelled in 1873, was not, however, actually established until 1836.

25. The name was changed in 1904.

26. For a contemporary description of this system, see Ontario Legislative Assembly, *Sessional Paper* No. 91, 1884. For sample fee schedules, see Keele (1851: 187-188), Wilson (1859: 67-68) and Jones (1882: 99-105).

27. The *Dominion Police Act*, R.S.C. 1906, c. 92, however, was never repealed and thus remains on the statute book to this day: see *Dominion Police Act*, R.S.C. 1927, Vol. V, p. 4308.

28. Minutes of Toronto City Council, March 11, 1835: Toronto City Archives.

29. For a history of the development and modern role of such boards in Canada, see Stenning, 1981a and 1981c.

30. Section 352 of the Act provided that: "A recorder or a Police Magistrate shall not in the first instance be appointed for any municipality, until the Council thereof communicates to the Governor its opinion that such an officer is required." In the event that there was no Recorder or Police Magistrate, nothing in section 374 seems to preclude the council from nominating two of its own members to be members of the board.

31. See e.g., section 69 of the Ontario *Police Act*, R.S.O. 1980, c. 381; section 80 of the Québec *Police Act*, R.S.Q. 1977, c. P-13; section 14 of the British Columbia *Police Act* S.B.C. 1974, c. 64; and section 208 of the Québec *Courts of Justice Act*, R.S.Q. 1977, c. T-16.

32. See e.g., the *Charter of the City of Saint John, 1785* (reprinted in R.S.N.B. 1855, Vol. III) at pp. 985-988 and 990-994.

33. See e.g., sections 746-750 of the Manitoba *Municipal Act*, C.S.M. 1892, c. 100.

34. See e.g., the *City of Moncton Police Force Act*, S.N.B. 1893, 56 Vict., c. 47.

35. See e.g., the *Alberta Police Act*, S.A. 1919, c. 26, s. 19.

36. Compare, for instance, the *Vancouver City Incorporation Act, 1886*, S.B.C. 1886, 49 Vict., c. 32, ss. 171-184A, the Saskatchewan *City Act*, S.S. 1908, c. 16, s. 79,

the *City of Fredericton Police Commission Act*, S.N.B. 1908, c. 42, and the Ontario *Police Act, 1946*, S.O. 1946, c. 72, ss. 6-18.

37. For an account of the genesis of the Ontario *Police Act, 1946*, see McDougall, 1971a and 1971b.

38. For an account of the genesis of the Québec *Police Act* of 1968, see Lemieux, Roy and Gourdeau, 1976.

39. A further major revision occurred with the enactment of the Nova Scotia *Police Act* in 1974 (S.N.S. 1974, c. 9).

40. Alberta had actually had a fairly comprehensive Police Act since 1919 (S.A. 1919, c. 26) but the 1971 *Police Act* brought major reforms.

41. For an account of the genesis of the British Columbia *Police Act* of 1974 (S.B.C. 1974, c. 64), see Nikitiuk, 1977.

42. At the time of writing, however, Prince Edward Island's new *Police Act* has not yet been proclaimed in force.

43. See the *Public Security Council of the Montreal Urban Community Act*, S.Q. 1977, c. 71.

44. See section 177 of the *Municipality of Metropolitan Toronto Act*, R.S.O. 1980, c. 314.

45. See sections 462-472 of the *City of Winnipeg Act*, S.M. 1971, c. 105.

46. See section 74 of *The Regional Municipality of Durham Act*, R.S.O. 1980, c. 434; section 69 of *The Regional Municipality of Haldimand-Norfolk Act*, R.S.O. 1980, c. 435; section 80 of *The Regional Municipality of Halton Act*, R.S.O. 1980, c. 436; section 91 of *The Regional Municipality of Hamilton-Wentworth Act*, R.S.O. 1980, c. 437; section 117 of *The Regional Municipality of Niagara Act*, R.S.O. 1980, c. 438; section 75 of *The Regional Municipality of Peel Act*, R.S.O. 1980, c. 440; section 39 of *The Regional Municipality of Sudbury Act*, R.S.O. 1980, c. 441; section 110 of *The Regional Municipality of Waterloo Act*, R.S.O. 1980, c. 442; and section 112 of *The Regional Municipality of York Act*, R.S.O. 1980, c. 443. The Regional Municipality of Ottawa-Carleton is the only regional municipality in Ontario at present that does not have a regional police force.

47. In Ontario, the number of municipal police forces in the province was more than halved between 1962 and 1978 (from 278 to 128).

48. The Alberta Police Commission, however, was disbanded two years later in 1973, and replaced by a Director of Law Enforcement and a Law Enforcement Appeal Board, both of which are currently still in existence; see Stenning (1981a: Part I, pp. 107-112).

49. A detailed description of these provincial police commissions will be found in Stenning (1981a: Part II).

50. See e.g., "Chief Calls Policing Grant System Unfair", Toronto *Globe and Mail*, December 2, 1980, p. 3.

51. The remaining 2% were accounted for by special-purpose police forces such as railway and harbour police.

52. In 1966, the *Newfoundland Company of Rangers Act, 1966* (S.N. 1966, No. 37) was enacted, which provided for the re-establishment of a second provincial police force in the province. No force has actually been established pursuant to this statute (which is still in force), and it seems that the Act was passed as a

precautionary measure in the event that contract provincial policing by the R.C.M.P. came to be viewed as too costly to justify its continuation.

53. This statute does, however, allow for the appointment of municipal by-law enforcement officers (see ss. 184-186).

54. The court in *R.* v. *Laramee* observed: "I think it is only fair to say that the law is not as clear as one might wish and that my interpretation of it is made in the course of deciding a criminal case, in which, as I have said, the benefit of any ambiguity or reasonable doubt must accrue to the defendant": (1972), 9 C.C.C. (2d) 433 at 444, *per* de Weerdt, J.M.C. (Mag. Ct.).

55. The only exception to this is found in section 21 of the Act, which provides that when a municipality fails to meet its obligations concerning the establishment and maintenance of a municipal police force, the Solicitor General may appoint "municipal constables" for that municipality. The section does not indicate, however, that such municipal constables are to be considered "members of a municipal police force" for the purposes of other sections of the Act.

56. Section 5(d) of Calgary *Bylaw No. 8862* (March 1974), establishing the Calgary Police Commission, refers to a "constable of the Calgary Police Service", and section 2 of the by-law defines "constable" as meaning "a member of the Calgary Police Service and where the context so requires includes the Chief". However, the council has no legislative mandate to confer the legal status of constable on the members of the police force, and this provision in the by-law undoubtedly cannot have that effect. It remains possible that a municipal police commission (which *does* have power to appoint members of the force, and to make regulations for the force) may be able to confer such status on members of the force through such regulations. Even this remains highly doubtful, however, and the author is not aware as to whether any municipal police commission in Alberta has purported to do so.

57. Subsection 31(3) provides that the Attorney General may direct a municipal policeman to serve outside the municipality.

58. Although the Prince Edward Island *Police Act* has not, at the time of writing, been proclaimed in force, it is considered here (rather than the legislation that is currently in force) because it presumably represents the policing legislation that will shortly be in effect within the province.

59. The *Newfoundland Company of Rangers Act*, R.S.N. 1970, c. 255, is not considered here because, although it remains in force, no police force has actually been established pursuant to this statute: see footnote 52, above.

60. The references for these various statutes are as follows: *R.C.M.P. Act*, R.S.C. 1970, c. R-9, as amended; British Columbia *Police Act*, R.S.B.C. 1979, c. 331; Alberta *Police Act, 1973*, S.A. 1973, c. 44, as amended; Saskatchewan *Police Act*, R.S.S. 1978, c. P-15; Manitoba *Provincial Police Act*, R.S.M. 1970, c. P150, as amended; Manitoba *Municipal Act*, S.M. 1970, c. 100, ss. 285-289, as amended; *City of Winnipeg Act*, S.M. 1971, c. 105, ss. 462-472, as amended; Ontario *Police Act*, R.S.O. 1980, c. 381; Québec *Police Act*, R.S.Q. 1977, c. P-13, as amended; *Public Security Council of the Montreal Urban Community Act*, S.Q. 1977, c. 71; New Brunswick *Police Act*, S.N.B. 1977, c. P-9.2, as amended; Nova Scotia *Police Act*, S.N.S. 1974, c. 9, as amended; Prince Edward Island *Police Act*, S.P.E.I. 1977, c. 28; Newfoundland *Constabulary Act*, R.S.N. 1970, c. 58, as amended.

61. This categorization assumes that subsection 17(3) is properly interpreted to mean that *all* officers of the force are peace officers, whether appointed as such by the Commissioner or not. The comma after "Every officer" at the beginning of the

subsection would seem to suggest that this is the correct interpretation. If it is not, of course, two further categories of members of the force are theoretically identifiable.

62. See also *Vandiver* v. *Manning* (1960), 215 Ga. 874; 114 S.E. 2d 121; *R.* v. *Goy* (1969), 67 W.W.R. 375 (Man. Mag. Ct.). Black (1979: 1017) states that the term "peace officer" refers in general to "any person who has been given general authority to make arrests".

63. See Canada Commission of Inquiry ... 1981: Appendix D. Also Stenning, 1981b: Part I, Chapter 2.

64. *Cf.* subsection 7(2) of the *Criminal Code*.

65. In some cases involving policing of municipalities, the agreement is a tripartite one between the federal government, the provincial government and the municipality, whereby provincial police services, provided under an agreement between the federal and provincial governments, are extended to include the policing of the municipality.

66. The agreement from which these clauses are quoted expired on March 31, 1981, and these clauses are apparently in the course of being renegotiated.

67. In *Cobble* v. *Mills and Swarich*, [1947] 2 W.W.R. 790 (Alta. S.C.), it was conceded that a R.C.M.P. officer performing contract policing services in the province was a "public officer" for the purposes of the Alberta *Public Authorities Protection Act*, R.S.A. 1942, c. 138.

68. The relevant provisions are: section 16 of the British Columbia *Police Act*; sections 3-5 of the Saskatchewan *Police Act*; sections 15-20 of the Manitoba *Provincial Police Act*; section 2 of the New Brunswick *Police Act*; sections 12 and 18 of the Nova Scotia *Police Act*; sections 11-13 and 41 of the Prince Edward Island *Police Act*; and the Newfoundland *Agreement for Policing the Province Act*, R.S.N. 1970, c. 6. See also the *Royal Canadian Mounted Police Agreement Ordinance* of the North West Territories, R.O.N.W.T. 1974, c. R-6.

69. Section 56 of R.R.O. 1980, Regulation 791, passed pursuant to the *Police Act*, which is concerned with members of the force, refers to "a constable or other police officer". Such a provision cannot, of course, be regarded as conferring a status on members of the force that is not conferred by the *Police Act* itself; it is merely evidence of the acceptance of the belief that members have such status. Alternatively, it might simply be considered as a reference to rank, rather than to legal status.

70. Provincial constables are also *ex officio* game guardians under *The Wildlife Act* and fishery officers under *The Fisheries Act*. The provision in subsection 4(2) of *The Provincial Police Act* designating provincial constables as peace officers for the purposes of the *Criminal Code* cannot, it seems, be operative provincial legislation; as we have seen above, only the federal Parliament can prescribe who shall be peace officers for the purposes of the *Criminal Code*, even though the persons so recognized may derive their appointment through provincial legislation (see pp. 95-98 of this study).

71. The author has tried in vain to discover the status of such "assistants". Available information suggests that no such officers currently exist in Ontario. The case of *R.* v. *Ontario Labour Relations Board, Ex parte Canadian Union of Public Employees, Local 543*, [1964] 2 O.R. 260 (H.C.), however, gives some indication as to who are *not* "assistants".

72. See e.g., *R.* v. *Stenning*, [1970] S.C.R. 631 (not the author of this paper); *R.* v. *Westlie* (1971), 2 C.C.C. (2d) 315 (B.C. C.A.); *Knowlton* v. *The Queen*, [1974]

S.C.R. 443; *R.* v. *Biron*, [1976] 2 S.C.R. 56; *Moore* v. *The Queen*, [1979] 1 S.C.R. 195; and, most recently the decision of the Ontario Court of Appeal in *R.* v. *Dedman* (1981), 32 O.R. (2d) 641.

73. See e.g., *Attorney General of Ontario* v. *Attorney General of Canada*, [1894] A.C. 189 at 200-201 (P.C.).

74. *Cf.* the comments of Magistrate O'Connor in *R.* v. *Jones and Huber* (1975), 30 C.R.N.S. 127 at 135: "it is not for the council of the City of Whitehorse to determine who is a peace officer for the purposes of the *Criminal Code*. That can only be done by Parliament".

75. See *Tremblay* v. *City of Québec* (1903), 23 C.S. 266; *Huchette* v. *Cité de Montréal* (1909), 37 C.S. 344; *Rey* v. *Cité de Montréal* (1910), 39 C.S. 151; *Levinson* v. *Cité de Montréal* (1911), 39 C.S. 259; *Hughes* v. *Cité de Montréal* (1911), 21 B.R. 32; *Dubé* v. *City of Montréal* (1912), 42 C.S. 533 (Court of Review); *Chevalier* v. *Cité de Trois-Rivières* (1913), 43 C.S. 436 (Cour de révision); *Cité de Montréal et Archambault* v. *Dame Mongeon* (1920), 31 B.R. 526; *Riel* v. *Cité de Montréal et Bélec* (1921), 32 B.R. 420; *Cité de Montréal* v. *Plante* (1922), 34 B.R. 137; *St. Pierre* v. *Cité de Trois-Rivières* (1935), 61 B.R. 439; *Bazinet* v. *Cité de St-Hyacinthe*, [1947] C.S. 261; *Morantz* v. *City of Montréal*, [1949] C.S. 101; and *Compagnie Tricot Somerset Inc.* v. *Corporation du Village de Plessisville*, [1957] B.R. 797.

76. *Pon Yin* v. *City of Edmonton, Hill and Kroning* (1915), 8 W.W.R. 809 (Alta. S.C., T.D.); *Patterson and City of Edmonton* v. *Tenove* (1978), 8 Alta. L.R. (2d) 391 (S.C., App. Div.).

77. *Bowles* v. *City of Winnipeg*, [1919] 1 W.W.R. 198 (Man. K.B.).

78. See *Fallis* v. *Wilson* (1907), 13 O.L.R. 595 (Master's Chambers); *Nettleton* v. *Municipal Corporation of the Town of Prescott* (1908), 16 O.L.R. 538 (Div. Ct.); *Aikens* v. *City of Kingston and Police Commissioners of Kingston* (1922), 53 O.L.R. 41 (H.C.); *Myers and City of Guelph* v. *Hoffman*, [1955] O.R. 965 (H.C.); *Johnson* v. *Adamson* (1980), 17 C.R. (3d) 245 (Ont. H.C.).

79. *Gibney* v. *Town of Yorkton and Reid* (1915), 31 W.L.R. 523 (Sask. Q.B.).

80. *Hébert* v. *Cité de Thetford-Mines*, [1932] S.C.R. 424; *Roy* v. *Municipal Corporation of the City of Thetford Mines and Doyon*, [1954] S.C.R. 395.

81. The province had, however, been held liable for the torts of members of the Sûreté du Québec in the earlier case of *Langlais* v. *La Reine*, [1960] C.S. 644. In *Townshend* v. *Pépin*, [1975] C.S. 423, the provincial Attorney General was held liable for the torts of members of the Sûreté du Québec but in this case it appears that the Attorney General did not contest his liability and the *Allain* case was not cited.

82. E.g., in *Morantz* v. *City of Montréal*, [1949] C.S. 101 at 107; *R.* v. *Labour Relations Board (N.S.)*, [1951] 4 D.L.R. 227 (N.S. S.C.); *Saanich Municipal Employees' Association Local 374* v. *Board of Commissioners of Police of District of Saanich* (1953), 8 W.W.R. (N.S.) 230 at 234 (B.C. S.C.), (B.C. C.A.); *Compagnie Tricot Somerset Inc.* v. *Corporation du Village de Plessisville*, [1957] B.R. 797.

83. For references to the *New South Wales* case, see: *Re Reference under the Constitutional Questions Act*, [1957] O.R. 28 at 31 (C.A.); *R.* v. *Ontario Labour Relations Board, Ex parte Canadian Union of Public Employees, Local 543*, [1964] 2 O.R. 260 at 263 (H.C.); *Re St. Catharines Police Association and Board of Police Commissioners for the City of St. Catharines*, [1971] 1 O.R. 430 at 434-435 (H.C.); *Allain* v. *Procureur Général de la Province de Québec*, [1971]

C.S. 407 at 410-411; *Schulze* v. *The Queen* (1974), 17 C.C.C. (2d) 241 at 247-248 (F.C., T.D.); and *Nicholson* v. *Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311 at 321.

84. See e.g., *R.* v. *Labour Relations Board (N.S.)*, [1951] 4 D.L.R. 227 (N.S. S.C.); *Saanich Municipal Employees' Association Local 374* v. *Board of Commissioners of Police of District of Saanich* (1953), 8 W.W.R. (N.S.) 230 (B.C. S.C.) and 651 (B.C. C.A.); *R.* v. *Labour Relations Board, Ex parte City of Fredericton* (1955), 38 M.P.R. 26 (N.B. Q.B.); *R.* v. *Ontario Labour Relations Board, Ex parte Canadian Union of Public Employees, Local 543*, [1964] 2 O.R. 260 (H.C.); *Canadian Union of Public Employees Local 501* v. *Village Commissioners of Parkdale and Sherwood and Attorney General of Prince Edward Island* (1973), 4 Nfld. & P.E.I.R. 372 (P.E.I. S.C.). The principle has also been invoked to determine whether the police are "employees" for other purposes: see e.g., *Re St. Catharines Police Association and Board of Police Commissioners for the City of St. Catharines*, [1971] 1 O.R. 430 (H.C.); *Mahood* v. *Hamilton-Wentworth Regional Board of Police Commissioners* (1977), 14 O.R. (2d) 708 (C.A.).

85. See e.g., *Jowitt* v. *Board of Commissioners of Police of City of Thunder Bay* (1974), 3 O.R. (2d) 95 (C.A.); *Re Metropolitan Toronto Police Association and Metropolitan Board of Commissioners of Police* (1974), 4 O.R. (2d) 83 (Div. Ct.); *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association* (1974), 5 O.R. (2d) 285 (Div. Ct.), and (1975), 8 O.R. (2d) 65n (S.C.C.).

86. A more detailed account of the circumstances surrounding this case will be found in McDougall, 1971b.

87. In *Nicholson* v. *Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, a majority of the Supreme Court of Canada similarly took the status of a constable into account in holding that a police board is under a duty to act fairly in dismissing a probationary constable. Although the *Reference* case was cited in their judgment, they expressed no opinion on it other than that it was of "no assistance in the present case" (p. 321).

88. "Trudeau: Keep Politicians Ignorant of Police Actions", Toronto *Globe and Mail*, December 12, 1977, p. 7.

89. See section 37 of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), and section 53 of the *R.C.M.P. Act*, re the R.C.M.P.; sections 53 and 54 of the British Columbia *Police Act*; section 48 of the Saskatchewan *Police Act*; section 21 of the Manitoba *Provincial Police Act*; sections 24 and 48 of the Ontario *Police Act*; section 2.1 of the Québec *Police Act*; section 17 of the New Brunswick *Police Act*.

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