

Peace Officer Concept

The protection of the individual from oppression and abuse is a major interest in a free society; but so is the effective prosecution of crime, an interest which at times seems forgotten. As against the rights of the individuals must be set the interests of society but as Lord Simonds found in Christie et al v. Leachinsky it is not easy so to state the law as not on the one hand to impinge upon the liberty of the subject or on the other hand to make more difficult the duty of every subject of the King to preserve the King's Peace.

John Honsberger, "The Power of Arrest and the Duties and Rights of Citizens and Police" (1963) Special Lecture before the Law Society of Upper Canada, p.5.

The Order-in-Council directed the Commission to examine the proposition that employees of the Security and Investigation Services Branch of the Post Office should be given the status of peace officers. At its hearings and in the briefs it received, the Commission heard arguments for and against the proposal. In support of their position postal inspectors, who were the strongest contenders for the granting of peace officer status, put forward a wide range of arguments. Some of these, such as the enhancement of available training programs and the improvement in the status and peer recognition of postal inspectors, have been dealt with elsewhere in this report. Six of the subjects raised in support of the need for peace officer status required careful legal analysis. These arguments centred on:

- power of arrest;
- power of detention;
- power of search;
- power of seizure;
- power of investigation and interrogation;
- use of force;
- protection for *bona fide* mistakes;
- access to police information;
- independence from management.

The gist of the inspectors' arguments is presented in introducing the Commission's analysis of each point.

The Canadian Bankers' Association supported the conferring of peace officer status on postal inspectors. The Association's arguments, however, were different from those of the inspectors. Indeed, the Association called for a reorganization of the Security and Investigation Services Branch along the lines of the U.S. Postal Inspection Service. In its testimony the Association emphasized the losses sustained by its major members which it estimated at several millions of dollars per year, and submitted that the losses of precious metals, money packets and bank cards were of such proportions as to warrant increased security and the granting of greater powers to postal inspectors. In support of its submission, the Association also presented statistics supplied by the federal Department of Supply and Services, placing loss sustained from stolen Government of Canada cheques from 1975 to 1979 at \$10,662,196.

In contrast to the support of the Canadian Bankers' Association, three attorneys-general and the Canadian Association of Chiefs of Police opposed giving peace officer status to postal inspectors. The attorneys-general presented a strong constitutional case against the granting of such powers. The Honourable R. Roy McMurtry, Solicitor General for the province of Ontario, stated:

Complications arise, however, where the activities of the security operation derogate from provincial responsibility for the administration of justice. We must express our basic opposition to the proliferation of federal police forces. In our view it is wrong to create new police forces or quasi-police forces for each type of federal property. Both police and public become confused as to who is in charge and doubts are raised regarding the role and authority of the local police. Also, the concept of the "peace officer" becomes diluted and takes on less meaning as more and more persons acquire the status. As mentioned, we are also concerned about federal initiatives which may impact negatively upon provincial responsibility for the administration of justice.

The Honourable Allan Williams, Attorney-General for the province of British Columbia, stated in a written submission:

I am concerned about the number of anomolous police forces presently operating in British Columbia under a variety of statutes and I have requested officials of the Ministry of the Attorney-General to undertake a review which, hopefully, will lead to measures reducing that number and bring under effective control those security agencies which cannot be eliminated altogether. In these circumstances, I would most certainly resist any initiative to move in any other direction.

The Honourable Rodman E. Logan, Attorney-General for the province of New Brunswick, submitted that:

... the ultimate responsibility for investigations into contraventions of the criminal law within the province, the apprehension and arrest of offenders and their prosecutions before the courts rests with the provincial Attorney General.

The Canadian Association of Chiefs of Police also opposed the conferring of peace officer status because of its constitutional implications and because the Association felt that a proliferation of police bodies was neither desirable nor warranted from the point of view of the principle of accountability or the control of policing.

The Canadian Labour Congress, the Canadian Union of Postal Workers, the Letter Carriers' Union of Canada, the Public Service Alliance of Canada and the International Brotherhood of Electrical Workers also opposed the granting of peace officer status for several reasons, but mainly on the grounds that a security force should be strictly preventive and not investigative. They urged that the work and duties of the Post Office's Security and Investigation element should be restricted to physical security and that investigations should be left to public police forces.

The Canadian Bar Association also opposed the conferring of peace officer status. At the same time, the Association stressed the need for full and complete investigation of losses even to the extent of giving full access to Post Office premises to public police forces.

In dealing with these arguments the Commission required a precise appreciation of the powers sought and how these differ from those which postal inspectors now have. To that end, the historical development of the peace officer concept was examined and the legal aspects were subjected to a thorough analysis.

Historical perspective

Historically, the peace officer had but limited powers.

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 endued with the authority of office.¹

The powers of peace officers were examined in England in 1929 by the Royal Commission on Police Powers and Procedures. It commented,

The police of this country have never been recognized either in law or by tradition, as a force distinct from the general body of citizens. Despite the imposition of many extraneous duties on the police by legislation or administrative action, the principle remains that a policeman, in the view of the common law, is only "a person paid to perform, as a matter of duty, acts which if he were so minded he might have done voluntarily".

Indeed a policeman possesses few powers not enjoyed by the ordinary citizen, and public opinion, expressed in Parliament and elsewhere, has shown great jealousy of any attempts to give increased authority to the police. This attitude is due, we believe, not to any distrust of the police as a body, but to an instinctive feeling that, as a matter of principle, they should have as few powers as possible which are not possessed by the ordinary citizen, and that their authority should rest on the broad basis of the consent and active cooperation of all law-abiding people. At the same time it must be realized that there are certain duties of a special nature which, if they are to be entrusted to the police and adequately performed by them, require the grant of special powers.

It follows that the police, in exercising their functions, are, to a peculiar degree, dependent upon the goodwill of the general public and that the utmost discretion must be exercised by them to avoid over-stepping the limited powers which they possess. A proper and mutual understanding between the police and public is essential for the maintenance of law and order.²

This statement was endorsed by the later British Royal Commission on the Police 1962.³ More recently, a Canadian writer has commented,

Many people believe that police officers' powers of arrest are much greater than those of private citizens. While police officers have additional powers, they are not extraordinarily powerful and there is a historical explanation for this. Before organized full-time police forces were created one hundred and fifty years ago, citizens were responsible for the apprehension of criminals. These citizens' powers have now been delegated to the police.⁴

Although a peace officer may possess "few powers not enjoyed by the ordinary citizen", Parliament has seen fit, over the years, to grant "peace

1. Critchley, T. A., *A History of Police in England and Wales*, Second Edition, London, England, (Patterson-Smith), p. 17.

2. Cmd. 3297.

3. *Report*, pp. 10-11.

4. Parker, Graham, *An Introduction to Criminal Law*, Toronto, (Methuen), p. 262.

officer'' powers to many. In fact, the Commission's research revealed that no fewer than 161 federal statutes, in addition to the Criminal Code, grant special powers traditionally reserved for peace officers. Attached to this report as Appendix D is a list of this legislation and the powers granted by it. For the purposes of this report it is not necessary to deal with the whole body of legislation. Attention need only be paid to the Criminal Code and the two statutes dealt with most frequently by postal inspectors (the Post Office Act and the Financial Administration Act). The Commission would be remiss, however, if it did not stress that revision of this proliferation of statutory law is desirable, if not essential. The need for a review, whether from a constitutional or any other viewpoint, is demonstrable and need hardly be underlined.

The primary definition of a 'peace officer', and the one which has guided the Commission in its deliberations, is set out in section 2 of the Criminal Code.

'peace officer' includes

- (a) a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer and justice of the peace,
 - (b) a warden, deputy warden, instructor, keeper, gaoler, guard and any other officer or permanent employee of a prison,
 - fa0008(c) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process,
 - (d) an officer or person having the powers of a customs or excise officer when performing any duty in the administration of the *Customs Act* or the *Excise Act*,
 - (d.1) a person appointed or designated as a fishery officer under the *Fisheries Act* when performing any of his duties or functions pursuant to that Act, 1976-77, c.35, s.21,
 - (e) the pilot in command of an aircraft
 - (i) registered in Canada under regulations made under the *Aeronautics Act*, or
 - (ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft registered in Canada under those regulations,
- while the aircraft is in flight, and
- (f) officers and men of the Canadian Forces who are
 - (i) appointed for the purposes of section 134 of the *National Defence Act*, or

- (ii) employed on duties that the Governor in Council, in regulations made under the *National Defence Act* for the purpose of this paragraph, has prescribed to be of such a kind as to necessitate that the officers and men performing them have the powers of peace officers; 1972, c.13, s.2(2).

Peace officer status is not restricted to those listed in this definition. The courts have held that section 2 of the Criminal Code is expansive rather than exhaustive.⁵ The principle has emerged that a person does not have to be specifically designated as a peace officer to be considered as one for the purposes of the Criminal Code. If a position created by statute is vested with sufficient power to bring it within the Criminal Code definition of 'peace officer', then the holder of that position is deemed to have the status or authority of a peace officer. It should also be borne in mind that the powers most often associated with a peace officer (arrest, detention, search and seizure, investigation and interrogation and the use of force) are not specially reserved for peace officers.

Legal analysis

In examining the legal implications of the proposal that postal inspectors be granted the status of peace officers, particular attention was paid to the powers being sought. Postal inspectors argued that they required the powers of peace officers in order to fulfil their duties. To arrive at a conclusion on whether to recommend that peace officer status be granted, it was necessary to know why the power was being sought, what the status of peace officer entailed and whether there were sufficient powers available without peace officer status to meet the required goal. The following discussion and legal analysis are organized around the arguments in favour of the proposal.

Power of arrest

Many postal inspectors expressed the view that they required the additional powers of arrest that only peace officer status would provide. They argued that the existing power of arrest, which is essentially the right to make a citizen's arrest in accordance with section 449(1) of the Criminal Code, is much too limited. In particular the requirement that to make a citizen's arrest one must observe an offence being committed, was considered to be restrictive. The powers found in section 449(1), it was argued, are not adequate in the frequent cases where offences are witnessed from observation galleries or over closed circuit television. The resulting necessity

5. See, for example *R. v. Renz*, (1973) 10 C.C.C. (2d) 250, in which the Ontario Court of Appeal held that a conservation officer was a peace officer for the purposes of section 2 of the Criminal Code.

of calling in the public police causes delays which, in addition to increasing the cost, often frustrates successful prosecution.

The McRuer Commission into Civil Rights defined arrest in 1969:

Any actual restraint imposed on a person's liberty against his will constitutes an arrest. The restraint may be imposed by the application of force, or by circumstances that imply a threat of force.⁶

It follows from the terms of the definition that one does not have to be a peace officer to carry out an arrest although peace officers have been given certain particular powers of arrest in the Criminal Code. Similarly, a distinction must be drawn between the power to arrest with and without a warrant.

Arrest without warrant

A wide variety of federal and provincial statutes give peace officers the power to arrest without warrant. While many of these remove the need for "direct observation" that is usually required for arrests by persons other than peace officers, some do not. The provisions for arrest without warrant in the Criminal Code illustrate the variations. Subsection 450(1) of the Criminal Code, for example, provides that:

A peace officer may arrest without warrant

- (a) a person who has committed an indictable offence or who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence,
- (b) a person whom he finds committing a criminal offence, or
- (c) a person for whose arrest he has reasonable and probable grounds to believe that a warrant is in force within the territorial jurisdiction in which the person is found.

Paragraph (a) of this subsection, which relates only to indictable offences⁷, does not require direct observation of an offence being committed. It permits arrest on a belief held on "reasonable and probable grounds". It also allows arrests in anticipation of a crime being attempted. Paragraph (b) does require direct observation, though it extends to all "criminal offences", including those which may be dealt with on summary conviction. The requirement that a peace officer must find someone "committing" an offence to make an arrest under this paragraph has been interpreted by the courts to permit arrest if a person is "apparently committing" an offence.⁸

6. Royal Commission of Inquiry into Civil Rights — McRuer (1969) Report No. 1, Vol. 2, p. 725.

7. The courts have held that, for the purposes of powers of arrest without warrant, "indictable offence" includes so-called "dual" offences which may be prosecuted on indictment or on summary conviction, at the election of the prosecutor see *R. v. Huff* (1980) 50 C.C.C. (2d) 324.

8. *R. v. Biron* (1975) 30 C.R.N.S. 109.

This paragraph gives peace officers greater powers of arrest than are available to others. As will be seen in the discussion in the next section, persons who are not peace officers may legally arrest without warrant only under the limited provisions of section 449 of the Criminal Code⁹. Paragraph (c) of section 450(1), like paragraph (a), allows a peace officer to act on "reasonable and probable grounds" and without direct observation of an offence being committed. Unlike paragraph (a), however, the "belief" referred to here is a belief in the existence of a valid warrant rather than a belief in the commission, or anticipated commission, of an offence.

Other powers of arrest are provided in section 31 of the Criminal Code which states:

- (1) Every peace officer who witnesses a breach of the peace and every one who lawfully assists him is justified in arresting any person whom he finds committing the breach of the peace or who, on reasonable and probable grounds, he believes is about to join in or renew the breach of the peace.
- (2) Every peace officer is justified in receiving into custody any person who is given into his charge as having been a party to a breach of the peace by one who has, or who on reasonable and probable grounds he believes has, witnessed the breach of the peace.

The power of arrest under subsection (1) of this section requires a peace officer to have actually witnessed a breach of the peace or to have reasonable and probable grounds for believing that such person was about to join in or renew the breach. The subsection thus allows a "direct observation" arrest or an anticipatory arrest. It does not allow an *ex post facto* arrest where there has been no direct observation of the offence by the peace officer.

As noted above, federal and provincial legislation abound with such provisions. The most commonly invoked, however, apart from those in the Criminal Code and selected federal statutes, are those in provincial liquor, petty trespass and highway traffic legislation. Whether any particular power of this kind is available to a peace officer depends on whether it can be related to his legally defined duties.

Arrest by others without warrant

Since they are not peace officers, the legal authority of Post Office inspectors and security guards to make arrests without warrant is akin to that of any other citizen. Section 449 of the Criminal Code provides:

⁹ See section entitled *Arrest by others without warrant*.

- (1) Any one may arrest without warrant
 - (a) a person whom he finds committing an indictable offence,
or
 - (b) a person who, on reasonable and probable grounds, he believes
 - (i) has committed a criminal offence, and
 - (ii) is escaping from and freshly pursued by persons who have lawful authority to arrest that person.
- (2) Any one who is
 - (a) the owner or a person in lawful possession of property,
or
 - (b) a person authorized by the owner or by a person in lawful possession of property,

may arrest without warrant a person whom he finds committing a criminal offence on or in relation to that property.
- (3) Any one other than a peace officer who arrests a person without warrant shall forthwith deliver the person to a peace officer.

The term "finds committing" as it appears in this section has been held to require direct observation of the commission of an offence by the person making the arrest. Information from some other person about the commission of an offence, however reliable such information is thought to be, does not by itself justify an arrest under 449(1)(a) or 449(2).¹⁰ This requirement of direct observation poses problems when electronic surveillance equipment is being used. Since it is often essential to act quickly before a suspect can dispose of or conceal evidence, security personnel frequently work in pairs with one officer watching the surveillance equipment and then signalling (perhaps by two-way radio) to another, who is nearer the scene of the offence. Although it would make sense for the second officer to then make an arrest, this is not permissible under the law. Instead the second officer can only try to place himself in a position to observe the offence being committed or maintain surveillance until the first officer arrives on the scene.

The references to "indictable offence" and "criminal offence" in section 449, do not limit the power of arrest to offences committed under the Criminal Code. Section 27(2) of the Interpretation Act extends the term 'criminal offence' to encompass offences under other federal statutes includ-

¹⁰ See *R. v. Bron*, (1975) 30 C.R.N.S. 109 at 114, in which the majority of the Supreme Court of Canada, interpreting the term "finds committing" in section 450(1)(b) of the Code (peace officer powers of arrest), stated that a person's power to arrest under such circumstances "is based on his own observation".

ing the Post Office Act and the Financial Administration Act.¹¹ In addition, the courts have determined that 'dual' offences — those which, at the option of the Crown, may be prosecuted either on indictment or summarily — may be treated as indictable offences for the purpose of arrests.¹²

Subsection (3) of section 449 requires anyone who makes an arrest under subsections (1) and (2) to deliver the arrested person to a peace officer "forthwith". This term does not mean "instantly", but as soon as is "reasonably possible or practicable under all the circumstances".¹³

Paragraph 449(1)(b) is the only part of the section which gives the power to arrest "on suspicion" and without the necessity for direct observation of the offence by the person making the arrest. What constitutes "reasonable and probable grounds", for the purposes of this paragraph, is a criterion of law which can only be resolved in the light of the particular circumstances of each case. A coherent report of an offence from a credible witness, however, is usually sufficient.¹⁴ To what extent verification is required before making an arrest under this paragraph also depends on the circumstances of the case. But, given the requirement of "fresh pursuit", it is reasonably clear that the power of arrest under this paragraph is not normally expected to involve much more than a snap judgment, albeit a prudent one.¹⁵

Arrest by peace officers with a warrant

Paragraph 455.3(1)(b) of the Criminal Code provides for the issuance of a warrant for the arrest of a person if after receiving information a justice considers that a case for doing so has been made. Alternatively, a justice may issue a summons directing the appearance of a person. Both actions compel a person against whom they are directed to attend and answer to a charge of an offence.

11. Although no case specifically on this point was found, Macdonald, J.A., in his judgment in *McNeil v. The Queen* (1977) 36 C.C.C. (2d) 45, at 63, clearly suggests, *obiter*, that offences under the Post Office Act are criminal offences. The decision of the Nova Scotia Court of Appeal in this case was subsequently reversed by the Supreme Court of Canada, but on grounds which give no reason to doubt the correctness of Macdonald, J.A.'s *obiter dicta*.

12. See, for example, *R. v. Huff*, (1980) 50 C.C.C. (2d) 324.

13. See, for example, *R. v. Cunningham and Ritchie*, (1980) 49 C.C.C. (2d) 390, at 395. See also *R. v. Cuthbertson* (1949) 4 D.L.R. 369, *R. v. Vogin* (1966) 3 C.C.C. 103, and *R. v. Bell* (1969) 2 C.C.C. 9. In *Perry v. Woodward Ltd.* (1929) 4 D.L.R. 751, the court stated, *obiter*, that private persons who detain persons (e.g., for shoplifting), may have a duty to question the suspect in order to verify that an offence has been committed, before handing him over to police authorities. The matter of questioning, however, will be discussed further below.

14. See, for example, *Lebrun v. High-Low Foods Ltd., et al.* (1968) 69 D.L.R. (2d) 433, and *Hucul v. Hicks* (1966) 55 D.L.R. (2d) 267.

15. See *R. v. Dean* (1966) 47 C.R. 311.

The Criminal Code also provides for the issuance of a warrant for arrest in several other instances. These include where it appears to a justice that a person who has been released ought to be kept in custody for reasons of public interest, failure to appear at a hearing, failure to comply with the terms of release, commission of another offence.

A warrant is a direction to arrest and there is no discretion vested in the person executing it. Arrest warrants under the Criminal Code can only be directed to, and executed by, peace officers as defined in section 2 of the Code. Postal inspectors do not have peace officer status for this purpose and they do not, therefore, have the power to execute a warrant of arrest unless they are acting in aid of a peace officer at his request. When acting in aid of a peace officer under such circumstances, they are legally protected by section 25 of the Code.

While Post Office inspectors cannot by themselves execute arrest warrants, they can legally swear out informations on the basis of which warrants may be issued, since section 455 of the Code provides that "any one" may swear out an information alleging the commission of an offence (see also sections 723 and 724). In addition the policy of the Post Office provides that under certain circumstances postal inspectors may exercise that authority.¹⁶

Power of arrest by "a person authorized"

Under section 449(2) of the Criminal Code "a person in lawful possession of property" or a "person authorized" by the person in lawful possession of property may arrest without warrant anyone whom he finds "committing a criminal offence on or in relation to that property". Whether a postal inspector or a Post Office security guard is "authorized by the owner or by a person in lawful possession" to arrest someone whom he "finds committing a criminal offence" against postal property or mail will, in any given context, always be a question of fact as well as of law. While the law can decide the legal conditions of "lawful possession" or authorization for this section, only departmental practices can reveal whether the authority has been bestowed. It is important to note first that "lawful possession" is not necessarily the same as legal ownership.

There is no doubt that while it is in the course of post, mailable matter is in the "lawful possession" of the Post Office Department, or at least of those postal employees who handle it. Indeed, it can be said with confidence that

¹⁶ See para. 115.1 of the *Manual of Information for Postal Inspectors*.

most, if not all, property on Post Office premises, in Post Office vehicles, drop boxes, etc., (except, of course, the personal property of persons visiting Post Office premises) is in the "lawful possession" of the Post Office and of the employees authorized to handle it.

Since security guards are not usually entrusted with possession of such property, the question of whether they may exercise the powers of arrest under section 449(2) will normally depend on whether they are "persons authorized" by the owners or by those in lawful possession of such property to do so.

There is little case law of much help in deciding what constitutes "authorization" for the purposes of section 449(2). Chief Justice Laskin, however, when he was on the Ontario Court of Appeal, referred to the authorization under section 449(2) as "arresting authority given by the owner or by the person in lawful possession".¹⁷

Whether postal inspectors have been so authorized can only be answered on the basis of an examination of Post Office directives. A review of these, however, indicates that there is not at present a simple answer.

Policies for postal inspectors are centralized and standardized. The principal source of information on the exercise of powers of arrest is the *Manual of Information for Postal Inspectors*. The relevant passages of the Manual state:

- 125.2 As a general rule, arrests are more common in Criminal Code offences whereas it is the practice to pursue Post Office Act charges by the issuance of a Summons to the accused.
- 125.3 Postal Investigators are to take action to arrange for the services of a Police Officer, if an arrest seems reasonably imminent. A Police Officer may (s.435CC) ¹⁸ arrest with or without a warrant, a person who he believes has committed or is about to commit an indictable offence or if he observes a person committing a crime. Police Officers are protected from allegations of false arrest by s.25 CC, etc.
- 125.4 While arrests are to be effected by a Police Officer, circumstances may arise where a Postal Investigator may have to perform what is often termed a 'Citizen's Arrest'. Caution is to be exercised in dealing with Juveniles
- 125.5 Citizen's Arrest (s.434CC) can only be effected by a Postal Investigator who actually observes a person committing an indictable offence and, where feasible, consists of touching the person on the shoulder or arm, identifying himself and stating

17. R. v. Dean (1966) 47 C.R. 311, at 321.

18. These instructions were promulgated in June 1965, at which time the present sections 449 and 450 of the Code were sections 434 and 435.

clearly 'you are under arrest' or 'I arrest you in the name of the Queen' and gives reason for arrest (s.25CC). This action is to be taken in such a manner as to avoid drawing undue attention and then delivering the prisoner as soon as possible to a Police Officer. The use of force or restraint is not advocated but if the person attempts to leave, it should be pointed out to him that in addition to the charges of which he has been made aware, he may also have to face a charge of avoiding or escaping lawful arrest.¹⁹

These sections suggest quite clearly that postal inspectors are not "authorized persons" for the purposes of section 449(2) of the Code, since they state categorically that arrests under section 449 are only to be made for indictable offences. Section 449(2), on the other hand, contemplates arrests for "criminal offences" (which term includes non-indictable offences).

Power of detention

For the most part, postal inspectors may not detain a suspect. They must rely on the suspect consenting to stay to be "interviewed". Since they cannot detain someone who, they think, has committed an offence, the request for an interview in such circumstances is often refused by the suspect. By the time public police forces can be brought in, the improperly appropriated goods or other reasons for suspicion are often no longer available as evidence. Using this line of reasoning, inspectors argued before the Commission that they required peace officer status in order to have adequate powers of detention over suspects.

In analysing this argument, the Commission found it necessary to draw certain distinctions. First, detention and arrest are not synonymous with one another. The Supreme Court of Canada has ruled that to have legal effect an arrest must involve detention.²⁰ No such ruling, however, suggests that detention must involve arrest. Indeed, when this subject was recently considered by the Supreme Court, Mr. Justice Ritchie, speaking for the majority, said,²¹

It appears to me to be obvious that the word "detention" does not necessarily include arrest, but the words "detain" and "detention" as they are used in s.2(c) of the Bill of Rights, in my opinion, connote some form of compulsory restraint....

The second distinction that must be drawn is between voluntary and involuntary detention. In a strictly technical sense 'voluntary detention' is not

19 See also paras 18, 207 6, 233 1, 241 1, 245, 257 1, 319 3 of the *Manual*

20 *R v Whitfield* (1970) 1 C.C.C. 129 See also *R v Liebrecht* (1979) 10 C.R. (3d) 179

21 In *Chromiak v R* (1980) 1 S.C.R. 471

really detention at all. Yet detentions made with some degree of express or implied consent are more common in routine security work. In an industrial context, such as that in which Post Office security personnel work, the terms of collective agreements, departmental or plant rules and regulations, and the general concept of management rights are of critical importance in this regard. Frequently these may authorize detentions which, in other contexts, would not be lawful.

Such detentions may or may not be related to security objectives, but are an inevitable attribute of management rights. The collective agreements currently in force in the Post Office provide for circumstances in which detentions may be required. Article 33.02 of the C.U.P.W. agreement, for example, provides in part:

The Employer shall conduct such investigations as may be necessary to determine the circumstances surrounding accidents on the job.

Clearly, this implies an obligation on the part of employees to cooperate in such investigations which may involve voluntary detention. Because these powers tend to be quasi-legal, they are subject to negotiation between management and labour. As a result they are, in theory at least, capable of being expanded or contracted.

While the type of investigation referred to above is unlikely to be a security matter, examples where management rights more or less commit employees to agree to voluntary detention for security purposes are not hard to find. The Plant Rules and Regulations under which postal employees currently work in two of the Toronto-area processing plants, for instance, give security guards a variety of powers which, by implication, entail at least a minimal degree of detention. These regulations give security personnel the "right to challenge Post Office employees and non-Post Office employees while in Post Office buildings", the "right to determine if parcels in anyone's possession have been properly cleared according to regulations", the "right to examine merchandise of value being carried by Post Office employees", and the "right to challenge drivers of vehicles entering or leaving the Post Office premises".

The exercise of such management rights obviously overlap the realm of involuntary detention. Where an employee is not obliged to agree to being detained and refuses to voluntarily remain or be "interviewed", any detention is *ipso facto* involuntary. Such detention need not involve actual physical

restraint. If a person feels he has no practical alternative but to remain, the law will consider him to be involuntarily detained.²²

There are circumstances, in which involuntary detention that is not incidental to an arrest may be lawful. Section 30 of the Criminal Code, for example, provides:

Every one who witnesses a breach of the peace is justified in interfering to prevent the continuance or renewal thereof and may detain any person who commits or is about to join in or to renew the breach of the peace....

More generally, it can be argued that section 25(1) of the Criminal Code makes any detention lawful if it is necessarily incidental to the effective exercise of any law power.²³ This provision reads as follows:

S.25(1) Criminal Code:

Every one who is required or authorized by law to do anything in the administration or enforcement of the law

(a) as a private person...

is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

The provisions of the Criminal Code relating to the lawful use of force by private persons to prevent the commission of offences (section 27), to suppress riots (section 32(4)), to prevent assaults (sections 34-37), and in defence of movable and real property (sections 38, 39, 41 and 42(3)), will be discussed in detail in a later section of this chapter. They are, however, of some relevance here. These provisions may include a limited right of detention to the extent that it is necessary and ancillary to the use of force.

These examples illustrate the right to detain which postal security personnel now have. Although the discussion has been cast mostly in terms of security personnel in general, it applies equally to postal inspectors in particular.

Power of search

The concept of search covers a wide variety of activities and characteristics. Searches may be of persons or of real or personal property. They may be inspectorial or investigative; they may be effected through human agency

22 See, for example, *Conn v. David Spencer Ltd.* (1930) 1 D.L.R. 805 and *Chaytor et al. v. London, New York and Paris Association of Fashion Ltd.* (1962) 30 D.L.R. (2d) 527.

23 The decision of the Supreme Court of Canada in *Eccles v. Bourque, Simmonds and Wise* (1975) 1 W.W.R. 609 throws some doubt on the extent to which such provisions may be interpreted as authorizing actions which are not specifically authorized by statute.

or by means of mechanical (usually electronic) devices; they may be conducted openly or surreptitiously; they may involve human contact of the utmost intimacy or no human contact at all; they may be conducted with or without a warrant; they may be continuous or sporadic; and they may be conducted randomly or selectively. The concept of search frequently includes electronic surveillance.²⁴ Electronic visual surveillance is considered separately in Chapter 3 of this report.

Although there is nothing in section 443 of the Criminal Code preventing a justice of the peace from issuing a search warrant to a postal inspector, the Commission is aware of only three occasions on which inspectors succeeded in obtaining a warrant. The Commission was asked to consider the difficulties of a postal inspector who, even when a search is urgent, has to convince a peace officer to apply for a warrant based either on the inspector's affidavit or on the knowledge which the officer has recently acquired from the inspector. Often, peace officers are otherwise occupied and by the time they are able to conduct the search the evidence sought is no longer available.

It was often stressed that the postal inspector, by his training and intimate knowledge of the Post Office and the movement of mail, is a highly specialized person whose presence at the scene of a search is indispensable for the identifying of Post Office property.

Peace officers

(i) Criminal Code

The issuance of search warrants by justices of the peace or magistrates is a discretionary action and not a mere legal formality or ministerial order. The power is conferred by section 443 of the Criminal Code which says:

- (1) A justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in a building, receptacle or place
 - (a) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed,
 - (b) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act, or
 - (c) anything that there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,

24 See, for example, Arnold, S.R., "Electronic Visual Surveillance and the Right of Privacy: When is Electronic Observation Reasonable?" (1978) 35 Washington and Lee Law Review 1043-1063.

may at any time issue a warrant under his hand authorizing a person named therein or a peace officer to search the building, receptacle or place for any such thing....

There are also provisions in the Criminal Code which allow a peace officer to conduct a search without a warrant. Section 99, for example, allows an officer, acting on reasonable and probable grounds, but without a warrant to search "a person or vehicle or place or premises other than a dwelling-house" for prohibited or restricted weapons.

(ii) Other federal statutes

Broad powers of search are conferred on peace officers by other federal statutes such as the Narcotics Control Act, the Customs Act, the Excise Act, and the Food and Drugs Act. These not only provide a wider power of search (including the right to search persons found on the premises) but also empower a peace officer to use a writ of assistance issued by a federal court judge as a blanket authority to conduct searches. It is not necessary to examine each of these legislative enactments in detail, but they must be kept in mind when considering the powers of search conferred upon peace officers.

(iii) Common law and the search of persons

"The peace officer has a common law right to search a person, although that search is limited to that which is incidental to the making of an arrest or the continued detention of a prisoner in safe custody".²⁵ After an arrest a peace officer may search a person for anything which may be helpful as evidence of the crime for which the prisoner was arrested. He may also search for and remove any weapons which might be used to effect escape. As an adjunct, a peace officer has the right to use as much force as is necessary to effectively conduct such a search.

Postal inspectors and security guards

Powers of search are important to security work. Their routine exercise can have a disciplinary and deterrent effect in the industrial context. However, they may also involve very considerable intrusions upon personal privacy and are only permitted sparingly by law.

While section 443 of the Criminal Code provides for the issuance of search warrants to non-peace officers, there is some legal doubt as to who may validly execute such a warrant. The doubt springs from an apparent

²⁵ Re Laporte and R. (1972) 8 C.C.C. (2d) 343 at p.350

inconsistency between subsections(1) and (3). Section 443(1) provides that a warrant may authorize "a person named therein or a peace officer" to search, etc. Section 443(3), however, provides that a warrant "may be in Form 5", and a warrant in Form 5 is clearly addressed to "peace officers in the said (territorial division)". Although the point has not been resolved by the courts, the express provision of subsection (1), together with the permissive terminology of subsection (3), suggests that a warrant may be legally executed by a person who is not a peace officer. It seems unlikely that the courts could regard the fact that a warrant is issued to a person who is not a peace officer as a substantial variation from Form 5.²⁶

There is, therefore, no legal impediment to postal inspectors applying for and executing search warrants. Their difficulty in obtaining them is of a more practical nature. First, judicial officers appear to be reluctant to issue search warrants to persons who are not peace officers. In this connection, it is important to note again that the issuance of search warrants under section 443 is discretionary, not mandatory. Secondly, current Post Office policy does not approve of such action. The official definition of the functions of postal inspectors, *The Manual of Information for Postal Inspectors*, makes it clear that they are not authorized by the Post Office to seek or execute search warrants.

Postal Investigators have no authority to obtain or to act on a Search Warrant without the presence of the police and when the need for searching becomes necessary, the Police should be consulted.

It is quite clear that search warrants under section 443 are to be issued only in connection with specific criminal investigations. For the most part, search warrants under other federal and provincial statutes are only available to peace officers or other persons with special status (for example, liquor inspectors). Similarly, powers of search without warrant, in both federal and provincial legislation, generally apply only to peace officers and other specially designated persons.

Certain sweeping powers of search without warrant, however, are technically available to postal inspectors now. Subsection 48(3) of the Post Office Act gives postal inspectors conducting investigations the powers of commissioners appointed under Parts II and III of the Inquiries Act. Section 7 of the Inquiries Act is particularly pertinent. It provides that:

26 Cases on this point are reviewed in Fontana, J.A., *The Law of Search Warrants in Canada* (Toronto: Butterworths, 1974), at pp 19-21 and 38-40.

The commissioner or commissioners may, for the purposes of investigation, enter into and remain within any public office or institution, and shall have access to every part thereof, and may examine all papers, documents, vouchers, records and books of every kind belonging thereto....

Although the Post Office Act gives these statutory powers to postal inspectors, current Post Office policy severely restricts their exercise. Paragraph 25.4.2 of the *Manual of Information for Postal Inspectors* states,

Such powers, however, are not to be used without the prior approval of the Director, Security and Investigation Services or the Director, Legal Services.²⁷

Information received by the Commission indicates that permission to use these extensive powers has been given on only two occasions.

Apart from these statutory powers of search, there are the rights of search under the common law and in the exercise of management rights. It should be stressed, however, that while there is no doubt that peace officers making arrests in Canada have incidental powers of search under common law, it has never been definitively determined by the courts that other persons making arrests have the same rights. The extent and implications of management rights in regard to searches, which is the most common justification for searches in industrial settings, has been the subject of a considerable amount of "arbitral jurisprudence" (the quasi-law of arbitrators, adjudicators, labour relations tribunals, etc.), as well as of a few court decisions. These decisions establish that the concept of management rights may, depending on the particular circumstances, embrace the right to have security personnel conduct personal or property searches, on a selective or random basis. The decisions, collectively, are instructive in spelling out the kinds of circumstances and considerations which will normally justify the exercise of such powers.²⁸

A review of Post Office policies, of the two major collective agreements, and of the information supplied to new employees at one Toronto location, as well as interviews with Toronto postal inspectors, reveals that while searches of employee property are sometimes conducted, both by postal inspectors and by security guards, the publication of policies and procedures in this regard is less than adequate. The collective agreements do not

27. This refers, in both instances, to the national directors. With respect to the exercise of these powers, see also paras. 27, 230, 252 2(d), 258.3 and 258.4 of the *Manual*.

28. See, *Re Board of Governors of Riverdale Hospital and Canadian Union of Public Employees*, Local 43 (1977) 14 L.A.C. (2d) 334 (search of employee's automobile); *Re Johnson Matthey and Mallory Ltd. and Precious Metal Workers' Union*, Federal Local 24739 CLC (1976) 10 L.A.C. (2d) 354 (personal searches of employees); and *Re Amalgamated Electric Corp. Ltd. (Markham) and International Brotherhood of Electrical Workers*, Local 1590 (1974), 6 L.A.C. (2d) 28 (search of employee's private effects).

contain specific reference to search procedures. The new employee information kit which was supplied to the Commission, while it contained warnings with respect to the serious consequences of employee theft, etc., contained no reference to any liability of an employee to be searched, or to have his property searched, while on Post Office premises. A staff memo, which apparently was posted on the bulletin boards, was to the same effect. A set of Plant Rules and Regulations, which included significant authority for security guards to search and confiscate the property of employees, was made available only to security officers. It was not made available to employees generally, or posted on bulletin boards. The Commission was told that employees could see such rules on request, but they were not routinely informed of their existence. Furthermore, the "conditions of employment" form and the "Plant Rules", which were included in the new employee information kit for this same location, contain no specific reference to search, or to the various "rights" of security guards listed in the Plant Rules and Regulations.

With respect to national policies, Postal Standards and Guidelines No.51-1-8, Security Guards (20th January, 1975), contains no specific reference to search powers of security guards, beyond the bare statements that "they may be instructed to enforce certain in-plant rules and regulations relating to security", and that their duties "may include" the following: "enforce security rules and regulations", "enforce systems designated to control access" and "contact with the public at access points". In August, 1980, Directive No. 028-050-1 replaced the 1975 instruction; however, the new directive has the same lack of precision as its predecessor.

As far as postal inspectors are concerned, the *Manual of Information for Postal Inspectors* is not much more informative. Paragraph 121.1 provides:

Searches submitted to voluntarily and witnessed, may be conducted by Postal Investigators but extreme caution is to be exercised when females are involved (services of Police Matron should be enlisted) or juveniles are involved (parents or guardian should be present — see Manual Chapter dealing with Juveniles). Refusal to submit to voluntary search must be respected and require the services of Police Officer.

Search procedures pursuant to management rights relate only to employees. Agreements between employees and employer concerning such procedures are not, of course, binding on customers or the general public. In dealing with the public, the powers of search by security personnel, apart from specific statutory or common law provisions, are based on property rights. As discussed above, search procedures are usually established, if at all, as conditions of access to, or use of, corporate property, generally stated

through unilaterally posted notices, or through express or implied contractual agreements.

Again, Post Office documents reveal little written policy either with regard to searches of members of the general public using Post Office premises or with regard to persons in a contractual relationship with the Post Office, such as those who transport mail under contract. Postal Standards and Guidelines, No.51-1-8, and the *Manual of Information for Postal Inspectors* contain no references to specific policies in this regard; nor has the Commission found any written training materials on this subject.

Plant Rules and Regulations from the Toronto area in dealing with the authority of security guards, does contain instructions from which limited rights to search the property of persons other than postal employees can be inferred. Under the heading, "Authority", guards are told they have:

1. The right to challenge Post Office employees and non-Post Office employees while in Post Office buildings.
2. The right to determine if parcels in anyone's possession have been properly cleared according to regulations — otherwise, to detain the parcel until properly cleared.
3. The right to challenge drivers of vehicles entering or leaving the Post Office premises, to satisfy that the vehicle is furthering Post Office business.

Six numbered "rights" are listed in this fashion (the others concern only postal employees), and these are followed by six numbered "methods" by which the "rights" are to be exercised. The "methods" consist of *pro forma* statements which security officers are to use in exercising the "rights". Unfortunately, the numbered "methods" do not correspond with the numbered "rights". Nevertheless, two of the "methods" give further reason to believe that the "rights" are intended to include limited powers of search. The document states:

The method by which Security Officers will carry out their authority is as follows....

2. (Sir/Madam) — This challenge is for you to identify yourself and demonstrate the contents of the parcel that you are carrying or show proper clearance for the article....
4. (Sir/Madam) — This challenge is made for you to produce evidence of permission for parking the vehicle you are driving on Post Office controlled premises.

The Commission has not ascertained the extent to which this local Toronto policy reflects those in force elsewhere. Nor is it clear whether, and how, members of the public who may be searched under such policies are made aware of them. As a variety of corporate defendants in suits for damages for false imprisonment and assault have found out to their cost, proper notification is essential.

Finally, on the subject of search, specific mention should be made of sections 38 and 39 of the Criminal Code which provide for self-help in defence of movable property, which probably could include limited search powers.²⁹ Section 38(1) is especially pertinent in this regard. It provides:

- (1) Every one who is in peaceable possession of moveable property, and everyone lawfully assisting him, is justified
 - (a) in preventing a trespasser from taking it, or
 - (b) in taking it from a trespasser who has taken it, if he does not strike or cause bodily harm to the trespasser.

Consent searches

Much was said to the Commission about the types of consent to conduct searches that have been obtained by postal authorities. Special concern was expressed over whether some of the consents given are voluntary or are extracted in such a way as to render them invalid. First, let it be stated that this question does not apply to the search of an employee's locker. Lockers are Post Office property which employees agree, when they are allocated, are liable to search. Although it would be preferable to have this consent in writing, an oral understanding is acceptable in law.

On the broader question of the 'voluntary' nature of the consent received for other types of searches, a recent decision of the Supreme Court of Canada is instructive.³⁰ The case involved the issue of consent under the Criminal Code with respect to electronic surveillance. The court held that while a consent must be voluntary in the sense that it may not be the result of coercion, it need not be voluntary in the sense that a confession must be. The court held that consent must be the conscious act of the consentor freely given for reasons which appear to him to be sufficient.

In another case³¹ before the Supreme Court of Canada Mr. Justice McIntyre said "the consent must not be procured by intimidating conduct or

29. It is conceivable that section 27 (use of force to prevent commission of an offence) also implies such powers.

30. *Rosen v. R.*, 1980 13 C.R. (3d) 214.

31. *Goldman v. R.*, 1980 13 C.R. (3d) 228 at p. 257.

by force or threat of force (by the police) but coercion, in the sense in which the word applies here, does not arise merely because the consent is given because of promised or expected leniency or immunity from prosecution".

These decisions answer the legal point associated with the criticism that consent is sometimes begrudgingly given to postal inspectors for searches.

Power of seizure

Closely related to the power of search is the power of seizure. Similarly, the arguments used in favour of postal inspectors having power to seize are parallel to those used for the power to search.

Peace officer

In general, anything seized by a peace officer holding a search warrant under section 443 of the Criminal Code³² is disposed of in accordance with section 446 of the Code. The section extensively provides the procedures to be followed by peace officers in this regard. It includes provisions for the safe keeping of seized material and for its return to its lawful owner or, alternatively, its forfeiture according to law.

Postal inspectors and security guards

In discussing the powers of seizure of postal inspectors, a distinction must be made between property owned by the Post Office or in which the Post Office has a legally protected interest, and property in which the Post Office has no legally protected interest (e.g., the personal property of employees). There is no doubt that, if duly authorized by the Post Office, security personnel may always seize property in which the Post Office has an interest unless, of course, the person from whom it is to be seized has a legal interest which takes precedence over that of the Post Office (e.g., by virtue of a lease or some other contractual arrangement). Section 41 of the Post Office Act provides that except for undeliverable mail, "... mailable matter becomes the property of the person to whom it is addressed when it is deposited in a post office". The courts, however, have held that while such matter is in the course of post, the Postmaster General has a "special property or interest" in it for the purposes of the law of theft (sections 283 and 314, Criminal Code).³³

32 It is not deemed necessary to discuss under this heading the powers of seizure in the Criminal Code with respect to gambling offences, currency, explosives, offensive weapons and so forth.

33 See *R. v. Cumming* (Ont. C.A.) (1961) 130 C.C.C. 107, and *R. v. Wendland* (Sask. C.A.) (1971) 1 C.C.C. (2d) 382.

There is no doubt that, when exercising their powers under section 48 of the Post Office Act, inspectors have the right to seize property belonging to or entrusted to the Post Office as may be necessary for the effective conduct of an investigation. This right, of course, is subject to their having lawful access to the property. Thus, in order to seize Post Office property from the private residence of a postal employee, for instance, either the owner's consent or a search warrant is required.

The property of others, whether employees or customers, can normally only be seized with the consent of the owner or pursuant to a search warrant. A search warrant permits the person executing it to seize the items named in it and "anything that on reasonable grounds he believes has been obtained by or has been used in the commission of an offence" (section 445, Criminal Code). It also permits seizure of "any explosive substance that he suspects is intended to be used for an unlawful purpose" (section 447). Similarly, offensive weapons and firearms are liable to seizure.

A peace officer also has the right to seize certain kinds of property when making a lawful arrest. This right was described by Mr. Justice Beck.

After making an arrest an officer has the right to search the prisoner, removing his clothing, if necessary, and take from his person, and hold for the disposition of the trial court, any property which he in good faith believes to be connected with the offence charged, or that may be used as evidence against him, or that may give a clue to the commission of the crime or the identification of the criminal, or any weapon or implement that might enable the prisoner to commit an act of violence or effect his escape.³⁴

As noted above, however, it has not been clearly established that these rights of search and seizure are available to persons other than peace officers who make arrests.

The only other statutory provisions which can be construed as giving persons who are not peace officers powers of seizure without warrant, and which are of relevance to Post Office inspectors, are sections 38 and 39 of the Criminal Code which were discussed above in relation to searches.

The right to detain, at least temporarily, the property of others may sometimes be an element of management or property rights (for example, as a condition of employment or of access to property). It is not uncommon in commercial, industrial and institutional settings such as retail stores, factories

34. *Gottschalk v. Hutton* (1921) 36 C.C.C. 298, at 301-302. See also *R. v. McDonald*, *R. v. Hunter* (1932) 59 C.C.C. 56; *R. v. Brezack* (1949) 96 C.C.C. 97. These cases are discussed in Stenning and Shearing, *Search and Seizure: Powers of Private Security Personnel*, (Ottawa), Minister of Supply and Services, 1980, a study paper prepared for the Law Reform Commission of Canada, at pp.61-64.

and museums to require visitors to leave bags and other property in the custody of security personnel. The Plant Rules and Regulations of the Toronto-area plants mentioned earlier confer on security guards the following rights to detain property that may not belong to the Post Office.

2. The right to determine if parcels in anyone's possession have been properly cleared according to regulations — otherwise, to detain the parcel until properly cleared....
5. The right to challenge an employee with a broken parcel or letter under suspicious circumstances and to discontinue the handling of the article until his/her Supervisor has been notified.

The document does not make clear what notification, if any, is given to persons whose property may be subject to the exercise of these "rights". With proper notification, such detention is perfectly legal. Without notification, the security guards and the Post Office may be held legally liable for detaining private property.

Power of investigation and interrogation

The investigation of a crime almost invariably leads to the questioning of suspects. At first glance, the Post Office Act appears to grant far greater powers of investigation and interrogation to postal inspectors than are given to public police forces. As discussed earlier, section 48(3) of the Act gives inspectors the powers enjoyed by a commissioner under Parts II and III of the Inquiries Act. It will be recalled that paragraph 48(1) appoints postal inspectors "to investigate and report on the state and management of the business" of the Post Office "including, without limiting the generality of the foregoing, the conduct of any postal employee, mail contractor or employee of a mail contractor" The powers of postal inspectors under this section cover the activities of a large number of persons.

It has already been noted, however, that the policy of the Post Office is that these powers are not to be exercised without the prior approval of the National Director, Security and Investigation Services, or the National Director, Legal Services. In conducting their enquiries, therefore, and in interrogating suspects, postal inspectors have only the same rights as any other citizen to ask questions, and no greater right to receive answers. They do, however, have as a sanction the other power vested in them by 48(3) of the Post Office Act, viz., the right to "suspend any postal employee suspected of misconduct in office". Post Office policy does not forbid the use of this provision of the Act. Indeed, Postal inspectors are specifically authorized to exercise this power.³⁵

35. Paragraph 27 of the *Manual of Information for Postal Inspectors*.

Where questions do relate to discipline, however, inspectors must conform to the collective agreements between the Post Office and the unions which provide:

The Employer agrees to notify an employee twenty-four (24) hours in advance of any disciplinary interview or disciplinary counselling session and to indicate the purpose of the meeting, including whether it involves the employee's personal file. If the employee fails to appear for the interview, and does not explain his inability to do so, the Employer shall proceed unilaterally.

Other parts of the agreements provide that the employee is entitled to be represented by a union representative when summoned for disciplinary reasons, "so that the latter may know what the situation is and contribute to its clarification", and that union stewards are not to be "hindered, constrained, prevented nor impeded in any way in the accomplishment of their duties while investigating complaints and representing employees" in the grievance process.

Some controversy has arisen in recent years over the relationship between these provisions of the collective agreements and the statutory powers of investigation which postal inspectors have under section 48 of the Post Office Act. In fact, the collective agreement cannot detract from the liability to criminal prosecution under the Criminal Code. Failure to conform to the requirements of a collective agreement may, however, invalidate disciplinary measures and procedures taken pursuant to that agreement.

Given the potential for conflict between the terms of the collective agreements and the provisions of section 48, postal inspectors have to exercise judgment in deciding whether to use their statutory powers in non-conformity with the agreement and jeopardize subsequent disciplinary proceedings,³⁶ or in conformity with the agreement and jeopardize the investigation. Postal inspectors have the legal right to exercise this judgment. In this connection, the fact that suspensions under section 48 have been held not to be disciplinary in nature is of some importance. A recent adjudication by the Public Service Staff Relations Board concluded that a postal inspector is "not exercising a disciplinary function" in suspending an employee.³⁷

One point discussed earlier needs to be reiterated here, that is, the extent to which postal inspectors may detain suspects for questioning after an arrest and prior to delivering them to a peace officer. Section 449(3) of the Criminal Code states that such delivery should be made "forthwith".

36. See, for example, the adjudication by Adjudicator J.C. Smith, of the Public Service Staff Relations Board, concerning grievances by Gary Bronson, Sherrill Cassidy and Karen Legere, December 12, 1977 (File Nos. 166-2-3302, 3303, 3304 and 166-2-3327, 3328, 3329), especially at pp. 12-15.

37. Adjudication of a grievance by A.G. Steele, June 20, 1980 (File No. 166-2-8050), at p.9, para.25.

Current interpretations of the term "forthwith" permit some latitude and suggest that persons making such arrests may even have a duty to attempt at least minimal verification of the commission of the offence before handing the suspect over to the police.

Jurisprudence on the admissibility of statements as evidence applies equally to postal inspectors as to public police. As "persons in authority" they must satisfy the court that a statement was voluntary. A caution prior to interrogation should be the general rule since statements must be proven to be free and voluntary, without hope of advantage or fear of prejudice. While oppressiveness by the investigators may exclude a statement, it is not the only grounds for exclusion. Courts scrutinize the circumstances surrounding the taking of a statement and almost invariably refuse to admit one obtained after denial of the right to counsel. The law does not require investigators to inform a suspect of his right to counsel but, when the request is made, it cannot be refused without serious consequences.

It is not necessary here to cover all aspects of admissibility of statements. It is sufficient to outline the above criteria and to emphasize, that all "persons in authority" are subject to the same rules.

Finally, on the subject of powers of investigation and interrogation, some comment is needed on the use of lie detectors. The Supreme Court of Canada has held that results of lie detector tests are not acceptable as evidence in criminal cases. They are used, however, for a variety of purposes by police and security personnel in Canada, including as an aid in investigations and as a means of employment screening. These uses of lie-detectors appear to be legal in Canada at the present time, and have never been successfully challenged either through the courts or through arbitration. Although one provincial government has attempted to introduce legislation to prohibit the industrial use of such devices,³⁸ as yet no such legislation has been enacted in Canada.

Allegations were made to the Commission that postal inspectors do use lie detectors during investigations. The Commission found no evidence, however, to support these claims. The Commission did discover that outside police forces have occasionally conducted polygraph tests while investigating criminal offences against the Post Office. It is possible that the allegations were related to public police activities and, therefore, beyond the terms of reference of this Commission.

38. See Manitoba, Bill No.20, 1979, Personal Investigations Act. The bill did not get beyond committee stage, but has apparently been re-introduced during the current session of the Legislature.

Use of force

Authority for postal inspectors to use force is directly related to their authority to make arrests, conduct searches and detain property. It, therefore must be considered as an aspect of the proposal to grant them peace officer status.

Section 25 of the Criminal Code gives peace officers a right to use force commensurate with their duties and authority. The force used must normally be proportionate to the gravity of the situation. Nevertheless, 25(4) allows peace officers and those lawfully assisting them to use any amount of force, including deadly force,³⁹ necessary to prevent a person from escaping lawful arrest.

Section 32(1) also permits a peace officer to use or order the use of "as much force as he believes, in good faith and on reasonable and probable grounds, (a) is necessary to suppress a riot, and (b) is not excessive, having regard to the danger to be apprehended from the continuance of the riot". While these controversial powers should rarely be of relevance to postal inspectors, during labour unrest involving mass violence they are not inconceivable.

Postal inspectors, like all other citizens, have the right to use force when acting in aid of a peace officer. Section 25 of the Criminal Code provides that:

- (1) Everyone who is required or authorized by law to do anything in the administration or enforcement of the law
 - (a) as a private person,
 - (b) as a peace officer or public officer,
 - (c) in aid of a peace officer or public officer, or
 - (d) by virtue of his office,is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.
- (2) Where a person is required or authorized by law to execute a process or to carry out a sentence, he or any person who assists him is, if he acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.
- (3) Subject to subsection (4), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless he

39 See: *Maratzear v. C.P.R.* (1922) 37 C.C.C. 297

believes on reasonable and probable grounds that it is necessary for the purpose of preserving himself or any one under his protection from death or grievous bodily harm.

- (4) A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner.

Section 27 provides:

Every one is justified in using as much force as is reasonably necessary

- (a) to prevent the commission of an offence
- (i) for which, if it were committed, the person who committed it might be arrested without warrant, and
 - (ii) that would be likely to cause immediate and serious injury to the person or property of anyone; or
- (b) to prevent anything being done that, on reasonable and probable grounds he believes would, if it were done, be an offence mentioned in paragraph (a).

Sections 30, 32(4), 34 to 39 and 41-42 further provide for the use of force.

Essentially, postal inspectors, not being peace officers, have no greater or lesser rights to use force than any other private person. Force must be reasonable and in proportion to the needs of the legal task.

The use of force is, of course, controlled not only by a person being held liable under civil law for damages for its illegal use, but also by being liable under the criminal law to such charges as assault, wounding, illegal possession and use of weapons, etc. The general provision of section 26 of the Code is of particular importance here:

Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.

Protection for *bona fide* mistakes

It was argued before the Commission that postal inspectors, not being peace officers, were afforded little or no protection under the Criminal Code. It was contended that an error in judgment could have serious negative effects on an inspector's career, even if the end which he sought was

perfectly justified. Peace officers, on the other hand, are protected by the Code while executing their duties. This argument raises the question of what protection, if any, is afforded to postal inspectors.

While it is clear that Post Office security personnel are not peace officers, they have the legal status of public officers for the purposes of the Criminal Code. That status also carries with it some measure of protection. A 'public officer' is defined in section 2 of the Code as follows:

'public officer' includes

- (a) an officer of customs or excise,
- (b) an officer of the Canadian Forces,
- (c) an officer of the Royal Canadian Mounted Police, and
- (d) any officer while he is engaged in enforcing the laws of Canada relating to revenue, customs, excise, trade or navigation.

While postal inspectors do not fall within paragraph (a), (b) or (c) of this definition, it is conceivable that they may fall within paragraph (d). Even if they do not, they may qualify on the grounds that the specific examples of public officers listed in the definition are not intended to be exhaustive. To take the first of these propositions, postal inspectors could be included under paragraph (d) of the definition as officers "engaged in enforcing the laws of Canada relating to revenue". Inspectors investigate (and sometimes prosecute) offences relating to "postal values" and the proper accounting for, and handling of, postal revenues. Examples of these offences can be found under section 65 of the Post Office Act (conversion of public monies), and under section 92 of the Financial Administration Act⁴⁰ (offences connected with the collection, management or disbursement of public money).⁴¹

The Commission is not aware of any court decision which settles the question of whether postal inspectors are public officers for the purposes of the Criminal Code. The few extant cases in which the definition of "public officer" has been considered, however, are instructive. In these cases the courts have taken an expansive rather than a restricted view. Recently Mr. Justice Hugessen of the Quebec Superior Court held that an agricultural inspector, acting under the Quebec Municipal Code, was a public officer for the purposes of sections 2 and 118 (obstructing a public officer in the execution of his duty) of the Criminal Code.⁴² In handing down this decision, the judge said:

40. R.S.C. 1970, c.F-10. In this connection, see section 79 of the Post Office Act.

41. Section 2 of the Act defines "public money" as including "duties and revenues of Canada".

42. *R. v. Cartier, R. v. Libert* (1979) 43 C.C.C. (2d) 553, at 555.

The expression 'fonctionnaire public', in English 'public officer', is one which, in the common law, has always been interpreted in a very wide way. In 30 Hals., 3rd ed., p.684, para.1319, the following definition is found: 'One who discharges any duty in the discharge of which the public are interested'.

These suggest an expansive interpretation indeed, of the definition of 'public officer'. In the *Labelle* case cited by Mr. Justice Hugessen, for example, the person involved was a municipal plumbing inspector who not only did not fall within the definitions in paragraphs (a), (b) or (c), but also could hardly be said to be "engaged in enforcing the laws of Canada"⁴³ relating to revenue, customs, excise, trade or navigation", under paragraph (d). If this line of authority is correct, there is a strong case to be made for concluding that postal inspectors are "public officers" for the purposes of sections 2 and 118 of the Criminal Code.

While the status of "public officer" is of relevance by virtue of a number of statutes,⁴⁴ the provisions of greatest importance in this context are those of the Criminal Code. In particular, section 118(a) of the Code provides that:

118. Every one who

- (a) resists or wilfully obstructs a public officer... in the execution of his duty or any person lawfully acting in aid of such an officer,

is guilty of

- (d) an indictable offence and is liable to imprisonment for two years, or
- (e) an offence punishable on summary conviction.

Recent decisions of the Supreme Court of Canada have taken a broad view of what constitutes "the execution of his duty" under this section.⁴⁵ As a result, section 118 considerably enhances the authority of any one who is regarded as a "public officer".

In carrying out his responsibilities as a public officer, section 118(a) of the Criminal Code imposes criminal liability on anyone who "wilfully obstructs" the investigations of a postal inspector. Section 26(2) of the Interpretation Act, must also be borne in mind.

Another provision of importance is section 246(2)(a) of the Criminal Code, which makes it an offence to assault "a public officer... engaged in

43 The term "laws of Canada", when used in federal statutes, generally refers only to provisions of federal legislation. Cf. section 5(2) of the Canadian Bill of Rights, R.S.C. 1970, Appendix III.

44 See, for example, section 2 of the Interpretation Act, R.S.C. 1970, c.I-23; section 2 of the Financial Administration Act, R.S.C. 1970, c.F-10.

45 See, *Knowlton v R* (1973) 10 C.C.C. (2d) 377; *R v Biron* (1976) 23 C.C.C. (2d) 513; *Moore v R* (1979) 5 C.R. (3d) 289. See also *R v Westlie* (1971) 2 C.C.C. (2d) 315 (B.C.C.A.).

the execution of his duty, or a person acting in aid of such an officer". While common assault under section 245 of the Code is a summary offence carrying a maximum penalty on conviction of six months' imprisonment or a fine of \$500, or both, assaulting a public officer is a "dual" offence — either indictable or summary at the option of the Crown — and if prosecuted on indictment carries a maximum penalty of five years imprisonment.

Furthermore, section 118(b) of the Criminal Code makes it an offence for any one to fail, without reasonable excuse, to assist a public officer in the execution of his duty in arresting a person or in preserving the peace, after being properly required to do so. In sum these various provisions amount to considerable authority for postal inspectors in performing their duties.⁴⁶

Access to police information

The Commission heard arguments that postal inspectors need better access to police information banks and to criminal records. While the witnesses appeared generally uncertain about the rules governing access to these sources of information, many felt that the absence of peace officer status was a definite handicap. They also felt that the lack of access hindered their investigations and in some cases precluded them from focussing attention on persons whose previous criminal record for similar offences made them prime suspects.

Access to prior arrest and conviction information with respect to employees, or applicants for employment, or suspects in an investigation, is considered important by many security personnel. Postal inspectors are no exception in this regard. The present legal position is that inspectors are neither legally entitled to, nor legally prohibited from, access to such information.

As far as police information is concerned, access is the prerogative of the police force which holds the information. Rules governing access are generally set administratively or, sometimes, in by-laws or regulations enacted by municipal police commissions,⁴⁷ and are not usually published.⁴⁸ The rules are usually in the form of guidelines and leave discretion to the police as to whom they will provide with the information.

46. It should be noted that impeding an investigation by postal inspectors has also been held to constitute "misconduct sufficiently serious to warrant dismissal" of a postal employee: see *R. v. A Civil Service Commission Appeal Board, ex parte Benoit* (1966) 52 D.L.R. (2d) 391, at 396.

47. See, for example, section 16 of the Ontario Police Act, R.S.O. 1970, c.35.

48. The courts have held that the public has no legal right to see such regulations: see *Re McAuliffe and Metropolitan Toronto Board of Commissioners of Police* (1976) 9 O.R. (2d) 583.

The national Canadian Police Information Centre (CPIC), to which almost all police forces in Canada contribute information, is run by a Management Board, with provincial and federal representation. The Board is responsible for the rules governing access to the Centre's computerized information bank. These rules are purely administrative, and are not the subject of legal regulation. CPIC provides terminals only to accredited public police departments. Other organizations can be furnished with information from the computer at the request of a police department, provided the organization has been specifically designated, by either the Solicitor General of Canada or the Attorney-General of a province. In September, 1979, CN Police, CP Police, the National Parole Board, the Correctional Services and a number of departments including the Post Office Department were so designated by the Solicitor General.

If postal inspectors were given peace officer status they would not automatically gain direct access to a CPIC computer terminal. It may, however, diminish the reason for not giving them direct access.

The only legislation of some relevance to this question of access to police information, or at least to federally held information, is the Canadian Human Rights Act, Part IV of which is concerned with "Protection of Personal Information".

The provisions of the Canadian Human Rights Act, and regulations enacted thereunder, do not currently impose any legal constraints on access to police information by Post Office security personnel.

Criminal records are governed by the Criminal Records Act and the Identification of Criminals Act. The former, while it places restrictions on access to criminal records of persons who have received pardons, contains no specific restrictions on access to other records. The confidentiality of criminal records, however, is maintained by the fact that the only way to obtain information about them which is guaranteed to be reliable is through the submission of fingerprints. Restricted access to fingerprint records (and, therefore, to reliable criminal record information) is imposed pursuant to section 2(3) of the Identification of Criminals Act, which provides that:

The signalatif cards [fingerprint records] and other results thereof may be published for the purpose of affording information to officers and others engaged in the execution or administration of the law.

Again, these provisions do not impose any absolute legal constraint on access to criminal records information by postal inspectors.⁴⁹ Indeed, it is understood that they do have limited access to such information at present.

Independence from management

The discretion of members of public police forces to investigate, arrest and prosecute outside the reach of extraneous influence of management or politics is essential. This concept is seen as necessary to safeguard the independence of that arm of the criminal justice system. The Commission has been reminded on numerous occasions that the discretion to prosecute within the Post Office has been altogether too often influenced by management at the plant, district, regional and even, on occasion, the national level.

That the prosecutorial process could be influenced or suffer pressures from outside is an anathema to our system and ought not to occur. This independence does not only include judgment as to whether or not to prosecute but whether to withdraw or discontinue criminal proceedings. The Commission has been reminded by attorneys-general who communicated with the Commission that such an interference is not acceptable. They have reminded the Commission of instances of legal or illegal strike situations where crimes were observed, prosecutions launched and then abandoned as part of a settlement. They have properly condemned such a practice.

It would be presumptuous, however, to suggest that peace officers do not encounter such extraneous pressures. It is appropriate to quote from a study entitled, "Ministerial Responsibility for National Security", prepared by J.L.I.J. Edwards for the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police. At page 72, he writes:

I venture to state that nothing is more calculated to engender public disillusionment with the criminal justice system and its constituent parts, — especially the police, the security service and the Crown prosecutors — than disclosures indicating a susceptibility to extraneous pressures. The greatest safeguard against the sully of these pillars of justice will be found in the integrity and sense of fundamental values that are nurtured by the individuals who have to administer the several parts of the system. Without these personal qualities any constitutional machinery or doctrine is extremely vulnerable.

This principle is not restricted to ministerial responsibility but transcends all administrative duties discharged by those who have the delegation or

49. The courts, however, have suggested that unauthorized police disclosure of criminal records information may constitute an offence under section 111 of the Criminal Code (breach of trust by a public officer), or (in Ontario) under section 69 of the Ontario Police Act, R.S.O. 1970, c.351 (inducing police officer to breach discipline): see *R. v. Chapman and Grance* (1972) 20 C.R.N.S. 141.

otherwise the power to suggest or influence prosecution. The greatest danger from such intrusion is that the influence may never protrude itself into public notice though the decision will be observed by a few and will only serve to bring the administration of justice into disrepute.

The structure within which postal inspectors operate lends itself too easily to a perceived or real interference and merits sufficient consideration to be addressed in the proposals of this Commission under a separate heading.