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Legal Status of Police
Volume IV**

December 1991

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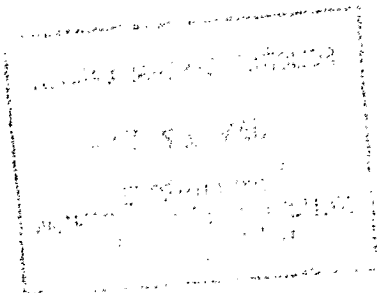
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Legal Status of Police
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THE LEGAL STATUS OF THE POLICE

**A Background Paper prepared for the
Department of the Solicitor General New Brunswick**

by

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THE STRUCTURE OF POLICING SERVICES

[T]he police are the public and...the public are the police; the police being the only members of the public who are paid to give full-time attention to duties which are incumbent on every citizen, in the interests of community welfare and existence -- Sir Robert Peel, 1822

The function of the police implies making a contribution to society (which has to be integrated with other administrative and judicial functions) in the form of social control which not only contributes to the protection of social achievements but also creates the conditions for social development and renewal aimed at achieving the essential values of our democracy. -- The Ontario Task Force on Policing (1972)

INTRODUCTION

The description of the police as "members of the public who are paid to give full-time attention to duties which are incumbent on every citizen, in the interests of community welfare and existence" which was first offered by Sir Robert Peel in 1822 anticipates the essential structural indicia of contemporary policing agencies. If viewed as "the civil force to which is entrusted the duty of maintaining public order, enforcing regulations for the prevention and punishment of breaches of the law and detecting crime"¹, it is apparent that the modern public law enforcement regimes which have been established in Canada have experienced only minimal transformation since the inception of their predecessors in eighteenth century England and Wales².

Not only do the police continue to be distinguished from other security forces by the public and professional character of their institutional structures³ but from a substantive perspective, despite the absence of any generally agreed-upon statement of principle formally governing the conduct of law enforcement, both statute and jurisprudence confirm the primary identification of the policing role with the objectives of crisis intervention and crime control⁴. Thus, for example, section 12(1) of the New Brunswick Police Act⁵ stipulates that "each police officer is charged with responsibility", *inter alia* for "maintaining law and order, preventing offences against the law [and] enforcing penal provisions of the law."

At the same time, it must be conceded that while the policing enterprise is traditionally associated with the administration of the criminal law, it is not confined to this activity but has been supplemented by the accretion of additional responsibilities. Therefore, from a purely operational or functional perspective, any description of policing which is restricted to the prevention of crime and the detection and apprehension of criminals is incomplete. In common with all other Canadian jurisdictions, the responsibilities of the police officer in New Brunswick have been augmented by the legislative assignment of a variety of collateral duties including the escort of persons in custody, service and execution of court process, the provision of courtroom order, and the enforcement of orders issued in family proceedings (such as custody and protective intervention orders), in which capacity the police assist the efficient operation of other components of the criminal justice system. Nevertheless, such services may properly be regarded as ancillary to the principal criminal law enforcement role of the police officer which is expressed through the exercise of the powers of investigation, arrest and charge⁶.

The police occupy a pivotal position in the administration of criminal justice through their responsibility for crime control⁷. However, the critical nature of their role in ensuring the operational efficiency of a fair criminal justice system depends less upon the scope of the duties which are assigned by statute and common law than upon the external conditions and the manner in which police powers are exercised. Concentration upon a formal inventory of the duties of the police to the exclusion of any discussion of either the social framework in which such duties are performed or of the powers which are applied to their fulfilment, deflects attention from the consideration of institutional issues which are equally, if not more, significant.

From a contextual perspective, it must be emphasized that any analysis of the policing role which focuses solely upon the objective of crime control is incomplete without attention to the countervailing influence of what have been described as modifying qualifiers.⁸ Such 'modifying qualifiers', which are of three classes, denote those features of the social fabric which inhibit or prevent full compliance with the goal of crime control and which therefore temper the exercise of police powers. Thus, while the product of external forces, such 'modifying qualifiers' function adjectivally to define the substantive content of the policing role.

The first and most obvious constraint upon police activity occurs as an incident of the physical and social framework in which law enforcement is undertaken and is typified by factors such as budgetary restrictions (which may produce limitations upon availability of personnel, facilities, technology, equipment and analogous resources), demographic characteristics of the policed territory, the impact of personnel affiliation and unionization, access to training programs and related matters. The existence and degree of systemic restrictions wields a dual influence upon the discharge of the policing function. First, considerations of cost and scale will govern the pragmatic capacity of police forces to accomplish functional goals. Secondly, such constraints may operate in a prospective fashion, exerting an impact upon the definition of the policing mandate and the identification of law enforcement priorities.

The importance of systemic qualifiers upon the exercise of the police function cannot be underestimated. However, while of obvious materiality, such variables pertain less to the analysis of the policing function than to the social context in which this function is discharged and are, for that reason, extraneous to the policing mandate and largely beyond the control of law enforcement authorities. Of greater importance are two other species of qualifiers which, when viewed in conjunction, refer to institutional controls defining the manner in which policing is conducted.

Within this latter category, a primary qualification upon law enforcement is attributable to the legal doctrines and instruments which entrench individual rights such as those guarantees which are constitutionalized in the **Canadian Charter of Rights and Freedoms**⁹. Closely aligned to the restraining influences upon police behaviour which result from adherence to theories of individual rights are secondary qualifications, reflected in procedural obligations, which are, in a certain sense, the logical institutional counterpart of the legal recognition of individual rights. Such institutional obligations encompass the legal, administrative and judicial control mechanisms (both formal and informal) to which all officials within the criminal justice system are subject: those developed at common law¹⁰; those which arise as a consequence of the internal structural hierarchy of police organization¹¹; those which are the product of theories of ministerial responsibility; those which result from the relationship between the police and other agents of criminal justice which regulate the general manner in which investigations are conducted¹²; finally, in addition to instruments of control which form part of the framework of the criminal justice system, one must acknowledge the effect of informal controls (imposed by community representatives or special interest groups).

The necessity for the imposition of modifying restraints upon the exercise of police powers can be justified on both general and specific grounds. From a general perspective, such limits are the predictable corollary of philosophical considerations which, in attempting to ensure fairness in the administration of criminal justice, attach equal weight to values which may be antithetical to realization of the goals of the detection, conviction and punishment of criminals. Thus,

"crime control might well be more effective without the limitations imposed by these qualifiers, but the whole sense of the qualifiers is that there are other values which should so far as possible, be preserved. The principles of fairness uphold values and rights which are believed to be worth upholding; the control of abuse is vital, for, if we assume that the rules of a criminal justice system represent a political compromise among conflicting policies, it would be a fraud on the democratic process and destructive of liberty if officials were then allowed to depart from those rules; and economic restraints on the system leave greater resources for other public undertakings which, in the final analysis, are given priority."¹³

While the need for restraint is a constant feature of the criminal justice system, it assumes critical proportions in the specific context of policing, due to the particular impact of the application of police powers upon the individual. It has been stated elsewhere that "arrest is the beginning of imprisonment"¹⁴. While this observation cannot be endorsed literally, it reflects a profound underlying truth: that the initiation of the criminal process is contingent upon affirmative police action (through investigation, arrest or charge). Recognition of the degree of control exerted by the police over the application of the criminal justice system to the private citizen therefore compels the following conclusions.

The exercise by the police of the powers to investigate crime, arrest suspects and charge offenders affects the privacy, liberty and security of the individual in an undoubtedly adverse way. The impairment of constitutionally protected interests which is occasioned by the investigative process coupled with the stigmatizing impact of arrest and charge upon the accused are factors which argue in favour of restraint and impartiality on the part of the police. The perceived need for restraint and neutrality is compounded by the selective character of the policing function. That is, at each phase of the policing role -- initial inquiries, investigation, arrest, charge -- the officer enjoys a large range of decision-making freedom. In order that such discretion be employed in a non-arbitrary manner, policing arrangements must confer upon law enforcement officers at least some degree of immunity from direction by external sources, particularly those which are political in nature.¹⁵

It is clear that the concept of police independence (that is, the insulation of the police from partisan direction) is, irrespective of its practical manifestations, a doctrine which is designed to afford the private citizen some measure of protection against law enforcement which is politically motivated. However, the concept of police independence is not equivalent to the vesting of absolute autonomy in either the individual officer or in the particular force as a whole. Unfettered independence on the part of the police could produce abuses of authority which are as undesirable as those which result from politicization of the law enforcement function. Therefore, police independence must be counterbalanced by the introduction of mechanisms of accountability which will either prevent the commission of excesses or provide the aggrieved citizen with a means of redress against such excesses.

Finally, the development of a process which would promote public accountability for the actions of an otherwise independent force suggests that in order for such accountability to be meaningfully exercised, those internal and external agencies which are responsible for the exercise of police powers must themselves enjoy certain powers of control and oversight with respect to the exercise of police powers. Control and accountability are reciprocal values. Any law enforcement regime, predicated upon the institutional independence of the police, which would impose responsibility for police conduct upon officials or agencies without a simultaneous conferral of a commensurate degree of supervisory authority, would ultimately undermine public confidence in the fairness and integrity of the administration of justice. In short, accountability for police activity demands recognition of a converse and proportional power of control over the manner in which policing is conducted¹⁶.

The desire to fashion a law enforcement regime which accommodates the three goals of independence, accountability and control is not unique to the sphere of policing.¹⁷ It is, in fact, a permanent dilemma in the criminal justice system which affects police, prosecuting authorities and the judiciary. However, a determination of the relationship between police independence and police accountability has assumed greater significance in this province in recent years due to two distinct but related developments.

In the context of public administration, in an effort to clarify the interrelationship of the various elements of the criminal justice system and to minimize opportunities for political interference and conflict of interest, on October 27, 1987, the formerly integrated provincial Department of Justice was reconstituted and its functions divided between two newly established ministries: the Department of Justice, headed by an Attorney General who is also known as the Minister of Justice,

and the Department of the Solicitor General¹⁸. The Department of Justice was vested with control over legal services, public prosecutions, law reform, court administration and consumer and corporate affairs. The new Department of the Solicitor General assumed jurisdiction over policing services, the correctional system, the offices of the Sheriff and Coroner as well as related services.

Internal governmental reorganization represents a critical step towards the attainment of objectivity and accountability in the administration of criminal justice. The separation of the investigatory and prosecutorial functions, in securing the institutional autonomy of each, greatly reduces the probability of the exertion of improper pressure by one branch of law enforcement upon another. The departmental division between agencies associated with the prevention, detection and punishment of crime, on the one hand, and those engaged in the prosecution of offenders, on the other, enhances public confidence in the impartiality of the decision-making process and thus contributes to both the appearance and the reality of neutrality in the administration of criminal justice. However, the establishment of a separate Ministry of the Solicitor General, vested with departmental responsibilities bearing no relationship to the historic office of the Solicitor General, has also contributed to the emergence of novel issues.

Historically, questions concerning the equilibrium among the forces of police independence, supervisory control and public accountability have tended to focus upon the interaction of individual police forces and those institutions and agencies which, by statute, common law or operational practice, have historically been conceded some degree of legal or factual responsibility for the creation of and supervision over law enforcement services: the Chief of Police, local government bodies or the provincial Police Commission. The assumption by the Solicitor General of significant powers in respect of policing services introduces a new element into this relationship and thus compels consideration of the potential capacity of the provincial executive to supersede local authority and define the terms of policing arrangements.

Institutional issues do not, however, provide the only justification for a re-examination of the legal status of the police in this province. The administrative uncertainty colouring the association of the Solicitor General and policing services which has resulted from departmental reorganization has been compounded by recent statutory amendments to the provincial Police Act which vest in the Minister heightened powers with respect to the administration of local law enforcement. Such legislative reforms have called into question the viability of the traditional understanding of the role of local government and external review agencies in relation to the police.

This background paper will attempt to describe in summary fashion the historical development of policing services in this province and attempt to determine the degree to which recent reforms (both institutional and statutory) have transformed the conventional understanding of law enforcement structures with particular emphasis upon the values of police independence, governmental control and political accountability for law enforcement. In this endeavour, two self-imposed limitations must be identified.

First, for obvious reasons, a narrow definition of 'police' has been employed in order to restrict consideration to those forces which perform a general, public policing role, as defined by provincial police legislation and the Royal Canadian Mounted Police Act. Such an approach exempts from any detailed discussion the legal position of what have been described as 'special status' police: cadets, auxiliary or reserve police forces, band constables and any other 'special purpose' police forces such as railway and harbour police or private security forces. Secondly, focus will be placed upon the legal implications of the institutional relationships between municipal and provincial police forces and those bodies, such as municipal government, the federal and provincial Solicitors General, the Attorney General, Police Commissions and the judiciary which are vested with powers of control, rather than to the legal operation of specific police powers exercised in the investigative, arrest and charging processes.

THE CONSTITUTIONAL FRAMEWORK OF POLICING

The practical functioning of legislative jurisdiction with respect to the administration of criminal justice is, from a constitutional perspective, unique. Although the justice system may be regarded as a homogenous subject comprised of policing, prosecutions and corrections, plenary legislative authority in relation to its component parts has not been assigned exclusively to either level of government. Rather, the criminal justice system is the product of centralizing and decentralizing forces in which the distribution of legislative and executive power is premised upon principles which are, in certain respects, antithetical to true federalism.

In marked contrast to other enumerated fields of legislative competence in which enacting and enforcement authority are viewed as co-extensive and assigned exclusively to either the provincial or federal government, the effective operation of the criminal justice system depends upon the compulsory co-operation of federal and provincial authorities. The mandatory participation of both levels of government is secured by a variety of mechanisms which include the division of powers in sections 91 and 92 of the Constitution Act, 1867, the continuation of pre-Confederation institutions such as the Attorney General and the judiciary, federal delegation, intergovernmental contractual arrangements and inter-jurisdictional fiscal agreements.

According to the provisions of the Constitution Act, 1867, both federal and provincial legislatures possess significant powers respecting the operation of the criminal justice system. First, Parliament by virtue of section 91(27) is authorized to legislate in relation to both substantive and procedural criminal law. Pursuant to this head of power, Parliament not only may enact positive criminal law (of which the most obvious expression is the Criminal Code) but may also designate the forum and procedures by which criminal offences are to be tried and may stipulate the punishment for violation of criminal offences. In addition to section 91(27), Parliament also enjoys the authority, conferred in section 91(28), to establish penitentiaries and analogous correctional facilities. Finally, Parliament is subject to legislative responsibilities in relation to certain groups, such as aboriginal peoples, which jurisdiction may incidentally impact upon the discharge of its primary authority in relation to criminal law and criminal procedure.

Provincial competence in relation to the criminal justice system derives from section 92(14) which empowers each province to enact laws concerning the administration of justice, a grant of authority which has been interpreted as including a broad spectrum of subjects traditionally associated with the justice system, such as the judiciary, public prosecutions, policing and the offices of sheriff and coroner. Provincial jurisdiction in relation to the administration of justice is further supplemented by sections 92(6) which permits the establishment of prisons and reformatories and 92(15) which enables the provincial legislature to enforce regulatory schemes through the imposition of penal sanctions.

As is evident from this brief description, the maintenance of the criminal justice system which is contemplated by the terms of the Constitution Act, 1867 depends upon collaboration of both federal and provincial authorities. While Parliament enjoys the exclusive power to enact substantive and procedural criminal law, the obligation to enforce national law (including its attendant fiscal implications) is, with few exceptions, borne by the provinces which are vested with primary authority in relation to the investigation and prosecution of criminal offences through the provincial court system. The rationale underlying the original assignment of jurisdiction over the constituent elements of criminal justice system was apparently to ensure realization of two potentially antithetical values: centralization through the articulation of uniform, national standards in the definition of criminal conduct and procedure in criminal matters¹⁹; decentralization in the enforcement of national standards in order to encourage sensitivity to particular community needs and interests, a result achieved by the retention of pre-Confederation mechanisms of local autonomy and accountability ²⁰.

While the constitutionally mandated involvement of both levels of government in the criminal justice system permeates all facets of the criminal process²¹, it is especially visible in the policing sphere. Provincial claims to constitutional control of policing agencies operating within the boundaries of New Brunswick proceed from a theoretical basis which is, to a large degree, self-evident. Section 92(14) of the Constitution Act, 1867, provides that the various provincial legislatures are vested with authority in relation to "the administration of justice in the province". This phrase, which has received a generous and expansive judicial interpretation, has been construed by the Supreme Court of Canada as a grant of power which enables each province to "establish, maintain and operate such facilities as may from time to time be necessary and advisable for the proper and effective enforcement of criminal law".²² As a consequence, the scope of the provincial grant of authority in this regard embraces virtually all operational facets of the criminal justice system:

"Before Confederation, the provinces were in charge of the administration of justice, including criminal justice...the provinces were to remain responsible in principle for the enforcement of criminal law and to retain such powers as they had before with respect to the administration of criminal justice. They continued in fact to police their respective territories, to investigate crime, to gather and keep records and information relating to crime, to prosecute criminals and to supervise police forces, sheriffs, coroners, fire commissioners, officers of justice, the summoning of juries, recognizances in criminal cases and the like...Some of these responsibilities are executive in nature; but to carry them out required instrumentalities which had to be regulated, financed, abolished and reconstituted and the jurisdictions and powers of which had to be defined by legislation."²³

Pursuant to this head of power, New Brunswick has statutorily sanctioned the establishment of policing services under the aegis of the provincial Police Act.

However, the capacity to establish and maintain police forces is not reserved exclusively to the provincial legislatures. A parallel power exists in favour of the federal Parliament stemming from the introductory words of section 91 of the Constitution Act, 1867 (the power to enact laws for the peace, order and good government of Canada') and section 91(27) (the power to legislate in relation to criminal law and criminal procedure). Acting in relation to these two grants of authority, Parliament has founded several federal policing agencies, of which the most significant for purposes of this discussion is the Royal Canadian Mounted Police.²⁴

THE DELIVERY OF POLICING SERVICES

THE HISTORY OF POLICING IN CANADA²⁵

An overview of the institutional models which have been adopted in Canada at both the federal and provincial levels reveals a preoccupation with the need to balance the values of independence, control and accountability in the sphere of law enforcement. At the same time, it must be admitted that, until recently, the interest in devising policing regimes which would afford adequate recognition to the conflicting claims of autonomy and accountability has not been explicitly articulated. Lacking a unitary philosophy of law enforcement and criminal justice administration, contemporary Canadian policing arrangements have not developed in a coherent or deliberate fashion but instead, the evolution of policing arrangements has proceeded on a largely piecemeal, ad hoc basis.

Thus, the regimes which are in place exhibit a high degree of structural diversity in relation to such matters as appointment, jurisdiction, discipline, disposition of public complaints, and the respective roles of local and central government agencies²⁶. That such variety occurs is, perhaps, inevitable, given the obvious historical, demographic, cultural and territorial differences which exist among the constituent provinces. At the same time, however, notwithstanding regional discrepancies, the history of policing in Canada also displays certain common features. As a consequence of the manifest desire to achieve the optimal balance between police independence, on the one hand, and control and accountability, on the other, the diverse institutional models which have been adopted are unified by the adherence to certain principles which have achieved general acceptance: the need to maintain local service delivery; the value of centralization and independence in the exercise of regulatory power; and the benefits of independent review mechanisms.

The underlying philosophical consensus concerning the importance of local control tempered by centralization of oversight authority and political responsibility is a legacy of colonial administration and a reflection of the continuing importance of the institutional component of the British justice system. In fact, so influential is the British system that, although the powers, duties and responsibilities of contemporary police officers (whether established pursuant to federal or provincial authority) are generally defined through the vehicle of legislation, the foundations of the modern institution of policing originate in the English common law. While the relevance of such models to twentieth century policing arrangements may not be immediately apparent, their significance is two-fold.

First, from a purely historical vantage point, owing to the colonial character of Canada's pre-Confederation relationship to Great Britain, the essential features of those offices which had been developed to administer criminal justice in England were reproduced in all material respects in the original British North American colonies. Moreover, there is no suggestion in the express language of the Constitution Act, 1867 that the powers and functions of pre-Confederation law enforcement officials were to be eliminated or altered by the fact of union. To the contrary, the preamble of the Constitution Act, 1867 explicitly states its intention to implement a political structure "similar in principle" to that of the United Kingdom. As a consequence, "the arrangements made by early colonial administrators to police the Canadian territories were no exception to this general rule, and the public police officials and forces established in the late eighteenth and early nineteenth centuries were explicitly modelled on their counterparts in the British Isles."²⁷ On this basis alone, a brief description of the evolution and role of the original 'police officer' ought to contribute to an understanding of this position in its modern manifestation.

Secondly, on a theoretical plane, while those pre-Confederation policing arrangements which were continued after 1867 have been significantly modified by statute, such alterations relate principally to the internal structure, operations and functions of the various forces. The language employed in legislation, however, to describe the status of the police officer incorporates reference to older models, a fact which may have an important bearing upon any analysis of the relationship of the police officer to executive and judicial authority. In short, a full appreciation of the legal status of the police officer can only be obtained through an examination of its predecessors, and, in particular, through a brief discussion of the office of the English constable.

1. The Office of the Constable

It is generally agreed that the office of the Constable represents the foundation of contemporary policing. The first recorded references to the position of Constable occur in the thirteenth century²⁸ although there is some evidence that the Norman legislation in relation to the constable did not establish the office but merely modified a pre-existing Saxon institution²⁹. Documentation from this period indicates that the title was applied to a number of locally appointed officers responsible both for 'the view of the arms' (that is, to ensure that every freeman was properly armed as required by law) and the preservation of the peace³⁰ (accomplished through the system of 'watch and ward'³¹). In this sense, the duty to 'preserve the peace' referred to the 'local' peace attaching to a particular community and its members, since the original constables did not represent the interests of the central government but were instead local officers which advanced the interest of their particular communities.

The earliest descriptions of the office emphasize communal responsibility for law enforcement, discharged through a locally elected official whose status was dictated by evolving customary law. However, during the succeeding four centuries, local control and autonomy in relation to law enforcement and peace-keeping was superseded by the gradual centralization of the administration of criminal justice. In the policing context, centralization was manifested by the rise of royal functionaries, such as the justice of the peace³², which were vested with both quasi-judicial responsibilities and supervisory powers over the constable³³. The ultimate effect of such developments was to subordinate the role of the constable to that of the judiciary and thus to transform the locally appointed, relatively autonomous law enforcement officer into an institution designed to "serve the purposes of a wider, national government".³⁴

The subjection of the constable to the central administrative control was further accelerated in 1662 by the transfer of appointment power from the community to the justice of the peace.³⁵ The designation of a surrogate of the central executive as the source of appointing authority signals the full conversion of the constable from a local law enforcement officer to an agent of the central executive³⁶. As a result, by the end of the sixteenth century, the constable was described as an "Officer that supporteth the Queen's Majesty in the maintenance of her peace"³⁷ whose powers, consistent with the origins and evolution of the office, incorporated two distinct theories of authority.

First, by virtue of the ancient origins of the office, the constable possessed certain inherent powers³⁸, described as 'original', terminology which was consonant with the early common law understanding of the position as the 'conservator' of both the communal and the royal peace. In addition to such inherent powers, however, through the operation of statute, the office of the constable also acquired an executive dimension according to which it functioned as an aid to or agent of quasi-judicial officers such as the justices of the peace, the coroner and the sheriffs "whose precepts he ought to execute or in default thereof he may be indicted and fined"³⁹.

The confluence of original and delegated authority in the one office renders the legal status of the constable somewhat problematic. Only two propositions can be maintained with a relative degree of confidence. First, the constable constitutes the genesis of contemporary policing structures in its (constantly shifting) accommodation of the competing values of local responsibility and central control within a single office vested with both inherent and ministerial powers⁴⁰. Secondly, it can also be asserted that while "the modern policeman is a long way distant from the parish constable...the change is merely a development.

While the police system...has been placed on an entirely new footing, the materials of which it has been formed had been in existence from the first."⁴¹ An examination of the history of policing in Canada in both the pre- and post-Confederation periods confirms the conclusion that the ancient office of the constable in both its peace-keeping and ministerial dimensions forms the basis for the establishment and operation of contemporary policing structures.

2. The Structure of Pre-Confederation Policing⁴²

Such historical records as are available support the view that the policing structures which were introduced into the various British North American colonies during the pre-confederation era were those which had been borrowed from the English constabulary system subject only to those modifications which were demanded by particular colonial conditions.

The first colony to incorporate the essential elements of the English justice system was that of Newfoundland, the Governor of which appointed justices of the peace and constables in 1729 pursuant to Royal Proclamation⁴³. The colonies composing maritime Canada -- Nova Scotia, New Brunswick and Prince Edward Island -- quickly followed suit. In 1749, the Governor of the colony of Nova Scotia (which at the time included New Brunswick), issued a proclamation requiring all settlers "to assemble together...in separate companies with their respective overseers and each company choose a constable."⁴⁴ Upon selection, the constables were sworn in by the justices of the peace, a practice which was continued until 1765 in which year the Town Officers Act⁴⁵ was passed, providing for the nomination of constables by a Grand Jury and formal appointment by justices of the peace.

In the absence of a statutory description of their mandate, these officers were simply directed to carry out those duties assigned to them by the justices⁴⁶. Shortly after becoming a distinct province under separate Charter in 1785, New Brunswick enacted the Town and Parish Officers Act⁴⁷ which provided for the appointment of two or more constables out of every town or parish of each of the colonial counties. Saint John, which was incorporated by Charter in 1786, extended to freeholders the right to elect and have sworn in one high constable and six constables.

By the mid-nineteenth century constables were active in Prince Edward Island. While initially nominated by justices of the Supreme Court and appointed by Justices of the Peace, after 1853 the power of nomination was placed in the hands of the Grand Jury and appointment vested in the justices of the Supreme Court.⁴⁸ Since in none of these jurisdictions were the powers, duties or responsibilities of the constable specified by statute, one commentator has concluded that "the office provided for was the common law office of the constable."⁴⁹

The experience of Eastern Canada in the pre-confederation period was replicated throughout the remaining territories. In 1764, after five years of military rule, during which policing functions were discharged by captains of the militia, civil rule was introduced in Quebec and civil courts established pursuant to an Ordinance Establishing Civil Courts⁵⁰. The effect of this ordinance was to replace the initial policing structure which had been established in 1651 with a system of justices of the peace competent to appoint bailiffs and sub-bailiffs who exercised many of the traditional functions of the English constable including policing⁵¹. In 1777, the law enforcement functions of the bailiff were removed from the bailiffs and divided between local Coroners and Captains and other commissioned officers of the Militia who enjoyed the status of "Public and Peace Officers within their respective Parishes."⁵² As a result of Ordinances passed in 1787⁵³ and 1836⁵⁴ the role of the common-law Constable, including its association with the enforcement of the criminal law, was confirmed in the colony.

Analogous developments occurred in the Western settlements. In 1792, the English common law was officially received as the law of the Province of Upper Canada and in 1793 the Legislative Assembly enacted the Parish and Town Officers Act which provided for the appointment by justices of the peace of a high constable and constables for every "parish, township, reputed township, or place." A similar provision was contained in the Laws of Assiniboia passed by the Governor and Council of the Red River Settlement in 1862⁵⁵. As a consequence, it appears safe to conclude that the office of the Constable, in all its dimensions -- a local peace officer, salaried and subject to the direction of the local magistrates or justices of the peace -- had become firmly embedded as an essential feature of the administration of criminal justice in all parts of pre-Confederation Canada.

3. Policing in the Post-Confederation Period

While the fact of political union did not disturb reliance upon the office of the constable as the basis of policing in Canada, the post-Confederation period witnessed significant developments in the institutional character of policing. Such phenomena which related to both the internal structure of police forces and the operation of external control agencies, achieved two results: an expansion of the range of police independence through increased professionalization and the concurrent introduction of arrangements fostering accountability and responsibility and external control.

i) The Development of External Accountability and Control

Gradual urbanization during the nineteenth century, witnessed by the incorporation of municipalities and increasing sophistication in the development of local government structures, contributed to the assumption by the local executive of control over policing. The most visible assertion of local control was manifested in the removal of the power of appointment of constables from the justices of the peace and a corresponding transfer of such authority to local government (either through appointment by common council or by election in a municipal ward)⁵⁶. Although by no means a uniform phenomenon⁵⁷, the shift from judicial to executive control represented a change in institutional structure which effected a fundamental transformation of the role of the constable. Originally perceived as a local 'peace keeper' whose primary function was to perform such administrative tasks as were necessary to the effective workings of the judicial process, the exercise of control over policing by local government encouraged an appreciation of the individual constable as a law enforcement officer and of the policing function as a municipal service. The degree of oversight applied by local government over the establishment and direction of such forces was almost total and extended to the powers of appointment, removal, remuneration and direction⁵⁸ of members of the forces.

Within this framework, the constable served as an administrative adjunct to local government, dependent for his welfare upon political affiliation and subservience to the direction of local government.⁵⁹ His role was restricted to enforcement of prior judicial decrees⁶⁰, including the execution of warrants, arrest of felons and debtors, the delivery of prisoners and the seizure of goods. Since no permanent, full time police force had been established in Canada at this period, the discharge of law enforcement functions by the local constable was an episodic enterprise, remunerated according to an established fee-for-service tariff.

Such arrangements generated problems of potential political abuse and inefficiency in law enforcement⁶¹. In particular, the relationship between the constable and local council spawned a perception of undue partisanship, a theme which emerges clearly from a consideration of documentation of both the province of Upper Canada⁶² and in the Maritimes⁶³. Nor was this phenomenon the unique product of the particular ethnic and religious tensions of the Maritime region. All provinces witnessed increasing popular demands to rationalize police organization through the subjection of an otherwise unstructured law enforcement agency to central supervision. Pursuit of two fundamental objectives -- enhanced jurisdiction over policing and elimination of that politicization flowing from constabulary dependence upon local councils -- prompted experimentation with several institutional devices which were intended to insulate police from the immediate influence of the local executive.

One solution, which appears to have gained greatest favour in Maritime municipalities, consisted in the centralization of control over the constabulary through the creation of a permanent, full-time uniformed police force under the direction of officials, whether administrative or judicial (for example, a Police Commissioner, Police Magistrate or Grand Jury), appointed by and responsible to the executive council of the province⁶⁴. In certain instances, regulation of the activities of the forces was undertaken by a Chief of Police appointed by the Lieutenant-Governor in Council⁶⁵ responsible to and paid by common council.

A more common alternative, employed by western communities, involved the transfer of control over the local constabulary from the judiciary or common council to a novel institutional body. Thus, for example, the Municipal Institutions of Upper Canada Act⁶⁶ placed governance of the police in the hands of a Board of Commissioners of Police⁶⁷ comprised of both elected officials and judicial officers representing local and provincial interests whose powers were co-extensive with those formerly exercised by common council. The Board was empowered to appoint both the Chief and individual members of the force, determine salaries and municipal financial obligations in relation to equipment and supplies, make regulations promoting internal operational efficiency and define the duties of the force⁶⁸.

Although the precise rationale prompting the location of control over police forces in either the central executive or in boards of police commissioners remains somewhat obscure, it is plausible to assume that the transfer of governing authority was intended, at least in part, to forestall excessive politicization of the force itself⁶⁹. Additionally, the composition of boards of police commissioners may have represented a desire to reconcile provincial and municipal executive interests on the one hand, and executive and judicial interests on the other⁷⁰.

Debate as to the appropriate location of control over the exercise of the policing function was not conclusively resolved at the time of Confederation. Rather, the solutions devised to respond to the problem of potential politicization of the police arising from their alignment with local government have been diverse and pluralistic. However, notwithstanding regional variations, two models have proven to be dominant. According to one regime, local council retains full and immediate control over policing through its powers of appointment, remuneration and control of members of the local force. Alternatively, the powers originally exercised by common council have been transferred to a board of police commissioners enjoying some degree of detachment from local council in terms of its membership, remuneration and tenure, with powers of supervision over local forces.

ii) Police Professionalism and Independence

While the office of the constable was preserved after Confederation as the principal instrument of law enforcement, the constitutional division of legislative and executive jurisdiction in relation to the criminal law, coupled with dramatic developments in the institutional structure of municipal government, exerted a profound impact upon the framework governing the delivery of policing services. Evolution of standards of accountability, manifested by the rationalization of agencies of control, was accompanied by experimentation in relation to organizational structures and review mechanisms as part of a more generalized trend favouring the development of law enforcement regimes which were both independent of local, partisan control (internally and in relationship to external governing bodies) and responsive to the needs of jurisdictions which were characterized by a large geographic territory and a small population.

The transfer of appointing authority from the local judiciary to local council, which was superseded in certain communities by the substitution of a board of police commissioners or police magistrate as the locus of supervisory authority, represents one important step towards the ultimate creation of a professional police force. However, the conversion of the position of the constable from a highly individualized administrative officer engaged in law enforcement on a part-time, fee-for-service basis into an organized bureaucracy discharging explicitly defined statutory responsibilities, was not accomplished merely by the assumption of control by local government institutions. The growth of professionalism was stimulated by reform of the internal operational structure of early police forces rather than by modifications of the relationship between the police and political officials.

The first significant influence upon the future of policing in Canada is signalled by the enactment in 1868 of the Police of Canada Act⁷¹, which created a Dominion Police Force to administer criminal and other federal laws. While the substantive content of this legislation is unimportant for purposes of this discussion, the model of policing which was instituted represented a radical departure from pre-Confederation policing structures. The creation of the Dominion Police Force marks the "gradual transition from the older tradition of the 'watch' and the constable with authority under common law and local mandate, to the concept of police officer and peace officer, the paid professional, mandated by legislation and subject to political control"⁷².

Although the traditional description of the powers of the constable remained unchanged, the federal legislation introduced major organizational and structural reforms in three areas: territorial jurisdiction; appointment mechanism; locus of supervisory control⁷³. First, in contrast to the conventional appreciation of the constable as a local peace-keeper exercising a territorially circumscribed jurisdiction, the law enforcement authority of members of the new Dominion force was national in scope. Secondly, and even more importantly, appointment power was removed from the local judiciary and located in the Governor of Council, thus placing the police force under the auspices of the central executive. Thirdly, the federal legislation provided for the appointment of federal Commissioners of Police who were to have control and management of the force as well as "all the powers and authority, rights and privileges of municipal police magistrates and justices of the peace in the Provinces in which they were employed"⁷⁴. While such a development nominally preserved the traditional subordination of the constable to the justice of the peace, both offices were placed under the direction of the federal Cabinet, thus achieving an unprecedented degree of centralization in administration and regulation⁷⁵.

Although the Dominion Police Force was relatively short-lived, its structural characteristics proved remarkably durable, forming the basis for all subsequent enactments of the various provincial legislatures whose purpose was either to establish new provincial police forces⁷⁶, or to modify existing arrangements. At the same time, provincial initiatives expanded upon and refined the essential components of the federal model in several material respects. A brief description of the reforms introduced by Manitoba⁷⁷ and Quebec⁷⁸ is illustrative of general trends governing the shape of policing regimes in the period immediately following Confederation.

In 1870 both provinces enacted legislation which established police forces of province-wide jurisdiction whose members, while exercising those powers which inhered in the historic office of the Constable⁷⁹, were appointed under the authority of the provincial Cabinet. Although patterned upon the federal legislation, the provincial schemes instituted two important and permanent adjustments to internal structure and locus of control.

First, the relevant provincial legislation explicitly recognized an internal hierarchy among members of the forces⁸⁰ based upon titular classification and seniority. Although the practical subordination of junior to senior officers had been implicitly acknowledged in pre-Confederation policing arrangements⁸¹, such relationships were foreign to the original understanding of the local constabulary which comprised a loose-knit association of semi-autonomous local law enforcement officers, enjoying co-equal status and authority⁸², whose differentiations in title derived not from distinctions in power but from the geographic or political designation of the region which they served. The Manitoba and Quebec models are thus significant as the first examples in the post-Confederation period of the statutory affirmation of an internally tiered organizational structure merged with the former, roughly egalitarian framework composed of the independent, autonomous constables.

The system of policing conducted by a constable, exercising inherent common law powers within a hierarchical operational structure, subject to control by the central executive found favour in all provinces which moved quickly to establish police forces with province-wide jurisdiction.⁸³ Equally rapidly, in most cases such territorially-based forces were disbanded with the eradication of those circumstances which, at least at the provincial level, had prompted their creation. Historically, provincial police forces emerged as a response to a particular problem: that of providing a satisfactory means of ensuring an adequate level of law enforcement in remote rural areas.

In time, the role of provincial police forces in rural policing was overtaken as two distinct developments rendered such forces obsolete -- the emergence of the R.C.M.P. as both a federal police force and as a provincial policing presence pursuant to intergovernmental contract (a phenomenon which will be discussed in greater detail subsequently) and the expansion of the powers of municipal government. As a consequence, provincial police forces have been disbanded by both the federal and all provincial governments, with the exception of Ontario, Quebec and Newfoundland.⁸⁴

However, the brief experimentation with provincial forces which was conducted by all provinces and the federal government constitutes a noteworthy phase in the history of policing in Canada for several reasons. While the vitality of territorial and regional forces depended upon the persistence of particular geographic and demographic conditions, from an institutional perspective the structure of both the national and the provincial forces anticipates the operational organization of contemporary policing regimes. Moreover, in these structures can be identified the two primary issues which affect the legal status of the modern police officer. One issue refers to the theoretical conflict created by the fusion, within the office of the police officer, of institutional subordination and functional independence which produces a dichotomy or, at the very least an ambiguity, in the legal analysis of the office. The second issue concerns the legitimacy of executive control in relation to the direction and management of police forces.

THE LEGAL STRUCTURE OF PROVINCIAL POLICING SERVICES

The structure of policing services in Canada is the product of the highly complex interaction of local, provincial and national laws⁸⁵ applied to and qualifying the institutional characteristics of the ancient office of the constable. Pursuant to its constitutional authority in relation to the administration of justice, each province has enacted legislation providing for the establishment of police forces. As a general rule, such legislation imposes a mandatory obligation upon all cities and towns to furnish policing services which are adequate to maintain law and order⁸⁶.

However, while policing remains, in legal terms, a local service, elements of centralization may be detected at both the formative and operational phases of policing services. First, and most importantly, municipal policing services are normally subsidized by provincial financial contributions to each municipality through a system of conditional and unconditional grants⁸⁷. Secondly, in areas in which the establishment of a local force is not warranted (due to population considerations) or is otherwise unfeasible, the responsibility for the provision of an adequate level of policing service will be borne by the province. Thirdly, in certain jurisdictions⁸⁸, centralization has also gained impetus through the establishment of provincial police forces subject to the central, rather than municipal, executive.

A growing tendency toward centralization may also be discerned in the operational aspects of the delivery of policing services, particularly with respect to mechanisms of control and accountability. Although the post-Confederation paramilitary model, according to which accountability flows vertically from the officer to the chief to the local appointing authority, continues to be influential, the tradition of local control has been more recently augmented by the development of review and monitoring agencies such as police boards and commissions which typically involve the intervention of the central government, through either Cabinet or a responsible Minister. As a consequence, the essential framework governing the delivery of policing services throughout Canada is, with few exceptions, one which attempts to accommodate decentralizing and centralizing elements within an organizational structure which integrates the office of the historically autonomous constable with a professionalized and unionized bureaucratic hierarchy.

Policing arrangements which have been implemented in New Brunswick exemplify the delicate balance between localizing and centralizing impulses which underlies law enforcement. Operationally, policing in the province is conducted both by municipal forces (those which have been directly established by local government or which have been contracted for by local authorities) and by the Royal Canadian Mounted Police, pursuant to the terms of an interjurisdictional agreement between Canada and New Brunswick⁸⁹ (hereinafter referred to as the Provincial Policing Agreement). The enforcement duties which have been assigned to either of these forces are regulated by a legal regime which is set forth in the provincial Police Act⁹⁰. This legislation, in general terms, is premised upon the efficient interaction of opposing forces of diversity and uniformity which in combination produce a relatively complex process of control and responsibility.

Until recently, the legal structure governing the delivery of policing services in New Brunswick exhibited a distinct preference for local autonomy and choice in the selection of policing models, in order to ensure responsiveness to particular local conditions. The priority attaching to local concerns in law enforcement is reflected in the fact that, until 1977, the establishment of police services was regulated by the provisions of the Municipalities Act which placed upon each municipality responsibility for the provision of police and fire services. It was not until 1973 that the central government first proposed a Police Bill which would have retained the local structure of policing but placed control over such forces in the hands of boards of police commissioners⁹¹. In the face of significant opposition, the Bill was withdrawn⁹². A subsequent Bill introduced in 1975, incorporating a modified version of the board of police commissioners which had originally been proposed, was similarly rejected and it was not until 1977 that the first provincial Police Act was passed.

The original Police Act was premised upon the primacy of local control. However, more recent developments, including the creation of a separate ministry of the Solicitor General and amendments to the Police Act have qualified the heretofore local system by the interjection of centralizing influences and, in affirming the mandate of the Solicitor General in relation to law enforcement, have tacitly acknowledged the legitimacy of intervention by the central executive. Although the specific features of the distribution of policing authority will be considered in greater detail in a subsequent section of this background study, the essential elements of the provincial policing structure may be conveniently summarized in the following way.

Policing services are performed by individual members of municipal forces and the RCMP who are described in section 2(2) of the provincial Police Act as enjoying "all the powers, authority, privileges, rights and immunities of a peace officer and constable in and for the Province of New Brunswick"⁹³. The fulfilment of their enumerated statutory obligations occurs through a vertically integrated, hierarchical chain of command predicated upon the subordination and responsibility of individual officers either to the Chief of Police (in the case of those forces which are established by local government)⁹⁴ or to the Divisional Commanding Officer and ultimately the Commissioner, as provided for by the terms of the Royal Canadian Mounted Police Act.

Those elements of control and responsibility which distinguish the internal structure of policing organization are paralleled by the statutory description of the association between the Chief of Police and the municipality. The interest of the municipality in the operation of policing services derives from section 3(1) of the Police Act which provides that "Every municipality shall be responsible for providing and maintaining adequate police services within such municipality". The Police Act does not compel adoption of a unitary or monolithic policing model but permits each locality to satisfy its statutory responsibility through the selection of one of four legislative options: through the establishment of its own force; through an agreement with the Lieutenant-Governor in Council for policing by the R.C.M.P.⁹⁵; through direct agreement with the Government of Canada for the services of the R.C.M.P., subject to the approval of the Lieutenant-Governor in Council⁹⁶; through an agreement with a neighbouring municipality for the services of its police force⁹⁷; or, with the approval of the Minister, through an agreement for the establishment of a regional police force⁹⁸.

As a logical corollary of its statutory duty to establish a police force and its concomitant fiscal responsibility to maintain an adequate level of policing, the municipality, through the vehicle of either town council or a board of police commissioners⁹⁹, enjoys a number of ancillary powers with respect to the operation of those forces which it has established, the most important of which consist in the power to appoint the Chief and individual members of the force¹⁰⁰ and the power to provide "direction and policy"¹⁰¹.

The express right of appointment and supervision vested in local government is the external executive counterpart of that administrative power which inheres in the Chief of Police to recommend to the board or council the appointment of individual members of the force¹⁰² and "to manage and direct the police force to fulfil the responsibility of the municipality to provide and maintain adequate police services"¹⁰³. Although the Police Act does not contemplate reproduction of the relationship of subordination which exists between the Chief of Police and individual members of the force, the Chief is, by legislation, 'responsible' to his appointing authority (either town council or the local board of police commissioners)¹⁰⁴.

Superimposed upon the structure of local control and accountability which characterizes the relationships of the police officer to the Chief, and the Chief to representatives of local government, is a further level of oversight exercisable by the provincial cabinet through the office of the Solicitor General. The role performed by the Solicitor General in the supervision of the delivery of policing services derives from two independent sources: that which is determined by the combined effect of section 18(a) of the Royal Canadian Mounted Police Act and the terms of the Provincial Policing Agreement and governs the relationship of the Minister to the R.C.M.P. in their municipal policing capacity; that which is stipulated by the provincial Police Act and prescribes the scope of ministerial authority in respect of local forces established by municipal government.

Within the context of policing services conducted by the R.C.M.P., the Provincial Policing Agreement requires members of the Force "to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime, and of offences against the laws of Canada and the laws enforced in any province in which they may be employed and the apprehension of criminals and offenders and others who may be lawfully taken into custody." As a result, when employed within a province, the Force is subject to both federal and provincial authority. The Government of Canada, through the Ministry of the Solicitor General retains jurisdiction over the "internal management of the Provincial Police Services, including administration and the application of professional police procedures"¹⁰⁵. However, in the discharge of its local policing role, the Commanding Officer of the Force is to "act under the direction of the [provincial] Solicitor General" who may determine and approve "provincial policing objectives, priorities and goals...including the allocation of personnel and equipment reflecting provincial priorities."¹⁰⁶

Notwithstanding the theory of local control which permeates the Police Act, the Solicitor General also plays an active part in the delivery of policing services by municipal forces, although in this context the precise contours of this role are less clearly defined. According to the Police Act, the Solicitor General is the Minister which is responsible through the legislative and executive process for the conduct of policing in the province¹⁰⁷. Meaningful exercise of political responsibility demands the extension to the Minister of a variety of oversight powers to ensure that both municipalities and local forces fulfil with their statutory obligations in relation to policing. Thus, for example, with respect to the municipality, in addition to those provisions of the Police Act already alluded to which require the involvement of either cabinet or the Minister prior to the assumption by the R.C.M.P. of a municipal policing role, the Act also compels cabinet intervention in the event of a local failure to comply with the statutory obligation to provide policing services¹⁰⁸. Furthermore, ministerial approval is required for the creation or termination of a local force¹⁰⁹.

The powers of the Minister in relation to policing services are not confined to general supervision of the municipality's performance of its role. Several provisions of the Police Act permit the application of ministerial authority directly over individual police forces. Thus, for example, section 6(1) of the Police Act also recognizes an extraordinary power in the Minister to intervene and assign the conduct of an investigation to a member of a municipal force or the R.C.M.P. in three exceptional circumstances¹¹⁰. More generally, in order to effectively discharge his statutory mandate to 'promote the preservation of peace, the prevention of crime, the efficiency of police services and the development of effective policing' in the province, the Minister enjoys certain functional powers, enumerated in section 1.1(2), including those of advice, consultation, inspection, education, information. Finally, by virtue of section 1.1(3) the Minister is now permitted to "issue guidelines and directives to any police force within the Province for the attainment of the purposes of subsection (1).

As is evident from the preceding description, the provincial Police Act implements an administrative framework of control and accountability in which the responsibility of the officer and the force is diffused through a continuum. Thus, individual officers are accountable to their internal superiors who are in turn subject to the direction either of local government bodies or, in the case of the R.C.M.P., of the federal Commissioner. Such institutions, as a reflection of their powers of control and management, enjoy a corresponding degree of accountability to the provincial Solicitor General who is ultimately answerable to the public for police activity. Within this system, the interlocking relationship of control and accountability may be conveniently be analyzed as a direct and vertically ascending process.

However, the existence of parallel relationships of control and accountability between the police and external agencies which are independent of local government or the Department of the Solicitor General must also be recognized. In this context, the process of responsibility is collateral rather than direct and, as a consequence, the accompanying powers of control are somewhat attenuated. This process of collateral accountability has three dimensions: the ministerial; the administrative; and the judicial.

Collateral ministerial responsibility refers to the current administrative relationship between the Departments of the Attorney General and the Solicitor General and to the ultimate location of control over the charging process. According to the relevant provisions of the Criminal Code¹¹¹ of Canada, the charging process is commenced by the laying of an information. Although 'anyone' may lay an information, in practice this function has been assumed by individual police officers as an adjunct of their statutory obligation to ensure the enforcement of the criminal law.

In New Brunswick, as a consequence of the internal administrative policies and procedures of the Department of Justice, a pre-charge screening process has been implemented which permits individual Crown Prosecutors to assess the viability of potential charges and to advise the police as to the propriety of the initiation of criminal prosecutions¹¹². An analogous policy has been adopted which governs applications by the police for search warrants¹¹³. The capacity of agents of the Attorney General to review the exercise of investigative and charging powers represents a significant, if extra-legal, constraint upon the manner in which the policing function is discharged and implicitly reflects a measure of responsibility on the part of the police to a Minister other than the Solicitor General.

Accountability through the administrative process has been ensured by the statutory establishment of two tribunals vested with significant, if narrow, powers of review over the conduct of police forces. Part II of the provincial Police Act establishes a Police Commission, with authority to receive and dispose of complaints in relation both to any aspect of policing in the province and to specific allegations of misconduct by individual members of the force. At the federal level, Part VI of the Royal Canadian Mounted Police Act mandates the creation of the Public Complaints Commission with jurisdiction over any complaint by a member of the public "concerning the conduct, in the performance of any duty or function under this Act, of any member or other person appointed or employed under the authority of this Act...whether or not that member of the public is affected by the subject-matter of the complaint."

Finally, the subjection of the conduct of police officers to judicial, as well as administrative, scrutiny has been achieved by the development of both the common law (exemplified by doctrines of abuse of process and civil false arrest and malicious prosecution) as well as by legislative developments of which the most noteworthy is represented by the **Canadian Charter of Rights and Freedoms**.

The overall effect of the current provincial Police Act is to superimpose some measure of centralization upon an organizational structure which is, in all essential features, conducted according to principles of local accountability and responsibility. Centralization is achieved in a variety of ways: first, through the power of the central executive to appoint a member of a board of Police Commissioners; secondly, through the exercise by the Solicitor General of powers to issue guidelines and directives associated with the discharge of the statutory mandate, to assign the conduct of an investigation in a particular case and finally, to retain ultimate control over the creation and termination of municipal forces; thirdly, by the subordination of local agencies to the authority of a non-elected, independent Police Commission.

The system of checks and balances which has been created by the provincial Police Act is not unique to New Brunswick although its emphasis upon local autonomy and control under the auspices of the local council is perhaps stronger in comparison to the balance which has been implemented in other regions.¹¹⁴ All jurisdictions have attempted to institute policing arrangements in which the primary local responsibility of local council to establish and maintain police forces is qualified by countervailing centralizing forces which are of both a legal and pragmatic nature¹¹⁵. However, while the operation of the Police Act depends upon the smooth functioning of the interrelationships of those bodies and officials entrusted with significant powers and obligations in relation to policing and while the Police Act itself is replete with references to concepts such as 'responsibility', 'direction' and 'control' when discussing the roles of the police officer, the Chief, local Government and the Solicitor General, the limits of authority are not defined. As a consequence, determination of the appropriate accommodation between independence, accountability and oversight remains controversial.

INDEPENDENCE, ACCOUNTABILITY AND CONTROL

THE POLICE AND POLITICS

It is axiomatic that the police, to effectively discharge their law enforcement role, must, like other actors within the criminal justice system, be free from political interference on the part of executive bodies¹¹⁶. Although the police are established by the legislature and accountable to various levels of government and, as an institution, are statutorily directed to uphold the law (the legislative product of a partisan body), the convention of political neutrality is one which enjoys general acceptance. As observed in the Commissioner's Report of the **Discretion to Prosecute Inquiry**¹¹⁷,

"The rule of law in a democracy requires the public's ongoing consent and confidence in order to survive. Any widespread unease with the essential fairness of our justice system can cripple it. Perception becomes reality when suspicion of injustice is allowed to fester. The system must be capable of quickly and convincingly resolving any such doubts...It is not enough to know...that the system works fairly. The adversarial nature of our political system and its apparent proximity to the administration of justice will inevitably raise questions of potential interference in criminal investigations involving political or other influential figures...The system itself must be capable of demonstrating its integrity on an ongoing basis."

In other words, the tradition of political neutrality imposes the requirement that the police apply the law equally to all individuals without regard to personal biases or ideologies and that the police be immune from political interference designed to advance the interests of a particular party or ideology. Thus, the principle embraces two distinct but inter-related concepts: first, that law enforcement be conducted by the individual officer in a personally fair and impartial manner and secondly, that policing as an institution be immunized against political interference and intervention. As expressed, the doctrine represents a somewhat over-simplified description of the relationship between the police and politics. Closer reflection demonstrates that a total divorce between policing and politics cannot be maintained since it is evident that policing itself is an inherently political activity in respect of both its institutional mandate and in the manner in which such mandate is discharged.

If the policing role is conceived of as embracing crime control and preservation of the peace, it is apparent that the principle of political neutrality cannot be interpreted literally. While from a certain perspective it is true that 'the police are the public and the public are the police', there is, as well, an inevitable alliance between the police and government. Although a community-based public service, policing must equally be regarded as an extension of the power and authority of the state.¹¹⁸ The very establishment of an organized police force, in both its original incarnation in the office of the local constable and in the contemporary version of a professional bureaucracy dedicated to law enforcement "presupposes that the social order needs defending and ought to be defended".¹¹⁹ Thus, the description of police forces as 'creatures of politics' merely reflects the historical reality that "police forces are created to facilitate the politics of stability and continuity, and to inhibit the politics of disruption and transformation".¹²⁰

The political dimension of policing is reinforced at the operational level by the various relationships (both fiscal and managerial) which obtain between the police and municipal and central governments.¹²¹ Ignoring for the moment persisting dispute as to the essential nature of police authority, the powers and duties of law enforcement agencies have received statutory exposition (both federal and provincial) throughout Canada, confirming the governmental character of the policing function. The relatively complex mechanisms of control and accountability which permit, at a minimum, governmental stipulation of law enforcement priorities and standards and which impose reciprocal duties of political responsibility upon both local and central political officials simply reinforce the political aspect of policing.

Furthermore, it is not only policing as an institution which is rooted in the political system. Politics, in a broad sense, permeates the micro-level of policing -- that is, the behaviour of the individual officer. It is important to realize that 'policing' is not a reflexive action and that police officers are not merely technocrats responsible for the fulfilment of a narrowly defined range of tasks. Rather, police are vested with a considerable degree of operational discretion with the result that even day-to-day policing must be regarded as encompassing an innately political dimension on the basis that "discretion imports the notion of choice and the setting of priorities in police work. The setting of priorities is clearly part of the policy-making process whether it exists at the street level or in the sphere of government and is undeniably a political act."¹²²

Any analysis of policing as an institution which refuses to acknowledge its inherently political character is therefore ill-conceived. Not only is it impossible to isolate policing from the political context in which it is carried out but the elimination of all political influences from law enforcement would arguably undermine the philosophical foundations of the criminal justice system. The viability of a legal regime which relies upon the exercise of official discretion at virtually all phases of the criminal process ultimately depends upon the existence of structures of control and accountability to prevent abuses of power. Although the loci of control and accountability are theoretically variable, conventionally, in democracies, such power and responsibility has been reposed in the hands of elected officials who are the logical representatives of the community.

Not only do arguments favouring the separation of politics from policing presuppose "a view of politics as a sinister process" which ignores the "importance of policing to the local community both as a service on its own and in its interrelationships with other local services"¹²³ but such a position, in prohibiting governmental oversight, sacrifices a valuable instrument of direction and accountability. On this basis inasmuch as "the values and beliefs of a position that place great emphasis on the need for keeping an emotional public from influencing police policy directly...are, or should be, unacceptable in a democratic scheme of government...the arguments for keeping politics out of the police are largely fraudulent. No matter how the system is structured, the police governing body must ultimately be responsible to the public -- that is accountability and that is politics".¹²⁴ Absent such a process, the potential magnitude of the injury to the public interest which can be inflicted by a completely autonomous police force is enormous.¹²⁵

At the same time, it is equally apparent that the interjection of certain forms of political considerations would erode the integrity of the criminal justice system. Manifestation of bias, prejudice or harassment in an individual officer or the use of the police force in its institutional dimension to further overtly partisan concerns would not only condone unfairness and inequality in the disposition of specific cases but more importantly would undermine public confidence in both the rule of law and in the communally representative nature of law enforcement. One must therefore distinguish between the legitimate and illegitimate role of politics in law enforcement¹²⁶. In view of the context in which policing is conducted, it is perhaps more accurate to assert that the principle of political neutrality is not intended to achieve a complete separation of policing and politics but to constitute a line of demarcation between "the proper role of the political process in the shaping of legal policies" and "the perversion of the legal process by political pressure".¹²⁷

While goals of fairness and equality of treatment support the insulation of the police from political interference, it is also evident that independence on the part of policing agencies must be expressed through a process of political accountability since "the government must fulfil its democratic mandate by ensuring that in the final analysis it is the government that is in control of the police and accountable for it"¹²⁸, a proposition which applies with equivalent force to all political bodies vested with certain powers in relation to the police.

The task of any effective policing regime is therefore twofold. First, a balance between independence on the part of the police, on the one hand, and accountability of the police to executive bodies (who are thereby vested with a commensurate measure of control), on the other, which will allow both the impartial enforcement of the law and the expression of the public interest must be implemented. The content of such balance will depend upon two factors: the meaning ascribed to independence, accountability and control and the relative importance attached to each. As is apparent, the relationship between the three principles is a dialectical one. The extent of control will be determined by the scope of independence and inevitably, accountability will be the product of the interaction of elements of control and independence.

Secondly, after determining those aspects of the policing function which are legitimately protected against executive interference and those which ought properly to be subject to governmental control, selection of the appropriate locus of such authority must be determined. Resolution of this issue will involve an assessment of the competing merits of local versus central control and will, additionally, entail consideration of the relative advantages to be attained by the vesting of powers of control in bodies which are themselves detached (in varying degrees) from government.¹²⁹

THE SCOPE OF POLICE INDEPENDENCE

Central to any discussion of the relationship between the police as an institution and government is an appreciation of the scope of police independence. Although the proposition that "...The authority of the individual constable to investigate crime, to arrest suspects and to lay informations before a justice of the peace comes from the common law and the Criminal Code and must not be interfered with by any political or administrative goals"¹³⁰ would appear to be a necessary implication of the criminal justice system, public perception of the need to ensure institutional independence in relation to the exercise of policing functions is a relatively recent phenomenon¹³¹. As an examination of the history of policing in both England and Canada demonstrates, while certain of the powers of the constable have variously been described as original or inherent, the office itself, since its inception, has been regarded as subordinate to governmental authorities.¹³² Furthermore, there is no persuasive evidence that domestic institutional reforms in the period immediately prior to and after Confederation were intended to wholly eliminate this subordination but were designed merely to substitute one less overtly political regulatory body (boards of police commissioners) for another (town council).¹³³

Nor do the terms of the provincial Police Act (in common with the relevant legislation of most other Canadian jurisdictions, including that enacted by the federal government respecting the establishment of the RCMP) reveal any explicit interest in ensuring that policing responsibilities be discharged in a climate of neutrality and impartiality. Rather, the emphasis of the legislation appears, at least facially, to be directed towards preservation of a structure whose dominant feature is a reciprocal and parallel relationship of control and accountability between the officer and chief, and chief and local council. Thus, the Chief of Police is described as "the chief executive officer of the police force" who possesses "all necessary powers to manage and direct the police force to fulfil the responsibility of the municipality". In this capacity, the Chief is appointed by the council or board and is declared to be directly responsible to the appointing authority¹³⁴.

It may also be suggested that the very statutory language stipulating the status and duties of police officers expresses a philosophy which is antithetical to the principle of independence. For example, in addition to the responsibility to 'maintain law and order, prevent offences against the law and enforce penal provisions of the law', police officers are also directed to perform a number of other functions upon the request or order of the court or provincial Cabinet¹³⁵. Analogously, section 17(1)

of the Police Act declares that a municipality is vicariously liable in tort for the wrongful acts of members of its police force "in the same manner as a master is liable in respect of a tort committed by his servant in the course of his employment". Such provisions are suggestive of a certain degree of subordination between the individual police officer and the appointing authority which is inconsistent with the assertions of functional independence.

At the same time, other provisions of the Police Act may be viewed as entrenching a certain range of autonomy in favour of the individual officer. Thus, for example, section 2 of the Police Act describes both municipal officers and members of the RCMP in their contractual capacity as having "all the powers, privileges, rights and immunities of a peace officer and constable". It is arguable that the conjunction of the descriptive labels 'police officer' and 'constable' does not merely represent the accidental, linguistic retention of earlier nomenclature but assimilates to the position of the statutorily defined 'peace officer' the powers of the more ancient, autonomous conservator of the peace. In support of this thesis, one may rely upon section 12 of the Police Act which expresses the functions of municipal police officers in the language of 'responsibility' rather than that of mandatory obligations.¹³⁶ Such phraseology appears more compatible with the model of the autonomous law enforcement officer, vested with a high degree of discretionary authority and immune from executive control, than with that of a police officer who enjoys only minimal independence and who is subordinate to the administrative direction of local political officers. If this assertion possesses at least some validity, it is obvious that the terms of the Police Act contain an inherent ambiguity. How can the status of an independent constable be reconciled with the express statutory powers of the Chief, town council or board (and to a lesser degree the Solicitor General) to direct the operations of a force?

It is clear, therefore, that concentration upon the historical development of the policing in Canada, coupled with contemporary statutory phraseology defining the relationship of the police to the various levels of government, provides an inadequate basis upon which to address this fundamental issue: to what extent are Canadian police insulated against the intervention of the executive in law enforcement? Parenthetically, it must be emphasized that the response to this question does not necessarily impel the endorsement of an absolutist understanding of the concept of independence. Although the issue of police independence has often been framed as a contest between complete freedom from control¹³⁷, on the one hand, and total subjection to governmental authority on the other¹³⁸, the dichotomy between autonomy and subservience may be less rigid than originally imagined.

Police independence is an elastic, rather than static, notion and the extremes of constabulary autonomy, on the one hand, and individual deference to executive authority, on the other, function more as representations of idealized standards than as accurate descriptions of operational reality. Since neither history nor statutory language unambiguously stipulates that degree of independence which attaches, either normatively or practically, to the individual Canadian police, and since determination of the appropriate extent of constabulary autonomy is a perennial concern of all democracies, a comparative examination of the experience of other jurisdictions may provide assistance.

Although the genesis of the modern Canadian concept of 'police independence' has been traced to a handful of nineteenth century cases¹³⁹ involving the extent of vicarious liability of a municipal corporation for the tortious acts of members of local police forces (an issue which has been legislatively determined in New Brunswick by section 17(1) of the Police Act), such decisions are of limited importance. Since independence is considered only tangentially and in the within the parameters of a civil suit, these cases are of minimal relevance in defining the constitutional compulsion of the police to obey executive direction in the discharge of their statutory policing obligations¹⁴⁰.

Rather, the principle of 'police independence' in its institutional sense is essentially a relatively recent Commonwealth invention, founded upon a number of cases which, taken together, advance the proposition that the authority of the 'constable' "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."¹⁴¹ Of these decisions, that which has proved to be the most influential is the judgment of Lord Denning, M. R. in Blackburn v. Metropolitan Police Commissioner¹⁴², in which the limits of police independence and the relationship of the constable to higher executive authority are directly discussed.

The case concerned a citizen's application for mandamus to compel the Commissioner of the Metropolitan Police Force to direct enforcement of gaming laws¹⁴³. Based upon the historical position of the constable as a 'conservator' exercising original, common law powers, Lord Denning held that the Chief Constable (that is, the Commissioner) was immune from executive direction in the enforcement of the law, observing¹⁴⁴:

"The office of Commissioner of Police within the metropolis dates back to 1829 when Sir Robert Peel introduced his disciplined Force. The commissioner was a justice of the peace specially appointed to administer the police force in the metropolis. His constitutional status has never been defined either by statute or by the courts...I have no hesitation, however, in holding that, like every constable in

the land, he should be and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act, 1964, the Secretary of State can call on him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone." (emphasis added).

Furthermore, according to Lord Denning, even the accountability of the police officer to the law is subject to certain qualifications¹⁴⁵:

"Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner of Police, or the chief constable, as the case may be, to decide in any particular case whether enquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter. He can also make policy decisions and give effect to them...[free from court interference]...".

Blackburn (No. 1) embraces the proposition that in the discharge of law enforcement functions, the Chief Constable (and perhaps by implication, the regular constable) is immune from prior direction by any executive authority, although presumably accountable at law through an ex post facto review process. Although ostensibly based upon the historical evolution of the office of the constable, the theory of 'police independence' which informs the Blackburn decision is not completely free from interpretive problems, however, and has generated a number of issues which remain to be fully resolved. Such issues relate to the following matters:

the extent to which the concept of constabulary independence is historically accurate; the applicability of the Blackburn decision to Canada; and the practical scope of police independence.

With respect to the preliminary question of the historical correctness of the Blackburn ruling itself, it must be recalled that the concept of 'police independence' which is advanced by Lord Denning depends almost wholly upon an historical characterization of the 'constable' as a conservator exercising inherent and original powers. However, the validity of the transposition of contemporary values of institutional independence to earlier periods in the development of the criminal justice system is debateable. Historically, while the constable clearly exercised law enforcement powers which were, in a certain sense original, the position was also that of an administrative officer subject to direction by the judiciary and, subsequently, the local executive, a status inconsistent with any expanded understanding of 'independence'.

Furthermore, even were the depiction of a fully autonomous constable compatible with the original dimensions of the office, the extrapolation of such an expansive theory of police independence has attracted serious objections. According to John Hogarth¹⁴⁶ : "A better formulation of the English position might be as follows: the status of the English constable comes from the common law, which defines his or her powers, immunities, privileges, rights and duties insofar as his or her discretionary power exists to investigate crime, make arrests, and bring suspects before justices of the peace. In exercising this discretion, his or her authority is original and not delegated, but it is the law which determines the outer limits of discretionary power and that law can be changed." Finally, the theory of independence advanced by Lord Denning cannot be easily accommodated to the bureaucratic and hierarchical structure of contemporary police organizations¹⁴⁷.

In addition to those criticisms directed to the validity of Blackburn within the context of the English criminal justice system, the extension of its rationale to other Commonwealth jurisdictions has also been challenged. The aspect of historical revisionism which colours Blackburn may be regarded as an acceptable technique to legally validate an hypothesis which otherwise commands a high degree of philosophical support -- that is, that the enforcement of the criminal law ought to be conducted in a climate of political neutrality. However, it has been suggested that such an appreciation of the status of the constable, if correct in any degree, can only be maintained in relation to the position of the English constable and has no validity with respect to Canadian police forces.

That is, while the concept of 'police independence' has been approved by certain courts¹⁴⁸, it has been suggested elsewhere that the principle of 'police independence' espoused by Lord Denning in Blackburn cannot be assimilated, without significant qualification, to the status of the Canadian constable due to the effect of several countervailing factors¹⁴⁹: the bureaucratic structure of Canadian police forces (which necessarily entails a certain degree of subordination to the directions of the Chief of Police)¹⁵⁰; the intervention of legislation to define the status and powers of the police officer; the interposition of a central executive, charged with an oversight role, into policing arrangements¹⁵¹. Thus it must be conceded that the appreciable constitutional and institutional distinctions between the Canadian and British justice systems coupled with the historical development and statutory basis of policing in Canada demonstrate that the principle of 'police independence' cannot be endorsed in the expanded sense argued for in Blackburn.

At the same time, rejection of the Blackburn thesis does not compel the conclusion that police independence in Canada cannot be supported by reference to either tradition or law enforcement philosophy. Rather, the issue is one which has assumed growing importance as efforts have been made to develop a theory of police independence which will accommodate the bureaucratic structure of the police, the tenets of democracy and the need to ensure accountability on the part of law enforcement officials. Within this context, the Blackburn decision serves as a valuable point of departure rather than as a dispositive justification in the evolving theory of police independence.

Therefore, as a result of the institutional distinctions between England and Canada, domestic debate in relation to the scope of 'police independence' has proceeded from a slightly different premise. Analysis has been focused, not upon the inherent merit of the principle, which is conceded, but upon the identification of the limits of the principle in a system in which police status is regulated by legislation and in which law enforcement is conducted within a bureaucratic structure premised upon interlocking levels of control and supervision. In other words, police independence in Canada has not been viewed affirmatively as a discrete value but has rather been defined negatively as the residuum of police power which is exempt from executive control and accountability. Police independence thus functions in a protective and defensive manner by ensuring that at least certain aspects of law enforcement are shielded against political influence¹⁵².

Such an approach is not without significant analytic difficulties, entailing as it does consideration of an essentially normative issue: which policing functions ought to be immune from executive direction, or conversely, what kind of political involvement is undesirable in the policing context?¹⁵³ While this question has attracted a variety of responses, the most common criterion which has been developed to delineate the sphere of police independence relies upon a division between 'policy', on the one hand and 'operations' on the other¹⁵⁴. The importance

of the distinction consists not only in its delineation of a method of separating politics from administration (and thus forming an appropriate basis for the assignment of responsibilities to bureaucrats and politicians) but in its impact upon issues of control over and accountability of public officials. It presumes a contrast between 'operations' as an exclusively bureaucratic function which demands a certain degree of autonomy on the part of the responsible administrator and 'policy' as a quasi-ministerial activity to which normal rules of control and accountability apply.

The proposed division between 'policy' and 'operations' is a relatively crude one which has been criticized as both intellectually unsound and operationally impracticable.¹⁵⁵ In the general realm of public administration an alternative to the policy/operations dichotomy has been proposed which would categorize bureaucratic and political responsibilities by reference to classification of function as either 'overall development and control of services' or 'day-to-day administration of services'. The analytic foundation of such a division is of obvious relevance to the field of policing and thus bears further elaboration. According to the **Maud Committee on Management of Local Government in the United Kingdom**¹⁵⁶:

"While it is clear that the overall development and control of services should be the responsibility of members (of local government authorities), in our view the day-to-day administration of services, the decisions in case work, the routine process of inspection and control should normally be the functions of the paid officers and not of the members...Although routine day-to-day work and decisions should rest with officers, such is the nature of much of that work that there should in appropriate circumstance be clear channels of appeal to the members. This is consistent with our view that ultimate direction and control should rest with the members.

If the officers are responsible for day-to-day administration and the many sensitive decisions involved, they must be alive to the different case, the instance which is likely to cause outcry, the hard case for which no precedent exists, and they must be prompt in bringing any such cases to the notice of the members for decision. This does not imply any interference with the right of the public to make direct approaches to members on such matters."

A parallel distinction has been proposed by Canadian authorities in the specific context of law enforcement. Drawing upon the recommendations of the 1962 British Royal Commission on the Police¹⁶⁷, the McDonald Commission of Inquiry into Certain Activities of the RCMP (1981) observed that "To the extent that a matter is one of 'control and management' or is 'connected' with control and management, the Minister [the Solicitor General Canada] has a statutory power of direction. The statute [the Royal Canadian Mounted Police Act] has made the English doctrine expounded in Ex Parte Blackburn inapplicable to the RCMP."

Instead, the McDonald Commission proposed a more restricted version of the concept of police independence according to which its ambit, and consequently the corollary extent of executive control, would be determined not by a simple division between policy and operations but by reference to the character of the policing function in relation to which control is asserted. According to the Commission, in order to determine the validity of arguments based upon police independence, a distinction should be drawn between police powers which were 'quasi-judicial' in nature and all other law enforcement functions:

"We believe that those functions of the RCMP which we have described as 'quasi-judicial' should not be subject to the direction of the Minister. To be more explicit, in any particular case, the 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 to that extent only, the English doctrine expounded in Ex Parte Blackburn should be made applicable to the RCMP. Even though the Minister should have no power of direction in particular cases in relation to the exercise by the RCMP of those 'quasi-judicial' functions, 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."

Furthermore, while the exercise of the powers of investigation, arrest and charge "should be free from the conventional processes of democratic control and influence"¹⁵⁸, a certain degree of executive supervision was mandated in the context of

"general policies in regard to law enforcement over the area covered by [the] force, the disposition of the force, the concentration of police resources on any particular type of crime or area, the manner in which he handles political demonstrations or processions and allocates and instructs his men when preventing breaches of the peace arising from industrial disputes, the methods he employs in dealing with an outbreak of violence or of passive resistance to authority, his policy in enforcing traffic laws and in dealing with parked vehicles and so on."¹⁵⁹

The divergence between this view, which has been advanced in Canada, England and Australia¹⁶⁰, and that of Lord Denning in Blackburn is immediately apparent. While Blackburn asserted a broad-based concept of police independence which would support both the autonomy of the chief constable from direction and control by its governing authority as well as independence in respect of 'policy' decisions such as the deployment of personnel and resources, the alternative approach, exemplified by the McDonald Commission embraces a more circumscribed range of police independence which encompasses the quasi-judicial functions of investigation, arrest and charge but not decisions related to law enforcement policy. Furthermore, such a theory, while guaranteeing to the Commissioner of the RCMP a range of freedom from Ministerial direction and control, preserves the principle of accountability even in relation to decisions taken in particular cases, if such generate important issues of public policy.

While the proposed distinction between quasi-judicial functions and operational policies represents a more refined method of differentiating between legitimate and illegitimate exertions of political power into the realm of law enforcement and is consistent with the statutory relationship between police forces and the responsible political authority, it is not a perfect solution to the troublesome issue of police independence, leaving many important issues relating to both the scope and the operation of the test in need of further clarification. With respect first to the proposed division between quasi-judicial powers and operational functions, a series of questions must be addressed. Can a complete separation between the quasi-judicial and operational policy be achieved or will there not, inevitably, be a high degree of overlap between the two categories? What is the criteria by which to distinguish between matters respecting the quasi-judicial sphere and those which refer to operational policy¹⁶¹? In whom will repose the authority for classification of the particular policing function under review?

Similar issues arise with respect to the implementation of the principle. Is the prohibition upon political involvement in the sphere of the 'quasi-judicial' an absolute ban or simply a restriction upon the exertion of powers of direction and control in respect of particular cases? In a justice system in which responsibility for policing is shared by local and central authorities do arguments supporting police immunity from executive interference apply with equivalent force to both levels of government or does the practical content of independence depend upon the source of the alleged interference? How can executive duties of political accountability be reconciled with police independence?

Does the concept of 'police independence' extend equally to both the Chief and his subordinates? Does it denote total constabulary autonomy in respect of all law enforcement decisions, or, alternatively, is 'independence' restricted by reference to the nature of the policing function involved, the type of offence, the class of offender, or the particular case as opposed to general law enforcement policy or operational administration? Does 'independence' permit a complete abdication of the law enforcement functions? What is the impact of unionization upon the assertion of police independence?

Despite these obvious difficulties, the separation between the 'quasi-judicial' aspects of law enforcement, in respect of which the police officer enjoys a guaranteed range of autonomy, and general law enforcement policies, the content of which may be subject to executive oversight, has received approval in Canada in academic commentary¹⁶², caselaw¹⁶³, public inquiry reports¹⁶⁴, and recent legislative schemes¹⁶⁵ as providing a means of discriminating between the legitimate and illegitimate exertions of executive power which is conceptually consistent with the constitutional status of the police in Canada. As one observer has noted, however, "its utility in practice will depend on at least three factors: the clarity with which the categories of policy and operations (or administration or day-to-day administration in individual cases) are defined; the extent to which responsibility for an authoritative application of these categories in practice is defined and assigned; and the extent to which the categories, and the assigned responsibility for applying them, are compatible with the administrative programs and structures to which they are to be applied."¹⁶⁶

THE CURRENT STRUCTURE OF CONTROL AND ACCOUNTABILITY: MUNICIPAL FORCES

If one concedes that the police may assert a claim to independence from political direction and control which has attained at least the status of a convention¹⁶⁷ and that such autonomy encompasses (at a minimum) conduct associated with the discharge of the 'quasi-judicial' functions, further questions arise. What are the implications of the doctrine of police independence upon the ability of internal and external agencies to supervise law enforcement and to what extent are the current provisions of the Police Act consonant with the legal status of the police? These two issues will be addressed through an analysis of the various relationships of independence, control and accountability which exist among those agencies charged with policing functions.

1. The Officer and The Chief

According to the principle of police independence, first articulated in Blackburn and modified to conform with the distinctive features of the Canadian political and legal system, police officers are imbued with an immunity from executive direction when engaged in the performance of the so-called quasi-judicial functions of investigation, arrest and charge. Thus, while local and central government may be competent to provide some degree of supervision in relation to the development and implementation of general law enforcement policies, they may not interfere with decisions made by individual police officers in respect of the initiation of the criminal process in relation to individual cases. To assess the validity of this proposition, the first issue which must be resolved involves a consideration of the status of the individual police officer and chief. Do the provisions of the current Police Act contemplate the discharge of policing functions by police officers, including the Chief, which enjoy a guaranteed range of independence in the performance of 'quasi-judicial' policing functions?

In general terms, it would appear relatively safe to conclude that the legal status of the police officer as defined by the Police Act is informed by the principle of qualified constabulary independence. In support of this proposition, one may point to section 2(2) of the Police Act which vests in both members of police forces and members of the RCMP "all the powers, authority, privileges, rights, and immunities of a peace officer and constable" as effective to incorporate the traditional legal independence of the original constable. Furthermore, the statutory enumeration of the responsibilities assigned to police officers in section 12 of the Act parallels those which historically have attached to the mandate of the constable and which have been relied on elsewhere to justify attribution of independence¹⁶⁸. However, such independence is not absolute but has been circumscribed by the operation of mechanisms of control.

Paramount among the statutory and administrative incursions upon the theoretically independent status of the individual officer is that which is generated by the internal bureaucratic hierarchy of contemporary forces which explicitly provide for the subordination of officers to the executive authority of, in the case of municipally established forces, the Chief, and in the case of the R.C.M.P., the Commanding Officers of the Detachment and of the Division, to the ultimate authority of the Commissioner of the Force.

By the nature of contemporary policing structures, the Chief or Commanding Officer represents the first level of control over policing, a feature of policing organizations which has important implications upon the scope of police independence. The subordination of individual officers to either the Chief of police or to the head of the force represents a necessary incident of administrative structure which has received statutory confirmation. Thus, for example, section 10(3) of the provincial Police Act provides:

"10(3). The chief of police is the chief executive officer of the police force and shall have all necessary powers to **manage and direct** the police force to fulfil the responsibility of the municipality to provide and maintain adequate police services in the municipality in accordance with this Act and the regulations."[emphasis added].

Analogous terminology is employed to describe the relationship of the Commissioner of the RCMP to members of the force in section 5(1) of the Royal Canadian Mounted Police Act:

"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." [emphasis added].

Although such language would appear on its face to derogate from the principle of police independence, the legitimacy of the exertion of powers of supervision and control on the part of the Chief was assumed in Blackburn¹⁶⁹. In the case of municipal forces, to the degree that the Chief of Police is statutorily described as the 'chief executive officer' of the force who is vested with "all the necessary powers to manage and direct the police force", it is implicit that the Chief may regulate the activities of the force¹⁷⁰, notwithstanding any apparent theoretical inconsistencies which result from the description of a police officer as simultaneously independent and subordinate. A similar conclusion may be reached in the case of the Royal Canadian Mounted Police.

Caselaw also supports the proposition that the power of direction inhering in the Chief extends to the discharge of the quasi-judicial functions¹⁷¹, notwithstanding its undoubtedly adverse impact upon the assertion of police independence, and in this respect encompasses the power to determine the conduct of an investigation. Thus, for example, in Wool v. Nixon¹⁷², the Federal Court (Trial Division) denied an application brought by a member of the R.C.M.P for an interim injunction to restrain his Commanding Officer from ordering the termination of an ongoing investigation. In holding that "the plaintiff has no absolute right to continue the investigation without the orders of his superiors", the court observed:

"In my view, the duty of Nixon with reference to the investigation is towards the Crown, or the public at large. He owes no duty to the applicant and the applicant has demonstrated no particular personal individual right, aside from whatever right he may hold as a member of the general public, to see that the administration of justice is properly carried out. A Commanding Officer is accountable to his superior and to the Crown, not to a staff-sergeant under him. He has the administrative discretion to decide what proportion of his resources will be deployed towards one particular investigation. Generally, the Court has no jurisdiction at the suit of a subject, or at the suit of a member of the force, to restrain the Crown, or its officers acting as servants, from discharging their proper discretionary functions...

The view that the plaintiff, albeit a competent investigator, has been too long with the case and may have lost the proper perspective of it is a judgment call within the purview of the authority of a Commanding Officer."

As Wool v. Nixon demonstrates, the powers of the Chief in relation to the force are both immediate and ultimate, encompassing all aspects of the law enforcement role (ranging from conduct in relation to a particular case to the establishment of law enforcement policies and priorities)¹⁷³.

The degree of control which may be exerted by the Chief over the activities of members of the force thus represents a significant statutory derogation from the concept of police independence in both its quasi-judicial and the operational dimensions. Absent any countervailing influence, the vesting of such unfettered authority in the Chief or superior officer of a force could induce significant abuses in the exercise of policing powers which therefore must be neutralized by the interjection of a secondary level of authority with concurrent, if not necessarily co-extensive, powers of control, to whom the Chief owes certain obligations of accountability. In the system of checks and balances implemented by the current provincial Police Act, that secondary level of control is represented by local government.

2. The Police and Local Government

Consistent with the origins of policing in Canada, the current provincial Police Act exhibits a persisting preference for local control over law enforcement. The impact of local government upon policing is manifested in two distinct ways. First, and most significantly, since policing is statutorily deemed to be a local responsibility, municipalities are vested with a virtually unlimited discretion in respect of both the structure of policing services and in the framework of governance applicable to such policing services. The broad range of legal choice and autonomy conferred upon municipalities by the Police Act discovers its practical reflection in variation in the types and size of municipal forces and in the nature and composition of local governing bodies. Secondly, once a police force has been established, local government, through either town council or a board of police commissioners, continues to exert influence over the delivery and conduct of policing services through its powers in relation to budget, appointment and remuneration of members of the force, and, most significantly, through its statutory power to 'provide the direction and policy' required for the force.

The selection of municipal government as the authority enjoying primary responsibility for the provision of policing services is not an historical accident but embodies a deliberate (if unarticulated) policy choice which favours the values of local autonomy, community responsiveness, diversity and pluralism over those of uniformity and centralization. The continued emphasis upon municipal responsibility for the provision of an adequate level of policing services in the community is intended to encourage the sensitivity of law enforcement agencies to local needs and conditions, a responsiveness which could be unduly jeopardized by centralization of control. If one acknowledges that law enforcement strategies are integrally linked not only to present and specific patterns of criminality but also to the more general historical identity of the community, it is inevitable that policing arrangements, in order to be compatible with the communities which they serve, will exhibit a high degree of structural heterogeneity.¹⁷⁴

However, unqualified local control over policing carries with it obvious dangers. The first problem may be described as that of politicization of policing. In an extremely significant and immediate way, the current Police Act contains within it the potential for the application of improper pressures by municipal authorities upon the operation of municipal forces. Such potential is created by both the general structure of the relationship between local government and the municipal forces, and the specific powers which are conferred upon municipal bodies with respect to the direction of the local force.

Politicization is the predictable consequence of the functional proximity of the local force to local government and its dependence upon municipal council for direction in the identification of law enforcement priorities, appointment of members of the force and funding. The relative probability of partisan intervention in law enforcement is arguably exacerbated when the municipal body vested with initial and primary control over the force is composed solely of elected members of town council. Such a situation, if only in theory, engenders material doubts as to the capacity of local forces to perform their statutory obligations free from the interference, or at the very least, influence, of community political pressures and thus challenges the viability of the convention of police independence.

Secondly, from a pragmatic perspective, continued reliance upon local governance may also promote an undesirable degree of disparity in the level of policing services provided to the various municipalities, thus encouraging inequality in the deployment of personnel and resources, fiscal inefficiency, unwarranted discrepancies in recruitment and training standards and law enforcement practices, and, in certain instances, unnecessary duplication¹⁷⁵.

If there is any merit to the two-fold contention that the exercise of significant powers in relation to the creation and delivery of policing services by municipal agencies jeopardizes the viability of the principle of police independence and fosters waste, inefficiency and inequality in the delivery of policing services, the association between the municipality and the local force demands consideration of two distinct questions. Should the principle of local control be maintained? If local control is preserved, what ought to be the arrangements concerning police accountability? The first question implicitly demands analysis of the validity of current policing philosophy and an evaluation of the priority which ought to attach to values such as standardization, rationalization and uniformity¹⁷⁶. The second question, while obviously related to policing philosophy, emphasizes institutional concerns and requires an assessment of the appropriate roles of governmental officials and citizens in the development of law enforcement policy¹⁷⁷.

Although the questions concerning the appropriateness of local control, on the one hand, and the best method of implementation of such local control, on the other, are separate, they are unified by two underlying themes: first, the conceptual competition between centralization and decentralization at the vertical governmental level, and, secondly, the desirability of expanding conventional mechanisms of control and accountability to achieve greater democratization. Since it is the former which has greatest relevance in any redefinition of the relationship between local government and the police, discussion of the introduction of novel 'non-political' institutions of accountability and control will be deferred to a subsequent portion of this paper.

The ongoing debate over the degree of centralization which is appropriate in the field of policing has both a philosophical and pragmatic dimension. Demands for greater centralization are often prompted by the view that traditional models of local control invariably compromise the perception, if not the reality, of police independence through the subordination of the Chief and officers to the regulation of local council. Such arguments are bolstered by more pragmatic claims respecting the economic and operational advantages gained by abandonment of purely local policing structures and the consolidation of local forces into regional policing bodies¹⁷⁸. In this way, the ideology of police independence exerts an important, if not dispositive, influence upon both the internal structure and the operational framework of policing services.

It is clear that the determination of the best form of the organization of policing services involves considerations beyond those of institutional objectives of independence and accountability. While centralization at the operational level may contribute to independence and accountability, integration and consolidation are more likely to be prompted by the economic policies of the government of the day, rather than by philosophical concerns. Since evaluation of the policy factors impelling government choice in relation to the structure of policing services is beyond the scope of this paper, it will be assumed that the current framework of local control will be retained and that further movement toward centralization will be resisted. Consequently, two issues must be addressed: first, from an institutional perspective, does the relationship between the Chief and local governing authorities minimize the possibility of improper political interference in law enforcement and secondly, in an operational sense, is that relationship described with sufficient clarity so as to conform to the principle of police independence?

(i) Institutional Competence

The response to the first issue requires a brief examination of the current structures of municipal police governance in the province. In common with other Canadian jurisdictions, the Police Act sanctions alternative methods of local regulation of the police: either directly through the aegis of town council or through a board of police commissioners (section 7(1)), composed of the mayor (or designate), the chief of police, three local residents appointed by town council and one resident appointed by the provincial Solicitor General. The establishment of a board of police commissioners to govern a municipal force is not mandatory but, instead, is a matter which under normal circumstances is reserved to the discretion of the municipality. Currently, only Saint John has created a board of police commissioners vested with those governing powers which are elsewhere exercised by local political officers.

However, in the event that a regional force is created, by virtue of section 17.1(2) of the Police Act, governing authority must be vested in a joint board of police commissioners consisting of one or more members representing each municipality policed by the regional force (of which at least one shall be a mayor or councillor), one or more persons ordinarily residing in the region who are appointed by the Solicitor General, and the Chief of the regional force. In either case, the statutory powers of the board of police commissioners are identical to those otherwise inhering in town council and include, inter alia, the authority to appoint the Chief and other officers and the obligation to provide the force with accommodation, arms, equipment, clothing and other necessary items.

The legislative recognition of two distinct regimes of municipal police governance raises an obvious question: does the removal of regulatory powers from local council and the vesting of such powers in a board of police commissioners or comparable institution offer any significant advantages in terms of either police independence or accountability? Phrased in another way, does the continued control of local council present any material threat to police independence? In order to adequately respond to these questions, it is first necessary to briefly review the history of boards of police commissioners in Canada.

The genesis of the institution of a board of police commissioners may be discovered in the 1858 Municipal Institutions of Upper Canada Act which provided for the establishment in every city¹⁷⁹ of a Board of Commissioners of the Police, consisting of the Mayor, two judicial officers and in certain circumstances, at least one member appointed by local council, empowered to "make such regulations for the government of the force, and for preventing neglect or abuse and for rendering the Force efficient in the discharge of all its duties". Members of city police forces were mandated by the legislation to "obey all the lawful directions, and be subject to the government of the Board". Although members of the Board received remuneration from City Council (which was additionally required to pay for "all such offices, watch-houses, watch-boxes, arms, accoutrements, clothing and other necessities as the Board may from time to time deem requisite and require for the accommodation and use of the force"), it was in no sense a committee of Council but enjoyed complete de jure, if not de facto, independence from municipal government. The Ontario legislation has provided the model for all subsequent provincial enactments establishing boards as an alternative to governance by municipal council, although predictably, the institutional and organizational qualities of the original Board have been transformed to conform to the particular experiences of each jurisdiction¹⁸⁰.

Available evidence suggests that the principal justification for the creation of police boards consisted in the desire to minimize, if not entirely eliminate, the perception of undue partisanship in law enforcement which resulted from the assumption by municipal councils of authority over the establishment and control of local police forces in the period immediately preceding Confederation¹⁸¹. The existence of such boards, which were notionally independent of town council and vested with statutory, rather than delegated, powers of direction and control over the conduct of police forces, was viewed as providing some measure of protection for police forces against the intrusion of partisan considerations into what ought ideally to be a politically neutral activity.

The ability of police boards to insulate police forces against politically motivated interference or direction is attributable to two important institutional characteristics. First, legislation regulating the composition of such boards originally required that at least certain of their membership be appointed by provincial, rather than local, authorities. Although it cannot be empirically demonstrated that the exercise of appointment powers by provincial authorities is more likely to guarantee neutrality and objectivity on the part of the members of the board¹⁸², its significance lies in the influence of centralization. The inclusion of provincially appointed civilian members within the ranks of police governing bodies acknowledges the reality that policing cannot be regarded as simply a self-contained, discrete municipal service but is a function in which there is a clear and evident provincial interest¹⁸³.

On a secondary level, the assignment of an appointment power to the provincial executive in permitting the expression of the provincial interest contributes to the development of a certain degree of standardization and uniformity without displacing local values¹⁸⁴. The importance of this consequence cannot be overlooked. Centralization has assumed particular significance in New Brunswick as a result of recent amendments to the Police Act, the effect of which is to vest the Solicitor General, the executive officer responsible for policing in the province, with extensive powers in relation to two statutory objectives described in section 1.1(1) of the Act in the following terms:

"1.1(1)(a)...the preservation of peace, the prevention of crime, the efficiency of police services and the development of effective policing, and

(b) [the co-ordination of] the work and efforts of police forces and the Royal Canadian Mounted Police within the Province."

The effect of this provision is to acknowledge and affirm ministerial powers of control in relation to policing which are aligned to traditional duties of ministerial accountability for policing. The establishment of police boards, composed in part of ministerial appointments, represents one means by which the statutory obligations of the executive can be fulfilled. In short, police governance through the institution of a police board enhances the powers of the Minister over the structure and delivery of policing services and through such centralization strengthens the process of political accountability.¹⁸⁵

Moreover, not only does the composition of a board of police commissioners achieve a valuable compromise between localized and central authority (a phenomenon which may be described as vertical integration), but the participation by individuals who are not (necessarily) affiliated with local politics (horizontal integration) may also encourage institutional impartiality by enabling public access to the development of law enforcement policy. Certainly one may discern in the predominance of judicial officers in the composition of the earliest police boards, an impulse to immunize the police against unrestrained partisan direction. While the appointment of local judicial officers may represent an imperfect means by which to effect the complete separation of policing and politics¹⁸⁶, it is clear that the membership by individuals outside the sphere of local politics serves, if not to 'depoliticize' police governance, then, at the very least, to democratize the regulatory process by expanding the range of values, interests and philosophies which will be considered in the formulation of law enforcement policy. Diversity in the composition of boards of police commissioners reinforces the public dimension in the policing function and enhances the likelihood of responsiveness and sensitivity to the special concerns of minorities and marginalized groups.¹⁸⁷

The features of centralization and democratization which inhere in the police board and contribute to its independence as a regulatory institution are also integrally linked to police independence in two ways.¹⁸⁸ First, such police boards function as a buffer between the police and town council through the interposition of a level of control which is separate from that of local council, thus inevitably reducing the influence of partisanship. Furthermore, in order for the board to function effectively as a vehicle of civilian control, its institutional characteristics are also intended to permit it to exist independently of the police force. In short, as a quasi-judicial body, a police board is neither the upper level of police management or a branch of local council but is independent of both.

The rationale underlying the establishment of police boards is relatively obvious: by locating secondary authority over municipal policing in an agency which is institutionally detached from both local council and the Chief of Police, the possibility of the application of improper extraneous pressures upon law enforcement is minimized¹⁸⁹. Nevertheless, notwithstanding its positive effects upon the preservation of the principle of police independence, police boards have been the subject of increasingly stringent criticism on a number of bases.¹⁹⁰ Most importantly, it is doubtful that a simple transferral of control to a board of police commissioners will, in and of itself, provide a sufficient guarantee against the possibility of interference in policing¹⁹¹. Moreover, in this context (and of course, depending upon the provincial role in the composition of board membership) it has been asserted fairly convincingly that to the degree that a police board succeeds in rendering the police free from the influence of local political officers, the accountability of the police to the municipality is correspondingly diminished. In other words, centralization and democratization may frustrate police responsiveness to community

concerns, inhibit flexibility in the development of alternative municipal policing policies and strategies and, most importantly, produce a force which is not subject to the normal processes of community responsibility.

Secondly, on a more pragmatic level, "the creation of a board of police commissioners...[does not] of necessity create a body of persons with an understanding of what is required of them in order that they may function effectively"¹⁹². In other words, there is no empirical evidence to support the contention that, from the vantage point of efficiency and effectiveness, the police board represents a method of police governance superior to that provided by town council¹⁹³. It is obvious that the practical effectiveness of such boards will depend, in large part, upon a number of variables including the clarity of the relevant legislation, qualities and experience of the individual members, size of municipal force, relationship to the local force tenure of the board, financial resources, community consensus and precision in definition of mandate¹⁹⁴. In order to function adequately, it is imperative that the statutory language implementing a board of police commissioners must be structured so as to "foster a balance between politically independent judgment and linkage to local government".¹⁹⁵ Finally, and this may be an extremely important factor in a province with the particular demographic characteristics of New Brunswick, the concept of governance by police boards may prove economically wasteful in the case of small local forces.

Although the New Brunswick Police Act permits the assignment of regulatory authority to boards of police commissioners, only Saint John has elected to substitute the control of a board for that of local council¹⁹⁶. While the opposition of municipalities to the concept of a police board is well-documented, the reasons underlying such resistance have not been articulated. It would appear safe to conclude, however, that the view of policing as an almost exclusively local responsibility, coupled with the desire to maintain the immediate control of the municipal executive, has proved compelling. However, a review of the structure of the delivery of policing services in the province demands a concurrent re-examination of the viability of the effectiveness of current methods of municipal police governance. Within the context of a carefully tailored legislative scheme, police boards have attained a number of positive objectives: promotion of police independence, democratization of control, enhanced access by special interests leading to more comprehensive and balanced law enforcement policies, introduction of centralizing influences leading to a higher degree of standardization and uniformity, expanded citizen participation, and enhanced police accountability.

In view of the benefits which have been associated with governance by a board of police commissioners, it may well be a suitable occasion to assess the merits of a lateral transfer of regulatory authority from local council to a board of police commissioners. That is, if the objective of insulating the police from local, partisan influences is regarded as worthwhile, the advantages inhering in governance by a special purpose police board, comprised of a mix of elected and appointed members, representing local, regional and provincial interests ought to be considered.

Analysis of the strengths of a police board may also be required should regional police forces be established. In such an event, the mandatory creation of joint boards of police commissioners may inevitably dictate the creation of municipal boards in order to achieve parity and consistency in methods of police governance.

(ii) Operational Control

Issues which arise in the context of the relationship between the police and local government are associated not only with questions of institutional competence but also encompass the limits of such relationships. The appropriate limits of control must also be determined, a problem which will exist irrespective of the ultimate locus of municipal control. In other words, what are or ought to be the powers which are assigned to the local regulatory agency (whether town council or board of police commissioner) in relation to the conduct of policing? Conversely, what are the limits of police independence from local control?

It is perhaps surprising, in view of the relatively long history of policing in Canada and the similarly sustained association of policing and local government, that the principles governing the boundaries of the relationship between the municipal executive and the police have not been fully elaborated either at common law or by statute. The lack of clarity which characterizes the respective roles of the police and local government in this context stands in sharp contrast to the well-defined association between the Chief and individual officers. The legal authority of the Chief to direct the operations of his force with respect to both general law enforcement and specific investigations flows inevitably from the language of the Police Act and from the bureaucratic structure of police organizations. By comparison, the relationship between the local force and municipal government is much more ambiguous. While the Police Act explicitly contemplates governance of the police force by either the local executive or by a board of police commissioners, the degree of control vested in local authorities is expressed in general language which is capable of two conflicting interpretations.

According to the Police Act, the association between the Chief of Police and local council (or where appropriate, local board of police commissioners) is one which approximates an agency relationship. Thus, for example, according to section 10(3), the Chief of Police is vested with "all necessary powers to manage and direct the police force to fulfil the responsibility of the municipality" and is to be "responsible directly" to the council or board "and shall not be required" by the council or the board "to report to anybody or person other than the board". In addition, the Chief of Police is said to act 'on behalf of' the municipality or board when recommending candidates for appointment to the force. Within this relationship, it is the responsibility of local government (either through council or a board of police commissioners) to "provide direction and policy" to the force.

'Direction and policy' is a highly flexible phrase. It is capable of a restricted meaning, the content of which is contingent upon the general statutory obligations of the municipality to provide an adequate level of policing services and the specific powers of the municipality in relation to the force, including powers of appointment of the Chief and members of the force, and the provision of "accommodation, arms, equipment, clothing and other items" considered necessary. The capacity of the municipality to stipulate 'direction and policy' would thus presumably be confined to the identification of policing needs for the particular community, the elaboration of general enforcement policy and analogous matters¹⁹⁷.

However, the phrase is equally susceptible of a more extended definition which would encompass not only a general policy-making function but also a more immediate degree of intervention into operational matters. That is, it is foreseeable that the powers of the local executive alluded to, coupled with their statutory mandate and rule-making authority, might be construed so as to support the capacity of local government to issue general statements and specific directives in respect of law enforcement decisions conventionally assumed to be within the particular purview of the Chief of Police¹⁹⁸. The language of the Police Act is unfortunately ambiguous on this point. The combination of the implicitly antithetical concepts of 'policy' which would seem to suggest an advisory and consultative role, and 'direction' which would appear, in contrast, to support the subordination of the Chief of Police to the control of municipal council renders the role of local government extremely problematic.

The principle of police independence -- whether that articulated in Blackburn or the more restrictive version advanced by other commentators -- dictates the preclusion of the Council or Board from direct involvement in particular investigations¹⁹⁹ for the reasons identified by the British Royal Commission on the Police: "it is clearly in the public interest that a police officer should be answerable only to his superiors in the force and, to the extent that a matter may come before them, to the courts. His impartiality would be jeopardised, and public confidence in it shaken, if in this field he were to be made the servant of too local a body." Is the power of 'policy and direction' vested in either municipal council or the board compatible with the theoretical understanding of the proper function of local authority in the administration of policing? Or, in contrast, do the current provisions of the Police Act inadvertently contemplate a more active degree of superintendence on the part of the municipal executive which unduly subverts the autonomy of the law enforcement officer?²⁰⁰

The relatively few cases which have addressed this issue fail to delineate with any degree of certainty the precise scope of the powers of either local council or police board in relation to the Chief and officers of the force. The matter was considered by the Ontario Court of Appeal in Re a Reference Under the Constitutional Questions Act which examined the power of local Council to dismiss a police officer without a prior hearing. According to the Court,

"Notwithstanding the facts that the responsibility to satisfy the police needs of a municipality is placed on the municipality...and that the appointment of members of a police force of a municipality ...is made by the board or by the council...and that payment of the salary or remuneration of the members of a police force is provided by a municipality, no member of such police force is an employee or servant of the municipality."²⁰¹

Furthermore, while the board was empowered to enact regulations "for the government of the police force, for preventing neglect or abuse, and for rendering it efficient in the discharge of its duties", and while provincial legislation imposed upon members of the police force an obligation to "be subject to the government of the board and [to] obey its lawful directions", such language did not enable the board, in the exercise of its governing authority "to give direction to any member of a police force prescribing the duties of his office" since

"those duties are of a public nature and are not owing to the municipality or a board by which a police officer has been appointed. The manner in which the duties imposed by statute on a member of a police force are performed is a matter of public concern."²⁰²

In so ruling, the court affirmed the proposition first articulated in Attorney General for New South Wales v. Perpetual Trustee Co. that

"...there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the state which he is said to serve. The constable falls within the latter category. His authority is original, not delegated, and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory rights independently of contract."²⁰³

Since this ruling appears to rely as much upon specific provisions of the provincial Police Act as upon more general principles of police independence, its general applicability has been challenged, leading one commentator to conclude "The issue of the nature and extent of the legal independence of chiefs of police and members of municipal police forces from...direction, control and management...appears thus to be quite unsettled...and is clearly one which must be determined not only according to common law principles but also with careful regard to the particular statutory provisions in force in each jurisdiction. The lack of clarity which prevails over this important relationship between a police board and its police force is a matter of serious concern..."²⁰⁴

In order to resolve this matter and to clarify the scope of the mandate of the local governing authority in relation to the stipulation of general operational policy (as opposed to intervention in particular cases), the advisability of amendments to the Police Act ought to be considered. An example of legislation which defines with greater precision the association between the chief and local government and which preserves the principle of police independence is provided by the Ontario Police Act which describes the powers of boards of police commissioners in the following way:

"31.(3). The board may give orders and directions to the chief of police, but not to other members of the police force, and no individual member of the board shall give orders or directions to any member of the police force.

31(4). The board shall not direct the chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police force."

3. The Police and the Solicitor General

The office of the provincial Solicitor General represents the third significant level of control upon the operation of policing services within municipalities. While doubts surround the identification of the precise limits of the authority of local council and boards of police commissioners to direct the operations of the municipal forces, the position of the Solicitor General in this respect is less problematic. Neither jurisprudence nor the provisions of the Police Act, with one significant exception, recognize any right of direct intervention by the Minister in relation either to particular cases or day-to-day administration of police forces.

This proposition does not mandate the total detachment of the Minister from the conduct of law enforcement by municipally established forces. Rather, the duty of political responsibility to which the Solicitor General is subject supports the exertion by the Minister of a certain degree of oversight or superintendence in the field of policing. The central problem in this respect, analogous to that which underlies the association of police and local authorities, is to establish a regime which accommodates the Minister's political responsibility without sanctioning improper interference in the performance by the police of their quasi-judicial role.

Recent amendments to the provincial Police Act have achieved a heightened degree of centralization of control in the hands of the Solicitor General which nevertheless does not appear to abrogate the basic principle of police independence. According to section 1.1(1) of the new Police Act the Minister is charged by statute with the two-fold responsibility to "promote the preservation of the peace, the prevention of crime, the efficiency of police services, and the development of effective policing" and "co-ordinate the work and efforts of police forces and the Royal Canadian Mounted Police within the Province" and may issue guidelines and directives for the fulfilment of such mandate. However, ministerial powers as described in section 1.1(2) of the Act are primarily consultative, supervisory and advisory and should not be confused with a power of direction and control.

The relationship between the Minister, on the one hand, and local government and police forces, on the other, which has been created by such recent amendments therefore parallels that model which was recommended by the 1962 English Royal Commission on the Police. Notwithstanding the ultimate political accountability of the Minister (in the case of England, the Home Secretary) in the legislature for the conduct of policing, the Commission rejected the complete subordination of local forces to the direction of the central executive on the basis that the independence of the police would be irrevocably impaired "since they would be

placed within a hierarchy or chain of command leading ultimately to a Minister who was not himself required to be impartial". However, the Commission did favour the implementation of measures which would impose greater statutory responsibility upon the Minister in order to promote police efficiency:

"It would be inappropriate to assign to the Secretaries of State complete responsibility for the police service; it is implicit in our rejection of any arrangement under which the police should be placed under the control of the Government that Ministers cannot in our view be responsible for the acts of individual policemen or for the day-to-day enforcement of the law. Consequently the responsibility of the Secretaries of State should not extend beyond a general duty to ensure that the police operate efficiently and they should have no powers of direction. Thus we recognise a fundamental distinction between central responsibility for an efficient organization, both central and local, and the responsibility of the police themselves, which is neither central nor local, for the enforcement of the law."

One exception to the normally consultative and advisory role performed by the Solicitor General is provided by section 6(1) of the Police Act which authorizes ministerial intervention in particular investigations. According to section 6(1), the Solicitor General, acting either at the request of a board, council, police chief or Commanding Officer of the RCMP, or in the interests of the administration of justice, may "assign the conduct of the investigation of any alleged offence to a member of a police force or of the Royal Canadian Mounted Police". At first blush, the vesting of such a power in the office of an elected Minister might seem contrary to the principle of police independence, sanctioning as it does a direct incursion into the realm of the 'quasi-judicial'. However, it may be justifiable on the basis that public confidence in the integrity of the criminal justice system requires the involvement, in an appropriate case, of an otherwise politically (and hence, publicly) accountable official who is sufficiently detached from local political pressures and partisan influences. It is also a power consonant with both the general statutory mandate of the Minister and with the analogous obligation of the provincial cabinet to monitor adherence by municipalities of their responsibility to provide and maintain an adequate level of policing services²⁰⁵.

The characterization of the Minister's powers in relation to municipal policing as one of general oversight which is expressed through the issuance of advisory and consultative guidelines and directives is intended to achieve four principal objectives:

- to implement certain powers of ministerial control which will ensure that obligations of political responsibility will be discharged in a meaningful way;
- to prevent politicization of the daily operations of police forces, and in particular to eliminate, or at least reduce the opportunity for interference in specific operational decisions relating to investigation, arrest and charge;
- to affirm that the responsibility for and control over policing remains a local function in order to ensure sensitivity to particular community needs;
- to permit, in appropriate instances, the development of uniform guidelines and general policies which will secure adherence to minimum standards of policing, thus achieving a level of equality and uniformity between municipalities, regardless of financial, demographic and related disparities.

However, a further question remains -- one which is less concerned with Ministerial powers of control than with those duties of accountability which are owed to the Solicitor General by local policing authorities, including the Chief and members of municipal forces.

Determination of the framework of accountability between the Minister and local governing authorities requires analysis of the ministerial role in the discharge of the operational responsibilities of the police. Does the relatively decentralized and localized structure of policing in New Brunswick require the total withdrawal of the Minister from any involvement in the day-to-day operations of police forces, including specific investigations? Is the Minister completely excluded from any powers in relation to operations? Or does the political responsibility of the Minister in the legislative process demand a reciprocal degree of accountability on the part of policing authorities in relation to operational matters. This issue has been considered elsewhere and two opposing views have emerged.

On certain occasions it has been asserted that fidelity to the principle of operational independence demands a complete separation of the Minister and police forces in this sphere. Thus, according to a former Prime Minister²⁰⁶:

"I have attempted to make it quite clear that the policy of...government...has been that [government] should be kept in ignorance of the day-to-day operations of the police force...I repeat that this is not a view that is held by all democracies but it is our view and it is one we stand by. Therefore, in this particular case it 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 doing constantly in their investigative practices, what they are looking at, and what they are looking for, and the way in which they are doing it.

I would be much concerned if knowledge of that particular investigative operation by the [security] police were extended to all their operations and indeed, if the Ministers were to know and therefore be held responsible for a lot of things taking place under the name of...criminal investigation. That is our position. It is not one of pleading ignorance to defend the government. It is one of keeping the government's nose out of the operations of the police force at whatever level of government.

On the criminal law side, the protections against abuse are not with the government. They are with the courts. The police can go out and investigate crimes, they can investigate various actions which may be contrary to the criminal laws of the country without authorization from the Minister and indeed without his knowledge.

What protection do we have then that there won't be abuse by the police in that respect? We have the protection of the courts."

In essence, arguments supporting a wholesale withdrawal of the Minister from any role in the operational dimension of policing are premised upon the assessment that, as between executive oversight and judicial review, it is the judiciary which, by virtue of its institutional independence, represents the more appropriate safeguard against abuses of authority. The passage quoted is implicitly premised upon a presumed incompatibility or contradiction between the constitutional independence of the police in the enforcement of the criminal law on the one hand, and executive superintendence of operational matters on the other and to that extent "treats knowledge and information as to police methods, police practices, even police targets as necessarily synonymous with improper interference with the day to day operations of a force."²⁰⁷

A contrary view, which would support some association between the Minister and police forces at the operational level, has been elsewhere advanced²⁰⁸:

"...Mr. Salisbury said that special branches of Police Forces had duties which he considered to be to the Crown, to the law and not to any political party or elected Government. In giving evidence he again affirmed that was his belief...That statement, in so far as it seems to divorce a duty to the Crown from a duty to the politically elected Government, suggests an absence of understanding of the constitutional system...of the United Kingdom...

Of course the paramount duty of the Commissioner of Police is, as is that of every citizen, to the law. The fact that a Commissioner of Police is answerable to the law and to the law alone" was adverted to by Lord Denning M. R. in ...Blackburn. This was in the context of the discretion to prosecute. No Government can properly direct any policeman to prosecute or not to prosecute any particular person or class of persons although it is not unknown for discussions between the executive and the police to lead to an increase or abatement of prosecutions for certain types of offences...

It is one matter to entrust to the Commissioner of Police the right to make decisions as to the conduct of the Police Force. It is quite another to deny the elected Government the right to know what is happening within the Police Force." (emphasis added).

It is this view which appears in greater conformity with the political accountability of the Solicitor General²⁰⁹. That is, in order to meaningfully fulfil his obligation of ministerial responsibility in the legislative process, it is imperative that the Solicitor General receive and be entitled to demand information in relation to general policing practices, policies and methods. Nor does such a position depend for its validity upon the demonstrated ineffectiveness of judicial review as an adequate deterrence to police misconduct.²¹⁰ Rather, the recognition of the right of the Minister to be kept informed of policing operations (and concomittant affirmation of the corollary duty of policing authorities to provide such information) is not antithetical to police independence but is critical to the maintenance of the principle of ultimate political accountability of police forces.²¹¹

4. The Role of the Police Commission

Until 1991, the New Brunswick Police Commission was vested with relatively extensive authority in relation to the supervision of the delivery of policing services in the province. In addition to its role in the resolution of public complaints, the Commission also performed an advisory and consultative function which included the powers to make regulations in relation to matters such as rank structure, training, appointment, promotion, use of equipment and insignia, and to approve reorganization of local forces. Historically, the development of police commissions in Canada is attributable to a particular philosophy as to the appropriate locus of supervisory control which has been described in the following terms²¹²:

"...police commissions...are intended at the provincial level to act as a buffer between the executive branch of government, including the Minister and his departmental officials, and the chiefs of police in running their respective forces on a day to day basis, and, at the municipal level, to keep a healthy distance between the police chief and the elected local politicians who are appointed to serve as representatives of the municipal government on the local police commission or police committee."

The institution of the police commission, as an external agency of control, functions as an adjunct to the primary organs of control -- municipal government and the central executive. Typically, in addition to their review jurisdiction, police commissions have been vested with relatively broad powers with respect to the police, including the authority to provide various support services such as the maintenance of statistical information, public and police education, the development of communication networks, and programs related to police management and recruitment techniques. While such powers provide police commissions with a material opportunity to influence the operation and conduct of police forces (even perhaps at the expense of municipal direction), any direction and control which may be exerted is essentially advisory and supervisory in nature.

Although the New Brunswick Police Commission conforms in its essential components to this brief description, its jurisdiction has been severely circumscribed by recent amendments to the Police Act, the effect of which has been to eliminate the regulatory dimension of its statutory mandate. Its role is now restricted to the following undertakings: the investigation and determination of complaints by any person relating to the conduct of a member of a municipal police force; the investigation and determination of any matter relating to any aspect of policing in any area of the province, either on its own motion, or at the direction of the Solicitor General; the determination of the adequacy of municipal, regional and RCMP police forces within the province. Such amendments were prompted by the desire to reflect in legislative form an appropriate division of authority between the Solicitor General and the Police Commission, due to the establishment of a Ministry of the Solicitor General, distinct from that of the Attorney General, with responsibility for policing in the province. To the degree that an institution such as the Police Commission is, by virtue of its statutory powers, well positioned to exercise a significant influence upon policing, its impact upon police independence and accountability merits examination.

The history of police commissions in Canada supports the conclusion that their establishment has been motivated by the desire to attain several objectives²¹³: to achieve greater co-ordination and efficiency in the conduct of policing services throughout the province through the articulation of minimum standards of recruitment, training, discipline and working conditions; and to provide for an independent²¹⁴ authority to review and dispose of internal disciplinary matters and public complaints. By virtue of their composition and related institutional features, Police Commissions have been regarded as relatively detached from and independent of those local pressures which might otherwise affect the actions of municipal authorities responsible for the provision and administration of policing services²¹⁵.

However, serious questions have been prompted by the traditional mixture of regulatory, supervisory and review functions which comprise the mandate of provincial Police Commissions. While such issues do not directly implicate aspects of police independence, to the extent that they bear upon the actual institutional autonomy and competence of police commissions, serious questions relating to the effectiveness of the police commissions as an agent of police accountability are generated. As one commentator has noted, there is

"an inherent and fundamental conflict among the functions which provincial police commissions must perform. On the one hand they must provide advice and technical assistance to police forces and police governing authorities, while on the other hand, in performing their quasi-judicial functions, they must present the appearance of an entirely impartial and unbiased tribunal"²¹⁶.

This essential dilemma -- which may be described as one of institutional mandate -- is compounded by two further problems. In addition to concerns related to the regulatory competence and expertise of the Commission, deriving from the structural indicia of the Commission (the background of members, duration of service, conditions of tenure and remuneration), equally germane and important issues have been identified which bear upon the relationship of a police commission to the executive. This problem has been described in the following terms:²¹⁷

"On the one hand, contact between a provincial police commission and the responsible Minister and his department is obviously essential to the effective fulfilment of the responsibilities of each in the area of policing. On the other hand, if a police commission is constantly responding to the whims of the Minister or officials in his department, whether or not it is legally required to, its independence of outlook and action is bound to be eroded over time, as well as its appearance of independence. Maintaining an appropriate balance between too much and too little contact calls for sound judgment and an appreciation of the importance of not allowing effectiveness to be sacrificed to independence. For, if an organization is not effective, it is of no great value that it is independent."

In order to resolve problems associated with operational competence and structural independence to ensure that the police commission functions as an effective vehicle of accountability, one must therefore examine the commission as an institution, isolate its dominant features and assign to it those functions which are consonant with its essential character. The most material characteristic of a police commission lies in its institutional independence. As noted earlier, the creation of provincial police commissions was animated by two desires: to achieve uniformity in policing operations and to provide a forum for the receipt and disposition of public complaints against the police. Is the independence of the police commission equally compatible with each of these objectives?

The rationale for the assignment to the police commission of regulatory powers over standards of recruitment, training, discipline and associated matters was most compelling when responsibility for the establishment and delivery of policing services was an exclusively municipal responsibility. In such circumstances, the possibility of uniformity and parity in the level of community policing services is virtually non-existent. The advisory, consultative and regulatory jurisdiction of the police commission may therefore represent an example of the assignment of powers by default which bears no necessary relationship to (and in fact may be impaired by) its independent status.

In such a case, justification for the vesting of regulatory powers in a central governmental ministry rather than a body such as a police commission is readily apparent. Not only is the assignment of powers to a political, rather than quasi-judicial, body consonant with the 'public' dimension of policing, but it is also consistent with the obligation of political accountability imposed upon the Minister, a feature which is absent from the police commission. That is, accountability demands a commensurate degree of control. In contrast, the continued exercise by the police commission of a review jurisdiction rests upon a more secure basis. It is difficult to quarrel with the proposition that the quasi-judicial powers exercised by the Commission require institutional independence, in order that the decisions of the commission command public acceptance.

Questions as to the propriety of the conferral of directory powers upon a quasi-judicial body immune from the conventional constraints of political accountability (to which both municipal council and the Minister are subject) has resulted in a significant transformation of the Police Commission. The effect of recent amendments to the Police Act has been to transfer much of the supervisory jurisdiction formerly exercised by the New Brunswick Police Commission to the office of the Solicitor General. As a consequence, the control which may be exercised by the Police Commission upon the conduct of law enforcement has been greatly attenuated. Its primary role now consists in the receipt and disposition of public complaints in respect of any aspect of policing in the province (including that which is performed by the RCMP pursuant to the Provincial Policing Agreement) and instances of alleged misconduct by individual members of municipal forces (excluding members of the RCMP)²¹⁸. In addition, the Commission may "assess the adequacy of each police force and the Royal Canadian Mounted Police Force and whether each municipality and the Province is discharging its responsibility for the maintenance of an adequate level of policing."

The powers of control over police forces possessed by the Commission and expressed through the complaint and assessment processes are extremely broad, although exercised within a narrow ambit. It is, additionally, applied on an ex post facto basis. While the impact of the Commission upon the exercise of police powers (both quasi-judicial and operational) may seem less obvious and direct than that which is exerted by either municipal or central government authorities, certain questions may be raised by those provisions of the Police Act which empower the Commission to refer the investigations of complaints to a chief of police, a council or a board of police commissioners.

However, in this respect, any potential for interference in the day-to-day operations of a force is more apparent than real. The power of the Commission to refer the conduct of an investigation to the executive officers of a force or to local bodies vested with responsibility for the provision of policing is not inherent but contingent upon the receipt of a complaint. Furthermore, in the event that the investigation ordered by the Commission reveals evidence of criminality, the Police Act provides for the intervention of the Minister, thus ensuring the operation of normal principles of executive responsibility.

5. The Role of the Crown

In the form which has attracted acceptance in Canada, the doctrine of police independence serves to immunize both the Chief and the individual police officer from the application of extraneous pressures (normally conceived of as political in origin) which would impair or interfere with the impartial exercise of the quasi-judicial powers of investigation, arrest and charge. Although the doctrine assumes its greatest significance in defining the limits of authority of executive governing bodies, its importance is not confined to this context. Encroachments upon the autonomy of the police in the restricted sphere protected by the doctrine of police independence may also be committed by external agencies which do not otherwise enjoy any powers of direct supervision over the police. Although the threat to the impartial exercise of discretion in respect of any of these three police powers is conventionally associated with abuses of authority by those immediately entrusted with certain statutory or common law responsibilities in relation to policing -- the Chief and local and central executive officers -- the viability of police independence is also implicated by the operation of administrative policies which have been implemented by the Public Prosecutions Branch of the provincial Department of the Attorney General, which exert a certain measure of de facto control over policing.

The operation of the doctrine of police independence, as developed in Blackburn, coupled with the principle of prosecutorial independence, embodies a particular philosophy upon which the respective roles of police and crown in the administration of criminal justice are predicated. Tradition reflects the sharp differentiation that exists between the functions of the police and Crown prosecutor at the initial stages of a criminal prosecution and which constitutes a check upon the otherwise unfettered discretion of each actor in order to protect the individual citizen against abuse. According to the conventional division of labour between the

investigative and prosecutorial arms of the criminal justice system, police are assigned the "complete responsibility for investigating offences, and for making the initial decision whether to bring the matter before a court...or to take no proceedings" while "after that point the case should become the responsibility of the [Crown prosecutor]" who "may then on the information before him decide to proceed as charged, or to modify or withdraw the charges...Those decisions will be for the prosecutor; and it is in that sense that he will have responsibility for the conduct of the case once the initial decision to proceed has been taken..."²¹⁹ As a consequence, control over the initiation of the criminal process lies within the complete discretion of the police and is expressed through the charging decision. Abuses which may occur at this stage are remedied by the ex post facto right of the Crown to terminate criminal proceedings through the withdrawal of charges or entry of a stay.²²⁰

Although legal theory posits a firm bifurcation between the powers of the police and those of the Crown with respect to the initiation and conduct of the criminal process, administrative practice in New Brunswick upholds Crown intervention in the criminal process at a much earlier stage than is supportable by reference to either legal theory or the experience of most other Canadian jurisdictions. The specific practice referred to is that of pre-charge screening²²¹. Consistent with the Blackburn ruling, the **Public Prosecutions: Operations Manual** acknowledges that "the conduct of any investigation is the responsibility of the law enforcement agency involved" and thus the Crown is admonished to "be aware that there is a fine line between providing legal advice upon request during the investigative process and actually becoming involved in these investigations, and [the Crown Prosecutor] should avoid the latter situation"²²².

However, the authority to determine issues related to both the propriety of the initiation of a criminal proceedings and the nature of the charges to be laid is within purview of the individual Crown prosecutor. According to the policy, "Crown prosecutors are to scrutinize and give their consent to all charges before they are laid by the police...the major role of the Crown Prosecutor is to determine whether a criminal offence is disclosed by the police investigation, whether a sufficient case is made out, and whether a prosecution is justified in the circumstances."²²³ The policy further articulates the standards to be applied by the Crown in a determination of the propriety of charging. Thus "when considering the institution or continuation of criminal proceedings, the first question to be determined by the Crown Prosecutor is whether the evidence is sufficient to justify a prosecution".²²⁴

The essential criterion governing the outcome of this inquiry is "whether there is a reasonable prospect of a conviction: that is, whether a conviction is more likely than an acquittal before an impartial trier of fact properly directed in accordance with the law" taking into account "the availability and admissibility of evidence, the credibility of witnesses and their likely impression on a judge or jury; the admissibility of any confessions, the reliability and admissibility of any identification" and the public interest in the initiation of the prosecution²²⁵. In addition, in circumstances which would support multiple charges, the Crown is also empowered "to review the investigation file and approve the most appropriate charge or charges"²²⁶.

The restriction upon police charging discretion which is effected by the policy is not a total one. The policy confirms that "the peace officer (or indeed a private citizen) has an absolute right in law to lay a charge and may actually do so" and if a charge is laid contrary to the advice of the prosecutor, "the Crown, as the Attorney General's representative, should be prepared to either proceed with the charge, allow a private prosecution to continue or halt further proceedings." In such an event, "the Director of Public Prosecutions is to be immediately advised and a decision will be made by the Director as to whether to stay proceedings (this must be agreed to by the Deputy Attorney general or Attorney General), to allow the proceedings to continue, or to withdraw the charge."

The policy also contains an internal mechanism to resolve disputes between the police and Crown in the event of a disagreement prior to charging. While "it is the Crown prosecutor's role to make the decision as to whether a charge is to be laid,...if there is strong disagreement with the investigating officer regarding the matter, the Crown Prosecutor should consult with the Regional Crown Prosecutor before a final decision is made on the file."

The departure from conventional common law principles governing the division of legal labour and the potential impact upon police independence which is occasioned by the administrative practice of pre-charge screening is evident. The division of legal responsibility between the police and the Crown is implicitly premised upon the qualitatively distinct positions occupied by each within the administration of criminal justice and the need to ensure their common independence.²²⁷ It has traditionally been presumed that the impartiality of the justice system is contingent upon a well-maintained separation between the investigative and prosecutorial functions.²²⁸ The ultimate object of the investigative process and by implication of the police officer is to "secure a conviction".²²⁹ In contrast, the prosecutor cannot be animated by any vested interest in the outcome of criminal proceedings. As a 'quasi-judicial' officer²³⁰, "though he functions within an adversary system, he is an adversary with a difference. His primary duty is not to act as the instrument of the police or to secure convictions by exploiting the opportunities afforded him by the rules of process."²³¹ The unique status of the Crown derives from its position within the criminal justice system and from the character of the criminal trial process:

"It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."²³²

The allocation to the Crown of the obligation to engage in pre-charge review explicitly violates the traditional divorce of police and prosecutions. To the degree that control over the charging decision passes from the individual police officer to the Crown, the independence of the police (and perhaps that of the Crown) is thereby undermined.

The incursion upon the concept of police independence which is occasioned by pre-charge screening is counterbalanced by the pragmatic advantages ensuing from the practice. First, it has been suggested that the intercession of the Crown acts as a check upon potential abuses of process by a police officer who may, as a consequence of involvement in investigation, be less than objective²³³. Secondly, a system of prior review by the Crown may be fairer to the accused and more sensitive to the public interest in the efficiency of the administration of justice because it ensures eventual prosecution in only those cases in which there is a substantial likelihood of conviction²³⁴. According to this view, a prosecutorial decision, involving as it does, difficult legal as well as factual questions, is one best made by an individual trained in the law in order to avoid unnecessary or abusive infringements of the liberty and security of the citizen²³⁵. Preliminary scrutiny by the Crown may detect and correct technical defects in charges, relieving the trial court of the necessity of resolving formal, collateral objections.

It is equally apparent that compelling arguments can be advanced in opposition to a formal pre-charge screening process. From the perspective of the citizen (both victim, potential accused and the public) the private climate in which the charging decision is made may be conducive to abuse. In contrast, the more common regime whereby withdrawals or stays of charges laid by the police must occur in public carries with it a certain guarantee of accountability.²³⁶

Pre-charge screening may also notionally usurp the judicial function insofar as it shifts the power to determine guilt from the judicial forum to the office of the Crown, thus additionally derogating from the traditional stance of prosecutorial impartiality.²³⁷ However, for the purpose of this discussion, the most significant aspect of the practice consists in its obvious ramifications upon the scope of police independence.

Although it has been suggested elsewhere that the potential for impairment of police independence, represented by pre-charge screening practices, is more apparent than real²³⁸ (due to the status of the police officer and the non-mandatory nature of the present screening process), the stronger view would appear to be that compulsory restrictions upon police charging practices which would negatively affect the exercise of police discretion and which are imposed by external authorities to whom the police are not otherwise accountable are of questionable constitutional validity²³⁹. For that reason, certain other jurisdictions, such as Manitoba and Nova Scotia, which have had occasion to address this issue have rejected the concept of mandatory pre-charge screening, electing instead to impose duties of police-Crown consultation at the preliminary stages while reserving to the police the ultimate discretion with respect to the initiation of criminal process.

It is difficult to assess the actual (as opposed to theoretical) impact of current provincial prosecutorial policies upon the viability of the principle of police independence. Insofar as the pre-charge screening guidelines reflect an administrative practice, rather than a legal requirement and are directory rather than compulsory in effect, the autonomy of the police in the discharge of quasi-judicial powers remains intact. Furthermore, to the extent that the policy does explicitly acknowledge the right of the police to lay a charge, contrary to the position of the Crown, police independence is maintained.

However, any adherence to conventional theory is undermined by the inclusion of language which is capable of an interpretation at odds with the theory of police independence and, at the very least, suggests that the policy's consistency with the principle is considerably attenuated. That is, while upholding the right of the police officer to lay a charge, the policy simultaneously imposes a requirement of Crown scrutiny and charge approval on the basis that "it is the Crown Prosecutor's role to make the decision as to whether a charge is to be laid", a proposition which runs directly counter to the concept of police independence.

As a consequence of this internal inconsistency, the policy is, from a formal, textual perspective, highly ambiguous and capable of two contradictory interpretations. On the one hand, language employed in the policy supports the concept of police discretion and limits the participation of the Crown to one of advice and consultation. On the other hand, however, the description of the Crown role also supports the view that the process contemplated by the policy imposes a mandatory requirement of prosecutorial approval as a prerequisite to the laying of any charge. If this latter interpretation is accepted, the validity of the policy is highly suspect.

Such formal ambiguity generates important substantive problems. That is, even if the policy receives a restrictive interpretation which affirms the ultimate control of the police in relation to the charging process and reserves to the Crown only an advisory capacity, emphasis upon prosecutorial involvement may well produce operational limitations upon the exercise of police powers in relation to affirmative charging decisions. That is, the practical manifestation of the apparent lack of clarity in the definition of the boundaries of the policing and prosecutorial roles may be the introduction of an element of confusion in the police/Crown relationship which is highly undesirable. In order to avoid this possibility, it would be preferable, both theoretically and pragmatically, if the prosecutorial guidelines confirmed, in a more explicit fashion, the unrestricted authority of the police to lay charges, notwithstanding the assignment to the Crown of any advisory or consultative powers.

THE STATUS OF THE RCMP

In addition to the general powers of oversight and supervision confided to the Solicitor General in relation to the operations of municipally established policing services, the Minister also plays a significant role in the conduct of local policing services provided by the RCMP pursuant to contract.

The role played by the RCMP in the provision of municipal policing services is governed primarily by the provisions of either the Provincial Policing Agreement or Municipal Policing Agreements. In both instances, authority in relation to control of the force is divided between the Government of Canada through the federal Solicitor General and the Province of New Brunswick through the provincial Solicitor General in the case of the Provincial Policing Agreement or, with respect to the Provincial Policing Agreement, between the federal Government and the Chief Executive of the Municipality subject to the general authority of the provincial Solicitor General.

The demarcation of responsibility effected by the contract is as follows. The internal management of RCMP services (whether pursuant to provincial or municipal agreement) including "administration and application of professional police procedures" remains within federal control. However, in the case of services provided pursuant to the Provincial Policing Agreement, the provincial Solicitor General is competent to determine "provincial policing objectives, priorities and goals" which must be implemented by the Commanding Officer of the Detachment who is also subject to mandatory duties of reporting and consultation vis-a-vis the Solicitor General. A similar division of authority between the provincial Solicitor General and the federal Government is contained in the Municipal Policing Agreement although modified by the inclusion of a mandatory duty of reporting and consultation between the member in charge of the municipal unit and the Chief Executive of the Municipality.

The legal significance of the phraseology "administration and application of professional police procedures" when contrasted with the reservation to the province of control over matters encompassed within the administration of justice in the province, and the implications of such terms upon the definition of executive control and responsibility has engendered extensive debate²⁴⁰, which is beyond the scope of this document. It is perhaps sufficient to say that the constitutional limits of ministerial authority in this context and the relationship of such authority to police independence remain undetermined and have only been resolved by extra-constitutional mechanisms and intergovernmental consultation²⁴¹.

CONCLUSION

Notwithstanding that the concept of government-sponsored law enforcement has been a feature of Anglo-Canadian community life since at least the time of the Normans, the legal status of the police as an institution remains unsettled. Serious questions persist in relation to what may be regarded as the most important characteristics of the police: the scope of police independence and the degree of autonomy from the control of and accountability to governing authorities at all levels. The confusion which characterizes the status of the police is explicable, in part, on the basis that the institution of the police embodies a fundamental conflict. As agents of the criminal justice system, the police are expected to discharge their responsibilities in a neutral and impartial manner. Consequently, the position of the individual officer is conventionally described as one of independence.

However, in institutional terms, the independence of the police is a qualified one. The gradual shift from law enforcement conducted by a semi-autonomous, local constable subject to judicial control, to a professional hierarchical bureaucracy exercising statutory powers subject to the direction of public officials has introduced an element of confusion into policing. The very existence of the police is contingent upon the affirmative action of civil authorities who are responsible for the delivery of policing services. Thus, as representatives and creatures of the community (both historically and in contemporary terms) the police are integrally associated with the executive branch of government which, in turn, is politically accountable to the electorate for the actions of the police. The result is a close identification between government and the police which inevitably calls into question the scope of police independence. This tension is compounded by the increasing trend towards centralization which has introduced an additional political element into the relationship between the police and governing authorities: the police can no longer be regarded as an exclusively local service but are also subject to a certain degree of supervision by the central provincial executive through the ministry of the Solicitor General.

Lines of control and accountability are further complicated by the establishment of novel agencies (boards of police commissioners and police commissions) which are by legislation assigned certain powers in respect of the discharge of law enforcement and by the relationship of the police to other constituent elements of the criminal justice system.

The central problem which therefore must be addressed by any examination of the police in New Brunswick consists in the determination of the appropriate balance between police independence and governmental control which will produce the maximum degree of accountability. Phrased in another way, any law enforcement regime must attempt to reconcile the need to ensure the subjection of the police to the public will (as an incident of democratic government) while simultaneously preventing the use of the police to achieve partisan goals. Effective law enforcement demands the development of a statutory regime which will, in a clear and precise way, assimilate that degree of police discretion which is the operational manifestation of police independence to a system of internal and external controls which are intended to ensure police accountability.

ENDNOTES

1. A. Grant, *The Police: A Policy Paper, Study Paper, Law Reform Commission of Canada, 1980*, at 3.
2. It is generally agreed that the first 'modern' police force was the Royal Irish Constabulary which provided the model for the London Metropolitan Police established in 1829 by Sir Robert Peel. According to Peel, writing in 1822, the principal functions of the police were:
 - 1) to prevent crime and disorder, as an alternative to their repression by military force and by severity of legal punishment.
 - 2) To recognize always that the power of the police to fulfil their functions and duties is dependent on public approval of their existence, actions, and behaviour and on their ability to secure and maintain public respect.
 - 3) To recognize always that to secure and maintain the respect and approval of the public means also the securing of the willing cooperation of the public in the task of securing observance of laws.
 - 4) To recognize always that the extent to which the cooperation of the public can be secured diminishes, proportionately, the necessity of the use of physical force and compulsion for achieving police objectives.
 - 5) To seek and to preserve public favour, not by pandering to public opinion, but by constantly demonstrating absolutely impartial service to law, in complete independence of policy, and without regard to the justice or injustices of the substance of individual laws; by ready offering of individual service and friendship to all members of the public without regard to their wealth or social standing; by ready exercise of courtesy and friendly good humour; and by ready offering of individual sacrifice in protecting and preserving life.
 - 6) To use physical force only when the exercise of persuasion, advice and warning is found to be insufficient to obtain public cooperation to an extent necessary to secure observance of law or to restore order and to use only the minimum degree of physical force which is necessary on any particular occasion for achieving a police objective.
 - 7) To maintain at all times a relationship with the public that gives reality to the historic tradition that the police are the public and that the public are the police; the police being the only members of the public who are paid to give full-time attention to duties which are incumbent on every citizen, in the interests of community welfare and existence.
 - 8) To recognize always the need for strict adherence to police-executive functions, and to refrain from even seeming to usurp the powers of the judiciary of avenging individuals or the state, and of authoritatively judging guilt and punishing the guilty.
 - 9) To recognize always that the test of police efficiency is the absence of crime and disorder, and not the visible evidence of police action in dealing with them." (Charles Reith, *A Short History of the British Police*, London: Oxford University Press, 1948).
3. See P. Stenning, *Search and Seizure: Powers of Private Security Personnel, Study Paper* prepared for the Law Reform Commission of Canada, 1979.
4. According to conventional wisdom, policing, as perceived in the twentieth century, is intended to "employ a system of rules and authoritative commands to transform troublesome, fragile situations back into a normal or efficient state whereby the ranks in society are preserved." R. Ericson, as quoted by A. K. McDougall, "The Police Mandate: An Historical Perspective" (1988) 12 *Canadian Police College Journal* 10, at 12.

5. R. S. N. B. c. P-9.2.

6. Although ironically it may well be that what are now viewed as secondary policing responsibilities once constituted the principal duties of the office. As noted by the 1972 Task Force on Policing in Ontario, "Modernization of policing, emphasizing various kinds of technological innovation has shifted the role of policing from that of peace officer to that of law officer. The change has taken place at the point of contact between police officer and citizen. It is characterized by a reduction in personal contact...between the citizen and his policeman. In addition it is characterized by a greater emphasis on law enforcement than on the service aspects of police work. In many respects, it has made police work more impersonal, more case and insider oriented and less concerned with the continuity of relationships with the community."

7. Although it must be emphasized that "A cardinal principle for the understanding of police organization and activity is that the police are only one among many agencies of social control". M. Banton as quoted by P. Sallman, "The Police and the Criminal Justice System", (1981) 5 Canadian Police College Journal 187, at 188-9.

8. The phrase has been coined by A. Ashworth, "Concepts of Criminal Justice" (1979) Criminal Law Review 412.

9. According to Ashworth, supra note 8, controls upon police conduct which derive from the objective of protection of individual rights "...are associated with the notion that members of society ought not to be subjected to certain kinds of treatment and ought, when suspected or accused of crime, to have certain facilities. Thus, the principles of fairness can be said to promote respect for certain rights of the individual, a respect which places limitations on methods which may properly be used in crime control". (at 413).

10. Such as civil actions of false arrest and malicious prosecution.

11. As an incident of the relationships (defined by both statute and common law) between the police chief and constable, and the police chief and municipal council or board of police commissioners. This category would also include monitoring agencies such as Police Commissions and the office of the Ombudsman.

12. Manifested in such phenomena as the judicial power to compel disclosure of evidence (see R. v. Stinchcombe (1992), 8 C. R. (4th) 277), to stay proceedings for abuse of process and to exclude illegally obtained evidence (see section 24(2) of the Canadian Charter of Rights and Freedoms) as well as those controls which would result from the implementation of pre- or post-charge screening by the Crown.

13. Ashworth, supra note 8, at 414.

14. Christie v. Leachinsky, [1947] A.C. 573, at 600, per Lord Simonds.

15. Thus, for example, according to Lord Denning, M. R. in R. v. Metropolitan Police Commission, ex parte Blackburn, [1968] 1 All E. R. 763:

"I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the

prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone."

16. As observed by John Hogarth, there has been a general trend in recent years towards democratization of the internal policing climate coupled with efforts to make policing services more directly accountable to the public. Such phenomena reflect the belief that "it is essential to a country which purports to be a liberal democracy to ensure that the police are held accountable to civilian authorities through a variety of internal and external controls. This is a necessary condition in order to maintain the police presence in a civilized form. The dilemma, however, is to try to ensure the accountability of the police and at the same time protect the police from unwarranted political interference in their day-to-day professional decisions and discharge of their duties." (in "Police Accountability", *The Maintenance of Order in Society*, R. Donelan ed., Supply and Services Canada, 1982).

17. See, for example, the discussion contained in *Proposal for the Reform of the Machinery of Public Prosecutions*, Office of the Attorney General of New Brunswick, 1989 which concerns the restructuring of the current provincial regime of public prosecutions.

18. In bifurcating ministerial authority in relation to the components of the justice system through the creation of a Department of the Solicitor General, responsible for policing, correctional and ancillary associated services, New Brunswick has adopted an institutional structure which replicates in all material respects that which had already been implemented by the Federal Government (see the Department of the Solicitor General Act, R.S.C. 1985, c.S-12); by Ontario (see the Government Reorganization Act, S. O. 1972, c. 1 and the Ministry of the Solicitor General Act, R. S. O. 1980, c. 288); by Quebec; and by Alberta (see the Department of the Solicitor General Act, R. S. A. 1973, c. 67).

19. As is reflected in the following statement of Lord Carnarvon, the complex structure of the administration of justice adopted in the Constitution Act, 1867 was a deliberate one:

"To the Central Parliament will also be assigned the enactment of Criminal Law. The administration of it, indeed, is vested in the local authorities; but the power of general legislation is very properly reserved for the Central Parliament. An in this I cannot but note a wise departure from the system pursued in the United States, where each state is competent to deal as it may with its criminal code, and where an offence may be visited with one penalty in the state of New York and with another in the State of Virginia. The system here proposed is, I believe, a better and a safer one."

20. That is, while the framers of the original constitution perceived the need for uniformity in the legislative definition of offenses, procedure and punishment, which could only be achieved by the allocation to the federal Parliament of authority in relation to the substantive criminal law and criminal procedure, the need to preserve an avenue for the expression of local concerns was regarded as equally compelling. The Constitution Act, 1867 in sections 91(27), 92(14) and 96-100 clearly entrenches the pre-confederation tradition of decentralized control over the administration of the criminal justice system in general, and over the initiation and conduct of criminal prosecutions in

particular. To a large degree, decentralization in enforcement was dictated by practical necessity:

"Considering the geographic enormity of the Canadian nation...and the state of railroads, telegraph and other technology in 1867, centralized control of prosecutorial discretion was not even possible in that era. Lack of adequate road systems and rail systems in 1867, the absence of telephone, telegraph and air connections and compendiously speaking, the primitive state of communications, all combined to make it clear that it was not within the contemplation of the Fathers of Confederation that ultimate constitutional authority for the conduct and prosecution of all criminal offenses - the multitude of cases arising daily and the hundreds of communities in what was then Canada - would centre in Ottawa." (R. v. Wetmore (1983), 49 N. R. 286, at 299).

However, the scheme of localized enforcement constitutionally authorized rests upon a basis more secure than historical convention or practical necessity. The effective functioning of the criminal justice system is contingent, in large part, upon differentiations drawn at the level of enforcement. As further observed by Mr. Justice Dickson in R. v. Wetmore:

"The ultimate decision as to whether or not to prosecute a particular individual, and, if so, in respect of which offenses, is one which requires a careful weighing of a multitude of local considerations including the seriousness of the conduct in light of community norms, the likely impact on the individual of bringing a prosecution, the likely benefit to the community of doing so, and the likelihood of a reoccurrence of the conduct, and the availability of alternative courses of action, for example, diversion or special rehabilitation programs. Assessing these factors obviously requires an understanding of the conditions prevalent in the community in which the criminal conduct occurred." (at 299).

Thus, in order to achieve the dual goals of a national and uniform system of criminal law and of flexibility and responsiveness in the administration of those laws in a way best suited to localized needs, conditions and pressures, the particular structure of ss.91(27) and 92(14) was incorporated into the Constitution Act, 1867 which implements "a special relationship...which...effect[s] a careful and delicate division of powers between the two levels of government in the field of criminal justice" (Wetmore, at 293).

21. The unique nature of the constitutional division of powers in relation to the criminal justice system is illustrated most clearly by the assignment to the federal government of authority in relation to criminal law and criminal procedure (Constitution Act, 1867, section 91(27)) and the simultaneous assignment to the provincial legislatures of authority in relation to "the administration of justice" (Constitution Act, 1867, section 92(14)). In certain instances, the joint involvement of federal and provincial authorities is expressed as an obligation of inter-governmental cooperation. Thus, for example, the establishment and maintenance of courts of criminal jurisdiction is contingent upon federal/provincial collaboration as a consequence of the interaction of sections 92(14) and 96-99 of the Constitution Act, 1867. Section 92(14) assigns to each province exclusive legislative authority in relation to "the administration of justice in the province, including the constitutional, maintenance and organization of provincial courts,...of criminal jurisdiction". However, the exercise of this authority is subject to the operation of sections 96-99 which require that justices of the superior courts be appointed and remunerated by the federal government.

In other instances, federal/provincial participation in the criminal justice system assumes the form of expressly concurrent powers. Thus, for example, both levels of government are vested with jurisdiction in relation to the correctional system. Provincial authority, granted in section 92(6) extends to "the establishment, maintenance and management of public and reformatory prisons" while Parliament is assigned exclusive authority in relation to "the establishment, maintenance and management of penitentiaries" by virtue of section 91(28). In addition, through a process of judicial interpretation, functional concurrency has been found to exist with respect to the assignment of prosecutorial authority. Notwithstanding the historical association of the provincial Attorney General with the prosecution of criminal offenses and the lack of any specific reference to the federal Attorney General in the Constitution Act, 1867, the Supreme Court of Canada has held that federal prosecutorial authority in relation to federal offenses is exclusive and that the capacity of provincial Attorneys General to enforce Criminal Code offenses is contingent upon a delegation of power effected by section 2 of the Criminal Code (see A.G. Canada v. CN Transportation [1983] 2 S. C. R. 206). An analogous concurrency has been discovered in the policing context. In Di Iorio v. Montreal Jail Warden ([1978] 1 S. C. R. 152), a majority of the Supreme Court of Canada held that 'the administration of justice in the province' included the administration of criminal justice and sustained the constitutionality of a provincial commission of inquiry into organized crime. However, in subsequent decisions, the Supreme Court upheld the authority of Parliament to establish a national police force and to exclusively regulate its internal management and discipline.

To this scheme there exists one exception. The offices of sheriff and coroner, both integral elements of the justice system, are not characterized by the bifurcation of enacting and enforcement authority which otherwise distinguishes the federal and provincial roles in the administration of criminal justice. Instead, the province is vested with the full range of competence in respect of the enactment of substantive law and the administration of such law governing the operations of sheriff and coroner.

22. A.G. Que. and Keable v. Attorney General of Canada et al. (1979), 90 D.L.R.(3d) 161, at 193.
23. Dilorio v. Warden, Jail of Montreal (1978), 73 D.L.R. (3D) 491 at 388 (S.C.C.).
24. The constitutionality of the Force has been upheld by the Supreme Court of Canada in A.G. Que. and Keable, *supra* note 8 and Attorney General of Alberta et al. v. Putnam (1981), 62 C.C.C. (2d) 51.

The contemporary Royal Canadian Mounted Police Force represents the amalgamation of two fundamentally distinct law enforcement models statutorily implemented by Parliament in the period immediately following Confederation. First, in 1873, Parliament founded the North West Mounted Police. This force was paramilitary with respect to personnel, structure and orientation. Subject to the direct supervision of Sir John A. MacDonald, the Force was primarily responsible for the policing of the northwestern territories purchased from the Hudson's Bay Company in 1869. Until the end of the First World War, the jurisdiction of the North West Mounted Police (renamed the Royal North West Mounted Police in 1904) was limited to Saskatchewan, Alberta and the Territories; the other western provinces were served by provincially established forces. It should also be noted that members of the Royal North West Mounted Police served overseas during the Boer War, at the Western front in 1918 and in Siberia in 1919. While the peace officer status of members of the Royal North West Mounted Police was initially regarded as incidental to its paramilitary role, absorption with the Dominion Police (a civilian security force responsible for guarding federal buildings in the national capital) on February 1, 1920, and reconstitution as the Royal Canadian Mounted Police shifted the focus of the force to traditional law enforcement activities.

The subsequent history of the force after its amalgamation with the Dominion Police has been described by the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted

Police in the following terms: "The Force established small complements in the other provinces although it was far from clear to what extent it would enforce federal laws that by and large had until then been enforced by provincial and municipal authorities. During the period from 1920 to 1950, with the exception of Ontario and Quebec, provinces abandoned their own provincial forces and began the practice, continued today, of contracting with the R.C.M.P. to carry out police duties. After August 15, 1950 when it absorbed the British Columbia Provincial Police, the Force was established as we know it today: an agency of the federal government with a strong presence in the 'contract provinces', the Territories and even in the two provinces, Ontario and Quebec, where it does not have any contractual duties." (Second Report, Vol. 1, at 50).

25. The material contained in this section is derived primarily from P. Stenning, *The Legal Status of the Police*, Study Paper, Law Reform Commission of Canada, 1981.

26. This comment may well be applicable to all policing systems. According to W. L. Lee, *A History of the Police in England*, 1971, "[the] English police...is not the creation of any theorist nor the product of any speculative school; it is the child of centuries of conflict and experiment." (at xxxi).

27. Stenning, *supra* note 22, at 7.

28. Although a writ of 1252 has been identified as the "first of the published documents in which the constable makes his appearance", available historical evidence suggests that the office itself was established prior to the Norman conquest. According to H. B. Simpson, "The Office of Constable" (1895) 10 *English Historical Review* 625: "...it appears equally probable that the duty of seeing that the liability attaching from a previous period to the individual township was properly discharged, would in natural course fall on its head man, whether he was styled reeve, tithing man, or head-borough. Constabularius would thus be his designation when his responsibility towards the central government was mainly regarded; this would be the title most familiar to the crown officials, and would be appropriate enough when he was looked on as the commander for police and military purposes of the inhabitants of the township." (at 631).

29. According to Stenning, *supra* note 22, the constable represents an adaptation of the earlier offices of 'tythingman' or 'borehead' who was in effect the local representative of the community at the annual 'leets' or 'courts' convened by the royal representative -- the sheriff. The role of the tythingman in law enforcement has been described by Stenning in the following terms:

"The law...gave to the tythingman or borsholder certain special authority over and above his general obligations as a member of the tythings. The granting of these special responsibilities led Tudor authors to claim that the tythingman's or borsholder's successor, the constable, was a 'conservator of the peace by the common law'. Chief among these responsibilities was that of organizing the 'hue and cry' in the event that a wrongdoer...evaded or escaped from custody. The 'hue and cry' required everyone to join in the pursuit of the wrongdoer until he was captured and placed in the custody of the tythingman, who would generally place him in the local stocks until he could be brought before a 'court' for bail. In order to assist him and his tything to maintain the peace, the tythingman was accorded special authority to intervene to prevent or terminate breaches of the peace. The penalties and fines payable by wrongdoer...varied not only according to the gravity of the offence itself, but also according to the status of the victim...Assaulting or killing a tythingman while he was in the execution of his duty to maintain the peace brought additional liability

to the wrongdoer. By the same token, the tythingman was protected from liability for injury or from killing a wrongdoer who resisted his authority in maintaining the peace.

In addition to these powers and protections, the tythingman was permitted to demand surety from those whom he found breaching the peace, to ensure that they would not do so in the future, and was entitled to confine such persons in the stocks until the surety was forthcoming. In the event that the person in custody had committed an offence which a 'trial' was necessary, the tythingman was responsible, along with the fellow members of his tything for bringing the person to justice...

The tythingman...also had authority...to act against suspected wrongdoers on the basis of reports from other credible persons, even though he himself had not witnessed the wrongdoing. Furthermore, he could take bail from a suspected wrongdoer....". (at 16 - 17).

30. According to William Lambard, *The Duties of Constables, Borsholders, Tithingmen and such other Low Ministers of the Peace*, [1583, reissued Theatrum Orbis Terrarum Ltd. and Da Capo Press, 1969], the duty imposed upon constables to conserve the peace consisted of three distinct functions:

"The conservation (or maintenaunce) of peace, standeth in three things, that is to say, first in foreseeing that nothing be done that tendeth, either directly, or by meanes, to the breach of the peace: secondly, in quieting or pacifying those that are occupied in the breach of the peace: & thirdly, in punishing such as have alreadie broken the peace. And here, least any man shoulde be deceived in not understanding what is ment by these words, 'The breach of the Peace', he must first of al know, that by the breache of the peace, is understoode, not only that fighting which we commonly cal the breach of the peace, but also that every murder, rape, manslaughter, & felony whatsoever, and every affraying (or putting in feare) of the Queenes people, whether it be by unlawful wearing of armour, or by assembling of people to do any unlawful act, are taken to be disturbances or breaches of the Peace".

31. Blackstone explains the system of 'watch and ward' in the following terms:

"Wardgard, or custodiea, is chiefly applied to the daytime, in order to apprehend rioters, and robbers on the highways; the manner of doing which is left to the discretion of the justices of the peace and the constable: the hundred being however answerable for all robberies committed therein by daylight, for having kept negligent guard. Watch is properly applicable to the night only; and it begins at the time when ward ends, and ends when that begins." [Sir Wm. Blackstone, *Commentaries on the Laws of England* (4th ed., 1978) at 6].

The theoretical importance of the system of 'watch and ward' to contemporary policing is developed by T. A. Critchley, *A History of Police in England and Wales*, (London: 1978):

"...the system of watch and ward is of particular interest in that it introduced the idea of town watchmen as a means of supplementing the traditional duties of the constable, and marks the emergence of a

distinction between town and rural policing. A watch of up to sixteen men, depending on the size of the town, was to be stationed at every gate of a walled town between sunset and sunrise, and the watchmen were given power to arrest strangers during the hours of darkness. All the men of the town were placed by the constable on a roster for regular service and refusal to obey a summons to serve resulted in committal to the stock. Arrested persons were handed over to the constable in the morning, and they too would be placed in the stocks...The ancient Saxon practice of hue and cry was now revived as a means of dealing with strangers who resisted arrest by the watchman...In effect this meant that a fugitive was to be pursued by the whole population. Work had to be laid aside, and anyone who failed to respond to the call was regarded as siding with the fugitive, and was himself hunted down." (at 6).

32. The title 'justice of the peace' denotes a royal official mandated to "hear and determine all manner of felonies or trespasses" committed within the county for which he was appointed.

33. Thus, for example, the justices of the peace were authorized to require sureties to keep the peace, to issue warrants of arrest to the constable in respect of individuals suspected of night-hunting, to supervise enforcement of vagrancy laws and to collect levies in relation to the hue and cry.

34. The process has been described by F. D. Price, *The Wigginton Constables' Book 1691 - 1836*, (Phillimore & Co., 1971), at x - xi in the following terms: "During the Middle Ages, as the institutions and instruments of royal government were evolved, this 'head man' came also to be seen as the representative of the village community to whom orders could be transmitted and upon whom local responsibility for their enforcement could be imposed by higher authorities: the government of the realm operating through the justices of assize and, later, the justices of the peace. The history of the constable is thus one of the gradual adapting of an essentially local officer, created to meet the needs of an autonomous village community...". (emphasis added).

35. By statute of 1662 (13 & 14 C. II, c.12) it was provided:

"If a constable shall die, or go out of the parish, any two justices may make and swear a new one, until the lord shall hold a leet, or till the next quarter session, who shall approve of the officer so made and sworn, or appoint another: and if any officer shall continue above a year in his office, the justices in their quarter sessions may discharge him, and put in another till the lord shall hold a court as aforesaid".

36. Such at least is the view of Simpson, supra note 25 at 639, who has stated:

"Perhaps the administration of the oath to constables by justices of the peace may be fairly considered as the characteristic mark of the final subordination of local to central government in rural districts, of the conversion of a local administrative officer into a ministerial officer of the crown; for, though the justices of the peace are local officers, they are independent of any of the more ancient administrative divisions of the country, such as the township or the hundred, and they derive their authority from the crown alone; so that

when, for the due execution of the constables' duties, it became necessary for them to receive the oath from the justices, it may be said that the local origin of their office had passed out of sight."

37. Lambard, supra note 27, at 5 - 6.

38. The inherent powers of the constable included: the power to arrest for a variety of enumerated offenses, to hold suspects in custody under certain circumstances, to compel the appearance of suspects before the justices, the power to commit certain individuals to jail, the power to trespass to effect arrests and the global power to put down insurrections and prevent breaches of the peace. A full inventory of the original powers of the constable is provided by Lambard, supra note 27.

39. Sir Matthew Hale, *History of the Pleas of the Crown*, (London: 1778) Vol. 11 at 62. As elaborated by Sir Francis Bacon:

"The authority of the constable, -- as it is substantive and of itself, or substituted and astricted to the warrants and commands of the justices of the peace, -- so again it is original, or additional: for either it was given them by the common law, or else annexed by divers statutes. And as for subordinate power, wherein the constable is only to execute the commands of the justices of the peace, and likewise the additional power which is given by divers statutes, it is hard to comprehend them in any brevity; for that they do correspond to the office and authority of justices of peace, which is very large, and are created by the branches of several statutes; but for the original and substantive power of constables, it may be reduced to three heads; namely,

1. For matter of peace only.
2. Of peace and the Crown.
3. For matter of nuisance, disturbance, and disorder, although they be not accompanied with violence and breach of the peace."

40. See Simpson, supra note 25, who has observed:

"After the constable had come to be regarded merely as a police officer attendant on the justices and other ministers of the crown, his position caused a good deal of difficulty to legal theorists. He possessed an undoubted though somewhat vague authority, but it was not derived from the sovereign; he was by common law a conservator of the peace, but he was no longer vested with any of those magisterial functions which justices, coroners, and other conservators exercised by virtue of their office; his person was surrounded with a good deal of traditional sanctity, but when the law was more closely examined it was found that his actual powers for the preservation of the peace differed very slightly from those of the lieges who were not imbued with the dignity of office...The legal anomaly of the constable's position is, however, explained if we regard him not merely as an officer appointed for the preservation of the king's peace nor as the mere officer of the parish, but as the direct representative of the...townships." (at 635 - 636, emphasis added).

41. Simpson, supra note 25, at 636.
42. For a general overview of the history of Canadian policing, please see W. Kelly & N. Kelly, *Policing in Canada*, (Toronto: Macmillan of Canada, 1976).
43. According to Stenning, supra note 22, it was not until 1825 that any rules governing the supervision of such constables were enacted. In that year, the colonial Governor, by letter, directed the Chief Magistrate to reimburse constables from money raised from tavern license fees and further stipulated that "the High Constable, under the authority of the Chief Magistrate, was to have the general superintendence of Constables." In 1833, in An Act to Regulate and Improve the Police of the Town of St. John's and to Establish a Nightly Watch in the Said Town", the House of Assembly required that "forty-eight persons were to be nominated by certain Justices of the Peace every six months, so long as the Act continued in force, from among the licensed Publicans of St. John's, to serve as Constables, and that the said Constables so nominated and appointed 'shall be bound to serve as such for the space of six months without fee or reward". It should of course be noted that the earliest system of security and policing was established in Quebec City in 1651. However, the structure of the force was modelled upon that of France and the policing duties of its members appear to have been extremely limited; they were directed to "watch for fires and [to] encourage the citizens to sleep in peace and entrust their safety to them". Stenning, supra note 22, at 35.
44. Stenning, supra note 22, at 38.
45. S.N.S. 1765, 5 Geo. III, c. 1.
46. Subsequently in 1765, the appointment process was stipulated by the Town Officers Act (S.N.S. 1765, 5 Geo. III, c.1) which provided for the nomination of constables by the Grand Jury and for formal appointment by the justices of the peace.
47. S.N.B. 1786, 26 Geo. III, c. 28.
48. An Act relating to the Appointment of Constables and Fence Viewers for Queen's County, (S.P.E.I. 1853, 16 Vict., c. 11).
49. Stenning, supra note 22, at 39.
50. The Ordinance provided:

"Whereas it is thought very expedient and necessary, for the speedy and due Execution of the Laws, and for the Ease and Safety of His Majesty's Subjects, That a sufficient Number of inferior Officers should be appointed in every Parish throughout this Province; It is therefore Ordered, by the Authority aforesaid, That the Majority of the Householders, in each and every Parish, do, on the Twenty-fourth Day of June, in every Year, elect and return to the Deputy Secretary, within fourteen Days after such Election, six good and sufficient Men to serve as Bailiffs and Sub-Bailiffs in each Parish, out of which Number the King's Governor, or Commander in Chief for the Time being, with the Consent of the Council, is to nominate and appoint the Persons who are to act as Bailiffs and Sub-Bailiffs in each Parish."

51. According to the Ordinance, the bailiffs and sub-bailiffs were directed to maintain public roads and "to arrest and apprehend all Criminals, against whom they shall have Writs or Warrants, and to guard and conduct them through their respective Parishes, and convey them to such Prisons or Places as the Writ or Warrant shall direct."

52. The 1777 Ordinance clearly reflects dissatisfaction with the bailiff system:

"as great Inconveniences might arise from the want of Peace Officers in different parts of the Province, the said Captains of Militia shall be and hereby are empowered to arrest any Person guilty of any Breach of the Peace, or any Criminal Offence, within their respective Parishes, and to convey or cause to be conveyed, such Person before the nearest Commissioner of the Peace to be dealt with according to Law."

53. The Ordinance of 1787 required Commissioners of the Peace to "appoint such and so many Persons as they may think sufficient, within the Towns and Banlieus of Quebec and Montreal, for carrying into Execution the orders and Decrees of the several Courts, and to preserve the Public Peace therein".

54. The effect of this Ordinance was to extend the power of appointment of constables possessed by justices of the peace in Montreal and Quebec City to the rest of the colony.

55. Articles 32 to 34 of the Laws of Assiniboia stated:

"XXXII. Efficient householders, not exceeding twelve in number, to remain in office for a term of three years from the 1st of September following the date of their appointment, shall be appointed constables on the last Thursday in each year by the magistrates, specially assembled for the purpose; and every constable so appointed must take the following oath:

"I swear by God, as I shall answer to God at the great day of Judgment, that I shall, till lawfully discharged from my office of constable, for the district of Assiniboia, be always ready at all hazards to serve and execute all legal writs, and to maintain public peace and security; and that I shall, to the utmost of my ability, obey all laws and all lawful authorities within and for the said district, and induce all others to obey the same, and that I shall do my best to become acquainted with all local regulations."

XXXIII. For any neglect of duty, any constable may be suspended by any magistrate or petty court, or may be dismissed by the General court.

XXXIV. Each constable shall receive twelve pounds a year, to be paid half-yearly -- except dismissed for neglect of duty, or pronounced after the close of his half year to have been deservedly suspended, he shall receive only three shillings and sixpence for every day of actual service."

56. See T. W. Acheson, *Saint John: The Making of A Colonial Urban Community*, (Toronto: 1985), Chapter 11.

57. For example, the control and management of the police force of the City of Charlottetown was not removed from the magistrate and vested in local council until 1941 in the Charlottetown Incorporation Amendment Act.

58. See, for example, the Toronto City Charter, S. U. C. 1834, 4 Wm. IV, c. 23 which authorized the common council (composed of elected aldermen and the mayor) to "regulate the police of the said City". Encompassed within the concept of 'regulation' were the powers of appointment and remuneration, according to section 57 of the Charter which stated: "the Common Council of the said City shall, from time to time, employ so many constables for the said City as to them may seem necessary and proper, and pay them such sum per annum for their services as to the said Common Council shall appear just."

The common council also was vested with powers of direct control over the content of police functions, by virtue of section 65 of the Charter: "the High Bailiff and City Constables shall be bound to obey the orders of the Mayor and Aldermen, or any or either of them, in enforcing the laws of this Province and the ordinances of the said City." Such powers of control could be exercised in relation to both general and specific cases: "the Mayor and Aldermen, or any one or more of them, shall have full power and authority to take up, arrest or order to be taken up or arrested, all and any rogues, vagabonds, drunkards and disorderly persons, and as the said Mayor or Aldermen, or any two of the, shall see cause, to order all or any such rogues, vagabonds, drunkards and disorderly persons to be committed to any workhouse that may hereafter be erected, or else to any House of Corrections, there to receive such punishment, not exceeding one month's imprisonment, or the common stocks, as the said Mayor and Aldermen, or any two of them, shall think fit."

59. In this respect, the experience of Saint John is typical of both the structural defects in nineteenth century Canadian policing arrangements and of the solutions that were ultimately developed to rationalize and stabilize law enforcement. As described by T. W. Acheson, *Saint John: The Making of a Colonial Urban Community*, supra note 53, at 214 - 215:

"The maintenance of order in early nineteenth century Saint John was essentially a function of the ward. Every year at the April elections, the freemen and freeholders of the ward met to elect their magistrate and their constable. Responsibility for keeping the peace rested with the alderman who was given considerable discretionary authority to intervene either personally or through a warrant issued to his constable. This highly personal method of law enforcement based upon the concept of the extended neighbourhood remained the centre of the criminal justice system for more than half a century after the city's founding. The relationship between the alderman and his constable tended to be symbiotic. The former normally chose the latter to be part of his ticket in the annual contests and since the constable could act only on the direction of a magistrate, his economic welfare rested in large measure on the alderman's willingness to use him".

60. According to Acheson: "Essentially, he was an officer of the court acting only after the commission of a felony or a misdemeanour in response to a court order." Supra note 53, at 215.

61. See the description by Acheson, supra note 53, at 217 - 22.

62. See, for example, A. K. McDougall, Law and Politics: The Case of Police Independence in Ontario, (unpublished paper presented to the 43rd Annual Meeting of the Canadian Political Science Association) who has observed: "...by the 1830's, cities and towns were authorized to appoint full-time police forces if they wished. Members of those forces were still appointed annually and their selection was based on patronage. The political character of appointees proved nothing short of disastrous when riots and religious rivalry shattered the peace of the community, since the faction in control of the municipal government was not above using the police as a partisan force." (quoted by Stenning, supra note 22, at 52).

63. For example, in 1840, the Grand Jury presented the police force as a public nuisance and attacked the magistracy, stating "two of our elected magistrates either embezzled or otherwise improperly withheld" the fines accruing from the courts. The petition prepared by the Grand Jury to the Legislature recommended an appointed judiciary on the following basis: "Such a magistracy being unbound by a dependence on the popular voice for their appointment...would be enabled much better and more effectively to preserve the peace of this community...than can ever be expected of Magistrates who rely upon an annual vote of the very people they are to rule over, but to whose will and pleasure they must be submissive in order to ensure their election to office." Acheson, supra note 53, at 129.

64. The institution of the Stipendiary Magistrate was adopted by both Portland, NB and Halifax as a solution to the problems of law enforcement presented by the early constabulary system. The concept of a Police or Stipendiary Magistrate, appointed by the central executive, received explicit recognition in the 'Baldwin Act' of 1849 which established elected local government in all municipalities in the province of Upper Canada. Section 74 of the Act provided that

"there shall be in and for each of the Towns which shall be or remain incorporated as such under the authority of this Act, one Chief Constable, and one or more Constables for each Ward of such Town who shall respectively hold their offices during the pleasure of the Town Council."

The Act also required the establishment in each town of a 'police office' and provided for the appointment of a 'police magistrate' whose functions were defined in section 69 of the Act:

"it shall be the duty of the Police Magistrate for such Town, or in his absence from sickness or other causes, or when there shall be no Police Magistrate for such Town, then it shall be the duty of the Mayor thereof to attend daily, or at such times and for such period as shall be necessary for the disposal of the business to be brought before him as a Justice of the Peace for such Town".

The police magistrate was vested with the power to suspend any Chief Constable from his duties "for any period in his discretion" and to appoint "some fit and proper person" to act as Chief Constable or Constable during the period of such suspension. In the event of exercise of such power, the suspension was to be reported to common council which could either dismiss or reinstate the officer.

65. A solution which was adopted in Saint John, NB. The power to appoint the city's police chief was not transferred to the city council until 1913.

66. S. C. 1858, 22 Vict., c.99.

67. According to s. 374 of the Act,

"In every City there is hereby constituted a Board of Commissioners of Police, and such Board shall consist of the Mayor, Recorder and Police Magistrate, and if there is no Recorder or Police Magistrate, or if the offices of Recorder and Police Magistrate are filled by the same person, the Council of the City shall appoint a person resident therein to be a member of the Board, or two persons so resident to be members thereof, as the case may require."

68. In this latter capacity, local constables were directed by section 379 of the statute to:

"obey all lawful directions, and be subject to the government of the Board, and shall be charged with the special duties of preserving the peace, preventing robberies and other felonies and misdemeanours, and apprehending offenders, and shall have generally all the powers and privileges, and be liable to all the duties and responsibilities which belong by law to Constables duly appointed."

69. According to one contemporary observer, the introduction of the Police Board and the subjection of the police force to its control, promoted both police independence and public trust in the integrity of law enforcement: "The newly organized body has now the perfect confidence of the public, and for that, among many other reasons they are, if not so useful as partizans, at any rate a far more valuable body of peace officers." A. Wilson, *The Constable's Guide: A Sketch of the Office of Constable* (Toronto: 1859) at 84. This enforced institutional separation of the constable from local government may also be regarded as an original, if partial, impetus toward a full recognition of police independence.

The desire to minimize the impact of politicization inherent in a structure of undiluted control by local council is not a phenomenon unique to Canada. Similar concerns underlie the report of the Wickersham Commission (US, 1931):

"The chief evil lies in the insecure short term of the service of the chief or executive head of the police force and in his being subject while in office to the control of politicians in the discharge of his duties...Limiting the powers of the police executive by placing absolute control of the police under the mayor, commissioner, or city manager, has opened the door for every conceivable type of incompetence, political corruption and organizational demoralization. The theory that the mayor, representing the people, will exercise wisdom in conducting the business of the city, and being directly responsible to the electors, will do his utmost to protect lives and property of inhabitants and preserve the peace, has been badly shattered, judged by the caliber of police service which is to be found in the majority of the communities in this country." (quoted by L. Ruchelman (ed.), *Who Rules the Police*, 1973: New York University Press, at 3).

70. See P. Stenning, *Police Commissions and Boards in Canada*, (University of Toronto: 1981) at I.11 - 12:

"In the first place, it [the board of police commissioners] represents a compromise between provincial and municipal control of municipal policing and police

policy, since a majority of the members of the Board could be, and in most cases probably were, provincially appointed. In this context, it is important to bear in mind that since Confederation, municipalities have never had any constitutionally defined sphere of jurisdiction...This means that the extent of municipal control over municipal policing is legally and constitutionally, if not politically, entirely at the discretion of the Provincial legislature....

The second aspect of the concept of the police boards envisaged by Ontario's early legislation, is the compromise it represents between judicial and political control of municipal policing and police policy. Clearly, this is an issue which raised quite different questions about the nature of policing and of the police function than those raised by the Municipal-Provincial compromise just discussed...[this] may reflect the political difficulty of withdrawing from municipalities an authority once conferred on them, or it may reflect a belief that neither complete judicial control nor complete political control of municipal policing is an ideal or satisfactory solution."

71. S. C. 1868, 31 Vict., c. 73.
72. According to D. P. Forcese, *Policing Canadian Society*, (1992: Prentice Hall Canada Inc.) at 16.
73. In addition, the federal legislation may also exemplify a philosophical attitude closely associated with the development of the 'new police' in both England and Canada. According to A. K. McDougall, the formation of the London Metropolitan Police in 1829 initiated a climate of reform in England, ending in 1856: "These reforms were part of a sweeping reform movement covering the whole range of social control legislation from public health to the poor laws and penalties under the criminal law." McDougall concludes that such reforms relied upon the belief that the power of the state was ultimate and could be exercised over the individual only through duly enacted legislation. ("The Police Mandate: An Historical Perspective", (1988) 12 Canadian Police College Journal 10, at 12).
74. The federal scheme was apparently heavily influenced by earlier police reforms in Great Britain and in particular by The Dublin Police Act of 1786 and The London Metropolitan Police Act of 1829.
75. This was accomplished by section 6 of the Police of Canada Act which stipulated:
- "Every Commissioner of Police and every Police Constable appointed under this Act shall be subject to such regulations in respect to order, management, and disposition of the Police, and shall receive such rates of pay or allowance as may from time to time be prescribed by the Governor in Council..."
76. Thus, for example, in 1871, Newfoundland established the Royal Newfoundland Constabulary, modelled upon the Royal Irish Constabulary. Subsequently, in 1906, the province of Saskatchewan passed legislation modelled upon the Police of Canada Act providing for the creation of a provincial force to be followed by Alberta which in 1917 established the Alberta Provincial Police.
77. Please see The Constables Act, S. M. 1870, 34 Vict., c. 11.
78. Please see the Quebec Police Act, S. Q. 1870, 33 Vict., c. 24.
79. Thus, for example, the Quebec Act provided that police officers appointed to the provincial force were to enjoy "all the powers, authority, protection and privileges, which any constable now has or shall hereafter by law have..."

80. Thus, section 2 of the Manitoba legislation provided:

"The Lieutenant Governor in Council may from time to time, as may be found necessary in the administration of justice and in the preservation of the peace and good order of society, appoint a Chief of Police and such subordinate Officers as it shall seem to him expedient, who shall hold office during pleasure; and he may remove, supersede or dispense with them or any of them, and re-appoint others in their or his stead, at pleasure."

Similarly, pursuant to the provisions of the Quebec legislation, the Lieutenant Governor in council was authorized to appoint "a commissioner of police and one or several superintendents of police" and the commissioner, in turn, was empowered to appoint sergeants and constables (who were classified as either first or second class). Section 4 of the Act further provided:

"The officers of the force shall take rank and have command in the following order, that is to say: the commissioner, the superintendents, the sergeants, the constables. Officers of the same grade, employed together upon the same service, shall have command according to seniority, and constables of the first class shall, in the absence of officers, command those of the second class..."

81. Hierarchical practice was made explicit in An Act for the Better Preservation of the Peace, and the Prevention of Riots and Violent Outrages at and near Public Works, while in Progress of Construction, (S. C. 1845, 8 Vict., c. 6) which in section 13 provided:

"It shall be lawful for the Governor in Council to cause a body of men not exceeding in number one hundred inclusive of officers, and to be called the Mounted Police Force, to be raised, mounted, armed and equipped, and to be placed under the command and orders of such Chief Officer and Subordinate Officers as the Governor in Council may deem necessary, and to cause such Police Force or any portion thereof, to be employed in any place in this Province in which this Act shall be then in force, under and subject to such Orders, Rules and Regulations as the Governor in Council shall from time to time make or issue." (emphasis added).

82. The notion of an established police force characterized by an internal hierarchical structure is unique to contemporary policing organizations and finds no counterpart in the original constabulary system. A distinction between 'high' and 'petty' constables had been recognized in the Middle Ages, as is evident from the following passage from Lambard, supra note 27, at 10:

"petie Constables were devised in townes and parishes, for the aide of the Constables of the Hundreds: so of latter times also, Borsholders, Tythingmen, Headboroos and suche like, have bene used as petie Constables, within their owne boroos and tythings. And yet not so universally, but that some of them have at this daye none other but their old office. For in some of the Westerne parts of England, you shall see that where there be many Tythingmen in one parish, there only one of them is for the Queene that is, a Constable, and the rest do serve but as the auncient Tythingmen did."

As Stenning observes, supra note 22, at 21:

"The relationship between the high constable of the hundred and the 'petty constable' of the town or village requires some further elaboration. It must be stressed, first, that this relationship was not in any real sense comparable to the modern relationship between a Chief Constable (or Chief of Police) and the constables of his force. The high constable of the Middle Ages did not choose or appoint the petty constables; they continued to be chosen in the local leet. Nor did he have any direct command over them. Indeed it would seem that for the most part, his powers were not significantly greater than theirs, and he shared a similar status. The whole notion, in fact, of constables being part of a hierarchical organization under the command of a Chief Constable is one that was virtually unheard of prior to the establishment of the 'new police' in the nineteenth century...Constables, whether they were high constables or petty constables, were more or less autonomous officers vis-a-vis one another. In 1583 Lambard...wrote that 'none of them hath more power of office therein than the other, although some of them have larger limits of place than the rest'".

This view persisted until the end of the eighteenth century, according to R. Burns, *The Justice of the Peace and Parish Officer* (London: 1793) who observed: "The original and proper authority of an high constable, as such, seems to be the very same and no other, within his hundred, as that of the petty constable within his vill; and therein, most probably, he is coeval with the petty constable." (at 397).

83. Provincial initiatives in this context will be briefly summarized:

a) Newfoundland: The Newfoundland Constabulary, incorporating the features of the Quebec and Manitoba models, was established in 1872.

b) British Columbia: While the British Columbia Police Force was created in 1871, it was not until the enactment of the Police Constables Act (43 Vict., c.22) in 1880 that explicit statutory confirmation was given to the power of the provincial cabinet to appoint provincial constables who were directed to "faithfully and impartially perform the duties appertaining to the said office". Since no statutory description of such duties appeared in the legislation, it must be assumed that the provincial Constables discharged the traditional common law role. By subsequent enactment (The Provincial Police Act, 1895, 58 Vict., c. 45), the Lieutenant Governor in Council was vested with the power to "direct and authorize the Superintendent of Police to appoint any fit and proper persons as police constables" who were to "obey all lawful directions and be subject to the government of such Superintendent of Police, and charged with all the powers, rights and responsibilities which belong by law to constables."

c) Alberta and Saskatchewan: Prior to creation as separate provinces, the region was policed by the North West Mounted Police, a force modelled on the Royal Irish Constabulary, which had been created pursuant to the Administration of Justice, North West Territories Act, S. C. 1873, 36 Vict., c. 35. The Act authorized the federal cabinet to appoint a Commissioner of Police who, as ex officio justice of the peace, was permitted to appoint constables and sub-constables having "all the powers, authority, protection and privileges which any constable now has or shall hereafter by law have" and subject to the direction and control of the Commissioner who was subject to the direction and control of cabinet. The peace-keeping role of the North West Mounted Police was supplemented by territorial constables, appointed by justices of the peace subject to the Appointment of Constables Ordinance, (O.N.W.T., 1878, No. 7) who also were vested with the status and duties of the common law

constable.

The two provinces continued to be policed by the Royal North West Mounted Police until 1917 at which time both formally established provincial police forces according to the Manitoba model.

d) Ontario: In response to deficiencies in the regional constabulary system (in which rural constables were appointed by local justices of the peace), Ontario passed a variety of enactments with respect to the appointment of county and provincial constables which anticipated the ultimate creation of a provincial police force by Order in Council in 1909. Ratified by the Constables Act, 1910, (S. O. C. 39), the Ontario Provincial Police Force was composed of constables under the command of a superintendent who had control of the force as well as powers of inspection, inquiry and discipline.

e) The Maritimes: Provincial forces were established in the Maritimes in the 1920's. Although the New Brunswick Appointment of Provincial Constables Act, 1898 had provided for the appointment of provincial constables, such were not organized into a provincial police force until 1927 by the Provincial Police Force Act (S.N.B. c. 9). Similarly while Nova Scotia had enacted two pieces of legislation -- the Provincial Constables Act, 1899 (62 Vict., c. 10) which provided for the appointment of a maximum of three provincial constables and the Organization of Provincial Police Act (S.N.S. 1910, c. 10) which permitted such constables to be organized as a provincial police force, such a force was not established until 1928. The provincial police force of Prince Edward Island was established in 1930.

84. In more recent years, isolated and sporadic efforts have been made to re-establish provincial police forces. Thus, for example, between 1978 and 1987, certain policing functions were assigned to the New Brunswick Highway Patrol, a police force enjoying province-wide territorial jurisdiction in relation to the enforcement of both the Criminal Code and provincial laws on all provincial highways. It is also noteworthy that the Manitoba legislature has also enacted The Provincial Police Act (R.S.M. 1987, c. P-150) providing for the creation of Manitoba Provincial Police Force "for the preservation of peace and good order and the enforcement of the law in Manitoba". It must be emphasized, however, that such initiatives are relatively exceptional.

85. See D. P. Forcese, Policing Canadian Society, *supra* note 69, who observes: "Through the nineteenth and early twentieth century Canada gradually developed major urban centres. By mid-century, Canada was overwhelmingly an urban nation, with most residents living in towns and cities. Municipal police forces therefore came to be of paramount importance as the frontier and rural population decreased. The municipal police forces, although subject to provincial legislation, tended to be more community-sensitive. They were local. But in Canada's history, right down to the present, there has been a marked government attempt to transpose local town or urban interests, to weaken local influences, and make police forces more subject to direct government command. Such police forces are more directly the instruments of the state or the provincial or national governments." (at 18).

It has been suggested that the comparatively weakened local interest, reflected in provincial and federal intervention into policing, is attributable to two factors: First, it is undeniable that the police in Canada are not only organized upon a quasi-military model, but have in fact, traditionally been assigned functions which are, in other jurisdictions, performed by the armed forces. In this regard, Forcese notes "The potential now [i.e. in the post-Confederation period] existed for the new police employees to be used by governments for tasks other than those related directly to crime control and relatively minor matters of public order. The potential now also existed of divorcing the police from their communities. In some part the state control of policing was prompted by the demands of the frontier. The new Canadian government was seeking to extend sovereignty over vast underpopulated territories. The frontier played a significant role in the development of modern Canadian policing. Where the Americans resorted to the Army and assorted adventurers and gunmen for major frontier

ventures, the new Canadian government merged the policing concept with the military influence already apparent in European antecedents. Eventually, as provincial forces were founded, especially in Ontario, the military organizational and command model was dominant."

86. In New Brunswick, policing is the only service which a municipality is explicitly required to provide by law. According to section 7(1) of the Municipalities Act, "A municipality may provide any of the services contained in the First Schedule" which are subsequently defined to include drainage, fire protection, refuse collection, traffic regulation, community services, water and sewage, streets, roads, sidewalks and housing. In contrast, the obligation to establish a police force is made mandatory by both section 7(2) of the Municipalities Act and section 3(1) of the Police Act.

87. In New Brunswick, provincial funding for local policing services is provided in the form of an unconditional grant to each municipality. The unconditional grant system is intended to achieve two objectives: to provide a stable foundation for municipal finances in recognition of the role played by municipalities in the provision of local property services; to effect a certain degree of equalization among otherwise disparate localities by providing a mechanism whereby reasonably comparable levels of services can be provided by municipalities enjoying similar tax bases. In contrast, in other jurisdictions such as Ontario, provincial participation in the provision of local services by municipalities is generated largely by conditional grants. Such grants are viewed as a superior method of ensuring that local services conform to both municipally determined priorities and provincial standards.

88. Ontario (the Ontario Provincial Police), Quebec (the Sûreté du Québec) and to a lesser degree, Newfoundland (the Royal Newfoundland Constabulary). New Brunswick has experimented on two occasions with the assumption of law enforcement duties by a provincial police force. In 1927, the New Brunswick Provincial Police Force was established with responsibility for the enforcement of temperance legislation and law enforcement in rural areas of the province. The force was disbanded in 1932 and replaced by the RCMP pursuant to an intergovernmental contractual arrangement. In 1981, amendments to the provincial Police Act granted legal status to the New Brunswick Highway Patrol, a force originally established in 1978 as an enforcement arm of the Provincial Secretary's Department. As a result of the amendments, the Highway Patrol functioned as a 'police force' with province-wide jurisdiction whose principal responsibility was to enforce both relevant provincial legislation and those sections of the Criminal Code concerning motor vehicle offences. The force was disbanded in February, 1989, and traffic law enforcement duties assumed by the RCMP.

89. The history of RCMP involvement in the delivery of municipal policing services is set out in the Policing Study: RCMP Component, (Department of the Solicitor General New Brunswick, 1991) and in P. Stenning, Legal Status of the Police, supra note 22.

90. S.N.B. 1991, c. P-9.2.

91. The establishment of police boards was made mandatory for cities and optional for smaller municipalities. Boards were to be composed of the mayor (or delegate), one local resident appointed by the Minister of Justice and three local ratepayers appointed by municipal council. While the board was to have general control over the municipal force, budgetary approval remained with the common council.

92. Apparently, the opposition was based upon the withdrawal of control from local council. According to commentary, "it would seem that all municipalities would rather deal directly with the problem of policing, either through the council or through a municipal manager. While it seems that police chiefs in some localities have experienced difficulty under this setup, it may be difficult to document any strong case against leaving that situation pretty much as it is." (Stenning, supra note 69, at l. 54 - 55).

93. Section 2(2) also deems each police officer and member of the R.C.M.P. to be "ex officio an inspector under the Motor Carrier Act, a peace officer under the Motor Vehicle Act, a game warden under the Fish and Wildlife Act, and an industrial fire warden under the Forest Fires Act" and further provides that "each member of and above the rank of corporal may exercise the powers conferred by section 9 of the Fire Prevention Act". Since the exercise of such powers is not germane to the purpose of this study, the impact of such statutory designations upon the legal status of the police will not be considered.

94. The control exerted by the Chief of Police is explicitly conferred by section 11(3) of the Police Act which provides:

"11(3) The chief of police is the chief executive officer of the police force and shall have all necessary powers to manage and direct the police force to fulfil the responsibility of the municipality to provide and maintain adequate police services in the municipality in accordance with this Act and the regulations."

95. Police Act, s. 4(a). It should be noted that under the terms of the present agreement between Canada and New Brunswick for the provision of R.C.M.P. services in the province, this alternative is presently only available to municipalities with populations of less than 2500. The agreement expires March 30, 1992.

96. Police Act, section 4(b).

97. Police Act, section 4(c).

98. Police Act, section 17.1(1). The means by which municipalities have elected to discharge their statutory obligations illustrate a high degree of operational diversity consistent with the relatively broad range of statutory options. According to the Policing Study: Municipal Policing Component (Department of the Solicitor General New Brunswick, 1991),

- 1) twelve municipalities have direct contract with the federal government for policing by the R.C.M.P.;
- 2) sixty-eight municipalities, each with a population of 2500 or less, employ the R.C.M.P. as the municipal force pursuant to the terms of the 'umbrella clause' of the general policing agreement between the governments of Canada and New Brunswick;
- 3) three municipalities have entered into an agreement with a neighbouring municipality for the provision of policing services;
- 4) two regional police forces have been established.

99. At present, only Saint John has established a board of police commissioners. The absence of a comprehensive system of municipal boards of police commissioners is reflected in the fact that municipal forces remained under judicial and direct provincial control longer than in other parts of Canada. It should be noted, however, that in 1907, the City of Moncton Police Commission Act placed the municipal force under the exclusive direction of a board of police commissioners consisting of the mayor, a local county court judge and the police magistrate. A similar statute (The City of Fredericton Police Commission Act) was enacted in 1908 creating a police commission composed of three ratepayers of the city, appointed by the provincial cabinet. The continued exercise of the statutory powers of the Board were subject to local council due to section 15 of the Act which provided:

"15. The City Council of the City of Fredericton may, at any monthly

meeting thereof, by the vote of two-thirds of the full Council, adopt a bye-law dissolving and putting to an end the Board of Police Commissioners hereby created and thereafter the said City Council, or a committee thereof, of not less than three members of the council, shall have and exercise all the powers and duties to be exercised by the said Board of Commissioners under this Act, and the said City Council may, at any time afterwards upon a like vote, repeal such bye-law and thereafter said Board shall be re-constituted and re-established with all the privileges and powers, and subject to all the conditions of this Act."

As noted by Stenning, supra note 69, at 1.50: "Although the council could thus not alter the board's powers or status so long as it remained in existence, it seems likely that the constant threat of dissolution posed by this provision must have endowed the council with a strong influence over the affairs of the board."

100. Police Act, ss. 10(1)(a) and 11(1)(a).

101. Police Act, s. 7(2).

102. Police Act, ss. 10(1)(a) and 11(1)(a).

103. Police Act, ss. 10(3) and 11(3).

104. Police Act, ss. 10(1)(a) and 11(1)(a).

105. Section 3 of the Provincial Policing Agreement.

106. The Agreement imposes mandatory duties of co-operation and consultation between the federal and provincial Solicitors General in relation to "any new issue, matter of general concern or dispute arising from [the] agreement", "the appointment of a Commanding Officer or C.I.B. officer", the temporary allocation of forces, and the exclusion of any geographic area from the ambit of the Agreement. Analogous duties of co-operation and consultation are also placed upon the Commissioner of the Force respecting minimum policing standards, the numbers and locations of detachments and internal organizational structures.

107. The political responsibility of the Solicitor General for the conduct of policing has been implicit since the creation of the Department in 1987. However, it has been made explicit by recent amendments to the Police Act which vest in the Minister, in section 1.1(1) of the Act, a two-fold statutory mandate to:

"(a) promote the preservation of peace, the prevention of crime, the efficiency of police services and the development of effective policing,

(b) co-ordinate the work and efforts of police forces and the Royal Canadian Mounted Police within the Province."

108. Police Act, s. 5.

109. Police Act, s. 4.1.

110. Police Act, section 6(1). Assignment may occur either at the request of a board, council or police chief; on the request of the Commanding Officer of the R.C.M.P.; or, in the absence of a request, "in any case in which, in the interests of the administration of justice, he [the Solicitor General] considers it appropriate."

111. In the case of indictable offences, section 504 and in the case of summary conviction offences, section 785.

112. The factors to be considered by the Crown in determining the advisability of the initiation of criminal prosecutions are enumerated in the **Public Prosecutions: Operations Manual**, Department of Justice, Topics 120 - 139.

113. **Public Prosecutions: Operations Manual**, Topic 100.

114. As noted by Stenning, **Police Commissions and Boards in Canada**, "Although New Brunswick was historically the next province to adopt the concept of a police board, the creation of the Moncton Police Commission in 1907 and of the Fredericton Police Commission in 1908 can only be viewed as somewhat exceptional in a province where municipalities once they were given direct control of their police forces, seem historically to have shown a particularly strong resistance to any attempts to deprive them of it." (supra note 69, at 1.47).

The identification of a Board of Police Commissioners as the instrument of control over the police which has been effected by recent amendments to Ontario policing legislation provides an illuminating contrast. In An Act to revise the Police Act and amend the Law relating to Police Services (S. O. 1990, c.10) the Ontario legislature has provided inter alia:

"4.(1) Every municipality to which this subsection applies shall provide adequate and effective police services in accordance with its needs.

5. A municipality's responsibility for providing police services shall be discharged in one of the following ways:

1. The board may appoint the members of a police force under clause 31(1)(a) in which case the municipal force shall pay the cost of the police force.
2. The board may enter into an agreement under section 7 (sharing police services).
3. The council may enter into an agreement under section 10 (agreements for provision of police services by the O.P.P.).
4. With the Commission's approval, the municipality may adopt a different method of providing police services.

27. There shall be a police services board for every municipality that maintains a police force.

31(1). A board is responsible for the provision of police services and for law enforcement and crime prevention in the municipality and shall,

- (a) appoint members of the municipal police force;
- (b) generally determine, after consultation with the chief of police, objectives and priorities

- (c) with respect to police services in the municipality; establish policies for the effective management of the police force;
- (d) recruit and appoint the chief of police and any deputy chief of police, and annually determine their remuneration and working conditions...;
- (e) direct the chief of police and monitor his or her performance...;"

The discharge of the Board's statutory functions are, according to section 3 of the Act, subject to review by the Solicitor General which enjoys a number of powers in relation to the development of policing policy.

115. The most evident manifestation of the shift away from local autonomy to central control in this jurisdiction is demonstrated by the recently expanded powers of the Solicitor General. In one sense, the transfer of authority in relation to policing to an executive officer of the provincial government, be it the Attorney General/Minister of Justice or the Solicitor General represents merely one aspect of a more pervasive trend away from local supervision of law enforcement agencies toward a consolidation of control in the hands of the provincial government. The establishment of a Department of the Solicitor General may thus be viewed as a development which is consistent with other manifestations of centralization exemplified by the following phenomena.

First, centralization of control over policing is reflected in the enactment of regulatory regimes which set uniform standards of police conduct, establish rules related to collective bargaining and arbitration and set out procedures for the disposition of public complaints. Secondly, one may observe, at the organizational level, consolidation of authority through the amalgamation of small, local forces, the establishment of regional or provincial policing bodies or the creation of specialized forces under the direct control of the Minister. Thirdly, the appointment of provincial police commissions vested with powers ranging from the supervisory, advisory, and regulatory to the investigatory and adjudicative exerts a further centralizing influence.

In addition to internal organizational and institutional measures, concentration of control is bolstered by the actions of agencies external to the police and the policing community. For example, there can be little doubt that the assertion by representatives of the public prosecutorial system of the power to engage in pre-charge screening and scrutiny of search warrant applications represents a significant qualification upon both the principles of local control and police independence. Additionally, the increasing involvement of the central government is reflected in the subsidization of municipal policing costs through general and special grants.

Finally, at the operational level, reliance upon the RCMP as a municipal force may be viewed as a further expression of centralization.

116. See, for example, the comments of the Commission of Inquiry Concerning Certain activities of the Royal Canadian Mounted Police, 1981, Second Report, Vol.2, at 1005 - 6:

"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. This important doctrine in our system of democratic government has often been overshadowed by the parallel concept that

the best interests of the state are served by keeping at bay any attempts to interfere with the making of police decisions relating to investigation and prosecution in individual cases."

117. Commissioner's Report, *Discretion to Prosecute Inquiry*, Province of British Columbia, November 1990.

118. P. Manning, "'Modern' Police Administration, the Rise of Crime-Focused Policing, and Critical Incident Analysis" in *The Maintenance of Order in Society*, R. Donelan, ed., (1982: Supply and Services Canada) at 56. The inevitable correlation between the policing and political spheres has been described by one observer in the following terms:

"The relationship between politics and policing has -- at least in liberal democratic states -- generally been denied and/or lamented. Denials that policing involves politics and vice versa, tend to come from two sources: 1) pro-police spokesmen aware that partisan politics often undermines police administration and performance; 2) politician apologists trying to maintain the image of impartiality despite the reality of partisanship. More often than not, both types are represented in the same person -- usually an official who believes the problems of partisanship become worse if their existence is admitted. Lamentations about police partisanship tend to be heard from two other sources: 1) people directly frustrated or oppressed by class, racial, ethnic, or other biases in society; 2) civil libertarians and other watchdogs and reformers concerned about social justice in general, or political gains in particular, or both. Against the other side's emphatic denials that police work involves politics, the critics assert strongly that it does, and demand that policing be non-partisan. Sharply opposed as they are, both sides make the same erroneous assumption: that the social process of policing can somehow be separated from its political context." (A. Turk, "Policing in Political Context" in *The Maintenance of Order in Society*, at 80).

119. A. Turk, *supra* note 115, at 80.

120. A. Turk, *supra* note 115, at 80. Predictably, shifting public perceptions respecting the legitimate objectives of policing authority derive from broader-based political considerations. As pointed out by The Research Group (R. Hann, J. McGinnis, P. Stenning, A. Farson, hereinafter referred to as the Research Group) in "Municipal Police Governance and Accountability in Canada: An Empirical Study", (1985) 9 *Canadian Police College Journal* 1:

"Unfortunately, defining the police function has proven elusive. Bittner has argued that the police mandate was ill-defined from the beginning and that, consequently, channels of accountability for the day-to-day operations of the police have never been clearly established. Rumbaut and Bittner have suggested that our present conceptions of the police function "have been shaped by the political upheavals and crisis of legitimacy that confronted all institutions of government in the 1960's." The image of the police as crime fighters is currently in retreat. Numerous writers have drawn attention to the fact that, generally speaking, police spend more time keeping the peace than

enforcing the law. This 'discovery' has clear implications in terms of accountability; for even if the necessity for a sphere of 'impartial' law enforcement can be demonstrated, the same argument cannot be as clearly made for other aspects of the police function. The image of the police as crime fighters, correct or incorrect, therefore has significance for the notion of police independence and for accountability." (at 7).

121. As Turk points out, supra note 115, all policing is inherently political. The material distinctions in the discharge of the policing function between various societies will depend upon the nature of the governing ideology:

"Specific police agencies, units, personnel, and assignments vary in regard to which function or kind of function is their primary concern. Though not always easy to apply, a distinction can be made between regular and political policing, depending upon how service-oriented or control-oriented is the characteristic activity of the organization or organizational role. Political policing involves a virtually exclusive concern with control, focused upon detecting and countering threats to the politics of stability and continuity. Regular policing is characterized by service activities in conjunction with control operations aimed usually at conventional lawbreaking rather than political deviance...Whatever the particular ideological premises (capitalist, socialist, or pre-modern), the most consequential feature of a state is where it lies on the line between democracy and totalitarianism. The more democratic the state, the more concern for due process -- in regular policing much of the time and in political policing at least some of the time. The more totalitarian the state, the more difficult it is to distinguish between regular and political policing, because any political disagreement becomes subversion -- in fact, as well as in official perception -- and any crime can readily acquire political significance...Real variety in the political context of policing, and in policing itself, is found only insofar as a politics, not of revolution and counter-revolution but of stability and continuity is possible -- i.e., only in relatively democratic states. Within such states, the authorities confront a wide range of social groups, more or less organized and more or less committed to the ground rules of conventional politics. The range of commitment defines the variety of political contexts in which policing is done." (at 81 - 82).

122. The Research Group, supra note 117, at 8, which identifies the problem arising from the exercise of police discretion in the following terms: "The location of considerable discretion in street-level policing renders problematic the adequacy of traditional control measures in police forces for, in effect, the officers have to supply their own variety of jurisprudential policy."

123. As stated in the Detailed Findings and Recommendations of the 1977 Royal Commission on Metropolitan Toronto (The Robarts Commission), Vol. 2.

124. 1978 Waterloo Region Review Commission on Police Governance in the Waterloo Region.

125. See the observations of the 1979 federal Royal Commission on Financial Management and Accountability (The Lambert Report): "The serious malaise pervading the management of government stems fundamentally from a grave weakening, and in some cases, an almost total breakdown, in the

chain of accountability, first within government and second in the accountability of government to parliament and ultimately to the Canadian people...Accountability is the fundamental prerequisite for preventing the abuse of delegated power and for ensuring, instead, that power is directed towards the achievement of broadly accepted national goals with the greatest possible degree of efficiency, effectiveness, probity and prudence."

126. Although as noted by The Research Group, supra note 117, while the distinction between partisanship and public interest is superficially an attractive one, it may well be unworkable in practice since "the very question as to what is or is not a partisan political decision...is itself likely to present itself as a political question which will engender substantial partisan disagreement." (at 43).

127. This distinction, which has been proposed by Daniel J. Meador in *The President, the Attorney General and the Department of Justice*, (1980: University of Virginia, originally referred to the relationship between politics and the prosecutorial branch. However, it appears equally apposite in the context of policing. As Meador explains, "Discussions of this subject are confused and often unproductive because of the varied meanings accorded the words 'political' and 'politics'. Assertions are often made that political influences have no place in the work of the Department of Justice; actions in which politics play a part are deemed improper. On the other hand, it is said that politics in the higher sense may legitimately be taken into account and that political considerations, properly understood, are inescapably involved in the administration of justice." (at 27). A similar division has been suggested by J. L. J. Edwards who has proposed the distinction between political considerations "savouring of personal advancement or sympathy, from politics of non-partisan interpretation" in which broader political considerations are paramount which "must be seen to involve the wider public interest that benefits the population at large rather than any single political group or factional interest." (in *Ministerial Responsibility for National Security*, prepared for the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, 1980).

128. Supra note 97, at 1006. See also the comments of the British Columbia Police Commission: "The challenge of the fair and effective administration of criminal justice is to achieve the proper balance between independence from political interference and accountability to the political process for the investigation and prosecution of crime."

129. As The Research Group observes, supra note 117, at 9,

"Another fundamental issue in determining the form police accountability will take has been that of whether the machinery to provide for it should be centrally or locally organized. Institutions of municipal police governance can in this way become the site for major struggles for influence between local and provincial authorities. On a more abstract level, underlying such struggles is the tension between the demands for increasing the efficiency of police forces through centralization and the demands for local freedom and control over law enforcement generally...However, to conceptualize the debate in terms of centralization or decentralization is too limiting...Reiss argues that the centralization -- decentralization discussion misses the focal point: 'In many democratic societies, the central problem for citizens is how they may be brought closer to the centres of political power that control the acquisition and allocation of resources, not whether administrative control is centralized or decentralized in the bureaucracy.'"

130. British Columbia Police Commission, *B. C. Police Boards Handbook*, 1980, at 13.

131. While some have argued that the concept of police independence may be traced to the office of the mediaeval constable, the more persuasive view is that it is a development of the nineteenth and early twentieth centuries. A similar development may be noted in relation to the development of the concept of prosecutorial independence: see, for example, J. L. Edwards, *The Law Officers of the Crown*, London, 1964.

132. But see the comments of A. Wilson, *The Constable's Guide: A Sketch of the Office of Constable*, (Toronto: 1859) who referred to the English office of constable as an 'independent functionary' having 'inherent and independent authority' (at 10). However, as observed by Stenning, *The Legal Status of the Police*, *supra* note 22, "[Wilson] did not elaborate on the meaning of the term 'independent' in this context, nor did he cite any authority for the proposition...the ascription of 'independence' to the office of constable was not common until the twentieth century." (at 53).

133. See the discussion by P. Stenning, *Police Commissions and Boards in Canada*, *supra* note 67.

134. A useful contrast is provided by the recent amendments to the Ontario Police Act which statutorily guarantee a range of independence in favour of both the individual officer and the Chief from the immediate direction of the board of police commissioners in the following provisions:

"31.(3) The board may give orders and directions to the chief of police, but not to other members of the police force, and no individual member of the board shall give orders or directions to any member of the police force.

31.(4) The board shall not direct the chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police force.

41.(2) The chief of police reports to the board and shall obey its lawful orders and directions."

135. See for example, section 12(1)(e) - (g) of the Police Act.

136. A useful contrast is provided by section 18 of the Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-9 which describes the functions of the force in the following language:

"18. It is the duty of members of the Force who are peace officers, subject to the orders of the Commissioner,

(a) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime, and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody;

(b) to execute all warrants, and perform all duties and services in relation thereto, that may, under this Act or the laws of Canada or the laws in force in any province, be lawfully executed and performed by peace officers;

(c) to perform all duties that may be lawfully performed by peace officers in relation to the escort and conveyance of convicts and other persons in custody to or from any courts, places of punishment or confinement, asylums, or other places; and

(d) to perform such other duties and functions as are prescribed by the Governor in Council or the Commissioner." (emphasis added).

137. According to the Final Report of the Royal Commission on the Police (U.K., 1967), the authority of the constable is uniquely personal in nature. His status is that of an officer whose "authority is original, not delegated, and is exercised at his own discretion by virtue of his office...he or she is neither a Crown servant nor a servant of the police authority."

138. The posture of police deference to the executive branch has been described by the U. S. Task Force on the Police in the following way: "the operations of the police are analogous to those of "any other administrative agency that exercises governmental authority...[and thus]...subject to effective legislative, executive and judicial review and control", The President's Commission on Law Enforcement and Administration of Justice -- Task Force Report: The Police, (1967: U. S. Government Printing Office), quoted by J. Hogarth, "Police Accountability", supra note 16, at 114.

139. See, for example, Wright v. City of Brandon (1887), 4 Man. R. 453 in which the plaintiff sued the defendant for assault and false imprisonment by a city police officer pursuant to a municipal by-law. In determining that the city could not be held vicariously liable for the wrongful act of one of its officers, the court observed: "The reason given for holding the corporation not liable is, that though a constable may be appointed by the corporation, yet in discharging his duty he is acting not in the interest of the corporation, but of the public at large." Reliance was placed upon the following extract from Hafford v. City of New Bedford (1860), 82 Mass. 297: "Where a municipal corporation elects or appoints an officer, in obedience to an act of the legislature, to perform a public service, in which the city or town has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community, such officer cannot be regarded as a servant or agent, for whose negligence or want of skill in the performance of his duties a town or city can be held liable."

Reference was also made to the view, expressed in Maximilian v. City of New York (1875), 62 N.Y. 160 that the duties of a police officer "are conferred not for the immediate benefit of the municipality but as a means to the exercise of the sovereign power for the benefit of all citizens" and "they are generally to be performed by officers who, though deriving their appointment from the corporation itself, through the nomination of some of its executive agents, by a power devolved thereon as a convenient mode of exercising a function of government, are yet the officers, and hence the servants of the public at large. They have powers and perform duties for the benefit of all the citizens, and are not under the control of the municipality which has no benefit in its corporate capacity from the performance thereof. They are not then the agents or servants of the municipal corporation, but are public officers, agents or servants of the public at large, and the corporation is not responsible for their acts or omissions."

Additional support for the concept of police independence may be discovered in the following cases: Rousseau v. La Corporation de Lévis (1888), 14 Q.L.R. 376: "The duties of these constables, or policemen, are set forth and prescribed in the statute itself, and they are imposed upon them in the public interest. Under the statute the council is empowered only to provide for the appointment and removal of constables. The service for which they are appointed is public and the City of Lévis can have no special or private interest in it. This should make plain that these constables are neither the servants nor the agents of the council."; Winterbottom v. Board of Commissioners of Police of the City of London (1901), 1 O. L. R. 549: "although they, as policemen or constables, hold their office at the pleasure of the board, that does not, in my opinion, constitute them servants of the board of police commissioners; so that the doctrine of respondeat superior is not applicable. The policemen have a duty to perform as peace officers, and to exercise which, like any other constable, they are particularly

appointed."; McLeave v. City of Moncton (1902) 32 S.C.R. 106: "When it is sought to render a municipal corporation liable for the act of servants or agents, a cardinal inquiry is, whether they are the servants or agents of the corporation...If...they are elected or appointed by the corporation in obedience to a statute, to perform a public service, not peculiarly local, for the reason that this mode of selection has been deemed expedient by the legislature in the distribution of the powers of government, if they are independent of the corporation as to the tenure of their office and as to the manner of discharging their duties, they are not to be regarded as servants or agents of the corporation for whose acts or negligence it is impliedly liable, but as public or state officers with such powers and duties as the state confers upon the, and the doctrine of respondeat superior is not applicable."

140. An early decision on this point is that of Bowles v. City of Winnipeg, [1919] 1 W.W.R. 198 in which the court, while exempting the municipal corporation from liability for the tort of a police officer, also remarked that in the exercise of their statutory obligations, police officers were compelled "to obey all lawful directions, and to be subject to the government of the Chief of Police", leading Stenning, supra note 22, to conclude: "The case thus seems to suggest that where constables are required by statute to "obey all lawful directions, and be subject to the government of" a particular person or body, such directions will only be considered unlawful if they specifically involve instructions to break the law...The...case...seems to suggest that the constitutional position of the police (in terms of their liability to receive and duty to obey orders, instructions and directions from others) is an issue not determined by the principles that govern whether or not anyone who may or may not give such orders can be held vicariously liable in damages for the torts of the police" (at 111).

141. Attorney General for New South Wales v. Perpetual Trustee Co., [1955] A.C. 457. The case involved a claim by the government of New South Wales for damages for the loss of services of a police officer who had been injured in a motor vehicle accident. In order to succeed, the government argued in favour of a characterization of the police officer as the servant of the executive. This contention was rejected by the Privy Council which observed: "...there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State which he is said to serve. The constable falls within the latter category. His authority is original, not delegated and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory rights independently of contract. The essential difference is recognized in the fact that his relationship to the Government is not in ordinary parlance described as that of servant and master." (at 489 - 90, emphasis added).

Another decision which has proved influential in the evolution of the concept of 'police independence' is that of the Court of King's Bench in Fisher v. Oldham Corporation, [1930] 2 K. B. 364. Although the case directly concerned the status of the constable for purposes of determining the vicarious liability in tort of a municipal council, the court in obiter also addressed the general legal status of the police. The court referred to the Australian case of Enever v. The King (1906), 3 C.L.R. 969 in which it was stated: "Now, the powers of the constable, quâ peace officer, whether conferred by common or statute law, are exercised by him by virtue of his office, and cannot be exercised on the responsibility of any person but himself...A constable, therefore, when acting as a peace officer, is not exercising a delegated authority but an original authority and the law of agency has no application." Relying upon this authority, the English court concluded: "If the local authorities are to be liable in such a case as this for the acts of the police with respect to felonies and misdemeanours, then it would indeed be a serious matter and it would entitle them to demand that they ought to secure a full measure of control over the arrest and prosecution of all offenders. To give any such control would, in my view, involve a grave and most dangerous constitutional change."

Perpetual Trust has been referred to with approval in a number of Canadian decisions: see, for example, Re Reference under the Constitutional Questions Act, [1957] O. R. 28; R. v. Ontario Labour Relations Board, [1964] 2 O. R. 260; Schulze v. The Queen (1974), 17 C.C.C. (2D) 241; Nicholson

v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S. C. R. 311.

The cumulative effect of such cases was endorsed by the Royal Commission on the Police (England, 1962) which referred to A.G.N.S.W. v. Perpetual Trustee Co. with approval, characterizing the constable as neither a Crown servant nor a servant of the police authority. This expansive view has been the subject of criticism by J. Hogarth, supra note 16.

142. Supra note 15.

143. The Commissioner of the Metropolitan Police had initiated a non-prosecution policy unless there was evidence of cheating or reason to suppose that a gaming club had become a refuge for criminals. This policy had apparently been adopted because of a lack of clarity in the Gaming Laws which had not been resolved by judicial interpretation.

144. Supra note 15, at 769.

145. Supra note 15, at 769.

146. Supra note 16, at 113.

147. See Stenning, supra, note 22:

"No one reading these early authors could possibly come away with the impression that in the performance of their duties as peace officers, constables were not subject to direction or instructions from others. The fact that they were entitled by the common law to do certain things 'by their own authority' was quite clearly not in earlier times regarded as in any way incompatible with their position of subordination to the justices of the peace. Nor, it must be remembered, were these justices of the peace purely judicial officers; rather, they were the embodiment of local government and remained so until well into the nineteenth century. If the concept of police independence propounded by Lord Denning and others is to be justified, therefore, it must seek such justification elsewhere than in the history of the office of constable in English common law. If the original office of constable is put forward as the basis for such a concept, it must also be explained why the chief constable is immune to instructions from others, but other constables under him are not immune to orders from him and from their superiors." (at 116).

In this regard, the accuracy of Lord Denning's analysis of the position of the Commissioner of the Metropolitan Police has itself been the subject of debate. According to L. H. Leigh, Police Powers in England and Wales, 1975:

"In Blackburn, Lord Denning categorically stated that the Commissioner of the Metropolitan Police is not subservient to the Home Secretary in operational matters. His position in such matters is independent. It has been argued, however, that the Metropolitan Police Commissioner stands in a different relation to the Home Secretary as police authority than do local chief constables to local police authorities. It is true that the Home Secretary answers to Parliament for the Metropolitan Police and that he will inform the House

of Commons of action taken by the police and even whether such action contravened the rules normally followed by the force. The situation is, however, ambiguous. Various Home Secretaries have stated that the Commissioner is not independent of themselves. The Home Secretary should be responsible for the policy of the police. The most recent statement is that of Mr. Simon in 1957 who stated: "For the Metropolitan Police, it is a matter for the discretion of the Secretary of State as to how far, in discharging the duties placed upon him by Parliament, he should himself, through the Home Office, interfere with the executive action which is the responsibility of the Commissioner. In practice, in respect of administration and the maintenance of discipline, it is the Secretary of State's sphere to prescribe and enforce general principles, and the Commissioner's sphere to apply them to individual cases, subject only to his general accountability to the Secretary of State as the police authority." In practice therefore, the Secretary of State intervenes in the limited areas of efficient administration and the maintenance of discipline. Whether he has wider powers to direct the police in the performance of their duties is doubtful, although much can no doubt be achieved by consultation. There is ambiguity concerning what executive action, proper to the Commissioner, the Home Secretary considers that he can interfere with...It would appear that the oversight of the Home Secretary was to operate in such areas as establishments, administration, and disciplinary regulations, leaving the direction of policing as such in the hands of the justices, otherwise known as the Commissioners and now the Commissioner of the Metropolitan Police. This would not have appeared unusual. At that period the police were generally answerable to the justices who did direct their operations. The justices had a primary duty to ensure that the peace was kept. A system in which the police were answerable to justices would not have seemed a system in which the police were constitutionally irresponsible." (at 7 - 9).

148. See, for example, Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association (1974), 5 O. R. (2d) 285; Re a Reference under the Constitutional Questions Act, *supra* note 137, in which the Ontario Court of Appeal stated:

"It is quite true that a board is expressly empowered to make regulations "for the government of the police force, for preventing neglect or abuse, and for rendering it efficient in the discharge of its duties." And further, the [Ontario] Police Act expressly provides that "the members of the police force shall be subject to the government of the board and shall obey its lawful directions". But the regulations which the board may make are expressly limited in scope. The board cannot make regulations inconsistent with regulations made by the Lieutenant Governor in Council, pursuant to s. 60 of the Act.

Again, while members of a police force must obey "the lawful direction" of the board, neither the board nor a municipality not having a board can lawfully give directions to any member of a police force prescribing the duties of his office.

The duties are of a public nature and are not owing to the municipality or a board by which a police officer has been appointed.

The manner in which the duties imposed by statute on a member of a police force are performed is a matter of public concern. Thus, the Attorney-General may, as a matter of administration of justice in the province, with or without a request from a council of a municipality, require an investigation and report to be made to him 'upon the conduct of any chief constable, constable, police officer, special constable or by-law enforcement officer...of any municipality.'" (at 30 - 31).

The Court concluded that "the relation of master and servant does not exist in law as between a municipality or a board and a member of a police force appointed under...the Police Act." (at 31).

149. Thus, for example, in Bisaillon v. Keable and Attorney General of Quebec (1980), 17 C. R. (3d) 193, the Quebec Court of Appeal refused an application for an injunction to restrain a provincial inquiry from divulging the names of police informants and to prevent the inquiry from examining methods to recruit informants. In response to arguments derived from Blackburn to the effect that investigative techniques (including use of informants) were beyond the supervisory jurisdiction or control of government, Turgeon J. A. observed in part:

"English police officers enjoy a much greater autonomy with respect to the Crown than do our police officers. The majority of prosecutions are conducted by the police, the decision to prosecute is taken by local police forces acting under the control of the chief constable and the different police forces may apply diverse policies in this regard, at the discretion of the chief constable. Several people maintain that this independence of the chief constable was the result of a historical accident, at least in the counties, consequent on the abandonment by the justices of the peace of the exercise of their power of control over constables...Our system for the administration of justice is quite different and the role and status of the police within this system is clear and well defined by legislative texts...[the Attorney General] has the supervision over all matters concerning the administration of justice...[he] is responsible for prosecutions which must be launched with respect to the application of criminal laws. It is not the police who take this decision. These latter must submit the results of their investigations to the agent of the Attorney General who evaluates the evidence and decides whether or not to authorize charges against offenders or to have the evidence submitted by the police completed further...[he] possesses powers of direction over the Sûreté du Québec and of supervision over the application of all the laws governing the police, particularly with respect to the Police Service of the Montréal Urban Community...One can see that the position of independence of a peace officer with respect to the executive power which the appellant claims by relying on English jurisprudence, has not been confirmed in our laws." (at 202 - 205).

150. See, for example, the decision of the Federal Court of Canada (Trial Division) in Wool v. Nixon (unreported, T - 2898 - 81, June 8, 1981). Wool, an RCMP staff-sergeant had applied for an interim injunction restraining his Commanding Officer, Nixon, from suspending an ongoing investigation. The application was refused on the basis that:

"...the duty of Nixon with reference to the investigation is towards the

Crown, or the public at large. He owes no duty to the applicant, and the applicant has demonstrated no particular personal individual right, aside from whatever right he may hold as a member of the general public, to see that the administration of justice is properly carried out. A Commanding Officer is accountable to his superior and to the Crown...He has the administrative discretion to decide what proportion of his resources will be deployed towards one particular investigation...That decision is of the type which those officers of the Crown are authorized to make. It is not incumbent upon the Court to substitute itself to properly appointed officers and to make administrative decisions in their stead. The view that the plaintiff...has been too long with the case and may have lost the proper perspective of it is a judgment call within the purview of the authority of a Commanding Officer."

151. Thus, for example, in Bisaillon v. Keable and Attorney General of Québec, *supra* note 145 the Québec Court of Appeal, in refusing to apply a principle of confidentiality which would prevent a provincial inquiry from receiving testimony relating to the identity of informants, rejected wholesale endorsement of an expanded theory of 'police independence' in Canada, citing distinctions between Canada and England: "the general organization of the system of the administration of justice in the context of which the police operate is fundamentally different from that of our system" insofar as "English police officers enjoy a much greater autonomy with respect to the Crown than do our police officers. The majority of prosecutions are conducted by the police, the decision to prosecute is taken by local police forces acting under the control of the chief constable and the different police forces may apply diverse policies in this regard, at the discretion of the chief constable" (at 203). In contrast, "Our system for the administration of justice is quite different and the role and status of the police within this system is clear and well defined by legislative texts" (at 203). As a consequence of the powers of supervision vested in the Minister of Justice over the conduct of both the police and the prosecutor, the Court concluded that "One can see that the position of independence of a peace officer with respect to the executive power which the appellant claims by relying on English jurisprudence, has not been confirmed in our laws." (at 207). A subsequent appeal to the Supreme Court of Canada was decided on other grounds.

It should be noted that the decision in Bisaillon has been the subject of criticism by commentators. As observed by Stenning, *supra* note 22:

"In the first place [the Court] gives insufficient emphasis to the extent to which the police in England are subject to the overriding authority of the Attorney General and the Director of Public Prosecutions, with respective powers to stay and take over prosecutions...Secondly, his analysis ignores the fact that the case in which the independence of the police in England has been most forcefully declared involved the Commissioner of the London Metropolitan Police, whose relationship to the Home Secretary...has historically been not very different legally from the relationship of the Sûreté du Québec to the Attorney General of the province...Evidently, the English Court of Appeal did not feel that this relationship detracted from the principle of police independence as propounded in Blackburn. Thirdly, the authority of the Bisaillon case is considerably weakened by the fact that the court chose not to consider the admittedly small amount of Canadian jurisprudence on the status of the police...it can hardly be seriously argued that the situation in Québec is legally so

different from that in other provinces that such jurisprudence is not relevant at all, even by analogy." (at 124 - 125).

However, the relevancy of Blackburn has also been questioned by non-judicial authorities. As observed by the 1981 Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police: "...the particular passage from Blackburn is constantly transposed to the Canadian scene with no regard to those essential features that distinguish Canadian police forces from their British counterparts...In Canada, section 5 of the R.C.M.P. Act clearly empowers the Minister to give direction to the Commissioner in regard to "the control and management of the force on all matters connected therewith". To the extent that a matter is one of "control and management" or is "connected" with control and management, the Minister has a statutory power of direction. The statute has to that extent made the English doctrine expounded in Ex Parte Blackburn inapplicable [to the RCMP]." (Second Report, Vol. 2, at 101).

152. As explained The Research Group, supra note 117: "While the concept of police independence has thus been variously formulated, a common feature is the assertion that there are some areas of police decision-making (or some kinds of police decisions) in which the police are not subject to the same degree of external control by and/or accountable to governing authorities, ministers or others charged with responsibility for police governance." (at 44).

153. As noted by Hogarth, supra note 16, the determination of which policing functions should be protected against governmental interference entails consideration of a number of ancillary issues:

"...it is essential to a country which purports to be a liberal democracy to ensure that the police are held accountable to civilian authority through a variety of internal and external controls. This is a necessary condition in order to maintain the police presence in a civilized form. The dilemma, however, is to try and ensure the accountability of the police and at the same time protect the police from unwarranted political interference in their day-to-day professional decisions and discharge of their duties...The scope of police authority to act independently of political or ministerial control must be defined. Related to that, there are a number of questions to be answered, such as: who sets general policy for public police forces in Canada; which police decisions require approval from an appropriate civilian body or from higher authority; and which civilian authority has, or ought to have, the right or duty to oversee the police, and at what level should this control be exercised?" (at 113).

154. The genesis of the distinction has been located in the observations of Woodrow Wilson in 1887 regarding the dichotomy of 'politics' and 'administration': "The problem is to make public opinion efficient without suffering it to be meddlesome. Directly exercised, in the oversight of the daily details and in the choice of the daily means of government, public criticism is of course a clumsy nuisance, a rustic handling delicate machinery. But as superintending the greater forces of formative policy alike in politics and administration, public criticism is altogether safe and beneficent, altogether indispensable. Let administrative study find the best means for giving public criticism this control and for shutting it out from all other interference." W. Wilson, "The Study of Administration" (1941) 56 *Political Science Quarterly*, quoted by The Research Group, supra note 117, which remarks: "What Wilson seemed to be implying was that in their administration of the 'daily details' and in their choice of the 'daily means of government', officials should enjoy some measure of official independence from control, and possibly accountability. To the extent that their decisions affect the 'greater forces of formative policy', however, they should be subject to the usual accountability and liability to control

as applies normally to representative government." (at 34).

155. See, for example, the observations of Goodnow who further refines the category of administration into three sub-groups -- executive, quasi-judicial and statistical -- and argues that only the first should "of necessity be subordinated to the function of politics" and that, as a consequence, the remainder "should be relieved very largely, if not altogether, from the control of political bodies". Moreover, the distinction between politics and administration has itself been attacked as intellectually unsound on the basis that

"whenever an administrator exercises discretion, he can be said to be potentially engaged in policy-making and that discretion can be said to exist at every level of administration. Furthermore, even at the highest level of policy-making, politicians inevitably rely on the advice and expertise of administrator. Under such circumstances...it is impossible to separate policy-making and operations as distinct areas of activity, one the province of politicians, the other the exclusive preserve of administrators....If policy and operations are truly inseparable, proposals to grant official independence with respect to operational decisions and activities, but not with respect to policy decisions, are liable to be unworkable in practice, for few, if any, decisions or activities can be so discretely categorized as policy or operations". (The Research Group, supra note 117, at 34 - 35).

156. United Kingdom, Maud Committee on Management of Local Government, 1967.

157. According to the Royal Commission, the 'quasi-judicial' powers of the police (those of investigation, arrest and charge) must be differentiated from all other policing tasks. In respect of these quasi-judicial functions:

"...it is clearly in the public interest that a police officer should be answerable only to his superiors in the force and, to the extent that a matter may come before them, to the courts. His impartiality would be jeopardized and public confidence in it shaken, if in this field he were to be made the servant of too local a body".

158. Supra note 113.

159. Supra, note 113.

160. See the Report on the Dismissal of Harold Hubert Salisbury by Madame Justice R. Mitchell, Commissioner, South Australia, 1978.

161. According to the Research Group, supra note 117, at 37, while it is difficult to devise definitive criteria to distinguish between policy and operations, constant characteristics of each category can be identified. The characteristics proposed by the Research Group are as follows: Policy Decisions -- decisions are likely to have broad impact; to contemplate a lengthy time frame both for the implementation of the decision and the attainment of results; to permit a broad range of official discretion and decisional flexibility. Operational Decisions -- decisions are fairly confined in impact, directed to the techniques, means and resources of the organization, involve consideration of a narrow range of alternatives and permit the exercise of a limited amount of official discretion.

162. See, for example, G. Gregory, "Police Power and the Role of the Provincial Minister of Justice" (1979) 27 Chitty's L. J. 13.

163. See, for example, the case of Re Copeland and Adamson (1972), 7 C.C.C. (2d) 393 involving the validity of a directive issued by the Toronto Board of Police Commissioners governing the use of wiretaps and electronic surveillance devices. The court held:

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

By inference the court supported the ability of the Board of Police Commissioners to direct the members of the force concerning law enforcement techniques.

164. See, for example, the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, supra note 113, which observed of the relationship between the R.C.M.P. and the federal Solicitor General:

"We believe that those functions of the R.C.M.P. which we have described as 'quasi-judicial' should not be subject to the direction of the Minister. To be more explicit, in any particular case, the Minister should have no right of direction with respect to the exercise by the R.C.M.P. of the powers of investigation, arrest and prosecution. To that extent, and to that extent only, should the English doctrine expounded in Ex parte Blackburn be made applicable to the R.C.M.P. Even though the Minister should have no power of direction in particular cases in relation to the exercise by the R.C.M.P. of these 'quasi-judicial' functions, 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." (Second Report, Vol. 2 at 1013).

A similar view was advanced by the British Columbia Police Commission in 1981:

"the Chief Constable is accountable to the Board for the overall policy of the force and the level and quality of service provided to the community. It is important to stress, however, that day-to-day professional policing decisions are matters that are reserved to the force itself. The authority of the individual constable to investigate crime, to arrest suspects and to lay informations before a justice of the peace comes from the common law and the Criminal Code and must not be interfered with by any political or administrative person or body. Overall policies, objectives and goals, however, are matters that

properly belong to civilian authority and police boards have the duty to see that the force operates within established policy and has the right to hold the Chief Constable accountable for these matters."

165. See, for example, subsections 31(3) and (4) of An Act to revise the Police Act and amend the law relating to Police Services, S. O. 1989, c.10 which provides:

"31(3). The [police] board may give orders and directions to the chief of police but not to other members of the police force, and no individual members of the board shall give orders or directions to any member of the police force.

31(4). The board shall not direct the chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police force."

166. The Research Group, supra note 117, at 36 - 37.

167. According to the Research Group, supra note 117, at 49, the claim of the RCMP to independence from political direction and control (at least when acting pursuant to provincial policing agreements) may rest upon a more secure foundation than that of convention for the following reasons:

"In the first place, it is possible that at least some municipalities contract with the RCMP to obtain something of a 'package', including a degree of police management experience, which they see as relieving them of some of the usual burdens associated with governing an autonomous municipal police force. Because of this, the experience of many RCMP municipal detachment commanders may be one of greater independence than that of their counterparts in municipal police forces. Second, it must be remembered that at least one commissioner of the RCMP has resigned his office on the ground that his independence was being undermined by the federal government...It is possible that this incident has contributed to a more enduring belief in a tradition of police independence within the RCMP than is the case in other police forces. Finally, it may be explained by the fact that RCMP detachment commanders tend to see their accountability and duty of obedience to be owed to superiors within the force itself rather than to local municipal governing authorities. It may be, therefore, that while they can see themselves as enjoying a substantial measure of independence from such local municipal governing authorities, they do not necessarily regard themselves as enjoying any greater absolute independence from accountability and control than do their municipal counterparts."

It should be noted that claims of police independence (with respect to both the RCMP and municipal forces) have been regarded by others as having attained a quasi-constitutional status. See, for example, the remarks of the Royal Commission on the Donald Marshall, Jr. Prosecution (Commissioner's Report, Volume I) which seems to imply that police independence exists as a necessary incident of the organizational structure and philosophy of the Canadian criminal justice system: "We believe that the right of the police to lay a charge ensures protection of the common law position of police independence and acts as an essential check on the power of the Crown". (at 232).

168. In reference to the import of analogous provisions contained in the Police Act, R.S.O. 1950, c. 279 in Re a Reference Under the Constitutional Questions Act, *supra* note 137 at 31:

"Those duties are of a public nature and are not owing to the municipality or a board by which a police officer has been appointed. The manner in which the duties imposed by statute on a member of a police force are performed is a matter of public concern...I conclude that the relation of master and servant does not exist in law as between a municipality or a board and a member of a police force."

The explicit statutory qualification upon the independent status of the individual officer is contained in section 17(1) of the Police Act which establishes a master/servant relationship for the purposes of tort liability. It is assumed that the description of the relationship between a municipality and the members of a municipal police force as one of master and servant is restricted to civil liability and does not affect the constitutional status of the police.

169. *Supra* note 15, at 769. It was also assumed by the 1962 Royal Commission on the Police which stated "it is clearly in the public interest that a police officer should be answerable only to his superiors in the force".

170. It is acknowledged that the concurrent recognition of police independence and police subordination to the powers of the chief constitutes an anomaly which is discussed by Stenning, *supra* note 22, at 126 -127: "For if it is true that a constable has public duties as a peace officer that 'cannot be exercised on the responsibility of any person but himself', how can he be subject to the orders of his superior officers or his chief of police with respect to such matters? Does the authority of a chief of police to 'direct and control' his police force include the authority to direct his officers with respect to the handling of particular investigations or prosecutions?"

171. See Hawkins v. Bepey and Others, [1980] 1 All E. R. 797.

172. An unreported decision of the Federal Court of Canada, Trial Division, (T - 2898 - 81, June 8, 1981). The facts are set out, *supra* note 146.

173. It is acknowledged that the holding in Wool may be contingent upon the specific language of section 18 of the RCMP Act which makes each officer, in the performance of his or her duties, "subject to the orders of the Commissioner". Such phraseology suggests that the principle of police independence has been significantly modified by statute.

174. The importance of continued community control over policing structures is emphasized by R. Apostle and P. Stenning, in Public Policing in Nova Scotia, Vol. II, Royal Commission on the Donald Marshall, Jr. Prosecution, at 135 - 138.

175. As noted by the author of the Report of the Royal Commission on Education, Public Services and Provincial-Municipal Relations, (The Graham Report, Nova Scotia, 1974): "There is no way that Nova Scotia can have effective municipal police protection when 16 independently operated town police forces consist of from one to five members including the chief, six have from six to ten members, three have 21 to 30 members and two towns employ a private policing organization." (at 15 - 20).

176. As explained by R. Apostle and P. Stenning, *supra* note 170, at 130, the centralization versus decentralization debate represents "a trend toward more 'rational' systematic policy generation and implementation. Ad hocery is being nudged aside in favour of long-term, system-wide planning,

involving the gathering of more adequate bases of information and the development of more clearly articulated objectives, goals and measures of evaluation. All of this has been facilitated by, if not actually prompted by, modern technological developments. Considerable economic and political risks are thought to be associated with resisting or ignoring these trends."

177. According to Apostle and Stenning, *supra* note 170, at 129 - 130, debate as to the appropriate degree of citizen participation in law enforcement

"reflects not only choices about how responsibility for the policing function is best distributed within a police organization, but also how responsibility for this function should be shared between a police organization and the members of the community it serves...[T]here is evident a modern trend towards more 'open' participative models of policy-making. The notion that police policy-making is accomplished by bureaucrats applying their expertise behind closed doors finds less and less favour these days. As a result, expectations of police managers and civil servants have significantly changed in recent years, although there is by no means consensus as to what the roles of such officials should now be in the police policy and decision-making process. What is clear is that other players, such as police associations, community groups and the public more generally, are being recognized as having more significant roles to play in this process than was the case heretofore and, if they are to be able to contribute effectively to the process, their access to critical information must be greatly enhanced."

178. See, for example, the remarks of Chief Judge Nathan Green contained in the **Report of the Commission to Review the Police Act and Regulations (Nova Scotia, 1981):**

"Recognizing the many advantages of regional policing this Commission recommends that the province establish a policy that encourages regionalization of police services and that provides a system of grants which would make the regionalization attractive to the municipalities...regionalized policing provides the lowest cost consistent with the coverage and protection provided. That coverage provides a very high standard of equipment and other support services and the remuneration and benefits of officers and civilians is the highest in Canada. The question of need is very much related to cost and in this regard, the result respecting coverage, organizational flexibility and self-sufficiency provide a substantial case for justification on the basis of need. On the matter of personalized policing the experience has shown that with regionalized policing there can be an intensive focus on personal and direct public contact through initiatives contained in the many personalized community services possible through a regionalized approach." (at 73).

179. The development of police boards in Canada is described by P. Stenning, **Police Commissions and Boards in Canada**, *supra* note 67. The original legislation required the establishment of police boards only in the case of cities. In all other municipalities which were permitted to maintain municipal police forces, such forces continued under the direct authority of municipal council in respect of appointment, tenure and related matters. Although it is commonly asserted that the creation of police boards was prompted by a desire to insulate police against partisan interference by town council,

Stenning observes:

"The fact that the requirement for a Police Board was not extended to towns which maintained their own police forces gives pause again to question the true motivations behind the creation of this institution. One would have thought that if the sole motivation had been to 'remove the police from politics', there would have been little justification for not insisting that any municipality which maintained a municipal police force should have a police board. Yet to this day there is only one jurisdiction in the country which has legislated such a requirement. Part of the reason for this may have been the small size of many municipal forces...In such circumstances it might be thought somewhat ridiculous to insist that one policeman should be governed by a board consisting of three persons. Nevertheless this does not in itself seem to be an adequate explanation of the distinction which such legislation has consistently made between large and small municipalities." (at l.15)

180. As Stenning observes, supra note 67, there is no such thing as a typical police board. Rather, an examination of the operations of such boards across Canada reveals a high degree of variation in composition, mandate, role, authority, and status although some uniformity in respect of the primary functions performed by such boards (supervision of police budget, labour relations, personnel and police-community relations) can be discerned.

181. The process has been described by P. Stenning, supra note 67, in the following way:

"With the gradual development of systems of local elected government...an important change occurred in the government of urban police forces. Instead of being viewed principally as a service ancillary to the judiciary, police forces increasingly came to be viewed as primarily a municipal service. This fundamental change in attitude towards the function of policing was manifested principally in the provisions of statutes creating institutions of local government in the second half of the nineteenth century. Such statutes took two forms; for the largest urban areas, they took the form of charters of incorporation as cities, while for other urban areas they took the form of statutes with more general application laying down the ground rules for local government. It is in these first local government statutes and ordinances that the origins of local municipal police boards...are to be found. Typically, the early local government statutes of general application gave to municipal councils the right to pass by-laws to establish municipal police forces and to regulate the conduct and duties of their members. Such policemen as were considered necessary by the municipal council were appointed by the council, and held office at the pleasure of the council...The influence of partisan political interests over the operations of these new urban police forces was seen as a product of the transfer of the powers of appointment and control of the police forces from judicial to political office holders. It is hardly surprising, therefore, that [a compromise was sought] which would allow urban policing to remain a municipal service and yet be preserved free from partisan political influences...A major product of the search for a compromise...was the creation of special purpose bodies which

came to be known as boards of commissioners of police...". (at I.4 - 6).

182. As observed by the **Waterloo Region Review Commission** with respect to the purportedly 'non-political' character of police boards staffed by provincially appointed members,

"the values and beliefs [of a position that] places great emphasis on the need for keeping an emotional public from influencing police policy directly...are, or should be, unacceptable in a democratic scheme of government...The present system where the provincial government appoints the majority of police commissioners is every bit as 'political' and more potentially dangerous than a situation in which a government composed of twenty-four separately elected individuals with at least three different political stripes and seven different factions appoints the police governing body."

183. The provincial interest in policing has often been denied or minimized. For example, the **Royal Commission on Metropolitan Toronto (1977)** remarked:

"...the police are an integral and important part of the whole local public service system...Despite the close functional relationship of the police to other local service agencies, there is a deliberate and substantial organizational separation. Indeed, because provincial legislation dictates the creation of a separate board of commissioners of police with a majority of its members provincially appointed, because there is an appeal to a provincial body if the municipal council objects to the police budget, and because provincial regulations in this field are so extensive, the police function might well be thought to be more closely allied with the provincial government than the municipal. In any event, it is certainly true that decisions regarding policing are taken quite separately from the rest of the local decision-making process...These circumstances have made it impossible for either the public or its local elected representatives to make an informed assessment of the policies of the police commission and to evaluate the management and operation of the police force. In view of the importance of policing to the local community both as a service on its own and in its interrelationships with other local services, steps should be taken to increase the accountability and responsiveness of policing to local government".

Similar sentiments were expressed by the **Waterloo Region Review Commission** which observed that "In essence, the Province has been trying to exercise some of its own responsibilities in policing indirectly through a local structure. This has, in turn, weakened the responsibility for the police at the local level" and which therefore recommended that "police responsibility should normally be lodged with Council, although perhaps there could also be a statutory committee with some delegated power in respect to internal police affairs and complaints about police behaviour."

However, as Stenning has observed, supra note 67,

"...it is important to bear in mind that since Confederation, municipalities have never had any constitutionally defined sphere of jurisdiction. For, while the legislative jurisdiction of the Federal and

Provincial legislatures is defined constitutionally by the British North America Act, all municipal authority is delegated constitutionally by the Provincial legislatures. The significance of this constitutional arrangement, of course, lies in the fact that the municipalities have no constitutional claim to any jurisdiction over any municipal service, including policing. This means that the extent of municipal control over municipal policing is legally and constitutionally, if not politically, entirely at the discretion of the Provincial legislature. Indeed, even the definition of policing as a municipal service is, as has already been discussed, constitutionally within the exclusive jurisdiction of the Provincial legislatures". (at 1.11).

Provincial legislative initiatives do not exhaust the role of New Brunswick in relation to policing. Fiscal policy (expressed primarily through the unconditional grant system) and the executive budgetary process will also have a significant impact upon the structure governing the delivery of policing services in the province. At present, the operation of the unconditional grant system contemplates that services in the public interest (such as health, justice and social services) will be classified as a provincial responsibility while services to property are categorized as a municipal obligation.

184. This conclusion has been disputed by many critics of police boards such as the Royal Commission on Metropolitan Toronto (1977) which viewed police boards and analogous institutions as impediments to effective local government:

"In order to govern effectively such a diverse urban community as Metro, elected representatives must be able to see the community as a whole, and ensure that public responsibilities that are mutually interdependent...are coordinated and integrated. In an urban environment already complicated and complex, such integration is inevitably impeded if the responsibility for these functions is fragmented between a general purpose municipal council on the one hand, and many special purpose authorities on the other. In addition, the multiplicity of special purpose bodies at the local level is a substantial impediment to rational financial planning and control in local government. Historically, the deliberate insulation of certain services from political control was designed to enable their provision unfettered by political interference and compromise. As a result, these areas of public activity have grown and flourished with a minimum of financial restraint, often aided by direct conditional grant support from the province. If governing implies the careful and considered allocation of public resources among competing needs, then the current provisions for mandatory special purpose bodies frustrate the ability of municipalities to govern. It must be concluded that in many respects these special purpose bodies appear to be sub-units of provincial administration rather than units of local government administration. This distinction is important because it emphasizes the point that local special purpose bodies as they now exist diminish local self-government and increase provincial control over the administration of local services."

185. This conclusion has been challenged by J. Hogarth, "Police Accountability", *supra* note 16, who has asserted that the creation of institutions such as police boards may further confuse the process of ministerial accountability by "weakening the capacity of the minister to effectively deal with

the police in his jurisdiction." (at 166).

186. The presence of local judicial officers on the earliest police boards is a phenomenon of ambiguous significance. According to Stenning, supra note 67:

"Presumably, if removing the police from politics had been the sole aim..., it would have been simple enough to revert to the former system whereby the police force was appointed by and under the exclusive control of judicial officers, with elected politicians playing no part in the government of the police. The fact that this solution was not adopted may reflect the political difficulty of withdrawing from municipalities an authority once conferred on them, or it may reflect a belief that neither complete judicial control nor complete political control of municipal policing is an ideal or satisfactory solution. The fact that judicial officers were chosen to form the majority on most police boards raises another question about motivation...[S]everal plausible theories may be put forward. On the one hand, judicial officers may have been chosen for this role for no other reason than that, in the light of the recent history of policing, they seemed to be the obvious choice. On this theory, the inclusion of judicial officers on police boards was little more than a reflection of conservative thinking. Alternatively, judicial officers may have been selected in the belief that they would satisfy best the desire for an impartial, non-political element in the government of the police. This theory suggests that it is the non-political nature of the judicial office which was being sought, and implies that if other equally non-political and impartial persons could be found, they might be able to fulfil the role equally well. A third possibility is that the choice of judicial officers was motivated not simply by the desire to have non-political governance of the police, but rather by the belief that policing, in its essence, is a quasi-judicial rather than a purely civic function like any other civic function." (at l. 13 - 14).

187. This tendency has often been resisted. According to Stenning, supra note 67:

"In addition to their independence from municipal councils and from the police themselves, there is also a more general notion that police boards must be 'non-political' to be effective. This notion involves the concept of a police board which is independent of certain 'political' influences from wherever they may come...While the nature of the 'political' influences from which the police must be protected are rarely clearly enunciated by those who advocate this more general notion of independence, the suggestion seems to be that it is special political interests from which the police must be protected, on the grounds that such special interests do not properly reflect the overall political will of the citizens as a whole...More particularly, it is not made clear whether the overall political will of the community being police...may constitute such a 'special interest'. Certainly there are those who would argue that it can. The basis of such an argument lies in the assertion that the standards governing the exercise of their statutory and common law duties by the police are standards which transcend local community concerns, and that while this does not mean that such local concerns can safely be ignored, it does mean that

where such concerns generate policy which is in conflict with such standards, the standards must prevail, and the police must be protected from attempts to impose such local policies." (at III.68).

188. The relationship between police independence and police boards was noted by the Saskatchewan Court of Appeal in Bruton v. Regina City Policeman's Association, Local No. 155 (1945) 3 D.L.R. 437:

"The Police Commissioners constitute a separate department of municipal government; they are involved with special statutory powers and are independent of the municipal council except that they are dependent upon the council for monies with which to maintain the police force. In providing for such a body to administer the police force, I am of the opinion that it was the intention of the Legislature to ensure a just and impartial carrying out of the duties which devolve upon constables and peace officers and 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 such as the detention and arrest of offenders, the preservation of the peace, the enforcement of laws and other similar duties with which police officers are entrusted by law." (at 448 - 449).

189. J. L. J. Edwards, in Ministerial Responsibility for National Security, 1980, has observed in this context:

"In estimating the dangers of interference and pressures being exerted against the members of a police force, from the police chief down to the ordinary constable, what must be identified is the composition and powers of the local police authority...[in Ontario] the principle has been adhered to in the larger municipalities that the members of the police commission or board should consist of a mixture of elected representatives, drawn from the municipal council, and members appointed by the Lieutenant-Governor in Council, prominent among whom are usually members of the local judiciary...[this] framework provides the right kind of checks and balances that are so necessary to ensure the impartial application of the criminal law." (at 75).

190. The principal criticisms of police boards, from both an institutional and an operational perspective, may be found in a series of Ontario Commission Reports: The Task Force on Policing in Ontario (1972); the Ottawa-Carleton Review Commission (1976); the Commission on Metropolitan Toronto (1977); the Hamilton-Wentworth Review Commission (1978); the Waterloo Region Review Commission (1978).

191. As to this point, Stenning, supra note 67, has observed:

"When the imprecise general mandate of police boards which is provided in most police legislation in Canada, is combined with the lack of clarity in the legal principles governing the proper relationship between a board and its force, the part-time and short-term nature of the membership of most police boards, and the great variations which

exist in the size and nature of the police forces over which such boards exercise jurisdiction, it will be apparent that there is room for a great deal of variation in the roles adopted by police boards and the relationships which exist between such boards and their police forces. As a practical matter, the size of the force, the personalities of the chief and members...of the police board, and the presence or absence of external pressures on the board...are likely to influence the relationship between a police board and its police force much more than any legal or management principles which may have been enunciated. Indeed, it is precisely because the establishment of police boards has in large measure been justified in terms of isolating or 'protecting' the government of the police from such pressures and influences, that police boards have themselves become such a controversial institution." (at III.33 - 35).

And, as noted by the Waterloo Region Review Commission,

"The arguments for keeping politics out of the police are largely fraudulent. No matter how the system is structured, the police governing body must ultimately be responsible to the public -- that is accountability and that is politics. The present system where the provincial government, elected through a party system, appoints the majority of police commissioners is every bit as 'political' and more potentially dangerous than a situation in which a government composed of twenty-four elected individuals with at least three different political stripes and seven different factions appoints the police governing body. Recent allegations of impropriety against provincially appointed police commissioners...suggest that no structure is immune from such accusations."

192. Public Inquiry, Estevan Board of Police Commissioners and Estevan Chief of Police, 1980, Saskatchewan Police Commission.

193. In fact, according to J. Hogarth, "Police Accountability", supra note 16, the capacity of a police board to provide effective management may be inherently weaker than that of local council since it is contingent upon "the credibility of the individual members of the board, and the moral authority they have been able to get from the community in general and the police community in particular", a credibility which may be difficult to engender when public perception views police boards as composed of "worn out police officers and political hacks." (at 116).

194. See note 187. The results of the empirical study conducted by The Research Group, supra note 117, confirm this point. As noted by the Research Group, a wide discrepancy exists, not only with respect to the powers possessed and exercised by police boards across Canada, but also with respect to the perception of the Chief and members of police forces of the effectiveness of such boards. In calling for further empirical analysis, the Group concluded:

"Our study casts doubt on the usefulness of theoretical prescriptive statements on police governance made in isolation of data on actual practice. The dichotomous division of decisions into 'policy' and 'operations' is frequently accepted without question...However, it does not explain our data on the allocation of decision-making responsibilities. At a minimum more realistic definitions of policy

decisions and operations decisions must be developed. It was also clear that to understand actual governing behaviour required consideration of the influence of other factors quite unrelated to the policy or operations content of decisions. The literature suggests that notions of police professionalism and police independence play important parts in defining the roles of police personnel and governing authorities. However, perceptions of what is meant by police professionalism and police independence varied widely among both police personnel and governing authorities...

The study also explored whether there were differences and similarities among types of forces. The literature indicated that municipal forces governed by boards and those governed by councils may differ in the division of responsibilities for decisions between the governing authorities and police personnel. We found no such differences among Quebec municipal forces, other Canadian municipal forces and RCMP detachments in the pattern of division of decision making responsibilities. In general, Quebec police respondents indicated less governing authority decision-making responsibility than their police counterparts elsewhere...Important differences existed between RCMP detachments and municipal forces. RCMP respondents indicated that governing authorities had fewer decision-making responsibilities, the significant exception being for items of major financial significance...

The study also considered whether governing authority and police personnel differed in their perceptions of governing authority decision making responsibilities. Perceptions differed considerably in several instances. In interview questions of who had made or would make specific decisions, chiefs perceived governing authorities as likely to be directly involved only half as frequently as did the governing authorities themselves. While there was little difference between municipal force chiefs and governing authorities on high policy items, governing authorities accorded themselves more responsibility for medium and low-level items than chiefs accorded them. RCMP detachment commanders accorded governing authorities little role in decision making, much less so than their municipal police counterparts...We also found variation between governing authorities and police respondents in the degree of access thought appropriate to police-held information. There would seem much potential for conflict in this area...

In general, the study shows that there are no simple rules to explain the division of responsibilities between police personnel and governing authorities. These are complex and influenced by many interacting persons and bodies...Before an informed debate can take place on what 'should be', further work is required to clarify and develop a consensus on what is meant both in theory and in practice by terms such as policy, operations, day-to-day administration, police independence and police professionalism. Given the responsibilities of members of governing authorities, the short time they have to develop an understanding and modus operandi regarding such issues poses special problems. Special attention should also be directed to differences among forces. Although there is insufficient evidence to support a particular model or models, further studies might highlight

the advantages and disadvantages of different ways of allocating responsibility for decision-making...Further study might also provide the opportunity to investigate the police governance roles of groups other than chiefs and municipal governing authorities. Other groups identified during this study as having an impact include: provincial attorneys and solicitors general, crown attorneys, provincial police commissions, police unions and associations and a variety of municipal officials. Clearly there can be no comprehensive framework of police governance without considering the roles of these groups." (at 76 - 80).

195. **The Task Force on Policing in Ontario**, supra note 185.

196. The history of police boards in New Brunswick is contained in Stenning, supra note 67, at 1.48 - 1.57. In describing the evolution of such boards, Stenning observes that "municipalities, once they were given direct control of their police forces, seem historically to have shown a particularly strong resistance to any attempts to deprive them of it." Although the tradition of judicial control over local forces persisted in this province well into the post-Confederation period, certain communities did experiment with the concept of a board of police commissioners. Thus, for example, in 1907, Moncton established a board of police commissioners composed of the mayor and two judicial officers (a county court judge and the police magistrate). In 1908, Fredericton established a board, designated as a Police Commission, consisting of three ratepayers appointed by the provincial cabinet. While the Commission was vested with significant statutory powers, section 15 of the relevant legislation provided city council with the discretion to dissolve the Commission at any time: and "thereafter the said City Council, or a committee thereof, of not less than three members of the Council, shall have and exercise all the powers and duties to be exercised by the said Board of Commissioners under this Act, and the said City Council may, at any time afterwards upon a like vote, repeal such bye-law and thereafter said Board shall be re-constituted and re-established with all the privileges and powers, and subject to all the conditions of this Act". The legislation creating the Fredericton and Moncton Boards has since been repealed.

197. Recent amendments to the Ontario Police Act, (S. O. 1990, c. 10) place the primary responsibility for governance of municipal forces in the hands of boards of police commissioners. The powers of such boards are enumerated with a high degree of precision and include the following:

- "31(1). A board is responsible for the provision of police services and for law enforcement and crime prevention in the municipality and shall,
- (a) appoint the members of the municipal police force;
 - (b) generally determine, after consultation with the chief of police, objectives and priorities with respect to police services in the municipality;
 - (c) establish policies for the effective management of the police force;
 - (d) recruit and appoint the chief of police and any deputy chief of police, and annually determine their remuneration and working conditions, taking their submissions into account;
 - (e) direct the chief and monitor his or her performance;
 - (f) establish an employment equity plan..., review its implementation by the chief of police and receive regular reports from him or her on that subject;

- (g) receive regular reports from the chief of police on disclosures and decisions on [secondary activities];
- (h) establish guidelines with respect to the indemnification of members of the police force for legal costs;
- (i) establish guidelines for the administration by the chief of police of the public complaints system;
- (j) review the administration by the chief of police of the public complaints system and receive regular reports from him or her on that subject."

In contrast, for example, the Municipal Act of Manitoba (R. S. M. 1988, c. M225) simply provides that:

- "291. The council of a municipality may pass by-laws...
- (e) for regulating the government of the police force, for preventing neglect or abuse, and for rendering the force more efficient in the discharge of its duties".

The Police Act of Alberta (S. A. 1988, c. P-12.01) represents a compromise. Every municipality which is policed by municipally established forces must form a municipal police commission which is responsible for 'oversight' of the police service and vested by section 31(1) with the following powers:

- (a) [to] allocate funds that are provided by the council;
- (b) [to] establish policies providing for efficient and effective policing;
- (c) [to] issue instructions as necessary to the chief of police in respect of such policies;
- (d) [to] ensure that sufficient persons are employed for the police service for the purposes of carrying out the functions of the police service."

198. See, for example, Hawkins v. Bepey and Others, [1980] 1 All E. R. 797 in which it was held that statutory powers of 'direction and control' included powers of control over charging policies. Even stronger authority for this proposition is provided by Re Copeland and Adamson (1972), 7 C.C.C.(2d) 393 in which the power of the Toronto Board of Police Commissioners to establish policy on electronic surveillance was upheld.

199. Although both council and the local board of police commissioners are empowered respectively to enact by-laws and make rules which are consistent with their responsibilities under the Act, the content of such rules and by-laws would most likely be restricted to the regulation of policy matters.

200. In this regard, one must also examine the effect of section 6(1) of the Police Act which empowers a board, council or chief of Police to request that the Minister assign the conduct of an investigation to another force, a right which as one commentator has observed "seems to imply that a board or council may legitimately concern itself with the investigation of particular alleged offences." Stenning, supra note 22, at 88.

201. (1957) O. R. 28, at 30.

202. Supra note 197, at 30 - 31.

203. (1955) A. C. 457, at 489.

204. See the discussion by P. Stenning, **Police Commissions and Boards in Canada**, *supra* note 67 who observes:

"The application of this principle to police officers in all of the provinces, however, is less clear. For the decision of the Ontario Court of Appeal...seems to be based not only on an exposition of common law relating to the status of constables, but also on the specific provisions of the Ontario Police Act under which municipal police forces and police boards are established in that province. But the provisions of the Police Acts of some of the other provinces differ significantly from those of the Ontario Police Act in ways which may have important implications for the applicability of the 'independence' doctrine...In reaching its decision...the Ontario Court of Appeal also appears to have been influenced by the fact that under the Ontario Police Act the power to order an investigation into the conduct of members of municipal police forces is vested in the provincial Attorney General and not in municipal boards." (at III.20 - 24).

205. Police Act, s. 5(1).

206. Prime Minister Trudeau, December 9, 1977, quoted in the **Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police**, (1981, Second Report, Vol. 2 at 1006).

207. J. Ll. J. Edwards, **Ministerial Responsibility for National Security**, 1980, at 96.

208. **The Report of the Royal Commission on the Dismissal of Harold Hubert Salisbury from the Office of Commissioner of Police, 1978** quoted in the **Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police** (1980, Second Report, Vol 2, at 964).

209. As observed by J. Ll. J. Edwards, **Ministerial Responsibility for National Security**, 1980:

"It is conceived on the other hand that the methods used by a police force in executing its criminal law mandate...should be of continuing concern to the appropriate Minister and that he has not only the right but a duty to be kept sufficiently informed. With information placed at his disposal the Minister must judge the acceptability of the police practices, not in his capacity as a partisan member of the Government but rather as an extension of the role historically associated with the office of Attorney General as guardian of the public interest. Governments have chosen to use the title of Solicitor General to describe the minister responsible for policing in the federal jurisdiction, and in some of the provinces it is all the more necessary that the interpretation of the Solicitor General's duties be closely allied to those of the Attorney General. In exercising this kind of sensitive responsibilities we should be under no illusion that the Minister concerned can expect to be subjected to public and parliamentary criticism from diverse quarters. However, in the absence of effective controls over the police by the courts and an objection to resorting periodically to the cumbersome machinery of a Royal Commission, there has to be more immediate means of underlining the ultimate accountability of all police forces to the legislative arm of government." (at 100).

210. The ability of the judiciary to adequately monitor the police has been the subject of debate. As noted by the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, (1981, Second Report, Vol. 2):

"We note that the Prime Minister...assigned the source of protection against police misdeeds on the law enforcement side of the RCMP to the courts and not to government. Such a policy implies two things. The first is that the courts will become aware of police misdeeds during the course of criminal trials on other matters and will make their views known from the Bench, and the second is that those views will have a salutary effect on the police...In our view reliance on comments from the Bench is an entirely haphazard and unsatisfactory method of control, depending as it does on the almost accidental disclosure of a misdeed in the course of other proceedings, and the inclination of the judge to comment on it or not, usually without the benefit of any background evidence or argument. The second implication of the policy is that it transfers to the private citizen the initial responsibility for correcting alleged abuses either by laying an information or bringing a civil action against the Force. There does not appear to be a strong tradition in Canada of the civil courts being used by private citizens as a means to curb police transgressions. The cost alone of such civil action is likely to deter all but the exceptional person. Neither is it sufficient to invoke the right of private prosecutions without also pointing out the statutory powers of the Crown to take over such private prosecutions and to determine whether to press forward with the case or to enter a stay of proceedings."

211. According to J. Li. J. Edwards, *Ministerial Responsibility for National Security*, 1980,

"...the Solicitor General of Canada and the provincial Ministers of Justice and Solicitors General, each of whom has responsibility to supervise the policing that is carried out within his own jurisdiction, should regard it as their duty to be kept informed of the methods and procedures followed by the federal, provincial and municipal police forces for whose actions they are, by statute, accountable to Parliament or the provincial legislature. At the very least this should require the appropriate Minister to become familiar with each force's standing instructions on investigative procedures....this does not entail an obligation to apprise the Minister of the daily operational activities of police forces." (at 102).

The appropriate relationship between the Solicitor General and the police has been analogized to that which obtains between the Attorney General and the individual Crown prosecutor. According to the Law Reform Commission of Canada,

"The police are by legislation subject to the supervision of a law officer; however, we feel that this direction should only be exercised at the level of general policy directives. At the level of individual cases, the independence of the police should be respected. In this

respect, the supervision of the police by the Solicitor General or other law officer should be similar to the present superintendence of the prosecution service by the Attorney General." (*Controlling Criminal Prosecutions: the Attorney General and the Crown Prosecutor*, Working Paper 62, 1990).

212. J. Ll. J. Edwards, *Ministerial Responsibility for National Security*, 1980, at 72. See also Stenning, *supra* note 67 for a discussion of the development of Police Commissions in Canada.

213. The history of Police Commissions in Canada is contained in P. Stenning, *Police Commissions and Boards in Canada*, *supra* note 67.

214. As Stenning remarks, *supra* note 67, the concept of independence in the context of bodies such as provincial Police Commissions is a variable one: "The notion of independence, when applied to a body such as a provincial police commission, means different things to different people. To its proponents it generally means the freedom to investigate and inquire into the police and the operation of police forces, and if necessary into the role of the government itself in such matters, without interference from either the police or the government. To its opponents, however, such independence is often characterized as an absence of sufficient political or democratic accountability for the activities of such commissions." (at II.123).

215. Of course, as Stenning indicates, *supra* note 67, the practical extent of the independence of the various provincial police commissions will depend upon a number of factors: its authority to determine its own business and priorities without interference from, and without having to obtain the approval of, external agencies; the source of staff recruitment for it is clear that "if [as has apparently been the case] most provincial police commissions rely very heavily on the ranks of serving and ex-police officers as a source of recruitment]...such practices...inevitably raise questions about the actual independence of such commissions from the police services under their jurisdiction"; and the scope of the police commission's accountability to the central executive.

216. Stenning, *supra* note 67, at II.133.

217. Stenning, *supra* note 67, at II.139.

218. Originally, according to provisions of the former *Police Act*, the Police Commission was competent to entertain complaints against individual members of the RCMP. The constitutionality of this aspect of the Commission's jurisdiction was dubious -- see *Scowby v. Glendenning* (1986) 32 D.L.R. (4th) 161. In any event, constitutional uncertainty has been resolved by the creation of the federal *Public Complaints Commission*, created by Part VI of the *Royal Canadian Mounted Police Act*. While the retention of a review jurisdiction in relation to any aspect of policing by the RCMP may be regarded as somewhat anomalous, it is justifiable on both a philosophical and a pragmatic basis. With respect to the former, it would appear that this jurisdiction is the logical counterpart of the Commission's statutory capacity to "assess the adequacy of each police force and the Royal Canadian Mounted Police and whether each municipality and the Province is discharging its responsibility for the maintenance of an adequate level of policing" (section 20). Furthermore, the assumption of such a jurisdiction is necessary since the mandate of the federal *Public Complaints Commission* is limited to the disposition of allegations of individual misconduct. As noted in the *1988-89 Annual Report of the Public Complaints Commission*: "The Commission has no jurisdiction to examine Force policies and procedures unless it has a relevant complaint concerning the conduct of an RCMP member. Nor has the Commission been given the power to monitor or audit Force operational activities." (at 57).

219. **Report of the Royal Commission on Criminal Procedure** (the Philips Commission, United Kingdom, 1981) at 146 - 149.

220. An illustration of this process is provided by the recent treatment of Dr. H. Morgentaler by the Ontario police and crown authorities. As discussed by the former Attorney General of Ontario, the Hon. Ian Scott, in "Law, Policy and the Role of the Attorney General: Constancy and Change in the 1980's" (1989), 39 U.T.L.J. 109:

"The Toronto police...charged Dr. Morgentaler and his associates...There is no doubt that they had reasonable and probable grounds to believe that an offence...was being committed. But, as has been emphasized, this is not the only decision to be made in deciding whether to proceed to trial...Given that the facts supporting the charge, and presumably the defence raised, would be virtually identical to the charge upon which the accused were tried and acquitted, it was...in the interests of justice that any further allegations of criminal activity be held in abeyance until the highest court authoritatively ruled on the legality of the impugned conduct. With these factors in mind, the charges laid were immediately stayed. This example clearly demonstrates the differences in the roles of the attorney general and the police. Before laying the charges, the police consulted the attorney general and his agents and were advised that any charges that were laid would, in the circumstances, be stayed. Notwithstanding this advice, the police concluded that it was their duty and responsibility to lay the charges that they believed on reasonable and probable grounds were warranted. The attorney general, while acknowledging the role of the police that entitled them to take this action, did what he believed the administration of justice required. To some observers, it may have appeared that the right hand did not know what the left was doing. In my view, that difficulty does not offset the importance of the principle of separation." (at 117 - 118).

221. Pre-charge screening is also conducted by the Crown in British Columbia and Québec. In certain other jurisdictions such as Manitoba and Nova Scotia, a formal process of post-charge screening has been adopted.

222. **Topic 100, Investigations: Policy and Guidelines.**

223. **Public Prosecutions: Operations Manual, Topic 130, "Initiating Prosecutions".**

224. **Public Prosecutions: Operations Manual, Topic 120 -- Guidelines for Initiating Prosecutions, section 120-2.**

225. Which, according to section 120-4 of the **Public Prosecutions: Operations Manual** encompasses such matters as the complainant's attitude, seriousness of the offence, pre-charge delay, age and health of the potential accused, public perception.

226. **Public Prosecutions: Operations Manual, section 160-1.**

227. See, for example, the **Commissioner's Report, Royal Commission on the Donald Marshall, Jr. Prosecution, 1989, Vol. 1: "under our system, the policing function - that of investigation and law enforcement - is distinct from the prosecuting function. We believe the maintenance of a distinct line**

between these two functions is essential to the proper administration of justice." (at 232).

228. As noted by the Law Reform Commission of Canada in **Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor**, Working Paper 62:

"...the major advantage of allowing the police an unrestricted right to lay charges is that it more affirmatively maintains the independence of the various aspects of the judicial system. The investigation of crime should be kept separate from the prosecution of crime, a position that is supported by the recent trend in Canada to remove control of the police from Attorneys General. The need for independence in the control of prosecutions is particularly clear in cases that involve allegations of criminal conduct by police officers. Without a division of authority between investigations and prosecutions, a strong potential for conflict of interest would exist." (at 71).

229. R. v. Edmunds (1978), 45 C.C.C.(2d) 104, at 116.

230. See, for example, Campbell v. Attorney General of Ontario (1987), 31 C.C.C. (3d) 289; Re Forrester and R. (1976), 33 C.C.C. (2d) 221.

231. **Criminal Procedure: Control of the Process**, Law Reform Commission of Canada, Working Paper 15, 1975.

232. Boucher v. R., [1955] S.C.R. 16, at 23 - 24.

233. See Gregory, "Police Power and the Role of the Provincial Minister of Justice" (1979), 27 Chitty's L. J.13, at 15 - 16: "The belief in guilt arises naturally enough in the process of investigation and arrest; it leads to a natural urge to encourage guilty pleas. This is sometimes accomplished in two ways: charging a more serious offence than the facts warrant, or charging several offences arising out of one act." See also the Commissioner's Report in the **Discretion to Prosecute Inquiry** (British Columbia, 1990) at 27.

234. According to Gregory, supra note 228:

"...the police officer is not trained or experienced in either the niceties of the law or trial tactics and rules of evidence. These factors have a considerable bearing on the question of the appropriate charge or whether any charge is appropriate. That decision is best left to an experienced criminal trial lawyer working closely with the investigating officer...On some occasions there is a legitimate case to be made to leave the issue up to the judge, particularly when the factors for and against the charge are difficult to resolve. This is the conclusion reached in most cases if prima facie evidence of guilt exists. In weighing the issue, the prosecutor normally considers the harm done to an individual from the mere laying of the charge; he is conscious that some will have lingering doubts regardless of how unequivocal the judgment of innocence. The damage done by the mere laying of an unjustified charge can seldom be wholly repaired." (at 16).

235. That pre-charge screening may ultimately result in a higher conviction rate (due to the avoidance of 'bad' or inappropriate charges) is borne out by the findings of the **Report of the Canadian Sentencing Commission (1987)** which determined that pre-charge screening in New Brunswick deterred plea-bargaining and multiple charging by the police and resulted in greater process efficiency due to a higher number of guilty pleas in cases brought to trial and a more co-operative Crown-defence relationship.

236. According to a submission of the B. C. Association of Chiefs of Police presented to the Justice Reform Committee on May 6, 1988:

"The fundamental weakness of the charge approval process is that the entire process is private; there is no information and hence no publicly-accessible paper trail, and the decision not to charge is done privately without written reasons and without public accountability. This yields two negative consequences. First, the victim, the police and the media do not know what considerations went into the decision not to prosecute. Second, it creates a private process where impropriety can occur. The privacy of the charge approval process excludes the checks and balances which was [sic] integral to the former system." Quoted in the Commissioner's Report in the **Discretion to Prosecute Inquiry (1990)**, at 22.

237. As observed by the B. C. Association of Chiefs of Police, quoted in The Commissioner's Report of the **Discretion to Prosecute Inquiry (1990)**:

"...in applying the 'substantial likelihood of conviction' prong of the quality control test, the Crown may have to make judgments respecting complex legal issues and issues with respect to which the law is not clear. Similarly, in applying the 'public interest' prong of the test, the Crown weighs public policy issues such as the nature and seriousness of the offence, the personal circumstances of the accused and the harm, if any, to the victim. In both respects, these decisions invade the role of the judiciary. Privacy, and the absence of independent review of these decisions compound the concern respecting the potential for abuse." (at 23).

238. According to Stenning, **Appearing for the Crown, (1986)**:

"It is a fact, however, that many provincial Attorneys General and Ministers of Justice in Canada have adopted policies towards police involvement in prosecutions whereby the police are required to obtain the consent of public prosecutorial authorities before laying charges. What then of the 'police officers' rights to invoke the law under the Criminal Code? The answer to this apparent conundrum seems to lie in the fact that a police officer's prosecutorial authority under the Criminal Code does not legally derive from his status as a police officer. Indeed he has no more prosecutorial authority than any other citizen. Since he does not have such authority as a police officer, therefore, it is difficult to see how there can be any impropriety in his being subject to direction or control as to his exercise of his prosecutorial authority when serving as a police officer. Whatever entitlement he has to exercise prosecutorial authority, in other words,

is an entitlement which he possesses as a citizen (like any other) but not as a police officer. When serving as a police officer, his entitlements as a citizen become subordinate to his duties as a police officer, including the duty to obey the lawful instructions of his superiors and others, such as Crown prosecutors, who may be given authority over him." (at 277).

239. For this reason, jurisdictions which have recently considered the institution of formal pre-charge screening have rejected it in favour of an ex post facto system of Crown review conducted in light of articulated prosecutorial guidelines: see, for example, the recommendations contained in *The Commissioners' Report of the Royal Commission on the Donald Marshall, Jr. Prosecution*, Vol. 1, Recommendations 37 and 38; *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor*, Law Reform Commission of Canada, Working Paper 62, Recommendations 18 - 23; *Crown Attorneys' Policy Manual*, Manitoba Department of Justice, 1991, Guideline Nos. 2:INI:1.1 and 2:INI:1.2 which confirm that "The police have the ultimate right and duty to determine the form and content of charges to be laid in any particular case according to their best judgment, subject to the Crown's right to withdraw or stay the charges after they have been laid."

240. See, for example, Stenning, supra note 22. Hogarth, supra note 16, observed a profound division in perception between the provincial executive and the RCMP with respect to the extent of provincial control. Preparatory to a study concerning the operation of mechanisms of police accountability, Hogarth circulated a questionnaire to both senior officials and commanding officers of the RCMP in all provinces in which the RCMP performed policing services pursuant to intergovernmental agreements. The respondents were asked to select among seven options a term to describe the powers of the Attorney General with respect to twenty-four key policing decisions which ranged from issues of policy development to the conduct of particular cases. The results of the survey produced the following findings:

"There was tremendous variation from province to province, which was not only in the way in which the Attorneys General believe they control the police, but also in the perceptions of the commanding officers of the RCMP. In general, the provinces with larger RCMP establishments experience greater difficulty in exercising control over the RCMP than provinces with smaller establishments. This can be accounted for partly in terms of scale, in that communication becomes more difficult according to size. However,...the real reason is that in the larger provinces the RCMP have been faced with a level of management which is concerned with police policymaking and with doing police research, and therefore the Minister is receiving a second opinion. Thus, in these larger areas, there is an attempt to integrate policing with policy in the administration of justice generally. The second thing that is evident from the replies is that those ministers who make demands on the RCMP emanating from a position of constitutional authority, experience more difficulty than those provinces who work out ad hoc solutions at the local level...It was clear then that the degree of co-operation between the RCMP and the minister responsible for policing at the provincial level depends more on informal working relationships on a face-to-face level than anything else. The last finding was one I did not expect. In general, the RCMP senior police managers had a perception of more control being exercised by the provinces than the provincial ministers themselves had. Most RCMP commanding officers seemed to feel they were required to carry

