Law Reform Commission of Canada
Commission de réforme du droit du Canada

legal status of the police

CRIMINAL LAW SERIES

STUDY PAPER

Canada

ERRATA

P. 86 (vi) Québec: Municipal police forces in Québec are established and maintained by municipalities and governed by municipal councils (Police Act, R.S.Q. 1977, c. P-13, s. 64, as am. by S.Q. 1979, c. 67, s. 27).

Delete:

and governed by municipal councils

LEGAL STATUS OF THE POLICE

Criminal Law Series

LEGAL STATUS OF THE POLICE

Criminal Law Series

A Study Paper prepared for the

Law Reform Commission of Canada

by

Philip C. Stenning

July 1981

Une édition française de ce document
d'étude est disponible.
Son titre est:

LE STATUT JURIDIQUE
DE LA POLICE

Available by mail free of charge from:

Law Reform Commission of Canada
130 Albert St., 7th Floor
Ottawa, Canada K1A 0L6

or

Suite 2180
Place du Canada
Montréal, Québec
H3B 2N2

Catalogue No. J32-6/4-1982E
ISBN 0-662-11996-7

Table of Contents

Acknowledgments

Many people have rendered assistance to the author in the preparation of this Study Paper, some very wittingly and others hardly aware of their contribution. The author wishes to acknowledge with special gratitude the invaluable help and encouragement offered with such characteristic generosity by two long-time friends and colleagues, John Edwards and Clifford Shearing. To Geoffrey Marshall, John Beattie, Tony Doob and Bill Shimmin, who have each assisted in their own special ways, the author also expresses his gratitude and appreciation. For his support and generous assistance throughout the project, the author also wishes to thank Calvin A. Becker, of the Law Reform Commission of Canada.

Philip C. Stenning

Introduction

> In this Province, the office of constable is created by statute alone; but the officer no doubt is the same person, and possesses the same powers and authorities which the constable in England possesses, for it was one of the distinctive features in all our legislation to assimilate our laws and institutions to the pattern which we had before us in the laws and institutions of England; and, in copying them, we did not fail to introduce the constable as the type of peace and order in social life.
>
> Adam Wilson, *The Constable's Guide* (1859: 16)

> [TRANSLATION]
> Our system for the administration of justice is entirely different, and both the role and status of the police within this system are clear and well defined by legislative provisions.
>
> Mr. Justice Turgeon, in *Bisaillon* v. *Keable and Attorney General of Quebec* (1980), 17 C.R. (3d) 193 at 204 (Qué. C.A.)

Until very recently, and despite some very explicit amendments of provincial legislation respecting the police, Canadian courts, on the few occasions on which they have been called upon to consider the matter at all, have relied heavily on English jurisprudence in delineating the status of the police in this country. However, recent events in Canada have raised both implicit and explicit challenges to define the legal status of the police in uniquely Canadian terms. In the context of this debate, the recent judgment of the Québec Court of Appeal in *Bisaillon* v. *Keable and Attorney General of Quebec* is one of the more explicit calls for a definition of the legal status of the police that does not rely on the assumption that the principles governing the Canadian police system are the same as those of the English system from which it has derived.

The principal issue on which discussion of the legal status of the police centres is that of the accountability of the police. In this respect, the legal status of the police is of importance in terms of its implications for internal as well as external accountability. As Bayley has pointed out, even a cursory review of structures for the control of the police in a variety of countries reveals that "it is not possible to say that democratic government requires a particular mode of control" (1979: 131). In a country such as Canada, which has such fragmented and diversified arrangements for the organization of policing, one would not necessarily expect to find that the police share a uniform status regardless of the jurisdiction in which they serve. Since constitutional authority to define this status resides in at least eleven legislative bodies in this country, differences can be expected.

This Study Paper examines the legal status of the police in Canada at the present time, and considers its implications for the government of the police and the exercise of police authority. Because the current legal status of the police is so often legislatively expressed with reference to the traditional offices of "constable" and "peace officer", the paper also examines the historical origins and evolution of these offices.

A narrow interpretation has been adopted in defining "police" for the purposes of this paper. The paper is limited in its scope to those persons who serve, usually full-time, as members of public police forces established under provincial police legislation, city charters or the federal *Royal Canadian Mounted Police Act* (hereinafter referred to as the *R.C.M.P. Act*). In particular, the following "special status" police are not separately considered in this paper: special constables, police cadets, auxiliary or reserve members of police forces, by-law enforcement officers, Indian band constables, and other "special purpose" policemen (e.g., railway police, harbour police, hydro police, government security guards and protective officers, and other "private" police).[1]

Chapter One contains an account of the origins of the office of constable in England, and discusses the development of this office to the point of its adoption in Canada during the nineteenth century. Chapter Two sketches the early development of the police in Canada, setting the scene for the discussion of their current legal status in Chapter Three. In Chapter Four, the origins and current understandings of the concept of police independence are examined, as well as the implications of this independence for the external control and governance of the police, vicarious liability for police wrong-doings, and the relationship between chiefs of police and the members of their forces.

In undertaking the research for this paper, especially with respect to Chapter Two, the author soon became aware of the paucity of available material on the history of the police in Canada. If nothing else, it is hoped that this modest contribution to the legislative history of policing in Canada may inspire others to undertake more serious efforts to fill the large gaps in our knowledge of the policing of this country during its infancy. In doing so, researchers may avoid the shortcomings of this work and eschew the tendency among historians to limit Canadian history (and therefore policing) to the period beginning with European colonization. Nothing, of course, could be further from the truth. An understanding of the systems of policing that existed among the native peoples of Canada before the arrival of Europeans might contribute much towards a solution of one of the most intractable policing problems in Canada today, namely that of providing humane and effective policing services to native communities. Most of us tend to assume that the modes of government (of which policing is such an essential component) that we live under today are the inevitable and preferred ones.

Historical examination of the origins of our present system, however, quickly challenges such assumptions, and helps us to understand that legal principles need not be cast in stone; that change is as essential as stability to healthy survival.

Because much of the historical material on the police is inaccessible to most readers, the author has included extensive quotations in the text of this paper; although not, it is hoped, to the point of making it less readable.

The day-to-day status of a policeman is not essentially, or even primarily, a legal phenomenon. In confining itself to the legal aspects of that status, this paper touches but one aspect of an enormously complex and controversial subject. To many, however, the police, more than any other group, embody the law, and it seems therefore essential that the legal status of the police should be better understood. In Canada, where policemen have become a national symbol, this is perhaps even more true than elsewhere. If Canada is to be judged by its policemen, it is well for Canadians to be informed judges of their police.

The objective of the paper being to describe the current legal status of the police and its origins, no recommendations for reform are proposed.

This Study Paper was initially completed and submitted to the Law Reform Commission of Canada in May 1981. Subsequently, revisions have been made, in particular to accommodate the judgments of the Supreme Court of Canada in *Attorney General of Alberta* v. *Putnam and Cramer and Attorney General of Canada* (1981), 123 D.L.R. (3d) 257 (S.C.C.), and of the Federal Court of Canada, Trial Division, in *Wool* v. *The Queen and Nixon* (not yet reported, June 8, 1981 (F.C., T.D.)). The paper has thus been prepared so as to state the law as of July 15, 1981.

CHAPTER ONE

English Origins of the Office of Constable

In conformity with years of practice as an imperial power, England introduced traditional English institutions of government to the colonial territories of Canada. Even our basic constitution, *The British North America Act* of 1867, declares in its preamble that it is intended to be "similar in principle" to the constitution of the United Kingdom, and Canadian courts have accepted this declaration as a guide in determining fundamental constitutional questions here.[2] The arrangements made by early colonial administrations for policing the Canadian territories were no exception to this general rule, and the public police officials and forces established here in the late eighteenth and early nineteenth centuries were explicitly modelled on their counterparts in the British Isles. Specifically, the power to appoint "constables" was originally given to centrally appointed justices of the peace.[3] With the establishment of democratically elected local government in the mid-nineteenth century, this power was in many cases transferred to the newly elected municipal councils.[4] In each case, the status and authority of the constables so appointed were defined by reference to the office of constable as it had evolved in England. This much is clear from the contemporary literature on the office (see e.g., Keele, 1851; Wilson, 1859; Jones, 1882). But while these early statutes provided for the appointment of constables in counties and in municipalities, none of them specified what the status, authority and duties of such officers were. Rather, it seems to have been assumed that they would have the same status, authority and duties as their English counterparts.

Later legislation providing for the establishment of police forces was barely more informative with respect to their legal status. The *Municipal Institutions of Upper Canada Act*, S.C. 1858, for instance, provided that constables appointed by virtue of its provisions

> 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.[5] (22 Vict., c. 99, s. 379)

They were also required to "obey all the lawful directions, and be subject to the government" of the Board of Commissioners of Police that appointed them. The "law" referred to in section 379 of the 1858 Act was, of course, the common law of England, which was in force in the colony at the time, and it is for this reason that in order to trace the origins of the legal status of the police in Canada, we must first consider the evolution of the office of constable under the common law in England.

A. "Police", "Constables" and "Peace Officers"

Before embarking on a review of the origins of the office of constable in England, it is worth making a short digression to discuss the origins of the terminology used to describe this office over the centuries. Today we speak of police officers and constables having the legal status of "peace officers" as a matter of common knowledge. Knowledge concerning the gradual adoption of these terms, and their historical application, however, is most instructive in elucidating the origins of the modern public policeman.

While we think of the term "police" as connoting a relatively specialized body of police officers performing a relatively specialized function relating to law enforcement, the preservation of the peace and the maintenance of order, this has by no means always been so. The term "police", in fact, does not appear to have been regularly used in the English language until sometime in the late eighteenth century, at which time it had a very different meaning from that which it has today. Writing in 1885, Maitland commented that "(t)he Police as an equivalent for the police force, the body of police constables, is very modern" (1885: 105). He noted that Dr. Johnson had included the word in his dictionary, "but only as a French word used in England", and as meaning "the regulation and government of a city or country so far as regards the inhabitants".

The word "police", used in this broader sense, appeared in the statutes of Upper Canada in the early nineteenth century. In 1816, for instance, an *Act to Regulate the Police within the Town of Kingston* was passed. The Act said nothing about constables or anyone else whom we would now call policemen, but provided that the magistrates of the town, assembled in General Quarter Sessions, could

> make, ordain, constitute and publish such prudential Rules and Regulations, as they may deem expedient relative to paving, keeping in repair, and improving the streets of the said Town, regulating slaughter houses and nuisances, and also to enforce the said Town Laws, relating to horses, swine or cattle of any kind from running at large, in said Town; relative to the inspection of weights and measures, fire men and fire companies. Provided always, that nothing herein contained,

> shall extend or be construed to extend to the regulating or ascertaining the price of any commodities, or articles of provisions that may be offered for sale.... (S.U.C. 1816, 56 Geo. III, c. 33)

Regulations for the Police of the Town of York (later Toronto) made by the magistrates a year later, in 1817, consisted of various ordinances dealing with bread, slaughter-houses, weights and measures, drains and sewers, the driving of carts and carriages, precautions against fire, and "swine running at large". Constables, firewardens, pound-keepers and other "peace officers" are mentioned only in passing as having a role to play in enforcing such regulations.

One of the first steps towards the emergence of elected local (municipal) government in Upper Canada was the creation, during the 1830s, of five-member elected boards with local government powers in the province's towns (Aitchison, 1949). These boards were called Boards of Police, a nomenclature that reflected their general mandate to govern and regulate affairs within the town.[6] Such boards, however, appear to have had no jurisdiction or authority over the constables who at that time were appointed by, and responsible to, justices of the peace.

In 1849, the famous "Baldwin Act"[7] was passed, which established elected local government in all municipalities in the province. In the case of towns, section 81 of the Act provided that town councils could pass by-laws "for establishing and regulating a Police for such Town". Section 74 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, by the central government, of a "police magistrate" to man it. Section 69 of the Act provided that

> 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.

Furthermore, the police magistrate was given the power to suspend from his duties any Chief Constable of the town, "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. If such power was exercised, the police magistrate, if he felt that such person ought to be dismissed, was to report the suspension to the town council, which could dismiss or reinstate the officer following the suspension (section 71). Section 73 of the Act provided that the clerk of the town council should be the clerk of the police office, "unless by

Act of the Town Councils of such Town another Officer be appointed for such purposes". A later provision of the Act (section 93) refers to such an officer as a "Police Officer".

The terminology of the "Baldwin Act" clearly illustrates the beginnings of what gradually came to be a more or less exclusive association of the term "police" with the constabulary in Canada. In England, this association had become commonplace by the end of the eighteenth century (Radzinowicz, 1956). It is equally clear, however, that even at this stage, when modern police forces were being established in the larger municipalities, the terms "police" and "constable" were in no sense synonymous, although as we shall see, ensuring the "police" of the municipality was one of the more important functions of the constable. Ten years later, the editor of *The New Municipal Manual for Upper Canada*, referring to the power of municipalities to "establish, regulate and maintain a police", noted that:

> The word "police" is generally applied to the internal regulations of Cities and Towns, whereby the individuals of any City or Town, like members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious and inoffensive in their respective situations ... but the word, as here used, has a still more restricted meaning, for it is intended to apply to those paid men who in every City and Town are appointed to execute police laws, and who in many respects correspond with Constables of Rural Municipalities. (Harrison, 1859: 158)

Clearly, the new meaning of the word was beginning to take hold. Writing in the same year, the Mayor of Toronto dedicated a book entitled *The Constable's Guide: A Sketch of the Office of Constable* to "the police force of the City of Toronto" (Wilson, 1859). Noting that the parish constable in England was permitted to appoint a deputy to perform a temporary or some special service in his stead, Wilson cautioned that "it by no means follows that such a rule applies in this Province, even with respect to the township constable, far less with respect to the *police* constable" (1859: 18). [Keele, writing eight years earlier, apparently thought otherwise (1851: 183-184).]

As we shall see, the significance of this transition during the nineteenth century from a "constabulary" to a "police force" lies essentially in the different characters of the two offices. While the parish and town constables were originally members of the community who served in the office by virtue of annual appointment as a matter of civic duty, and usually without substantial remuneration, the "new police" of the reform era were full-time, salaried officers who specialized in "police" work, and who were organized into a bureaucratically-controlled body to perform this work. The medium through which this radical change was accomplished was the "police office", staffed by a full-time salaried "police magistrate", who had the powers and authority of a justice of the peace. The point that must be emphasized here, however, is that this innovation was accomplished through an adaptation of the old office of constable, rather than through the creation of a new office with a new status and powers. As *Halsbury's Laws of England* emphasized:

> in essence a police force is neither more nor less than a number of individual constables whose status derives from the common law, organized together in the interests of efficiency. (1959: Vol. 30, p. 43)

The incremental, rather than revolutionary, nature of the transition from "constabulary" to "police force" has also been emphasized by Maitland who, in describing the establishment of police magistrates in England, wrote that:

> One of their chief duties had been to appoint and control a small band of paid constables attached to each office. Even in 1829 when "a new police force" for "the Metropolitan Police District" was formed, this was done by establishing in Westminster one more police "office", provided with two paid justices of the peace, who, under the Home Secretary, were to rule the new constabulary. In 1839 these two "justices" receive the new name of "Commissioners of Police of the Metropolis"; the judicial and executive duties comprised in the old conservation of the peace fall apart, and we are left with learned magistrates and gallant commissioners. (1885: 100)

In tracing the origins of the legal status of the modern "police"[8] therefore, it is to the history of the office of "constable" that we must turn.

The origins of the word "constable" have been the subject of considerable dispute over many centuries. Writing in 1583, William Lambard explained the name in the following terms:

> The name Constable, is made (as I have read) of two English wordes put togither, namely, Cuning (or Cyng) & Staple, which do signifie, the stay (or hold) of the king. For by the auncient custome of this realme there is a great officer called the Constable of England, who by meanes of the great authoritie that he had, was a principal stay unto the Kings governement: and this man had jurisdiction & authoritie in deeds of Armes, and in matters of warre, both within and without the Realme. Out of which office, this lower Constableship was at the first drawn and fetched, and is (as it were) a verie finger of that same hande. For the Statute of Winchester, which was made in the time of King Edward the first, and by which these lower Constables of hundreds and fraunchises were first ordained, doth (amongst other things) appoint, that for the better keeping of the peace, two Constables in everie Hundred and Franchise, shoulde make the viewe of Armour.
>
> So then, the name of Constable in a hundred or franchise doth meane, that he is an Officer, that supporteth the Queenes Majestie in the maintenaunce of her peace, within the precinct of his hundreth, or franchise: and he is many times called the High Constable, in comparison of the Constables or Petie Constables that be in the townes or parishes within his hundred or franchise, whose part it likewise is to maintaine the peace within the several limittes of their owne townes, or parishes. (1583: 4)

Lambard's account of the etymology of the word "constable" is by no means unchallenged. Others (e.g., Blackstone, 1876: Vol. I, p. 317; Simpson, 1895: 626; Devlin, 1966: 6) have insisted that the word is derived from the Latin words *comes stabuli*, meaning master of the horse. Despite these differences of opinion,[9] however, most writers seem to agree that the word was almost certainly introduced into England by the Normans from continental Europe at the time of their invasion and conquest in 1066, and that it was the name given to an officer in their court who held great military responsibilities. At some

point, however, the title was applied to designate a *local* official charged with various responsibilities relating to the preservation of the peace and the "view of arms". In a particularly thorough review of the original sources on this question, Simpson identifies a writ of 1252 as the "first of the published documents in which the constable makes his appearance" (1895: 630). He argues, however, that there is no reason to believe that the officers referred to as *constabularii* in this writ were new officers created by the writ:

> On the contrary, the absence of any directions respecting the mode of their appointment makes this somewhat improbable; and it appears at least 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. (1895: 631)

This thesis, which has been widely accepted, and which asserts that "constable" was not an office created by the Norman Kings, but a Norman term applied to a pre-existing office of great antiquity, is of critical importance to an understanding of the historical origins of the legal status of the constable. It suggests that the legal status of "constable" finds its origins in an historical period that pre-dates the use of that term. As we shall see, it finds a great deal of support from the early authors who wrote about the office of constable, and it goes a long way to explaining the distinction that such authors draw between the "original and inherent" character of the office on the one hand, and its "ministerial" character on the other. Some further historical elaboration is required, however, before this matter can be discussed.

All of the early accounts of the office of constable agree that the most important characteristic of the office was that its holder was a conservator or guardian of the peace (e.g., Fitzherbert, 1538: 49; Lambard, 1583: 11; Bacon, 1608: 749). The significance of this term must therefore be discussed.

William Lambard, in his *Eirenarcha or the Office of Justices of Peace*, written in 1581-82, discusses the ancient concept of the "peace" at some length. He first distinguishes between an "inward peace" (related to one's conscience and religious faith) and an "outward peace" which "hath respect to other men". The "outward peace", he writes, is of two sorts:

> the one is opposed (or set) against all manner of striving and contention, whether it be in countenance, gesture, worde, or worke.... The other is onely an abstinence from actual force and offer of violence, and is rather contrary to *arma*, *proelium*, and *bellum* (which cannot be without force, or armes) than it is to *lis*, *pugna* or *certamen*, which ... may be *nudis verbis*, & *citra arma*. (1581-82: 5-6)

Lambard noted that "the lawe of our Realme likewise, useth the worde Peace diversly, but yet so, as it is altogither occupied about these outwarde Peaces". He continued:

> Sometymes therefore, the word Peace is taken for Protection, or defence.... Sometymes (as it seemeth to me) it is taken for Rightes, Priviledges, and Liberties.... And sometimes it is taken for a withholding (or abstinence) from that injurious force & violence, whereof I spake before. And this is it that is most commonly understood by the worde Peace, in our lawe: and for the maintenaunce hereof chiefly, were these Wardens and Justices of the Peace first made and appointed. (*Ibid.*: 6-7)

Citing the *Statute of Westminster the First*, c. 1 ("Let the peace of the land be maintained in al points, and common right be done to all, as well poore as rich"), and a statute of Richard the Second ("Let the peace bee well and surely kepte, that the Kings subjects may safely goe, come, and abide, according to the lawe of the realme, and that Justice and right be indifferently ministred to every Subject"), he concludes

> that this furious gesture, and beastly force of bodie, or hands (and not everie contention, suite, and disagreement of mindes) is the proper subject and matter, about which the Office of the Justices of the Peace is to be exercised. (*Ibid.*: 10)

In his book, *The Duties of Constables, Borsholders, Tithingmen, and such other Low Ministers of the Peace*, written in 1583, Lambard wrote that:

> The conservation (or maintenaunce) of the peace, standeth in three things, that is to saye, first in foreseeing that nothing be done that tendeth, either directlye, 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. (1583: 11-12)

The status of "conservator of the peace" or "peace officer" is recognized by all the commentators on the office of constable as its central component. While it is now enshrined in statutory provisions (e.g., section 2 of the *Criminal Code* of Canada, which defines "peace officer" as including a "police officer", "police constable" and "constable"), it has its origins in the common law.[10] It is therefore to this early pre-parliamentary common law, and the manner in which the status of peace officer accrued to constables and their predecessors, that we now turn.

B. Pre-Norman Systems of "Police" in England

The history of the evolution of English police has been the subject of an enormous volume of literature (e.g., Critchley, 1978; Devlin, 1966; Hart,

1978; King, 1980; Price, 1971; Radzinowicz, 1956; Simpson, 1895; Summerson, 1979; Wrightson, 1980). In this paper, it is intended to do no more than sketch the outlines of this development, highlighting those aspects of it that are most important to an understanding of the modern legal status of the police in Canada. Readers who require a more detailed account are referred to the several sources listed in the bibliography to the paper.

The dominant impression that a perusal of this literature leaves is that the history of policing in England is marked by its evolutionary, rather than revolutionary, character. As Lee has pointed out:

> 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. (1901: xxxi)

When one considers the extent to which the history of England itself is studded with invasions, conquests, revolutions and all manner of bloody internecine struggles, and when one considers policing as a central function of stable government,[11] the evolutionary, incremental development of policing in England seems all the more remarkable. Yet, again, as Lee has noted,

> amongst all our institutions it would be hard to find one so eminently characteristic of our race, both in its origin and in its development, or one so little modified by foreign influences, as the combination of arrangements for maintaining the peace, which we call "police". (1901: xxvi)

One might argue that even a loosely-organized community will be found to have a "policing" system of some kind, and that therefore a history of police in England must start at the dawn of its civilization. This has not been possible, since archeological evidence has not been sufficient for such a venture. As a result, and perhaps somewhat arbitrarily, chroniclers of English policing have generally pointed to the laws of Alfred in the ninth century and Edgar in the tenth century, as laying the foundations for the modern "police system" in England.

These early Anglo-Saxon laws reflected the political realities of the times — a huge number of small, agriculturally-based rural communities, ruled by a sovereign who did not have at his disposal a vast army of bureaucrats and soldiers, and who consequently relied heavily on the good will and co-operation of powerful local lords (called "thanes") to maintain his sovereignty. Under these circumstances, the only way that peace and stability could be maintained was through the establishment of mutual pacts or pledges between all levels of society whereby the less powerful, in return for protection, would pledge their support to the more powerful against any attacks or attempts to disturb or destroy their "peace" (i.e., freedom to come and go unmolested, and to have undisturbed enjoyment of their estates and possessions). In addition, those who joined together in such a pledge were held responsible for each other's behaviour and for the maintenance of the "peace" within their community. If the "peace" of the community, or of any one of its members, was disturbed or broken, the community as a whole was responsible for

restoring the peace and bringing the offender to justice. Failure to fulfil this responsibility rendered the community as a whole liable to pay a fine to its overlord. Lee describes these arrangements as follows:

> The plan adopted counted on the assistance of self-interest for its complete success; the thane being a landed proprietor and consequently unable to dispose of his property secretly, was security to the king for all the members of his household — if any of them broke the law, his over-lord the thane was careful to bring him to justice. Yet poverty brought no exemption to the landless freeman. He too had to find a guarantee for his good behaviour; if he was unable to attach himself to some thane, he was compelled to combine with others in the same position as himself, in order that their joint goods or aggregate credit should provide sufficient bail for the shortcomings of any member of the society. (1901: 3-4)

The combinations of freemen, to which Lee refers, involved groupings of ten families and were consequently called "tythings". Under such a system, a freeman who failed either to attach himself to the household of a thane or to join and become accepted as a member of a tything found himself an outlaw with no protection for his "peace". In fact, under the laws of Canute, every freeman over the age of twelve years was required to be a member of a tything (Critchley, 1978: 3). Under such circumstances, personal credit and reputation were of crucial significance, since these were the means through which one gained acceptance into a thane's household or a tything, and thereby access to the protection of the law. "Strangers" were naturally viewed with great suspicion and circumspection.

Every tything (they were also called "boroes" in some places) elected one of its members as its head. This head man [for apparently it always was a man (Burn, 1793: 397)] was known by various names in different localities, according to custom. The principal titles were: tythingman, boroes ealder (later borsholder), boroehead or headboroe, or chief pledge (Lambard, 1583: 8). In this capacity he was, in effect, the local community spokesman and represented his tything in larger assemblies. He can thus be fairly described as the first example in England of a truly local administrative officer. Historians seem to agree that it is in this office that the origins of the office of constable are to be found.

This system of mutual pledging, which was in effect a rudimentary system of local policing, came to be known as the "frankpledge", although scholars are not all agreed as to whether the adoption of this term occurred before or after the Norman conquest. In order to ensure that the system operated properly, the King divided the country into shires or counties, and in each appointed, as his representative, a shire reeve or sheriff. Since each shire contained many tythings, larger groupings of ten tythings were organized, called "hundreds" in the South and Midlands, and "wapentakes" in the North (Radcliffe and Cross, 1954: 2). Each hundred similarly elected a headman, called a "hundredman" or "reeve" (Critchley, 1978: 2). On regular occasions, and at least once a year, these groups met and held a "court" or "leet", which all members were originally required to attend. The leets of the hundreds were

also referred to as "tourns" and "torns". All business related to that level of government was conducted at the leet, including the election of various local officers such as the tythingman. The sheriff visited every hundred each year and held a special court, called the "sheriff's tourn". At this meeting, the tythingmen were required, amongst other things, to present all the members of their tythings. This procedure, known as the "view of frankpledge", allowed the sheriff, acting on the King's behalf, to ensure that the system of local police was properly maintained.

The law (or perhaps it could be more accurately described as "custom" at this time) 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" (e.g., Fitzherbert, 1538: 49; Lambard, 1581-82: 14; Bacon, 1608: 752). Chief among these responsibilities was that of organizing the "hue and cry" in the event that a wrongdoer (the term "felony" was not yet current) 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 wrongdoers (or their tythings, if the amount could not be secured from the wrongdoer's assets) varied not only according to the gravity of the offence itself, but also according to the status of the victim (Radcliffe and Cross, 1954: 6-7). 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 (later called bail) 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 (a power much later assumed by the justices of the peace). In the event that the person in custody had committed an offence for which a "trial" was necessary, the tythingman was responsible, along with the fellow members of his tything, for bringing the person to justice. As Lee describes it:

> In the event of the non-appearance of a culprit at the court of justice to which he was summoned, his nine fellow-pledges were allowed one month in which to produce him, when, if he was not forthcoming, a fine was exacted, the liability falling, in the first place, on any property of the fugitive that might be available, in the second place, on the tything, and, — should both these sources prove insufficient to satisfy the claim, — on the Hundred. Furthermore the headboroughs were required to purge themselves on oath, that they were not privy to the

> flight of the offender, and to swear that they would bring him to justice if possible. On the other hand, if any member of a tything was imprisoned for an offence, it was not customary to release him without the consent of his fellow-pledges, even though the fine had been paid. (1901: 5)

The tythingman (or borsholder or headborough) also had authority, which his fellow citizens apparently did not, 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, which was a power [again, later assumed by justices of the peace (Lambard, 1581-82: 15)] that, along with the others mentioned, accrued to him by virtue of his status as a conservator of the peace.

As the office developed over the years, more authority and responsibility were added, and powers were gradually transformed into duties. Failure to perform those duties rendered the tythingman liable to a fine or imprisonment. While it is not necessary to detail all of the characteristics of the office here — they are recounted in all of the later texts (e.g., Lambard, 1583; Fitzherbert, 1538) — it is perhaps opportune at this point to summarize the most important characteristics from which the office of constable developed.

Although this account emphasizes the peace-keeping responsibilities of the tythingman, it must be stressed that his responsibilities were broader than this. He was, in fact, a "police"-man in the true (old) sense of that word — he was, initially at least, an elected community spokesman, responsible for all aspects of local government within his community, and able to represent his fellow pledges in larger assemblies. He was entirely responsible to the community that elected him as its representative, and it could remove him if not satisfied with his performance. His responsibility for the maintenance of the "peace" can only be properly understood in the context of the concurrent responsibility of every freeman in his community for the same task. As an elected spokesman of the community, the tythingman tended to be someone of considerable stature and prestige within his community, yet his status in no way diminished the mutual and communal responsibilities of his fellow pledges.

It is important to understand that the "peace" maintained by the community in these early times was not an undivided King's or Queen's peace, such as we know it today. The political realities of the times were not such as to permit such an all-encompassing sovereign influence. This important point has been well summarized by Radcliffe and Cross:

> Today we consider that any illegal violence is a "breach of the peace", and from this standpoint "breach of the King's peace" might seem to cover most of the other offences and many more. But it is only gradually that the "King's peace" has come to have such an extended meaning. In Canute's day the "King's peace" did not extend to all places at all times, but only to all places at some times and to some places at all times. For instance, it covered the King's own household and

> his officers and the four great roads of England ("the King's Highway") at all times, and it reigned everywhere on the great festivals of the Church. But there were many places and occasions in which it could be claimed that an act of illegal violence was no breach of the King's peace — though maybe it was a breach of some lesser man's peace. Every freeman had a "peace" of his own the breach of which was an offence varying in gravity with the importance of its owner, but it was only very gradually that the "King's peace" ate up all lesser "peaces" so that any act of violence anywhere was a breach of the King's peace though the King was not in any way directly affected by it. (1954: 7-8)

The importance of this for understanding the status of these early tythingmen is that it makes it clear that their original authority was not essentially derived from the sovereign, but from the community they served. The "peace" of which they were by custom (later called "common law") recognized as conservators was not principally a sovereign "peace" but a local "peace" attaching to the community and its members. These early "police"-men, therefore, were not royal officers representing the interests of the sovereign, but local officers representing the interests of the community that chose them. In understanding later references to the "original authority" of constables, it is essential to bear these points in mind. As Lee has pointed out, referring to these early arrangements for policing:

> The police organisation which we are considering is generally spoken of as the "Frankpledge system," frankpledge signifying the guarantee for peace maintenance demanded by the king from all free Englishmen, the essential properties of this responsibility being, that it should be local, and that it should be mutual. As we trace the history of police in England we shall see that these two qualities have survived through the successive stages of its evolution, and seem to be inseparable from our national conception of police functions. (1901: 4)

C. "Constables" and "Justices of the Peace"

After the Norman conquest of England, such harmony as had been established under the Saxon kings was shattered. In place of consent and co-operation, which had been the basis of the maintenance of order in the country before the conquest, the Normans found it necessary to impose their order and "peace" on an unwilling and conquered Saxon society by coercion and, at times, savage brutality. Through grants of land and privilege to Norman knights, a feudal manorial system of government was imposed on the previous organization of thanes's households and tythings. Not surprisingly, fear, tension and suspicion, frequently erupting into violence, grew between the Saxon peasantry and their Norman overlords.[12] All of this had a very significant impact on the previously-established customary system of policing.

Nevertheless, the Normans did not seek to impose a radically new system of policing on the country. Rather, they sought to adapt and "strengthen" the old system in order to secure peace and stability for their new regime. While the tything system was not abolished, it was in many instances absorbed into a feudal manorial network. The old "leet" was typically superseded by the manorial court, whose lord or steward now appointed officers to serve the manor. Such offices were usually completely unpaid, as before, and refusal to serve rendered the appointee liable to a fine or imprisonment. The tythingman, borsholder, headborough or chief pledge was no longer elected by his peers, but appointed by his overlords.

Because the Norman rulers could not rely on a Saxon peasantry to enforce a Norman system of peace and order, central penetration of local government was greatly increased. The sheriff, the royal representative who was now almost always a Norman rather than a Saxon, was given greater authority to supervise the maintenance of the peace and the administration of law and justice. By royal writs and edicts (called "assizes"), responsibilities, powers and duties that had evolved through custom under the Saxons were formulated and laid down in "legislation", although historians are not always clear as to which edicts created new responsibilities and duties, and which simply codified and modified established ones. The Assize of Clarendon (1166), for instance, sought to restore the old frankpledge system with renewed vigour and severity after the chaos of King Stephen's rule (1135-1154). In addition to his authority to hold the "view of frankpledge", the Royal Sheriff was given added authority to require heads of tythings to make reports (called "presentments") of all kinds of matters falling within their knowledge. As well as reporting deficiencies in local administration (e.g., roads and bridges not being kept in proper repair) in such presentments, local representatives were in effect expected to inform on their communities. Not only were accusations of felony to be reported, but any information about the presence of suspicious persons ("such as sleep by day and watch by night, and eat and drink well and have nothing") and strangers in the community was also to be relayed. Such reports were to be made to a group of twelve freemen of the hundred (the origins of the Grand Jury). Serious accusations were passed on to the sheriff and brought for trial before itinerant Royal Justices, sent around the country by the sovereign to hear such cases and ensure proper administration, as well as to collect taxes (Critchley, 1978: 4).

The purpose of all this was to permit the rulers to keep a close watch on the peasantry, so that any tendencies towards disaffection or insurrection could be quickly detected and stamped out. Not only did the sovereign require unquestioned loyalty from his subjects in order to ensure the stability of his rule at home; he required the services of loyal soldiers to fight his wars on the continent of Europe. In 1181, the Assize of Arms required every freeman to bear arms for the purposes of preserving the peace and securing criminals. The Assize restated the ancient duty to raise a "hue and cry" in order to arrest

a fugitive felon, reiterating the responsibility of the tythingman or headborough to supervise this procedure. "Every adult in the locality was then bound to arm himself and take up the chase; the hue and cry being passed on to other districts traversed until the wanted person was caught or reached sanctuary" (Devlin, 1966: 4).

At about this time, the term "constable" came to be applied to certain of the local officers previously known as tythingmen, borsholders, headboroughs and chief pledges. As was previously mentioned, the first documented use of the term to describe such local officers seems to have been in a writ issued in 1252, requiring the appointment of one or two constables in every township (depending on its population), and of one chief or "high" constable in each hundred, who were to have special responsibility for the "view of arms" (i.e., ensuring that every freeman was properly armed as required by the Assize of Arms) and for the preservation of the peace (Simpson, 1895: 630). As was also previously noted, there seems little reason to believe that this writ created any new offices. Rather, it seems to have been an affirmation of well-established duties and responsibilities of local officers of tythings and hundreds. This was undoubtedly necessitated by the general disintegration of government that had occurred as a result of King Richard's prolonged absences on crusades and King John's difficulties with the barons.

Most writers seem to agree that the application of the term "constable" to the local "head man" marks the beginning of a long process through which this official was gradually transformed from being purely (or at least principally) a local officer of community government to being a representative of the Crown within the community. In this connection, it is worth noting that, as Lambard points out, not all "head men" were recognized as "constables":

> petie Constables were devised in townes and parishes, for the aide of the Constables of the Hundreds: so of latter times also, Borsholders, Tythingmen, Headboroes and suche like, have bene used as petie Constables, within their owne boroes 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 shal 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. (1583: 10)

It was at about this time, too, that the system of "watch and ward" was introduced in towns and cities as a measure conducive to the preservation of the peace. While the writ of 1252 mentioned "watch and ward", and specified that the responsibility for it lay with the constables to which the writ referred, it seems probable that the writ was doing no more than giving formal recognition to a system of policing that had already been instituted some years before (Lee, 1901: 25-26). Blackstone explained the terms "watch and ward" as follows:

> Wardgard, or *custodia*, 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. (1876: Vol. I, p. 318)

Critchley has described the system in the following terms:

> 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 stocks. Arrested persons were handed over to the constable in the morning, and they too would be placed in the stocks.... [T]he 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. (1978: 6)

It is clear that the policing measures envisaged by the writ of 1252 preserved the fundamental principles that had guided comparable systems in Saxon times — i.e., they should be locally-based, mutual and involve communal responsibilities.

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. In the period of which we are now speaking, constables, whether they were high constables or petty constables, were more or less autonomous officers vis-à-vis one another. In 1583, Lambard, referring to high constables, petty constables, tythingmen, borsholders, etc., 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" (1583: 28). Burn's observations on the subject, written in 1755, make it clear that this remained the case at least until the end of the eighteenth century:

> 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. (1793: 397)

Nevertheless, the high constable apparently did, particularly after the introduction of justices of the peace, develop a more or less supervisory role with respect to the petty constables within his "constablewick". In 1608, Sir Francis Bacon, in answer to the question, "What difference is there betwixt the high-constables and petty-constables?", wrote:

> Their authority is the same in substance, differing only in the extent; the petty-constables serving only for one town, parish or borough; the head-constable for the whole hundred: nor is the petty-constable subordinate to the head-constable for any commandment that proceeds from his own authority; but it is used, that the precepts of the justices be delivered unto the high-constables, who being few in number, may better attend the justices, and then the head-constables, by virtue thereof, make their precepts over to the petty-constables. (1608: 754)

Somewhat at variance with this view of the relationship is that of Jacob, writing in 1718, who stated that while "the petty constables and tythingmen are not subordinate to the high constable in any thing that proceeds from his own authority merely" (1772: 4), nevertheless "the high constable has the direction of the petty constables, headboroughs and tythingmen within the hundred" and is to "present the defaults of petty constables, headboroughs, etc., who neglect to apprehend rogues, vagabonds and idle persons, whores, night-walkers etc., and also all defaults in repairing highways and bridges and the names of those who ought to repair them; scavengers who neglect their duty, and all common nuisances" (1772: 8).

As a result of gradual intermarriage between Saxons and Normans, another important change occurred, but it was one that was to be short-lived. The suspicion and mistrust between the races, which had characterized the period following the conquest, receded, and the tendency towards greater direct penetration into local government affairs by the sovereign seems to have abated somewhat. Greater jurisdiction was accorded to local lords of the manor, through their manorial courts, at the expense of the sheriff's jurisdiction. The Assize of Northampton in 1176, for instance, significantly reduced the authority of the sheriffs. In particular, responsibility for supervision of the frankpledge (the "view of frankpledge") was removed from the unpopular sheriff's tourn (the royal court of the hundred) and given to the manorial court leet (Critchley, 1978: 4-5; Lee, 1901: 18-19, 25). The original principle of local control over policing was thus significantly reinforced.

It was not long, however, before the persistence of disorder and improprieties led to the belief that greater central supervision over policing and the administration of justice was needed. This process, it seems, began as early as 1195, when Richard I appointed certain knights throughout the realm to ensure that all males over fifteen years of age took an oath to maintain the peace. In order to fulfil this responsibility, these knights, who were later designated as conservators or wardens of the peace, enlisted the assistance of the sheriffs and constables. The development of this relationship between local constables and royal officers designated as wardens of the peace led to a

perception of local constables as being associated with and representing royal interests. There is considerable suggestion within the contemporary literature that the fostering of this association was motivated as much by the political ambitions of the sovereign as by any desire to improve the quality of the administration of justice. In this context, it is as well to remember that the thirteenth and fourteenth centuries, during which this gradual royal annexation of the local office of constable occurred, constituted a period of great political and social unrest in England.

A landmark in this gradual transformation of the office of constable was the *Statute of Winchester* of 1285, (13 Edw. I) which sought to rationalize and refine the police system that had been gradually developed over preceding centuries. This statute, the preamble to which described its object as "to abate the power of felons", has been described as especially important

> because it sums up and gives permanency to those expedients introduced in former reigns, which were considered worthy of retention for the protection of society; and because it presents to us a complete picture of that police system of the middle ages which continued with but little alteration for more than five hundred years, and which even now, though greatly changed in its outward appearance, is still the foundation upon which our present police structure is built. (Lee, 1901: 24-25)

The statute contained three principal features, which have been summarized by Devlin as follows:

1. The hundred was to be answerable for all offences committed in it. Every man between 15 and 60 was to have arms in his house prescribed in accordance with his rank and property, ready for use in keeping the peace.
2. The hue and cry was to be revived. The sheriffs were to follow law breakers with the whole countryside and the pursuit was to follow everywhere and anywhere until the offender was caught or reached sanctuary. If the hue and cry was not levied at once, the residents were to be fined.
3. Watch and ward was to be kept in towns. The gates of walled towns were to be shut between sunset and daybreak and a watch of six men was to guard each gate. Every borough was to have a watch of twelve persons, and small towns were to have watchmen according to their population. (1966: 5)

The *Statute of Winchester* did not apply to the City of London, which was the subject of another statute passed in the same year. This statute provided for the division of London into twenty-four wards, each with six watchmen controlled by a constable who was responsible to an alderman. The aldermen, together with the mayor, formed the Common Council of the city, and were responsible for its government. The Council and its members had judicial as well as executive and administrative responsibilities. In addition to the static watch, a "marching watch" was also established to move about and assist the watchmen in the wards. Watchmen were empowered to arrest offenders, or strangers who did not give a proper account of themselves, and bring them before the mayor for disposition, and punishment if warranted. In these arrangements we can discern the rudimentary beginnings of beat policing,

which was adapted to form the basis of the "new police" system four and a half centuries later. Also, the fundamental principle that the primary responsibility for policing should rest with local government authorities was most emphatically affirmed.

The high and petty constables were the linchpins for the implementation and administration of the *Statute of Winchester*. Of considerable importance in this respect were its provisions concerning the Assize of Arms (requiring all males between 15 and 60 years of age to maintain arms). As Lee has pointed out:

> The Assize of Arms was something more than a mere police regulation. Sheriffs and constables were royal officers, and the powers entrusted to them, which included the liberty to make domiciliary visits for the purpose of viewing the armour, together with the general supervision they exercised over an armed population, placed at the king's disposal a force that could on occasion be employed for political ends unconnected with the professed motive of the Assize, that of peace maintenance. (1901: 28)

While most writers do not agree with Lee's characterization of constables as "royal officers" at this time, there can be no doubt that the policing arrangements set out in the *Statute of Winchester* constituted an important step in the gradual process whereby constables came to be viewed as representing central (royal) and not simply local interests. That process, however, was greatly hastened by developments in the fourteenth century, to which we now turn.

The knights whom Richard I had appointed to monitor the system of local policing that was then in place were, sometime in the mid-thirteenth century, accorded the title of wardens of the peace. As Lambard has noted, this was a designation that was widely used by the thirteenth-century kings, and reflects their concern to have loyal supporters of high rank dispersed throughout the realm, who would alert them to any serious threats to their sovereignty. In the early fourteenth century, however, the political instability of the sovereign was greatly heightened when Queen Isabella, the exiled wife of King Edward II, returned to England in 1327 with Sir Roger Mortimer and other noblemen who were disenchanted with the old king's rule, and staged a *coup d'état*, taking the king captive and installing his young son, Prince Edward, as king in his place. As Lambard recounts it, writing in 1581:

> And then also, for as muche as it was (not without cause) feared, that some attempte would be made to rescue the imprisoned King, order was taken, that he should be conveyed (secretlie, and by night watches) from house to house, and from castle to castle, to the ende that his favourers should be ignorant what was become of him. Yea, and then withall, it was ordained by Parliament, in the life time of that deposed King, and in the verie first entrie of his sonnes raigne (1 E. 3, c. 15) that in everie Shire of the Realme, good men and lawfull (whiche were no maintainers of evill, nor Barrettours,[13] in the Countrey) should bee assigned, to keepe the peace: which was as much as to say, that in everie Shire, the King himselfe should place speciall eyes and watches over the common people, that shoulde be both willing and wise to foresee, and be also enabled with meete authoritie, to represse all intention of uproare and force, and that even in the firste seede thereof, and before that it shoulde grow up to any offer of daunger. So that,

> for thys cause (as I thinke) the election of the simple Conservatours or Wardeins of the Peace, was first taken from the people, and translated to the assignement of the King. (1581-82: 21-22)

The status and authority of these Wardens of the Peace were gradually enhanced during Edward III's reign. In 1344 they were given authority to examine and punish minor law violations, and in 1360 they were authorized to "hear and determine (at the King's suit) all manner of felonies or trespasses" (i.e., serious or petty offences) committed within the county for which they were appointed. In addition they were given authority to require sureties to keep the peace (an authority which, it will be recalled, had once belonged to tythingmen, etc.). At some point during this period, and certainly by 1361, these Wardens of the Peace came to be called "justices of the peace".

The impact of the establishment of justices of the peace on the role and status of the constables was evidently very great, for within a relatively short time the constables found themselves in a position of almost complete subservience to the justices of the peace. The gradual transformation of the office of constable has been nicely summed up by Price:

> 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, to serve the purposes of a wider, national government. (1971: x-xi)

The essential elements of this important transformation need only be briefly summarized here. For a while, the two royal offices of sheriff and justice of the peace co-existed in uncomfortable, but tolerable, harmony. In some cases, one person held both offices in the same county at the same time, but this was "to the great oppression of the people, who bitterly complained of the heavy fines that were inflicted, and of the outrageous bail that was exacted by these pluralists" (Lee, 1901: 46). In 1378, the holding of both offices simultaneously was prohibited, and from this point onward, the status and authority of the justices of the peace increased at the expense of that of the sheriffs.

During the late fifteenth and the sixteenth centuries, the authority of the justices of the peace was greatly increased. In 1485, the justices were empowered to issue warrants (also called "precepts") requiring constables to arrest and bring before them persons suspected of night hunting (1 Hen. VII, c. 7). In 1555, constables were given additional tasks, under the supervision of the justices of the peace, in connection with the maintenance of highways (2 & 3 Phil. and Mary, c. 8). In 1572, they were given responsibility, again under supervision, to enforce the draconian vagrancy laws of that period (14 Eliz. I, c. 5); in 1585, they were required to collect levies in connection with hue and

cry (27 Eliz. I, c. 13); and in 1601, along with the churchwardens, they were given responsibilities respecting the administration of the poor laws (43 Eliz. I, c. 2).

Although the constables continued to be chosen in the leet courts, the practice began at this time of having them sworn in before justices of the peace. When the English church broke away from the Church of Rome in the sixteenth century, the local parish, controlled by its vestry, began to develop into an important unit of local government. The introduction of the poor laws, the administration of which was shared by the constable and the churchwardens, under supervision of the justices of the peace, resulted in a closer association between the constable and the parish. It was not long before this association began to overshadow the constable's more traditional links with the manorial court. In many instances, the constable of the village, although still officially appointed in the leet, came to be nominated by the vestry and known as a "parish constable".

As more relatively menial statutory responsibilities were heaped on the constable, the office became onerous and time consuming. Under the supervision of the justices of the peace, it continued to be essentially unpaid, with the exception of certain recognized fees and expenses. Not surprisingly, it became less attractive to members of the new merchant class, who could ill afford to take time away from their growing businesses in order to fulfil such civic duties. At one time, the office of constable had been a position of considerable status and prestige. Now, in its increasing subordination to the supervision of the justices, it became far less desirable.

As a result of these and other factors, members of the emerging middle class increasingly resorted to the appointment of a deputy who could fulfil the office of constable in their place, rather than accepting the responsibilities of the office themselves. The practice of paying deputies (who sometimes themselves would pay other deputies in turn) to fill the office of constable became widespread in the sixteenth century. Bacon wrote in 1608 that holders of the office

> be men, as it is now used, of inferior, yea of base condition, which is a mere abuse or degenerating from the first institution; for the petty-constables in towns ought to be of the better sort of resiants in the same: save that they be not aged or sickly, but of able bodies in respect of keeping watch and toil of their place; nor must they be in any man's livery. The high-constables ought to be of the ablest free-holders, and substantiallest sort of yeomen, next to the degree of gentlemen; but should not be incumbered with any other office, as mayor of a town, under-sheriff, bailiff, etc. (1608: 751)

Many writers have claimed that persons summoned to serve the office of constable could only fulfil the obligation by the appointment of a deputy in special circumstances. Bacon (1608: 754) wrote that such deputies could be appointed only "in case of necessity", while Burn wrote that,

> he may appoint a deputy to execute a warrant directed to him, when by reason of sickness, absence, or otherwise he cannot do it himself; yet it doth not seem to be settled, that a constable can make a deputy, without some special cause....
>
> ... And the superior must be answerable for his deputy, upon any miscarriage; unless the deputy is duly allowed and sworn; for then he is constable. (1793: 399)

In the light of later comments by the courts about the nature of the constable's authority (which are considered below), Burn's indication of the reason why constables were permitted to appoint deputies ("Inasmuch as the office of a constable is wholly ministerial, and no way judicial") is of particular interest. The same assertion appears also in the writings of Hawkins (1721: Vol. II, p. 62).

Perhaps surprisingly, considering the era in which they were writing, neither Fitzherbert (1538) nor Lambard (1583) appear to make any reference to the practice of appointing deputies. There seems to be ample evidence that such practices were common during the sixteenth century, and the extensive resort to them seems to suggest that whatever theoretical restrictions there were, were not difficult to evade. Furthermore, most writers are agreed that they were a major contributor to the steady decline in the prestige and status of the office.

Another important shift in the nature of the office occurred with the gradual decline in influence and relevance of the manorial courts, or courts leet. With more of the responsibilities for local government being given by statute to the justices of the peace and the vestry during the sixteenth century, manorial courts began to default in their responsibility to appoint constables. The justices made good on such defaults by appointing constables themselves. In 1662, this practice was formally recognized and made legitimate by statute (13 & 14 C. II, c. 12):

> 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 sessions, 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. (Burn, 1793: 402)

According to Burn, however, "it is certain that justices of the peace had power to nominate and swear constables, on the default of the town or leet, before the statute of 13 & 14 C. II, c. 12 and therefore, that they have such authority in some cases not mentioned in that statute" (*ibid.*).

As Price has pointed out, it was the enclosure laws of 1796 that provided the final impetus for the decline of the manorial courts, the transference of the ultimate control of the selection of the constable to the justice of the peace, and the eventual transformation of the constable from an officer of local government to an executive agent of the justices of the peace:

> As long as the traditional open fields agriculture was practised, the constable was needed to fulfil the ancient supervisory duties which appertained to him as the village "head man". The court leet still had to meet to make the rules governing the communal use of the land and to impose penalties on those who broke them; and the constable continued annually to be appointed by the court to operate and enforce these rules.
>
> ....
>
> In the post-enclosure village, however, there were no longer the "manorial" duties left for the constable to perform. In consequence of this the office soon ceased to be filled in many places. (1971: xiii)[14]

Simpson argued that the introduction of the practice of justices of the peace swearing in constables marks the critical point in the transformation of the office:

> 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. (1895: 639)

Others, however, have argued that Simpson exaggerates the significance of this practice:

> On another view, it could be seen as no more than a rationalisation of earlier practices, made necessary by the failure of the courts leet — nor, probably, would most modern opinion accept that the seventeenth century justice was very subservient to the Crown. In any case, as the lord of the manor and the justice was generally the same person, it is doubtful whether contemporary people saw any significance in it at all. (Critchley, 1978: 17)

Whatever the correct view on this matter may be, there is no doubt that by the end of the sixteenth century the constable was being described by contemporary writers as "an Officer that supporteth the Queen's Majesty in the maintenance of her peace" (Lambard, 1583: 5-6) and one who was "for the Queen" (*ibid.*: 10).

D. The Dual Nature of the Office

At about the same time, reference to the duality of the nature of the office began to appear in the literature. Writing in 1538, Fitzherbert says that "the office of a Constable was an office at the common law, and was ordained for the conservation of the king's peace, to be held and kept in every town among

the king's subjects there dwelling" (1538: 48). While Fitzherbert's use of the past tense to describe the office as having been "an office at the common law" implies a recognition of a transformation of the office, it was Lambard, writing forty-five years later, who first gave explicit recognition to the notion of the duality of the office:

> everye of these Borsholders, Tythingmen, Borroweheades, Headborrowes, Thirdborrowes,[15] and chief pledges, hathe two several offices at this daye: the one being his auncient and firste office, and the other hys latter made office. (1583: 6-7)

Prior to this statement, Lambard had noted that

> the diverse names also of Constables, petie Constables, Tythingmen, Borsholders, Boroeheades, Headboroes, chiefe pledges, and such other (if there be any) that beare office in townes, parishes, hamlets, tythings or boroes ... are al in effect but two, that is to say, Constables and Borsholders. (1583: 4)

Lambard delineated the origins of their "ancient and first office" by describing the pre-Norman system of tythings and hundreds. This description went on to include the Norman "frankpledge" and the system of mutual surety and pledge that formed the basis of policing in early times. Then, turning to their "latter made office", he wrote:

> As touching the latter office that these Borsholders, Tythingmen, Headboroes, Boroeheades, Thirdeboroes, and chiefe pledges have, it is in manner al one with the office of a Constable of a towne, or parish, which is comonly named a Petie Constable, or under-constable, because he is a final Constable, in respect of the Constable of his Hundred, within whose limit he is. For, as about the beginning of the raigne of King Edward the Thirde,[16] petie constables were devised in townes and parishes, for the aide of the Constables of the Hundreds: so of latter times also, Borsholders, Tythingmen, Headboroes and suche like, have bene used as petie Constables, within their owne boroes and tythings. (1583: 9-10)

Clearly, this distinction reflects an attempt to describe the process whereby an original local office of great antiquity was adapted from the thirteenth century onwards to meet the needs of expanding royal influence in the government of the country. Lambard, however, went on to make another important distinction in describing the office as it existed in his day. Noting that "a great and chief part" of the duty of both High and Petty Constables "doth consist in the maintenance of the Queen's Majesty's peace", he distinguished between their duty in matters concerning the peace which was "by their own authority" and that which was "under the authority of others" (1583: 10-11). Under the rubric of duties that constables had "by their own authority", Lambard listed various powers (both by common law and by statute) that they had to prevent breaches of the peace, including:

1. The power to "take, (or arrest) suspected persons, which walk in the night, and sleep in the day: or which do haunt any house, where is suspicion of bauderie", to take such people before a justice of the peace to find sureties of their good behaviour; and to require the assistance of others in exercising such powers.

2. The powers under the *Statute of Winchester* to "arrest such strange persons as do walk abroad in the night season", and the responsibility for setting and controlling the night watches for this purpose.

3. The power (with certain exceptions) to arrest and commit to gaol "any person whatsoever" who "shall be so bold, as to go, or ride armed, by night, or by day, in fayres, Markets, or any other places", or who "carry Dags, or Pistols, or . . . be apparelled with privy coats, or dublets", and to "take such armour from him, for the Queen's use".

4. The duty to "go with the strength of the County, and to set themselves against . . . any great assembly, or rumor of people . . . in manner of insurrection", and to "take and imprison such offenders".

5. On request of one whose life has been threatened, to arrest the person making the threat, and to require him to find surety of the peace before a justice of the peace, and "carrie him to prison if he refuse to finde it". (*Ibid.*: 12-15)

Under the rubric of duties that constables had "by their own authority", Lambard also listed several common-law and statutory responsibilities "to pacify and punish the breach of the peace", including:

6. If he shall "see any men going about to break the peace, as by using hoate words by which an Affray is like to grow, then ought such Officer to command those persons to avoid upon pain of imprisonment: and if they will not depart, but shall draw weapon, or give any blow, then ought he to do his best to depart them, and to keep them insunder: and he may (for that purpose) both use his own weapon, and may also call others to assist him".[17]

7. The power to break open the doors of a house in order to arrest someone who has made an affray and has fled into the house to avoid arrest; and if he "do fly from thence also, yet may the Officer follow him, and in fresh suit take him, though it be in another Shire or county", and take him before a justice of the peace to find surety of the peace.

8. To break into any house where fighting occurs "to cause the peace to be kept", and to take those who are fighting before a justice of the peace to find surety for the peace.

9. To arrest any participant in an affray who has caused injury, and take him to gaol to await the next gaol delivery, or to take him before a justice of the peace.

10. To arrest those who assault private persons, or who assault the officers themselves "whilst they be in doing their offices", and to take such persons and commit them to gaol or bring them before a justice of the peace to find surety for the peace.

11. To receive highway robbers who have been arrested by private persons, and take them before a justice of the peace to find surety for their "good abearing".

12. To arrest persons suspected of murder or felony, on the information of a private person, and to take the suspect, along with the informant, before a justice of the peace to be "examined as appertaineth". Lambard adds that "any of these said officers may search within the limit of his authority, for any persons suspected of Felony: for it is a chief part of their office, to repress felons".

13. To arrest any one that is "endited of Felony: So, if the common voice and fame be, that A.B. hath done a felony, that is sufficient cause for any of these Officers (that shall thereof suspect him) to arrest him for it".

14. "And I like well of their opinion, which do hold, that if information be given to any such officer, that a man and a woman be in adultery, or fornication together, then the officer may take company with him, and that if he find them so, he may carry them to prison".

15. When he has in his custody "any offender that ought to be carried to the gaol, there such an officer is not bound forthwith to carry him, but may well for a reasonable time keep him in the Stocks, until that convenient provision of strength may be made to carry him safely thither". (*Ibid.*: 15-19)

Lambard described these powers and duties as ones with respect to which constables "have authoritie by their owne offices, without any commandment from others" (1583: 19). He then went on to discuss the duties of constables, also connected with the maintenance of the peace, which are "under the authority of others", under the heading "serving of precepts":

> But for as much as a great part of their duetie (concerning the peace) resteth in the making of due execuetion of the precepts of Higher Officers, and especially of the Justices of the Peace, who be (as it were) immediately set over them, let us also see after what manner these Constables and other the said inferior ministers of the Peace, ought to behave themselves in that behalfe. Albeit then, that these saide Officers be subject to the commaundements of the Justices of gaole deliverie, and of Oier and Terminer, and of some Higher Justices, yea and to the preceptes of Coroners also and of other Officers, in some certaine cases, yet because most commonly they are called uppon by the Justices of Peace, they ought specially to shewe themselves obedient to their preceptes, and may not dispute whether their commandementes be grounded upon sufficient authoritie, or no: as knowing that although a Justice of the Peace (which is a Judge of Record) should direct a Warrant beyond his authoritie to a Constable, or one other of the saide Officers, yet shall such Officer be holden excused for executing the same, howsoever that Justice of peace himselfe be blamed for it. (*Ibid.*: 19-20)

There follows a detailed account of the procedures to be followed in properly executing the warrants issued by justices of the peace. The remainder of Lambard's treatise is devoted to a recital of a whole host of statutory duties

imposed on constables "in other points of service that do not concern the Peace". Such duties, too numerous to list here, include matters connected with the enforcement of laws relating to the sale of corn; the control of rogues, vagabonds and beggars; the handling of prisoners; the administration of poor laws; the repair and maintenance of highways and bridges; the statute of labourers; the laws against certain kinds of games being played in public (such as "dice, cards, tennis, bowls"); and various laws dealing with fair trading in the market.

Lambard's treatment of the office of constable is the most detailed available in the literature of the time. It has been described at some length here, however, because later writers, and subsequently the courts in defining the legal status of constables, have made much of the distinctions he drew between a constable's "ancient and first office" and his "latter-made office", and between those duties concerning the peace that are "by his own authority" and those that are "under the authority of others". References to these distinctions pervade later writings on the office. Writing in 1608, Sir Francis Bacon referred to the authority of constables as "original", "additional" and "subordinate":

> 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.[18]
> 3. For matter of nuisance, disturbance, and disorder, although they be not accompanied with violence and breach of the peace. (1608: 751-752)

Dalton, writing in 1619, made no reference to the duality of the office of constable, but in 1721, Hawkins referred to the "original institution" of the office as having been "for the better preservation of the peace" under the common law. He went on to state:

> it is said that a Constable was at the Common Law a subordinate officer to the Conservators of the Peace: and consequently since the Office of such Conservators hath been disused, and Justices of Peace constituted in their stead, it hath always been holden, that the Constable is the proper Officer to a Justice of Peace, and bound to execute his Warrants. (1721: Vol. II, 62)

A few years later, Hale combined Lambard's original two distinctions into one when he wrote:

> For the office of constable is of twofold extent. 1. Ministerial and relative to the justices of peace, coroners, sheriffs, etc., whose precepts he ought to execute, or in default thereof he may be indicted and fined. 2. Original or primitive, as he is a conservator of the peace at common law.

> By the original and inherent power in the constable he may for breach of the peace and some misdemeanours, less than felony, imprison a person. (1778: 88)

Burn adopted a position essentially the same as that of Hawkins, merely noting that constables were both conservators of the peace by the common law and subordinate officers to justices of the peace (1793: 403-404). Blackstone, however, wrote that:

> These petty constables have two offices united in them: the one ancient, the other modern. Their ancient office is that of head-borough, tithing-man, or borsholder; ... their more modern office is that of constable merely; which was appointed, as was observed, so lately as the reign of Edward III,[19] in order to assist the high constable. (1876: Vol. I, pp. 317-318)

The significance of these references to the dual nature of the office of constable will be discussed in greater detail below, in connection with modern formulations of the legal status of the police.

What is striking about these accounts of the office of constable is their substantial similarity. The accounts written in the eighteenth century (see e.g., Jacob, 1772) hardly differ at all from Fitzherbert's (1538) and Lambard's (1583) accounts written in the sixteenth century. Furthermore, and especially important from the point of view of this paper, the accounts published on the North American continent during the nineteenth century (e.g., Bacon, 1860; Keele, 1851) do not differ significantly from the earlier English accounts. From this it seems clear that despite the degeneration in the prestige and efficiency of the office-holders during the seventeenth and eighteenth centuries (which finally spurred the eighteenth- and nineteenth-century reformers to devise the "new police": Critchley, 1978: Chapter 1), the essential legal authority and status of the constable, which had been established by the sixteenth century, did not significantly change during the ensuing three centuries. We can also be reasonably certain of the accuracy of Wilson's (1859: 16) assertion that it was this office that was introduced into Canada in the eighteenth century, and for which provision was made in the *Parish and Town Officers Act* of 1793 (S.U.C. 1793, 33 Geo. III, c. 2). The fact that no provision was made in that statute for the status, authority or duties of the constables for whose appointment it provided, seems merely to corroborate this view. Writing in 1882, Jones asserted similarly that "(t)he office of constable in Canada is coincident with the introduction into the Province of the commercial law of England" (1882: 20).

As Simpson, writing in 1895, pointed out, the transformations in the office of constable that occurred during the fourteenth and fifteenth centuries obscured the precise legal status of the constable in later years:

> 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 indued with the dignity of office.[20] (1895: 635)

Simpson suggested that:

> 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 old vill or township. (*Ibid.*: 636)

Referring to the multitude of privileges and powers that were later accorded to the constable by express legislative enactment, Simpson concluded that:

> These and other powers have in the course of the last two centuries been assigned to the office by express legislation, but they evidently represent the attributes of a legal status existing from a very remote period, though perhaps not previously recognised by the courts of law . . . . The modern policeman is a long way distant from the parish constable of even the last century, but the change is merely a development. While the police system of this country has during the present reign been placed on an entirely new footing, the materials of which it has been formed had been in existence from the first. (*Ibid.*)

This, then, was the office that was introduced into Canada during the seventeenth and eighteenth centuries. It is to these developments that we must now turn.

CHAPTER TWO

Police in Early Canada

Historical information on the early development of police in Canada (or rather, the colonies that preceded it) is pitifully inadequate.[21] Nevertheless, we know enough about the legal provisions governing the establishment of these police to be able to state with confidence that, almost without exception, the legal status with which they were endowed was that of "constable" as it had been defined in preceding centuries by the common law of England. The exception, as might be expected, was to be found in Québec during the one hundred years preceding its conquest by the British, and for a short while thereafter.

Writers on the history of policing in Canada claim that the first Canadian "policemen" appeared on the streets of Québec City in 1651 (Lamontagne, 1972: 28). Apparently their only duty was "to watch for fires and to encourage the citizens to sleep in peace and entrust their safety to them" (*ibid.*). The exact status and authority of these policemen are not clear; presumably an inquiry into the status and authority of their counterparts in France at the time would provide some answers. Such an inquiry, however, is beyond the scope of this paper, and in any event need not concern us here because, with the conquest of New France by the British in 1759, the basis for policing the colony was soon radically altered.

For five years after the conquest (1759-1764), the new colony was under military rule, and policing functions were assigned to the captains of the militia (Barot and Bérard, 1972: 9). In 1764, however, civil rule was introduced and civil courts were established by ordinance (*Ordinance Establishing Civil Courts*, see Kennedy, 1918: 37). This ordinance introduced English-style justices of the peace into the province, and provided that

> 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. (*Ibid.*: 39)

These bailiffs and sub-bailiffs were to be sworn in before the justices of the peace and, among other duties, were to

> oversee the King's High-ways and the publick Bridges, and see that the same are kept in good and sufficient Repair; 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. (*Ibid.*: 40)

While the names are different, the similarity of the status and roles of these officers to contemporary high and petty constables in England is clear from the terms of this ordinance. During this period, they apparently shared responsibility for policing with members of the militia.

In 1777, *An Ordinance for Establishing Courts of Criminal Jurisdiction in the Province of Quebec* was enacted, which provided among other things, that, in the cities of Québec and Montréal, two "Commissioners of the Peace shall sit weekly in Rotation ... for the better Regulation of the Police, and other matters and Things belonging to their Office" (Kennedy, 1918: 165). It seems that the system of locally-chosen bailiffs and sub-bailiffs cannot have been too successful, for some of the functions (especially with respect to the duties of the coroners) that had been given to them by the 1764 ordinance (Kennedy, 1918: 37) were given by the ordinance of 1777 to the "Captains of the Militia". In addition, the 1777 ordinance provided that:

> 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 impowered 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. (*Ibid.*: 165)

In 1787, this ordinance was amended to give Captains and other commissioned officers of the militia, sergeants appointed by the Captains, and "other officers in the respective Parishes", the formal status of "Public and Peace Officers within their respective Parishes". All of these officers were "authorized and enjoined to do and exercise all and singular the Duties and Services of Public and Peace Officers within their respective Parishes according to Law" (Kennedy, 1918: 188). In addition, the amendment of 1787, entitled *An Ordinance to Explain and Amend an Ordinance for establishing Courts of Criminal Jurisdiction in the Province of Quebec* authorized and required the Commissioners of the Peace or the Justices 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, every of which Persons so appointed shall faithfully perform the Duties of the Offices for which he may be so appointed for the space of one year. (*Ibid.*)

Anyone so appointed who neglected or refused to perform the office rendered himself liable to a not inconsiderable fine of twenty pounds plus costs.

It would seem that the ordinance of 1787 finally paved the way for the introduction within the Province of Québec of the English-style office of constable (Barot and Bérard, 1972: 13), and from this moment onward, the constable formed the basis of policing within the province. In 1802, the powers of the Commissioners of the Peace in Québec and Montréal were abrogated, leaving control of the policing of the two cities entirely in the hands of the justices of the peace, as was the case in England at that time (*ibid.*: 14). Shortly thereafter, the term "constable" came into common use in Québec. In 1836, the power of justices of the peace to appoint constables, which had been limited by the ordinance of 1787 to Québec and Montréal, was extended to the whole province (*ibid.*), and in 1838 the power to appoint constables for the cities of Québec and Montréal was given to the Civil Secretary, although constables were still to be sworn in before justices of the peace. These men, who were to form a *corp de police* for each of the two cities, were to "act as Constables for preserving the Peace and preventing robberies and other felonies, and apprehending offenders against the Peace" (*An Ordinance for Establishing an Efficient System of Police in the Cities of Quebec and Montreal*, S.L.C. 1838, 2 Vict., c. 2, s. 3) — a formulation that came into standard usage in English Canada at about this time and is still found in many provincial Police Acts to this day. The 1838 ordinance also provided in the same section that

> men so sworn, shall within the said cities have all such powers, authorities, privileges and advantages, and be liable to all such duties and responsibilities as any Constable duly appointed now has, or hereafter may have by virtue of the Laws of this Province, or any Statutes made or to be made, and shall obey all such lawful commands as they may from time to time receive from the said Inspector and Superintendents of the Police, for conducting themselves in the execution of their office. (*Ibid.*)

Since the statutes providing for the appointment of constables in Québec were those relating to the administration of criminal justice (see above), the relevant "law of the province" referred to in this section of the ordinance was the common law of England.[22] Thus the section can be seen to have confirmed the introduction of the common-law office of constable into the Province of Québec, as modified by specific statutory provisions of the province related to that office. A similar provision can be found in the statute that established the Québec Provincial Police Force in 1870. It defined the duties of members of the force and provided that,

> for these purposes, and in the performance of all the duties assigned to them by or under the authority of this act, they shall have all the powers, authority, protection and privileges, which any constable now has or shall hereafter by law have, or which the constables or sub-constables of the respective cities or towns now have. (*Quebec Police Act*, S.Q. 1870, 33 Vict., c. 24, s. 47)

Meanwhile, other colonies in British North America were developing their own methods of peacekeeping. Although European settlement of Newfoundland began as early as 1497 (Fox, 1971: 3), it seems that justices of the peace and constables were not appointed there until 1729 (Prowse, 1895: 287). The appointment of such officers was pursuant to a royal proclamation authorizing the new Governor to make such appointments, and declaring that the law the officers were to administer was to be the common law of England. It was apparently not until 1825, however, that any rules and regulations governing the supervision of these constables were drawn up. In that year, the Governor, in a letter to the Chief Magistrate at St. John's, directed that the constables should be paid salaries out of money raised from tavern licence fees, and that "(t)he High Constable, under the authority of the Chief Magistrate, was to have the general superintendence of the Constables" (Fox, 1971: 22). Eight years later, on July 27 1833, a Bill entitled *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* was passed by the House of Assembly. This Bill provided 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 the town 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'" (Fox, 1971: 23). It was not until forty years later, with the passage of the *Constabulary Act* of 1872, that the force was re-organized and designated the "Constabulary Force of Newfoundland". That statute remained unchanged as the basic police legislation of Newfoundland for almost one hundred years, until it was revised in 1970 (*The Constabulary Act*, S.N. 1970, No. 74). An unusual feature of this statute is that nowhere did it explicitly state that the members of the force held the office of "constable". Rather, it seems that this had to be inferred from the fact that the force was referred to in the statute as a "constabulary force". Such an interpretation, perhaps reinforced by the fact that section 8 of the 1872 Act provided for the appointment by justices of the peace of persons to act as special constables "whenever it shall be found that the ordinary constabulary force is insufficient to maintain the public peace of any locality", seems nevertheless a rather oblique manner in which to confer the status of constable. This anomaly persists in the statute governing the force to this day.

The town of Halifax, Nova Scotia, was founded in June 1749, pursuant to a royal proclamation. A month later, the new Governor in Council issued a proclamation requiring that "all settlers shall assemble together tomorrow morning at the hour of 11 o'clock in separate companies with their respective overseers, and each company choose a constable" (Mitchell, 1965: 3). As in other jurisdictions, the constables, once chosen, were to be sworn in before justices of the peace, and were subject to their direction. As Mitchell has indicated: "At this time the constables were not organized; however, they carried out specific duties as detailed to them by the justices" (*ibid.*). In 1765, however, the appointment of constables was placed on a statutory basis with

the enactment of the *Town Officers Act* (S.N.S. 1765, 5 Geo. III, c. 1) by the new House of Assembly. This statute provided for the nomination of "constables" by a Grand Jury, and their formal appointment by justices of the peace. The complete absence of any other reference in the statute to the status, duties or responsibilities of these officers makes it clear that the office provided for was the common-law office of constable. An almost identical statute was enacted by the legislature of New Brunswick in 1786, called the *Town and Parish Officers Act* (S.N.B. 1786, 26 Geo. III, c. 28).

By the early nineteenth century, constables were being appointed in Prince Edward Island. They were nominated as such by justices of the Supreme Court of Judicature of the Island, and sworn in by justices of the peace. This much is clear from a statute enacted in 1843 with the revealing title of *An Act to Compel Persons Appointed to the Office of Constable to Serve as Such* (S.P.E.I. 1843, 6 Vict., c. 2). The Act, like those in other jurisdictions, provided for a substantial fine or imprisonment for anyone who, having been chosen as a constable, refused or neglected to perform the duties of the office without just cause. Ten years later, the legislature enacted *An Act relating to the Appointment of Constables and Fence Viewers for Queen's Country* (S.P.E.I. 1853, 16 Vict., c. 11), which, like Nova Scotia statute, provided for the nomination of constables by a Grand Jury, but their appointment by justices of the Supreme Court of the Island. By the mid-nineteenth century, therefore, the common-law constable, modelled on his English counterpart, was well established throughout Eastern Canada.

Meanwhile, colonists had been moving steadily westwards. In 1792 the English common law was officially introduced as the law of the new Province of Upper Canada (*Introduction of English Common Law Act*, S.U.C. 1792, 33 Geo. III, c. 1), and in the following year the *Parish and Town Officers Act* (S.U.C. 1793, 33 Geo. III, c. 2) was enacted for the province. The Act provided for the appointment, by the justices of the peace at their general quarter sessions, of a high constable for each district of the province, and constables in every "parish, township, reputed township, or place".

Further west, the Red River Settlement was first established in 1812, in what is now Manitoba. While we know little about the early policing arrangements for this pioneer settlement in the District of Assiniboia (see Kelly and Kelly, 1976: 9-10), some clue can be gained from the *Laws of Assiniboia* passed by the Governor and Council of the Settlement in 1862. Articles 32 to 34 of those laws provided for police:

> **XXXII.** Efficient householders, not exceeding twelve in number, to remain in office for a term of three years from the 1st 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.

The laws also provided that: "In future no constable shall be at liberty to absent himself from the settlement for more than one night at a time, without express permission from the magistrate of the district to which he belongs". These provisions reveal the essential characteristics of an English common-law constable — a local peace officer, generally subordinate to local justices and paid a modest salary for the performance of his duties.

A. Early Federal and Provincial Police Forces

In 1867, the provinces of Canada, New Brunswick and Nova Scotia joined to form the Dominion of Canada. Confederation, of course, brought a new dimension to the problem of policing, particularly because, under the provisions of *The British North America Act, 1867* (30 & 31 Vict., c. 3 (U.K.)), responsibility for criminal justice was divided between the federal Parliament and provincial legislatures. While Parliament was given powers to enact criminal law and procedure (section 91, paragraph 27), the administration of justice, including criminal justice, was generally understood to have been given to the provinces (section 92, paragraph 14). One cannot at this point state it much more categorically than that, because even after 114 years of experience with this constitution, the exact nature of this division of responsibility, and its implications for policing, have not been the subject of authoritative and definitive rulings by the courts. While this matter will be the subject of further discussion later in this paper, for the moment it will be sufficient to point out that, whatever may have been the intentions of the draftsmen of *The British North America Act*, both the federal and provincial levels of government considered that it entitled them to establish police forces. Within a year of its creation, Parliament enacted the *Police of Canada Act*, S.C. 1868, 31 Vict., c. 73, authorizing the establishment of a Dominion Police Force to carry out the enforcement of criminal laws and other Dominion laws only.

The *Police of Canada Act* broke new ground with respect to policing legislation in Canada, and set an example that was soon emulated in Manitoba, Québec and Newfoundland, and subsequently in all other provinces.

The statute marks the first major departure in Canada from the English model of the local constable, in that it provided for the appointment of a police force that was to be deployed throughout the new confederation. In addition, and perhaps more importantly in terms of the legal status of its members, the force's officers and constables were to be appointed either by or under the authority of the Governor in Council (in practice a sobriquet for the federal Cabinet), rather than simply by justices of the peace. A third significant feature of this legislation was that it provided for the appointment of one or more Commissioners of Police who were not only to have control and management of the police force, but also were to have all the "powers and authority, rights and privileges" of municipal police magistrates and justices of the peace in the province in which they were employed.[23] This scheme was modelled after the ideas of the police reformers in England (Radzinowicz, 1956: Vol. III), whose advocacy of a "new police" had borne fruit in the enactment, first, of the *Dublin Police Act* in 1786,[24] and subsequently of the *London Metropolitan Police Act* in 1829 (10 Geo. IV, c. 44 (U.K.)). While the scheme preserved the traditional subordination of constables to justices of the peace, it significantly altered the character of both offices. In the first place, neither office, as manifested in this scheme, was a purely local office, as it had traditionally been. In the second place, the constable was no longer locally chosen, but was to be appointed by or under the authority of the central government. Finally, and perhaps most significantly, both offices were to be subject to direct regulation by the central government. To this end, section 6 of the Act provided that:

> 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....

Clearly, the traditional common-law office of constable, while still forming the basis of the status and authority of the "new police", had undergone radical transformations through these statutory provisions.

Within a very short time of the establishment of the Province of Manitoba in 1870, a *Constables Act* was enacted there (S.M. 1870, 34 Vict., c. 11) which built on the experience of the *Police of Canada Act* (S.C. 1868, 31 Vict., c. 73) and laid the foundations for the appointment of a provincial force in the province. At about the same time in Québec, a similar statute was enacted to establish the Québec Provincial Police Force (*Quebec Police Act*, S.Q. 1870, 33 Vict., c. 24). Like the federal legislation just described, these two statutes each provided for the appointment of forces whose members were "constables", but whose jurisdiction was not purely local. In these cases, each constable had province-wide jurisdiction. Such officers were to be appointed by, or under the authority of, the respective Lieutenant Governors in Council, rather than by justices of the peace. In two important respects, however, these provincial statutes differed from the federal legislation. In the first place, the persons placed in immediate control of these provincial forces were not accorded the status of magistrates or justices of the peace; and in the

second place, a hierarchical subordination of junior to senior members of the force was explicitly recognized in the statutes. Thus, section 2 of the Manitoba statute, for instance, provided that:

> 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.

Although each of these officers was declared to be a "constable" by the statute, this status had now to be understood in the context of the statute's explicit provision that some of these constables were "subordinate" to others.

The notion of a hierarchically-organized police force was, of course, one of the central characteristics of the "new police" and had been adopted in practice, as we shall see, not only by the new Dominion Police Force, but also by municipal forces in Canada. The fact that the "new police" remained based on the common-law office of constable, however, posed some problems in defining their legal status — problems that have never been adequately resolved. On its face, the "new police" seemed to create something of a legal anomaly — that is, a body of officers who, from the most senior to the most junior, all shared an equal legal status (that of "constable"), and yet some of whom were to be "subordinate". This had been left unarticulated by the early statutes that created such forces in Canada. The subordination of constables to other authorities (especially justices of the peace) had long been recognized both by common law and by statutes both in England and in Canada. However, the direct subordination of one constable to another, while it may have been effected in practice was, with one exception, not so recognized in Canadian law until the enactment of the Manitoba and Québec provincial police statutes in 1870.

The one exception was a statute enacted by the Parliament of the Province of Canada in 1845, entitled *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). Section 13 of this Act provided that:

> 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.

Section 15 of the Act provided that the men employed in such a force were declared to be "Constables and Peace Officers for the purposes of this Act". The Act was to be in force only for "(t)wo years, and from thence to the end of

the next ensuing session of Parliament and no longer" (section 18). This period was later extended (by S.C. 1851, 14 & 15 Vict., c. 76) for a further five years to 1855. The statute was passed apparently to deal with unrest among the predominantly Irish labourers who were building the Welland and St. Lawrence Canals. A force was also raised pursuant to this statute to quell riots in Montréal, protesting the Rebellion Losses Bill of 1849, which resulted in the burning of the Parliament Buildings (Kelly and Kelly, 1976: 17-18). It was, in effect, the first "federal" police force in Canada.

As we have noted, the Manitoba legislation referred simply to the appointment of "a Chief of Police and such subordinate Officers" as seemed necessary. The Québec statute, however, was much more explicit in this regard. The Lieutenant Governor in Council was authorized to appoint "a commissioner of police and one or several superintendents of police", and the commissioner was authorized to appoint the sergeants and constables, the latter being divided into first- and second-class constables. Section 4 of the Act then provided that:

> 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.... (*Quebec Police Act*, S.Q. 1870, 33 Vict., c. 24)

Another important feature of these early statutes providing for the creation of provincial police forces was the extent of the authority they gave to the government to control such forces. While the *Police of Canada Act* gave the Governor in Council power to make regulations for the Dominion Police Force, and the earlier Province of Canada statute of 1845 provided that the mounted police force envisaged by it was to be "under and subject to such Orders, Rules and Regulations as the Governor in Council shall from time to time make or issue", the Manitoba statute was much more explicit in this regard. It left little doubt as to the pervasiveness of the government's authority to control the provincial force:

> The Lieutenant Governor in Council may, at all times and from time to time, in the case of the Chief of Police and of all subordinates and persons under him, whether Officers, Constables or Privates, as he may in all other cases not provided for by law, fix and determine their compensation respectively, and, generally, order, direct and determine all matters and things connected with the management, ordering and arrangement of all matters connected with the office and duties of the Chief of Police, subordinate Officers, Constables, Privates and other persons connected with him, them or any of them. (S.M. 1870, 34 Vict., c. 11, s. 5)

By comparison, the Québec statute of 1870, creating the Québec Provincial Police Force, gave primary responsibility for directing, controlling and managing the force to the Commissioner of the force. In many important respects, however, such direction, control and management of the force were subject to

the approval of the Lieutenant Governor in Council (see e.g., sections 13, 14, 16, 18, 22, 37, 41, and 42), and some of these functions were reserved exclusively to the Lieutenant Governor in Council (see e.g., sections 2, 3, 21, 25, 36, and 43).

The subordination of constables to the dictates and control of elected politicians was not new in Canada; as we shall see later, it was already well established in the case of municipal police forces. Together with the recognition of the subordination of constables to each other, however, it was a development of considerable significance for the constitutional status of the police, and introduced new and important elements to be considered in determining that status. These two features also characterized the Newfoundland Constabulary which was created in 1872, and are to be found in all subsequent statutes creating provincial police forces in other provinces. We shall return to a discussion of their significance later in this paper. For the moment, however, we return to the development of policing in the other provinces of Western Canada.

British Columbia became a province and joined Confederation in 1871. As early as 1858, however, police forces had been created at Fort Victoria on Vancouver Island and Fort Langley on the mainland. These two forces, whose commissioners and members were all "constables" in the common-law tradition, "became the core of British Columbia policing when Vancouver Island joined the colony of British Columbia in 1866" (British Columbia Police Commission, 1980: 3). In 1871, they formed the nucleus of the new British Columbia Provincial Police Force. The legislative foundation for this force, however, does not seem to have been established until the enactment of the *Police Constables Act* in 1880 (43 Vict., c. 22) which retroactively validated "all appointments of Constables heretofore made by the Lieutenant Governor in Council", and gave authority to the Lieutenant Governor in Council to appoint "such persons as he may think proper to be Provincial Constables" in the future. Such provincial constables were required to take an oath in which they swore to "faithfully and impartially perform the duties appertaining to the said office". Beyond these somewhat cryptic provisions, the statute contained no indication of the status, authority, powers or duties of these officers.

Just over twenty years later, however, the British Columbia Provincial Police Force was placed on a clearer legislative footing by the *Provincial Police Act, 1895* (58 Vict., c. 45), which provided for the appointment of a Superintendent of Police within the province. The statute provided also that the Lieutenant Governor in Council could "direct and authorize the Superintendent of Police to appoint any fit and proper persons as police constables". Such constables were required by the Act to "obey all lawful directions and be subject to the government of such Superintendent of Police, and [were] charged with all the powers, rights and responsibilities which belong by law to

constables". The police force established by this statute remained in operation in British Columbia until 1950 (see Clark, 1971), when it was disbanded in favour of contract policing by the Royal Canadian Mounted Police.

By the end of the nineteenth century, the parts of the North West Territories that were later to become the provinces of Alberta and Saskatchewan were also developing systems of policing based on the model of the common-law constable. The police force that was deployed to maintain order and preserve the peace in this region was the North West Mounted Police, modelled on the Royal Irish Constabulary (created in 1836), and established pursuant to the federal *Administration of Justice, North West Territories Act*, S.C. 1873, 36 Vict., c. 35 (see MacLeod, 1976).

The provisions of this statute were explicit, not only in spelling out the status of the new force's members, but also in emphasizing the force's subordination to governmental authority. Section 10 of the Act authorized the Governor in Council of the Dominion to appoint, by commission, a Commissioner of Police, one or more Superintendents of Police, a Paymaster, a Surgeon and a Veterinary Surgeon for the force. The Commissioner, in turn, was to be authorized by the Governor in Council to appoint constables and sub-constables for the force. Following the example of the *Police of Canada Act* of 1868, section 15 provided that the Commissioner and every Superintendent of the force were to be *ex officio* justices of the peace. For the first time in Canada, therefore, the offices of justice of the peace and constable were combined in one officer: *all* members of the force were declared by section 19 to have "all the powers, authority, protection and privileges which any constable now has or shall hereafter by law have" in the performance of their duties. Each member was also to take an oath in which he would swear to "diligently and impartially execute and perform the duties and office of (constable, superintendent etc.)" and that he would "well and truly obey all lawful orders or instructions which [he] shall receive as such (constable etc.), without fear, favour or affection of or towards any person or party whomsoever". With respect to general direction and control of the force, section 11 of the Act provided that:

> The Commissioner of Police shall perform such duties and be subject to the control, orders and authority of such person or persons as may, from time to time, be named by the Governor in Council for that purpose.

And section 33 provided that:

> The Department of Justice shall have the control and management of the Police Force and of all matters connected therewith; but the Governor in Council may, at any time order that the same shall be transferred to any other Department of the Civil Service of Canada, and the same shall accordingly, by such order, be so transferred to and be under the control and management of such other Department.

Apart from the oblique reference to "lawful orders or instructions" in the oath of office of members of the force, the subordination of constables to officers was not expressly stated in the Act, except with respect to their duty to

execute warrants of judicial officers and to perform "all duties and services in relation thereto". In the performance of this duty, members of the force were declared (by section 19) to be "subject to the orders of the Commissioner or Superintendent". However, since the Superintendents and the Commissioner were *ex officio* justices of the peace, the subordination of the constables to these officers could be understood as an integral characteristic of the common-law office of constable, which they held. In this case, as in the case of the Dominion Police Force, the constables, although they were clearly subordinate to the Commissioner and Superintendents, just as clearly did not share equal status with those officers.

In addition to the North West Mounted Police, the North West Territories were also policed by constables appointed by justices of the peace, as provided for by the *Appointment of Constables Ordinance* (O.N.W.T. 1878, No. 7). Such constables, whose status and duties were not specified in the Ordinance and must therefore be taken to be those of common-law constables, had jurisdiction to act throughout the Territories.

In 1905, the provinces of Alberta and Saskatchewan were created. These provinces lost little time in enacting police legislation. In 1906, Saskatchewan passed its *Constables Act* (chapter 20), which was almost identical to the Manitoba statute of 1870, and thus allowed for the creation of a provincial police force under the control of the Lieutenant Governor in Council. The commanding officer of such a force was to be styled, as in British Columbia, a Superintendent of Police. The Alberta *Constables Act* of 1908 (chapter 4), by comparison, was in identical terms to the North West Territories' *Appointment of Constables Ordinance* which it replaced. A year later, however, the power to appoint constables with province-wide jurisdiction was extended to judges of the District and Supreme Court, and to the Lieutenant Governor in Council (*Constables Act*, S.A. 1909, c. 7). Despite these provisions, however, these two provinces continued to be policed provincially by the Royal North West Mounted Police[25] until 1917, when both provinces enacted statutes formally establishing their provincial constables as provincial police forces (*Alberta Provincial Police Act*, S.A. 1917, c. 4 and *Saskatchewan Provincial Police Act, 1920*, S.S. 1919-1920, c. 19).

The Alberta statute of 1917 is of some interest historically, in that it provided that the new Alberta Provincial Police should be "controlled and managed" by a three-member Board of Commissioners. The three members of the Board, who were named personally in the statute, were the Police Magistrates of Edmonton and Calgary and the Deputy Attorney General of the province. Alberta thus became the first province in Canada to experiment with a provincial police commission. The experiment was short-lived, however. Two years later, the control of the provincial force was turned over to the Attorney General of the province (*Alberta Police Act*, S.A. 1919, c. 26).

In Upper Canada, the inadequacies of the system whereby constables for rural areas were appointed by justices of the peace (pursuant to the *Parish and Town Officers Act* of 1793), became apparent during the nineteenth century. Such constables were usually amateur and either completely unpaid or paid according to a fee schedule based on the execution of specific judicial processes.[26] Under such circumstances, efficient and effective policing in the counties and districts could hardly be expected, and was apparently not achieved (McDougall, 1971b: Chapter 2). A number of measures to alleviate the situation were introduced. In 1851 a statute (*An Act to Authorize the Employment of Military Pensioners and Others as a Local Police Force*, S.C. 1851, 14 & 15 Vict., c. 77) was enacted to permit military pensioners and others to perform voluntary services as members of local police forces. In return for such service over five years, these persons were each to be granted fifty acres of public lands, on condition that they settle thereon. In 1860, the earlier provisions of the *Parish and Town Officers Act* (S.U.C. 1793) were repealed, and the *Appointment of Constables Act* was passed (S.C. 1860, 23 Vict., c. 8), which provided for the appointment of local constables by magistrates, as before, but authorized such appointments to continue from year to year unless the appointee claimed exemption from serving.

Neither of these measures proved adequate, however, and in 1874 the Ontario *Administration of Justice Act* (37 Vict., c. 7, ss. 65-67) gave the Lieutenant Governor of the province the power to appoint constables for territories "not attached to a county for ordinary municipal and judicial purposes". This power had previously resided in stipendiary magistrates appointed for such areas (S.C. 1857, 20 Vict., c. 60, s. 6). Three years later, the *Constables Act* (S.O. 1877, 40 Vict., c. 20) permitted any judge of a county court to appoint county constables at any time. Previously they could only be appointed by the courts of general sessions of the peace, which sat infrequently. This Act also enabled the Lieutenant Governor to appoint provincial constables who would have authority to act throughout the province, and thus paved the way for a provincial police force. Although the first provincial constable (a detective) was appointed in 1875 (pursuant to the *Administration of Justice Act* of 1874 — see Murray, 1977), over thirty years were to pass before a provincial force was created.

The Ontario *High and County Constables Act* (S.O. 1896, 59 Vict., c. 26), borrowing another idea from England, not only improved the system for appointing high constables and gave them the supervision of all the constables in their counties, but also established an Inspector of Legal Offices. This officer was given wide powers to inspect the offices of high and county constables, to hold inquiries into their conduct and, in appropriate cases, to suspend them from duty pending further inquiry by the county council. The Act provided for the appointment of high constables by county councils. When the councils defaulted in this responsibility, it fell to any three of four local officers (the county judge, the warden, the sheriff and the county crown attorney). In addition, on the recommendation of the sheriff and the

county crown attorney, any high constables could be appointed as, or authorized to exercise the powers of, a provincial constable by the Lieutenant Governor in Council. An actual provincial police force did not become a reality in Ontario, however, until 1909, when the Ontario Provincial Police Force was established by an order in council (October 13, 1909). This was ratified the following year by the *Constables Act* of 1910 (c. 39, s. 17). The force was comprised of constables under the command of a superintendent who, in addition to having the control of the force, was given the same powers in relation to its members as the provincial Inspector of Legal Offices had been given with respect to high constables.

In the Maritime provinces, provincial police forces were not established until the late 1920s. New Brunswick's *Appointment of Provincial Constables Act* of 1898 (61 Vict., c. 6) provided for the appointment of provincial constables, but these officers were not organized into a provincial police force until 1927 (*Provincial Police Force Act*, S.N.B. 1927, c. 9). Similarly, Nova Scotia's *Provincial Constables Act* of 1899 (62 Vict., c. 10) provided for the appointment of provincial constables, "not exceeding three in number", with province-wide jurisdiction. A further statute, the *Organization of Provincial Police Act*, S.N.S. 1910, c. 10, was enacted to allow these provincial constables to be organized as a provincial police force. Kelly and Kelly (1976: 16) have indicated, however, that such a force was not in fact established in Nova Scotia until 1928. Two years later, neighbouring Prince Edward Island established a provincial police force (*Provincial Police Force Act*, S.P.E.I. 1930, c. 16). As we have seen, Newfoundland's provincial force, the Newfoundland Constabulary, had been established in 1872. In 1935, the colony (for it was not yet part of Canada) established a second provincial force, modelled on the Royal Canadian Mounted Police, and called the Newfoundland Company of Rangers (Fox, 1971: 119-120).

It is unnecessary to dwell further on most of these provincial police forces, since only three of them — the Ontario Provincial Police, the Québec Police Force and the Newfoundland Constabulary — are still in existence, and in practice the Newfoundland Constabulary is confined to municipal policing in the City of St. John's. The remaining seven provincial police forces were disbanded in favour of contract provincial policing by the R.C.M.P. (Saskatchewan in 1928, Alberta and the three Maritime provinces in 1932, and British Columbia and Newfoundland in 1950). Nevertheless, the fact that such contract policing by the R.C.M.P. may not continue indefinitely, and that legislation authorizing the establishment of a provincial police force remains in effect in many of these provinces at the present time, dictates that the existence of these earlier forces should not be lost from memory.

At the federal level, one other development remains to be noted, namely the establishment in 1920 of the Royal Canadian Mounted Police. From its creation in 1868, the Dominion Police Force had been deployed principally, although not exclusively, in the eastern provinces and in the nation's capital.

The North West Mounted Police, on the other hand, had been created specifically for policing in the West. When the western provinces began to develop their own provincial police forces, some further rationalization of federal policing arrangements seemed called for. The result was the effective merger, in 1920, of the Royal Northwest Mounted Police and the Dominion Police, to establish a new force with jurisdiction throughout the country, to be called the Royal Canadian Mounted Police. The *Royal Northwest Mounted Police Amendment Act*, S.C. 1919 (2nd Sess.), c. 28, merely changed the name of the Royal Northwest Mounted Police to that of the Royal Canadian Mounted Police, without making any major changes to the legal constitution or status of the force. It provided that no further appointments should be made to the Dominion Police Force.[27]

B. Nineteenth-Century Municipal Policing

By the beginning of the nineteenth century, legislation existed in Ontario, Québec and the Maritime provinces authorizing the appointment of common-law municipal constables by justices of the peace. In the early 1830s, significant changes occurred in the arrangements for municipal policing. Two important factors precipitated these changes. One was the police reform movement in England; in particular, the 1829 enactment of the *London Metropolitan Police Act* (10 Geo. IV, c. 44 (U.K.)). The other was the advocacy of reform of local government, particularly the transference of local government responsibilities from appointed justices of the peace to elected municipal councils (Aitchison, 1949). The result of these two reform movements was that in the early 1830s, charters of incorporation were enacted for the major cities. These charters provided for government by elected municipal councils and transferred almost all the local government responsibilities of the justices of the peace, often including the responsibility for the appointment of constables, to the councils.

It is not necessary to review all these developments here. For our purposes, it will be sufficient to illustrate their impact on municipal policing and the status of municipal policemen with a few examples. As the first of these, we shall consider the City of Toronto, incorporated by charter in 1834 (*Toronto City Charter*, S.U.C. 1834, 4 Wm. IV, c. 23). The charter provided for the government of the city by a common council consisting of elected aldermen and presided over by an elected mayor. For purposes of government, the council was empowered to enact by-laws on a wide variety of matters. This legislative authority included the authority "to regulate the police of the said City" (section 22). More specifically, however, the charter provided, by section 57,

(t)hat 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.

In addition to the executive and administrative responsibilities of the justices of the peace for local government, certain judicial functions were transferred to the new elected council. Thus, section 77 of the statute provided

(t)hat there shall be a Court of Record, called the Mayor's Court of the City of Toronto, wherein the Mayor for the time being shall preside, assisted by the Aldermen of the said City, or any one of them.

Section 78 provided

(t)hat the said Court shall in all cases possess the like powers and have the same jurisdiction over crimes and misdemeanours arising within the City of Toronto and the Liberties thereof, which the Courts of General Quarter Sessions of the Peace within this Province now or hereafter shall have by law.

Thus, the new elected council, like the justices of the peace whom it replaced, had executive, administrative and judicial responsibilities. The notion of the separation of such powers in local government was not to gain acceptance for some years. Under these circumstances, it was not surprising to find provisions for the direct control of the police by the new municipal council. Thus, section 65 of the statute provided

(t)hat 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.

Section 74 left no doubt that this power of control embraced law enforcement decisions in particular cases as well as more general matters:

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 them, 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 Correction, 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. (Emphasis added)

There were, however, also a High Bailiff and a City Magistrate, and in practice the day-to-day control of the city's new police force was entrusted to these two officers. Thus, in 1835, the city council resolved "that five persons be appointed as police constables to be in constant attendance at the Police Office and otherwise employed under the direction of the High Bailiff and the City magistrate".[28] As before, however, the status and duties of these constables were left undefined by statute; their status and duties were to be those of the common-law constable as modified by the statute itself. Furthermore, the command structure within the new force was also left unarticulated.

In 1849, the *Municipal Corporations Act* (S.C. 1849, 12 Vict., c. 81 — the so-called "Baldwin Act") was passed for Upper Canada, which generalized local government by elected councils to all municipalities in the province. The provisions of this statute concerning the establishment of police forces in cities and towns were substantially similar to those of the *Toronto City Charter*. The statute did, however, provide for the appointment of an officer to be called a "Chief Constable" in cities and towns. While this officer was obviously intended to be the head of the police force (subject to the governance of the Police Magistrate and the Council), neither his duties nor his relationship to the constables of his force were specified in the statute. As a result, his status remained undefined.

Nine years later, a significant change was made in the policing arrangements for Upper Canada's five cities by the enactment of the *Municipal Institutions of Upper Canada Act* of 1858 (S.C. 1858, 22 Vict., c. 99). This statute, a revision of the earlier *Municipal Corporations Act*, introduced into Canada the concept of a Board of Commissioners of Police as the governing authority for a municipal police force. This institution, first developed in the United States in the mid-1840s (Fosdick, 1969: 77) was subsequently adopted as the mode of governance for municipal police forces in many Canadian provinces. It is therefore of considerable importance to an understanding of the legal status of the police today.[29] Section 374 of the Act of 1858 provided that:

> 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.

The Recorder referred to in this section was a judicial officer appointed by the Crown (i.e., the province) and holding office at its pleasure. The Recorder was *ex officio* a justice of the peace.

The Act stipulated that the police force was to consist of a chief constable and "as many constables and other officers and assistants, as the Council from time to time deems necessary, but not less in number than the Board reports to be absolutely required". Members of the force were to be appointed by, and hold their offices at the pleasure of, the Board (sections 376 and 377). The Board was required to make 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" (section 378). But most important in assessing the status of the police under this legislation was section 379, which provided that:

> The Constables shall obey all the 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 misdemeanors, 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.

Again, the status of the Chief Constable and his relationship to the constables and other officers of the force were left unspecified in the Act. Presumably, however, he was to be considered one of the constables for the purposes at least of section 379 of the Act.

The reason for the adoption of municipal police boards for Upper Canada's cities remains obscure. In a note to the 1859 edition of *The New Municipal Manual for Upper Canada*, the editor, referring to section 374 of the Act (establishing the boards), wrote that "(t)he object of this and the following sections is as much as possible to make the Police Force of a city independent of the City Council" (Harrison, 1859: 221, note (j)). But given the *ex officio* membership of the Mayor on the board, and the fact that the section allowed for the other two members of the board to be nominated by the council under certain circumstances,[30] this is an unconvincing explanation. McDougall has similarly asserted that the 1858 provisions were enacted with the intention of "removing the police from politics". Referring to the period immediately prior to the introduction of these measures, he wrote that

> 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. (1971a: 11-12)

Although McDougall cites no specific source for this allegation, some support for it can be found in passages of Wilson's *The Constable's Guide*, published in Toronto in 1859. Referring to a rule that the new Board of Commissioners of Police in Toronto had introduced to the effect that "each man, upon his appointment, should declare upon oath, that, with the exception of the order of Freemasonry, he was not connected with any secret society", Wilson wrote that:

> The exclusion of all secret society men is found to prevail in every part of the old country, in the United States, and in Australia; and from the repeated complaints against the partizan character of the force in this city, it had become necessary, even in justice to the force itself, to introduce the rule here which had been found to be so necessary and beneficial elsewhere. (1859: 83)

Wilson went on to deny suggestions that this rule had been adopted for the purpose of excluding anyone "who is or ever has been an Orangeman" from the police force. Claiming that "there are now many Orangemen in the force", he argued that the rule "does not exclude the secret society man; he may be and is in fact yet taken as readily as anyone else; all he is asked to do is not connect himself with the society or to attend its meetings while he is a policeman" (*ibid.*: 84). Commenting that, before the introduction of the rule, six of the seven officers of the force and "more than half" of its fifty-three constables were members of the Loyal Orange Association, Wilson wrote:

> This seems to have been carrying matters too far the other way, and to have justified, with much apparent reason, the many complaints which were made against the partizan character of the force — and to have given colour, not merely to the belief that none but an Orangeman could be admitted into the force, but to the belief that some of the unfortunate affrays which disgraced our city for the last few years, and which ended without the arrest or detection of any of the offenders, could not have happened, or could not so have ended, if the force had been differently constituted. (*Ibid.*: 85)

Arguing that "the police is not established for the purpose of representing any particular party, sect or country", and that the introduction of the rule about secret society membership had had a beneficial effect on the police force, Wilson concluded that:

> 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. (*Ibid.*: 84)

It was perhaps as a result of this concern over the force's partisanship that Wilson referred to the original English office of constable as an "independent functionary" having "inherent and independent authority" (*ibid.*: 10). He did not, however, elaborate on the meaning of the term "independent" in this context, nor did he cite any authority for the proposition, as he had for every other statement he made about the original office in England. Furthermore, when he came to describe the office as it existed in the province of Upper Canada, he did not repeat the claim concerning the "independence" of the office. He was content to cite the time-honoured distinction between the office's "original" and its "ministerial" aspects, and to refer to the constable's "original and inherent" powers and functions (*ibid.*: 19, 20). As we have seen, the latter terms were descriptions that had been applied to the office of constable by writers in England from the sixteenth century onwards. However, the ascription of "independence" to the office of constable was not common until the twentieth century, especially in England. Its appearance in Wilson's text in 1859, therefore, is of particular interest. No similar references are to be found in the contemporary Canadian texts of Keele (1851) or Jones (1882), nor in the American text of Mathew Bacon (1860), all of which tend rather to stress the subordination of constables to the magistracy.

A study of the legislative developments in Upper Canada from 1793 to 1858 indicate that by the latter date there were in Canada three basic legislative models providing for the office of constable in municipalities.

(1) Constables might be appointed for municipalities by justices of the peace (usually in general or quarter sessions of the peace, but sometimes in special sessions called for the purpose). The *Parish and Town Officers Act* of 1793 and its successor the *Appointment of Constables Act* of 1860 are examples of this model.

(2) Municipal constables in cities and towns might be appointed by the municipal council, and be generally under their control and supervision. The charter of the City of Toronto of 1834 and the "Baldwin Act" of 1849 are examples of this model.

(3) Municipal constables in cities might be appointed by, and accountable to, a board of commissioners of police; this was the model introduced by the *Municipal Institutions of Upper Canada Act* of 1858.

With a few notable exceptions — e.g., the legislation in Québec, whereby the police of Quebéc City and Montréal were appointed by the provincial government — these three models were adopted to varying degrees by every province of Canada during the nineteenth and early twentieth centuries. The latter two remain the normal basis for the maintenance of municipal police forces throughout Canada today, the principal exceptions being the policing of some municipalities by the R.C.M.P. or the Ontario Provincial Police, under contract. These exceptions will be discussed later.

Numerous examples have already been cited of legislation in which the first of these models was adopted. In some provinces this model persisted well into the twentieth century. Indeed, the control and management of the police force of the City of Charlottetown was not finally taken out of the hands of the city magistrate and given to the city council until 1941 (see *Charlottetown Incorporation Amendment Act*, S.P.E.I. 1941, c. 24, s. 4). With the exception of the power to appoint special constables, which in some provinces remains in the hands of judicial officers,[31] the power of justices of the peace to appoint constables has now been abolished in all of the provinces.

Since its adoption in Upper Canada during the 1830s, the second model for establishing municipal police forces has been, and remains, the most common throughout Canada. Over the years it has been implemented in one of four ways: firstly, as in Toronto in 1834, by including it in the provisions of specific charters of incorporation for specific cities;[32] secondly, by making provisions in a municipal Act or its equivalent, applying to municipalities generally;[33] thirdly, by drafting a special statute providing specifically for the policing of a particular municipality;[34] and fourthly, and more recently, by including provisions in a police Act or its equivalent, providing generally for policing arrangements (including those in municipalities) throughout a province.[35]

The result of using various modes of implementation is that the provisions governing municipal policing in Canada are to be found in a veritable host of statutes, many of which (especially the city charters and the special Acts) were not routinely reprinted in the periodic revisions and consolidations of the statutes of the provinces concerned, and have become difficult to locate. Provisions of such statutes are by no means uniform, and in some

cases do no more than confer a general power on municipalities, leaving it to municipal councils, through by-laws, to define in detail the arrangements for their policing.

The third model was first implemented by the *Municipal Institutions of Upper Canada Act* in 1858 (Stenning, 1981a and 1981c). It has since been adopted by most provinces through statutory provision that varies greatly from one jurisdiction to another.[36] At the present time, slightly less than one-third of all autonomous municipal police forces in Canada (i.e., excluding municipalities policed by the R.C.M.P. or by the O.P.P. on contract) are governed by such police boards or commissions.

The existence of a vast array of policing legislation in Canada makes it extremely difficult to generalize about the status of Canadian police in any historical period. Although the common-law office of constable was, as we have seen, the basic vehicle adopted in all legislation defining the legal status of the Canadian policeman, the exact legal status of a policeman in any particular jurisdiction could only be assessed by examining the extent to which specific statutory provisions relating to that jurisdiction had amended, enlarged or diminished the original common-law definition of the office. While the rationalization and consolidation of policing legislation, which began with the enactment of the Ontario *Police Act, 1946*, has considerably alleviated the problem in this regard, the existing diversity of policing legislation nevertheless remains a significant obstacle to the delineation of a single, uniform status for all police officers in Canada today. It is to current legislation, and to the modern legal status of the police, that we must now turn.

CHAPTER THREE

The Current Legal Status of the Police in Canada

As noted in the preceding chapter, the common-law status of constable was adopted for the police in early Canada through legislation enacted during the eighteenth and nineteenth centuries until, by the early twentieth century, the status of the police was essentially defined by statute (and statutory interpretation) in every part of the country. By the end of the nineteenth century, police in Canada were operating pursuant to a wide array of statutory provisions in each provincial, as well as the federal, jurisdiction. This situation has to some extent persisted to this day, although it has been somewhat clarified and rationalized by the reform of policing legislation that began with the enactment of the Ontario *Police Act, 1946*. Before proceeding to a description of the current legal status of the police, the nature and significance of this reform, as well as the resulting current demography of the police in Canada, should be examined.

A. The Reform of Police Legislation, 1946-1977

Prior to 1946, legislation governing the police was diverse; rural police were provided for in one statute (typically a Constables Act, or its equivalent), provincial police in another, and urban municipal police in several others (Municipal Acts, city charters and special legislation). The Ontario *Police Act, 1946* (chapter 72) marks the beginning of a period of major reform. Other provinces followed Ontario's lead by enacting statutes (usually Police Acts) that attempted to deal comprehensively with all public police within their jurisdiction. For most provinces, a truly comprehensive statute of this kind was not entirely feasible, since all of their provincial policing and some of their municipal policing was by now undertaken on contract by the R.C.M.P., who were governed principally by the federal *R.C.M.P. Act*. Nevertheless, a

significant degree of rationalization and uniformity of approach, as well as some major innovations in police governance, were achieved through this reform.

Ontario was the leader in this legislative reform by several years.[37] Québec came next with the enactment of its new *Police Act* in 1968 (chapter 17),[38] followed by Nova Scotia in 1969 (chapter 17),[39] Newfoundland in 1970 (No. 74), Manitoba (with a less comprehensive revision) and Alberta[40] in 1971 (both chapter 85), British Columbia[41] and Saskatchewan in 1974 (1974, chapter 64 and 1973-74, chapter 77 respectively), and New Brunswick and Prince Edward Island[42] in 1977 (chapter P-9.2 and chapter 28 respectively). The federal *R.C.M.P. Act* underwent a major revision in 1959 (chapter 54). Despite these comprehensive reforms, some of Canada's major municipal police forces (e.g., those of Montréal,[43] Toronto[44] and Winnipeg[45]), as well as the nine regional police forces in Ontario,[46] remain the subject of legislative provisions that are separate from the provincial Police Acts.

The enactment of these comprehensive Police Acts was of no small symbolic significance. Since 1867, the enactment of legislation governing policing within the provinces had undeniably been a provincial responsibility. This responsibility had been fulfilled in a way that gave substantial recognition to the historic English attitude that policing was a local responsibility. This attitude had been preserved, particularly with respect to urban policing, by providing for policing through legislation that dealt with all aspects of municipal affairs, services and concerns. The common adoption of Municipal Acts as the legislative vehicles through which to provide for municipal policing thus lent strength to the belief that policing should be viewed as a municipal service for which municipal authorities had primary responsibility. In many cases, this was further emphasized by the minimal content of such legislative provisions, which typically left most of the details of structure, organization, control, accountability and governance of municipal policing to be provided for through local municipal by-laws. Municipal policing was thus frequently treated as just another local municipal service, and in some jurisdictions the provision of policing services was functionally combined with the provision of other municipal services (typically fire-fighting services: see e.g., Tardif, 1974).

Modern provincial Police Acts represent a substantial and symbolic departure from the traditional approach. Although much of the responsibility for policing has been left in local hands by such legislation, today's Police Acts have significantly asserted provincial control over the provision and regulation of local policing services. The assertion has been manifested in a number of important ways. Firstly, it has been manifested through the enactment of an increasing number of provincial regulatory provisions that impose uniform standards on local police forces with respect to such matters as conditions of service, rank structures, disciplinary codes and procedures, equipment standards, recruitment and promotion qualifications, procedures for dealing with

public complaints against the police, and collective bargaining and arbitration procedures, to name but a few. For example, the power that local boards of commissioners of police in Ontario had possessed since 1858, to make "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", was curtailed by the *Police Act, 1946* in its provision that such boards could henceforth only make such regulations as were "not inconsistent" with provincial regulations made pursuant to the new Act. All modern Police Acts provide for substantial provincial regulation of this kind.

Secondly, provincial control over municipal policing has been asserted by making provision for, and exercising, a provincial veto over the creation of new municipal police forces. It has also been asserted by adopting, pursuant to provincial Police Acts, policies of amalgamation, regionalization and absorption of smaller forces into provincial policing arrangements. These policies have substantially curbed the proliferation of small municipal police forces (e.g., in Ontario).[47]

The third, and perhaps most important, manifestation of increased provincial control over municipal policing was the creation of provincial police commissions having substantial supervisory, advisory, monitoring, regulatory, investigative and quasi-adjudicative powers. Beginning with the creation of the Ontario Police Commission in 1962, provincial police commissions were established in Québec in 1968, Manitoba and Alberta[48] in 1971, British Columbia in 1974, Saskatchewan in 1975, Nova Scotia in 1976 and New Brunswick in 1978.[49]

A fourth manifestation of increased provincial influence over municipal policing has been the introduction or extension in some jurisdictions of direct or indirect provincial representation (through provincial appointees) on the governing authorities of municipal police forces. This has been accomplished by introducing new requirements for the establishment of local boards of commissioners of police or municipal police commissions. While the implications of such representation remain unclear (Stenning, 1981c) it undoubtedly provides one more vehicle through which policies and procedures governing local police forces can be influenced to suit provincial interests.

A fifth manifestation of growing provincial influence over municipal police has not been accomplished through the reform of police legislation, but through the up-grading and modernization of the prosecutorial system in many provinces. In recent years, provincial Attorneys General, through their crown attorneys and crown prosecutors, have begun to assert more control over the laying of charges and the conduct of prosecutions (see e.g., Gregory, 1979). This, as we shall see, is a development that has particular significance for the legal status of the police. In one recent case, it has been cited as a major consideration in determining that status.

A final indicator of increasing provincial control over municipal policing has been the development of direct provincial subsidization of municipal policing costs through general or special grants (see e.g., British Columbia, Task Force... 1978; Ontario, Provincial-Municipal... 1978; Pukacz, 1978). It is arguable that of all the manifestations of provincial influence over municipal policing, the grant system has been the most powerful; for in the provision of policing services, as in the provision of other expensive public services, dollars and cents speak loud and clear.[50]

All of these developments are relevant to an assessment of the current legal status of the police in Canada. They contribute to the erosion of the traditional view that policing is primarily a local responsibility, most appropriately viewed as a local service, and that the constable is essentially a local officer serving parochial interests. While judicial abandonment of the traditional view is evident in court decisions handed down as long as one hundred years ago, the modern reform of police legislation in Canada adds credence to the change in the perception of the status of constables. This is a matter, however, to which we shall turn in more detail later.

B. The Current Demography of the Police in Canada

The last thirty years of reform have resulted in dramatic changes in the demography of policing in Canada. This is of some importance in placing the discussion of the legal status of the police in context. In 1977 (the most recent year for which such statistics have been published), over 65,000 persons were employed by police forces established under the various Police Acts in Canada. Of these, 52,303 (80%) were sworn constables, the remainder being civilian personnel. Of these 52,303 constables, 27% were employed in a single force, the R.C.M.P.; 16% were employed by two provincial police forces (the O.P.P. and Q.P.F.); and 55% were employed by local municipal and regional police forces established pursuant to provincial Police Acts.[51] Over one-third of all sworn constables at this time were employed in twelve metropolitan areas, two of which (Montréal and Toronto) together accounted for 20% of all sworn constables in the country. Thus, five large police forces (the R.C.M.P., the O.P.P., the Q.P.F. and the Toronto and Montréal forces) together accounted for almost two out of every three (63%) sworn constables in Canada (Canada, Statistics Canada, 1978).

At present there are approximately 450 separate police forces in Canada, all but three of which (the R.C.M.P., the O.P.P. and the Q.P.F.) are municipal or regional forces. Almost three-quarters of these municipal and regional

police forces are maintained in Ontario and Québec (128 in Ontario and 196 in Québec). In 1977, these two provinces together employed 51% of all the sworn police officers in the country. At the present time, the R.C.M.P. provide not only the provincial policing for eight of the ten provinces, but also police 192 municipalities in seven of these eight provinces, on a contract basis.

These statistics illustrate dramatically the trend towards centralizing the control of policing in Canada. The proliferation of locally-controlled forces persists in Ontario and Québec, although even in these two provinces the trend is towards amalgamation and regionalization of police forces. However, in the other eight provinces the situation is very different. An extreme example of centralized control is Newfoundland, where all policing is now controlled directly or indirectly (in the case of the R.C.M.P.) through the provincial Department of Justice. There are, in fact, now only two police forces operating in Newfoundland (the R.C.M.P. and the Newfoundland Constabulary),[52] the operation of municipal police forces in that province having been finally prohibited by its *Municipalities Act* of 1979 (c. 33, ss. 184-186).[53] Again, these trends are relevant to an appreciation of the current legal status of the police in Canada to the extent that they provide significant reinforcement for the view that constables can no longer be properly regarded as principally local officers serving primarily parochial interests.

C. Status, Jurisdiction, Duties and Powers

Another matter that must be briefly discussed before proceeding to an analysis of the current legal status of the police in Canada is the relationship of the concepts, jurisdiction, duties and powers to each other. These are all words that have a wide variety of meanings and connotations in legal discourse. It is therefore important to define them when used in connection with the police.

The term "status" has been defined as "the legal relation of (an) individual to (the) rest of the community", and "a legal personal relationship, not temporary in its nature nor terminable at the mere will of the parties, with which third persons and the state are concerned" (Black, 1979: 1264). Fitzgerald indicates that:

> The term status is used in a variety of senses. It is used to refer to a man's legal condition of any kind, whether personal or proprietary. A man's status in this sense includes his whole position in the law — the sum total of his legal rights, duties, liabilities or other legal relations, whether proprietary or personal, or any particular group of them separately considered. (1966: 240)

When used in association with a constable, or the police, the term "status" is vaguely defined, referring to a whole "package" of rights, responsibilities, duties, liabilities, powers and legal relationships to others. It is interesting to note that the expression "the status of constable" is rare in legal literature; writers have generally preferred to refer to the "office of constable", and then describe the various attributes associated with the office. In this sense, however, the title of "constable" undoubtedly connotes a status; that is, a legal position that has a "package" of juridical attributes and relations associated with it. Defining the "status of the police" in any historical period (including the present) is a matter of some delicacy, since the "package" of legal attributes to which it refers changes subtly and gradually from one era to the next.

As we have seen, the ascription of the status of "constable" has been a constant in the legal definition of the status of the police in England for at least seven centuries. The same common-law concept of the status of "constable" was employed to define the legal status of the police during the eighteenth and nineteenth centuries in Canada. The objective of this chapter is to examine the extent to which this remains the case in Canada today, and if so, to consider what changes in that status have been wrought by twentieth-century legislative enactments and common-law decisions. The implications of the current legal status of the police for the accountability of the police and the exercise of their authority will then be examined in the following Chapter.

"Jurisdiction" also has widely different meanings within the law. As it relates to the police, it is used principally to refer both to the geographical limits, and to the limits of the content, of their authority. Thus we may speak of a policeman having jurisdiction *within* a particular province or municipality, *and* of his having jurisdiction *over* certain classes of offences, or jurisdiction to enforce certain laws. Jurisdiction is thus the "authority, capacity, power or right to act" (Black, 1968: 991) in a broad sense. It therefore constitutes an important aspect of the status of a policeman.

The fact that the jurisdiction of a policeman embraces the limits of the content of his authority means that to some extent a policeman's legal jurisdiction may be defined by his duties and powers. Thus if we want to know whether a particular policeman has jurisdiction over a particular kind of offence, or jurisdiction to enforce a particular law, the usual way to find out will be to examine his legally-defined powers and duties to discover whether they include the power and duty to enforce that law. Like his jurisdiction, therefore, a policeman's duties and powers are important items in the "package" that makes up his status. But, even together, they do not wholly define his status; rather, they are evidence of it.

Understanding the meaning and relationship of these legal concepts is important to an understanding of the status of the police, for two reasons. In the first place, legislation frequently defines status by specific reference to jurisdiction, duties and powers in a manner that approaches tautology. A good

example of this, and one that is particularly pertinent to a discussion of the legal status of the police, is to be found in the provision of section 2 of the *Criminal Code*, where "peace officer" is defined for the purposes of the *Code*. This provision reads:

> "peace officer" includes
> ...
> (*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, ...

The status of "peace officer" under the *Criminal Code* involves a panoply of powers (e.g., to arrest — section 450 of the *Code*), duties (e.g., to receive into custody a person arrested by a private individual, and determine whether he should be released or taken before a justice — subsection 454(1)), and protections (e.g., from criminal and civil liability in certain circumstances — section 25). In addition, the fact that someone is a peace officer affects his relations with others in important ways; for instance, assaulting a peace officer in the execution of his duty is a more serious offence than assaulting someone who is not a peace officer (see sections 245 and 246). For a person to avail himself of all the powers, duties and protections of a peace officer, he must be one who has the status of peace officer. It is for this reason that the definition of peace officer in section 2 of the *Code* was required — to clarify just who does enjoy this status for the purposes of the *Code*.

At first, it seems obvious that the definition of peace officer in section 2 confirms the traditional common-law position that all constables are peace officers. As noted earlier, constables have for centuries been recognized by the common law as "conservators of the peace". The courts, however, have held otherwise, and have decided that when the words "peace officer" are used in particular sections of the *Criminal Code*, they are not always intended to mean all of the persons included in the definition of "peace officer" in section 2.

In *R.* v. *Laramee* (1972), 9 C.C.C. (2d) 433 (N.W.T. Mag. Ct.), the court had to decide whether a "City Constable" of Yellowknife, whose duties were limited to the enforcement of city by-laws, could properly be viewed as a "peace officer" for the purposes of section 235 of the *Criminal Code*, which empowers peace officers to administer breath tests to persons suspected of drunken driving. The court held that when used in section 235, the term "peace officer" was intended to mean only those persons referred to in the definition of peace officer in section 2 of the *Code* who are "employed for the preservation and maintenance of the public peace". After examining the limited duties defined for the constable in question, the court concluded that:

> Even if, therefore, by-law enforcement does, in a general sense, encompass (for restricted municipal purposes) the "preservation and maintenance of the public peace", such enforcement does not extend to preservation and maintenance of the public peace in reference to *Criminal Code* offences, or offences under other federal statutes. (p. 443)

Thus, the court held that even though the officer had been expressly referred to as a "constable" in the legislation under which he was appointed, he was not a "peace officer" for the purposes of section 235 of the *Criminal Code*.

A similar result was reached in the Saskatchewan case of *Wright* v. *The Queen*, [1973] 6 W.W.R. 687 (Sask. Dist. Ct.). In order to determine whether the officer concerned was a "peace officer" for the purposes of the *Criminal Code*, the court felt it necessary to examine the nature of his duties and the extent of his powers. Yet the whole object of determining whether a person is a "peace officer" under section 2 of the *Code* is to discover the extent of his powers, duties, protections, etc. The somewhat anomalous result of these cases seems to be, therefore, that while a policeman's status determines his powers and duties, his powers and duties may also determine his status.[54]

The other important lesson from these cases seems to be that the status of "constable" in Canada does not always and under all circumstances embrace the status of "peace officer", at least as this status is defined in the *Criminal Code*. This leads us to a consideration of the other reason for understanding the complex relationship between jurisdiction, duties, powers and status of the police, which is that in some statutes providing for their appointment, their legal status seems to be defined *indirectly* by reference to their jurisdiction, duties and powers, etc. The legislation in Alberta provides a good illustration of this. Unlike its predecessors (see e.g., section 17 of the Alberta *Police Act, 1971*, c. 85), the Alberta *Police Act*, nowhere expressly refers to members of municipal police forces in that province as "constables". Nor do the regulations passed pursuant to the Act. Instead, a municipal policeman is referred to throughout the statute and regulations as "a member of a municipal police force".[55] In determining the legal status of these municipal policemen, therefore, a legitimate question arises as to whether they have the status of "constables". Although this might come as a surprise to members of municipal police forces in Alberta, most of whom, like their counterparts elsewhere, are daily called "constables", it remains highly doubtful that the mere administrative assignment of a title such as that of "constable" can be considered, in the absence of specific legislative provision to that effect, sufficient to amount to the conferment on its holder of the legal status of constable, with all that that entails.[56]

Given this situation, it would seem that the only way one could conclude that members of municipal police forces in Alberta have the status of "constable" is by implication from the provisions of the statute defining their jurisdiction and duties. These are to be found in section 31 of the Act, which provides that:

> **31.** (1) Every member of a police force has the power and it is his duty to
>
> (a) perform all duties that are assigned to peace officers in relation to
> (i) the preservation of peace,

(ii) the prevention of crime and of offences against the laws in force in Alberta, and
(iii) the apprehension of criminals and offenders and others who may lawfully be taken into custody, and

(b) execute all warrants and perform all duties and services thereunder or in relation thereto that under the laws in force in Alberta may lawfully be executed and performed by peace officers.

(2) A member of a municipal police force has authority throughout Alberta in the execution of his duties as a member of the municipal police force for which he is appointed or when acting pursuant to a direction under subsection (3).[57]

Note that even this provision does not state that a municipal policeman in Alberta *is* a "peace officer". It merely states that he must perform "all duties that are assigned to peace officers" in relation to the specified functions. Can we say with confidence, therefore, that the status of a municipal policeman in Alberta is that of "constable" or "peace officer"? Clearly, such assertions can only be made on the basis of inferences from the nature and extent of the jurisdiction and duties that the statute assigns to these officers. In this respect the statute illustrates how difficult it is to clearly define the legal status of the police. In this connection, it is noteworthy that even the official oath, which all members of police forces in Alberta are required to take before assuming office — and which might be expected to provide significant indication of their legal status — does not mention the name of the office they are to hold. It is to be inserted by the person taking the oath, or by the person administering it (see *The Oaths of Office Act*, R.S.A. 1980, c. O-1).

A policeman's jurisdiction, duties and powers, then, are important indicia of his status. This is not usually spelled out in the legislation under which he is appointed. There is no doubt, however, that with the enactment in every province, and by the federal Parliament, of statutes providing for the establishment and maintenance of police forces, the police in Canada today are entirely the creatures of statute, and have no status independently of such statutes: see *Bisaillon* v. *Keable and Attorney General of Quebec* (1980), 17 C.R. (3d) 193 (Qué. C.A.), per Turgeon J.A., at p. 202. It is to these statutes that we now turn.

D. Legislative Provisions for the Legal Status of the Police

1. Police Legislation

The first legislative provisions that must be consulted in defining the legal status of police in modern Canada are those that specifically provide for the establishment and maintenance of police forces. The statutes considered

under this heading are: the federal *R.C.M.P. Act*; the provincial Police Acts of British Columbia, Alberta, Saskatchewan, Ontario, Québec, New Brunswick, Nova Scotia and Prince Edward Island;[58] the *Provincial Police Act*, *Municipal Act* and *City of Winnipeg Act* of Manitoba; the Newfoundland *Constabulary Act*;[59] and the *Public Security Council of the Montreal Urban Community Act* of Québec.[60] At this point, the status of regular members of the forces established pursuant to these statutes will be examined; the special position of chiefs of police, commissioners and other heads of police forces will be dealt with in a separate section below.

(a) *The R.C.M.P.*

Because the R.C.M.P. provide contract policing to eight provinces and 192 municipalities within those eight provinces, the police legislation in those provinces, and the agreements through which such contract policing is undertaken, are relevant, in addition to the *R.C.M.P. Act* itself, in defining the legal status of members of this force.

The *R.C.M.P. Act* provides for "officers" of the force (whose ranks are specified) to be appointed by the Governor in Council (subsection 6(3)). "Members of the force other than officers" are appointed by the Commissioner of the R.C.M.P. (subsection 7(1)). This terminology makes it clear that both officers and other ranks are "members of the force" for the purposes of the Act. Subsection 7(4) of the Act provides that the Commissioner may appoint any member of the force to be a "peace officer". Section 11 provides that civilian staff may be appointed, but specifies that such persons are not "members of the force". Such staff are therefore not among those who can be appointed as "peace officers" pursuant to subsection 7(4). Section 15 requires that each member of the force, whether a peace officer or not, must take an oath, in which he or she swears to "faithfully, diligently and impartially execute and perform the duties required of me as a member of the Royal Canadian Mounted Police". While the duties of members who are peace officers are spelled out in the statute (section 18), the duties of other members of the force are not.

Subsections 17(3), (4) of the *R.C.M.P. Act* specify that:

> (3) Every officer, and every person appointed by the Commissioner under this Act to be a peace officer, is a peace officer in every part of Canada and has all the powers, authority, protection and privileges that a peace officer has by law.
>
> (4) Every officer, and every member appointed by the Commissioner to be a peace officer, has, with respect to the revenue laws of Canada, all the rights, privileges and immunities of a customs and excise officer, including authority to make seizures of goods for infraction of revenue laws and to lay informations in proceedings brought for the recovery of penalties therefor.

These provisions make it clear that members of this force fall into two categories. The status of those in one category is clearly defined as that of "peace officer"; the status of those in the other category (members who are not peace officers) is not defined at all in the statute. None of the members of the force are specifically defined as having the status of "constable".

In addition to the status of "peace officer", which accrues only to officers of the force and to those members of the force who are specifically appointed as such by the Commissioner, subsections 17(1), (2) provide that:

> (1) The Commissioner, and every Deputy Commissioner, Assistant Commissioner and Chief Superintendent, is *ex officio* a justice of the peace having all the powers of two justices of the peace.
>
> (2) Every Superintendent and every other officer designated by the Governor in Council is *ex officio* a justice of the peace.

It will be readily apparent that it is impossible to speak generally about the legal status of members of the R.C.M.P., since at least four different classes of members can be identified, each of which has a different status from the others:

(1) Officers who are "peace officers" and who are *ex officio* justices of the peace having all the powers of two justices of the peace.

(2) Officers who are "peace officers" and are *ex officio* justices of the peace *simpliciter*.

(3) Officers and other members who are simply "peace officers".

(4) Other members of the force.[61]

Note that subsection 17(4) does not say that R.C.M.P. members who are peace officers *are* customs and excise officers, but merely that they have "all the rights, privileges and immunities of a customs and excise officer". In practice, however, little turns on this, since the *Customs Act*, R.S.C. 1970, c. C-40, subsection 2(1), and the *Excise Act*, R.S.C. 1970, c. E-12, section 2, both specify that *all* members of the R.C.M.P. (i.e., whether peace officers or not) are "officers" for the purposes of statutes dealing with customs and excise. Subsection 17(4), however, illustrates the difficulty of determining whether a provision of this kind is intended to confer an entire status, or merely certain attributes of that status. In the absence of the provisions of the *Customs Act* and *Excise Act*, a question could easily arise as to whether, by virtue of subsection 17(4), an R.C.M.P. officer was a customs officer for the purposes of prosecuting someone for failure to declare goods to a customs officer at the border — that is, in a case in which the *status* of the officer, rather than simply his "rights, privileges and immunities", was at issue. As we shall see, provisions such as subsection 17(4), which refer to police personnel as having certain attributes of a status, rather than stating that they actually have such status, are common in Canadian policing legislation. While the statutes are enacted presumably with the intention of conferring no more power than is

considered to be absolutely required, they make it difficult to state with certainty what the legal status of the police truly is. This can have serious consequences for persons dealing with the police.

As noted in Chapter One of this paper, the status of "peace officer", which is the basic status accorded to most R.C.M.P. members by the *R.C.M.P. Act*, has for centuries been recognized as the central component of the office of constable, and has its origins in the common-law status of "conservator of the peace". Indeed, American courts have held that the terms "conservator of the peace" and "peace officer" are synonymous (*Ex parte Levy* (1942), 204 Ark. 657; 163 S.W. 2d 529 at 532), and refer in general to persons who are "designated to keep the peace and arrest persons guilty or suspected of crime" (*Vandiver* v. *Endicott* (1959), 215 Ga. 250, at 251; 109 S.E. 2d 775 at 777).[62] Despite its centrality to the legal status of the police, however, "peace officer" remains only vaguely defined in the law, and has not been the subject of significant judicial examination. Part of the reason for this, of course, is that the definition is itself dependent on the concept of "peace" which, as has been noted in Chapter One, is also vaguely defined in the common law. As recently as April 1981, the English Court of Appeal observed that:

> A comprehensive definition of the term "breach of the peace" had rarely been formulated so far as could be discovered from cases going back to the eighteenth century. The older cases were of interest, but they were not a sure guide to what the term was understood to mean today, since the keeping of the peace in the latter half of the twentieth century presented formidable problems bearing upon the evolving process of this branch of the common law. (*Per* Watkins, L.J.A., in *R.* v. *Howell, The Times*, Law Report, April 13, 1981, p. 17)

In modern Canada, of course, the major attributes of the status of "peace officer" are to be found in literally hundreds of statutory provisions, of which those of the *Criminal Code* referred to earlier in this Chapter are the most well known. A recent inventory of only federal legislative provisions identified no fewer than 162 federal statutes in which "peace officer" powers are granted to various officials.[63] Referring to this, a recent Commission of Inquiry commented in its Report:

> 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. (Canada, Commission of Inquiry ... 1981: 95)

As far as we know, no similar inventory of provincial laws or municipal by-laws bearing on the status of peace officer has ever been undertaken. If it were, it would no doubt underline with even greater emphasis the difficulty of defining this status with any precision. The fact that section 17 of the *R.C.M.P. Act* states that members who are peace officers shall have all the powers, etc. that a peace officer has "by law", however, indicates that they enjoy not only the status of peace officer as defined by this multitude of statutory provisions, but also any residual aspects of the status that may derive from the common law.[64] Given the vagueness of the common-law

definition of this status, this merely compounds the difficulties of accurately describing the legal status of the police today. The traditional common-law status of "conservator of the peace", as it applied to constables, has been described in Chapter One above (see especially pp. 12-13 and 27-32). The fact that R.C.M.P. officers and members are no longer legislatively designated as having the status of "constable", however, raises further doubts about whether the common-law definition of the status of "peace officer" applies to them. As Lambard (1581-82: Ch. 3) noted, the common-law status of "conservator of the peace" was held by a wide variety of officials, and the powers, duties and responsibilities implied depended on the nature of the office to which it attached.

(b) *R.C.M.P. When under Contract*

In addition to the status they derive from the *R.C.M.P. Act*, members of the R.C.M.P. also derive status from provincial police legislation when they perform contract policing in a province. Such contract policing is performed pursuant to formal written agreements between the federal Solicitor General and either the provincial minister responsible for policing (in the case of provincial policing) or the municipality concerned (in the case of municipal policing).[65] Such agreements derive their legality from section 20 of the *R.C.M.P. Act* and comparable sections of provincial police legislation. R.C.M.P. members providing policing services under such contracts often derive the status of a provincial constable or municipal constable from the relevant provincial legislation. Subsection 12(4) of the Nova Scotia *Police Act*, S.N.S. 1974, c. 9, for instance, referring to the agreement for provincial police services, provides that:

> While the Agreement referred to in subsection (3) or any agreement made pursuant to subsection (1) is in force, each member of the Royal Canadian Mounted Police Force, including the Commissioner of the Force and every officer, non-commissioned officer and member of the Force, shall be *ex officio* a provincial constable and shall have all the power, authority, immunity, protection and privileges of a provincial constable under and by virtue of this Act and every other enactment.

Subsection 11(6) of the Act provides that:

> Each provincial constable shall have the power and authority to enforce and to act under every enactment of the Province and any reference in any enactment or in any law, by-law, ordinance or regulation of a municipality to a police officer, peace officer, constable, inspector or any term of similar meaning or import shall be construed to include a reference to a provincial constable.

Subsection 18(3) of the Act, referring to an agreement for the policing of a municipality, provides that:

> When an agreement made pursuant to this Section is in force, the officers and members of the established police force shall be municipal police officers for the municipality.

And subsection 16(2) defines the status of a municipal police officer:

> Each municipal police officer shall have all the power and authority of a provincial constable under this Act
>
> (a) within the limits of the municipality for which he is appointed; and
>
> (b) within the Province when he is acting outside the municipality for which he is appointed at the request of the Attorney General, or assisting a provincial constable or a member of the Royal Canadian Mounted Police Force who is *ex officio* a provincial constable or when he is pursuing a matter that arose within, or a person fleeing from, a municipality for which he is appointed.

While the Nova Scotia *Police Act* thus defines the status of R.C.M.P. contract members in terms of the status of provincial constables and municipal police officers appointed pursuant to that Act, in Saskatchewan, where the *Police Act* does not currently provide for a provincial police force as such, the status of R.C.M.P. contract members is defined quite independently of that of other police officers in the province. Subsection 3(3) of the Act thus defines their status in the following terms with reference to a contract for provincial police services:

> During the period of an agreement under subsection (1), members of the Royal Canadian Mounted Police are peace officers and have the duty and power to perform all duties that are or may be assigned to peace officers or constables in respect to the preservation of the peace, the prevention of crime, and the enforcement of laws in force in the province.

This provision may be contrasted with section 5 of the Act referring to municipal-federal agreements for municipal police services, which provides simply that

> during the period of such agreement, members of the Royal Canadian Mounted Police may exercise all the powers conferred on constables or peace officers by the municipality or any law in force in the province.

Whether any significance attaches to this difference in wording between the two provisions — one of which says that R.C.M.P. members *are* peace officers, while the other one merely states that they may exercise the powers of peace officers and constables — remains unclear.

The British Columbia *Police Act* takes yet another approach to defining the status of R.C.M.P. members when on contract, by providing (in paragraph 16(2)(b)) that

> every member of the Royal Canadian Mounted Police shall, subject to the agreement, be deemed a provincial constable.

Subsection 15(1) of the Act defines the status of a provincial constable:

> Subject to the regulations and the directions of the Commissioner, a provincial constable or a special provincial constable has, while carrying out the duties of his appointment, jurisdiction throughout the Province to exercise and carry out the powers, duties, privileges and responsibilities that a police constable or peace officer is entitled or required to exercise or carry out at law or under any Act or regulation.

Subsection 16(2) of the Act provides that when an agreement is in force, the divisional commanding officer of the R.C.M.P. shall be deemed to be the Commissioner of the provincial police force. Taken together, therefore, sections 15 and 16 of the Act seem to provide that the status of a member of the R.C.M.P. on contract within the province shall not only be subject to regulations made under the Act and the directions of the divisional commanding officer, but also be subject to the agreement itself. A more complex provision for defining the status of a police officer would be hard to devise.

Two provisions of the standard agreement for contract policing between the federal and provincial ministers are of particular relevance in this regard. They provide that:

> **3.** The internal management of the Provincial Police Services, including the administration and application of professional police procedures, shall remain under the control of Canada.
>
> **4.** (1) The Commanding Officer of the Provincial Police Services shall for the purposes of this agreement act under the direction of the Attorney General in the administration of justice in the Province.
>
> (2) Nothing in this agreement shall be interpreted as limiting in any way the powers of the Attorney General, relating to the administration of justice within the Province.[66]

Substantially similar provisions are to be found in the standard agreements for municipal contract policing, with the provision that in enforcing the by-laws of the municipality, the member in charge of the police unit (i.e., detachment, shall "act under the lawful direction of the Chief Executive of the municipality".

It must be remembered that any status that a member of the R.C.M.P. derives from provincial policing legislation as a result of providing policing services under contract is additional to, and not in substitution for, his or her status under the *R.C.M.P. Act*. Thus, for instance, subsection 41(3) of the Prince Edward Island *Police Act* provides that:

> Nothing in this Act shall affect the appointment or status of any person as a member of the Royal Canadian Mounted Police.

The fact that status as a "contract" policeman adds to an R.C.M.P. member's status under the *R.C.M.P. Act* presents some knotty problems that are far from having been resolved. The possibility exists that aspects of the additional status derived as a result of the contract may conflict with aspects of the original status under the *R.C.M.P. Act*. Although there are many potentialities for such conflict, two areas in which it has been commonly perceived are those of political accountability and subjection to disciplinary procedures. Quite apart from the question of how much control can legally be exerted over *any* policeman by duly constituted political authorities — a matter that will be addressed in the following Chapter — a legitimate question arises in the case of contract policing by the R.C.M.P. as to *where* the authority to exercise such control lies. Section 5 of the *R.C.M.P. Act* provides that the Commissioner of

the R.C.M.P. "under the direction of the Minister, has the control and management of the force and all matters connected therewith", and section 21 authorizes the Governor in Council to make regulations and the Commissioner to make rules, known as standing orders, for this purpose. As a member of the force, an R.C.M.P. officer is of course subject to such control, regulations and rules, and no agreement that the federal Minister may enter into pursuant to section 20 of the Act can detract from the authority of the Governor in Council, the Minister and the Commissioner in this regard.

Most of the Police Acts in the contracting provinces are worded in such a way that no legal right or authority in the provincial Attorney General to direct or control members of the R.C.M.P. on contract within the province can be inferred from their provisions. As we have seen, however, the British Columbia *Police Act* provides that, "subject to the agreement", the R.C.M.P. shall be deemed to be a provincial force, members of the R.C.M.P. shall be deemed to be provincial constables, and the R.C.M.P. Divisional Commander shall be deemed to be the Commissioner of the provincial force. We have also noted the provision in the standard agreement to the effect that the commanding officer is for certain purposes to act "under the direction of the Attorney General". The legal position is completed by subsection 13(1) of the Act, which provides that:

> The Commissioner, under the minister's direction, has general supervision over the provincial force, and shall perform the other functions and duties assigned to him under the regulations or under this or any other Act.

When read together, these provisions clearly involve potential conflict. As members of the R.C.M.P., the Divisional Commander and members of the R.C.M.P. on contract in British Columbia are, according to the *R.C.M.P. Act*, subject to the control and management of the Commissioner of the R.C.M.P., under the direction of the Solicitor General. But as the Commissioner of the provincial police force, the Divisional Commander of the R.C.M.P. in British Columbia is, according to the agreement and the British Columbia *Police Act*, subject to the direction of the provincial Attorney General "in the administration of justice in the province" and, insofar as the agreement permits, under the direction of the provincial Attorney General in exercising his "general supervision over the provincial force". Similarly, in their capacity as provincial constables, the members of the R.C.M.P. on contract in British Columbia are, according to the agreement and the British Columbia *Police Act*, subject to the general supervision of their Divisional Commander, under the direction of the provincial Attorney General, insofar as the agreement permits. In the result, the status of R.C.M.P. members under the British Columbia *Police Act* appears to be in potential conflict with their status under the *R.C.M.P. Act*, in that they could find themselves subject to conflicting directions emanating from the federal Solicitor General and the provincial Attorney General, each legitimately exercising his authority under the respective statutes.

Although the terms of the British Columbia *Police Act* seem to pose this potential conflict in a particularly acute way, the problem is by no means confined to that province. Even when the provisions of a provincial Police Act are not such as to give rise to conflict, there still remains the potential for conflict between the terms of the agreements (giving certain powers of direction to provincial Attorneys General) and the provisions of the *R.C.M.P. Act* (giving authority for the control and management of the force to the federal Solicitor General, the Commissioner of the R.C.M.P. and the federal Governor in Council). The only way that such a conflict can be avoided is to make a clear distinction between decisions relating to the control and management of the force on the one hand, and decisions relating to the administration of justice by the force in the province on the other. As at least two provincial Commissions of Inquiry have demonstrated, making such a distinction, while theoretically possible, is practically impossible (see Alberta, Commission of Inquiry ... 1978; and New Brunswick, Commission of Inquiry ... 1978).

Three recent court decisions have addressed different aspects of this problem. In *Re Ombudsman Act*, [1974] 5 W.W.R. 176 (Sask. Q.B.), Bayda J. of the Saskatchewan Court of Queen's Bench had to decide whether the R.C.M.P. acting under contract in that province constituted a "department" or "agency of government" such as to render its members liable to investigation by the provincial Ombudsman. The decision in the case turned on the particular provisions of the provincial statute in question. It is therefore of limited value as a precedent concerning the general legal status (in this case constitutional status) of R.C.M.P. members when acting on contract to a province. In the course of reaching this decision, however, Bayda J. considered the implications of the terms of the agreement concerning the authority of the provincial Attorney General to direct the commanding officer under certain circumstances, and observed:

> The purpose of and justification for para. 6 is this: If a police force is going to police certain portions of the province it will be necessary for the head of that police force in the province to confer from time to time with some person in authority in the province, to discuss with that person matters of policy, and to receive from that person directions in matters of policy relating to the enforcement of laws in effect in the province. Paragraph 6 stipulates that the head of the division, the officer commanding, is for that purpose to go to the Attorney General of the province and not to some other minister or some other person or group of persons. (p. 181)

Bayda J. concluded that this provision did not have the effect of converting the divisional commander and the members of the force into public officers of the Crown in right of Saskatchewan, and that the *Saskatchewan Provincial Police Act* in force at the time (R.S.S. 1965, c. 114, the predecessor to the present *Police Act*) did not "purport to legislate any change in the status of the members of the force who come to serve in Saskatchewan pursuant to the 'arrangements'" (*ibid.*). That Act, however, did not contain the provisions relating to the status of members of the R.C.M.P. serving in the province on contract that are to be found in the Saskatchewan *Police Act* today, and that

have been quoted above. It therefore remains doubtful whether, had he been speaking of the provisions of the present Act, Bayda J. would still have reached this last conclusion. Furthermore, from his conclusion that the terms of the agreement did not confer on R.C.M.P. members the status of public officers of the Crown (a matter he was required to decide in the course of interpreting the terms of the *Ombudsman Act*), obviously no inference can be drawn to the effect that the terms of the agreement do not alter the status of R.C.M.P. members at all, since he did not address that question.[67] Nor did he consider the possibility of conflict between the terms of the agreement and sections 5 and 21 of the *R.C.M.P. Act*. As a result, the decision is not of very much help in resolving the issues being discussed here, despite its apparent relevance to them.

In *Attorney General of Quebec and Keable* v. *Attorney General of Canada*, [1979] 1 S.C.R. 218, the Supreme Court of Canada had to decide whether a provincial Commission of Inquiry could, during an inquiry into alleged wrongdoings by three police forces (including the R.C.M.P.), examine matters relating to the general management of the federal police force. The R.C.M.P. conduct under investigation in this inquiry took place in a province in which the force does not provide policing services under contract, so the case is relevant to the contract situation only by analogy. The Court held that a provincial Commission of Inquiry could not validly inquire into the administration of the R.C.M.P. Delivering the opinion of the majority, Mr. Justice Pigeon indicated that an attempt by a provincial Commission to examine the methods used by the R.C.M.P., or to examine the "regulations and practices" of the force, amounted to examining "essential aspects of their administration" and was therefore beyond provincial constitutional competence. In his minority opinion, however, Mr. Justice Estey, in agreeing with the result reached by the majority, added some comments that are of relevance to the situation in contract provinces. Referring to the right of provinces to investigate "the operations of provincial and municipal police in the detection of crime and the enforcement of the criminal law", Estey J. observed:

> This right or authority on the part of the Province in relation to s. 92(14) (of the *British North America Act*) does not by a back door, as it were, lead to a right to investigate a validly established federal organization, including a federal police organization. That is not to say that where members of such a federally organized force offend the criminal law, the ordinary agencies of criminal investigation and law enforcement within the Province would not operate as in the case of any other individuals. *There may be circumstances in those Provinces which have contractual or other arrangements with the federal government with reference to the maintenance of police forces which will call into question different principles, but with which we are not here concerned.* (pp. 258-259 — Emphasis added)

The last suggestion, that the practice of providing contractual policing to provinces may have implications for the status of members of the R.C.M.P. such as to render them more liable to investigation and scrutiny by provincial

authorities than would otherwise be the case, was of course no more than *obiter dictum*, and was in no way necessary for the decision of the case. Mr. Justice Estey's opinion in this case was concurred with by Mr. Justice Spence.

Of much more direct relevance to the issues under discussion here are the decisions of the Alberta Court of Appeal and the Supreme Court of Canada in *Attorney General of Alberta and Law Enforcement Appeal Board* v. *Putnam and Cramer*, [1980] 5 W.W.R. 83 (Alta. C.A.). The issue in this case was whether section 33 of the Alberta *Police Act*, insofar as it purported to authorize the Alberta Law Enforcement Appeal Board to hear an appeal from a decision of the commanding officer of the contract R.C.M.P. force in Alberta respecting the conduct or performance of duty of members of the force while in the course of their duty, was valid provincial legislation. In a unanimous judgment, the Alberta Court of Appeal held that this provision of the Alberta *Police Act* did contemplate an interference with the internal management of the R.C.M.P., and that for this reason the provision was *ultra vires*. The court cited the Supreme Court of Canada's decision in the *Keable* case in support of this decision. During the course of its judgment, the court reviewed the provisions of the agreement between the Attorney General of Alberta and the federal Solicitor General respecting the provision of provincial police services by the R.C.M.P., and concluded, *per* McGillivray C.J.A.:

> I see nothing in these provisions which would justify the application of the Police Act to the R.C.M.P., and indeed, a specific provision in the agreement that the force should be so subject is open to the same criticism which is made against the Police Act insofar as it is said to affect the internal operation of the R.C.M.P. (p. 89)

The court appears thus to have confirmed that the terms of such an agreement cannot derogate from the authority of the Commissioner of the R.C.M.P., the Solicitor General of Canada and the federal Governor in Council, under sections 5 and 21 of the *R.C.M.P. Act*, with respect to the control and management of the force.

The decision of the Alberta Court of Appeal in the *Putnam and Cramer* case was upheld by the Supreme Court of Canada by a majority of eight to one ((1981), 123 D.L.R. (3d) 257). At the hearing before the Supreme Court, six of the seven provincial Attorneys General who were represented as intervenants in the case took the position that a distinction should be drawn between the investigation of a complaint (against R.C.M.P. officers serving in a province) and the imposition of discipline as a result of such investigation. These intervenants argued that although a province had no authority to discipline R.C.M.P. officers, it was entitled to authorize an inquiry into a citizen's complaint against R.C.M.P. officers who were in the province pursuant to contract. The Attorney General of British Columbia, however, contended that a province was fully entitled to provide in its legislation for discipline as well as investigation in such cases. He contended further that,

> officers of the R.C.M.P. had no independent legal right to be in Alberta to enforce federal criminal law, and that in so far as they were there, pursuant to an agreement with the Province or with any municipality, it was still necessary for them to be sworn in as peace officers pursuant to Alberta authorization as a condition of exercising their functions. (p. 260)

Delivering the judgment of the majority, Laskin C.J.C. commented that this latter position ran counter to the decision of the Supreme Court in the *Keable* case, and was "completely untenable" (p. 260). The court also rejected the argument of the majority of the provincial Attorneys General, but interestingly enough on the ground that the legislation in question (section 33 of the Alberta *Police Act*) did not in fact make the distinction between investigation and discipline, which they had argued would be *intra vires*. The fact that the Supreme Court chose to uphold the appeal on this ground rather than totally reject the theoretical contentions of the majority of Attorneys General seems to leave open the possibility that provincial legislation that successfully provides for investigation but not the imposition of discipline in such cases might still be held *intra vires*. In considering the status of members of the R.C.M.P. when serving in a province, however, the majority did make the following important observations:

> The position would be no different, so far as the constitutional question is concerned, if the R.C.M.P. detachment were concerned with the enforcement of the criminal law or of provincial law or municipal by-laws. It does not appear to me to be possible or practical to separate the law enforcement duties of the R.C.M.P. detachment for the purpose of determining whether in some respects they are subject to the procedures of the *Police Act, 1973* and in others not. The R.C.M.P. code of discipline is applicable to officers of that force, whatever be their duties, and the fact that policing contracts are authorized with a Province or a municipality does not, as art. 2 of the contract in this case expressly specifies, remove them from federal disciplinary control. (pp. 264-265)

In concluding the reasons for the majority, Laskin C.J.C. commented that "in other respects" he was in "substantial agreement" with the "comprehensive reasons" of the Alberta Court of Appeal in the case (p. 265).

The terms of the majority judgment, as well as those of Mr. Justice Dickson's lengthy and interesting dissent in the *Putnam and Cramer* case, make it unlikely that the case will be considered as having resolved the issues surrounding the status of members of the R.C.M.P. when serving, under contract or otherwise, in a province (cf. Ontario, Commission of Inquiry ... 1980). In considering the implications of the *Putnam and Cramer* decision, it is perhaps worth pointing out that of all the provincial legislation dealing with contract policing by the R.C.M.P., the Alberta *Police Act* is unique in that it contains no provisions specifically concerning the status of R.C.M.P. officers who undertake provincial or municipal policing duties pursuant to an agreement. All similar statutes in the other seven provinces contain provisions that in some way indicate that, while on contract, R.C.M.P. members shall be, or shall have all the powers, privileges, etc., of peace officers or provincial

constables or municipal constables, etc.[68] The Alberta *Police Act*, however, contains no such provision, and the R.C.M.P., when providing contract policing services in that province, must therefore be presumed to have exactly the same status they have when undertaking national policing not under contract. Whether this unique aspect of the Alberta *Police Act* has any implications for the applicability of the *Putnam and Cramer* decision to other contract provinces remains a matter of speculation. In this connection, it is noteworthy that Laskin C.J.C., in commenting on the position put forward by the Attorney General of British Columbia in the *Putnam and Cramer* case, drew particular attention to the fact that subsection 17(3) of the *R.C.M.P. Act* provides that members of the R.C.M.P. who are peace officers hold this status "in every part of Canada" (p. 260). It might perhaps be argued that a province would have a more legitimate interest in interfering with R.C.M.P. officers in their capacity as provincial constables or municipal police officers than it would have in interfering with them in their capacity as members of the R.C.M.P. While at first glance the *Putnam and Cramer* decision might seem to suggest that in a dispute concerning the provisions of the British Columbia *Police Act* and the *R.C.M.P. Act*, the *R.C.M.P. Act* would be found to be paramount, the difference between the British Columbia and Alberta Police Acts respecting the matter of the status of R.C.M.P. members when on contract gives some reason to think that *Putnam and Cramer* might not have been decided quite the same way had it arisen in British Columbia rather than in Alberta. Resolution of the kinds of issues that arose in the *Putnam and Cramer* case may become even more complicated, however, if the Bill to amend the *R.C.M.P. Act*, which has recently been introduced by the federal government, and which provides for the establishment of a R.C.M.P. Public Complaints Commission including members from each of the contracting provinces, is enacted in its present form (House of Commons, Bill C-69, First Reading, June 22, 1981).

Before leaving this subject, it is worth noting that in many provinces in which they do contract policing, members of the R.C.M.P. find themselves saddled with quite an array of new offices. Subsection 2(2) of the New Brunswick *Police Act*, for instance, provides that:

> Every member of the Royal Canadian Mounted Police and every member of a police force have all the powers, authority, privileges, rights and immunities of a peace officer and constable in and for the Province of New Brunswick, and are *ex officio* inspectors under the *Motor Carrier Act*, game wardens under the *Game Act*, industrial fire wardens under the *Forest Fires Act*, and fishery guardians under the *Fisheries Act*, and each member of and above the rank of corporal may exercise the powers conferred by section 9 of the *Fire Prevention Act*.

This panoply of offices presumably renders R.C.M.P. officers liable to directions and instructions from, or at least accountable to, a variety of provincial ministers. It merely serves to compound the problem of clearly defining the status of the R.C.M.P.

(c) *Provincial Police Forces*

Three provincial police forces currently exist in Canada: the Ontario Provincial Police, the Québec Police Force (Sûreté du Québec), and the Newfoundland Constabulary, although the last is in practice confined to policing the City of St. John's. The feature that distinguishes such forces is that they are organized by, and accountable to, provincial authorities, usually through a provincial Attorney General, Minister of Justice or Solicitor General. In this way, their organization and structure closely resembles that of the R.C.M.P. While current legislation provides for the creation of five other provincial police forces (in British Columbia, Manitoba, Nova Scotia, Newfoundland and Prince Edward Island), this legislation will not be further considered here since, apart from the utilization of the R.C.M.P. on contract for this purpose, such forces have not been established.

Provision is made for the Ontario Provincial Police in Part IV of the Ontario *Police Act* (R.S.O. 1980, c. 381). The force consists of a Commissioner appointed by the Lieutenant Governor in Council (subsection 43(1)), "such other officers and other ranks as are appointed", and "such employees as are required in connection with the Force" (subsections 46(1) and 46(2)). Officers are appointed by the Lieutenant Governor in Council and, while the statute is silent on the matter, other ranks are in practice appointed by the Commissioner. Subsection 43(2) provides that:

> Subject to the direction of the Ontario Police Commission as approved by the Solicitor General, the Commissioner has the general control and administration of the Ontario Provincial Police Force and the employees connected therewith.

The provisions of the Act concerning the status of members of this force border on the cryptic. Section 47, which deals with the force's duties, refers simply to "members" of the force. Section 56 provides that:

> Every chief of police, other police officer and constable, except a special constable or a by-law enforcement officer, has authority to act as a constable throughout Ontario.

No provision of the *The Police Act*, however, indicates that any member of the O.P.P. is a "constable" for the purposes of this section. The only way such an inference could be drawn is from the provisions of section 47, prescribing the duty of members of the force. Such duty includes a mandate:

> (*a*) to perform all duties that are assigned to constables in relation to the preservation of the peace, the prevention of crime and of offences against the laws in force in Ontario and the criminal laws of Canada and the apprehension of criminals and offenders and others who may be lawfully taken into custody.

While the ascription of status through the definition of duties is not conducive to a clear definition of such status, it seems to be the only way in which the status of members of the O.P.P. as "constables" can be deduced from the provisions of the *The Police Act*. In any event, there is no doubt that in practice such status has been implied from the provisions of the Act.[69] The

history of the legislation establishing the O.P.P. — the original statute stated that "There shall be a force of police constables to be known as the Ontario Provincial Police Force" (S.O. 1910, c. 39, s. 17(2)) — has contributed to the legitimacy of such an imputation. Apparently the status of Ontario Provincial Police officers is not in any way affected by their assignment to contractual municipal policing duties pursuant to sections 64 and 65 of *The Police Act*.

By comparison with the Ontario legislative provisions in this regard, the Québec *Police Act* is a model of clarity. The Act provides for the establishment of the Sûreté du Québec under the command of a Director General appointed by the Gouvernement of Québec (sections 43 and 44). Apart from the Director General, the force consists of five Deputy Directors General, other officers of various ranks, "constables and assistant constables" and cadets (section 43). The Deputy Directors General and the "senior" officers are appointed by the Gouvernement on the recommendation of the Director General, and all other members are appointed by the Director General with the approval of the Attorney General (sections 46 and 47). Functionaries and employees of the Force other than members and cadets are appointed in accordance with the provincial *Civil Service Act* (section 51). All of the officers, including the Director General and the five Deputy Directors General, and all of the constables and assistant constables, are "members" of the Force (section 43). The Force as a whole is "under the authority of the Attorney-General" (section 39).

Section 2 of the Act provides for the status of members of the Sûreté in the clearest of terms:

> The members of the Police Force . . . shall be constables and peace officers in the entire territory of Québec; . . .

The reference here to the status of constable and peace officer, as with similar references in the *R.C.M.P. Act* and the Ontario *Police Act*, must be taken to embrace not only such status as defined by statutory provisions, but also residual aspects of the common-law status. As long as no attempt is made to define the status of "constable" or "peace officer" by statute in such a way as totally to exclude the common law, the common law continues to govern to the extent that it is not abrogated, amended or superseded by statute.

Of all provincial police legislation, the Newfoundland *Constabulary Act* (R.S.N. 1970, c. 58) is perhaps the most enigmatic in dealing with the status of members of this force. The original statute, providing for the creation of the force in 1872, contained no provision specifically indicating the status of members of the force. The only inference that could be drawn from the statute's provisions in this regard was from a reference to the force as a "constabulary force". The 1872 statute remained unchanged in this respect until 1970, when a revised and modernized statute was enacted to replace it. In terms of its provision for the status of members of the force, however, the new Act is scarcely more informative than the old. The Act states that the

Constabulary Force of Newfoundland, consisting of "officers and other members", is reconstituted and continued "as a constabulary force in and for the province" (subsection 4(1)). Its only other provision respecting the legal status of members of the force is subsection 4(3), which provides that:

> For the purposes of this Act, all the powers, authority, rights, protection and privileges which members had by law immediately before the coming into force of this Act shall, subject to this Act, continue in the members.

Unlike the provisions of police legislation in other provinces, which generally define the duties of members of police forces in terms of the preservation of the peace, maintenance of order, prevention of crime, apprehension of offenders, etc., section 13 of the Newfoundland *Constabulary Act* defines the duties of the members of the force in terms that make it difficult to infer any particular status for such members:

> It is the duty of members of the force, subject to the orders of the Chief of Police, to
>
> (a) perform all police duties of any kind whatsoever that may be assigned to the force by the Minister from time to time;
>
> (b) act as wardens, inspectors, patrolmen, guides or in other like capacities if so appointed under any of the laws of Canada or of the province; and
>
> (c) perform such other duties and functions as are, from time to time, prescribed by the Lieutenant-Governor in Council or the Minister.

No other police force in the country seems to be so patently under the complete legal control and authority of a government. Apart from the extensive (almost complete) power to define the duties of the force "from time to time" provided for in section 13, section 5 provides that:

> The Minister has, subject to Section 28, the general control and management of the force and of all matters connected therewith.

Section 28 provides that the

> Lieutenant-Governor in Council may make such regulations not inconsistent with this Act as he deems necessary or advisable for the more effective carrying out of the purposes of this Act according to its true spirit, intent and meaning and for dealing with any matters for which no express provision has been made or in respect of which only partial or imperfect provision has been made.

Section 7 provides for the appointment of a Chief of Police and other officers of the force by the Lieutenant Governor in Council, and section 11 provides that the Lieutenant Governor in Council may authorize the Chief of Police to appoint other members of the force. Sections 8 and 9 define the relationship between the Chief of Police and the Minister:

> **8.** Subject to Section 28, the Chief of Police has, under the direction of the Minister, the control and management of the force and of all matters connected therewith.
>
> **9.** The Chief of Police shall perform the duties assigned to him by, and is at all times subject to the control, orders and authority of, the Minister.

The Minister responsible for the administration of this Act is the provincial Minister of Justice. The author has been unable to discover any reported court decision that sheds any further light on the legal status of members of this police force.

(d) *Municipal Police Forces*

The legislation that directly relates to the establishment of municipal police forces is still, despite the reforms of the last thirty years, prolific. Not only are such forces established pursuant to general provincial statutes dealing with policing, and in some cases pursuant to special legislation relating to particular cities. They are also the subject of numerous municipal by-laws and regulations of police boards and commissions, which define and affect their operations. Such by-laws and regulations are not collected in any one place and, in the case of regulations of police boards and commissions, are often not even available for inspection by the public. The courts of one province have in fact held that such regulations relating to one municipal force are not public documents and may lawfully be withheld from public scrutiny: *Re McAuliffe and Metropolitan Toronto Board of Commissioners of Police* (1975), 9 O.R. (2d) 583 (Div. Ct.).

Under such circumstances, a comprehensive account of the legal status of all municipal police officers in Canada becomes difficult, if not impossible, to achieve. This section, therefore, will focus on the major parameters of the legal status of municipal police, as provided for by the principal policing statutes of the provinces.

(i) *British Columbia*: In this province, every municipal police force must be appointed and governed by a municipal board of commissioners of police (*Police Act*, R.S.B.C. 1979, C. 331, s. 17(2)). Such forces are to consist of "a chief constable and other constables and employees the board considers necessary to provide policing in the municipality" (subsection 22(1)). Subject to collective agreement as defined in the *Labour Code* of British Columbia, the chief constable and every constable and employee of such a force is declared by the statute to be an employee of the board (subsection 22(3)). The three provisions that define the functions, duties and jurisdiction of a municipal police force each specify that it is "under the direction of the board" (subsections 22(2), 27(1) and 30(1)). The board is required to make rules consistent with the Act and regulations thereunder, respecting the administration of the force, the prevention of neglect and abuse by its constables, and the efficient discharge of duties and functions by the force and its constables (subsection 26(1)). It appears, therefore, that all municipal police officers in British Columbia have the common-law status of constable, as modified by the provisions of the *Police Act*.

(ii) *Alberta*: As in British Columbia, municipal police forces in Alberta must all be appointed and governed by a municipal police commission (*The Police Act, 1973*, S.A. 1973, c. 44, s. 18(2)). Such forces are to consist of a "chief of police" and other "members of the police force", all of whom are appointed by the municipal police commission. The appointment of the chief of police, however, is subject to ratification by the municipal council (subsection 25(2)). Subsections 25(3) and (4) define the relationship between the police force and the municipal police commission:

> (3) Every member of the police force of an urban municipality, however appointed, is, from and after the passing of the by-law establishing a commission, subject to the jurisdiction of the commission and shall obey the lawful directions of the commission.
>
> (4) Notwithstanding subsection (3), except when communicating a decision of the commission, no member thereof shall issue or purport to issue any order, direction or instruction to any member of the municipal police force relative to his duties as a member of the force.

In addition, subsection 26(1) provides that:

> Except when inconsistent with this Act, the direction of the police force with respect to discipline within the force and to the maintenance of law and order in the urban municipality is the responsibility of the chief of police or any person acting for him.

While the relationship of subsection 26(1) to subsections 25(3) and (4) is not beyond dispute, it seems that the opening words of subsection 26(1) indicate that the section must be read as subject to the provisions of subsections 25(3) and (4). According to this interpretation, the Chief of Police could not direct the police force under subsection 26(1) in a manner inconsistent with a lawful order of the commission under subsection 25(3), which he is required to obey. Other provisions of the Act (e.g., those relating to the authority of the Attorney General (section 22) and of the Alberta Law Enforcement Appeal Board (section 33)) also operate to constrain the scope of the chief's authority under subsection 26(1). The commission is empowered to make rules consistent with the provisions of the *Police Act* "governing the operation of a police force".

Apart from these provisions, the legal status of municipal police in Alberta is not generally defined by any provision of the Act, although their duties and jurisdiction are defined by reference to "duties that are assigned to peace officers" (section 31).

(iii) *Saskatchewan*: In this province, municipal police forces are appointed and governed either by boards of police commissioners or by municipal councils, depending on the size of the municipality (larger municipalities are required to establish boards). Such forces are to consist of "a chief of police and such other officers and personnel" as the board or council considers necessary (subsection 37(1) and section 31). The oath of office prescribed by the Act indicates that members other than the Chief of

Police are to be sworn in as "police constables" (see Schedule, Form 1). Every member is declared to be subject to the jurisdiction of the board or council, as the case may be and "shall obey its lawful direction" (section 33). The Act declares that such board or council "has sole charge and control of the police force", and

> for the purposes of *The Trade Union Act*, it is deemed to be the employer of the personnel of the police force and, subject to that Act, the chief of police and any person holding the position of deputy chief of police are deemed to be agents of the employer and all other members are deemed to be employees. (subsection 33(2))

A board is authorized to make regulations consistent with the Act and regulations thereunder, "for the governing and administration of the police force" (subsection 30(1)). No comparable authority is given to a municipal council by the Act. As in the Alberta *Police Act*, subsection 38(1) of the Saskatchewan *Police Act* provides that:

> Except where inconsistent with the provisions of this Act, the daily direction of the police force with respect to the maintenance of law and order in the municipality and discipline within the police force is the responsibility of the chief of police or any person acting on his behalf.

Section 46 provides that members of police forces shall, for the purposes of enforcing vehicle weight restriction by-laws or orders, "have all the powers conferred upon police constables by section 71 of *The Highways Act*".

While the Saskatchewan *Police Act* does not specifically state that municipal police have the status of constable, it would seem that this could reasonably be inferred from its provisions. Furthermore, as in the Alberta *Police Act*, the duties of municipal police specified in the Saskatchewan *Police Act* are defined by reference to "duties that are assigned to constables and peace officers". The Saskatchewan Act, however, provides that the body that appoints a municipal policeman can in fact define his duties, for the section of the Act that defines the duties of municipal police begins with the words "(u)nless otherwise indicated in his appointment a member has the power and responsibility to...."(subsection 37(3)).

(iv) *Manitoba*: Municipal police forces in this province are established either pursuant to section 286 of *The Municipal Act*, 1970, c. 100, or pursuant to legislation relating to a particular municipality (e.g., section 462 of *The City of Winnipeg Act*, 1971, c. 105). Section 286 of *The Municipal Act* provides that larger municipalities must, and smaller municipalities may, appoint "a chief constable and ... one or more constables for the municipality". Such forces are appointed and governed by the municipal council, which is authorized to enact by-laws,

> (e) for regulating the government of the police force, for preventing neglect or abuse, and for rendering the force efficient in the discharge of its duties;

(f) for delegating to the chief of police the right to maintain discipline in the force by applying and enforcing the penalties set out in the by-law against members of the force guilty of breaches of duty or discipline or of the requirements of any rules applicable to the members of the police force. (section 285)

Subsection 287(2) describes the status of such constables as follows:

Each constable shall hold office during the pleasure of the council, and has the same powers and privileges, and is subject to the same liability and to the performance of the same duties, and may act within the same limits, as a constable appointed by the Lieutenant Governor in Council.

The status of provincial constables appointed by the Lieutenant Governor in Council is defined by subsection 4(2) of *The Provincial Police Act* as follows:

The commissioner and every officer and constable of the force is ex officio an officer within the meaning of The Wildlife Act, an inspector under The Liquor Control Act, The Amusements Act and The Highway Traffic Act, a peace officer as defined by the Criminal Code (Canada) and such other officer as may be designated in any other Act to enforce the penal provisions thereof.[70]

The provisions of *The City of Winnipeg Act* (S.M. 1971, c. 105) are quite similar to those of *The Municipal Act*, (S.M. 1970, c. 100) regarding the status of members of the city's police force. The force is to consist of "a chief of police and as many constables and other officers and assistants as council may consider necessary from time to time" (subsection 462(2)). The Act permits the city council to govern the force itself or to enact a by-law creating a board of commissioners of police, and to transfer to this board as much of the responsibility for the government of the force as the council sees fit (sections 464 and 465). Unlike the provisions of *The Municipal Act*, the provisions of *The City of Winnipeg Act* do not clearly define the status of members of the force. The Act does, however, provide that, "subject to the paramount authority" of the council or board, as the case may be, the members of the police department

(a) shall obey all lawful directions and be subject to the orders of the chief of police; and

(b) are charged with the duty of preserving the peace, apprehending offenders and generally with the performance of all duties that by law devolve upon peace officers. (subsection 462(5) and section 469)

The council (or the board, if one is established) are authorized to make regulations for the force similar to those which are provided for in section 285 of *The Municipal Act.*

These provisions make it clear that in Manitoba the common-law status of constable and peace officer, as modified by the statutory provisions cited, remains the basis of the legal status of the police.

(v) *Ontario*: As in Saskatchewan, municipal police forces in Ontario may be appointed and governed by municipal councils or boards of commissioners of police, depending on the size of the municipality concerned.

Larger municipalities are required to establish boards (*The Police Act*, R.S.O. 1980, c. 381, ss. 8-21). Section 14 of the Act provides that a police force established by a board shall consist of "a chief of police and such other police officers and such constables, assistants[71] and civilian employees as the board considers adequate". Similarly, section 20 provides that a police force established by a municipality that does not have a board shall consist of "one or more constables and such other police officers, assistants and civilian employees as the council considers adequate", and that "(w)here a police force has two or more constables, the council may appoint one constable to be chief of police". Section 56 of the Act provides that:

> Every chief of police, other police officer and constable, except a special constable or a by-law enforcement officer, has authority to act as a constable throughout Ontario.

Section 57 defines the duties of municipal policemen, and concludes by stating that they "have generally all the powers and privileges and are liable to all the duties and responsibilities that belong to constables".

A board is authorized to make regulations consistent with regulations made by the Lieutenant Governor, "for the government of the police force, for preventing neglect or abuse, and for rendering it efficient in the discharge of its duties" (section 16). No comparable authority is given by the Act to a municipal council where there is no board. Subsection 17(1) of the Act provides that:

> Notwithstanding section 2, the board is responsible for the policing and maintenance of law and order in the municipality and the members of the police force are subject to the government of the board and shall obey its lawful directions.

Again, although section 2 of the Act places responsibility on municipalities for maintaining law and order and establishing police forces, the Act does not contain a comparable provision indicating that where there is no board, members of municipal police forces are subject to the government of the council and must obey its lawful directions. Subsection 31(1) of Regulation 791 (R.R.O. 1980) passed under the 1980 *Police Act* provides that:

> No chief of police, constable or other police officer shall take or act upon any order, direction or instruction of a member of a board or council. (subsection 31(1))

Any such person who receives such an order, etc., is required to report it to the Ontario Police Commission, which in turn is required to report the matter to the provincial Solicitor General.

Note that these provisions of the Ontario *Police Act* are substantially the same as those of its original predecessor, the *Municipal Institutions of Upper Canada Act* of 1858. This makes it clear that the common-law office of constable, as modified by these statutory provisions, remains the basis of the legal status of municipal police officers in the province.

(vi) *Québec*: Municipal police forces in Québec are established and maintained by municipalities and governed by municipal councils (*Police Act*, R.S.Q. 1977, c. P-13, s. 64, as am. by S.Q. 1979, c. 67, s. 27). Such forces are to consist of a director or chief and other municipal policemen. Section 2 of the Act provides that all municipal policemen are "constables and peace officers" throughout the territory of Québec, thus indicating the continuance of the common-law status in this province, as modified by specific statutory provisions. Section 68 provides that a municipal police force is under the direction of the director or chief who commands it, and states specifically that "(t)he manager of a municipality has no authority in any matter concerning a police inquiry" (as am. by S.Q. 1979, c. 67, s. 29). In line with this last provision, section 144 of *The Municipal Code*, as amended, now provides that

> the report concerning the police department cannot contain any information which, in the opinion of the police chief, might disclose the content of a record concerning a police inquiry. (as am. by S.Q. 1979, c. 67, s. 38)

Section 113.1 of the *Cities and Towns Act* (R.S.Q. 1977, c. C-19, as am. by S.Q. 1979, c. 67, s. 39) now provides that

> the manager shall have no access to the correspondence, communications, or records concerning a police inquiry.

Section 65 of the *Police Act* provides that a municipality that maintains a police force may adopt by-laws concerning various aspects of the running of the force, including providing for the "organization, equipment and maintenance of a police force and the discipline of its members", and to "prescribe the duties and powers of the members of such force".

The police department of the Montréal Urban Community is established under the provisions of the *Public Security Council of the Montreal Urban Community Act*, S.Q. 1977, c. 71. The Act indicates that the force is a department of the Urban Community (section 221), and shall consist of "the director, the policemen and such other functionaries and employees as necessary" (section 223). The director is appointed by the Lieutenant Governor in Council, on the recommendation of the Minister of Justice, who must previously have consulted on the matter with the executive committee of the Urban Community, and the Public Security Council (section 224). The latter body is somewhat analogous to a municipal police commission, but has more limited directive powers than such bodies typically have. The functions of the Council are essentially limited to those of (i) fixing the objectives of the police department, (ii) receiving comments or representations from the public concerning public security within the community or the administration of the police department, and initiating consultations thereon, and (iii) disposing of disciplinary charges against senior officers of the force. In addition, the Security Council has some important responsibilities concerning the budget, hiring policies, the provision of equipment, and working conditions of the force (sections 212-214). The force, however, is "under the authority of the director" (section 222), who is required to:

(*a*) direct, administer and organize the Police Department;
(*b*) hire and supervise the department staff;
(*c*) procure, for the Police Department, the arms, equipment, clothing and other things necessary for the discharge of the duties assumed by the Police Department. (section 229)

The Director is also required to supply the Security Council with information necessary for the discharge of its functions, and periodically submit reports to it concerning the "operations and expenses" of the department (section 230). He is also responsible for preparing the department's budget and managing it "under the supervision of the Security Council" (section 231). He is required to submit to the Minister of Justice "every detailed report on conditions that are disturbing to order, peace and public safety, or on the crime situation" (section 230).

The Lieutenant Governor in Council has wide power to make regulations on "ethics and discipline for the policemen of the Community" (section 235), which includes the power to determine the duties of policemen. This provision contains the only reference in the Act to the legal status of the members of the police department; the section provides that such regulations can determine "the occupations, activities and employments forbidden to policemen on account of their status as peace officers".

(vii) *New Brunswick*: Municipal police forces in this province are established by municipal councils, and are normally also governed by them. Councils have the option, however, of establishing a board of police commissioners, and in the event that such a board is established, it is responsible for "providing the direction and policy required" for the police force, within the budget established by the municipality (*Police Act*, S.N.B. 1977, c. P-9.2, s. 7(2)). Municipal police forces consist of a Chief of Police and "such other police officers" as the council or board, as the case may be, considers adequate, all of whom are "members of the police force" (sections 1 and 10). Subsection 2(2) of the Act provides that

> ... every member of a police force [has] all the powers, authority, privileges, rights and immunities of a peace officer and constable in and for the Province of New Brunswick, and are *ex officio* inspectors under the *Motor Carrier Act*, game wardens under the *Game Act*, industrial fire wardens under the *Forest Fires Act*, and fishery guardians under the *Fisheries Act*, and each member of and above the rank of corporal may exercise the powers conferred by section 9 of the *Fire Prevention Act*.

The Chief of Police is appointed by the council or, if there is one, by the board, and "shall be responsible directly" to the body that appoints him. The remaining members of municipal police forces are appointed by their chiefs of police (sections 10 and 11). The Act provides that a board and a council can make rules, consistent with the Act or regulations passed thereunder, "for the purpose of performing its responsibilities under this Act" (subsections 11(7) and 7(13)).

A unique provision of the New Brunswick *Police Act*, which has potentially profound implications for the relationship between a council or board, its Chief of Police and the Minister of Justice in that province, is section 6, which provides that:

> (1) The Minister
>
> > (*a*) on the request of a board, or a council where a board has not been established, or a police chief, or
> >
> > (*b*) on the request of the Commanding Officer of the Royal Canadian Mounted Police,
>
> may assume the conduct of the investigation of any alleged offence, and in such case he shall in writing so notify the board, or the council where a board has not been established, the chief of police, or the Commanding Officer of the Royal Canadian Mounted Police, as the case may be.
>
> (2) Where a notification is given under subsection (1), each member of the police force or the Royal Canadian Mounted Police shall
>
> > (*a*) give to the Minister, or any person authorized by him to investigate the alleged offence, all possible assistance and information,
> >
> > (*b*) carry out and obey the orders of the Minister or any person authorized by him to investigate, and
> >
> > (*c*) deliver to the Minister, or to any person authorized by him to investigate, possession of all files, documents and physical objects relating to the investigation that are in his possession.
>
> (3) Any person who fails to comply with this section commits an offence and is liable on summary conviction to a fine of one hundred dollars, and in default of payment thereof to imprisonment in accordance with subsection 31(3) of the *Summary Convictions Act*.

This provision seems to imply that a board or council may legitimately concern itself with the investigation of particular alleged offences. This matter will be the subject of further discussion in the next Chapter.

(viii) *Nova Scotia*: As in Saskatchewan and Ontario, municipal police forces in Nova Scotia are governed by municipal councils or boards of commissioners of police, depending on the size of the municipality; larger municipalities are required to establish boards (*Police Act*, S.N.S. 1974, c. 9, ss. 15 and 19). Unlike the other two provinces, however, the ultimate authority for appointing members of a municipal police force in Nova Scotia remains with the council, even when a board has been established. The powers and duties of a board for the government of the force are determined by the council in each case through the by-law establishing the board. In this connection, subsection 20(2) of the Act provides that:

> Notwithstanding the right of a municipality to direct its own police operations, the function of any board shall primarily relate to the administrative direction, organization and policy required to maintain an efficient and adequate police force.

Municipal police forces in this province are to consist of "a chief officer and such other officers, assistants and civilian employees as the council may from time to time deem necessary" (section 14). Subsection 16(2) provides that each municipal police officer "shall have all the power and authority of a provincial constable", and subsection 11(6) provides that:

> Each provincial constable shall have the power and authority to enforce and to act under every enactment of the Province and any reference in any enactment or in any law, by-law, ordinance or regulation of a municipality to a police officer, peace officer, constable, inspector or any term of similar meaning or import shall be construed to include a reference to a provincial constable.

The fact that no general provision respecting the status of provincial constables, apart from this one, appears in the Act, suggests that the common-law office of constable, as modified by the provisions of the Act, remains the basic status of the police in Nova Scotia.

Like the Alberta and Saskatchewan *Police Acts*, subsection 15(5) of the Nova Scotia *Police Act* provides that

> Except when inconsistent with the provisions of this Act, the actual day to day direction of the police force with respect to the enforcement of law and the maintenance of discipline within the force shall rest with the chief officer or person acting for him.

The Nova Scotia *Police Act*, however, does not contain a provision specifically requiring the chief and members of a municipal police force to "obey the lawful direction" of a council or board, such as is found in the Alberta and Saskatchewan Acts. The only comparable provision in the Nova Scotia *Police Act* is the one, in subsection 20(2) that refers to the "right of a municipality to direct its own police operations" and the function of boards with respect to "administrative direction". It is possible, therefore, that the provision in the Nova Scotia *Police Act* giving the chief the day-to-day direction of the force may, because of this difference of legislative context, imply a greater degree of autonomy, vis-à-vis his governing authority, for a police chief in Nova Scotia than is enjoyed by his counterparts in Alberta and Saskatchewan. The issue is complicated further, however, by the inclusion of subsection 19(11) in the Nova Scotia *Police Act*, which provides that:

> Except when communicating a decision of the board, no member thereof shall issue or purport to issue any order, direction or instruction to any member of the municipal police force relative to his duties as a member of the force.

This is identical to the provision found in the Alberta *Police Act* (S.A. 1973, c.44, s. 25(4)), and similar to one included in Ontario Regulation 791 (R.R.O. 1980, s. 31). The opening words of the Alberta and Nova Scotia provisions,

however, seem to imply that a board, in its corporate capacity, *is* entitled to issue orders, directions or instructions to a member of a police force "relative to his duties as a member of the force".

(ix) *Prince Edward Island*: The provisions of the Prince Edward Island *Police Act* with respect to municipal police forces are substantially similar to those of the Nova Scotia *Police Act*. This is explained by the fact that both statutes were modelled on the same draft Police Act, drawn up as the result of an initiative of the Council of Maritime Premiers. Some important differences between the two Acts, however, must be noted. Firstly, the Prince Edward Island Act contains no provisions comparable to those of the Nova Scotia statute that define, in general terms, the legal status of municipal police officers. Secondly, and of considerable potential significance for the relationship between police forces and their governing authorities in this province, the provision in the Prince Edward Island *Police Act* giving a Chief of Police "(t)he actual day to day direction of the municipal police force with respect to the enforcement of the law and maintenance of discipline within the force" (S.P.E.I. 1977, c. 28, s. 18) does not contain the same opening qualifier ("Except when inconsistent with the provisions of this Act", S.N.S. 1974, c. 9, s. 15(5) and S.A. 1973, c. 44, s. 26) as is contained in the comparable provisions of the Nova Scotia and Alberta Police Acts. Nor, however, does the Prince Edward Island statute contain the provision found in the Nova Scotia and Alberta Police Acts, prohibiting the issuance of orders, directions or instructions to municipal police officers by members of boards, with its implication of the right of the board itself to issue such orders, directions or instructions.

These differences in the drafting of the Acts suggest that the terminology of the Prince Edward Island *Police Act* was chosen to guarantee autonomy in the day-to-day direction of a municipal police force in matters pertaining to law enforcement and discipline, without interference from the governing authority. This issue is one to which we shall return when discussing the status of chiefs of police, below, and when discussing the implications of this status in the following Chapter.

In all other significant respects, the provisions of the Prince Edward Island *Police Act* regarding the status of municipal police officers are substantially the same as those of the Nova Scotia *Police Act*.

(x) *Newfoundland*: Municipal police forces, other than those established exclusively for the enforcement of municipal by-laws, are not now permitted to be established or maintained in Newfoundland.

(e) *Chiefs of Police, Commissioners, and Other Heads of Police Forces*

A considerable amount of detail has already been given concerning the status, powers and authority provided for chiefs of police, commissioners and

other heads of police forces by police legislation in different jurisdictions. A few general remarks on this subject will be made here.

The notion of a formal command structure within a police force was one that did not receive explicit recognition in police legislation in Canada until many years after it had become a practical reality through the establishment of the "new police" during the 1830s and 1840s. It was a notion that was quite foreign to the traditions of the common-law office of constable, and its modern imposition has resulted in legal dilemmas that have not been resolved to this day. A review of modern police legislation makes it apparent that legislators have come a long way in recent years towards a precise definition of the authority of chiefs and other heads of police forces, and the legal relationships between them, their governing authorities and the members of their forces. Even so, the status of such officers remains at best ambiguous and at worst completely unclear in current police legislation in Canada. A comparison of the provisions of the various provincial police statutes dealing with chiefs of municipal police forces will illustrate this uncertainty.

At one extreme are the provisions of *The Municipal Act* in Manitoba, which, while recognizing that there shall be a Chief of Police for a municipal police force, say nothing about his status or relationship to his governing authority and the members of his force, beyond the somewhat cryptic provision that a council may pass by-laws "for delegating to the chief of police the right to maintain discipline in the force" (S.M. 1970, c. 100, s. 285). At the other extreme are the provisions of the *Public Security Council of the Montreal Urban Community Act* (S.Q. 1977, c. 71) which specify that the Director of the Montréal Urban Community Police Department shall have substantial autonomy to "direct, administer and organize the Police Department", and that "the members of the personnel" and the department as a whole shall be "under the authority of the director" (ss. 222, 223 and 229-231). In between these two extremes lie two spectra, along which the provisions of the police legislation of the other provinces can be placed. One of these runs from very poor definition of the status of the Chief at one end, to clear definition at the other. The other runs from a status of very low autonomy at one end, to a status of substantial autonomy at the other. Some examples of points on these spectra will illustrate their nature.

Police legislation in Ontario, while it provides specifically for the appointment of chiefs of police for municipal forces (*Police Act*, R.S.O. 1980, c. 381, ss. 14 and 20(3)), appears to give them a status no different from that of other members of their forces — they are all "constables". It contains virtually no provisions indicating their particular functions and responsibilities, or their relationships to their governing authorities and to the members of their forces. Chiefs, like all other members of their forces, are required to obey the "lawful directions" of their boards of commissioners, in jurisdictions where such

boards exist. The only reference in the Act to any particular authority that chiefs have over the members of their forces is an oblique one, in a provision that deals with liability of chiefs for the torts of members of their forces. This provision (section 24) states that the chief of police "is liable in respect of torts committed by members of the police force under his direction and control in the performance or purported performance of their duties". The Act does not specify when, or under what circumstances, members shall be "under his direction and control". While the regulations passed under the Act contain provisions concerning specific responsibilities of Chiefs (in relation to discipline, use of firearms, etc.) and dealing with their own liability to discipline, dismissal, etc., they contain no provisions indicating the status and authority of chiefs. Neither do they indicate what relationships should exist between them, their governing authorities and the members of their forces. Chiefs in Ontario, then, would appear to be near the low end of both spectra (poor definition of status, and relatively low autonomy).

A shade nearer the middle of both spectra are the provisions of the British Columbia *Police Act* (R.S.B.C. 1979, c. 331). Section 27 provides that:

> (1) The chief constable of a municipal force has, under the direction of the board, general supervision over the municipal force, and shall perform the other functions and duties assigned to him under the regulations or any Act.
>
> (2) A municipal force shall, under the direction of the chief constable, perform the duties and functions respecting the enforcement of municipal bylaws, the criminal law and the laws of the Province, and the general maintenance of law and order in the municipality, as may be assigned to it or to a peace officer by the board, under the regulations or under any Act.

The provisions of *The City of Winnipeg Act* define the status and role of the chief of that force in terms similar to these provisions in the British Columbia *Police Act*. Still further along the spectrum of autonomy are the provisions of the Alberta, Saskatchewan and Nova Scotia Police Acts, while the provisions of the Prince Edward Island *Police Act* appear to envisage even greater autonomy for municipal police chiefs there. The provisions of the Québec *Police Act* and of the New Brunswick *Police Act* also lie towards the top end of the autonomy spectrum. The latter Act provides that:

> The chief of police is the chief executive officer of the police force and shall have all necessary powers to direct the police force in carrying out its duties and responsibilities. (S.N.B. 1977, c. P-9.2, ss. 10(3) and 11(3))

It will be recalled that this Act also provides that a chief shall be "responsible directly" to his council or board, as the case may be.

The purpose of such an illustration, which is admittedly more superficial than would be required for a thorough comparison, is not to draw invidious comparisons between the status of chiefs in different jurisdictions — which in *practice* may not reflect the legal provisions anyway — but merely to draw attention to the wide variation in the manner in which such status is legislatively defined. Such variation belies the validity of attempts to treat the legal

status of chief officers in Canada as a uniform phenomenon. In each jurisdiction, this status is defined somewhat differently from the way it is defined in the others.

By comparison with that of municipal chiefs of police, the status of the Commissioners of the R.C.M.P. and the O.P.P. and of the Director General of the Sûreté du Québec are elaborately spelled out in the statutes under which they are appointed. Each of these officers, in addition to his responsibilities respecting the command of his force, has judicial authority. The Commissioner of the R.C.M.P. is *ex officio* a justice of the peace having all the powers of two justices of the peace (*R.C.M.P. Act*, R.S.C. 1970, c. R-9, s. 17); the Commissioner of the O.P.P. is *ex officio* a provincial judge for the province "(u)nless otherwise provided by order in council" (*Police Act*, R.S.O. 1980, c. 381, s. 44); and the Director General of the S.Q. is *ex officio* a justice of the peace throughout the province (*Police Act*, R.S.Q. 1977, c. P-13, s. 53).

Each of these officers commands his force under the supervision of a Cabinet Minister. The R.C.M.P. Commissioner has the control and management of the force and all matters connected therewith, "under the direction of the Minister" (currently the federal Solicitor General — section 5). Unlike his counterparts in the two provincial forces, however, he is also authorized to "make rules, to be known as standing orders, for the organization, training, discipline, efficiency, administration and good government of the force". But his authority is expressly stated to be subject to the provisions of the Act and regulations made thereunder by the Governor in Council (subsection 21(2)). Presumably, since the scope of standing orders can be said to be concerned with the control and management of the force, the exercise of the Commissioner's authority in this regard is also subject to the direction of the Minister.

The Commissioner of the O.P.P. has the "general control and administration" of the force and its employees, "(s)ubject to the direction of the Ontario Police Commission as approved by the Solicitor General" (R.S.O. 1980, c. 381, s. 43(2)). In Québec, while all the personnel of the S.Q. are "under the orders of the Director General" (section 52), the force as a whole is "under the authority of the Attorney-General" (section 39). While the Director General has no power to make standing orders comparable to that of the Commissioner of the R.C.M.P., the government is required to receive and consider (but not necessarily to accept) his recommendations before exercising its right to pass certain regulations relating to the force, provided that the Director General's recommendations are submitted within such time limit as the Government may fix (ss. 57 to 57.2, R.S.Q. 1977, c. P-13, s. 57, as am. by S.Q. 1979, c. 67, s. 26).

Both the Commissioner of the O.P.P. and the Director General of the S.Q. have authority to conduct inquiries into the conduct of members of their

forces, and for this purpose have extensive powers under their provinces' respective *Inquiries Act* (Ontario *Police Act*, R.S.O. 1980, c. 381, s. 43(3); Québec *Police Act*, R.S.Q. 1977, c. P-13, s. 54). The Commissioner of the R.C.M.P. does not have comparable authority with respect to members of that force, and like his senior officers, may only initiate such an inquiry when he suspects that a service offence has been committed (ss. 30-32).

In 1966 an attempt was made to designate the Commissioner of the R.C.M.P. as a deputy head of a department, for the purposes of the *Civil Service Act*, S.C. 1960-61, c. 57, and an order in council was passed ostensibly for this purpose (SOR/66-11, *Canada Gazette*, Part II, January 12, 1966, p. 14). This designation, however, appears to have been flawed, and therefore could not have had the intended effect. In order for the Commissioner to be designated as the deputy head of the R.C.M.P. as a department, for the purposes of the *Civil Service Act*, the R.C.M.P. had first to be designated as a department for the purposes of that Act (see paragraphs 2(1)(*g*) and (*h*) of the *Civil Service Act*). In the order in council, however, the R.C.M.P. was designated as a department, not for the purposes of the *Civil Service Act*, but for the purposes of the *Financial Administration Act* (R.S.C. 1952, c. 116). Since the R.C.M.P. had not been designated as a department for the purposes of the *Civil Service Act*, the purported designation of the Commissioner or its deputy head for the purposes of that Act cannot have had legal effect. It seems, therefore, that despite rumour to the contrary, the Commissioner of the R.C.M.P. does not have legal status as a deputy head of department. As far as this author has been able to ascertain, the Commissioner's counterparts in the O.P.P. and S.Q. do not have the status either.

The status of the head of the third provincial police force in Canada, the Newfoundland Constabulary Force, has already been considered in the discussion of that force above (see pp. 79-80). Here it is sufficient merely to point out that the chief of police of this force has a much more limited status than his counterparts in the R.C.M.P., the O.P.P. and the S.Q. He has no judicial status, as they do, nor does he have the considerable authority to conduct inquiries, which is possessed by the heads of the O.P.P. and the S.Q. Furthermore, his subordination to the Minister is expressed in even more emphatic terms than is theirs. While they are under the "direction" or "authority" of higher authorities, he is "at all times subject to the control, orders and authority of, the Minister" (*Constabulary Act*, R.S.N. 1970, c. 58, s. 9).

In British Columbia, the divisional commander of the R.C.M.P., when the R.C.M.P. is performing contract provincial policing pursuant to an agreement, is deemed to be the commissioner of the provincial police force. Technically, therefore, this division of the R.C.M.P. constitutes a fourth provincial police force in Canada. The status of R.C.M.P. members while serving in this capacity in British Columbia, and of the divisional commander in particular, however, has already been discussed at some length earlier in this Chapter (see pp. 70-71), and requires no further comment here.

2. The *Criminal Code*

In addition to the status police derive from the statutes under which they are appointed, they almost always derive status as "peace officers" under the *Criminal Code*. The likelihood of a police officer being recognized as having status as a peace officer under the *Criminal Code* is directly related to his prescribed duties under the statute pursuant to which he is appointed. Broadly speaking, the more extensive his prescribed duties, and the more closely they are related to the "preservation and maintenance of the public peace", the greater is the likelihood that he will be recognized as having the status of peace officer for the purposes of the *Criminal Code*.

In this context, the manner in which a policeman's duties are defined is of considerable importance. In most provinces, the duties of the police are fixed by statutory provisions. In some police legislation, however, police duties are not fixed by statutory provision, but are left to be defined by particular persons or bodies. The Saskatchewan *Police Act*, for instance, effectively allows the board or council that appoints municipal police officers to define their duties, since the duties spelled out for a member of a municipal police force by the section are declared to be his "(u)nless otherwise indicated in his appointment" (R.S.S. 1978, c. P-15, s. 37(3)). Similarly, most of the duties of members of the Newfoundland Constabulary are those assigned "from time to time" by the Minister or "prescribed by the Lieutenant-Governor in Council or the Minister" (*Constabulary Act*, R.S.N. 1970, c. 58, s. 13). In Nova Scotia, the Attorney General has authority to direct that the duties of municipal officers shall be other than those specified in the *Police Act* (S.N.S. 1974, c. 9, s. 16(1)). In Prince Edward Island, this power is accorded not only to the Minister of Justice, but also to the council or board that has responsibility for the force (*Police Act*, S.P.E.I. 1977, c. 28, s. 19(1)). In Québec, councils have a similar power to define the duties of policemen (*Police Act*, R.S.Q. 1977, c. P-13, s. 65).

The seemingly circuitous process of reasoning by which the courts determine whether someone is a "peace officer" for purposes of the *Criminal Code* is further confounded by recent judicial utterances to the effect that the extent of the duties of such a "peace officer" *should* not be defined. In *R.* v. *Dietrich* (1978), 39 C.C.C. (2d) 361, Rae J. of the British Columbia Supreme Court was called upon to decide whether a policeman was, in the circumstances of the case, a "peace officer. . . engaged in the execution of his duty" for the purposes of a charge under paragraph 246(2)*(a)* of the *Criminal Code* (assaulting a peace officer). In his judgment he observed that:

> Having regard to the concern of the law to which I refer, the duty of a peace officer extends beyond simply the apprehension of criminals, the detection and prevention of crime and the preservation of the peace. It is neither necessary nor desirable to attempt to say in general terms how far that duty extends. (p. 364)

The precise definition of peace-officer status under the *Criminal Code* seems thus to have become a somewhat esoteric exercise in judicial revelation. The only consolation for the police in this regard is that over the years the courts in Canada appear to have shown a marked tendency towards giving them the benefit of any doubt.[72]

Peace-officer status under the *Criminal Code* is, of course, of enormous consequence to the police, since it carries with it access to substantial discretionary powers in respect of law enforcement and the maintenance of order. By subsection 27(2) of the federal *Interpretation Act* (R.S.C. 1970, c. I-23), these powers are extended to the enforcement of offences under other federal legislation. The discretionary nature of such powers has long been recognized by the courts, although rarely explicitly: see e.g., *Fortin* v. *La Reine*, [1965] C.S. 168. What is not so clear, however, is the relationship between these discretionary powers and the duties that police are accorded under provincial police legislation, and the implications of this relationship for the control and accountability of the police. This difficult issue will be the subject of discussion in the following Chapter. It will be sufficient meanwhile to reiterate here that it is because police have the duties that they have (as spelled out in police legislation) that they are recognized as peace officers for the purposes of the *Criminal Code*, and enjoy all the powers, protection and privileges provided for in that statute. This relationship of status to duty has been recognized as a fundamental aspect of the common-law office of constable for centuries. Thus, Hale, having reviewed the common-law powers of constables and the special protection offered them by the common law, concluded:

> the reason of all this is, because he is *ex officio* a conservator of the peace, and is not only permitted but by law injoined to take a felon, and if he omits his duty herein, he is indictable and subject to a fine and imprisonment. (1778: 91)

Similarly, Wilson, writing in Toronto in 1859, reflected on the matter in the following terms:

> As the duties of the constable are of that nature, that when he acts he must do so promptly and vigorously, with little or no time for much reflection, and none in many cases for getting advice; and as he cannot be expected to know all the law of arrests, and other difficult matters pertaining to his office, it is but right that he should be protected against whatever vexatious proceedings may be taken against him, to the utmost extent of what is reasonable; for it is much better the peace officer should be protected who is acting *bona fide* for the benefit of the public, from the consequences of an occasional and unwitting wrong; and certainly that he should not be amenable for the wrong of another, than that he should be deterred from arresting the criminals and offenders against the peace of society. It is for this purpose that statutes have been passed. (1859: 60)

While such a justification might not receive universal assent today insofar as it appears to condone police ignorance of their authority, the proposition that the powers and protection enjoyed by the police must be justified in terms of the extent and nature of their duties is one with which few would disagree. Inadequate training and knowledge of their authority has historically been a persistent problem associated with the police. It led Blackstone to comment

that "of the extent of which powers, considering what manner of men are for the most part put into these offices, it is perhaps very well that they are generally kept in ignorance" (1876: Vol. I, p. 318). Such an approach can hardly be regarded as acceptable in Canada in the 1980s.

The fact that police in Canada derive their most significant status from the federal *Criminal Code* rather than from the statutes under which they are appointed raises some difficult questions about the limits of constitutional authority to define their status. In particular, it raises a question about the boundaries between the exclusive power of the federal Parliament to legislate in relation to criminal law and procedure on the one hand, and the exclusive power of the provincial legislatures to legislate in relation to the administration of justice on the other. That the latter power includes the power to legislate in relation to the administration of criminal justice, is not seriously questioned: see e.g., *Di Iorio and Fontaine* v. *Warden of the Common Jail of the City of Montréal*, [1978] 1 S.C.R. 152, and *Attorney General of Quebec and Keable* v. *Attorney General of Canada*, [1979] 1 S.C.R. 218. Nor does it seem to be seriously questioned, although it has never been definitively decided, whether the federal Parliament has the right to establish a federal police force such as the R.C.M.P. for the enforcement of criminal and other federal laws: see e.g., *Re White, White* v. *Regem* (1954), 12 W.W.R. (N.S.) 315 (B.C. C.A.), *Proprietary Articles Trade Association* v. *Attorney General for Canada*, [1931] A.C. 310 (P.C.), and the *Keable* case. This explains the curious anomaly that despite the fact that constitutional authority for the enforcement of criminal law is recognized as belonging to the provinces, by far the largest police force in the country is a federal force established under federal legislation.

What is not so clear, however, is where the boundary lies between federal and provincial authority to define the status of the police. Neither is it clear who shall be recognized as having that status. Present legislation, in which the limits of "peace officer" status for the purposes of criminal-law enforcement are defined in section 2 of the *Criminal Code*, seems to be justified on the basis that federal legislative authority of this kind is necessarily incidental to the federal authority to legislate in relation to the criminal law and criminal procedure (*B.N.A. Act*, s. 91, para. 27), even though the power to legislate in relation to the administration of justice (including the enforcement of the criminal law) has been recognized as falling within exclusive provincial competence (*B.N.A. Act*, s. 92, para. 14). Such overlap is justified through the doctrine of "paramountcy", which establishes that where a federal ancillary legislative power co-exists with an exclusive provincial head of legislative competence over the same subject matter (in this case, the legal status of police), the federal legislation will "occupy the field" and prevail over any provincial legislation in the area insofar as such provincial legislation conflicts with it. So long as federal legislation continues to occupy the field, conflicting provincial legislation remains "inoperative", but not constitutionally invalid.

Should the federal legislation be repealed, or modified so that it no longer conflicts with provincial legislation, the field once again becomes open, and provincial legislation in relation to it becomes operative again.[73]

Just how far federal legislation defining the legal status of provincially-appointed police officers can be justified as legislation that is legitimately ancillary to the federal legislative power in relation to criminal law and procedure, without unacceptably encroaching on the provincial legislative power in relation to the administration of justice, remains unclear. That there must be some limits becomes clear when one contemplates the possibility of a *Criminal Code* amendment providing that only members of the R.C.M.P. are "peace officers" for the purposes of the *Code*. Such an amendment would be politically unthinkable and probably constitutionally invalid, since it would effectively drain provincial legislative competence in relation to any significant criminal-law enforcement. The question, as it relates to the definition of "peace officer" status, has never been placed squarely before the courts. A substantially similar question, relating to the constitutional legislative power to define the status of "prosecutor" for the purpose of the *Criminal Code* was, however, raised in the recent case of *R.* v. *Hauser*, [1979] 1 S.C.R. 984. But the Supreme Court of Canada held that the issue discussed here did not actually arise in that case, since the case involved drug legislation that relied on the "peace, order and good government" clause, rather than the federal criminal-law power, for its constitutional validity. As a result, the question of how the legislative authority for defining the legal status of the police in relation to the enforcement of the criminal law is shared between the federal Parliament and provincial legislatures remains unclear. Since criminal-law enforcement constitutes such a significant part of the authority of the police, this question is of considerable significance. Although it does not affect the right of provincial legislatures to define the status of the police in relation to the enforcement of provincial or municipal laws, it does have significance for any provincial provisions that purport to give provincially-appointed police officers status to enforce criminal laws (see e.g., subsection 4(2) of the Manitoba *Provincial Police Act*, R.S.M. 1970, c. P150). It would seem that insofar as such provisions conflict with the *Criminal Code* definitions of "peace officer", "public officer", etc., they are inoperative.[74] This is significant in terms of its implications for control and accountability of the police (see Grant, 1980).

Every officer of the R.C.M.P. is also a "public officer" for the purposes of the *Criminal Code* (section 2, "public officer"). There are cases that suggest that other police officers may also have this status: see e.g., *R.* v. *Cartier*, *R.* v. *Libert* (1978), 43 C.C.C. (2d) 553 (Qué. S.C.) and cases cited therein. However, since almost all police officers are recognized as peace officers for the purposes of the *Criminal Code*, the addition of the status of "public officer" is not very significant: "public officers" have no powers, privileges, protections, etc., which "peace officers" do not also enjoy.

3. Other Legislation

Police officers also derive status from the provisions of a host of other federal and provincial statutes. They may have the status of game wardens and game guardians, conservation and wildlife officers, fisheries, liquor and motor vehicle inspectors, fire prevention officers and park wardens, etc. Statutory provisions for these occupations are prolific in Canadian legislation and apparently no comprehensive inventory of them has ever been drawn up. Such additional status for police officers is important, in that it usually carries with it powers that would not otherwise be available to police officers. But it is relatively insignificant when compared to the status of "constable" and "peace officer", which most police personnel enjoy.

More important, in terms of the accountability of the police, is the status of "public officer". This status is derived from statutes that impose limitations on civil actions against persons performing statutory duties: see e.g., *Kellie* v. *City of Calgary and Morgan and Maley (No. 2)* (1950), 1 W.W.R. (N.S.) 691 (Alta. S.C., App. Div.); *Koshurba* v. *Rural Municipality of North Kildonan and Popiel* (1965), 53 W.W.R. (N.S.) 380 (Man. C.A.); and *Magrum* v. *McDougall, R.* v. *Magrum*, [1944] 3 W.W.R. 486 (Alta. S.C., App. Div.). Because they effectively limit the liability of police officers for wrongful acts, the statutory limitations are included in the Appendix (p. 133) to this paper. These provisions have been the cause of some concern. They may compel a victim of police wrongdoing to choose between seeking a remedy through the civil courts or seeking redress through disciplinary procedures established under police statutes. Although both remedies are available to a complainant, police disciplinary proceedings will frequently not be pursued when civil or criminal proceedings are underway. If, however, a complainant waits until a police force has completed its investigation, he may very well find that any civil remedies he had against the offending officer have been statute-barred by the provisions of these Acts.

E. The Common Law

The establishment of police forces in Canada is now regulated entirely by legislation, and therefore the common-law status of the police is preserved only to the extent that it has not been abrogated or altered by statutory provisions. However, the common-law status of "constable" and "peace officer", with statutory modifications, remains the basis of the legal status of the police in most jurisdictions today. While twentieth-century Canadian jurisprudence relating to this traditional common-law status will be reviewed

in the next Chapter, one status which the courts have created for the police during this century, and which has been of considerable significance to them, must be mentioned here. This is the status of a "person in authority".

Ever since it was first given clear expression by the Judicial Committee of the Privy Council in England in *Ibrahim* v. *The King*, [1914] A.C. 599, the so-called rule of "voluntariness" with respect to pre-trial confessions of an accused person has been adopted by Canadian courts. The rule of voluntariness, as originally formulated, provided that no pre-trial confession of an accused person should be admitted as evidence against him in court unless it was first proved to have been voluntarily made; that is, not induced by any hope of advantage or fear of prejudice exercised or held out by "a person in authority". This rule is of considerable importance for the police and is now applied by Canadian courts to all pre-trial statements of an accused person, regardless of whether the statements are technically "confessions" or not: *Piché* v. *The Queen*, [1971] S.C.R. 23. A police officer acting in his official capacity in the investigation of offences has always been regarded by the courts as having the status of "a person in authority" for the purposes of the rule.

CHAPTER FOUR

Some Implications of the Modern Legal Status of the Police

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

A. The Concept of Police Independence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Robertson J.'s second point was that:

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

As a result of this, he observed,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

After citing these cases, McCardie J. continued:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The office of Commissioner of Police within the metropolis dates back to 1829 when Sir Robert Peel introduced his disciplined Force. The commissioner was a justice of the peace specially appointed to administer the police force in the metropolis. His constitutional status has never been defined either by statute or by the courts. It was considered by the Royal Commission on the Police in their report in 1962 (Cmnd. 1728). I have no hesitation, however, in holding that, like every constable in the land, he should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act 1964 the Secretary of State can call on him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone. That appears sufficiently from *Fisher* v. *Oldham Corpn.*, the Privy Council case of *A.-G. for New South Wales* v. *Perpetual Trustee Co. (Ltd.)*.
>
> Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner of Police, or the chief constable, as the case may be, to decide in any particular case whether enquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter. He can also make policy decisions and give effect to them, as, for instance, was often done when prosecutions were not brought for attempted suicide; but there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere. Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than £100 in value. I should have thought that the court could countermand it. He would be failing in his duty to enforce the law. (p. 769)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Conclusions

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

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

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

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

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

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

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

Appendix

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

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

Bibliography

Aitchison, J.H. 1949 — "The Municipal Corporations Act of 1849" (1949), 30 *Canadian Historical Review* 107-122.

Alberta 1978 — Commission of Inquiry into Royal American Shows Inc. and Its Activities in Alberta. *Report*. Edmonton: 1978. (Commissioner: Mr. Justice James H. Laycraft)

Alberta 1981 — Law Enforcement Division, Department of the Solicitor General. *The Function and Operations of Municipal Police Commissions in Alberta*. Edmonton: Alberta Solicitor General's Dept., 1981.

Arthurs, H.W. 1971 — *Collective Bargaining by Public Employees in Canada: Five Models*. Ann Arbor: Institute of Labour and Industrial Relations, 1971.

Atiyah, P.S. 1967 — *Vicarious Liability in the Law of Torts*. London: Butterworths, 1967.

Bacon, Francis 1608 — *The Works of Francis Bacon* (ed. by Spedding, Ellis and Heath, 1861). Reprint. Canstaff: Frohmann Verlag, 1963.

Bacon, Mathew 1860 — *A New Abridgement of the Law*. Vol. II. Philadelphia: Johnson & Co., 1860.

Barot, D. and N. Bérard 1972 — *Étude historico-juridique: Organisation et pouvoirs de la police*. Montréal: Centre International de Criminologie Comparée, Université de Montréal, 1972.

Bayley, David H. 1979 — "Police Function, Structure and Control in Western Europe and North America: Comparative and Historical Studies" In *Crime and Justice: An Annual Review of Research*, edited by N. Morris and M. Tonry, Vol. 1, pp. 109-143. Chicago/London: U. of Chicago Press, 1979.

Black, H.C. 1968 — *Black's Law Dictionary* (4th ed.). St. Paul: West Publishing Co., 1968.

Black, H.C. 1979 — *Black's Law Dictionary* (5th ed.). St. Paul: West Publishing Co., 1979.

Blackstone, Sir Wm. 1876 — *Commentaries on the Laws of England* (4th ed.). Vol. I: *Of the Rights of Persons*. London: John Murray, 1876.

British Columbia Police Commission 1980 — *B.C. Police Boards Handbook.* Vancouver: B.C. Police Commission, 1980.

British Columbia 1978 — Task Force on Municipal Policing Costs in British Columbia. *Preliminary Report.* Vancouver: July 1978.

Burn, R. 1793 — *The Justice of the Peace and Parish Officer* (18th ed.). London: Strahen and Woodfall, 1793.

Canada 1981 — Commission of Inquiry Relating to the Security and Investigation Services Branch within the Post Office Department. *Report.* Ottawa: Minister of Supply and Services Canada, 1981.

Canada, Statistics Canada 1978 — *Police Administration Statistics, 1977.* Ottawa: Statistics Canada, 1978.

Chester, D.N. 1960 — "The Independence of Chief Constables: Some Questions" (1960), 38 *Public Administration* 11-15.

Clark, C. 1971 — *Tales of the B.C. Provincial Police.* Sidney, B.C.: Gray's Publishing Ltd., 1971.

Critchley, T.A. 1978 — *A History of Police in England and Wales* (Revised edition). London: Constable, 1978.

Cull, Helen A. 1975 — "The Enigma of a Police Constable's Status" (1975-77), 8 *Victoria University of Wellington Law Review* 148-169.

Dalton, M. 1619 — *Countrey Justice* (2nd ed.). Reprint. London: Professional Books, 1973.

Devlin, J. Daniel 1966 — *Police Procedure, Administration and Organisation.* London: Butterworths, 1966.

Downie, B.M. and R.L. Jackson 1980 — *Conflict and Co-operation in Police Labour Relations.* Ottawa: Minister of Supply and Services Canada, 1980.

Edwards, J.Ll.J. 1970 — "Discretionary Powers by the Police and Crown Attorneys in the Criminal Law" (1970), 59 *Canadian Police Chief* 36-49.

Edwards, J.Ll.J. 1980 — *Ministerial Responsibility for National Security.* Ottawa: Minister of Supply and Services Canada, 1980.

Fitzgerald, P.J. 1966 — *Salmond on Jurisprudence* (12th ed.). London: Sweet and Maxwell, 1966.

Fitzherbert, Sir Anthony 1538 — *The New Boke of Justices of the Peace*. Reprint. London: Professional Books Ltd., 1972.

Fosdick, R.B. 1969 — *American Police Systems*. Montclair, N.J.: Patterson Smith, 1969.

Fox, A. 1971 — *The Newfoundland Constabulary*. St. John's: Robinson Blackmore, 1971.

Freedman, David J. and Philip Stenning 1977 — *Private Security, Police and the Law in Canada*. Toronto: Centre of Criminology, University of Toronto, 1977.

Garth, H.H. and C. Wright Mills 1958 — *From Max Weber: Essays in Sociology*. New York: Oxford University Press, 1958.

Gillance, Ch. Insp. K. and A.N. Khan 1975 — "The Constitutional Independence of a Police Constable in the Exercise of the Powers of his Office" (1975), 48 *Police Journal* 55-62.

Goebel, J. 1976 — *Felony and Misdemenour*. Philadelphia: University of Pennsylvania Press, 1976.

Goldstein, Herman 1977 — *Policing a Free Society*. Cambridge, Mass.: Ballinger Publishing Co., 1977.

Grant, A. 1980 — *The Police – A Policy Paper: A Study Paper Prepared for the Law Reform Commission of Canada*. Ottawa: Minister of Supply and Services Canada, 1980.

Gregory, Gordon F. 1979 — "Police Power and the Role of the Provincial Minister of Justice" (1979), 27 *Chitty's Law Journal* 13-18.

Grosman, Brian A. 1975 — *Police Command: Decisions & Discretion*. Toronto: Macmillan, 1975.

Haag, Peter J. 1980 — "Constitutional Status of the Police: Complaints and Their Investigation" (1980), 13 *Australia and New Zealand Journal of Criminology* 163-178.

Hale, Sir Matthew 1778 — *History of the Pleas of the Crown*. Vols. I & II. London: 1778.

Halsbury, 1959 — *Halsbury's Laws of England* (3rd ed.). Vol. 30. London: Butterworth & Co., 1959.

Harrison, Robert A. (ed.) 1859 — *The New Municipal Manual for Upper Canada*. Toronto: Maclear & Co., 1859.

Hart, Jennifer 1978 — "Police" In *Crime and Law in Nineteenth Century Britain*, edited by W.R. Cornish *et al.*, pp. 177-219. Dublin: Irish University Press, 1978.

Hawkins, William 1721 — *A Treatise of the Pleas of the Crown* (2nd ed.). 2 Vols. Reprint. New York: Arno Press, 1972.

Jacob, G. 1772 — *The Complete Parish Officer* (16th ed.). London: Strahan and Woodfall, 1772.

Jones, J.T. 1882 — *The County Constable's Manual.* Toronto: Carswell & Co., 1882.

Keele, W.C. 1851 — *The Provincial Justice, or Magistrate's Manual* (3rd ed.). Toronto: H. Rowsell, 1851.

Keith-Lucas, Bryan 1960 — "The Independence of Chief Constables" (1960), 38 *Public Administration* 1-11.

Kelly, William H. and Nora Kelly 1976 — *Policing in Canada.* Toronto: Macmillan, Maclean-Hunter, 1976.

Kennedy, W.P.M. (ed.) 1918 — *Documents of the Canadian Constitution 1759-1915.* Toronto: Oxford University Press, 1918.

King, Walter J. 1980 — "Vagrancy and Local Law Enforcement: Why be a Constable in Stuart Lancashire?" (1980), 17 *The Historian* 264-283.

Lambard, William 1583 — *The Duties of Constables, Borsholders, Tithingmen, and such other Low Ministers of the Peace.* Reprint. Amsterdam/New York: Theatrum Orbis Terrarum Ltd., and Da Capo Press, 1969.

Lambard, William 1581-82 — *Eirenarcha or the Office of Justices of Peace.* Reprint. London: Professional Books Ltd., 1972.

Lamontagne, Mme Gilles 1972 — "Some Québec Police History" 61 *Canadian Police Chief* (Oct. 1972) 4: 28-30.

Lee, W.L. Melville 1901 — *A History of Police in England.* Reprint. Montclair, N.J.: Patterson Smith, 1971.

Lemieux, D., E. Roy and D. Gourdeau 1976 — "La Commission de Police du Québec" Paper prepared by the Laboratoire de recherche sur la justice administrative, Faculté de Droit, Université Laval: September 1976. (unpublished)

MacLeod, R.C. 1976 — *The North-West Mounted Police and Law Enforcement, 1873-1905*. Toronto: University of Toronto Press, 1976.

Maitland, F.W. 1885 — *Justice and Police*. Reprint. New York: AMS Press, 1974.

Marshall, G. 1973 — "The Government of the Police Since 1964" In *The Police We Deserve*, edited by J.C. Alderson and P.J. Stead, pp. 55-56. London: Wolfe Publishing Ltd., 1973.

Marshall, G. 1978 — "Police Accountability Revisited" In *Policy and Politics*, edited by D. Butler and A.H. Halsey, pp. 51-65. London: MacMillan Press, 1978.

Marshall, G. 1965 — *Police and Government*. London: Metheun & Co. Ltd., 1965.

Marshall, G. 1960 — "Police Responsibility" (1960), 38 *Public Administration* 213-226.

McDougall, A.K. 1971a — "Law and Politics: The Case of Police Independence in Ontario" Paper presented to 43rd Annual Meeting of the Canadian Political Science Association, June 9, 1971. (unpublished)

McDougall, A.K. 1971b — "Policing in Ontario: The Occupational Dimension to Provincial-Municipal Relations" Doctoral Thesis, University of Toronto, 1971. (unpublished)

Milte, K.L. and T.A. Weber 1977 — *Police in Australia*. Sydney: Butterworths, 1977.

Mitchell, J.D.B. 1962 — "The Constitutional Position of the Police in Scotland" (1962), NS7 *Juridical Review* 1-20.

Mitchell, V.W. 1965 — "Halifax Police Department" 30 *R.C.M.P. Quarterly* (April 1965) 4: 308.

Murray, J.W. 1977 — *Memoirs of a Great Canadian Detective*. Toronto: Collins, 1977.

New Brunswick 1978 — Commission of Inquiry into Matters Relating to the Department of Justice and the Royal Canadian Mounted Police. *Report*. Fredericton: January, 1978.

Nikitiuk, Constantine 1977 — *The British Columbia Police Commission: A Case Study of Successful Administrative Reform*. M.A. Thesis, Department of Political Science, University of Victoria, B.C., September 1977. (unpublished) (Commissioner: The Hon. Mr. Justice Charles Hughes)

Nott-Bower, Sir Wm. 1926 — *Fifty-Two Years a Policeman*. London: Edward Arnold & Co., 1926.

Ontario 1980 — Commission of Inquiry into the Confidentiality of Health Information. *Report*. 3 Vols. Toronto: Queen's Printer, 1980. (Commissioner: The Hon. Mr. Justice Horace Krever)

Ontario 1981 — Police Commission. *Guidelines for Police Governing Authorities*. Toronto: Ontario Police Commission, 1981.

Ontario 1978 — Provincial-Municipal Grants Reform Committee. *Report*. 2 Vols. Toronto: Queen's Printer, 1978. (Re police grants: see Vol. I., pp. 182-184 and Vol II, pp. 403-406)

Ontario 1977 — Royal Commission on Metropolitan Toronto. *Report*. Vol. 2: *Detailed Findings and Recommendations*. Toronto: 1977. (Commissioner: Hon. J.P. Robarts)

Ontario 1978 — Waterloo Region Review Commission. *Police Governance in Waterloo Region*. Toronto: Queen's Printer, 1978.

Ontario 1979 — Waterloo Region Review Commission. *Report*. Toronto: Queen's Printer, 1979.

Ouellette, Yves 1978 — "Le contrôle politique sur les services de police municipaux" (1978), 13 *Revue Juridique Thémis* 265-274.

Parris, Henry 1961 — "The Home Office and the Provincial Police in England and Wales — 1856-1870" (1961), *Public Law* 230-255.

Plehwe, R. 1974 — "Police and Government: The Commissioner of Police for the Metropolis" (1974), *Public Law* 316-355.

Plehwe, R. 1973 — "Some Aspects of the Constitutional Status of Australian Police Forces" (1973), 32 *Public Administration* (N.S.W.) 268-285.

Price, F.D. 1971 — *The Wigginton Constables' Book 1691-1836*. London: Phillimore & Co. Editor, 1971.

Prowse, D.W. 1895 — *A History of Newfoundland*. London/New York: Macmillan & Co., 1895.

Pukacz, Emil K. 1978 — *Report of the Special Consultant on Police and Other Services to the Administration of Justice in Ontario*. Toronto: Ministry of the Attorney General, 1978.

Radcliffe, G.R.Y. and G. Cross 1954 — *The English Legal System* (3rd ed.). London: Butterworths, 1954.

Radzinowicz, L. 1956 — *A History of English Criminal Law*. Vol. III: *The Reform of the Police*. London: Stevens & Sons Ltd., 1956.

Robinson, Cyril D. 1975 — "The Mayor and the Police — The Political Role of the Police in Society" In *Police Forces in History*, edited by G.L. Mosse, pp. 277-315. London/Beverly Hills: Sage Publications, 1975.

Saskatchewan Police Commission 1981 — *Public Inquiry: Estevan Board of Police Commissioners and Estevan Chief of Police, Nov. and Dec. 1980.* Regina: Saskatchewan Police Commission, 1981.

Sharman, G.C. 1977 — "The Police and the Implementation of Public Law" (1977), 20 *Canadian Public Administration* 291-304.

Simpson, H.B. 1895 — "The Office of Constable" (1895), 10 *English Historical Review* 625-641.

South Australia, Royal Commission 1978 — *Report on the Dismissal of Harold Hubert Salisbury.* Adelaide: Government Printer, 1978. (Commissioner: Madame Justice R. Mitchell)

South Australia, Royal Commission 1971 — Royal Commission on the September Moratorium Demonstration. *Report.* Adelaide: Government Printer, 1971. (Commissioner: Mr. Justice Bright)

Stenning, Philip C. 1981a — *Police Commissions and Boards in Canada.* Toronto: Centre of Criminology, University of Toronto, 1981.

Stenning, Philip C. 1981b — *Postal Security and Mail Opening — A Review of the Law.* Toronto: Centre of Criminology, University of Toronto, 1981.

Stenning, Philip C. 1981c — "The Role of Police Boards and Commissions as Institutions of Municipal Police Governance" In *Organizational Police Deviance: Its Structure and Control*, edited by C.D. Shearing. Toronto: Butterworths, 1981.

Summerson, H.R.T. 1979 — "The Structure of Law Enforcement in Thirteenth Century England" (1979), 23 *American Journal of Legal History* 313-327.

Tardif, Guy 1974 — *Police et politique au Québec.* Montréal: L'Aurore, 1974.

Toronto 1970 — Board of Commissioners of Police. *Report on an Inquiry into Allegations Made against Certain Members of the Metropolitan Toronto Police.* Toronto: Board of Commissioners of Police, 1970.

United Kingdom 1981a — Royal Commission on Criminal Procedure. *The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure* (Cmnd 8092-1). London: H.M.S.O., 1981.

United Kingdom 1981b — Royal Commission on Criminal Procedure. *Report* (Cmnd. 8092). London: H.M.S.O., 1981.

United Kingdom 1928 — Royal Commission on Police Powers and Procedure. *Minutes of Evidence*. London: H.M.S.O., 1928.

United Kingdom 1962 — Royal Commission on the Police. *Final Report* (Cmnd. 1728). London: H.M.S.O., 1962.

Waller, Louis 1980 — "The Police, the Premier and Parliament: Governmental Control of the Police" (1980), 6 *Monash University Law Review* 249-267.

Wettenhall, Roger 1977 — "Government and the Police", 53 *Current Affairs Bulletin* (March 1977) 10: 12-23.

Whitrod, R.W. 1976 — "The Accountability of Police Forces — Who Polices the Police?" (1976), 9 *Australia and New Zealand Journal of Criminology* 7-24.

Wilson, Adam 1859 — *The Constable's Guide: A Sketch of the Office of Constable*. Toronto: Maclear & Co., 1859.

Wrightson, Keith 1980 — "Two Concepts of Order: Justices, Constables and Jurymen in Seventeenth-Century England" In *An Ungovernable People*, edited by J. Brewer and J. Styles, pp. 21-46, 312-315. London: Hutchinson, 1980.

Endnotes

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

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

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

19. See footnote 16, above.

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

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

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

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

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

25. The name was changed in 1904.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Table of Cases

Table of Statutes

Canada

Province of Canada

Dominion of Canada

British Columbia

Alberta

Saskatchewan

Manitoba

Assiniboia

Province of Manitoba

Ontario

Province of Upper Canada

Province of Ontario

Québec

Province of Québec (1763-1791)

Province of Lower Canada (1791-1841)

Province of Québec (1867-)

New Brunswick

Nova Scotia

Prince Edward Island

Newfoundland

Northwest Territories

Ireland

Great Britain

England

United Kingdom