

# The Governance of Military Police in Canada

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## Citation Information

Halpenny, Andrew. "The Governance of Military Police in Canada." *Osgoode Hall Law Journal* 48.1 (2010) : 1-53.  
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# The Governance of Military Police in Canada

## **Abstract**

The Military Police is a special federal police force in Canada with unique authority, designed to support military commanders both in operations and in garrison. However, it has historically been under the command of non-Military Police officers, and is consequently not governed like other police forces in Canada. Part of this arrangement can be explained by its special military duties, but much of it is the result of a tradition that is at odds with current societal norms. It is the position of the author that differences in norms between the Military Police and other Canadian police forces can only be justified by bona fide military requirements. This article proposes pragmatic changes that would see the Canadian Forces Provost Marshal, who is the senior Military Police officer of the Canadian Forces, command all Military Police. Their duties and functions, however, would be guided by a newly established Military Police Services Board. This Board would provide transparent policy guidance and require equally transparent accountability from the Military Police in a manner that respects the norms of Canadian law and other police services. Reprinted by permission of the publisher.

## **Keywords**

Police; Canada--Armed forces--Military police; Police administration; Canada

# The Governance of Military Police in Canada

ANDREW HALPENNY\*

The Military Police is a special federal police force in Canada with unique authority, designed to support military commanders both in operations and in garrison. However, it has historically been under the command of non-Military Police officers, and is consequently not governed like other police forces in Canada. Part of this arrangement can be explained by its special military duties, but much of it is the result of a tradition that is at odds with current societal norms. It is the position of the author that differences in norms between the Military Police and other Canadian police forces can only be justified by bona fide military requirements. This article proposes pragmatic changes that would see the Canadian Forces Provost Marshal, who is the senior Military Police officer of the Canadian Forces, command all Military Police. Their duties and functions, however, would be guided by a newly established Military Police Services Board. This Board would provide transparent policy guidance and require equally transparent accountability from the Military Police in a manner that respects the norms of Canadian law and other police services.

La Police militaire est une force de police fédérale spéciale au Canada dotée d'une autorité exclusive visant à appuyer les commandants militaires, tant dans les opérations que dans les garnisons. Cependant, sur le plan historique, elle a été sous le commandement de policiers non militaires et, par conséquent, non dirigée comme les autres services de police au Canada. Cette organisation peut s'expliquer en partie par ses fonctions militaires particulières, mais découle dans une grande mesure principalement d'une tradition qui est à l'opposé des normes sociétales actuelles. C'est l'opinion de l'auteur voulant que les normes différentes entre la Police militaire et les autres services de police canadiens peuvent seulement se justifier par les exigences militaires de bonne foi. Le présent article propose des modifications pragmatiques qui verraient le Grand prévôt des Forces canadiennes, soit l'officier senior de la police militaire des Forces canadiennes, commander l'ensemble de la Police militaire. Cependant, leurs obligations et fonctions seraient orientées par un Conseil des services de la police militaire (Military Police Services Board)

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qui a été récemment mis sur pied. Ce conseil procurerait une orientation de politique transparente et exigerait également une responsabilisation transparente de la part de la Police militaire, d'une manière qui respecte les normes de la législation et des autres services de police.

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**IN A POLICING CONTEXT**, many would be surprised to find a police force where members do not work for the chief of police, municipal councils and government ministers can directly task individual police officers, and those councillors and ministers would personally decide on the merit of the officer and whether he or she is deserving of promotion. And yet, in the Canadian Forces, the Military Police (MP) work in a structure that effectively produces these scenarios on a daily basis. This is in spite of jurisprudence which stands for the proposition that, at a minimum, the police have significant independence from government.<sup>1</sup> Academic writings argue for a nuanced relationship between government and police to ensure accountability through oversight and review. None, however, suggest that the relationship should be exercised through anyone other than the chief of police.<sup>2</sup> And no police force operates other than under the direction of the chief of police.<sup>3</sup> Numerous commissions of inquiry in Canada

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1. *R. v. Campbell*, [1999] 1 S.C.R. 565 [*Campbell*].

2. See Part II(G), below, for an analysis of current literature.

3. See e.g. *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, s. 5(1) [*RCMP Act*]; *Police*

have looked into the important relationship between government and police, including one inquiry that dealt with the MP.<sup>4</sup> These sources of law, theory, and commission recommendations provide important standards to test the accountability of this special police force.

Seventeen years have now passed since the tragic events of Operation DELIVERANCE when the Canadian Airborne Regiment Battle Group was involved in the unlawful killing of a local boy during its peace enforcement mission in Somalia.<sup>5</sup> The Inquiry that examined this 1993 incident issued a damning report, raising concerns that low-level commanders had too much influence over MP who were impeded in their investigations of the crime.<sup>6</sup> Today, commanders continue to directly command most MP in the Canadian Forces and control policing priorities and tasks. Further, they assess the suitability of MP members for promotion. All of this appears to be at odds with generally accepted policing standards.

No significant incident such as what happened in Somalia has recurred in the Forces. Additionally, the MP has since evolved and become much more professional in all aspects of policing. However, important differences of opinion exist within the Canadian Forces about the best command structure for the MP, with some commanders insisting on the continuing importance of their direct control of MP, and others advocating for the centralization of all such policing under MP officers.<sup>7</sup> Before other problems arise, we should assess the command and control arrangements of MP using civilian policing standards of governance as a model. This is all the more important because of the very high operational rate at which the Canadian Forces is being used in many countries, particularly in Afghanistan. High-level activities like these operations raise more opportunities to expose organizational weaknesses that may lead to failure. The law and the Forces have changed significantly since 1993. Now is the time to examine whether this special

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*Services Act*, R.S.O. 1990, c. P.15, ss. 17(2), 41(1) [*Police Services Act*].

4. Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair*, vol. 1 (Ottawa: Public Works and Government Services Canada, 1997) [*Somalia Inquiry*]. The Somalia Inquiry and others will be reviewed below.
5. See *ibid.* at 217-74. Chapters 11 and 12 detail the situation at the time in Somalia, including the development and approval of the political and military plans.
6. See Part III(A), below, for more detail on the history of the mission and the findings and recommendations of the Somalia Inquiry.
7. *Ibid.*

and crucial police force for the Canadian Forces reflects the best professional governance standards which Canadians can rightfully expect, while continuing to respond effectively to their military missions.

The MP, of course, are special because their primary function is to assist military commanders in enforcing discipline of Canadian Forces members.<sup>8</sup> They have limited jurisdiction over persons who are not Forces members, and they are ultimately part of the larger Canadian Forces, which is responsible to the federal government for national defence matters. Additionally, they have unique duties which differ significantly from that of civilian police, whose role is to prevent crimes and keep the peace amongst a civilian population to whom they, in turn, are ultimately responsible. Thus, any analysis of how MP should be governed must bear this seminal difference in mind. Further, an analysis of governance relating to MP must accommodate the unique structure of the Forces. For example, government *per se* has no relationship with the MP, unlike the Royal Canadian Mounted Police (RCMP),<sup>9</sup> since all government direction must flow through the Canadian Forces's most senior commander, the Chief of the Defence Staff.<sup>10</sup> However, the non-MP commanders who oversee MP perform an executive function through the execution of their duties. Their authority to issue lawful orders suggests that standards applicable to government may be applied by analogy to them.

This article will examine both the law and theory of police governance in Canada to test it against the current situation in the Forces. The purpose is to propose a model of governance and oversight that responds effectively and efficiently to military commanders while reflecting Canadian police governance standards. I argue that where there is no bona fide military reason to depart from civilian standards, they should be applied to the MP. In addressing this purpose, Part I will set the groundwork with a brief account of the evolution of the modern common law police constable, followed by the early developments of the MP in Canada. Part II will introduce the key issues of police governance, police duties, and the development of the concept of police independence and the jurisprudence pertaining to it. In the same Part, I will provide an overview of governance structures including police services boards, and the challenges facing governance, as well

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8. Canada, National Defence, *Military Police* (B-GL-362-001/FP-001) (Ottawa: Department of National Defence, 2000) at 17-19.

9. *RCMP Act*, *supra* note 3, s. 5(1).

10. *National Defence Act*, R.S.C. 1985, c. N-5, s. 18.

as a review of the current literature pertaining to it. Part III returns to a detailed analysis of the MP situation today. I will propose fundamental changes in the structure and oversight of the MP that will better reflect Canadian legal standards and expectations, yet continue to address bona fide military requirements.

The result will highlight the recommendation that command of all MP should rest with the senior MP officer of the Forces known as the Canadian Forces Provost Marshal (CFPM). However, the CFPM will be accountable to the Chief of the Defence Staff through a newly established Military Police Services Board that will determine MP priorities, resources, and policies. By implementing such a model, it is proposed that potential problems will be averted, the MP will be reinvigorated by a more relevant command structure, and better police accountability will be realized through more effective oversight. The CFPM will be wholly responsible for the standards of MP training and professionalism in the Forces, and commanders will have significant influence over the prioritization of tasks and the allocation of resources to support their operational requirements, all the while respecting the importance of independence of the MP where necessary.

## **I. THE HISTORICAL DEVELOPMENT OF CIVILIAN AND MILITARY POLICE**

To begin an examination of the governance of MP, it is important to see how both the civilian police and the MP have evolved. The genesis, purpose, and organization of these two branches of policing tell an insightful story about society's concerns and ideals. A study of the evolution of the civilian police and the MP can illuminate the values that were prevalent when policing emerged as a profession through the study of their organizational and ideological imperatives. These imperatives continue to be reflected to various degrees in our police services, academic theories, jurisprudence, and the law today. This background will show why we are in our present state of policing. With the establishment of this "start state," we will have the bedrock upon which to build the future for a more responsive and accountable MP.

### **A. HISTORICAL DEVELOPMENT OF CIVILIAN POLICE**

Policing traditions in Canada trace their roots to developments in England because of Canada's colonial and Commonwealth heritage links to Great Britain. As will be shown, this tradition differs in important ways from the European police

models. Two main streams of policing evolved over the centuries and were brought to and continue in Canada today: the constabulary model and the paramilitary model. Parishes in England developed the constabulary model, whereas the British Crown instituted the paramilitary model in 1814 with the establishment of the Royal Irish Constabulary.

In early days, towns provided their own “night watch” to keep the peace and to provide a guard for the village from outside marauders. Parishes eventually established constables who were generally of a higher quality than those watchmen,<sup>11</sup> although they, too, left much to be desired. This was because each parish operated independently of the others. The constables normally lacked training and were privately raised and funded (although not necessarily paid). As a result of all this, by the eighteenth century there was a push in Great Britain to professionalize the parish constables and to do away with the town watchmen. However, this was met with significant political opposition, as the British jealously guarded against encroachments on their local autonomy.

The introduction of the word “police” was one of the political manoeuvres of the day to convince communities to give up some of their parochial control and to allow more standardization. In 1829, Sir Robert Peel, the Home Secretary, chaired a parliamentary committee that led to the formation of the Metropolitan Police upon the passing of the *Metropolitan Police Act, 1829*.<sup>12</sup> The word “police” comes from the French language, which in turn derives from the medieval Latin word “*politia*,” meaning policy.<sup>13</sup> At the time of the reforms in England, the word “police” was used only in continental Europe, where those police were responsible to their central governments. But control by the British Crown of local matters was something from which the English historically balked. However, the new use of “police” was adopted to distinguish it from the previous non-professional watches and constables. “Police” was used more as a verb or adverb to denote “the arrangements made in all civilised countries to ensure that the inhabitants keep the peace and obey the law. The word also denotes the force of peace officers (or police)

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11. Barry S. Godfrey, Chris A. Williams & Paul Lawrence, *History & Crime* (London: SAGE Publications, 2008) at 56-57.

12. (U.K.), 10 Geo. IV, c. 44.

13. *The Concise Canadian Oxford Dictionary*, s.v. “police.”



employed for this purpose.”<sup>14</sup> Even today, the name “constable” is more commonly used to refer to the individual, whereas the service is known as the police.

The paramilitary Royal Irish Constabulary, on the other hand, had the role of ensuring the British Crown’s dominion in Ireland and the application of British, as opposed to Irish, laws. The Royal Irish Constabulary was a paramilitary organization in that it was based on a strong centralized hierarchy, used military ranks and military-styled uniforms, and had members who lived throughout the land in barracks.<sup>15</sup> It became an effective and efficient force, which led to its emulation by several of the British Empire’s colonies, including Newfoundland with its Royal Newfoundland Constabulary, and the Victoria Police of Australia. Following Confederation, Canada adopted the Royal Irish Constabulary model when it formed the North West Mounted Police for colonizing the Western territories.<sup>16</sup> Provincial police forces have followed the paramilitary model as well.<sup>17</sup> The feature which distinguishes the two, historically at least, is that constables or local police respond locally, whereas paramilitary federal or provincial police enforce dominion authority. With this brief historical account of the development of civilian police, we will now look to the development of Canada’s MP. The comparison will highlight the historical differences in the role of each, which goes a long way in explaining the gap between the respective current concepts of governance. Once we understand the extent and content of the gap, we will be in a better position to accept as legitimate the bona fide military requirements necessitating those differences for the MP, or to critique its governance structures where those differences are not justifiable.

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14. Metropolitan Police “History of the Metropolitan Police,” online: <<http://www.met.police.uk/history/definition.htm>>.

15. Royal Irish Constabulary, online: <<http://www.royalirishconstabulary.com>>.

16. *Ibid.* See also DeLloyd J. Guth, “The Traditional Common Law Constable, 1235-1829: From Bracton to the Fieldings to Canada” in R. C. Macleod & David Schneiderman, eds., *Police Powers in Canada: The Evolution and Practice of Authority* (Toronto: University of Toronto Press, 1994) 3.

17. Although there were many more in earlier days, only Ontario, Quebec, and Newfoundland have continued to have provincial police since the 1930s. In the other provinces, the RCMP act as provincial police and, in numerous cases, as municipal police. They also share provincial policing responsibilities with the Royal Newfoundland Constabulary outside of major communities. The RCMP also serve as the police force for the territories.

## B. EARLY DEVELOPMENT OF MILITARY POLICE IN CANADA<sup>18</sup>

Military police have roots which go back to the earliest era of military history and are linked to the title of “provost marshal,” the head of the MP.<sup>19</sup> By the time of the Norman invasion of England in 1066, the duties began to coalesce into a comparable concept of policing duties as continues today, if in a form which some might now find objectionable. Throughout English history, the provost or provost marshal was linked very closely with the Sovereign. In fact, the provost’s role in maintaining order was so important that, in earlier times, the Sovereign appointed him personally. The term “provost” was used for MP members in the Canadian Army until the unification of the three armed services (navy, air force, and army) in 1968. Recently, the title of Provost Marshal has been reintroduced to describe the head of Military Police elements such as the Army Provost Marshal or the Joint Task Force Afghanistan Provost Marshal. History and tradition play an important role in the Canadian Forces.

In spite of the fact that the role of the MP has traditionally included those duties which civilian police commonly perform (*i.e.*, keeping the peace and enforcing the laws), those duties have never been a large part of MP tasks. Particularly during times of war, the main duties of the MP have been taken up with prisoner control and detention, traffic control (for the large and complex army movements on the battlefield), and straggler and refugee control. Straggler control

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18. See Lieutenant Commander A.N. Gale, *Governance of the Canadian Forces Military Police* (M.D.S. Thesis, Canadian Forces College, 2002) [unpublished]. Most of this section relies on this work, which contains detailed notes and bibliography. See also Canadian Forces Provost Marshal, “History of the Canadian Military Police Branch,” online: <<http://www.vcds.forces.gc.ca/cfpm-gpfc/apm-agp/hcmpb-hbpmc-eng.asp>>; Andrew R. Ritchie, *Watchdog: A History of the Canadian Provost Corps* (Burlington: Canadian Provost Corps Association, 1995); and Major Q.E. Lawson, “A Very Short History – The Canadian Provost Corps” (1955) 9 Can. Army J. 156.

19. *Black’s Law Dictionary*, 8th ed., *s.v.* “Provost-Marshal.” According to the definition, “[i]n military law, the officer acting as the head of the military police .... under martial law. He, or his assistants may, at any time, arrest and detain for trial, persons subject to military law committing offenses.” *Cf. National Defence Act*, *supra* note 10, s. 156:

Officers and non-commissioned members who are appointed as military police under regulations for the purposes of this section may (a) detain or arrest without a warrant any person who is subject to the Code of Service Discipline, regardless of the person’s rank or status, who has committed, is found committing, is believed on reasonable grounds to be about to commit or to have committed a service offence or who is charged with having committed a service offence.

involves reuniting soldiers separated from their units—often, although not exclusively—as a result of dislocation during battle. The more “hard” policing duties during war involve criminal investigations and apprehending deserters. Garrison duties on military bases in peace time involve more traditional policing such as criminal and service offence investigations, keeping the peace duties, and army base security duties. The essential difference between civilian police and MP is that, whereas the duties of civilian police include the preservation of the peace, prevention of crime, and protection of life and property of the citizenry,<sup>20</sup> the role of MP is ultimately to support military commanders to enforce discipline amongst their troops and to support battlefield operations. They are responsible and responsive to their commanders, not the community in which they work, except indirectly. This difference in purpose is vital as we consider the law and theory of police governance in relation to MP, since the governance models upon which we must rely are exclusively civilian-based. Recognizing this difference is crucial because it ultimately impacts the recommendations for reform.

The Royal Canadian Navy was the first service in Canada to have an official policing component. It was called the Shore Patrol and commenced at the Navy’s inception in 1910 for the purpose of maintaining discipline of sailors, although dockyard security was left to the RCMP. In the latter part of World War I, the Canadian Military Police Corps was raised for the Army, but disbanded at the war’s end. In World War II, RCMP volunteers formed 1 Provost Company shortly after the outbreak of the conflict in September 1939. This effectively started the new Corps of Military Police in the Canadian Army. Similarly, the Royal Canadian Air Force formed its own police force for air base security with a senior staff officer overseeing its management at Air Force headquarters in Ottawa.

The three military services were amalgamated in 1968 into one, which is commonly referred to as the Canadian Forces.<sup>21</sup> Part of that process involved uniting trades from the three services that performed similar duties, such as logistics, medical, administration, and military policing. The MP then formed into a new organization called the Security Branch. Following unification, recruiting, selection, personnel management, and training were managed outside of the Security Branch, meaning that decisions on crucial issues of competency and policing standards were in the hands of non-MP personnel. Further, in the tradition of the

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20. See Part II(A), below.

21. *National Defence Act*, *supra* note 10, s. 14.

former services, MP were assigned to military bases under command of base commanders who were rarely, if ever, MP officers. Indeed, for many years, the senior MP officer in the Canadian Forces was a staff officer rather than a commander. General MP policies were managed, but not commanded, by National Defence Headquarters in Ottawa.<sup>22</sup> Although there were initiatives over the years to improve the quality of policing and to address growing concerns that MP were too closely linked to their commanders upon whom they relied, all attempts failed. The last initiative took place at the time of the Somalia Affair and involved a study in 1996 called Operation THUNDERBIRD.<sup>23</sup> Again, the former services preferred much of the status quo including the retention of MP under their direct command. The one exception, albeit an important one, with which the services agreed was the placement of criminal investigators under the command of the senior MP of the Canadian Forces.<sup>24</sup> By this time, however, the impact of the Somalia Affair was quickly overtaking the entire Forces. The MP were no exception.

Prior to investigating the impact that the Somalia Inquiry had on the MP and its consequential evolution, we will examine the larger issues of police independence and governance in Canada. This is a broad topic, but one that is fundamental to the understanding of society's historical and current views of the relationship between government and police. It will provide the standards by which to evaluate the current situation in the Forces. Further, such lacunae which may be found in this comparison can then be addressed in a rigorous legal analysis.

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22. See generally *Queen's Regulations and Orders for the Canadian Forces*, c. 3, s. 2—Command, online: <<http://www.admfincs.forces.gc.ca/qro-orf/vol-01/index-eng.asp>> [QR&O]. The terms “commanders” and “staff” will be used frequently throughout this article. Commanders have the direct responsibility for subordinate military organizations and personnel which have been assigned to them. They may issue lawful orders to those subordinates, and they are responsible for their operational effectiveness, as well as their good order and discipline. Staff, on the other hand, are assistants to commanders who advise and execute that which supports a commander's requirements. Staff generally do not have command authority on their own, although it is common for a commander to delegate command responsibility to senior staff for efficiency purposes. See also *Somalia Inquiry*, *supra* note 4 at 67-76 (for a helpful overview of command).
23. The thunderbird, which plays an important role for many Aboriginal peoples, is the symbol of the Military Police Branch.
24. The designation of this title has changed numerous times over the years, but at least since the early 1960s, the appointment has been a staff position in the National Defence Headquarters (NDHQ) until recently. Recent changes are discussed below.

## II. INDEPENDENCE AND GOVERNANCE

Governance relates to accountability. The issues that arise concerning governance of police relate to their place in society. For example, are they a part of one of the branches of government or perhaps a fourth entity?<sup>25</sup> What degree of control over them is appropriate, and by whom or through what organizations? What should be the relationship between government<sup>26</sup> and the police (*i.e.*, how tied to direction should police be), or alternatively, under what conditions, if any, may the executive issue binding direction to police? These governance issues can be formulated in many different ways but are commonly brought into focus through the use of the concept of “police independence.” A great deal of ink has been spilt trying to grapple with this latter subject. As will be shown, attempting to succinctly encapsulate the concept of independence as it relates to police governance is like relying on automobile bumper stickers to understand theological and philosophical concepts; it is not reasonably possible. The term is useful, nonetheless, as a short-hand expression which relates to the central issue of policing governance, including that of the MP. Consequently, while burrowing through the numerous theories and positions outlined below, perhaps the issue can be posited in the following way: What should the relationship of MP be with their commanders to ensure that they can effectively police without improper interference, and yet be responsive to legitimate military needs? To understand this central relationship, we must first review the role of the police.

### A. POLICE DUTIES

Although the role of the police has evolved over the centuries and its duties are now governed primarily in Canada by statute, its simple common law origins provide the essence: “Police duties, at common law, include ‘the preservation of the peace, the prevention of crime, and the protection of life and property.’”<sup>27</sup> Statutory direction provides little more to this broad authority, which is understandable considering the myriad of situations to which police are required

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25. The other three being the executive, the legislature, and the judiciary.

26. “Government” is used here in an expansive manner to indicate the legitimate political controlling agency at the federal, provincial, or municipal levels.

27. *R. v. Clayton*, [2007] 2 S.C.R. 725 at para. 69, citing *Dedman v. The Queen*, [1985] 2 S.C.R. 2 at para. 14.

to respond.<sup>28</sup> In fact, legislation more commonly restrains than grants additional police powers.<sup>29</sup>

The very essence of such broad and generally defined powers means that police must have considerable discretion, and it is the use and abuse of such discretion that attract attention from governments and citizens who seek their accountability. Although police are sworn to uphold the law, they normally have the discretion to decide when, how, and even if laws will be enforced. This discretion was the basis of the application for a writ of *mandamus*, which was at the heart of what is perhaps English jurisprudence's best known case dealing with policing independence, *R. v. Police Commissioner of the Metropolis, Ex parte Blackburn*.<sup>30</sup> In declining to issue the writ to compel police action, the court expounded on the importance of broad discretion being available to the Chief Constable and the Chief's independence from government and the courts. A recent Canadian case came to a comparable conclusion where, in spite of the application succeeding on the facts, the court made clear that interference in police discretion is exceptional.<sup>31</sup> This jurisprudence is naturally based on the historically accepted principles of common law policing relating to their necessary independence.

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28. See e.g. *Police Services Act*, *supra* note 3, s. 4(2). See also Godfrey, Williams & Lawrence, *supra* note 11 at 53-54.

29. See e.g. *Criminal Code*, R.S.C. 1985, c. C-46, s. 25. This section addresses the protection of persons administering and enforcing the law. Section 25(4) speaks to justification in the use of force, but with numerous restrictions. It does not permit the use of force *per se*; rather, the law allows the use of force in restricted circumstances. Consequently, a peace officer may rely on this section as a defence under the appropriate factual scenario (for example, to a charge of assault causing bodily harm), but cannot use it as a specific authorization to use force.

30. [1968] 1 All E.R. 763 (C.A.) [*Blackburn*].

31. *1536412 Ontario Ltd. v. Haudenosaunee Confederacy Chiefs Council*, [2008] O.J. No. 2286 at para. 29 (Sup. Ct.). The judgment states, "[T]he police have the right to use their discretion in the enforcement of the law and private property rights. A blanket refusal to assist a property owner or a class of property owners, however, would be an abuse of that right." In this case, Aboriginal peoples occupied and effectively claimed sovereignty over lands that their ancestors had lawfully surrendered. They were found not to have any legitimate claim. However, the police not only refused to assist the lawful owners in re-establishing their peaceful possession of the lands, but also threatened the owners with arrest in spite of the right of defence of real property found in the *Criminal Code*.

## B. INDEPENDENCE

With the advent of Sir Robert Peel's "new police" in 1829 came the introduction of his "Peelian Principles,"<sup>32</sup> otherwise known as Peel's Nine Principles,<sup>33</sup> which established the "citizen police," as they were referred to. Central to the Principles, found in the fifth one, is the concept of impartiality: "Police seek and preserve public favour not by catering to public opinion but by constantly demonstrating absolute impartial service to the law."<sup>34</sup> The essence of this concept is that the police are one and the same as the citizens, but have the special duty of applying the law. To do so effectively and "impartially," an ethos of being responsible only to the law itself developed and was encouraged. Indeed, it was undoubtedly considered essential for the acceptance of the new police so that they would not be seen as privileging the interests of the military<sup>35</sup> or other special interests, including the ruling class. Undoubtedly idealistic and probably ephemeral in nature, one commentator described the citizen police and the independent nature of the British "Bobbie" in the following way:

One of the most striking features of the behaviour of the British police is their success in preventing their dependence on public approval from interfering with the efficiency of their service to Law, and thus overcoming what might appear, in theory, to be a fundamental weakness of their organization. They never forget their dependence on public approval, and they secure it, not by pandering to the local or temporary demands of a section of the public at any temporary moment, but by a strict impartiality in their behaviour, and by providing a consistent service of unbiased support of laws, and resistance to their breach, regardless of the nature of justice of the laws. The consistent aloofness of the police from political bias, and their sustained indifference to any other aspect of a law than its need of being observed

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32. See Susan A. Lentz & Robert H. Chaires, "The Invention of Peel's Principles: A Study of Policing 'Textbook' History" (2007) 35 J. Crim. J. 69. The origin of the listed principles is debated, although it is conceded that Sir Robert Peel generally espoused such principles in his various speeches and writings.
33. See New Westminster Police Services, "Sir Robert Peel's Nine Principles," online: <<http://www.nwpolice.org/peel.html>>. Recall that Sir Robert's innovation was restricted to municipal constables and did not address the paramilitary RIC in Ireland, which had been recently formed. Inevitably, cross-pollination has occurred, but important governance differences remain because of their distinction.
34. *Ibid.*
35. See Guth, *supra* note 16 at 7. Unlike many European countries, there was considerable reluctance from the earliest of times in English history to use constables in any military fashion or to use the military itself within the country.

are frequently the cause of temporary embarrassment and unpopularity, but they are the real foundation of the immense confidence with which the public regards the police, and on which their value and their strength depend.<sup>36</sup>

Consequently, the police have relied upon impartiality and the authority of the rule of law as the basis for executing their duties and insisting upon a clear separation from government involvement in their affairs. This approach has been taken up in common law jurisprudence, although with questionable logic and selective facts. However, the principle of policing independence, at least as it pertains to law enforcement duties, still prevails in Canadian law.<sup>37</sup>

### C. THE JURISPRUDENCE OF POLICE INDEPENDENCE

The analysis begins with the leading case on police independence in Canada. *R. v. Campbell*<sup>38</sup> was an appeal from the Court of Appeal for Ontario, upholding a General Division<sup>39</sup> decision to deny a motion for stay of proceedings because of a “reverse sting” in which police illegally sold a large amount of hashish to the accused contrary to the *Narcotics Control Act*.<sup>40</sup> It was established that there was no basis in law, in spite of the legal opinion upon which the police relied, that allowed the RCMP to sell drugs even in such exigent circumstances where they did so for the sole purpose of enforcing the law. In anticipation of this ruling, the Crown submitted that “even if the conduct of the RCMP was facially prohibited by the terms of the *Narcotics Control Act*, no offence was committed because members of the RCMP are either part of the Crown or are agents of the Crown and as such partake of the Crown’s public interest immunity.”<sup>41</sup> The Court replied that:

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

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36. Godfrey, Williams & Lawrence, *supra* note 11 at 55, citing Charles Reith, *British Police and the Democratic Ideal* (London: Oxford University Press, 1943) at 7.

37. *Campbell*, *supra* note 1.

38. *Ibid.*

39. See *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 1.1(1). The General Division is now known as the Superior Court of Justice in Ontario.

40. R.S.C. 1985, c. N-1, as rep. by *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

41. *Campbell*, *supra* note 1 at para. 26.



occupies a public office initially defined by the common law and subsequently set out in various statutes. In the case of the RCMP, one of the relevant statutes is now the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10.<sup>42</sup>

The Court continued its analysis and limited these findings to criminal investigations since other provisions of the *Royal Canadian Mounted Police Act*<sup>43</sup> and the *Department of the Solicitor General Act*<sup>44</sup> provide the Solicitor General's duties and function "extend to matters relating to the RCMP" in prescribed circumstances.<sup>45</sup> The Court found that, "it is therefore possible that in one or other of its roles the RCMP could be acting in an agency relationship with the Crown."<sup>46</sup> In making its findings, the Court relied in its analysis upon a number of generally well-known Canadian and Commonwealth cases that dealt with the issue of independence.<sup>47</sup> We will now examine each of these to understand their reasoning and the contexts in which they were decided. The reader should keep in mind, as the Court readily admits, that most of the cases were civil matters relating to the liability of respective municipalities for illegal activities or misfeasance of its police. This is important when analyzing the scope and meaning of independence.<sup>48</sup>

One of the earliest reported Commonwealth cases dealing with the legal relationship between government and police was the Supreme Court of Canada decision in *McCleave Estate v. City of Moncton*.<sup>49</sup> The Court dealt with an appeal from the Supreme Court of New Brunswick *en banc*, which overturned a finding of liability at trial that the City of Moncton was in a position of *respondeat superior* (*i.e.*, a position of vicarious liability because of a master/servant relationship)<sup>50</sup> in relation to the misfeant Constable Belyea. The civil suit followed the quashing of charges laid pursuant to the *Canada Temperance Act*<sup>51</sup> under which Constable Belyea purported to act in seizing the plaintiff's liquor from his hotel and

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42. *Ibid.* at para. 27.

43. *Supra* note 3.

44. R.S.C. 1985, c. S-13, as rep. by *Department of Public Safety and Emergency Preparedness Act*, S.C. 2005, c. 10, s. 37 [*Public Safety Act*].

45. *Campbell*, *supra* note 1 at para. 28.

46. *Ibid.* at para. 29.

47. *Ibid.* at paras. 29-36.

48. See Part II(B), below.

49. (1902), 32 S.C.R. 106 [*McCleave*].

50. *Black's Law Dictionary*, 8th ed., *s.v.* "respondeat superior."

51. R.S.C. 1886, c. 106.

destroying it. The trial court awarded \$300 in damages. In dismissing the appellant's action, the Court cited with approval the ruling in the American case from 1861 of *Buttrick v. The City of Lowell*<sup>52</sup> which held in part:

Police officers can in no sense be regarded as agents or officers of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government, but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws and other similar powers and duties with which police officers and constables are entrusted are derived from the law, and not from the city or town under which they hold their appointment.<sup>53</sup>

Further, the Court concluded that:

Belyea held his appointment from the corporation (of the City of Moncton) 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.<sup>54</sup>

A few years thereafter, the High Court of Australia considered a similar claim arising from an illegal arrest by a police constable, and to evaluate the same issue of the effect of the doctrine of *respondeat superior* as it related to the defendant Government of Tasmania. Relying upon the prevailing law of agency, which stated that the test was "whether the party sought to be made responsible retained the power of controlling the act,"<sup>55</sup> the Court in *Enever v. The King* determined:

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. If he arrests on suspicion of felony, the suspicion must be his suspicion, and must be reasonable to him. If he arrests in a case in which the arrest may be made on view, the view must be his view, not that of someone else. Moreover, his powers being conferred by law, they are definite and limited, and there can be no suggestion of holding him out as a person possessed of greater authority than the law confers upon him. A constable, therefore,

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52. 83 Mass. 172 (Sup. Jud. Ct., 1861) [*Buttrick*].

53. *McCleave*, *supra* note 49 at para. 2, citing *Buttrick*, *ibid.* at 174.

54. *Ibid.* at paras. 109-10.

55. [1906] 3 C.L.R. 969 at 977, Griffith C.J. (H.C.A.) [*Enever*].

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.<sup>56</sup>

The concept introduced here of the constable's authority being "original" and not delegated is important. His or her authority derives exclusively from the law and not from governmental appointment or authority. Such laws as existed "were intended merely to deal with the appointment and disciplinary control of constables"<sup>57</sup> and implied no concept of agency or liability on the part of the Crown, which had never existed.<sup>58</sup> The question that remains, however, is the extent to which this concept of independence applies in the present day. This is particularly important to know with regard to matters that may not be exclusively law enforcement functions and those situations where it is not clear to what degree the police are conducting law enforcement. Historical examples of such problems will be examined below.<sup>59</sup>

In 1955, the Judicial Committee of the Privy Council also identified the unique authority of police constables. In *Attorney-General for New South Wales v. Perpetual Trustee Co.*,<sup>60</sup> the Judicial Committee observed that:

[A constable's] 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.<sup>61</sup>

As mentioned in *Campbell*,<sup>62</sup> the Court's decision in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*<sup>63</sup> dealing with the issue of procedural fairness in relation to a probationary police constable held that "we are dealing with the holder of a public office, engaged in duties connected with the maintenance of public order and preservation of the peace, important values in

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56. *Ibid.*

57. *Ibid.* at 979.

58. *Ibid.*

59. See Part II(F), below.

60. [1955] A.C. 457 (P.C.) [*Perpetual Trustee*].

61. *Ibid.* at 489-90.

62. *Campbell*, *supra* note 1 at para. 31.

63. [1979] 1 S.C.R. 311.

any society.”<sup>64</sup> It went on to indicate that in the circumstances in the appeal, the lower courts’ construction of the applicable legislation results in “reducing the status of the office of police constable to that involved in a master-servant relationship merely because there had been less than eighteen months’ service in the office.”<sup>65</sup> The clear implication here is that no police constable should be considered to be in a master-servant relationship; they are all holders of public office. For the purposes of analyzing the independence of police, the decision is constrained to its facts, as this was an action for wrongful dismissal and, in the fashion of the other cases, neglected to address in any manner the relationship between government and police throughout the breadth of their duties.

The last case dealt with in any detail in *Campbell* is perhaps the best known and most quoted case for the proposition that police are independent of government direction: *R. v. Metropolitan Police Comr., Ex parte Blackburn*<sup>66</sup> was an English appeals case written by the redoubtable Lord Denning in 1968. It is claimed that this case “has had more influence over the realities of police governance in this country than any legislated mandate ever did.”<sup>67</sup> Mr. Blackburn brought an action for a writ of *mandamus* to compel the police to enforce gaming laws which they were reluctant to do because of problems with prosecuting them. As the matter directly addressed police discretion, the case most closely touches that aspect of governance which is the object of this article. Prior to entering into a review of the case, its principal *dictum* as expressed in the opinion of Lord Denning will be stated. The decision relates to the position of the Commissioner of the London Metropolitan Police, who is that force’s chief of police. Lord Denning held:

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

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64. *Ibid.* at 322.

65. *Ibid.*

66. *Blackburn, supra* note 30.

67. Philip C. Stenning, “Police and Politics: There and Back and There Again?” [Stenning, “There and Back”] in Macleod & Schneiderman, *supra* note 16, 209 at 214 (referring to Canada).

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.<sup>68</sup>

Although the decision has considerable support in some corners, it has many detractors. As Professor Stenning writes:

Despite the fact that one of the many critics of this statement has commented that it deserves quotation in full “because seldom have so many errors of law and logic been compressed into one paragraph,”<sup>69</sup> Lord Denning’s exposition of the doctrine of police independence in the *Blackburn* case remains today the most oft-quoted statement of the doctrine by its proponents in Britain, Canada, Australia, and New Zealand, to the point that the doctrine is now not infrequently referred to as “the *Blackburn* doctrine,” and the *Blackburn* decision itself as the “police chief’s bible.” If he had had copyright over his statement, Lord Denning would have been able to retire a lot sooner than he did.<sup>70</sup>

Denning’s *dictum* appears to stand for a very wide and expansive proposition of independence that leaves sparse room for accountability by the police to government authorities.<sup>71</sup> To be sure, *Campbell* does not appear to want to go so far, although its true scope is somewhat unclear. At a minimum, *Campbell* stands for the proposition that neither are the police protected by Crown immunity, nor is the Crown liable for their misfeasance or malfeasance in relation to criminal investigations.<sup>72</sup> The court found that “the Commissioner [of the RCMP] is not to be considered a servant or agent of the government while engaged in a criminal investigation.”<sup>73</sup> To deny civil liability of the police for misfeasance and yet claim

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68. *Blackburn*, *supra* note 30 at 769.

69. Philip Stenning, “The Idea of the Political ‘Independence’ of the Police: International Interpretations and Experiences” in Margaret E. Beare & Tonita Murray, eds., *Police & Government Relations: Who’s Calling the Shots?* (Toronto: University of Toronto Press, 2007) 183 at 198-99, citing Laurence Lustgarten, *The Governance of Police* (London: Sweet & Maxwell, 1986) at 64.

70. *Ibid.*

71. *Ibid.* at 199.

72. But see *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129 (discussing important developments in tort liability regarding negligent investigations).

73. *Campbell*, *supra* note 1 at para. 33. See Philip C. Stenning, “Someone to Watch over Me:

Crown immunity for them in selected circumstances is illogical. As noted in *Campbell*, “the Crown cannot have it both ways.”<sup>74</sup> The weakness of the judgment in *Campbell*, perhaps attributable to the facts it was based on, is that it omits any policy discussion of the ramifications of such findings in the context of very real circumstances that arise every day in the interaction between government and the police, except to concede that “for certain purposes the Commissioner of the RCMP reports to the Solicitor General.”<sup>75</sup> Of course, this is perfectly explicable in our common law jurisprudence tradition since the courts should restrict their findings to the facts and law arising in each case. The case does restrict itself to criminal investigations and admits to the possibility “that in one or other of its roles the RCMP could be acting in an agency relationship with the Crown.”<sup>76</sup> And, this criminal limitation is undoubtedly appropriate as explained by Stenning: “Even if one were to assume that the [*Blackburn*] doctrine has some legitimate basis in English legal history as applicable to English chief constables, it flies in the face of some of the clearest language to the contrary in Canadian statutes concerning police governance.”<sup>77</sup> Consequently, we must await future cases for judicial guidance on the context where the “closer relationship”<sup>78</sup> exists.

This provides the history, policy, and jurisprudence dealing with police independence that we require for understanding some of the background to the relationship of the MP and their commanders. The article can now examine those same considerations as they relate to police governance. This will provide an explanation of society’s mechanisms by which the police are held accountable while still

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Government Supervision of the RCMP” in W. Wesley Pue, ed., *Pepper in Our Eyes: The APEC Affair* (Vancouver: University of British Columbia Press, 2000) 87 at 87-92, 95 [Stenning, “Someone to Watch”] (for a discussion of the problems of identifying what is “law enforcement.” This pertains to what the Court may mean by restricting itself to “criminal investigation”).

74. *Campbell*, *ibid.* at para. 35.

75. *Ibid.* at para. 33. See also *Public Safety Act*, *supra* note 44, s. 34(1)(s). As per the *Act*, the current Minister responsible for the RCMP is the Minister of Public Safety and Emergency Preparedness.

76. *Ibid.* at para. 29. See also *ibid.* at para. 28 (providing a brief description of the RCMP’s “myriad of functions apart from the investigation of crime” wherein they may be in a “closer relationship to the Crown”).

77. Stenning, “There and Back,” *supra* note 67 at 215.

78. *Campbell*, *supra* note 1 at para. 28.

being independent. These mechanisms will show the practical tools that may be appropriate for the governance of the MP in Canada today.

#### D. OVERVIEW OF GOVERNANCE STRUCTURES

The theories and practices of police governance generally address two interrelated but distinct forms of governance. The first is the provision of policy guidance and task prioritization through the appropriate minister or through a police services board which is responsible to that minister.<sup>79</sup> The police are commonly responsible to inform their respective minister or board of important issues as they arise. This is the form of governance that will be studied in this article. For convenience, the term “oversight” will be used in this article to describe it.<sup>80</sup>

The other form of governance is that which is generally provided in response to complaints about the police. This form of *ex post facto* governance aims to address alleged aberrations in the use of police authority. It can, and indeed probably should, tie back into the first form of governance through its recommendations. Often it will be able to contribute to decisions concerning policies, equipment, training, and so on. The recent controversy in Canadian policing concerning the use of Taser weapons is a good example of this issue. Numerous complaints commissions or review panels<sup>81</sup> exist with varying degrees of authority to compel attendance, provide remedies to complainants, and change police policies and procedures. This form of governance is generally referred to as “review.”<sup>82</sup> Again,

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79. There can be numerous variations of this construct, but it is beyond the scope of this article to discuss them all. These two forms are the most common. The terms “police commissions” and “police service boards,” or minor variations of them, are used rather interchangeably. For simplicity, all will be referred to as police service boards hereafter.

80. See Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Accountability and Transparency: Background Paper* (Ottawa: Public Works and Government Services Canada, 2006) at 15-17 [Arar, *Background Paper*].

81. As with police service boards, complaints commissions frequently go by different names (*e.g.* Ontario Civilian Police Commission, Ontario’s newly established Independent Police Review Office, the Commission for Public Complaints Against the Royal Canadian Mounted Police, and the Military Police Complaints Commission).

82. See Arar, *Background Paper*, *supra* note 80 at 15-17. The Canadian Forces has two formal review mechanisms to oversee complaints relating to MP. Internal review is provided by the Military Police Credentials Review Board. Independent civilian review is provided by the Military Police Complaints Commission. Both the Credentials Board and the Complaints Commission are established pursuant to the *National Defence Act*, *supra* note 10, Part IV—Complaints About or By Military Police.

this article is restricted to the analysis of the “oversight” form of governance, as it applies to Canadian policing generally and as it should apply to the MP.

Formal police oversight structures have existed in various forms since at least the mid-nineteenth century, although these were restricted to municipal police forces. Provincial police commissions, however, date only from the 1960s.<sup>83</sup> The two main reasons for the existence of both provincial commissions and municipal police services boards are (a) the provision of regulation which goes beyond that which can be reasonably provided by other means of regulation such as the courts, police discipline structures, or human rights tribunals; and (b) the provision of “important administrative functions which support the delivery of police services.”<sup>84</sup> The following section examines police services boards in more detail as an important means in Canada to govern police.

#### E. POLICE SERVICES BOARDS

Historically, governance responsibilities rested with ministers. Over recent decades, however, governance responsibilities have been devolved to municipal police services boards, although in some cases those responsibilities have been retaken by ministers.<sup>85</sup> Even where police service boards operate, ministers continue to hold supervisory responsibilities.<sup>86</sup> The following will discuss general principles that animate many of the various federal and provincial legislations, accepting the numerous variations between jurisdictions.

The development of police services boards likely started primarily to insulate police forces from direct influence of an undue nature by elected officials. That is, in many ways the boards assist both police and government to achieve some of the ideals discussed above regarding accountability and independence. The Court of Appeal for Saskatchewan explained that it was “to place the chief of police, the officers and the constables of the force in a position where they are removed from the influence of persons who may attempt to interfere with the due performance of police duties.”<sup>87</sup> The Law Commission of Canada explained:

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83. Paul Ceysens, *Legal Aspects of Policing*, vol. 1, looseleaf (Salispring Island: EarlsCourt Legal Press, 1994) at para. 4.2(a).

84. *Ibid.* at para. 4.1.

85. *Ibid.*

86. See e.g. *Police Services Act*, *supra* note 3, s. 3(2).

87. *Bruton v. Regina City Policemen's Association, Local No. 155*, [1945] D.L.R. 437 at 448 (Sask. C.A.). For a more fulsome discussion of this issue, see also Ceysens, *supra* note 83 at para. 4.3(a).



Since the mid-19<sup>th</sup> century, police governance institutions at the regional and municipal level (known ... more recently as police services boards) were established with the specific intention of insulating the police from direct governance by elected municipal politicians, and guaranteeing a measure of political independence for police services in the performance of their duties. The idea has been to further remove the police from direct political control by ensuring that these independent bodies, rather than elected politicians, provide policy direction and approve police budgets.<sup>88</sup>

Board members are appointed, not elected. The Ontario scheme provides various boards of different size depending upon the size of the community that the respective police force is serving.<sup>89</sup> Judges, justices of the peace, police officers, and criminal defence counsel are excluded from membership,<sup>90</sup> whereas required members include the head of the municipal council or a delegate, another council member, council appointed citizen(s), and provincial appointees, depending upon the board size.<sup>91</sup> Board members are bound by regulation to a code of conduct which prescribes, in part:

1. Board members shall attend and actively participate in all board meetings.
2. Board members shall not interfere with the police force's operational decisions and responsibilities or with the day-to-day operation of the police force, including the recruitment and promotion of police officers.
3. Board members shall undergo any training that may be provided or required for them by the Solicitor General.
4. Board members shall keep confidential any information disclosed or discussed at a meeting of the board, or part of a meeting of the board, that was closed to the public.
5. No board member shall purport to speak on behalf of the board unless he or she is authorized by the board to do so.<sup>92</sup>

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88. Ceyskens, *ibid.*, citing Law Commission of Canada, *In Search of Security: The Future of Policing in Canada* (Ottawa: Public Works and Government Services Canada, 2006) at 85. But see Lorne Sossin, "The Oversight of Executive-Police Relations in Canada: The Constitution, the Courts, Administrative Processes, and Democratic Governance" in Beare & Murray, *supra* note 69, 96 at 106-07. Sossin acknowledges these ideals, yet provides a practical example of its failure when the Toronto Police Services Board became dysfunctional in 2004.

89. *Police Services Act*, *supra* note 3, s. 27.

90. *Ibid.*, s. 27(13).

91. *Ibid.*, ss. 27(4)-(9).

92. *Members of Police Services Boards—Code of Conduct*, O. Reg. 421/97, ss. 1-5.

Presently, the alternative scheme of governance by direction from the responsible minister is restricted in Canada to the RCMP<sup>93</sup> and the Ontario Provincial Police (OPP),<sup>94</sup> although in Ontario's case, the OPP are still subject to oversight and direction by the Ontario Civilian Police Commission.<sup>95</sup> The Commission, however, does not have a policy-making role; rather, it generally may inquire into the conduct of police services boards and police forces. Duties are not prescribed for the Minister of Public Safety and Emergency Preparedness, who is responsible for the RCMP, although they are for the Minister of Community Safety and Correctional Services in the case of the OPP.<sup>96</sup> However, these duties apply to all police forces in Ontario including the OPP. Because of the general nature of the legislation in each case, few lessons can be drawn from the relationships that would add to the discussion of governance of the MP in any meaningful way. Nonetheless, the principles and structures of police services boards appear to provide a useful framework for consideration in the military context.

The advantage of boards is that they have the potential to develop expertise that ministers and their staff would never be able to acquire. Further, they can more effectively address the local concerns of those being served by police forces. Finally, the benefit of providing more binding and meaningful policies adapted to local circumstances while still reflecting concerns and priorities at the provincial levels can aid in achieving a level of commonality amongst communities which residents can rely upon, while reflecting parochial priorities.<sup>97</sup> Police boards, however, are not a panacea for the ailments which independence seeks to overcome. Nonetheless, they provide a promising governance structure which may be usefully applied to address the inherent challenges of military commanders having direct command over the MP. Although there are few recorded incidents in the Canadian Forces where such challenges caused problems, civil law examples abound.

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93. *RCMP Act*, *supra* note 3, s. 5.

94. *Police Services Act*, *supra* note 3, s. 17(2).

95. *Ibid.*, s. 22.

96. *Ibid.*, s. 3(2).

97. See also Kent Roach, "The Overview: Four Models of Police-Government Relations" in Beare & Murray, *supra* note 69, 16 at 67-69.

## F. PRACTICAL CHALLENGES IN GOVERNANCE AND INDEPENDENCE

In 1959, Commissioner Nicholson of the RCMP resigned in protest of the federal government's refusal to follow his advice to send additional RCMP officers to support the Government of Newfoundland as it requested.<sup>98</sup> In the Commissioner's view, there was improper interference by the federal government with police business.<sup>99</sup> Newfoundland had decided to decertify an American logging industry union that was involved in a protracted and significant strike, and wanted to replace it with one that the Premier himself was attempting to organize. The RCMP were the provincial police outside of St. John's and pursuant to their contract the provincial Attorney-General could request additional forces which Canada was obliged to send if circumstances permitted. The Commissioner assessed that at least fifty officers could be spared and had them on standby in Moncton. The federal government declined to send them, however, assessing the matter as politically-motivated union bashing by the Newfoundland government of which the federal government wanted no part.

As a result, the Commissioner resigned. Perhaps not coincidentally, the Minister tabled an amendment to the *Royal Canadian Mounted Police Act*,<sup>100</sup> changing the operative wording in section 5 relating to the relationship between the Minister and the Commissioner. It now reads as follows:

The Governor in Council may appoint an officer to be known as the Commissioner of the Royal Canadian Mounted Police who, *under the direction of the Minister*, has the control and management of the force and all matters connected therewith.<sup>101</sup>

The former relevant section in place until that time read "*under the Minister*."<sup>102</sup> While this amendment clearly indicated the government's intent to control the police as it saw fit, practices changed only a decade later.

The role of the government led by Prime Minister Trudeau in directing policing operations also raised considerable concern during the 1970 *Front de Liberation du Québec* uprising, although "perhaps [we] will never know for sure to

98. See Stenning, "Someone to Watch," *supra* note 73 at 87-92.

99. *Ibid.* at 89, 92.

100. *Royal Canadian Mounted Police Act*, S.C. 1959, c. 54, s. 5.

101. *Ibid.* [emphasis added].

102. Stenning, "Someone to Watch," *supra* note 73, citing the former *Royal Canadian Mounted Police Act*, R.S.C. 1952, c. 241, s. 10(1).

what extent, if at all, political direction of policing decisions occurred.”<sup>103</sup> Accusations that the government was directly involved ensued in the following years as the RCMP, in executing their former mandate as a security service, engaged in “patently illegal activities in their efforts to gain intelligence about, and thwart the efforts of, separatists in Quebec.”<sup>104</sup> In stark contrast to the Nicholson Incident, when questioned about the government’s knowledge of those police operations, Prime Minister Trudeau stated:

[T]he policy of this government ... has been that they—indeed, the politicians who happen to form the government—should be kept in ignorance of the day-to-day operations of the police force and even of the security force. ... [I]t is not a matter of pleading ignorance as an excuse. It is a matter of stating, as a principle, that the particular minister of the day should not have a right to know what the police are constantly doing ... [or] in the way in which they are doing it ... [T]he protections we have against abuse are not with the government, they are with the courts.<sup>105</sup>

Prime Minister Trudeau focused on accountability for misdeeds or illegal activity through the courts after the fact. This is certainly an important aspect of accountability and governance, but he perhaps conveniently omitted to discuss the role of government in giving operational or policy direction to the forces that resulted in their illegal activity. It does appear that his government was quite involved in at least prioritizing, *inter alia*, police efforts. As the Minister of External Affairs noted, the government “felt that the RCMP was directing too much of its attention on Communists to the detriment of the real threat in Canada from separatists.” Indeed, the Commissioner of the RCMP specifically requested “clear direction” from the government for such activity.<sup>106</sup>

These two incidents highlight the tensions that can arise in policing operations between the executive and the chief of police. In the Nicholson Incident, the government was not about to allow an independent police force to create an untenable political problem. On the other hand, Prime Minister Trudeau appears to have found the hands-off approach to policing, as he publicly expressed it, as perhaps a convenient means of achieving political goals without being held accountable. The RCMP were left out to dry despite following the government’s wishes. Surely, there is middle ground to find in this crucial relationship.

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103. *Ibid.* at 99.

104. *Ibid.*

105. *Ibid.* at 99-100.

106. *Ibid.* at 100.

In contrast to Trudeau's stance, when looking into the allegations of wrongdoing by the RCMP Security Service, the McDonald Commission<sup>107</sup> made the following observations about police independence and governmental involvement:

3. We take it to be axiomatic that in a democratic state the police must never be allowed to become a law unto themselves. Just as our form of Constitution dictates that the armed forces must be subject to civilian control, so too must police forces operate in obedience to governments...<sup>108</sup>
4. The concept of independence for peace officers in executing their duties has been elevated to a position of paramountcy in defining the role and functions of the RMCP. ... We believe, on the contrary, that the peace officer duties of the RCMP should qualify, but not dictate, the essential nature of those relationships.<sup>109</sup>
19. ... [T]he Minister should have no right of direction with respect to the exercise by the RCMP of the powers of investigation, arrest and prosecution. *To that extent, and that extent only should the English doctrine expounded in Ex Parte Blackburn be made applicable to the RCMP... [However], the Minister should have the right to be, and should insist on being, informed of any operational matter, even one involving an individual case, if it raises an important question of public policy. In such cases he may give guidance to the Commissioner and express to the Commissioner the government's view of the matter, but he should have no power to give direction to the Commissioner.*<sup>110</sup>

This provides some of the clearest direction about government-police relations. While acknowledging the importance for the police to be able to investigate individual criminal matters under conditions of their choosing, there is clear acknowledgement that, unlike *Blackburn*, the police are responsible to more than just the law itself and their own conscience. The McDonald Commission provides the key as being governmental involvement in matters where "it raises an important question of public policy."<sup>111</sup> However, even this important theme of keeping the government informed omits the other equally salient question of the proper

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107. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, Second Report, *Freedom and Security Under the Law*, vol. 2 (Ottawa: Supply and Services Canada, 1981) [McDonald Commission].

108. *Ibid.* at 1005.

109. *Ibid.* at 1006.

110. *Ibid.* at 1013 [emphasis added].

111. *Ibid.*

means of prioritizing policing activities, since the Commission seems to restrict itself to ongoing investigations.<sup>112</sup>

The debacle arising from the Asia-Pacific Economic Cooperation (APEC) meetings of November 1997 perhaps best illustrates the grey areas of governmental interaction with police. The facts are very helpful in illustrating what could be termed “political interference,” and yet also illustrate those areas where political involvement in police operations may be quite appropriate. Canada hosted the annual high-level meeting of APEC leaders from 19 to 25 November 1997 in Vancouver, and the RCMP were responsible for security. The security concerns included expected student protests against some of the foreign governments represented at the meetings on the final day at the University of British Columbia (UBC). There were a number of buildings and roadways on the university campus granted by licence to the Government for the purposes of the conference.<sup>113</sup> In spite of the RCMP’s security assessment, “[t]he RCMP enlarge[d] the perimeter of a fenced area that they had deemed necessary for security purposes at UBC in order to accommodate [the Prime Minister’s] ‘specific wish that this is a retreat and leaders should not be distracted by demos, etc.’”<sup>114</sup> This was the result of political considerations to maintain the dignity of the event, as well as its security. The political considerations dealing with dignity which affected the security planning were discussed in detail in the APEC Report,<sup>115</sup> but were not found to be inappropriate:

Although the Canadian government did not guarantee that President Suharto would not be embarrassed, it is my view that in appropriate circumstances the federal government and the RCMP may be justified in taking limited steps to ensure that

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112. See also Ontario, *Report of the Ipperwash Inquiry: Investigation and Findings*, vol. 1 at 676-77 [*Ipperwash Inquiry*]. The Commissioner, Justice Sidney B. Linden, seems equivocal about the appropriate involvement of government and the proper police response to any such involvement.

113. Commission for Public Complaints Against the RCMP, *APEC—Commission Interm Report* (2001) at para. 6.2, online: <<https://www.cpc-cpp.gc.ca/prt/rep/phr/apec/APEC-intR-index-eng.aspx>> [*APEC Report*].

114. “Chronology of Events” in W. Wesley Pue, ed., *Pepper in Our Eyes: The APEC Affair* (Vancouver: University of British Columbia Press, 2000) xii at xiii (citing the notes of RCMP Superintendent Wayne May from 27 August 1997).

115. *APEC Report*, *supra* note 113 at para. 9.

visiting heads of state are not subject to certain types of embarrassment or affronts to their dignity.<sup>116</sup>

The issue of the moment, then, is the extent to which such instruction is consistent with lawful direction by a government to its police. With this review, we can now appreciate the issues that can arise in government-police relations and the importance of recognizing the necessity not only of the police requirement for independence, but also that government has legitimate interests which may necessitate some involvement in police operations.

Using the events at APEC as a factual basis upon which to examine the issue, important insights may be found. It was clearly within the mandate of the RCMP in that case to establish and enforce a security perimeter for the protection of those Internationally Protected Persons under their charge.<sup>117</sup> Further, their mandate included the protection of all persons who may have been or actually were subject to attack or other criminal offences, although in this latter case they may have used their discretion as to the manner in which it was addressed. What, then, is the mandate of Canadian police services to enforce matters beyond lawful necessity, but which, in and of themselves, are legitimate political goals? In this case, their mandate was the broadening of the security perimeter from what the RCMP assessed as necessary for security purposes, to what the government assessed as necessary for political purposes.<sup>118</sup>

It is proposed that as there was no legitimate law enforcement requirement here to expand the perimeter, it was for the government-requestor to provide the lawful basis to the police who they directed to enforce such extended

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116. *Ibid.* at paras. 9.4, 9.7.

117. See also *R. v. Knowlton*, [1974] S.C.R. 443 [*Knowlton*]; *Tremblay c. Québec (Procureur général)*, [2001] J.Q. no. 1504 (Sup. Ct.). *Knowlton* dealt with an accused who unlawfully and wilfully obstructed a peace officer who was protecting Premier Kosygin of the United Soviet Socialist Republic. The accused attempted to take pictures of the Premier in a restricted area deemed necessary by the police for the Premier's protection. In *Tremblay*, the accused unsuccessfully sought a permanent injunction against the police security forces protecting certain international dignitaries at the Third Summit of the Americas in Quebec City in 2001. The police refused him permission to enter into a restricted area for the purposes of lawfully protesting. In both cases, the restricted areas were otherwise public spaces.

118. See *APEC Report*, *supra* note 113 at para. 13.2.2. APEC Commissioner Justice Hughes found no evidence that the security perimeter was larger than necessary. However, for the purpose of discussion, it will be assumed that the perimeter was expanded beyond what the RCMP assessed as necessary to satisfy its security requirements.

requirements.<sup>119</sup> For example, where a conference such as that of APEC occurs on private property, perhaps provincial trespass legislation can be relied upon. Similarly, military commanders can control entry to their bases through the *Defence Controlled Access Area Regulations*<sup>120</sup> to similar effect, should a conference be held on a military base. Perhaps other government property may be protected by similar regulations. What would be illegitimate would be for the police to use force, including their powers of arrest, detention, and restrictive controls for any purpose that is not founded in law. Some of Commissioner Hughes's most useful recommendations deal directly with this:

- When the RCMP are performing law enforcement functions (investigation, arrest and prosecution) they are entirely independent of the federal government and answerable only to the law.
- When the RCMP are performing their other functions, they are not entirely independent but are accountable to the federal government through the Solicitor General of Canada or such other branch of government as Parliament may authorize.
- In all situations, the RCMP are accountable to the law and the courts. Even when performing functions that are subject to government direction, officers are required by the RCMP Act to respect and uphold the law at all times.
- The RCMP are solely responsible for weighing security requirements against the Charter rights of citizens. Their conduct will violate the Charter if they give inadequate weight to Charter rights. The fact that they may have been following the directions of political masters will be no defence if they fail to do that.
- An RCMP member acts inappropriately if he or she submits to government direction that is contrary to law. Not even the Solicitor General may direct the RCMP to unjustifiably infringe Charter rights, as such directions would be unlawful.<sup>121</sup>

It therefore appears patent that the issue of independence and governance go hand in hand. Both are qualified, neither takes precedence over the other, and each is essential. Where the executive gives direction to the police in furtherance of its legitimate governing role, such as instructing them to act beyond what they assess is required for law enforcement purposes, it should do so in a manner that

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119. See Roach, *supra* note 97 at 55 (suggesting in his "Full Police Independence" model that police have their own lawyers to advise them on such issues). This raises the related issue, then, of the requirement for police to have their own lawyers to advise them independently of government in such circumstances. It is beyond the scope of this article, however, to address this issue.

120. S.O.R./86-957, made pursuant to *National Defence Act*, *supra* note 10, s. 12(1).

121. *APEC Report*, *supra* note 113 at para. 10.4.



is readily reviewable through the provision of written instructions and the bases in law for such action. Police services boards may do this on behalf of the executive. They can act as the link between necessary police independence and the provision of lawful executive direction.

It is proposed that police services boards are uniquely positioned to provide ascertainable and reviewable executive direction to police through their written directions to them. They ensure the accountability of the police through a review of police actions, recommendations, and reports. Further, boards have the advantage of being able to develop expertise in police governance that a minister will ordinarily lack. The chief of police is responsible to the board to ensure that the necessary law enforcement independence is respected, although the chief's position on any such matter is itself reviewable by the board, the executive, and the courts. Similarly, the police would be able to point to the board's directions in reliance for their activities of a non-law enforcement type. They would always be accountable to the board through their reports and advice, including those instances where they decline executive direction. This latter case could only arise, it is suggested, where the board's direction impinges upon their necessary independence in a law enforcement situation, or where the police must weigh the effect of *Charter*<sup>122</sup> issues related to such direction, or the lawfulness of the direction.<sup>123</sup> In the APEC case, for example, it was likely reasonable to expand the perimeter to satisfy government requirements as long as there was a lawful basis to control that extra land beyond that which was needed for the protection of the dignitaries. However, their confiscation of protest signs was improper since it infringed the protestors' right to free speech. The signs could not be viewed as unlawful since there was no criminal threat to the dignitaries by their use, and there was no legitimate executive function which could otherwise justify their removal.<sup>124</sup>

In spite of this history, considerable debate continues in Canada concerning the relationship between government and police, which in turn has led to further detailed analyses of the issue of police governance.<sup>125</sup> We will continue

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122. *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

123. See *APEC Report*, *supra* note 113 at para. 10.4.

124. See *e.g. ibid.* at paras. 13-30.

125. Several public inquiries from both the federal and provincial levels of government have been struck, addressing the interrelationship of government and police. The more important and relevant ones that are studied here include the McDonald Commission, Somalia Inquiry, and

our examination of the issues with a brief review of some of the current theoretical governance models. These models were presented at a symposium held in support of Ontario's Ipperwash Inquiry<sup>126</sup> into the killing of Dudley George by the OPP during a protest in 1995 at the Kettle and Stony Point First Nations on Lake Huron. A key part of the Inquiry's mandate was to investigate police and government relations.<sup>127</sup>

### G. MODELS OF OVERSIGHT GOVERNANCE STRUCTURES

Professor Kent Roach provides a comprehensive study of four models of police governance.<sup>128</sup> His "[m]odels provide a convenient means of highlighting different policy options and the value choices and assumptions implicit in the choice of those policies."<sup>129</sup> They help to provide a basis for comprehensive debates about alternatives by grounding discussion in somewhat fixed constructs for comparative purposes. They need not be limiting as they tend to spawn new models to address identified weaknesses and unique situations as will be studied here with the MP.<sup>130</sup>

Roach's first model<sup>131</sup> is that of full police independence founded on the *Blackburn* doctrine, which in his view proposes police autonomy for law enforcement and deployment purposes. Supporters of this model would find comfort in government statements holding that the government has no role in day-to-day police operations and indeed should be kept uninformed of them.<sup>132</sup> He also suggests that proponents of this model are likely cynical of the reliability and integrity of elected officials, who they see to be incapable of directing police without partisan motives.

His second model is titled "Quasi-Judicial or Core Police Independence."<sup>133</sup> Based on the *Campbell* case, the model explains a relationship exempt of any executive direction involving "core law enforcement functions" such as

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the APEC Inquiry.

126. *Ipperwash Inquiry*, *supra* note 112. For more information about the symposium, see "Foreword" in Beare & Murray, *supra* note 69 at ix-x.

127. Beare & Murray, *ibid.* at ix.

128. Roach, *supra* note 97.

129. *Ibid.* at 54.

130. *Ibid.* at 54-55.

131. *Ibid.* at 55-57.

132. See *e.g.* Prime Minister Trudeau's statement at 26, above.

133. Roach, *supra* note 97 at 57-59.

the investigation and laying of charges. It suggests a construct based on the rule of law which seeks to ensure that there is no interference in applying the law in an equitable manner to all, irrespective of one's position in society. Acknowledging some interaction between the parties, it would see a healthy balance when seeking information of police while avoiding improprieties. Full confidence in the police is assumed in criminal matters where prosecutors and courts act as checks, acknowledging, however, the lack of systemic review mechanisms when police decline to lay charges.

The third model, "Democratic Policing,"<sup>134</sup> is similar to—but more dynamic than—the core policing independence model. It is based on the recommendations of the McDonald Commission, which accepts that not only can ministers be informed, but that they must be informed because they have the responsibility to act in exigent circumstances where significant political issues arise. It emphasizes the classic ideal of ministerial responsibility in our parliamentary system, which could also be realized by police services boards seeking to represent the broader community's interest in providing necessary direction to police.

Roach's fourth model is called "Governmental Policing."<sup>135</sup> This presents an opposite theme to his first model of policing, which seeks full police independence. Skepticism is not directed towards the governing powers, but the likelihood that police independence will allow them to become a law unto their own. The model would support close involvement of political staff and police such as has been developing between, for example, the Prime Minister's Office and the Commissioner of the RCMP, as well as the effect of the recent anti-terrorism laws and the increasing influence of the Minister of Public Safety and Emergency Preparedness. Both of these developments have been at the expense of the ministerial authority of the former Solicitor-General.<sup>136</sup> This model centralizes policing operations along with many other political functions and therefore shows less confidence in the expertise and abilities of police in the modern complex world.

Professor Lorne Sossin provides another, perhaps less structured, model than those of Roach.<sup>137</sup> He seeks to answer the following questions: "[W]hat are the mechanisms which constrain and define executive accountability and police

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134. *Ibid.* at 59-62.

135. *Ibid.* at 62-64.

136. *Ibid.* at 63.

137. Sossin, *supra* note 88.

oversight in Canada ... [and] can the need for the police to remain apolitical and autonomous be reconciled with mechanisms of governance and accountability?”<sup>138</sup> He then sets out to address these two competing demands with an “apolitical and autonomous” model of relationship.<sup>139</sup> Sossin’s fundamental concern is that there is no “overarching vision and coherence” to oversight in the literature, with most commentators identifying themselves as either pro-police or anti-police; Sossin finds these identifications inhibit constructive dialogue. Further, an artificial construct of “police policy” and “police operations” pervades the discussion, which he finds “is maintained not because it accords with a readily identifiable boundary, but rather because we have yet to discover any other way of distinguishing legitimate government interests from illegitimate ones.”<sup>140</sup> He defines “apolitical” as “an orientation of detachment” from the political process, whereas “autonomous” relates “to a set of administrative practices, arrangements, and structures that constitute a functional separation from the government.”<sup>141</sup>

Sossin’s model proposes a culture of interest in, and sensitivity to, political concerns while eschewing its influence on fundamental policing decisions. Autonomy does not mean independence since, as Sossin finds is reflected in policing history in Canada and extant legislation, the police should not be independent of government control. High levels of police professionalism involving strong internal controls, “intra-executive” review, as well as external oversight, ensures “functional autonomy and the highest standards of professionalism.”<sup>142</sup> Sossin explores the problem with the policy/operational dichotomy that is in vogue, and explains that although it is certainly clear in some circumstances, it is much less so in others. Where executive decisions are taken that affect policing operations, it is essential that clear written records explain the issue.<sup>143</sup> Sossin suggests various mechanisms to realize his model, central to which is the role of all three branches of government in providing fulsome and vigorous oversight.

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138. *Ibid.* at 96.

139. *Ibid.*

140. *Ibid.* at 99.

141. *Ibid.* at 101.

142. *Ibid.* at 102.

143. *Ibid.* at 123-24.

Continuing the theme that the policy/operational dichotomy has inherent weaknesses, Professor Margaret Beare proposed a pragmatic analysis.<sup>144</sup> She noted that government-police relations are much more integrated and subtle than commentators might have you believe. Problems only come to light when there are crises, and so this subtle, pervasive, and ongoing interaction generally goes unnoticed. She quotes Robert Reiner to illustrate the point: “Like riding a bike, policing is the sort of activity that is thought about mainly when the wheel comes off. When things are running smoothly it tends to be a socially invisible, undiscussed routine.”<sup>145</sup>

As other authors have pointed out, for all the independence and autonomy that police will espouse as being essential to the proper execution of their duties and maintenance of professionalism, they commonly use political means to achieve their interests through, for example, the promotion or support of political policies, politicians, or parties.<sup>146</sup> Similarly, one only needs a cursory knowledge of North American politics to see the depth to which politicians rely on policing for their own interests, such as promoting policies of “getting tough on crime,” “war on drugs,” youth violence, and so on. To understand the dynamics of the relationship, all aspects need to be acknowledged and the more it is examined, the weaker and more inconsistent in practice are concepts of independence and autonomy. Beare gives a very interesting overview of policing in politically heightened conditions in Canada that provides helpful context to her argument<sup>147</sup> and illustrates the developing international influences on policing. Although police may move to standardize techniques and equipment with foreign services, there is often international political pressure to standardize laws and ensure cooperation, all of which weakens the argument for independence.<sup>148</sup>

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144. Margaret E. Beare, “Steeped in Politics: The Ongoing History of Politics in Policing” [Beare, “Steeped in Politics”] in Beare & Murray, *supra* note 69, 313.

145. *Ibid.* at 316, citing Robert Reiner, *The Politics of the Police* (Oxford: Oxford University Press, 2000) at 9.

146. *Ibid.* (relying therein on Orwin Marenin and Gerry Woods). See also *ibid.* at 350-53.

147. *Ibid.* at 324-33.

148. *Ibid.* at 360-62.

## H. SUMMARY

In spite of much of the rhetoric—from Lord Denning, chiefs of police, or police unions—it is clear that the concept of police independence needs to be approached carefully and treated in an intelligent and pragmatic fashion. There is seldom, if ever, justification for government to intervene in the methods of police investigations or their charge-laying discretion. However, from a governance perspective, it is arguable that the executive and military commanders need to know about those policing activities that affect their own obligations. The devil will be in the details as to how that is accomplished, but Roach's models help us conceive the vital issues to be addressed and the outcome of different scenarios. Sossin, too, helpfully illustrates the professional approach, which he recommends should be taken under the rubric of police being “apolitical and autonomous” in their relationship with government, while Beare pragmatically identifies the interconnectedness of the relationship as opposed to its independence. Indeed, Beare finds that government and police regularly demonstrate their mutual dependence. Many of the issues will not be readily applicable in the military concept because of fundamental structural differences. Nonetheless, these models and theories need to be examined carefully, as they provide important guidance and illustrate inevitable weaknesses that must be taken into account. In any event, those governance structures must be balanced with the courts' perceptions of the importance of police independence. The trick now is to extrapolate those indicia of society's standards and apply them reasonably and fairly to the military context. Remember that the role of the MP is significantly different than that of other police services. To be effective, the standards must be applied *mutatis mutandis*, thereby giving due consideration to necessary bona fide requirements of the Canadian Forces.

Part III, below, will examine where the Canadian Forces is today in its policing. We will continue its story from the Somalia Inquiry and examine related and influential reports which resound in its organization today. From this understanding, we will be positioned to propose a way ahead that, it is suggested, will best provide an accountable and efficient MP force governance structure for the Forces that adequately reflects Canadian standards.

### III. ISSUES IN GOVERNANCE OF MILITARY POLICE

At the outset, it was proposed that the command and control arrangements of MP be examined with a view to comparing them to standards of civilian policing governance in Canada. Acknowledging the important differences in the roles, priorities, and communities served, the article starts from an understanding that accountability and oversight of the MP should be comparable in quality if not in form to other police forces, save for bona fide military requirements.

A number of issues arise as we review the jurisprudence and literature. Independence of the police from government interference has been a theme throughout the history of the common law constable, but the scope and texture of that concept is less clear. At one extreme is the *Blackburn* doctrine, which appears to insist that the constable “is not the servant of anyone, save of the law itself.”<sup>149</sup> The decisions and theories since that time have tried to provide greater context to the position. Importantly, *Campbell* confirms the concept of “original authority” as being a key component of independence.<sup>150</sup> This suggests the existence of inherent powers in policing which may not be infringed by other authority.<sup>151</sup> If that is correct, then military command is excluded from interference with police discretion, at least to the degree that it relates to law enforcement. This becomes crucial in deciding who commands MP, and the answer seems obvious: if police have “original authority,” then only they may decide on its application. It appears the police may *only* be commanded by police, although there is a continuing relationship, accountability, and responsiveness to the executive for non-law enforcement matters.

On the other hand, there is a danger in overstating the concept of police independence as the literature explains. Certainly, there must be a relationship of accountability to those government agencies to which police are responsible. In the military sense, this means that the Canadian Forces Provost Marshal must be responsible to the Chief of the Defence Staff who is the Canadian Forces’s senior commander. This accountability includes executing those lawful orders which fulfil the military mandate and otherwise do not interfere with law enforcement.

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149. *Blackburn*, *supra* note 30 at 769.

150. *Campbell*, *supra* note 1.

151. *Black’s Law Dictionary*, 8th ed., *s.v.* “inherent powers.”

The subtleties and complexities of this relationship have been observed by Beare and Sossin.<sup>152</sup>

There are two main models of accountability within the “oversight” form of governance: ministerial oversight, and that of police services boards.<sup>153</sup> Recall that the paramilitary model of policing generally relies on a direct relationship between the respective chief of police and minister, as is the case with the RCMP<sup>154</sup> and OPP, whereas municipal police forces are generally governed by police services boards. The former, it was suggested, traditionally had a role of dominion to enforce the Crown’s presence whereas the latter was representative of locals protecting themselves and consequently being responsive primarily to their community. But where do the MP fit in? It might appear at first instance that in the Forces, the MP being a force of the Crown would have the role of dominion in the fashion of the RCMP, OPP, et cetera. But this may not be sustainable where the role of MP is that of supporting commanders in keeping discipline of their troops, whereas a force like the North West Mounted Police in the nineteenth century enforced colonial dominion over the Aboriginal peoples.

Whether paradigms of municipal constable or paramilitary forces are at all helpful, then, is questionable. Perhaps a more pragmatic view of the form of governance which would best be workable should be the starting point. Kent Roach’s analyses are of assistance in that they suggest that before we decide how we want to effect governance, we need to decide what purpose we want it to serve.<sup>155</sup> It appears that his “full independence” and “government policing” models may be perhaps difficult to implement in the military context. The duties of MP primarily involve support to commanders in the exercise of their legitimate mandates,

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152. See above at 33-35 for a discussion of their positions.

153. See Part II(D), above, for a discussion of the two forms of police governance, being “oversight” and “review.”

154. See e.g. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP’s National Security Activities* (Ottawa: Public Works and Government Services Canada, 2006). Chaired by the Right Honourable Dennis O’Connor, the Commissioner’s report provides a discussion of the relative merits of oversight structures as they relate to the national security mandate of the RCMP.

155. See 32-33, above, for a review of Roach’s arguments.



which requires both close coordination and responsiveness to the commanders' needs. Thus, neither the fully independent model nor the detailed control by "government" (in this case by commanders) is pragmatic or efficient. The high level of specialization and technical knowledge of police is more efficiently left to them, with a coordinating and prioritizing role left to the commanders *in situ*.

Roach's other two models, "quasi-judicial or core police independence" and "democratic policing," may have a more realistic chance of implementation. The intent here is not to decide which model or combination of models might be most appropriate, but to highlight those which could effectively provide acceptable governance and be readily adapted to the military context. It is suggested that the latter two fit the bill since they appear to be more amenable to the military hierarchy and the common give and take in command structures. However, it may be that no model is sufficient. Sossin's proposal of a relationship where the police are "apolitical and autonomous" can certainly have grounding in the Forces context. In their role of supporting commanders, MP should embrace their legitimate military tasks except to the extent that those tasks may impinge on their ability to effectively execute their law enforcement duties. Their responsibility should be to provide technical and other professional policing advice to give best effect to those tasks and to expose the impact those tasks will have on other policing duties that may be affected.

Keeping these issues in mind, we will now step back to examine the recent development of the MP in the Canadian Forces. This review will help us understand how the MP arrived at their current command arrangements prior to our analysis of how they might change to meet modern standards of police governance.

#### A. THE SOMALIA AFFAIR, 1993

Somalia had fallen into anarchy after the overthrow of its president in 1991, and in short time a humanitarian crisis developed because of widespread famine, which was exacerbated by the fighting between various outlaw militia gangs. The Canadian Airborne Regiment Battle Group was deployed in late 1992 as part of a United Nations-sanctioned peace enforcement operation.<sup>156</sup> They made their base camp near the town of Belet Huen, whose people were severely affected by the crisis. Because of the large military encampment and its relative wealth of

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156. *Somalia Inquiry*, *supra* note 4. See chapters eleven and twelve for the situation at the time in Somalia, including the development and approval of the political and military plans.

stores, locals commonly broke into the camp to steal goods. The Canadian commanders were incapable of stopping the pilfering that was seriously affecting operations and they incrementally adopted more and more stringent security measures. Illegal orders were eventually issued to abuse the pilferers who were caught in the camp in an attempt to stop them. In at least one case, this resulted in a Somali being captured, tortured, and killed.

Three important reports in relation to the MP were issued as a result of the events in Somalia. Their principal recommendations are briefly addressed here. The Somalia Inquiry, which examined this incident and the deployment of the Canadian Forces to Somalia, was wide-ranging.<sup>157</sup> A significant part related to the military justice system, including the role and powers of the MP and their relationship with commanders. The Inquiry felt that the command structure inhibited the MP in their ability to effectively and independently investigate suspected crimes, including those involving the commanders themselves. This problem became acute when two senior officers, including the Commanding Officer of the Battle Group, as well as junior officers and soldiers were eventually accused of crimes.<sup>158</sup> Much of this concern was centred on the fact that commanders not only lacked policing knowledge, but that they could misuse their authority to thwart criminal investigations, even if inadvertently:

The commanding officer is not a peace officer, is not subject to a peace officer's oath of office or code of conduct, and has no overriding obligation to advance the administration of justice. ... Thus, the commanding officer may decide not to investigate a matter, or may refuse to take action, not because it serves the goals of the [Canadian Forces], but because it serves the commanding officer's more parochial interests.<sup>159</sup>

These commanders assign and prioritize MP duties, directly affect the deployment of MP detachments, assess MP members' suitability for promotion, and, in large part, determine the materiel allocation with which they perform their duties. No other police force in Canada is controlled by its civilian masters to the degree that military commanders control MP.

The Somalia Inquiry made the following pertinent recommendations:

40.6 Military Police be independent of the chain of command when investigating major disciplinary and criminal misconduct.

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157. *Ibid.*

158. For a summary of those courts martial and their eventual dispositions, *see ibid.* at 335-58.

159. *Ibid.*, vol. 5 at 1284.

40.8 All Military Police, regardless of their specific assignment, be authorized to investigate suspected misconduct of their own accord unless another Military Police investigation is under way.

40.11 The Director of Military Police be responsible and accountable to the Chief of the Defence Staff for all Military Police purposes.<sup>160</sup>

Many other recommendations were made by the Inquiry. These three are listed because of their importance to understanding the proposed recommendations. The changes, however, were never implemented. In spite of this, significant legislative, regulatory, and procedural changes were made.<sup>161</sup> For example, the National Investigation Service that investigates serious and sensitive allegations<sup>162</sup> was created on 1 September 1997 and is independent of all commanders except its own, who is a senior MP officer. It is a unit that comes under the command of the Canadian Forces Provost Marshal. The Inquiry recommended that it be independent of him as well, but that was not accepted.

Shortly before the release of the Somalia Inquiry Report, the Special Advisory Group on Military Justice and Military Police Investigation Services released its report.<sup>163</sup> The Special Advisory Group was established by the Minister of National Defence in January 1997<sup>164</sup> and released its report three months later. It was chaired by the former Chief Justice of Canada, Brian Dickson.<sup>165</sup> With regard to policing matters, its purpose was:

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160. *Ibid.* at 1296-98.

161. Bill C-25, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1st Sess., 36th Parl., 1998. As discussed below, there was some overlap in two related reports, including similar recommendations such as the need for an independent criminal investigation service, which became the National Investigation Service.

162. "Serious and sensitive" relate to the complexity of particular cases and the potential for political and media interest.

163. Department of National Defence, *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services* (Ottawa: Department of National Defence, 1997) [*SAG Report*].

164. Department of National Defence, "Ministerial Direction" [*SAG Report*, "Ministerial Discretion"] in *SAG Report*, *ibid.* at Annex A.

165. The Right Honourable Brian Dickson fought with distinction as an artillery officer in the Canadian army during World War II, where he was seriously wounded. A deeper understanding of the Canadian military and a more empathic approach compared to that of the Somalia Inquiry Report is apparent in his report.

[T]o assess the roles and functions of the Military Police, including the independence and integrity of the investigative process, against the delivery of effective police services to the Canadian Forces ... [including, *inter alia*] the independence of the Military Police, ... the establishment of a clear command and control framework for Military police, [and] ... the establishment of an accountability framework including an adequate independent oversight mechanism ...<sup>166</sup>

Many matters being dealt with at the same time in the Somalia Inquiry were also dealt with in the Advisory Group's Report. The two reports came to similar conclusions in many instances, but differed in tone.<sup>167</sup>

The Advisory Group's Report notes that:

Contrary to many public perceptions, the investigation of service offences is not the main role of the military police. While investigations are conducted on a routine basis, most military police members carry on numerous other functions and tasks ... [in] four core areas, namely, police, security duties, custodial duties and direct support to military operations.<sup>168</sup>

Following the briefest of discussions of command arrangements in the Forces, the Report recommends "that command and control of military police required in the operational support of the commanders remain under their respective commands ... and that all other military police resources be under the command and control of the [Canadian Forces Provost Marshal (CFPM)]."<sup>169</sup> The Report then goes on to discuss the role of the CFPM including the change in title of the position to that, and recommends that CFPM have primary responsibility for MP selection and recruiting standards, training, and review of all MP functions.<sup>170</sup> All of these recommendations were accepted and are extant. However, if the language is not as clear as one would hope with regard to the recommended command and control arrangements, confirmation was provided by a mandatory review conducted the next year.

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166. *SAG Report*, "Ministerial Direction," *supra* note 164 at para. 4.

167. See *SAG Report*, *supra* note 163 at i. Compare the title of the *Somalia Inquiry (Dishonoured Legacy)* to the title of the Foreword of the *SAG Report (A Cause for Confidence)*. The two reports were issued only about ten weeks apart.

168. *SAG Report*, *ibid.* at 13.

169. *Ibid.* at 29.

170. *Ibid.*

In the fall of 1998, the Vice Chief of the Defence Staff (VCDS)<sup>171</sup> established a review by an external panel, again headed by The Right Honourable Brian Dickson (the Review Group). The purpose of the review was to assess the effects of the implementation of the Advisory Group recommendations and, if needed, to recommend such adjustments as would be advisable.<sup>172</sup> The Review Group's report<sup>173</sup> was delivered to the VCDS in December of that year shortly after Dickson's death. Significant headway was made by the MP during that year-and-a-half under review, as enormous organizational changes were implemented. The two areas of interest of the report to be discussed here are chapter two, "Command and Control of the Military Police," and chapter three, "The Accountability Framework."

The Review Group confirmed the Advisory Group's recommendation that MP at bases and wings should remain under supervision of the operational chain of command. Strong arguments were made by the CFPM against this arrangement, stating "that it was extremely difficult to have the policies and procedures, which the Canadian Forces Provost Marshal is responsible for, applied consistently or at all unless there is authority to compel their enforcement through a command and control structure."<sup>174</sup> However, the Review Group found "that all the executive authority required by the CFPM in order to ensure respect for military police duties and procedures is provided by the Accountability Framework between the [VCDS] and the CFPM."<sup>175</sup>

The Accountability Framework<sup>176</sup> was an agreement entered into to address concerns of improper command influence. It lays out the respective duties and obligations of each office holder and "is meant to ensure that the reporting relationship of the CFPM to the VCDS does not in any way compromise the independence of the CFPM in relation to the investigatory role of the military

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171. Vice Admiral G.L. Garnett. The VCDS is the second-in-command of the Canadian Forces, and reports to the Chief of the Defence Staff who commands all of the Forces.

172. Department of National Defence (Canada), *Terms of Reference—Military Police Services Review* by Vice Chief of the Defence Staff (Ottawa: Department of National Defence, 1998) [Review Group], duplicated in *Report of the Military Police Services Review Group* (Ottawa: Department of National Defence, 1998) at Annex A.

173. *Ibid.* at Annex B.

174. *Ibid.* at c. 2, para. 3.

175. *Ibid.*

176. *Ibid.*, Annex B. See chapter three for analysis and recommendations.

police, including the [National Investigation Service].<sup>177</sup> The Review Group was satisfied both with the content of the Agreement and its functionality. It was convinced that any problems with command of MP by military commanders would be satisfactorily addressed in part “because it is clear that the senior leadership of the Canadian Forces is committed to ensuring that the chain of command use its own authority to ensure the implementation of military police policies and procedures ... [and] to ensure that the CFPM’s legitimate concerns are addressed.”<sup>178</sup> The Review Group also recommended “that the CFPM be afforded the ability to comment on the technical skills of military police members” and that those comments be “considered” for career management, progression and administration purposes.<sup>179</sup> These arrangements persist today.

## B. THE CURRENT SITUATION

Although only briefly noted, the issue that there can be many masters over civilian police is simply unknown in common law countries, contrary to the present case for MP in the Forces. The CFPM commands only a small percentage of MP in the Forces, while the remainder are commanded by non-MP officers.<sup>180</sup> It can be fairly stated that all civilian police forces have a chief of police who is the sole authority to task and deploy his or her police officers. This arrangement addresses the professionalism, competency, and accountability of police.

Serious and sensitive issues in the Canadian Forces are out of the reach of commanders now because they are handled through the National Investigation Service (NIS).<sup>181</sup> But the majority of offences are of a lesser magnitude<sup>182</sup> and are

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177. *Ibid.* at c. 3, para. 2.

178. *Ibid.* at c. 3, para. 3.

179. *Ibid.* at c. 2, para. 5.

180. See below at 46-47.

181. It is important to state that the NIS is neither a separate nor special entity in the Forces. It is another military unit, in this case coming under the command of the CFPM, composed of regular MP. Those MP may be posted to the NIS or any other MP unit or detachment from time to time. However, members of the NIS investigate major crimes, or crimes alleged against senior officers. Members of the NIS are the only MP who may lay charges under the *Code of Service Discipline*.

182. The Canadian Forces has a two-tiered judicial system where minor disciplinary offences are tried summarily by military commanders with limited punishment authority, whereas formal trials resembling civilian criminal trials are found in the court martial system. In the fiscal year 2007-2008, there were 2,035 summary trials conducted compared to seventy-eight

handled locally by commanders and MP who are not in the NIS. As we have seen, the fact that MP have other military tasks does not differ greatly from civilian police, and so justifications for the special military command arrangements fail. As it pertains particularly to service offence investigations, which include criminal offences, the CFPM needs the specific independence and authority to task, deploy, and re-deploy MP and equipment as he or she deems required. The NIS, for example, may be in charge of an investigation but require additional police resources for assistance. Currently, though, the CFPM's only option in such a situation is to request the cooperation of local commanders whose MP he or she needs to task. Although he or she has the right to go to the VCDS to force a recalcitrant commander to cooperate, this is impractical except in extreme situations. On the other hand, should the CFPM have command over all MP, he or she would, when required, be able to "reach down" to assign duties to Base or Wing MP.

The requirement for CFPM to have command authority has other practical consequences unrelated to investigations. The Canadian Forces is currently heavily tasked to provide members for overseas operations, including those in Afghanistan. Service members are typically assigned to be in theatre for approximately six months, although longer tours are not uncommon. Prior to deployment, they participate in a significant amount of training. This commonly involves up to nine months of training and administration, much of which is often at a distant base. Following a tour in the field, most members will be entitled to long leave and administrative time to prepare them to reintegrate into their normal jobs. A tour, then, can take a member away from his or her regular job for often fifteen months or more. With approximately 2,900 Forces members currently serving overseas on a multitude of operations,<sup>183</sup> and at two tours per year, the disruption to normal base duties is significant. Not only do holes have to be filled in important jobs that cannot be undertaken in such an absence, ensuring that they have high-quality soldiers who are capable of handling those overseas operations is also crucial. Naturally, commanders turn to the CFPM when there are deployment problems with MP or other issues and yet he or she has no authority to ensure

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courts martial. See Department of National Defence, *Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces: A Review From 1 April 2007 to 31 March 2008* (Ottawa: Office of the Judge Advocate General) at 13, 136.

183. See Canadian Expeditionary Force Command, "International Operations," online: <<http://www.comfec-cefcom.forces.gc.ca/pa-ap/ops/index-eng.asp>>. Figures are stated as of 16 June 2010.

control or the quality of the personnel being deployed. The most that he or she can do at present, as with surges in investigations, is to negotiate with commanders who have their own parochial interests. Frustration and inefficiency can result.<sup>184</sup>

The current command-driven arrangement appears to resemble a town mayor having his own personal police force, and this provides an appearance of improper influence. There are no orders, directions, or extant policies which guide the relationship between commanders and MP, and the CFPM has little or no influence over the quality of policing except after the fact.<sup>185</sup> Importantly, and unlike ministers responsible for police in the federal or provincial governments, the commanders who exercise executive authority over the MP do so without specific statutory authority, except for that of command generally. This is probably a historical anomaly more than a conscious decision of Parliament. Indeed, the MP appear to be the only police force in Canada that does not have their own specific legislation; rather, they are mentioned in very limited terms in the *National Defence Act*, relating to their jurisdiction to make arrests and deal with certain complaints.<sup>186</sup> Consequently, other command-related problems arise regularly.

MP are spread across the entire country on navy, army, and air force bases and wings, commonly in small detachments of ten to twenty MP members. They are normally commanded by a junior officer in the rank of captain, but because of operational deployments, required professional courses, or other tasks and reasons, the local Detachment Commander is not infrequently a non-commissioned member of the rank of warrant officer or sergeant. Base and wing commanders are commonly colonels, a rank that is eight levels higher in the hierarchy than the warrant officer, and three ranks more senior to the captain. As rank plays strongly in the military, the differences inevitably affect relations. This can cause the local Detachment Commander, who depends upon being perceived by his commander as cooperative and productive and who has otherwise no policing priority guidelines, to be agreeable to those priorities that the commander sees as important. MP are then liable to be employed in a manner that does not opti-

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184. The author has witnessed these exact problems on a regular basis during his two appointments as a military legal adviser to the Office of the CFPM.

185. See *QR&O*, *supra* note 22 at art. 22.04; *National Defence Act*, *supra* note 10, Part IV—Complaints About or By Military Police.

186. *National Defence Act*, *ibid.*, s. 156.



mally use their policing training and skills, and may result in poor policing. Its effects, however, will probably not become apparent until “the wheel comes off.”<sup>187</sup>

The concerns argued by the CFPM in 1998 to the Review Group relating to the difficulties of enforcing MP policies and procedures<sup>188</sup> continue to this day.<sup>189</sup> Although the CFPM is now a commander and no longer simply a staff officer,<sup>190</sup> his or her command is restricted to the NIS, the Canadian Forces Service Prison and Detention Barracks, the Canadian Forces Military Police Academy, and the Military Police Security Service, totalling about only 10 per cent of the approximately two thousand MP members in the Forces. The remaining MP continue to be commanded by non-police officers. These officers evaluate and control the careers of MP with little or no input from the CFPM or his or her staff. Policing priorities and policies will necessarily be significantly affected by the wishes of local commanders over what distant Ottawa may want; indeed, there is no effective means of ensuring the priorities of the CFPM are enforced or restricted. This is not to suggest that improper direction is being given by local commanders,<sup>191</sup> but as the Somalia Report suggested, the local commanders will inevitably have their own “parochial interests.”<sup>192</sup>

Being in a hierarchical organization where authority rests in command and rank, the CFPM has no effective legal or lawful control over MP except for his or

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187. Beare, “Steeped in Politics,” *supra* note 144 at 316, citing Robert Reiner, *The Politics of the Police* (London: Oxford University Press, 2000) at 9.

188. See 42-43, above.

189. See Department of National Defence, 1920-1 (DPM Police) *Military Police Issues*, 4 October 2007 [on file with author]; *Military Police Command and Control*, Presentation to Command Council by CFPM, 17 October 2008 [on file with author]; 1180-1 (D NDHQ Sec) *Commanders’ Council Meeting 05/08 Held on 17 Oct 08—Record of Decisions*, 31 October 2008; *Military Police Command and Control Update*, Presentation to Command Council by CFPM, 25 November 2008 [on file with author]; and VCDS 5225-1 (EA CFPM) *Military Police C2*, 31 December 2008 [on file with author].

190. Department of National Defence, Canadian Forces Organization Order 9507—*Canadian Forces Military Police Group*. This order states that the Canadian Forces Military Police Group is a formation which is commanded by the CFPM.

191. Indeed, there is little or no publicly available information suggesting significant problems recently. However, the concern is to address likely and obvious issues before there are problems.

192. See the text accompanying note 160, above. However, that text deals with criminal investigations, which is not the case here. Nonetheless, unintentional and indirect effects on investigations are liable to occur where commanders’ priorities affect the numbers of available MP and their resources.

her own 10 per cent. Yet, he or she is responsible for effective policing in the Forces. The CFPM “is responsible for developing policies and plans to guide the management of security and military police resources of the Department.”<sup>193</sup> Literally, this suggests that the CFPM is only responsible for “policies and plans” related to MP; practically, however, he or she will inevitably be the one everyone looks to when there are problems anywhere related to MP. But with responsibility must come authority, of which, for some 90 per cent of the Forces’s MP, the CFPM has little or none.

Changes, however, need not be complex or difficult. Command is not an absolute in the Forces. The military functions regularly on something less than full command. Command relations are defined in the doctrine manual titled *CF Operations*.<sup>194</sup> There is a hierarchy of command and, while avoiding technical definitions, it is fair to explain them as having at the highest level “Operational Command,” which includes complete authority to assign missions or tasks, deploy units, reassign forces, or to retain or delegate authority as may be necessary. The next lower level is “Operational Control,” which is a delegated authority allowing the commander to direct assigned forces to accomplish specific missions or tasks and is usually limited by time or location. There are lesser levels of command as well. By maintaining a higher level of command, that commander has ultimate authority to take back any delegated command authority. It can be temporarily for a specific purpose, or permanently. Orders the commander issues would be binding on his or her subordinates, including those troops under another commander’s delegated authority, although it would be improper to interfere with that delegated commander except in the case of pressing operational considerations. At present, local commanders effectively have Operational Command over their MP, and CFPM has no command relationship. This is surely at odds with public expectations.

Recall that the Supreme Court has made it clear in *Campbell* that police must be independent of the executive, at least for investigative purposes, although there may be a closer relationship for other purposes.<sup>195</sup> The same case supported

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193. Canadian Forces Provost Marshal, “About CFPM – Mission and Vision,” online: <<http://www.vcds.forces.gc.ca/cfpm-gpfc/apm-agp/index-eng.asp>>.

194. Canada, National Defence, *CF Operations* (B-GJ-005-300/FP-000) (Ottawa: Department of National Defence, 2000), online: <[http://www.dcds.forces.gc.ca/jointDoc/docs/B-GJ-005-300\\_e.pdf](http://www.dcds.forces.gc.ca/jointDoc/docs/B-GJ-005-300_e.pdf)>.

195. *Campbell*, *supra* note 1 at para. 29.

the proposition in *Enever* that police have “original authority,”<sup>196</sup> or inherent powers. Although their powers are proscribed by legislation<sup>197</sup> and jurisprudence<sup>198</sup> within their areas of jurisdiction, the MP enjoy the full panoply of those powers which all police forces have while being under the direct supervision and responsibility of the chief of police. The relationship with the executive can be realized either directly, through the responsible minister, or indirectly through police services boards. The boards provide continuity, stability, and insulation for both the executive and the police from the demands of politics of the day.<sup>199</sup> Finally, Canadians can properly expect an analogous standard of accountability and professionalism in the MP that is comparable to that of any other police force, but for bona fide military requirements. Those bona fide military requirements appear from our study to be limited to the requirement for the MP to be responsive to their military commanders in the unique areas of military operations that are not found in other police forces. The MP’s unique duties include responsibility for prisoners of war, detainees, stragglers, refugees, and displaced persons on the battlefield; naval ship security in foreign ports; airfield security; and the general security of the Department of National Defence. As it pertains, however, to the overall management, command and control, selection, training, employment, and distribution of the MP, as well as all matters dealing with criminal and disciplinary investigations within the Forces, there appears to be no bona fide requirement that would displace the standard of these matters being the direct responsibility of the chief of police or the CFPM.

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196. *Ibid.*

197. *National Defence Act*, *supra* note 10, s. 156.

198. See *R. v. Nolan*, [1987] 1 S.C.R. 1212; *R. v. Haynes* (1994), 130 N.S.R. (2d) 311 (N.S. C.A.). These two cases, amongst others, speak to the jurisdiction of Military Police which is generally limited to those persons who are subject to the *Code of Service Discipline* pursuant to s. 60 of the *National Defence Act*, *supra* note 10. Importantly, *Nolan* states at para. 18 that although provisions defining those persons who are “peace officers” pursuant to the *Criminal Code*, *supra* note 29, s. 2 expands Military Police jurisdiction to persons who are not subject to the *Code of Service Discipline*, the provision is limited and not intended to extend that authority for them “to act as ‘peace officers’ throughout a province and in relation to all residents of a province, duplicating the role and function of the civil police.”

199. See Part II(F), above. In my discussion above, it is important to note that all of the examples dealt with the RCMP, who are directly controlled by their minister and do not have a police services board. The point is made not to suggest that direct ministerial control is inherently less effective or accountable. Rather, it is to highlight the greater risk of parochial influences affecting the police, particularly in areas where the use of their discretion is essential.

### C. A PROPOSED WAY AHEAD

With the foregoing in mind, it is proposed that two fundamental steps take place to align MP governance with other Canadian police accountability standards. The first is to place all MP under the operational command of the CFPM. The second is the establishment of a Military Police Services Board (MP Services Board).

The newly established MP Services Board is envisaged as a unique type of police services board. It would be responsible for the provision of multi-layered governance oversight at the national, regional, and local levels of command to govern the traditional roles of MP in support of operational military commanders. It would oversee the traditional roles of enforcing good order and discipline of military members, as well as such other legitimate military duties as commanders deem are, under all the prevailing circumstance, best executed by MP. The multi-layered unique board is necessary to account for bona fide military requirements such as unity of command and the national, as opposed to local, nature of the Forces, while still addressing unique local concerns. Further, the Board would ensure that a level of expertise in policing and military issues would develop and thereby minimize the risk of commanders misusing their MP for their "parochial interests."

The Board, with the advice of the CFPM, would issue policy and task priorities to MP units and elements depending upon their respective operational responsibilities and needs. The orders of the Board would be the CFPM's responsibility to execute. Although detailing the make-up and responsibilities of the Board, including its various levels, is beyond the scope of this article, it is expected that direction from each level would, in effect, be a subset of its superior board's directions. For example, the national level would issue general, broad direction which would apply to most MP. It would decide upon the allocation of MP members to commands, and govern their general duties and authority to use or trial new equipment and methods of policing. The national direction would also guide and constrain each of the next subordinate levels. That next subordinate board would do the same for its own bases and units. For example, this level might govern the Navy, Army, or Air Force and provide direction which is applicable to the whole of each. At each level, a smaller sub-board would decide matters within its respective sphere of responsibility. Each level would be constrained by the direction of its superior board's directions.

This would be quite intelligible within the military as it parallels the means by which military orders are commonly issued.

It would be important that directions from the Board and its sub-elements be only issued to the affected MP Detachment Commander by or on behalf of the CFPM. Local military commanders would have limited authority to issue orders directly to MP. However, it would be quite normal for particularly routine matters of a local nature that the CFPM could delegate his or her authority to a local sub-board for the sake of expediency. Again, each level would only be able to execute those tasks which fall within their delegated authority. Unusual and unique conditions would need to be approved by the higher command within the MP Branch, and perhaps by the national Board.

In this construct, it is expected that the CFPM would be uniquely responsible for all military policing matters within the Canadian Forces, much as a chief of police is for his or her force. The training, administration, discipline, and accountability of all MP would be the responsibility of the CFPM and orders to MP would only be issued by or on behalf of the CFPM. However, much as municipal police services boards are responsive to the needs of their communities through their municipal councils and police services boards, MP would, in similar fashion, be responsive to their respective commanders whom they support through the MP Services Board. For example, the policing priorities of the Army commander would likely differ from that of the Air Force commander. The Army commander could be very concerned during preparations for a pending operation overseas that there is an inordinate drug abuse problem with his soldiers which needs to be addressed. The Air Force commander, on the other hand, might well have ongoing but not extraordinary drug abuse concerns amongst his members, but has considerable concerns about sabotage and general security on his air bases. Both are equally valid concerns Canadians can confidently expect that their military commanders would address with the support of their MP. But commanders, whether at the international, national, regional, or local levels each would need to decide for themselves their priorities and then be prepared to be held accountable. MP must be able to respond to, and indeed in their own turn be responsive to, their respective commanders for the policing priorities which they would be assigned by their local sub-board. The accountability of the executive (*i.e.*, commanders) would be clearly shown in the written directions of the MP Services Board. The CFPM would be accountable through his reports to the

Board for those matters within the discretion of the police for which they are independent of their commanders.

Orders issued by the Board to the CFPM would provide the governance of MP in like manner to that of other police forces, while command of all MP by the CFPM would ensure that he or she has the legal authority to deploy, re-deploy, train, assess, and otherwise manage the MP under command. Further, this would ensure the means for the CFPM to override improper command orders which, particularly in the law enforcement role, impinge upon the required police independence that the courts require and other authorities support.

This model would ensure reasonable and accountable governance, providing effective military policing services where and how such governance is required. In the same vein, effective and indeed measurable guidelines would be provided so that new junior MP officers who are local Detachment Commanders have the guidance and support they need when confronted with difficult or complex situations for which they may otherwise lack experience. Commanders, too, would have a clear understanding as to what they can use their MP for, and under what conditions, or when they might be withdrawn for other duties.

#### IV. CONCLUSIONS

The Military Police Branch has evolved considerably from its humble beginnings in Canada a century ago. Much has changed. MP must now be qualified in the same type of police training as their civilian counterparts, as well as qualify in unique military training. They now have control over the selection and police training of their members and have an independent criminal investigation unit which is outside of the chain of command. Further, there are robust police complaints mechanisms in place which are regularly used and tested.<sup>200</sup>

However, more needs to be done before problems arise, and problems are foreseeable. For Canadians to be confident that MP have the control and complete oversight mechanisms to ensure proper policing as is expected in any community in Canada, important changes must be made. The CFPM, as the “chief of police” of the Canadian Forces, must command all MP as all chiefs of police

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200. See Military Police Complaints Commission, “Chair’s Message,” online: <<http://www.mpcc-cppm.gc.ca/index-eng.aspx>>; *QR&O*, *supra* note 22, art. 22.04.

command their constables. Finally, MP standards and requirements need to be effectively meshed with commanders' needs, both in combat operations and in garrison. To do this, a MP Services Board must be established which accounts for operational, national, regional, and local concerns. This will complement the "review" governance system that is already well-established and will complete the necessary overall governance structure for the complete professionalization of MP as recognized as essential in law and practice for all police throughout Canada.

