

## **Police Government Relations and Police Independence**

Kent Roach, CM, FRSC,  
Professor of Law and Prichard Wilson Chair in Law and Public Policy,  
University of Toronto

1<sup>er</sup> juin 2017

*The opinions expressed are those of the author and do not necessarily reflect those of the Commission of inquiry on the protection of the confidentiality of journalistic sources.*

## **Biographical Note**

Kent Roach, C.M., F.R.S.C. is the Prichard-Wilson Chair of Law and Public Policy and Professor of Law at the University of Toronto Faculty of Law. He is a graduate of the University of Toronto and of Yale, and a former law clerk to Justice Bertha Wilson of the Supreme Court of Canada. Professor Roach has been editor-in-chief of the *Criminal Law Quarterly* since 1998. In 2002, he was elected a Fellow of the Royal Society of Canada. In 2013, he was one of four academics awarded a Trudeau Fellowship in recognition of his research and social contributions. In 2015, he was appointed a Member of the Order of Canada. He is the author of 13 books on various aspects of public law and has written over 200 articles and chapters published throughout the world. Acting pro bono, he has been counsel in many Supreme Court of Canada cases involving criminal justice.

Professor Roach served as research director for the Goudge Inquiry into Pediatric Forensic Pathology and for the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182. He has served on the Canadian Council of Academies Expert Panel on Policing that resulted in the Policing Canada in the 21<sup>st</sup> Century report published in 2014. He is presently a member of the Expert Panel examining Indigenous policing. He also served on the research advisory committee for the inquiry into the rendition of Maher Arar and the Ipperwash Inquiry into the killing of Dudley George dealing with police government relations in both inquiries. His paper on Four Models of Police Government Relations served as the overview for the Ipperwash Inquiry's on the subject and was published in a collection on the subject. He also served as an expert for the Military Police Complaints Commission on police government relations and his report was subsequently published in the Osgoode Hall Law Journal.

## **Abstract**

This paper examines police government relations. The first part examines the principles and models that govern police government relations including the ideas of core police independence from political direction of law enforcement decisions and the scope for legitimate democratic direction of the police. The Supreme Court's landmark decision on police independence in *Campbell and Shirose* is examined. The second section concludes that *Campbell and Shirose* remains the leading Canadian legal authority on police independence since it was decided in 1999. The third part examines Quebec and Canadian Police Acts and finds they generally fail to address police independence or provide transparent mechanisms to govern police government relations. The fourth part examines Australian, New Zealand and United Kingdom legislation on police-government relations. The fifth part, building on the recommendations of the Ipperwash Inquiry, makes concrete proposals for how Police Acts can codify a core of police independence from political direction with respect to law enforcement decisions while providing a transparent mechanism for political direction to the police that makes clear how both police and governments discharge their respective responsibilities.

## **Introduction**

The proper approach to police government relations has remained illusive even though it has resulted in a number of scandals and been the subject of study and recommendations by a long list of public inquiries. They include the Keable and McDonald inquiries into RCMP wrongdoing in the late 1970's, the Marshall Commission in Nova Scotia in the late 1980's, the Somalia inquiry of the 1990's, the APEC inquiry in the early 2000's and Ontario's Ipperwash inquiry in the mid 2000's.

Despite many specific recommendations made by the Ipperwash Inquiry to codify police government relations, Police Acts throughout Canada remain largely silent on this topic despite its importance to governments, the police and the public alike. There has been a preference for tacit agreements and understandings as opposed to codified regulatory frameworks. This is unfortunate because there are precedents for a clearer and more transparent approaches both in the reform proposals of the Ipperwash Inquiry, and in legislation of similar democracies most notably Australia and New Zealand.

This paper will argue that legislative reform is needed and possible, but it will also suggest that legislative reform alone will not be sufficient. Legislative reforms need to codify the basic constitutional principle of police independence and to ensure that police officers are able to resist unlawful orders from political authorities.

At the same time, police-government relations are too complex to be governed exclusively by the constitutional principle of police independence and related concerns about the rule of law. There is a need to recognize that in a democracy, responsible political authorities have legitimate interests in providing directions on policing policies and efficiencies. That said, political direction to the police should be transparent so as to better promote democratic debate and accountability.

Legislative reform can provide a sound basis for recognizing both the legitimate but limited ambit of police independence from politicians and for structuring police-government relations in a transparent manner. At the same time, however, legislative reform needs to be supplemented by better training of both the police and government officials and better public understanding of police government relations. This task of education will not be easy. Proper police government relations requires a balance between respecting the independence of the police to make law enforcement decisions in individual cases while allowing many other forms of legitimate political direction of the police.

We all know that it would be wrong for a politician to call a judge. But the answers are more complex with respect to politicians calling the police. In some cases, it would be wrong for a political official to call the police. The Supreme Court of Canada recognized in 1999 that the police should enjoy independence from governments "while engaged in a criminal investigation". It concluded that such a principle was

required to maintain the integrity of the rule of law.<sup>1</sup> This case remains the leading case outlining a principled but limited approach to police independence. It is surprising and disappointing that no Canadian Police Act has been amended to reflect this principle.

On the other hand, politicians who have responsibility for a provincial or municipal police services would often act properly if they contacted the police to obtain information and/or to establish policing policy. Indeed, our elected officials should be encouraged to take responsibility for policing policy, albeit in a manner that is as transparent as possible and that promotes democratic accountability for the perhaps controversial policy directives that governments give to the police.

There have been incidents in Canada of politicians improperly trying to influence police investigations. They include the 1989 findings of the Marshall Commission about interference with RCMP investigations of Cabinet ministers and some of the conclusions of the APEC inquiry. At the same time, however, there are also concerns around the RCMP wrongdoing in Quebec in the 1970's that responsible Ministers did not know enough about police practices including illegal ones.

### **Outline of the Paper**

The first part of this paper will review the considerable work that has already been done on police government relations in Canada with particular attention to what models and constitutional and democratic principles should govern police government relations both at the national and municipal level. It will review the Supreme Court's leading 1999 *Campbell and Shirose* decision defining a core of police independence over law enforcement decisions. The second part of the paper will suggest that subsequent jurisprudence has not displaced that leading decision.

The third part of the paper will examine the Quebec Police Act and other Police Acts in Canada. It finds that they generally fail to recognize police independence or to structure interactions between police and responsible officials.

The fourth part will examine Australian, New Zealand and UK laws that govern police-government relations. It finds that the laws in some Australian states and in New Zealand address police government relations in a clearer manner than most Canadian Police Acts, but also that they define police independence from government in a somewhat broader manner than in *Campbell and Shirose*. Recent developments in the UK will be examined, but it will be suggested that they lack the clarity of a codified approach.

The last part will return to the Ipperwash Inquiry's recommendations and argue that they still constitute the best recommendations concerning police government relations even though they have not yet been implemented in Ontario and were found

---

<sup>1</sup> R. v. Campbell [1999] 1 SCR 565 at para 33

not to have been present in the subsequent controversy over the policing of Indigenous protest in Caledonia. The Ipperwash Inquiry recommended that limited and consensus principles of police independence should be codified and that the Police Act should also be amended to provide clear and mandatory procedures that will allow police government relations to be conducted in a flexible manner that maximizes transparency, legitimacy and accountability for how both government and the police exercise their respective powers and responsibilities. It also suggested that statutory reform and a move away from tacit understandings should be supplemented by better training of police and government officials about the principles that should govern police government relations.

Statutory reform is a necessary but not a sufficient condition for improving police-government relations. We must confront the uncomfortable fact that after decades of controversy in this area reform has remained illusive. Unfortunately, at times it may be in the strategic interests of governments and/or police to keep government- police relations opaque and based on tacit understandings.

## **I. The Models and Principles of Police-Government Relations**

I wrote a background paper for Ontario's Ipperwash Inquiry on police government relations.<sup>2</sup> Reflecting a lack of consensus about the meaning of police independence in Canada and other common law countries, it constructed four possible models of police-government relations. The Ipperwash Inquiry in its final report devoted a chapter to police-government relations and expressed a preference for the democratic policing model while also recommending codification of another model that I had identified as core or quasi-judicial police independence.<sup>3</sup>

This part of the paper will examine the models as they could inform police government relations in Quebec.

### ***The Polar Extremes of Full Police Independence and Governmental Policing***

Both Ontario's Ipperwash Inquiry and the federal Arar Commission conceived of police government relations as a balance that sought to avoid extremes that are inconsistent with a constitutional democracy. One extreme, sometimes described as a police state, would be one in which the police took orders from the government about who they should investigate and charge and who they should not investigate and charge. This model has been identified in my work as *governmental policing*.

---

<sup>2</sup> Kent Roach "The Overview: Four Models of Police-Government Relations" in Margaret Beare and Tonita Murray eds. *Police Government Relations: Who's Calling the Shots* (Toronto: University of Toronto Press, 2007).

<sup>3</sup> *Report of the Ipperwash Inquiry* (Toronto: Queens Printer, 2007) Volume 2 Chapter 12.

An alternative but equally as extreme model is one where the police were completely independent from governmental direction and only subject to legal controls imposed by the courts. This model risks producing a different kind of police state: namely one in which the police can make a broad range of both policy and operational decisions that are not subject to direction or control by the elected government. This model was identified in my work as one of *full police independence*.

Although both the models of governmental policing and full police independence are extremes that were rejected by the Ipperwash Inquiry, they both find some support in law and commentary. Indeed such, support accounts for much of the lack of clarity and confusion in this field.

### ***Governmental Policing***

The governmental policing model (modified somewhat to reflect traditions of Ministerial responsibility) finds some support in s.50 of Quebec's Police Act which provides:

The Sûreté du Québec, the national police force, shall act under the authority of the Minister of Public Security and shall have jurisdiction to enforce law throughout Québec.

In a case arising from RCMP wrongdoing in the 1970's and an attempt by Quebec police forces to resist revealing sources before a provincial inquiry, the Quebec Court of Appeal interpreted a predecessor of this provision as pre-empting English common law concepts that police officers enjoyed any degree of independence from government. Turgeon J.A. in the lead judgement stressed:

20 In Canada, and particularly in Quebec, modern police forces are created by statutes which define their responsibilities and their relationships with other bodies involved in the administration of justice.

21 The appellant refers to English authorities, but has failed to establish that there is no difference between our system and that which prevails in England. However, it appears that the general structure of the system of administration of justice within which English police officers act is fundamentally different from that of our system...

26 There is no national police force in England nor is there a police force similar to the Quebec Provincial Police: there exist only local police forces of which the organization, the structure of power and the supervision by central authorities vary according to whether it is a part of the Metropolitan Police Force or of the City of London Police or, on the other hand, the county forces....

29 Our system of administration of justice is completely different, and the role and status of the police within this system is clear and well-defined by statute.

30 In our system, the Attorney-General exercises the functions of the chief law enforcement officer of the Crown and assumes responsibilities with respect to police officers which preclude comparing the autonomy of the Director of the M.U.C. Police Department with that of an English Chief Constable....

40 As guardian of public order, the Attorney-General is responsible for the conduct of criminal prosecutions. He is given administrative power over the Quebec Provincial Police, powers of supervision over the application of all statutes involving police, especially with respect to the Montreal Urban Community Police Department. An examination of numerous provisions of the *Police Act*, R.S.Q. 1977, c. P-13, shows clearly the primary role accorded to the executive in our police system. The Quebec Provincial Police, under the authority of the Attorney-General are charged with maintaining peace, order and public safety in the entire territory of Quebec, preventing crime and infringements of laws of Quebec, and seeking out the offenders (s. 39 [am. 1979, c. 67, s. 19]). The powers which the law accords to the Attorney-General are in keeping with the spirit of this institution in Canada; as the guardian of public order, the Attorney-General is responsible for functions which might be otherwise allocated in England.

41 Therefore, the contention that the peace officer has an independent position with respect to the executive power, an argument based upon English jurisprudence which is relied upon by the appellant, is not in accordance with our law...

43 Having considered the Quebec legislation, I am of the opinion that the Director of the Montreal Urban Community Police Department is not an English Chief Constable.

44 I conclude that in the case at bar, the appellant cannot invoke English common law which I have summarized above. It is the legislation of Quebec which must prevail and pursuant to this legislation, the Attorney-General is the guardian of public order and the chief prosecuting officer.<sup>4</sup>

Justice L'Heureux-Dube concurred in the above judgment adding:

132 I agree with my colleague, Mr. Justice Turgeon, for the reasons he has given, that the appellant is exercising a Government function in the

---

<sup>4</sup> Bisailon v. Keable 1980, Carswell, Que 1248 (translation from original)

administration of justice. In this sense, the appellant must be considered as a Government official even if his status within the public service may differ from that of other officials.

133 I am entirely in agreement with my colleague, Mr. Justice Turgeon, in the comparison he makes between British institutions and our system of the administration of justice, and I also agree with the conclusions which he draws to the effect that these two systems present fundamental differences.<sup>5</sup>

In the result, the Quebec Court of Appeal over one dissent rejected the claim that common law principles relating to police informers prevented the Quebec commission of inquiry from questioning police officers about their sources. The Supreme Court of Canada subsequently reversed this decision on other grounds related to the importance of the police informer privilege, but without addressing the question of police independence<sup>6</sup> and whether, as suggested by the majority of the Quebec Court of Appeal, the statutory framework in Quebec displaced common law jurisprudence on police independence.

The enduring significance of the Quebec Court of Appeal judgment, however, is that it reveals how under a plain and positivistic reading of the Quebec Police Act, and indeed Police Acts throughout Canada including the RCMP Act, responsible Ministers and various municipal authorities often seem to be given more or less complete authority over the police. To be sure, Police Acts do not grant such authority to the government at large and instead grant it to the responsible Minister or responsible municipal authority. Nevertheless, the relevant point is that the statutory framework in Canadian Police Acts fail explicitly to recognize any police independence from government.

### ***Full Police Independence***

If there is some support in Police Acts for the idea that the government through the responsible Minister has full authority over the police, there is also some support in the common law for the idea of full police independence from government.

The genesis of the idea of police independence is in Lord Denning's controversial 1968 decision in *Ex Parte Blackburn* rejecting a challenge to the Commissioner of the London Police's instructions not to enforce certain gambling laws. Lord Denning relied on several earlier common law cases holding that police constables were not in a master servant relationship with the government for the purposes of civil liability. He then stated in emphatic and categorical terms:

---

<sup>5</sup> *ibid*

<sup>6</sup> *Bisailon v. Keable* [1983] 2 SCR 60

I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or 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 thus man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.<sup>7</sup>

There have been many academic criticisms of Lord Denning's broad and categorical approach to police independence. To the extent that it relies on older civil liability cases holding that the police are not in a master-servant relationship with the government, Lord Denning fails to deal with issues of constitutional principles in a liberal democracy that would suggest that the elected government should be able to provide policy guidance to its police.

The idea that the police are only "answerable to the law and to the law alone" also overestimates the degree to which the independent judiciary control or supervise the police. To be sure, the judiciary plays an important role, one augmented by the 1982 Canadian Charter of Rights and Freedoms, in approving search warrants and reviewing police conduct in the course of criminal and sometimes civil trials. Nevertheless, judicial supervision of the police especially on policy matters such as enforcement practices is rare. It is thought by many to be beyond judicial expertise and competence. As will be seen below, although the Supreme Court of Canada has relied on Lord Denning's 1968 judgment, it has articulated the parameters of police independence from governmental direction in a much more restrained and limited matter.

Nevertheless, there is some support for the model of full police independence. Prime Minister Pierre Trudeau in rebutting allegations of Ministerial complicity in RCMP illegalities in the 1970's appealed to the idea of full police independence when he argued:

I have attempted to make it quite clear that the policy of this Government, and I believe the previous governments in this country, has been that they...should be kept in ignorance of the day-to-day operations of the police and even of the security force. I repeat that is not a view that is held by all democracies but it is our view and it is one we stand by. Therefore, in this particular case it is not simply a matter of pleading ignorance as an excuse. It is a matter of stating as principle that the particular Minister of the day should not have a right to

---

<sup>7</sup> R. v. Metropolitan Police ex parte Blackburn [1968] Q.B. 116 at 135-6.

know what the police are doing constantly in their investigative practices, what they are looking at, and what they are looking for, and the way in which they are doing it....

What protection do we have then that there won't be abuse by the police in this respect? We have the protection of the courts. If you want to break into someone'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.<sup>8</sup>

The model of full police independence as reflected in the above quote is based on both faith in the integrity and professionalism of the police and confidence that the courts can effectively supervise the police. It recognizes that attempts by governments to be informed by the police may be perceived by a sometimes cynical and suspicious public as attempts to influence or control the police.

The McDonald Commission rejected the broad Denning and Trudeau views of police independence. It stressed that responsible Ministers should be informed of policing decisions, even those relating to law enforcement, if they raised general policy issues.

<sup>9</sup>

The McDonald Commission's approach is consistent with a model of democratic policing that is distinct from the model of full police independence and will be discussed below. Nevertheless it is sobering that even some informed critics of full police independence such as English constitutional lawyer Geoffrey Marshall<sup>10</sup> and Canadian political scientist Andrew Sancton<sup>11</sup> have concluded that actual experience supports a sort of de facto model of full police independence because of a reluctance of responsible political authorities to take responsibility for policing policy. In other words, many political authorities have followed Prime Minister Trudeau practice of eschewing both information about and responsibility for controversial policing decisions. Indeed, the Keable Commission which examined many of the same RCMP

---

<sup>8</sup> As quoted in John Ll.J. Edwards *Ministerial Responsibility for National Security* (Ottawa: Supply and Services, 1979) at 94-5.

<sup>9</sup> "We take it to be axiomatic that in a democratic state the police must never be allowed to become a law unto itself. Just as our form of Constitution dictates that the armed forces must be subject to civilian control, so too must police forces operate in obedience to governments responsible to legislative bodies composed of elected representatives." Commission of Inquiry Concerning Certain Activities of the RCMP *Freedom and Security under the Law* (Ottawa: Supply and Services, 1981) at 1005-06.

<sup>10</sup> Geoffrey Marshall "Police Accountability Revisited" in D Butler and A.H. Halsey *Policy and Politics: Essays in Honour of Norman Chester* (London: MacMillan, 1979) at 60-61; Geoffrey Marshall *Constitutional Conventions* (Oxford: Oxford University Press, 1984) at 144.

<sup>11</sup> Andrew Sancton "'Democratic Policing': Lessons from Ipperwash and Caledonia" (2012) 55 *Canadian Public Administration* 365

illegalities as the McDonald Commission went so far to say that responsible political officials engaged in practices of ignorance and camouflage with respect to those illegalities.<sup>12</sup>

In its chapter on police government relationships, the Ipperwash Inquiry carefully considered the models of governmental policing and full policing independence outlined above and rejected them. In my view, the Ipperwash Inquiry was correct to reject both models, despite the support that they have in some law and commentary.

The Ipperwash Inquiry rejected the model of governmental policing. Although it did not find improper governmental influence with respect to the policing of the Ipperwash Indigenous protest that led to the police killing of Dudley George, the Inquiry expressed concerns about the role that various government representatives other than the Minister responsible for the OPP played. It also recommended that there should be some statutory recognition of a limited degree of police independence from governmental direction when it recommended that Ontario's Police Services Act be amended "to specify that the power of the responsible minister to direct the OPP does not include directions regarding specific law enforcement decisions in individual cases" and that the OPP Commissioner has "operational responsibility with respect to the control of the OPP, subject to written directives from the responsible minister."<sup>13</sup> It also specifically rejected the idea of governmental wide policing by recommending that the Police Services Act "should be amended to prohibit anyone but the responsible minister (or his or her delegate) from providing directions to the OPP"<sup>14</sup>.

With respect to the model of full police independence, the Ipperwash Inquiry concluded:

This model essentially holds that police should be free from governmental direction on *all* operational matters. It finds some support in s. 31(4) of the *Police Services Act* which provides that municipal police boards cannot direct the chief of police "with respect to specific operational decisions or with respect to the day to day operations of the police."

Many parties to the Inquiry made submissions and recommendations effectively supporting this model, likely premised on the belief that it creates

---

<sup>12</sup> The Keable Commission observed that the RCMP had not informed the responsible Minister concluding: « Appliqué aux rapports entre les corps policiers et l'autorité politique, le principe du cloisonnement ou du besoin de savoir se transforme en son contraire, à savoir *la nécessité d'ignorer*. Le second facteur qui influe sur la communication entre les corps policiers et l'autorité politique est ce que nous appellerons une procédure de *camouflage*. », *Rapport de la Commission d'enquête sur des opérations policières en territoire québécois* (Québec, Ministère de la Justice, 1981) at 410-411 (emphasis in original)

<sup>13</sup> Ipperwash Inquiry supra Recommendation 71

<sup>14</sup> Ibid Recommendation 72

an impermeable shield against the perception or fact of political or partisan influence. Support for this model is also likely based on a belief that the risks and consequences of inappropriate police behaviour are far fewer than the risks and consequences of inappropriate political interference.

Unfortunately, this model, taken to its logical extreme, could make the police a law unto themselves and significantly undermine ministerial responsibility. It could also encourage an abdication of political responsibility for the policy of policing. Full police independence also has the potential to defeat transparency and accountability if police accountability effectively becomes voluntary.<sup>15</sup>

The Ipperwash Inquiry also concluded that the model of full police independence was inconsistent with the Supreme Court's approach to the subject in *Campbell and Shirose* which had limited police independence from government to law enforcement decisions.

Building on the important albeit still unimplemented work and recommendations of the Ipperwash Inquiry, it is best to reject the models of either full police independence or governmental or even Ministerial policing as extremes that run the respective dangers of giving the police too much or too little independence from government. As the Ipperwash Inquiry stressed, police government relations ultimately involve a question of balance. Although some degree of police independence should be recognized and codified, much of the respective powers and responsibilities of police and government should be left to evolve, albeit subject to codified procedures designed to ensure accountability, legitimacy and to enhance public knowledge and confidence.

Although the Ipperwash Inquiry was focused on relations between the responsible Minister and the OPP, there is no reason why its basic principles could not be applied to municipal policing, albeit with some adjustment to make sure that the relevant municipal political authority communicates with the police in a manner that focuses responsibility and accountability. As will be seen, a number of Police Acts attempt to do this by prohibiting individual members of municipal police commissions from communicating with the police and/or by requiring relevant policy directions to the police be enacted by resolutions of the police commission or by municipal by-laws. The context and the players are different, but the principles independence and democratic policing models that completed my four models of police government relations. In what follows, I will outline how these models of democratic policing with clear lines of responsibility should be the same.

---

<sup>15</sup> Ipperwash Inquiry supra at 338

## **The Complementary Models of Core Police Independence and Democratic Policing**

The Ipperwash Inquiry ultimately endorsed a combination of the core police complementary and in the case of core police independence supported by constitutional principle.

### ***Core Police Independence***

The core police independence has origins that predate Lord Denning's 1968 Blackburn decision. In 1962, a British Royal Commission recognized police independence from governmental direction, but unlike Lord Denning confined it to "quasi-judicial matters" such as "the enforcement of the law in particular cases" including the "pursuit of enquiries and decisions to arrest and to prosecute". It stressed "[w]e entirely accept that it is in the public interest that a chief constable, in dealing with these quasi-judicial matters, should be free from the conventional processes of democratic control and influence."<sup>16</sup> It noted, however, that "the Commissioner's policies as regards the disposition of his force and the methods he employs can be, and frequently are, challenged and debated in Parliament."<sup>17</sup>

In 1981, the McDonald Commission similarly concluded that the responsible Minister "should have no right of direction with respect to the exercise by the RCMP of the powers of investigation, arrest and prosecution. To that extent, and that extent only, should the English doctrine expounded in *Ex Parte Blackburn* be made applicable to the RCMP."<sup>18</sup>

In 1989, the Inquiry into Donald Marshall Jr's wrongful conviction examined two cases where the RCMP did not pursue potential criminal investigations against Nova Scotia Cabinet Ministers. It defined both incidents as examples of discriminatory double standards in law enforcement and violations of police independence. It stressed that "inherent in the principle of police independence is the right of the police to determine whether to commence an investigation" and concluded that the RCMP had failed to be "independent and impartial" and even committed a "dereliction of duty" by not pursuing investigations against Cabinet ministers after the intervention of the Nova Scotia Attorney General who also sits in Cabinet.<sup>19</sup> The Marshall Commission's findings are perhaps the strongest findings of any Canadian commission of inquiry of executive interference with police independence. The Marshall Commission's findings are re-enforced by the Supreme Court of Canada's

---

<sup>16</sup> United Kingdom, Royal Commission on the Police (1962) Final Report Cmnd. 1728 (London: H.M.S.O.). at paras 86-7.

<sup>17</sup> Ibid at para 91.

<sup>18</sup> Commission of Inquiry Concerning Certain Activities of the RCMP *Freedom and Security Under the Law*, Vol 2 (Ottawa; Supply and Services, 1981) at 1013.

<sup>19</sup> Royal Commission on the Donald Marshall Jr. Prosecution *Findings and Recommendations* Vol 1 (Halifax: Queens Printer, 1989) at 232

subsequent decision in *Campbell and Shirose* which related core or limited police independence to the constitutional principle of the rule of law which stresses that the law should be applied impartially to all including to high governmental officials. The Marshall example also reveals the limits of Lord Denning's concept of full police independence where the police are only answerable to the law. In the Nova Scotia cases, the interference with police independence resulted in no charges and as such was not amenable to judicial control or review. Lord Denning's rhetoric about the police only being accountable to the law rings hollow in cases where there is no court case to review police conduct or governmental interferences with police independence.

### ***Campbell and Shirose***

The contemporary anchor for the core or quasi-judicial police independence model is the Supreme Court's 1999 decision in *R. v. Campbell and Shirose*.<sup>20</sup> In that case, the Crown attempted to claim Crown immunity for police actions in which RCMP officers sold the accused illegal drugs. The Court unanimously rejected this argument with Justice Binnie concluding:

The Crown's attempt to identify the RCMP with the Crown for immunity purposes misconceives the relationship between the police and the government *when the police are engaged in law enforcement*. A police officer *investigating a crime* is not acting as a government functionary or an agent of anybody.... While for certain purposes the Commissioner of the RCMP reports to the Solicitor General, the Commissioner is not to be considered a servant or agent of the government while engaged in a criminal investigation. The Commissioner is not subject to political direction. Like every other police officer similarly engaged, he is answerable to the law and, no doubt, to his conscience.<sup>21</sup>

As the italicized parts of the quote reflect, this is a much more nuanced and limited understanding of police independence than articulated by Lord Denning's sweeping language in the Blackburn case. Specifically, it limits police independence from governmental direction to law enforcement functions while recognizing that the police perform many other functions and that "some of these functions bring the RCMP into a closer relationship with the Crown than others."<sup>22</sup>

The *Campbell and Shirose* case is helpful both in its more limited approach to defining police independence from executive control and in articulating a rationale for this independence in the constitutional principle of the rule of law. With reference to *Roncarelli v. Duplessis* which resulted in substantial damage awards against the then

---

<sup>20</sup> [1999] 1 SCR 565

<sup>21</sup> Ibid at paras 27 and 33 (emphasis added)

<sup>22</sup> Ibid at para 29

Premier of Quebec, the Court remarked that the rule of law was “one of the ‘fundamental and organizing principles of the Constitution’” and quoted Professor F.R. Scott who wrote “it is always a triumph for the law to show that it is applied equally to all without fear or favour. This is what we mean when we say that all are equal before the law.”<sup>23</sup>

This above understanding of police independence as rooted in the rule of law stresses the importance of the police being able to open investigations without any direction or interference from government including the responsible Minister. The Court’s reference to the rule of law as a fundamental constitutional principle is important because it provides the juristic basis for reading down s.5 of the RCMP Act which places the RCMP “under the direction” of the responsible Minister to not include direction from the Minister while the Commissioner or another RCMP officer is “engaged in a criminal investigation”. When engaged in such a function the Commissioner “is not subject to political direction” and “like every other police officer similarly engaged, he is answerable to the law and, no doubt, to his conscience.”<sup>24</sup>

Justice Hughes in his interim report on the APEC inquiry embraced the *Campbell and Shirose* principles of police independence and recommended that they should be codified in the RCMP Act to make clear that “when the RCMP is performing law enforcement functions (investigations, arrest and prosecution) they are entirely independent of the federal government and answerable only to the law.” He also recognized that in performing other functions that the RCMP would not be independent of the responsible Minister.

An important gloss that Justice Hughes added to the debate is the idea that the police had responsibility even in the area of legitimate governmental direction for ensuring that its actions were lawful including in compliance with the Charter. He warned that the fact that the police “may have been following the directions of political masters will be no defence”<sup>25</sup> if a court finds their conduct to be unlawful.

*Campbell and Shirose* is less helpful in other respects. Consistent with the case-by-case method, the Court only provided a limited definition of police independence as including criminal investigations including in that case the reverse sting operation in which the RCMP officers sold the accused drugs. The Court did not define the outer limits of police independence. As will be seen, this has been interpreted by the Ipperwash inquiry as creating a flexible zone that could be occupied by legitimate direction from the responsible Minister.

---

<sup>23</sup> Ibid at para 18

<sup>24</sup> Ibid at para 33

<sup>25</sup> Hon Ted Hughes Interim Report for the Commission of Public Complaints Against the RCMP (2001) at 10.4.

The Court's reference to the rule of law as one of Canada's fundamental organizing principle also begs the questions of how other organizing principles, most specifically democracy, should be reconciled with police independence. The Court did not address this issue but the Ipperwash Inquiry tried to reconcile the rule of law principle of police independence with democracy.

*Campbell and Shirose* also does not deal with the status of frequent statutory restraints on police conduct even within the core of criminal investigations. For example, a number of sensitive offences involving terrorism, hate propaganda and extra-territorial offences require the Attorney General's consent before a police officer can lay a charge. Such statutory restrictions persist even though they limit the ambit of police independence with respect to criminal investigations. In addition, Parliament also requires the Attorney General's consent for exceptional investigative procedures short of laying charges such as preventive arrests and investigative hearings under the terrorism provisions of the Criminal Code. I am not aware of cases where the police independence principle has invalidated such clear statutory provisions. It is possible that police independence could be recognized as a principle of fundamental justice under s.7 of the Charter<sup>26</sup> but no cases have done so yet and it is unclear how restrictions on police independence that are designed to provide additional protections for suspects and the accused would be challenged. In short, *Campbell and Shirose* restricts police independence to criminal investigations and even within this limited sphere, police independence may not be absolute.

### ***Democratic Policing***

The democratic model of policing starts with the work of the McDonald Commission which stressed the importance in a Parliamentary democracy of Ministerial responsibility for the police and the need for Ministers to be fully informed about even police operations and criminal investigations to the extent that they raise policy issues that may be the subject of legitimate Ministerial direction.

The Ipperwash Inquiry endorsed the democratic policing model stating as follows:

"Democratic policing"... aims to revitalize ministerial responsibility and counter trends toward increasing government centralization. As a result, it is consistent with the responsibility of the minister under the *Police Services Act*, the principles of democratic government, ministerial accountability, and transparency. For these reasons, I believe that the "democratic policing" model is the most appropriate conceptual framework for police/government relations in Ontario.

---

<sup>26</sup> I have explored this question in Kent Roach "Police Independence and the Military Police" (2011) 49 Osgoode Hall L.J. 117 at 130-131.

The democratic policing model explicitly encourages the use of ministerial directives to ensure transparency and accountability for those changes. ...

The final virtue of the democratic policing model is that it acknowledges and promotes democratic participation by encouraging policing policy to be debated, evaluated, and established in a transparent and accountable manner.

A focal point of the Ipperwash Inquiry's endorsement of democratic policing was its endorsement of the use of written and public Ministerial directives as a means to give policy direction to the police. It recommended that the power of the responsible Minister to provide such directions be specifically codified in the Police Services Act and that the Commissioner of the OPP should be able to refuse to follow any directions that were not in the prescribed and public form.

The Ipperwash Inquiry rejected a distinction between governmental guidance and direction to the police as too ambiguous. Rather, it expressed a preference for directions that would engage democratic debate because they would be written and public. In this way, the Ipperwash Inquiry saw reliance on tacit understandings or informal communications and suggestions from the government to the police as antithetical both to open democratic debate and government responsibility for the direction it provides to the police.

### **Reconciling Core Police Independence with Democratic Policing**

The Ipperwash Inquiry's recommendations are best seen as based on core police independence which would be codified in the form of an explicit statutory prohibition on "directions regarding specific law enforcement decisions in individual cases"<sup>27</sup> combined with the acceptance and promotion of democratic policing that would depend on how active various Ministers were in providing transparent policy directions to the police in the form of written and public directives.

The relation between the four models and in particular the flexible way that the Ipperwash Inquiry advocated a combination of core police independence with democratic policing is perhaps best illustrated in the following graph:

---

<sup>27</sup> Ipperwash Inquiry at 357 (Recommendation 71)

<b>Full Police Independence</b>	<b>Core Police Independence</b>	<b>Democratic Policing</b>	<b>Governmental Policing</b>
<i>Ex parte Blackburn</i> (1968) Lord Denning	<i>Campbell and Shirose</i> SCC 1999	Ministerial Policy Responsibilities (By written and public directives as recommended by Ipperwash Inquiry)	<i>Bisaillon v Keable</i> , 1980 (Que CA) stresses statutory authority of political authority
Pierre Trudeau's defence of Ministerial conduct in face of RCMP illegalities	Police answer to only to law with respect to law enforcement decisions in individual cases	Ipperwash Inquiry)	s 50 of Quebec Police Act
Police answerable to only the law	s.83 of Quebec Police Act no political direction and "no authority over police investigations".	Policing Operational Responsibility (expands and contracts in response to degree of policing making by responsible political authority)	s.17 of Ontario Policing Service Act
Rejected by Ipperwash and McDonald Commissions	Police answerable to responsible democratic authorities for policy of operations	Accepted by Ipperwash and McDonald Commissions with emphasis on Ministerial responsibility	s 5 of RCMP Act
	Accepted by Ipperwash and McDonald		Rejected by Ipperwash Inquiry

A key to understanding the flexible interaction between core police independence and democratic policing is provided in the Ipperwash Inquiry's statement that:

Democratic policing also recognizes that it will be impossible to reach a consensus about the dividing line between police and government responsibilities in every situation. The flexibility inherent in ministerial directives means that they could be tailored to specific situations.

Commissioner Linden went on to elaborate:

The model of democratic policing I recommend recognizes that the precise ambit and content of police operational responsibilities and governmental policy responsibilities will evolve over time. I am persuaded that the best way

to approach the difficulties of distinguishing policy from operations is not through attempts at a static or legalistic definition, but rather by providing a process to resolve difficulties in defining policy and operations which will promote transparency and accountability and will be consistent with ministerial responsibility.<sup>28</sup>

The Ipperwash Inquiry also drew on the Patten Report on Policing in Northern Ireland to reconceptualize the term police independence as policing responsibilities. It agreed with Patten that the idea of independence was not helpful because it contemplated “a broad zone of independent, unfettered police discretion which is patently at odds” with both legitimate demands that police explain their law enforcement decisions and that political authorities can “decide policy matters, including ‘policies of operations.’”<sup>29</sup>

The Ipperwash Inquiry accepted the idea of police responsibilities, but matched it with the corresponding idea of ministerial policy responsibilities. It adopted the new term policy responsibility in the hope that would emphasize traditions of democracy and discourage “abdication or shirking of appropriate oversight and policy responsibilities by ministers or governments”.<sup>30</sup>

The Inquiry recognized that there would be a dynamic and even dialectical relationship between policing and ministerial responsibilities. In other words, policing responsibilities would expand if the responsible minister failed to exercise his or her policy responsibilities. This recognizes the reality of political shirking or what could more charitably be described as a political and democratic decision not to enter a policy field. This was a well-documented phenomenon before the Ipperwash Inquiry and Andrew Sancton has found evidence of a lack of assumption of Ministerial responsibility in the Caledonia incident that was ongoing as the Ipperwash report was finalized.<sup>31</sup>

## Summary

An important contribution of the Ipperwash inquiry was to insist on proper procedures based on written and public directives should responsible Ministers exercise their policy responsibilities. Consistent with core police independence and *Campbell and Shirose*, the Inquiry insisted that Ministerial policy responsibilities could never expand into giving directions with respect to specific law enforcement decisions in individual cases. Justice Hughes’ approach in the APEC inquiry suggests

---

<sup>28</sup> Ipperwash Inquiry at 344

<sup>29</sup> Ibid at 335

<sup>30</sup> Ibid at 337

<sup>31</sup> Andrew Sancton “‘Democratic Policing’: Lessons from Ipperwash and Caledonia” (2012) 55 Canadian Public Administration 365.

that the police have an obligation not to follow any unlawful orders from their “political masters” including those that contravene the Charter.

Although it proposed extensive legislative reform, the Ipperwash Inquiry did not see statutory reform alone as a panacea. It contemplated that the Commissioner of the OPP should refuse to follow directions that were not from the responsible Minister or were not written and intended to be released publicly. It also recommended that the police devise policies to insulate line decision makers from political intervention and that there be training and policies in both the police and government on the proper principles and procedures to govern police-government relations.<sup>32</sup>

## II. Jurisprudence on Police Independence

Police independence is sometimes subject to notice and interpretation by the courts. Such issues arise infrequently and almost always in a context where the proper approach to police government relations is not the focus of the judicial decision. As discussed above, the Supreme Court’s decision in *Campbell and Shirose* is rightly viewed as foundational. It remains the leading case in Canada on the subject, though it arose in the context of attempts by the government to claim Crown immunity for the actions of undercover police officers selling illegal drugs to the accused.

In *Chambly (Ville) c. Gagnon*,<sup>33</sup> the Quebec Court of Appeal, noted the tension between fixed-term contracts for the police chief and police independence. It commented:

The expiration of the contract of agreement of the chief of police is a sword of Damocles that ill accommodates the independence desired. The closer it gets the thinner the rope becomes and the blade sharper. There are strong odds that a complacency as culpable as it is understandable will soon come to the aid of the mayor’s son who persists in running red lights! It is precisely this type of situation that the legislature wanted to extenuate.<sup>34</sup>

This decision is notable in suggesting that the Quebec Court of Appeal no longer shares the scepticism that two members of it expressed in its 1980 decision in *Bisaillon v. Keable* about police independence. This is understandable given the Supreme Court’s subsequent 1999 decision in *Campbell and Shirose* recognizing police independence as a constitutional principle related to the rule of law. At the same time, the Supreme Court reversed the Court of Appeal in *Chambly v. Gagnon* on the basis that the expiry of a fixed term contract for a police director did not constitute

---

<sup>32</sup> Ipperwash Inquiry Recommendations 76-80

<sup>33</sup> [1997] A.Q. No. 2256 rev’d [1999] 1 SCR 8

<sup>34</sup> Ibid at para 20

a dismissal. The Supreme Court's decision was very brief and did not discuss police independence.

In a subsequent case, the Ontario Court of Appeal recognized that police independence is potentially in play with a fixed term contract for a deputy police chief, but ultimately concluded that such a contract did not undermine the limited criminal investigative independence of the Deputy Chief as outlined by the Supreme Court in *Campbell and Shirose*.<sup>35</sup>

The Federal Court has appealed to the principle of police independence as a reason not to characterize a decision by a RCMP officer to initiate a criminal investigation as a decision by a federal board, commission or tribunal subject to judicial review under the Federal Court Act.<sup>36</sup> Similarly Cournoyer J. of the Quebec Superior Court has concluded: "Même si la portée du principe de l'indépendance de la police à l'égard du pouvoir exécutif n'est pas clairement délimité, cette indépendance existe certainement à l'égard de la conduite des enquêtes et à l'égard de l'application de la loi, c'est à dire, selon les termes de l'article 48 de la *Loi sur la police*, de la mission de maintenir la paix, l'ordre et la sécurité publique, de prévenir et de réprimer le crime et les infractions aux lois ou aux règlements pris par les autorités municipales, et d'en rechercher les auteurs."<sup>37</sup>

## Summary

Not surprisingly, the courts have not contradicted the understanding of police independence articulated by the Supreme Court in *Campbell and Shirose* since that case was decided in 1999. This supports the idea articulated by both the Ipperwash and APEC inquiries that this limited understanding of law enforcement independence should be codified. The next question is whether Canadian legislatures have done so.

---

<sup>35</sup> *Chambers v. Chatham-Kent Police Services Board*, 2007 ONCA 414 at para 32

<sup>36</sup> Justice Tremblay-Lamer concluded: "While for certain purposes the [RCMP](#) could be acting in an agency relationship with the Crown, when an [RCMP](#) officer is in the course of a criminal investigation, he or she is independent of the control of the executive government: *Campbell*, at paragraph 31. This is why police investigating crimes do not enjoy the Crown's public interest immunity: *Campbell*, at paragraph 27. In short, when investigating crimes peace officers are not subject to political direction; rather they are answerable to the law and, no doubt, to their conscience: *Campbell*, at paragraph 33.... The proposition flowing from the above jurisprudence that police conducting criminal investigations are independent of the Crown is buttressed by Professor Ken Roach's recent observations in "The Overview: Four Models of Police-Government Relations", Research Papers Commissioned by the Ipperwash Inquiry (2007), online: The Ipperwash Inquiry <[http://www.ipperwashinquiry.ca/policy\\_part/meetings/pdf/Roach.pdf](http://www.ipperwashinquiry.ca/policy_part/meetings/pdf/Roach.pdf)>. At page 76 of his article, Professor Roach concludes that, while there is still much dispute about the scope of police independence beyond the criminal investigation sphere, "there seems to be growing consensus that the police should be protected from political direction in the process of criminal investigation." *Canada (Deputy Commissioner, Royal Canadian Mounted Police) v. Canada (Commissioner, Royal Canadian Mounted Police)*, [2008] 1 FCR 752, 2007 FC 564 at para 46, 48

<sup>37</sup> *Garbeau c. Montréal (Ville de)*, 2015 QCCS 5246 at para 320 (footnotes omitted)

### **III. Canadian Police Acts**

In what follows I will examine Police Acts in Quebec and the rest of Canada to see what they say about police government relations in general and police independence in particular. My overall findings are that with few exceptions, these Police Acts have not been updated to take account of *Campbell and Shirose*. In addition, they do little to structure police government relations to maximize transparency and the accountability of either responsible political or policing officials for the manner in which they discharge or fail to discharge their respective responsibilities.

#### **Quebec's Police Act**

##### ***Ministerial Direction and the Sûreté du Québec***

Section 50 of Quebec's *Police Act*<sup>38</sup> follows a bare bones Ministerial direction model that is also found in the RCMP Act and Ontario legislation by simply providing:

The Sûreté du Québec, the national police force, shall act under the authority of the Minister of Public Security and shall have jurisdiction to enforce law throughout Québec.

Section 63 provides some elaboration by providing

On the recommendation of the Director General, the Government may, by regulation,

- (1) set rules governing the operation of the Sûreté du Québec;
- (2) establish training requirements for the cadets and members of the Sûreté du Québec, and provide for the payment of their medical costs.

The reference to the recommendation of the Director General contemplates some interaction between the government and the head of the Sûreté. The reference to "the government" making regulations may simply reflect that regulations are made by the government as a whole, but it may also reflect the idea of governmental policing discussed above.

##### ***Municipal Forces***

As in most Canadian police acts, there are separate provisions in the Quebec legislation governing municipal police forces.

##### ***No Political Authority Over Police Investigations***

---

<sup>38</sup> CQLR c.P-13.1

Section 83 provides that the director of police has direction and command of a municipal police force and generally serves for fixed but renewable terms. More importantly, it recognizes core police independence by stating:

The director general of a municipality shall have no authority over police investigations.

This provision which was in the Police Act when originally enacted in 2000 is one of the few recognition of core police independence in Canadian police acts. It follows the *Campbell and Shirose* approach to police independence by providing that the director general of a municipality should not direct police investigations.

*Political Direction through Municipal By-laws.*

Section 86 contemplates rule setting for the municipal forces by municipal by-laws. Specifically s.86 provides:

Every municipality may make by-laws to

- (1) provide for the organization and equipment of a police force;
- (2) prescribe the duties and powers of the members of the police force;
- (3) determine the places where the police officers may have their residence;
- (4) establish classes of police officers and the ranks that may be conferred upon them;
- (5) prescribe the inspections to which police officers must submit.

The by-laws apply subject to the other provisions of this Act and the government regulations made under its authority.

A by-law made under this section must be transmitted to the Minister by the clerk or secretary-treasurer of the municipality concerned within 15 days of coming into force.

The focus on regulations and by-laws is helpful because such governmental directions to the police are both public and prospective. This respects the rule of law rationale for police independence articulated in *Campbell and Shirose* by avoiding the mischief of non transparent and ad hoc political directions that simply relate to particular individuals. The prospective and general nature of legislative law-making has long been recognized as an important component of both democracy and the rule of law. The subject matters in s.86 relating to matters should as inspections of the police and their equipment and organization also speak to matters outside of core police independence.

Both the recognition that responsible political authorities in s.83 “have no authority over police investigations” and the recognition of political direction through

transparent by-laws in s.86 are assets in Quebec's Police Act that are consistent with core police independence and in my view should be retained and built upon.

### ***Appointments***

The ability of the Minister and the municipality to appoint the heads of the provincial and municipal forces is in line with most Police Acts. The provision for five year terms provide some security of tenure. Section 87 also provides that a municipal police director should not be dismissed or have pay reduced without cause with the possibility of judicial review under s.89. Responsible political authorities have a legitimate interest in ensuring that they appoint the type of policing leaders that they want. It is difficult to guarantee that appointment and reappointment powers would never be abused, but as discussed in the last section, courts have accepted that limited term appointments are consistent with police independence over law enforcement decisions.<sup>39</sup>

### ***Investigations***

Section 279 of Quebec's Police Act gives the Minister or a person designated by the Minister undefined powers to "investigate any police force". Such undefined and open ended powers could provide some risks to core police independence. In contrast s.281 is more precise and less amenable to abuse because it defines the purpose of a Ministerial investigation as determining the adequacy of police services, a matter outside the scope of core police independence.

The Minister might argue that the open-ended investigative powers in s.279 is necessary to obtain information from the police. Investigations can obtain information and promote accountability. Such processes are distinct from attempts to control policing decisions whether they relate to matters within or outside of core police independence. Policing scholar Philip Stenning has argued that one of the problems with the police independence debate is that it often conflates attempts to achieve accountability and make the police answerable for their conduct with attempts to direct or control the police.<sup>40</sup>

Although the distinction that Professor Stenning and others make between political bodies obtaining information from the police to promote accountability and directing or controlling the police can be made in theory, many scandals about police-government relations have occurred because attempts by government officials to obtain information from the police were perceived as attempts to influence the police.

---

<sup>39</sup> *Chambly (City) v. Gagnon*, [1999] 1 SCR 8; *Chambers v. Chatham-Kent Police Services Board*, 2007 ONCA 414 at para 32.

<sup>40</sup> Philip Stenning "Governance of the Police: Independence, Accountability and Interference" (2011) 13 *Flinders L.J.* 241.

<sup>41</sup> The answer in my view is to provide for more formal and transparent procedures and to take special care with “real time” governmental requests for information which may reasonably be perceived as attempts to influence police decisions as opposed to governmental investigations that by focusing on past police conduct are less likely to influence police decisions in a way that may reasonably be seen as impinging on police independence.

Section 289 provides that the Minister “may, at any time, order that an investigation be conducted or, where expedient, be re-opened by the police force or peace officer designated by the Minister in order to examine an allegation against a police officer or a special constable concerning a criminal offence”. Although intended to enhance the accountability of the police<sup>42</sup>, this section infringes core police independence by contemplating that a Minister may order that an investigation be conducted or re-opened. To a large extent, the purpose of this section has been overtaken by 2013 amendments to the Police Act relating to independent investigations of the police.

Section 289.3 added by the 2013 amendments is similar to s. 289. It contemplates that the Minister may “charge” the Bureau des enquêtes indépendantes with conducting investigations of peace officers that do not involve serious injury or death. Unlike s.289, s.289.3 is explicitly reserved for “exceptional cases” and the direction is made to an office with a limited mandate of investigating possible criminal offences committed by police officers.<sup>43</sup>

The public interest in ensuring accountability and independent investigations of the police in both s.289 and s.289.3 is obvious and important. Nevertheless, it would be more respectful of police independence to repeal such Ministerial powers to direct police investigations. If Ministerial direction was, however, retained, it should at least be confined to directions to the Bureau des enquêtes indépendantes and not, as is possible under s.289, to every police force and peace officer in Quebec.

Justice Tulloch of the Ontario Court of Appeal contemplates that Ontario’s SIU and not the Minister should decide when independent investigations of police conduct that did not result in death or serious injury be conducted.<sup>44</sup> This position seems more consistent with police independence than ss.289.3 or 289 of the Quebec Police Act.

---

<sup>41</sup> Kent Roach “Police Government Relations: The Overview” at 69-71.

<sup>42</sup> Section 64 of the Police Act contemplates that the Director General of the Surete can also open similar investigations.

<sup>43</sup> Under s. 289.2, the Minister is also required to charge the the Bureau des enquêtes indépendantes with conducting investigation into police involvement in deaths or serious injury, but this is required in every case (taking away Ministerial discretion) and is “in order to ensure the impartiality of the investigation.”

<sup>44</sup> Hon. Michael Tulloch *Report of the Independent Police Oversight Review (2017)* at Recommendation 5.3. The recommendation contemplates that the Attorney General and the Minister of Community Safety, as well as police chiefs and police services boards, may make a request that the SIU conduct an investigation, but that the ultimate decision to commence the investigation will be made by the SIU director.

### ***Policy Responsibility and Directions***

Section 304 of the Quebec Police Act establishes the broad policy jurisdiction and responsibilities that the Minister of Public Safety has with respect to policing. It provides:

The Minister of Public Security is responsible for determining general policy concerning police organization and crime prevention.

More specifically, the Minister is responsible for preparing and proposing strategic plans and policies in such matters.

The Minister shall produce a guide to police practices and make it available to police organizations.

The language of responsibility used in this section is consistent with the approach taken by the Ipperwash Inquiry in stressing political responsibility for policy direction of the police that may expand and shrink over time. Sections 305, 306 and 308 single out crime prevention as part of the Minister's responsibility, and crime prevention is a matter outside of the core of police independence.

Such definitions of the responsible Minister's responsibilities are helpful in codifying the legitimate subjects and scope of democratic policing. As will be seen, this approach is also consistent with the trend in English legislation in specifying a broad range of effectiveness and efficiency measures that are subject to legitimate direction by the responsible political authority. Such approaches move away from tacit understandings. They attempt to define legitimate grounds for political direction of the police. At the same time, however, they are not constrained by a clear codification of police independence that limits political direction or by a process that ensures proper and transparent procedures for the responsible political authority to convey legitimate policy direction to the police.

### ***Summary***

The Quebec Police Act is inconsistent on the issue of police independence. Section 50 fails to recognize police independence by following the RCMP Act model of placing the national police force "under the authority" or direction of the responsible Minister. It contains no limits on Ministerial authority to recognize full police independence. Sections 289 and 289.3 are also in tension to core police independence by contemplating Ministerial directions of police investigations.

In contrast, section 83 that applies to municipal police forces is more respectful of police independence by providing that the director general of a municipality "shall have no authority over police investigations". Other provisions contemplating municipal by-laws and outlining the policy responsibilities of the Minister of Public

Safety can promote democratic policing while also respecting police independence with respect to law enforcement decisions including investigations.

## **Canadian Police Acts**

### *Unreformed “Under the Direction” Provisions*

The Ontario legislature has not amended the *Police Services Act* either to codify core police independence or to provide procedures and regulations to govern police-governmental relations even though this was recommended by the Ipperwash Inquiry a decade ago. This is an unfortunate state of affairs, but it cannot be said that Ontario is alone in neglecting legislative reform in this critical area.

Section 5 of the *RCMP Act* still contains a bare bones provision found in many provincial Police Acts that simply provides that the Commissioner or Police Chief shall exercise his or her duties “under the direction of the Minister”. This provision fails to recognize the core of police independence by precluding directions to officers about law enforcement decisions in specific cases. A variety of the barebones “under the direction” of responsible political authorities are found in other Acts including s.7(1) of the B.C. Police Act, s.2 of the Alberta Police Act, s.17(2) of Ontario’s Police Service Act, s.4 of the Royal Newfoundland Constabulary Act and ss.6(2) and 10(8) of Prince Edward Island’s Police Act. Similar bare bones references to police chiefs being under the direction of municipal police commissions are also found in ss.26(3) and 34(1) of the B.C. Police Act.

Section 27(1) of the Alberta Police Act qualifies the reference to direction by the responsible political authority somewhat by referring to the police commission’s powers as “general supervision”. Section 35(2) of Saskatchewan’s Police Act similarly refers to “general direction” by the commission and s.4 of the Manitoba Act similarly refers to “general direction” by the Minister. Such references to “general” direction or supervision helpfully point away from political direction in specific cases. Nevertheless there is no reason why the implications of such an approach and a prohibition on direction in specific cases could not be spelled out in the Police Acts. In other words, Police Acts should define the core of police independence against direction of law enforcement decisions in specific cases.

Section 31 of Ontario’s Police Services Act and Policy/Operational Matters Sections 31(3) and (4) of Ontario’s *Policing Services Act* limits the powers of municipal police commissions over their police services in a way that is not found in many other Canadian Police Acts. It provides:

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

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

Section 31(3) is helpful because, much like requirements of Ministerial direction, it centralizes communications by only requiring that the Board itself give directions to the Chief. It attempts to avoid a free for all where individual members of the commission may attempt to direct individual members of the police service. Prescribed and centralized procedures can promote accountability. At the same time, s.31(3) could better promote accountability by requiring, as do some other Police Acts, that any order or direction from a police commission to a chief be written.

Section 31(4) prohibits the responsible police authority from directing the police chief on “specific operational decisions” or “the day-to-day operations of the police.” The Ipperwash Inquiry recognized that the distinction between policy and operations can be blurred, but was reluctant to abandon it entirely in part because the idea that political authorities should not interfere with police operations included matters within the law enforcement core of police independence.<sup>45</sup> It emphasized that even when a responsible political authority established a policy to govern police operations that the actual implementation of that policy through decisions to make arrests or commence or stop investigations should be left to the expertise and law enforcement discretion of the police.<sup>46</sup>

### ***Newfoundland and Written Orders***

Section 6(2) of the *Royal Newfoundland Constabulary Act* provides that “the chief shall report to the minister and shall obey the minister’s orders and directions”. The language of obedience is quite strong and could undermine both core police independence and the larger notion of police operational responsibilities.

A more valuable feature of the Newfoundland legislation is section 6(3) which mandates that the Minister’s “orders and directions...shall be in writing.” The requirement for written directions as well as directions that only come from the responsible political authority can promote both transparency and accountability. Mandatory requirements as in the Newfoundland legislation would also have the advantage of making clear that attempts to avoid requirements to reduce directions to writing would themselves be illegal. This could also trigger what the APEC Inquiry recognized as the ability of the police to refuse to obey illegal orders even from the responsible political officials.

### ***Manitoba’s More Elaborate Approach***

Manitoba has perhaps the most advanced legislation in Canada with respect to police government relations between police commissions and police chiefs. Section 27 and

---

<sup>45</sup> Ipperwash Inquiry at 327.

<sup>46</sup> Ibid at 329.

28 define the purposes and general duties of police boards as politically responsible authorities. Sections 28(3), (4) and (5) then limit police board activities by providing:

**Restriction on police board activities**

28(3) The police board may give orders and directions to the police chief, but not to other police officers. No individual member of the board may give an order or direction to any police officer.

**No role on specific matters**

28(4) The police board must not give orders or directions on specific operational decisions, individual investigations or the day-to-day operation of the police service.

**No role in personnel matters**

28(5) With the exception of the police chief, the police board has no role with respect to the discipline or personal conduct of any police officer.

The Manitoba Police Act helpfully sets out with some degree of specificity both the specific duties of the police commission and restrictions on the board’s ability to give orders or directions “on specific operational decisions, individual investigations or the day-to-day operation of the police service.”<sup>47</sup> It should be noted, however, that this formulation goes beyond core police independence as articulated in *Campbell and Shirose* which does not go so far as to shelter all police operations (as distinct from law enforcement decisions in individual cases) from political direction.

**Summary**

In conclusion, Canadian Police Acts have generally not been amended to reflect the understanding of core police independence in the 1999 *Campbell and Shirose* case.

Some Acts do restrict political direction but generally on the basis that there should not be directions on operational matters. Section 83 of the Quebec Police Act is more precise in providing that a municipal political authority has “no authority over police investigations”. This is consistent with core police independence. In contrast, however, s.50 of the Quebec Police Act (and many other acts in Canada) simply provides that the police are subject to the direction of the Minister or other responsible political authorities. Read literally such provisions, as well as more

---

<sup>47</sup> A somewhat similar provision though one that perversely excludes reference to individual investigations which lie well within the core of police independent is found in s.3.1(2)(c) of New Brunswick’s Police Act which provides that the civic authority or police commission “ shall issue instructions as necessary to the chief of police but not to any other member of the police force and the instructions issued shall not be in respect to specific operational decisions or not in respect of the day-to-day operations of the police force.”

specific provisions that allow Ministers to require police to conduct investigations, are inconsistent with core police independence over law enforcement decisions in individual cases as represented in *Campbell and Shirose*. Finally and with an exception to some references to written directions or orders, Canadian Police Acts fail to structure police-governmental interactions in a manner to enhance transparency or accountability. As will be seen in the next section, statutes in other countries do a better job.

#### **IV. Australian, New Zealand and UK Acts**

The Australian Federal Police Act, 1979 fails to codify the parameters of police independence. At the same time, s.37(2) of the Act helpfully requires that the Minister give “written directions to the Commissioner with respect to the general policy to be pursued in relation to the performance of the functions of the Australian Federal Police Act.” This at least suggests that the directions should concern “general policy” and it promotes transparency and accountability by requiring that the direction be written.

The Queensland *Police Services Administration Act* provides that the minister may give direction to the commissioner about “policy and priorities to be pursued in performing the functions of the police service,” subject to the provision that all written directions should be kept and provided annually to the Crime and Misconduct Commission and then referred to the Parliamentary Committee on Crime and Misconduct. This helps preserve an accountability trail. On a democratic policing model, directions to the police should be publicly available and readily accessible.

#### ***Victoria’s Restrictions on Ministerial Direction***

Section 10(3) of the Victoria Police Service Act, 2013 contains similar wording as the Queensland Act about Ministerial direction on matters of policy and priorities, but also contains the following explicit restrictions on Ministerial powers.

- (2) Subject to subsection (3), a direction under subsection (1) cannot be given in relation to any of the following matters—
  - (a) preservation of the peace and the protection of life and property in relation to any person or group of persons;
  - (b) enforcement of the law in relation to any person or group of persons;
  - (c) the investigation or prosecution of offences in relation to any person or group of persons;

- (d) decisions about individual members of [Victoria Police](#) personnel, including decisions in relation to discipline;
- (e) the organisational structure of [Victoria Police](#);
- (f) the allocation or deployment of police officers or [protective services officers](#) to or at particular locations;
- (g) training, education and professional development programs within [Victoria Police](#);
- (h) the content of any internal grievance-resolution procedures.

This list of excluded topics goes well beyond core police independence and could impede democratic policing and the assumption of Ministerial responsibility for the policies that govern police operations. Nevertheless s.10(3) does allow the Minister in certain circumstances to give a direction on matters defined in s.10(2) (e), (f), (g) or (h). In their recent comparative examination of police government relations in six countries, David Bayley and Philip Stenning refer to the 2013 Victorian legislation as the “most advanced example”<sup>48</sup> of legislation while noting that legislation itself cannot solve all the potential problems of police government relations and that the definition of police independence in the Victorian legislation is broad and hence “is the most restrictive in terms of matters where political direction is not permitted.”<sup>49</sup>

### ***Victoria’s Restrictions on the Provision of Information***

Section 11 of Victoria’s Police Act provides that the Commissioner should generally provide the Minister with information about policing subject to exceptions if the provision of the information would reasonably be likely to “prejudice any investigation of a contravention or possible contravention of the law; or prejudice the prosecution of any person for an offence; or endanger the life or physical safety of any person.” This provision effectively provides the police a basis for denying information to the responsible police officials.

Many of Canada’s scandals over police-government relations have revolved around claims that responsible political officials were simply trying to obtain information that may be necessary to discharging their legitimate policy-based responsibilities. Even if, as the McDonald Commission concluded, the responsible political authority

---

<sup>48</sup> David Bayley and Philip Stenning *Governing the Police* (New Brunswick: Polity Press, 2016) at 186

<sup>49</sup> *ibid* at 82

needs information for the purpose of policy making, requests by political officials for information to be supplied by the police may be interpreted by the public and perhaps even the police as subtle attempts to influence the police. Consideration should be given to regulating attempts by political authorities to obtain information from the police about ongoing operations. If so, s.11 of the Victorian Act is a helpful starting point by providing legitimate grounds for the police denying information.

It is also notable that the restrictions in the Victorian Act on political requests of the police for information would apply more readily to ongoing investigations and prosecutions. Political requests for information may more reasonably be seen as attempts to influence the police where the police investigation has not been completed.<sup>50</sup> Once an investigation is complete, then there is less risk that requests for information will influence the exercise of law enforcement discretion.

### ***South Australia and Written Directives***

South Australia's Police Act 1998 takes a simple and elegant approach to police government relations that provides in s.6 that "Subject to this Act and any written directions of the Minister, the Commissioner is responsible for the control and management of SA Police". Section 8 provides that any Ministerial direction shall be published in the Gazette within eight days and laid before Parliament within six sitting days. The only exclusion on Ministerial directions is contained in s.7 which provides that: "No Ministerial direction may be given to the Commissioner in relation to the appointment, transfer, remuneration, discipline or termination of a particular person." This does not track core police independence as discussed above because it singles out personnel decisions and fails to preclude Ministerial direction with respect to law enforcement decisions. Nevertheless, the South Australian approach demonstrates how a Police Act can in a few simple sections regulate police government relations to increase transparency and accountability while precluding specific forms of political direction of the police.

### ***New Zealand***

Section 16 of the New Zealand Policing Act 2008 helpfully combines both the responsibilities and the independence of the police Commissioner in the same provision. Section 16(1) addresses responsibilities by providing:

- (1) The Commissioner is responsible to the Minister for—
  - (a) carrying out the functions and duties of the Police; and
  - (b) the general conduct of the Police; and

---

<sup>50</sup> Roach "Four Models of Police Government Relations" supra at 70-71.

- (c) the effective, efficient, and economical management of the Police; and
- (d) tendering advice to the Minister and other Ministers of the Crown; and
- (e) giving effect to any lawful ministerial directions.

This section effectively defines police responsibilities to the Minister including the following of lawful ministerial directions.

Section 16(2) of the New Zealand Policing Act, 2008 defines police independence as follows:

- (2) The Commissioner is not responsible to, and must act independently of, any Minister of the Crown (including any person acting on the instruction of a Minister of the Crown) regarding—
  - (a) the maintenance of order in relation to any individual or group of individuals; and
  - (b) the enforcement of the law in relation to any individual or group of individuals; and
  - (c) the investigation and prosecution of offences; and
  - (d) decisions about individual Police employees.

This definition of police independence embraces core police law enforcement independence as defined in *Campbell and Shirose* in s.16(2)(b) and (c) but goes beyond it in its reference to the maintenance of order and decisions about individual police employees. It demonstrates, however, that it is possible to codify police independence.

### ***The United Kingdom***

The British approach to police independence is both complex and controversial. Despite being the home of the idea of full police independence as articulated by Lord Denning in *Ex Parte Blackburn*, legislation in the UK has encouraged a considerable amount of democraticization of police governance.<sup>51</sup>

---

<sup>51</sup> Philip Stenning “The Idea of the Political ‘Independence’ of the Police: International Interpretations and Experience” in Beare and Murray *Who’s Calling the Shots* supra

In England, Police and Crime Commissioners are now directly elected. This has raised concerns that their directions to the police may be illiberal and populist.<sup>52</sup> A partial response to these concerns has been the Home Secretary's issuance of the UK Policing Protocol Order 2011.<sup>53</sup> As will be seen, however, this eight page statutory instrument may have muddied the waters compared to the more succinct codified approaches taken in South Australia and New Zealand.

Is the Common Law Sufficient?

The Policing Protocol Order, 2011 affirms police independence as follows:

11. The 2011 Act does not impinge on the common law legal authority of the office of constable, or the duty of constables to maintain the Queen's Peace without fear or favour. It is the will of Parliament and Government that the office of constable shall not be open to improper political interference. ...

This provision may overestimate the guidance provided by common law decisions in defining the ambit of police independence. As observed above, Lord Denning's sweeping and broad approach to police independence has been controversial and contested since it was first articulated in 1968. Many Canadian Policing Act implicitly rely on the common law approach in *Campbell and Shirose* by failing to address police independence and in Canada the common law has arguably been strengthened in that case by reference to constitutional principle. Nevertheless, the precise legal status of *Campbell and Shirose* remains unclear especially when set against clear statutory authority to the contrary. In my view, it is best to move towards some codification of core police independence.

### ***Democratic Direction of the Police***

Paragraph 17 of the Policing Protocol Order sets out a long list of legal powers and duties of the Police and Crime Commissioners. Most of these are uncontroversial as they relate to issues of "strategic direction and objectives of the force", budget matters, links with the community and the maintenance of "an efficient and effective police force for the police area". Nevertheless some of the powers could more controversial. For example para 17(j) contemplates that the political authority will "hold the Chief Constable to account for the exercise of the functions of the office of Chief Constable and the functions of the persons under the direction and control of

---

<sup>52</sup> Dominic Wood "The Importance of Liberal Values within Policing: Police and Crime Commissioners, Police Independence and the Spectre of Illiberal Democracy" (2016) 26 Policing and Society 148.

<sup>53</sup> The full document is available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/117474/policing-protocol-order.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117474/policing-protocol-order.pdf)

the Chief Constable.” This reference to functions could include law enforcement functions and as such would impinge on police independence.

### ***“Operational Independence”***

Some other paragraphs stress police independence. For example:

18. In addition, the PCC must not fetter the operational independence of the police force and the Chief Constable who leads it. ...

22. The Chief Constable is accountable to the law for the exercise of police powers, and to the PCC for the delivery of efficient and effective policing, management of resources and expenditure by the police force. At all times the Chief Constable, their constables and staff, remain operationally independent in the service of the communities that they serve. ...

30. The operational independence of the police is a fundamental principle of British policing. It is expected by the Home Secretary that the professional discretion of the police service and oath of office give surety to the public that this shall not be compromised. ...

Even these provisions, however, lack precision. The reference to “operational independence of the police” is potentially so broad that it could undermine democratic policing including legitimate political policy direction of the police.

### ***Obtaining Information***

The Protocol also addresses the critical issue of the ability of the PCC to obtain information from the police as follows:

19. In order to enable the PCC to exercise the functions of their office effectively, they will need access to information and officers and staff within their force area. Such access to any information must not be unreasonably withheld or obstructed by the Chief Constable and/or fetter the Chief Constable’s direction and control of the force.

This paragraph is utterly vague in providing only that the police should not unreasonably deny information to the political authority. This is in accord with critical commentary in the UK which has stressed the overall vagueness and ambiguity of the 2011 Protocol.<sup>54</sup> As seen above, the Victoria Act more helpfully

---

<sup>54</sup> S. Lister, S. “The new politics of the police: police and crime commissioners and the ‘operational independence’ of the police.” (2013) 7, *Policing: a journal of policy and practice*, 239.

enumerates valid reasons for denying information to the political authority including concerns about prejudicing investigations and endangering persons. Given that so much controversy has been caused in Canada by attempts by politicians to obtain information about police operations, more specific guidance than open-ended references to reasonableness should be provided.

### ***Interactions Between Police Independence and Political Direction***

Other parts of the protocol address the respective roles of the police and the political authority in a more holistic and comparative manner. They include:

35. The PCC and Chief Constable must work together to safeguard the principle of operational independence, while ensuring that the PCC is not fettered in fulfilling their statutory role. The concept of operational independence is not defined in statute, and as HMIC has stated, by its nature, is fluid and context-driven.

36. The relationship between the PCC and Chief Constable is defined by the PCC's democratic mandate to hold the Chief Constable to account, and by the law itself: primary legislation and common law already provide clarity on the legal principles that underpin operational independence and the Office of Constable.

37. In order to respond to the strategic objectives set by the PCC and the wide variety of challenges faced by the police every day, the Chief Constable is charged with the direction and control of the Force and day-to-day management of such force assets as agreed by the PCC.

The statement in paragraph 35 of the 2011 Protocol that: "the concept of operational independence is not defined in statute, and...is fluid and context-driven" bears some resemblance to the Ipperwash Inquiry's recognition that the respective operational and policy responsibilities of the police and the Minister will be dynamic.

There are, however, two critical differences. First, the Ipperwash Inquiry recommended a core of police independence that would be codified and could not be impinged by political direction of law enforcement activities, regardless of the context. The Ipperwash Inquiry would not have, as does the 2011 Protocol, leave such matters to common law.

Second, the Ipperwash Inquiry provided a procedure through which the responsible political authority would provide direction to the police in the form of written and public directives. This promotes transparency, accountability and democracy for how police government relations evolve.

## **Summary**

In my view, the new British approach is not a model that Canadian jurisdictions should emulate<sup>55</sup>. To be sure, it underlines how democratic control of the police may increase, but the South Australian and New Zealand Acts are more precise and clear in attempting to define the legitimate scope of political direction and police independence from direction. The South Australian act also provides mechanisms in the form of written directives that are transparent and will focus accountability for how both responsible political authorities and the police exercise their responsibilities. That said, the approach taken in all these foreign jurisdictions understandably do not reflect the precise ambit of police independence as it is understood in Canada under *Campbell and Shirose*.

## **V. Towards A Codified and Structured Approach to Police Independence and Police Government Relations**

Although legislative reform will not cure all possible problems in police government relations, it is necessary and long overdue. There is a growing and strong consensus about core police independence over law enforcement decisions in individual cases that should be codified. Quebec has gone part of the way to codification with its reference in s.83 of the Police Act to the Director General of the municipality having “no authority over police investigations”. There is also growing consensus about the need to recognize and structure a democratic policing model though no Canadian Police Act has yet to embrace this approach to democratic policing.

### ***Building on the McDonald Commission***

The McDonald Commission remains a helpful starting point both with respect to police independence and democratic policing. It expressed scepticism about full police independence as championed by Lord Denning and Pierre Trudeau. Its statement that it accepted *ex parte Blackburn* only to the extent that it would preclude direction of law enforcement powers of investigation, arrest and prosecution is remarkably consistent with the doctrine of police independence subsequently articulated by the Supreme Court in *Campbell and Shirose*. The McDonald Commission can also be seen as consistent with the democratic policing model endorsed by the Ipperwash Inquiry in its acceptance that the responsible political authority can provide policy direction to the police.

Where the McDonald Commission may be less helpful is in its failure to recognize that attempts by political authorities to request information from the police, even while theoretically distinct from attempts to control or direct the police, may often be perceived by the public and perhaps by the police as attempts to influence the police.

---

<sup>55</sup> For similar criticism about uncertainty and contradictions in the new British approach see Bayley and Stenning *Governing the Police* supra at 188-189.

Remedies for these perceptions may, however, be clear codification of core police independence and increased transparency of the interactions between the police and the responsible political authority.

The Marshall Commission found political interference with police independence over law enforcement decisions. This is consistent with the concept of police independence subsequently articulated in *Campbell and Shirose*. In that case, the concern was that the Attorney General attempted to discourage criminal investigations of Cabinet ministers, but the same mischief of interference with the impartial and professional playing out of the rule of law would occur and perhaps even be magnified if a political official encouraged the police to conduct a particular criminal investigation. The Somalia Inquiry similarly recommended that the military police should not be subject to the military chain of command when engaged in investigation of major disciplinary or criminal offences.<sup>56</sup> Thus the Court's 1999 decision in *Campbell and Shirose* did not come out of the blue. It built on the important work of these commissions of inquiry which accepted the principle of police independence but defined it in less sweeping terms than Lord Denning.

### ***Building on Campbell and Shirose***

Post-*Campbell and Shirose* inquiries are also helpful in fleshing out its implications for police government relations. Justice Hughes 2001 APEC inquiry is helpful in its affirmation that:

- When the RCMP is performing law enforcement functions (investigation, arrest and prosecution) they are entirely independent of the federal government and answerable only to the law.
- When the RCMP are performing their other functions, they are not entirely independent but are accountable to the federal government through the Solicitor General of Canada or such other branch of government as Parliament may authorize.

The Hughes Inquiry recommended that core police independence in the form police independence over law enforcement decisions be codified in the RCMP Act. This would alert officials to the importance of police independence, but unfortunately the RCMP Act has not yet been amended in this manner.

The Hughes Inquiry also examined some of the effects of the Charter on police government relations when it stated:

---

<sup>56</sup> Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair*, vol. 5 (Ottawa: Public Works and Government Services Canada, 1997) at 1296

- In all situations, the RCMP is accountable to the law and the courts. Even when performing functions that are subject to government direction, officers are required by the RCMP Act to respect and uphold the law at all times.

If further stated:

The RCMP is solely responsible for weighing security requirements against the Charter rights of citizens. Their conduct will violate the Charter if they give inadequate weight to Charter rights. The fact that they may have been following the directions of political masters will be no defence if they fail to do that.

An RCMP member acts inappropriately if he or she submits to government direction that is contrary to law. Not even the Solicitor General may direct the RCMP to unjustifiably infringe Charter rights; as such directions would be unlawful.<sup>57</sup>

The Charter adds another and a complicating dimension to police government relations which will be discussed below.

The Arar Commission is helpful both in its recognition of core police independence as articulated in *Campbell and Shirose* but also in recognizing the important role of democratic policing and Ministerial responsibility. It recommended increased use and transparency of ministerial directives in providing policy guidance to the police, including in particular sensitive areas such as the national security.<sup>58</sup>

### ***The Ipperwash Inquiry***

Finally, the Ipperwash Inquiry remains the most recent and most developed Canadian report that makes concrete and extensive recommendations to improve police government relations. It rejects the idea that government can provide “guidance” to the police short of direction because it:

almost inevitably creates an appearance of improper influence. It also creates an accountability-free zone in which governments would forever be able to plausibly deny responsibility for the reasonable interpretations of their actions. In my view, anything beyond the exchange of information between the responsible minister and the commissioner should take the form of clear and

---

<sup>57</sup>Hon Ted Hughes Commission Interim Report (2001) ch. 10.4 at <https://www.publicsafety.gc.ca/lbrr/archives/hv%207641.a8%20r6%202001-eng.pdf>

<sup>58</sup> Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Public Services, 2006) at 458

written directives to the commissioner. Anything less than that contradicts transparency and accountability—values that are central to this report.<sup>59</sup>

The report also warns that “[s]ometimes, even a reasonable appearance of government influence can damage public confidence in the impartial and non-partisan administration of justice.”<sup>60</sup>

As suggested in part one, the Ipperwash Inquiry’s recommendations are best understood as a combination of the core or quasi-judicial policing model and the democratic model.

### ***Democratic Policing and Core Police Independence***

Statutory recognition of core police independence may also promote democratic policing by making it more difficult for politicians to hide behind overinflated claims of police independence.

Andrew Sancton in his analysis of legislative and policy debates surrounding the policing of Indigenous protest in Caledonia, Ontario subsequent to the police killing of Dudley George at Ipperwash found that the responsible Minister did not take political responsibility for the policy of policing and even misread the Ipperwash recommendations as based on a simple model of full police independence<sup>61</sup> Professor Sancton observed:

A quick reading of Linden’s two pages of recommendations might leave the impression that he is concerned above all with insulating the police from government control. But what he is really concerned with is protecting the police from ad hoc, informal influence by an unspecified array of government operatives, ranging from the premier to ministerial staffers, a pattern he documented in the Ipperwash events. The real substance of the recommendations, especially Recommendations 71–73, is to focus responsibility for the OPP on a single minister and to make it clear that that minister is responsible for policing policy, that the minister expresses such policy through public directives, and that such directives can extend even into policy matters relating to the “operational responsibility” (357) of the OPP commissioner.<sup>62</sup>

It is important to note that this approach in Caledonia took place in the absence of the legislative reform recommended by the Ipperwash Inquiry. It took place in an

---

<sup>59</sup> *ibid* at 334.

<sup>60</sup> *Ibid* at 304

<sup>61</sup> Andrew Sancton “‘Democratic Policing’: Lessons from Ipperwash and Caledonia” (2012) 55 *Canadian Public Administration* 365

<sup>62</sup> *Ibid* at 378

environment in which police-government relations were governed by tacit and unclear understandings of police-government relations.

Had the legislative reform proposed by the Ipperwash Inquiry been implemented at the time of Caledonia, than it would have been clear to informed observers that 1) police independence was limited to immunity from political direction of law enforcement decisions in individual cases and 2) that other political direction could only legally come from the responsible political authority in the form of written and publicly disclosed directives. This might have focused and sharpened the democratic debate and minimized inaccurate claims about the ambit of police independence.

It is important to recognize that even more robust forms of democratic policing should not eclipse or overshadow the importance of core police independence over law enforcement decisions. Even in cases where the responsible political authority was active in providing policy direction to the police, it would have to respect the core of police independence by not attempting to direct police law enforcement decisions in individual cases. As Commissioner Linden stated:

I hasten to add that even when the government occupies the policy field, the police will still retain discretion and independence with respect to many operational issues in implementing the government policy. For example, the police would still retain the discretion to decide when to arrest people, even if the government issued a clear and transparent policy declaring that an Aboriginal occupation will be considered a simple matter of trespass. The core of police independence would be meaningless if the government could direct when and/or how to enforce the law.<sup>63</sup>

The basic bedrock principle is police independence. It never changes and is supported in Canada by constitutional principle and the rule of law. The degree of democratic policing can, consistent with the nature of democracy, change and evolve.

### ***Information***

One issue that may require further thought is providing procedures or guidelines to govern attempts by the responsible political authority to obtain information about police actions. In many cases, requests for information- much like the giving of “guidance” that political authorities claim stop short of direction- have provoked controversy and reasonable suspicion of government influence. Thought should be given to limiting the ability of the responsible political authority (but perhaps not necessarily their staff or civil servants) from obtaining “real time” information about ongoing or future investigations.

---

<sup>63</sup> Ibid at 329

### ***Compliance with the Charter***

Another area that may require more thought is with respect to Charter based concerns. The APEC inquiry dealt with these matters and suggested that the police should not obey a direction from a responsible political authority that it believed violated the Charter. This seems correct, but is complicated by the fact that issues of Charter compliance are rarely straight forward. Given disagreements about the law, it may be appropriate to suggest not only that the police refuse an order from political authorities that they believe to be unlawful but also to trigger some process, perhaps through the Attorney's General department and if need be through the courts, to resolve disputes over whether a particular order is actually illegal.

In addition, the responsible political authority may have a legitimate interest in requiring the police to adopt policies that better protect rights and freedoms than the minimum standards that will be enforced by the courts under the Charter.

### ***Education and Training***

Finally, legislative reforms will not be useful if police and politicians are not educated to understand both the letter and the spirit of the reforms. The Ipperwash Inquiry recognized this fact and recommended training and education both for police and political officials. At the same time in their recent review of police government relations in six democracies, Professors Bayley and Stenning concluded that "legislative specification" while not a "silver bullet" can nevertheless be effective by reducing disagreements between the police and the government and "providing a clearer basis for resolving them when they do arise."<sup>64</sup>

### **Conclusion**

The fact that the question of the legitimate scope of police independence from government direction has been raised in so many Canadian inquiries into scandals including the present one raises interesting question about why statutory reforms to clarify and provide transparent procedures to govern police-government relations have not been enacted 18 years after the Supreme Court's decision in *Campbell and Shirose* and 10 years after the Ipperwash Inquiry's recommendations.

One hypothesis to explain the lack of legislative reform is simply that governments may have concluded that despite being at the heart of more than one scandal that controversies with respect to police government relations were unlikely to emerge again.. If governments were of this view, they were mistaken.

Controversies in police-government relations continue to erupt on a regular basis and there is no reason to think that they will not do so in the future. Indeed, they may

---

<sup>64</sup> Bayley and Stenning *Police Government Relations* supra at 189.

increase given the expanding legal and technological powers of the police, the greater awareness and transparency of police conduct and the increased diversity of our communities. This underlines the urgent need to codify core police independence and to provide transparent procedures to govern less settled issues of police government relations.

Another slightly more sinister hypothesis is that it may be in the interests of governments and police to keep police government relations unclear if not opaque. Both political responsible authorities and police leaders may not be overly eager to accept the responsibility that will come with greater transparency about police government relations. But such transparency is needed if the public is to be able to hold both politically responsible authorities and the police accountable for actions that significantly shape the type of society we live in.