IPPERWASH DISCUSSION PAPER
GOVERNMENT/POLICE RELATIONS

June 2006

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MEMORANDUM

TO: Ipperwash Inquiry
Parties with Part Two Standing

FROM: Nye Thomas
Director, Policy and Research
Ipperwash Inquiry

DATE: June 2006

RE: Discussion Paper on Police/Government Relations

1. INTRODUCTION

This is the first of three short discussion papers on major policy areas being considered in Part Two of the Ipperwash Inquiry. This paper considers the relationship between police and government and the scope of police independence from improper governmental influence. The Inquiry is also preparing discussion papers on policing and Aboriginal peoples (including policing occupations) and Treaty and Aboriginal rights.

The purpose of this paper is to provide parties with notice of the issues that Part Two is considering on this subject. The paper also sets out a series of questions that are likely to arise in our deliberations. **Parties are encouraged to consider some or all of these questions and the issues raised in the discussion papers in their written and oral submissions.** A list of questions is attached as Appendix A.

Neither the Commissioner, commission staff, nor the Inquiry's Research Advisory Committee have reached any conclusions on these issues. The Inquiry's policy staff and Research Advisory Committee have, however, provisionally identified a series of issues and questions that are likely to inform our analysis. The Commissioner will not be considering final recommendations on this or any other Part Two topic until the evidence is completed and all submissions have been received.

This discussion paper does not include references to the factual evidence or testimony heard at the Part One hearings. This paper will, however, discuss several policy topics or issues that have been discussed at the hearings. This is because many of the legal, policy and practical issues discussed at the hearings have been discussed in previous Inquiries, reports, and articles on this subject.

This discussion paper does not purport to address every relevant issue on this subject. Moreover, the issues and questions discussed here are neither exhaustive nor fixed. They are, rather a summary of major issues and questions that we have identified so far. We encourage parties to discuss or recommend other issues or questions we have not identified.

The focus of this paper is on provincial policy and processes.

2. THE IMPORTANCE OF POLICE/GOVERNMENT RELATIONS

The Ipperwash Inquiry is the fifth major Canadian public inquiry in the last 25 years to consider police/government relations.[1] The issue has also been discussed at length in the United Kingdom, New Zealand, and Australia.[2]

The police/government relationship establishes the parameters and expectations of government involvement in policing policy and operations. The relationship is important because fundamental democratic principles and values are at stake. Police and policing are amongst the most basic functions of any state. Canadian democracy depends upon the police to fulfill their responsibilities equally, fairly, professionally, and without partisan or inappropriate political influence.

Yet the police/government debate is not simply about preventing police from becoming "a law unto themselves" or inappropriate government influence. It is also about accountability and transparency for police and government decision-making.

Given this background, the Ipperwash Inquiry should attempt to develop recommendations that address both police and politicians/governments. The Inquiry may also attempt to provide guidelines for procedures to govern police-governmental relations generally and with respect to policing of Aboriginal protests and other public order events and crises. Finally, the Inquiry's should also presumably attempt to transcend individual governments, ministers, civil servants and police officials in order to accommodate a variety of different situations, political philosophies, and personal styles.

1 In addition to the Ipperwash Inquiry, this issue was discussed at the APEC Inquiry, the Donald Marshall Inquiry, and the McDonald Commission. The issue is likely to be discussed at the Arar Inquiry as well.
2 See Prof. Stenning's background paper for the Inquiry, *The Idea of the Political "Independence" of the Police: International Interpretations and Experiences*, posted at www.ipperwashinquiry.ca/policy_part/relations/crp.html.

3. INDEPENDENCE, ACCOUNTABILITY AND TRANSPARENCY

The Report of the Independent Commission on Policing On Northern Ireland (the "Patten Report") discussed the relationship between police independence, accountability and transparency at length.[3]

The Patten Report emphasized that while police should sometimes make decisions free from external direction "no public official, including a chief of police, can be said to be 'independent'" at least in the sense of being "exempted from inquiry or review after the event by anyone."[4] The Patten Report also discussed the importance of police accountability and the types of police accountability:

> In a democracy, policing, in order to be effective, must be based on consent across the community. The community recognizes the legitimacy of the policing task, confers authority on police personnel in carrying out their role in policing and actively supports them. Consent is not unconditional, but depends on proper accountability, and the police should be accountable in two senses – the "subordinate or obedient" sense and the "explanatory and cooperative" sense.
>
> In the subordinate sense, police are employed by the community to provide a service and the community should have the means to ensure that it gets the service it needs and that its money is spent wisely. Police are also subordinate to the law, just as other citizens are subordinate to the law, and there should be robust arrangements to ensure that this is so, and seen to be so. In the explanatory and cooperate sense, public and police must communicate with each other and work in partnerships, both maintain trust between them and to ensure effective policing, because policing is not a task of the police alone.
>
> It follows there are many aspects to accountability. There is democratic accountability, by which the elected representatives of the community tell the police what sort of service they want from the police, and hold the police accountability for delivering it. There is transparency, by which the community is kept informed, and can ask questions, about what the police are doing and why. There is legal accountability, by which the police are held to account it they misuse their powers. There is financial accountability, by which the police service is …held to account for its deliver of value for public money. And there is internal accountability, by which officers are accountable within a police organization. All of these aspects must be addressed if full accountability is to be achieved, and if policing is to be effective, efficient, fair and impartial.[5]

[3] United Kingdom, Independent Commission on Policing for Northern Ireland (Rt. Hon. C. Patten, Chair), *A New Beginning: Policing in Northern Ireland* (London: 1999).
[4] *Ibid* at 33.
[5] *Ibid* at 22.

The Patten Report also noted the important relationship between transparency and accountability:

> People need to know and understand what their police are doing and why. This is important if the police are to command public confidence and active cooperation. Secretive policing arrangements run counter not only to the principles of a democratic society but also to the achievement of fully effective policing.[6]

4. WHAT ARE WE CONCERNED ABOUT?

The Inquiry's policy staff and Research Advisory Committee have provisionally identified several issues or questions in this area. Simply put, these are the policy problems we have been grappling with.

To start, we are obviously concerned with ensuring the professionalism of policing and preventing partisan policing or inappropriate government influence. We are also obviously concerned about police becoming "a law unto themselves," free from democratic input or control on appropriate issues.

We are further concerned about the accountability of both police and government decision-making. It appears that neither the statutory, constitutional, common law, nor policy rules in Ontario today clearly or adequately define the roles and responsibilities of the police and government respecting government intervention in, or influence over, certain kinds of police decision-making. Key concepts – including "police independence," "policy" and "operations" – are not defined in any statute, regulation or formal policy that we are aware of.

It also appears that the transparency of decision-making could be improved. Indeed, the importance of transparency cannot be underestimated. Transparency is necessary to hold decision-makers accountable.

Moreover, it appears that there is little agreement about which police activities fall within the ambit of police independence. Professor Stenning has written that there is "very little clarity or consensus among politicians, senior RCMP officers, jurists… commissions of inquiry, academics, or other commentators either about exactly what 'police independence' comprises or about its practical implications…"[7] As a result, the relationship can be confused or misunderstood, particularly during a crisis.

Nor is it clear *who* has the right to intervene in police activities. Both the *RCMP Act* and the Ontario *Police Services Act* give their respective Solicitor Generals the authority to direct the RCMP and OPP. Nonetheless, it appears that Ministers and officials other than the Solicitor General sometimes give police direction or guidance during specific

[6] *Ibid* at 25.
[7] Stenning at 5.

incidents. This situation may challenge both the statutory provisions and ministerial accountability.

Finally, it appears that little comparatively little analysis has been given to police/ government relations in the context of either public order policing or policing Aboriginal peoples. It may be that new or different rules are required in these situations.

To be fair, it is unlikely that everyone agrees that structural or systemic reforms are necessary. Many people likely believe that the most important safeguard in the police/government relationship is the personal integrity and professionalism of the individuals involved. They may also be skeptical of complex or costly institutional reforms that purport to clarify the real world of police/government relations. Or they may simply believe that practical experience has demonstrated that the existing system works well. These are important objections, particularly when voiced by observers with years of practical experience.

5. CURRENT LAW AND THEORY ON POLICE INDEPENDENCE

"Police independence" has a long and unsettled legal and theoretical history that we will not repeat here.[8] What follows below is a brief summary of the major legal and policy reference points in this debate.

a. The Ontario *Police Services Act*

The current statutory framework governing police/government relations in Ontario and the ambit of political independence is the *Police Services Act*.

Section 17(2) of the *Act* states: "Subject to the Solicitor General's direction, the Commissioner has the general control and administration of the Ontario Provincial Police and the employees connected with it." Section 3(2)(j) of the *Act* also gives the Solicitor General the authority to "[I] ssue directives and guidelines respecting policy matters." These sections are similar to provisions in the *RCMP Act.*[9]

Moreover, neither the *Act* nor its regulations define "police independence", "operational decisions", or the scope of "directives and guidelines." Professor Roach concludes "[o] ne of the reasons for controversy and confusion about police independence in Canada is the general absence of clear statutory definitions of the concept."[10]

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[8] *Ibid* at 4-10.

[9] *Royal Canadian Mounted Police Act* R.S.C. 1985 c.R-10. Section 5 of the *Act* reads**: "**5**.** (1) The Governor in Council may appoint an officer, to be known as the Commissioner of the Royal Canadian Mounted Police, who, under the direction of the Minister, has the control and management of the Force and all matters connected therewith."

[10] See Professor Kent Roach's background paper for the Inquiry, *Four Models of Police-Government Relationships*, at pg. 8. This paper is posted at www.ipperwashinquiry.ca/policy_part/relations/crp.html.

The *Act* appears to create different standards for police independence as between the OPP and municipal police in Ontario. Section 31(4) of the *Act* says that local police boards will not direct the Chief of Police "with respect to specific operational decisions or with respect to the day to day operations of the police". There is no equivalent limitation on the provincial Solicitor General with respect to the OPP. As a result, the *Act* may give the provincial Solicitor General broad powers to intervene in OPP policy *and* operations.

b. *Campbell and Shirose (1999)*[11]

R. v. Campbell and Shirose is the Supreme Court of Canada's most extensive discussion of police independence. The case concerned whether the RCMP was covered by Crown public interest immunity when they conducted a reverse sting in a drug operation. Binnie J. rejected the claim of Crown immunity stating for the unanimous Court that:

> A police officer investigating a crime is not acting as a government functionary or as an agent of anybody. He or she occupies a public office initially defined by the common law and subsequently set out in various statutes.[12]

Binnie J. noted that the police "perform a myriad of functions apart from the investigation of crimes" and that

> [S]ome of these functions bring the RCMP into a closer relationship to the Crown than others. . . [I]n this appeal, however, we are concerned only with the status of an RCMP officer in the course of a criminal investigation, and in that regard the police are independent of the control of the executive government."[13]

The Court declared that the principle of police independence from the Crown in the exercise of its law enforcement functions "underpins the rule of law" which "is one of the 'fundamental and organizing principles of the Constitution'".[14] Binnie J. further explained that:

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

[11] *R. v. Campbell* [1999] 1 S.C.R. 565
[12] *Ibid* at paragraph 27.
[13] *Ibid* at paragraph 29.
[14] *Ibid* at paragraph 18.
[15] *Ibid* at para 33. Justice Binnie then cited Lord Denning's famous comments in *R. v. Metropolitan Police ex parte Blackburn* [1968] Q.B. 116 at 135-136 to the effect that: "I have no hesitation in holding that, like every constable in the land, [the Commissioner of the London Police] should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act, 1964, the Secretary of

Campbell and Shirose suggests that the core of police independence is the exercise of law enforcement discretion and the conduct of criminal investigations in individual cases. The case does not, however, consider the outer limits of police independence from government. Nor does it address public order policing.

c. Other Reports and Developments

i. The McDonald Commission (1981)[16]

The McDonald Commission concluded that responsible Ministers should have extensive authority to direct, comment upon, or be advised of a wide range of police activities, including areas traditionally considered police "operations." The Commission defended Ministerial involvement on the basis of democratic principles:

> We take it to be axiomatic that in a democratic state the police must never be allowed to become a law unto themselves. Just as our form of Constitution dictates that the armed forces must be subject to civilian control, so too must police forces operate in obedience to governments responsible to legislative bodies composed of elected representatives.[17]

The Commission rejected any distinction between "policy" and "operations" that would insulate "the day to day operations of the Security Service" from Ministerial review and comment. To do so would result "in whole areas of ministerial responsibility being neglected under the misapprehension that they fall into the category of 'operations' and are thus outside the Minister's purview."[18] As a result, the Commission argued that democratic accountability required that the responsible Minister should have a right to be:

> . . . informed of any operational matter, even one involving an individual case, if it raises an important question of public policy. In such cases, [the Minister] may give guidance to the [RCMP] Commissioner and express to the Commissioner the

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State can call upon him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or no 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." *Blackburn* effectively establishes one end of the spectrum in the debate on police independence.

[16] Commission of Inquiry Concerning Certain Activities of the RCMP *Freedom and Security under the Law* (Ottawa: Supply and Services, 1981).

[17] *Ibid* at 1005-1006.

[18] *Ibid* at 868.

> government's view of the matter, but he should have no power to give *direction* to the Commissioner.[19]

The Commission did not reject police independence entirety. It concluded that police should be independent from government only in the field of criminal process.

ii. The APEC Inquiry (1999)[20]

The APEC Inquiry considered allegations that the Prime Minister's Office interfered with RCMP security operations. After considering the issue at length, Mr. Justice Hughes recommended that:

- When the RCMP is performing law enforcement functions (investigation, arrest and prosecution) they are entirely independent of the federal government and answerable only to the law.
- When the RCMP are performing their other functions, they are not entirely independent but are accountable to the federal government through the Solicitor General of Canada or such other branch of government as Parliament may authorize.
- In all situations, the RCMP is accountable to the law and the courts. Even when performing functions that are subject to government direction, officers are required by the *RCMP Act* to respect and uphold the law at all times.
- The RCMP is solely responsible for weighing security requirements against the Charter rights of citizens. Their conduct will violate the Charter if they give inadequate weight to Charter rights. The fact that they may have been following the directions of political masters will be no defense 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.[21]

Justice Hughes restricted police independence to the core functions of criminal investigations. He also recommended that the RCMP "request statutory codification of the nature and extent of police independence from government" with respect not only to

[19] *Ibid* at 1013 (emphasis in original).
[20] Commission Interim Report Following a Public Inquiry into Complaints that took place in connection with the demonstrations during the Asia Pacific Economic Cooperation Conference in Vancouver (Ottawa: Commission of Public Complaints, RCMP, 23 July 2001). The APEC Inquiry was established under the public complaints provisions of the *RCMP Act* to consider the treatment of protestors during an international summit held at the University of British Columbia in 1997.
[21] *Ibid* at 10.4.

"existing common law principles regarding law enforcement" but also "the provision of and responsibility for delivery of security services at public order events."[22] He did not explain whether public order policing was within the zone of police independence.

The APEC Report appears to suggest that the Charter may expand the ambit of police independence. Justice Hughes stated that "weighing security requirements against the Charter rights of citizens" is exclusively a matter for the police and that they should refuse to follow "the directions of political masters" if the result is to violate the Charter.

iii. The Patten Inquiry (1999)

As noted earlier, the Patten Report concluded that "no public official, including a chief of police, can be said to be 'independent'" at least in the sense of being "exempted from inquiry or review after the event by anyone."[23]

Patten recommended replacing the phrases "police independence" and "operational independence" with "police operational responsibility." He argued that "police operational responsibility" was clearer and more consistent with police accountability.[24]

Patten also recommended that the policing board should be able to require the Chief Constable to report on any operational matter and to ask the police complaints body also to investigate, including public order events. Its report also stressed that both the policing board and the police should be as transparent as possible.

iv. The Donald Marshall Commission (1989)[25]

The Commission into Donald Marshall's Wrongful Conviction also examined two cases where Nova Scotia cabinet members had been the subject of RCMP criminal investigations, but were not criminally charged.

The Marshall Commission, like the McDonald Commission before it, limited police independence to the process of criminal investigation. The Marshall Commission addressed the balance between accountability and independence by recommending the creation of a Director of Public Prosecutions who would ordinarily be independent from the Attorney General but could be subject to written directives that would be published in the Gazette. This model was subsequently adopted in Nova Scotia.[26]

Professor Roach discusses the Nova Scotia model in his Inquiry background paper. He identified it a basis for a democratic model of police government relations because it

[22] *Ibid* at 31.3.1.
[23] See footnote 4.
[24] *Patten* at 32.
[25] *Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: Queens Printer, 1989).
[26] *Public Prosecutions Act* S.N.S. 1990 c.s21 as amended by S.N.S. 1999 c.16.

respects the core of police independence while allowing the responsible Minister to intervene in policing matters in a transparent and accountable manner.[27]

v. Ministerial Directives

A number of governments have issued detailed ministerial directives governing how police and other enforcement agencies perform their work. They include directives that establish rules for activities arguably within the core zone of police independence – criminal investigations. Directives of this sort are the "policies of operations" described years earlier by the McDonald Commission.

The federal Solicitor General has issued directives to the RCMP. These directives address the following topics: information sharing agreements between the RCMP and other agencies; RCMP investigations into sensitive sectors such as unions and academia including policy guidance that the RCMP not interfere with the "free flow and exchange of ideas normally associated with the academic milieu"; and requiring the RCMP to inform the Minister of investigations that are likely to give rise to controversy.[28]

The RCMP has publicly acknowledged that these directives establish a policy framework for areas of RCMP activities requiring clarification by the political executive; provide the RCMP with standards in selected areas of policing activity for achieving a balance between individual rights and effective policing practice; and inform the public about the character of supervision provided by the political executive to the RCMP.[29]

Ontario's Interim Enforcement Policy can also be seen as a form of Ministerial Directive. Subject to some enumerated exceptions, it requires approval of an MNR Assistant Deputy Minister before planned enforcement procedures including search warrants are undertaken with respect to the exercise of Aboriginal harvesting rights. It also provides for consultation with Aboriginal Chiefs before decisions are made to proceed with charges.[30] This directive provides policy guidance and procedures to govern the exercise of law enforcement discretion.

vi. Other International Developments

Professor Philip Stenning's background paper for the Inquiry discusses legislation and policy reform proposals in the United Kingdom, Australia, and New Zealand. Professor Stenning demonstrates that these questions are being asked in other jurisdictions as well. For example, legislation in some Australian states also contemplates Ministerial directives to the police. The legislative proposals introduced in New Zealand in 2001

[27] Roach at 43-44.
[28] Arar Commission *The RCMP and National* Security, December 2004 at 41-43.
[29] RCMP submissions to the Arar Commission February 2005 at 27.
[30] Interim Enforcement Policy amended October, 2005.

represent the current outer limit of legal and policy reform in this area.[31] It is important to note, however, that the New Zealand proposal was recently withdrawn.

QUESTIONS FOR DISCUSSION

6. GUIDING PRINCIPLES

The Inquiry will likely begin by identifying several core principles to use as reference points for its analysis and potential recommendations in this area. The principles we have provisionally identified include:

- Ensuring the professionalism of police operations and non-partisan policing;
- Promoting accountable and transparent police decision-making;
- Promoting accountable and transparent government decision-making;
- Ensuring consistency with Canadian political traditions of Parliamentary democracy;
- Promoting clear and understandable lines of authority;
- Respecting the practical demands and operations of police and government, particularly in relation to the policing of protests.
- Respecting treaty and Aboriginal rights and the rule of law;

This is a long list. That said, the most difficult question for the Inquiry is likely to be how to balance competing principles, not simply to identify them. For example, it is sometimes argued that non-partisan policing requires "buffers" to ensure a structural separation of politicians and police. This is part of the rationale for police service boards. The principle of non-partisan policing may also explain certain reporting or administrative relationships within government ministries. On the other hand, some people likely believe that "buffers" are unsound because they hamper Ministerial accountability and/or democratic input into police activities.

Question 1: *Are these principles appropriate to guide the Inquiry's analysis and recommendations on police/government relations? Or, should there be others and what should they be?*

7. SCOPE OF POLICE DECISION-MAKING

a. Policy And Operations

What is appropriate scope of police decision-making? When does the government have the right to become involved?

[31] Prof. Stenning's paper includes a detailed analysis of developments in all three jurisdictions.

The *municipal* provisions of the Ontario *Police Services Act* statute reflect the conventional theory of police/government relations in which police have independent authority for "operations" and governments have authority to direct "policy." This theory is based, no doubt, upon fairly straightforward ideas about the appropriate balance between police professionalism/expertise for operations versus the need for democratic input and control of public policy.

As noted earlier, the *Act* does not explicitly prohibit the provincial Solicitor General from intervening in OPP operations. Nevertheless, it is likely that most provincial policy makers believe the policy/operations distinction applies to the OPP as well.

Patten, of course, believed that the phrases "police independence" and "operational independence" were themselves misleading. He preferred the phrase "police operational responsibility."

One important benefit of the policy/operations distinction is that it provides decision-makers with an apparent bright line demarking where police independence ends and permissible government intervention begins. The analytical problem is that "policy" issues are not always clear and that policy issues can arise for the first time in the context of an ongoing operation. Moreover, a definitive definition of "policy" and "operations" may be both unwise and/or impossible. The Patten Report concluded that:

> One of the most difficult issues we have considered is the question of "operational independence." Some respondents urged us to define operational independence, or at least to define the powers and responsibilities of the police…We have consulted extensively in several countries, talking to both police and to those who are responsible for holding them accountable. The overwhelming advice is that it is important to allow a chief constable sufficient flexibility to perform his or her functions and exercise his or her responsibilities, but difficult if not impossible to define the full scope of a police officer's duties.[32]

It is difficult to use simple distinctions to guide decision-making in absence of understanding what values, interests or objectives the words "policy" and "operations" are intended to represent. As a result, the Inquiry may want to identify criteria that assist police and policy-makers to distinguish policy and operational issues. For example, an "operational" issue could become a "policy" issue when it affects constitutional rights, affects third parties or issues not directly involved in the situation/issue, raises interjurisdictional issues, sets a precedent for similar operations in the future, or where operational decision-makers do not have existing policies or protocols to guide them.

[32] *Patten* at 32.

An alternative, but complementary, approach would be to encourage governments to issue transparent "policies of operations" or to give the Minister or the police the option of requiring that any policy direction be written down so as to enhance transparency and accountability.

The Inquiry may want to identify a potential range of police activities in which governments should have the authority to become involved. Given our mandate, however, our analysis should perhaps focus on public order policing and whether or not this activity is within the zone of police independence. It may of course be true that some, but not all, public order policing is within that zone. Some public order events may raise important public policy questions because of their cost, effect on intergovernmental relations, effect on communities or third parties, or their effect as long-term precedents.

Aboriginal protests, occupations, and blockades are, of course, a crucial category of public order events that may inevitably raise public policy questions, particularly where a colour of right, treaty right, or other Aboriginal right is alleged.

It may be that "policy" and "operations" will always be fluid concepts, incapable of precise definition. If so, transparency and accountability for decision-making would appear to be crucial, no matter what definitions are used.

Question 2: *Is it advisable to define police "independence" definitively?*

Question 3: *In which areas should police have "independent" decision-making authority? What criteria may assist decision-makers determine if an issue is "policy" or "operational?"*

Question 4: *Do Aboriginal and/or other public order events raise "policy" issues in which governments can and should intervene?*

Question 5: *Should governments have the right to issue directions in "policy" areas outside the core area of police activities in criminal investigations?*

Question 6: *Should governments have the right to intervene in the "policies of operations?"*

Question 7: *Is the phrase "police operational responsibility" preferable to "police independence" and "operational independence?"*

b. Direction And Guidance

The McDonald Commission recommended that it some circumstances it was appropriate for government to provide the police with *guidance*, but not *directions* on policy and/or operational matters. This might occur when a government official says that he or she wants something to happen, but that they are not directing the police to do it. Some have criticized this distinction as untenable or impractical in the "real" world, especially in the absence of a consensus about police independence. It is also not clear how governments can be made accountable for "guidance" they may give to the to the police.

Question 8: Should governments have the right to give non-binding advice to police on operational matters? If so, how can this "guidance" be made transparent or governments made accountable?

c. Accountability for Police Operations

The McDonald Commission concluded that the responsible Minister should always have a right to be informed of any operational matter, even one involving an individual case, if it raises an important question of public policy. The Patten Report similarly recommended in almost every case the policing board should be able to require a report from the Chief Constable even with respect to operational matters.

Question 9: Should governments have the right to be informed "of any operational matter, even one involving an individual case, if it raises an important question of public policy?"

8. INSTITUTIONAL STRUCTURES AND PROCESSES

Most writers and reports on police independence doubt the ability of existing institutions to ensure accountability and transparency for either police or government decisions especially in crisis situations. That said, the Inquiry must be mindful of the practical realities of modern public administration. We presumably will have to be convinced that any new structure or process meets both our substantive recommendations and is workable and practical. What follows below is a high-level summary and analysis of some of the key questions that the Inquiry may address.

a. Current Accountability Mechanisms

The police are subject to disciplinary and civil actions and criminal prosecutions for their actions while responsible Ministers are subject to questioning in the legislature and the media and civil law suits, access to information requests and complaints to the Ombudsman or the human rights commission. The province has also just introduced new

police complaints legislation. A fundamental question will be to decide if these mechanisms are sufficient to meet our substantive policy recommendations.

Question 10: Do current structures or processes ensure accountable and transparent decision-making by the police and government on police/government relations?

b. Codifying Police Independence

The Inquiry will have to consider if and where its substantive recommendations should be codified. If so, where? The *Police Services Act*, regulations, ministry policies?

Question 11: Should police independence be codified? If so, where?

c. Ministerial Accountability and *Police Services Act*

The plain language of the current *Police Services Act* in Ontario gives the provincial Solicitor General the authority to represent the government to the police. The Act also makes the Solicitor General accountable for the actions of the police to the public and legislature. This structure is consistent with the principle of ministerial accountability.

Does this structure reflect the realities of modern government? Professors Roach and Sossin in their papers for the inquiry have both pointed the need to consider the growing importance of central institutions in government and the challenges they present to traditional understandings of Ministerial responsibility. It could be argued that in its emphasis on Ministerial responsibility, the Ontario *Police Services Act* does not accord with the realities of modern Canadian governments.

The issue arises because ministers or officials *other* than the Solicitor General appear to be often involved in policing policy or directions, particularly during a crisis or operation. Does this challenge the legitimacy of the existing statutory arrangements and the principle of Ministerial accountability? At a minimum, it is clear that these officials should be bound by the same limits on government intervention as the Solicitor General.

Interministerial committees are an obvious and practical tool for managing issues or crises that involve more than one government ministry or agencies. What is the relationship between an interministerial committee and the role and authority given to the Solicitor General by the *Police Services Act*? The composition of an interministerial committee is an important issue. A committee of Deputy Ministers is clearly different than a committee of more junior government officials. A committee that combines political staff and civil servants is different again.

To what extent do policing issues involving Aboriginal people justify a different approach to the way that the government interacts with the police? Professor Gordon

Christie discuses some of these issues in his background paper for the Inquiry. In particular, he discusses the role of central institutions with respect to Aboriginal affairs, the role of Ministry of Natural Resources officials who have some police powers and issues of Aboriginal and treaty rights.[33]

Question 12: Assuming the principle of ministerial accountability remains sound, are the existing provisions of the Police Services Act sufficient to protect and promote Ministerial accountability?

Question 13: Should there be special rules governing non-Solicitor-General officials?

Question 14: Do policing issues involving Aboriginal peoples justify unique police/government rules? If so, what are they?

The Solicitor General and the Attorney General may have independent constitutional obligations. This may mean that in appropriate circumstances these ministers have some kind of duty to disregard the advice or direction of his or her Cabinet colleagues on policing policy issues or operations.

Question 15: Does the Solicitor General and/or Attorney General have the authority to disregard the advice or direction of his or her Cabinet colleagues on policing policy issues or operations?

d. The Ontario Provincial Police

Most of questions so far have concerned legislative or organizational arrangements within the provincial government. The Inquiry may also want to consider institutional arrangements within the OPP.

Question 16: Should advice or directions from the government be directed to the Commissioner or through the Commissioner's office? How can operational decision-makers, incident commanders, and front-line officers within the OPP be insulated from inappropriate government directions or advice?

e. Police Services Boards

The Inquiry may consider whether to recommend some kind of police service board for the OPP. Professor Roach notes that the OPP is "somewhat anomalous" in not having a police board. He argues that

[33] See Prof. Christie's background paper for the Inquiry, *Police-Government Relations In the Context of State-Aboriginal Relations*, posted at www.ipperwashinquiry.ca/policy_part/relations/crp.html.

> . . . a properly staffed police board might be able to spend much more time on policing than a Minister with multiple responsibilities in an expanding security portfolio. Such a board might also be more inclined to develop protocols and guidelines to deal in advance with issues such as the policing of protests. Police boards could also facilitate the inclusion of Aboriginal people and other vulnerable groups in the democratic model of policing. At the same time, it could be argued that adding another body…might only cause confusion and diffuse accountability.[34]

A related issue concerns *public* participation in policing issues. The police/government literature typically discusses the relationship between the executive and the police. The issue of public participation in the government/police relationship is largely missing. This is unfortunate as it is widely understood that modern public institutions depend on pubic participation to function most effectively. As a result, the Inquiry may consider institutional structures that promote public participation on policing issues.

Some of the arrangements we may consider – police service boards, for example – have attendant public processes or reporting arrangements that could promote participation, accountability and transparency. The Inquiry must ask, however, whether a police service board model of public participation can be effectively reproduced at a provincial level or is otherwise advisable.

Question 17: Should there be a Police Service Board for the OPP? Are there other ways of facilitating greater public participation in formulating and discussing the policies that govern the OPP?

f. Transparency and Directives

How can policy directions be more transparent? This is an important issue irrespective of whether the direction comes from government, a Minister or a police board. As discussed above, one model to increase transparency is the use of Ministerial directives.

Question 18: Should there be greater use of Ministerial Directives to the OPP? Should all governmental directions be reduced to writing and made public? Should the Commissioner have the option of asking that governmental direction be reduced to writing in the form of a Ministerial directive?

g. Government Intervention During A Crisis

When can governments intervene? The RCMP Ministerial Directives are detached from particular events or investigations. Conversely, the Nova Scotia Director of Public

[34] Roach at 38-39.

Prosecutions model contemplates "real time" policy direction with respect to an ongoing prosecution or event. Professor Stenning notes that consultation between police commissioners and government ministers, including state premiers and prime ministers, prior to and during the public order operations is not considered inappropriate in either Australia or New Zealand and may, in fact, be seen positively. Government intervention may be more complicated during a crisis because it may be difficult to record government directives, advice, etc. in a constantly changing and face-paced environment.

The APEC report concluded that accountability for government interventions during an event was best achieved through appropriate record keeping and effective case management. In this way, government directives or interventions would be recorded for posterity and subsequent review.

Question 19: How should governmental directions to the police be recorded during a crisis? If government issues directions during a crisis, how should they be transmitted and recorded?

9. THE MINISTRY OF NATURAL RESOURCES

Policing, especially with respect to Aboriginal people, is not only carried out by the OPP and municipal police forces, but also by MNR officials. The *Fish and Wildlife Conservation Act* gives conservation officers limited powers to arrest and issue warrants. These powers raise questions about police independence and conservation officers and the appropriate balance between accountability and independence for MNR enforcement activities. They also raise questions about government and Ministerial accountability. As noted earlier, the Ministry's Interim Enforcement Policy is an interesting example of a transparent "policy of operations."

Question 20: Does the principle of police independence apply to the law enforcement actions of conservation officers? How should the government and the responsible Minister be held accountable for direction given to conservation officials?

10. CONCLUSION

As noted above, the purpose of this paper is to provide parties with notice of the issues that Part Two is considering. Parties are encouraged to consider some or all of these questions and the issues raised in the discussion papers in their written and oral submissions.

Please contact me with any questions or comments.

APPENDIX A

QUESTIONS ON GOVERNMENT/POLICE RELATIONS

Question 1: *Are these principles appropriate to guide the Inquiry's analysis and recommendations on police/government relations? Or, should there be others and what should they be?*

Question 2: *Is it advisable to define police "independence" definitively?*

Question 3: *In which areas should police have "independent" decision-making authority? What criteria may assist decision-makers determine if an issue is "policy" or "operational?"*

Question 4: *Do Aboriginal and/or other public order events raise "policy" issues in which governments can and should intervene?*

Question 5: *Should governments have the right to issue directions in "policy" areas outside the core area of police activities in criminal investigations?*

Question 6: *Should governments have the right to intervene in the "policies of operations?"*

Question 7: *Is the phrase "police operational responsibility" preferable to "police independence" and "operational independence?"*

Question 8: *Should governments have the right to give non-binding advice to police on operational matters? If so, how can this "guidance" be made transparent or governments made accountable?*

Question 9: *Should governments have the right to be informed "of any operational matter, even one involving an individual case, if it raises an important question of public policy?"*

Question 10: *Do current structures or processes ensure accountable and transparent decision-making by the police and government on police/government relations?*

Question 11: *Should police independence be codified? If so, where?*

Question 12: *Assuming the principle of ministerial accountability remains sound, are the existing provisions of the Police Services Act sufficient to protect and promote Ministerial accountability?*

Question 13: *Should there be special rules governing non-Solicitor-General officials?*

Question 14: *Do policing issues involving Aboriginal peoples justify unique police/government rules? If so, what are they?*

Question 15: *Does the Solicitor General and/or Attorney General have the authority to disregard the advice or direction of his or her Cabinet colleagues on policing policy issues or operations?*

Question 16: *Should advice or directions from the government be directed to the Commissioner or through the Commissioner's office? How can operational decision-makers, incident commanders, and front-line officers within the OPP be insulated from inappropriate government directions or advice?*

Question 17: *Should there be a Police Service Board for the OPP? Are there other ways of facilitating greater public participation in formulating and discussing the policies that govern the OPP?*

Question 18: *Should there be greater use of Ministerial Directives to the OPP? Should all governmental directions be reduced to writing and made public? Should the Commissioner have the option of asking that governmental direction be reduced to writing in the form of a Ministerial directive?*

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