Commission of Inquiry
into the Actions of Canadian Officials in Relation to Maher Arar

Policy Review

Police Independence from Governmental/Executive Direction

A Background Paper
to the Commission's
Consultation Paper

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Police independence is a common law and constitutional principle that governs the relationship between the police and the government, including the responsible Minister. Professor Philip Stenning has concluded there is "very little clarity or consensus among politicians, senior RCMP officers, jurists including the Supreme Court of Canada, commissions of inquiry, academics, or other commentators either about exactly what 'police independence' comprises or about its practical implications…"[1] Nevertheless, the Commission must consider the precise ambit of police independence, the legal status of the doctrine and whether and how concerns about governmental interference in criminal investigations should factor into the structure of an arm's-length review mechanism for the national security operations of the RCMP.

The Common Law Doctrine of Police Independence

The modern genesis of the doctrine of police independence is found in a 1968 British common law case, *Ex Parte Blackburn*, in which Lord Denning made the following oft-quoted statement:

> I have no hesitation in holding that, like every constable in the land, [the Commissioner of the London Police] should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act, 1964, the Secretary of State can call upon him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.[2]

The above articulation of a broad doctrine of police independence has been influential and

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[1] P. Stenning, "Someone to Watch over Me: Government Supervision of the RCMP" in Wes Pue ed. *Pepper in Our Eyes: The APEC Affair* (Vancouver: University of British Columbia Press, 2000) at 113.

[2] *R. v. Metropolitan Police ex parte Blackburn*, [1968] Q.B. 116 at 135-136. See also *R. v. Chief Constable of Sussex ex parte International Trader's Ferry Ltd.* [1999] 1 All E.R. 129.

has been accepted by many courts. Most recently, the Supreme Court of Canada in *R. v. Campbell and Shirose*, accepted Lord Denning's articulation in relation to the police where they are engaged in criminal investigations. However, Lord Denning's statement has also been the subject of some debate. Before returning to *Campbell and Shirose* it is useful by way of background to examine some of the commentary on the issues. The paper then sets out the relevant statutory framework, the concept of Ministerial Directions to the RCMP, the approach to the doctrine by other public inquiries in Canada and concludes with a detailed examination of *Campbell and Shirose*.

A number of commentators have questioned whether it was appropriate for Lord Denning to derive the doctrine of police independence from a series of civil liability cases holding that there was no master and servant relationship between the police and the government.[3] Others have argued that Lord Denning wrongly conflated the idea that the police should be immune from improper political control or direction with the broader and different idea that the police should not be answerable or accountable to the responsible Minister and only answerable in a court of law. Although judicial review is an important restraint on the police, it will generally only occur in cases that result in criminal charges and trials. Some scholars have argued that while the police should be independent from improper control or direction, they should not be immune from requests for information or answers designed to promote accountability even if those questions are asked by the responsible Minister.[4] On the other hand, some commentators point to cases in which Ministerial requests for

[3] *Fisher v. Oldham Corporation*, [1930] 2 K.B. 364; *Attorney General for New South Wales v. Perpetual Trustee Company*, [1955] A.C. 457. In the Canadian context see *McCleave v. City of Moncton* (1902), 32 S.C.R. 106 at 108-109. For an examination of other early Canadian civil liability jurisprudence see Stenning, *Legal Status of the Police* (Ottawa: Law Reform Commission of Canada, 1981) at 102-112. Professor Stenning concludes that "none of these cases, however, determines the implications of the constitutional status of the police in terms of their liability to receive direction of any kind with respect to the performance of their duties." Ibid. at 110. See also G. Marshall, *Police and Government* (London: Methuen, 1965).

[4] The British constitutional scholar Geoffrey Marshall who has written frequently on police governmental relationships has drawn a distinction between "the familiar type of ministerial responsibility and political responsibility that might be dubbed the 'subordinate and obedient' mode in which the supervisor's responsibility is typically accompanied by administrative control and the ability to direct and veto" with a different "style of accountability that might be called the 'explanatory and co-operative' mode" that "rests on an ability to issue orders but on the capacity to require information, answers and reasons that can then be analysed and debated in Parliament and in the press." G. Marshall, "Police Accountability Re-visited" in D. Butler and A. Halsey, *Policy and Politics* (London: MacMillan, 1978) at 61-62. See also P. Stenning, "Accountability in the Ministry of the Solicitor General of Canada" in Stenning ed. *Accountability for Criminal Justice* (Toronto: University of Toronto Press, 1995).

information were perceived by the public and perhaps the police as interference and question whether the distinction between control and accountability can be sustained in the absence of wide acceptance of police independence.[5]

The doctrine of police independence from the executive is only accepted in common law countries. It should be noted that in the United Kingdom and other Commonwealth countries, it has generated some commentl.[6] The Independent Commission on Policing for Northern Ireland, (the Patten Report) concluded that the term "police independence" should be replaced with the term "police responsibility" in order to highlight the distinction between legitimate police independence from direction or control as opposed to illegitimate claims that the police are not answerable for their activities. It concluded:

> Long consideration has led us to the view that the term 'operational independence' is itself a large part of the problem. In a democratic society, all public officials must be fully accountable to the institutions of that society for the due performance of their functions, and a chief of police cannot be an exception. No public official, including a chief of police, can be said to be 'independent'. Indeed, given the extraordinary powers conferred on the police, it is essential that their exercise is subject to the closet and most effective scrutiny possible. The arguments involved in support of 'operational independence' – that it minimises the risk of political influence and that it properly imposes on the Chief Constable the burden of taking decisions on matters about which only he or she has all the facts and expertise needed- are powerful arguments, but they support a case not for 'independence' but for 'responsibility'. We strongly prefer the term 'operational responsibility' to the term 'operational independence.'[7]

Police operational responsibility as conceived by the Patten commission involves the right of police to make decisions free from external direction or control, but rejects the idea that the police's "conduct of an operational matter should be exempted from inquiry or review

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[5] K. Roach, "Four Models of Police-Government Relationships" at www.ipperwashinquiry.ca/policy-partt/conference/html.

[6] P. Stenning, "The Idea of the Political 'Independence' of the Police: International Interpretations and Experiences" prepared for the Ipperwash Inquiry/Osgoode Hall Law School Symposium on Police/Government Relations, held June 29, 2004, and available at www.ipperwashinquiry.ca/policy-partt/conference/html.

[7] Independent Commission on Policing for Northern Ireland, *A New Beginning: Policing in Northern Ireland* September 1999 at para. 6.20.

after the event by anyone."[8] The Patten Commission recommended that the police be answerable to police boards for ordinary policing and the Home Secretary for national security policing.[9] In its emphasis on accountability, it stated that "we disagree with Lord Denning that the police officer 'is not a servant of anyone, save of the law itself."[10]

Prior to *Campbell and Shirose*, the doctrine of police independence articulated by Lord Denning in *Blackburn* also received mixed treatment by courts in Canada. It was, for example, rejected by the Quebec Court of Appeal in a 1980 case as inappropriate in the Canadian context in which various police acts give responsible Ministers powers of control and direction over the police. For example, Turgeon J.A. stressed that in contrast to the English history, "notre système d'administration de la justice est tout à fait différent, et le rôle et le statut de la police à l'intérieur de ce système est clair et bien défini par des textes législatifs."[11] A judge-made common law doctrine could be displaced by statute. This raises the issue of the Canadian statutory framework.

The Relevant Statutory Framework

The statutory framework for relations between the RCMP and the responsible Minister is provided in s. 5(1) of the *Royal Canadian Mounted Police Act*:

> The Governor in Council may appoint an officer, to be known as the Commissioner of the Royal Canadian Mounted Police, who, under the direction of the Minister, has the control and management of the Force and all matters connected therewith.[12]

From 1959[13] to 1966, the relevant Minister was the Minister of Justice of Canada; and from 1966 to the present, it has been the Solicitor General of Canada. Since December 12, 2003, the Solicitor General has been styled as the Deputy Prime Minister and Minister of Public Safety and Emergency Preparedness.

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[8] Ibid. at 6.21.
[9] Ibid. at 6.22.
[10] Ibid. at 1.14.
[11] *Bisaillon v. Keable and Attorney General of Quebec*, 1980 Carswell 22 at para. 28 (Que. C.A.) rev'd on other grounds [1983] 2 S.C.R. 60.
[12] *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10.

The above statutory provision can be compared with s. 6 of the *Canadian Security Intelligence Act*[14] which provides:

> 6(1) The Director, under the direction of the Minister, has the control and management of the Service and all matters connected therewith.
> (2) In providing the direction referred to in subsection (1), the Minister may issue to the Director written directions with respect to the Service and a copy of any such direction, shall, forthwith after it is issued, be given to the Review Committee.
> (3) Directions issued by the Minister under subsection (2) shall be deemed not to be statutory instruments for the purposes of the *Statutory Instruments Act*.

The responsible Minister for CSIS is the Solicitor General (Minister of Public Safety and Emergency Preparedness); and the Review Committee mentioned in s. 6(2) is the Security Intelligence Review Committee.

It can also be compared with the statutory framework that governs the relationship between the CSE and the Minister of Defence. Section 273.62 of the *National Defence Act*[15] provides:

> (1) The part of the public service of Canada known as the Communications Security Establishment is hereby continued.
> (2) The Chief of the Communications Security Establishment, under the direction of the Minister or any person designated by the Minister, has the management and control of the Establishment and all matters relating to it.
> (3) The Minister may issue written directions to the Chief respecting the carrying out of the Chief's duties and functions
> (4) Directions issued under subsection (3) are not statutory instruments within the meaning of the *Statutory Instruments Act*.

The above statutory frameworks for the RCMP, CSIS and CSE all contemplate direction from the responsible Minister with provision for written Ministerial directions to both CSIS and CSE. Such written directions are not statutory instruments, but in the case of CSIS, a

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[13] *Royal Canadian Mounted Police Act*, R.S.C. 1959, s. 5. Before that time, the *North-West Mounted Police Act* of 1873, 36 Vict c.33, s. 33, also contemplated that the Department of Justice would be responsible for the "control and management" of the Force.
[14] R.S.C. 1985, c.23.
[15] R.S. 1985 c. N-1 as amended by S.C. 2001 c. 41, s. 102.

copy is provided to the review committee. In contrast, there is no reference to written directions from the Minister to the RCMP Commissioner in the *RCMP Act*.

Ministerial Directions to the RCMP

In November of 2003, three new Ministerial Directions were issued to the RCMP from the then Solicitor General with respect to national security investigations. These three directions have implications for the issue of police-governmental relations and in particular the distinction between the ability of the Minister to be informed about criminal investigations with national security implications as opposed to the ability of the Minister to direct such criminal investigations.

The "Ministerial Direction (regarding) National Security Responsibility and Accountability" relates to investigations of offences under the *Security Offences Act* and of terrorist offences and activities under the *Criminal Code*. It recognizes that "as per subsection 5(1) of the *RCMP Act*, the control and management of the RCMP, and all matters connected therewith, is the responsibility of the Commissioner of the RCMP, under the direction of the Solicitor General." It then goes on to flesh out the statutory concept of the Commissioner having responsibility for control and management subject to Ministerial direction by stating:

> The Minister is accountable to the Parliament of Canada for the RCMP. The Commissioner, in turn, reports to and is accountable to the Minister.

In order to enhance both ministerial accountability and what is described as "the Commissioner's operational accountability", the Direction provides for "central coordination" of national security investigations in RCMP headquarters. It also contemplates that the Minister will be informed about certain national security investigations in the following provision:

> As part of the accountability process, the Minister will be advised or informed regarding certain RCMP investigations with respect to matters that fall under subsection 6(1) of the *Security Offences Act*, and investigations related to a terrorist offence or terrorist activity, as defined in section 2 of the *Criminal Code of Canada*. The Commissioner of the RCMP shall exercise his judgment to inform the Minister of high profile RCMP investigations or those that give rise to controversy.

The above Ministerial Direction is premised on the oft-noted distinction between the Minister's ability to be informed about high profile or controversial criminal investigations and the "operational accountability" and responsibility of the head of the police, namely the Commissioner of the RCMP with respect to national security criminal investigations. This direction contemplates that the Minister must be accountable to Parliament for the RCMP and should be informed about high profile or controversial national security investigations of the RCMP, but it does not contemplate Ministerial control or direction of those investigations.

In November, 2003 another Ministerial Direction was issued with respect to national security investigations in "sensitive sectors" involving "fundamental institutions of Canadian society" such as "academia, politics, religion, the media and trade unions". It singles out the need for RCMP investigations not to "impact upon the free flow and exchange of ideas normally associated with an academic milieu" or to "adversely affect the rights or freedoms" of academics. It also provides that the Assistant Commissioner, Criminal Intelligence Directorate shall approve all RCMP investigations involving "sensitive sectors". This direction suggests that Ministerial policy directives can affect the conduct of criminal investigations and provide procedural requirements within the RCMP for sensitive investigations, but it does not amount to a requirement of Ministerial approval for criminal investigations and it also recognizes that "there are no sanctuaries from law enforcement."

A third Ministerial Direction issued in November, 2003 requires prior Ministerial approval of written or oral arrangements or co-operation between the RCMP and "foreign security or intelligence organizations" to ensure that they are "compatible with Canada's foreign policy" including "consideration of that country or organization's respect for democratic or human rights". This direction goes beyond the above two in requiring prior Ministerial approval before the RCMP co-operates with foreign intelligence agencies. At the same time, this requirement for prior Ministerial approval does not apply "to arrangements and cooperation with foreign law enforcement agencies or organizations", thus creating a

distinction between RCMP cooperation with security intelligence agencies and other police forces.

Taken together, these three recent Ministerial Directions, combined with understandings of police independence, flesh out the reference in s. 5(1) of the *RCMP Act* to the Commissioner having control and management of the RCMP subject to Ministerial direction. They suggest that criminal investigations relating to national security are subject to Ministerial direction because of their high profile or controversial nature, their potential effect on civil liberties and the need for the Minister to be accountable to Parliament for the RCMP, especially with respect to high profile or controversial national security investigations. These Ministerial Directions provide procedures to guide national security criminal investigations, including prior Ministerial approval for agreements and cooperation with foreign intelligence operations and special procedures and cautions for investigations into sensitive sectors. Combined with the requirement to be discussed below of approval by an Attorney General before many national security prosecutions and before some investigative techniques, they qualify an absolutist understanding of police independence in national security criminal investigations. At the same time, the Ministerial Directions contemplate that the Commissioner of the RCMP will have "organizational accountability" and central coordination for criminal national security investigations and do not contemplate Ministerial control of specific criminal investigations.

What Other Inquiries Have Concluded About Police Independence

The McDonald Commission considered the concept of police independence at some length and concluded that:

> The Minister should have no right of direction with respect to the exercise by the R.C.M.P. of the powers of investigation, arrest and prosecution. To that extent, and to that extent only, should the English doctrine expounded in *Ex parte Blackburn* be made applicable to the R.C.M.P.[16]

Even with respect to the above "quasi-judicial" police functions of investigation, arrest and prosecution, however, the McDonald Commission drew a distinction between accountability

and answerability on the one hand and control and direction on the other. It concluded that the Minister should have a right to be "informed of any operational matter, even one involving an individual case, if it raises an important question of public policy. In such cases, he may give guidance to the Commissioner and express to the Commissioner the government's view of the matter, but he should have no power to give *direction* to the Commissioner."[17] The 2003 Ministerial Directions discussed above similarly contemplate that the Minister should be informed about high profile or controversial RCMP national security activities, but they do not contemplate Ministerial direction or approval of specific RCMP investigations, with the exception of RCMP co-operation with foreign intelligence (but not police) agencies.

The McDonald Commission's approach can be contrasted with a broader view of police independence articulated by Prime Minister Pierre Trudeau when he stated:

> 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 force and even of the security force. I repeat that is not a view that is held by all democracies but it is our view that 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 a principle that the particular Minister of the day should not have a right to know what the police are doing constantly in their investigative practices, what they are looking at, and what they are looking for, and the way in which they are doing it….
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> I would be much concerned…if the Ministers were to know and therefore be held responsible for a lot of things taking place under the name of security or criminal investigation. That is our position. It is not one of pleading ignorance to defend the government. It is one of keeping the government's nose out of the operations of the police force at whatever level of government.
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> On the criminal law side, the protections we have against abuse are not with the government. They are with the courts. The police can go out and investigate crimes…without authorization from the Minister and indeed without his knowledge.

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[16] Commission of Inquiry Concerning Certain Activities of the RCMP *Freedom and Security under the Law* (Ottawa: Supply and Services, 1981) at 1013.
[17] Ibid. at 1013 (emphasis in original).

> What protection do we have then that there won't be abuse by the police in that respect? We have the protection of the courts. If you want to break into somebody's house you get a warrant, a court decides if you have reasonable and probable cause to do it. If you break in without a warrant a citizen lays a charge and the police are found guilty. So this is the control on the criminal side, and indeed the ignorance, to which you make some ironic reference, is a matter of law. The police don't tell their political superiors about routine criminal investigations.
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> On the security side,…the principle has been that the police don't tell their political superiors about the day to day operations. But they do have to act under the general directions and guidelines laid down by the government of the day. In other words, the framework of the criminal law guides the policy of the police and on the criminal side the courts check their actions.[18]

Prime Minister Trudeau argued that police independence from the executive included not only freedom from governmental direction of criminal investigations, but also governmental requests for information about such investigations. He did contemplate that with respect to security matters the police would act "under the general directions and guidelines laid down by the government of the day."

The McDonald Commission expressed concerns that the idea that the responsible Minister should remain ignorant of "the day to day operations of the Security Service" could undermine Ministerial responsibility. It could also in the Commission's view encourage a "misapprehension" that important policy "questions concerning the distinction between legitimate dissent and subversive threats to the security of Canada" and about "the legality and propriety of a particular method of collecting intelligence in the context of a particular case"[19] would fall under the term operations. In its view, the police should be answerable to the Minister for such policy decisions. The 2003 Ministerial Directions are also contrary to the Trudeau statements in that they contemplate that the responsible Minister will be informed about high profile or controversial RCMP national security investigations.

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[18] As quoted in J.L.J. Edwards, *Ministerial Responsibility for National Security* (Ottawa: Supply and Services, 1980) at 94-95.

[19] Commission of Inquiry Concerning Certain Activities of the RCMP *Freedom and Security under the Law* Second Report (Ottawa: Supply and Services, 1981) at 868-69.

Other commissions have also examined the issue of police independence. The Royal Commission into the Donald Marshall Jr. concluded that "inherent in the principle of police independence is the right of the police to determine whether to commence an investigation". The police should in an appropriate case be prepared to lay a charge, even if it was clear that the Attorney General would refuse to prosecute the case. Such an approach in the Royal Commission's view "ensures protection of the common law position of police independence and acts as an essential check on the power of the Crown." It concluded that the RCMP "failed in its obligation to be independent and impartial" in its investigation of two Nova Scotia cabinet ministers.[20] The RCMP refusal to proceed with an investigation without authorization from the Department of the Attorney General was "a dereliction of duty" and "a failure to adhere to the principle of police independence. It reflects a double standard for the administration of criminal law, contributes to the perception of a two track justice system and undermines public confidence in the integrity of the system."[21] It should be noted that the criminal offences being investigated in these cases, unlike terrorism offences under s. 83.24 of the *Criminal Code* or all offences under s. 24 of the *Security of Information Act*, did not require the Attorney General's prior consent to commence a prosecution.

In his interim report into complaints arising from the APEC conference, Justice Hughes articulated the following propositions concerning police independence:

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

[20] *Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: Queens Printer, 1989) at 212-214.
[21] Ibid. at 216.

- The RCMP are 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.[22]

Justice Hughes recommended that the "RCMP should request statutory codification of the nature and extent of police independence from government" with respect to "existing common law principles regarding law enforcement" and "the provision of and responsibility for delivery of security services at public order events."[23] The *RCMP Act* has not been amended following these recommendations and the reference to the Commissioner being "under the direction of the Minister" remains.

Campbell and Shirose

The fullest and most recent examination of police independence was conducted by the Supreme Court of Canada in the 1999 case of *R. v. Campbell and Shirose*. The Crown sought to defend police conduct in conducting a "reverse sting" operation in which RCMP officers sold drugs to the accused on the basis that the police were part of the Crown or agents of the Crown and protected by the Crown's public interest immunity. Binnie J. for the unanimous Supreme Court rejected such an argument:

> The Crown's attempt to identify the RCMP with the Crown for immunity purposes misconceives the relationship between the police and the executive government when the police are engaged in law enforcement. A police officer investigating a crime is not acting as a government functionary or as an agent of anybody. He or she occupies a public office initially defined by the common law and subsequently set out in various statutes. [24]

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[22] Commission Interim Report Following a Public Inquiry into Complaints that took place in connection with the demonstrations during the Asia Pacific Economic Co-operation Conference in Vancouver (Ottawa: Commission of Public Complaints, 2001) at 10.4.
[23] Ibid. at 31.3.1.
[24] *R. v. Campbell*, [1999] 1 S.C.R. 565 at para. 27.

The Court noted that the RCMP "perform a myriad of functions apart from the investigation of crimes" and that "[s]ome of these functions bring the RCMP into a closer relationship to the Crown than others." Nevertheless the Court stressed that "in this appeal, however, we are concerned only with the status of an RCMP officer in the course of a criminal investigation, and in that regard the police are independent of the control of the executive government."[25] The Court noted that this principle "underpins the rule of law"[26] which it noted "is one of the 'fundamental and organizing principles of the Constitution'".[27] The Court also quoted with approval the extract from Lord Denning's 1968 decision in *Ex Parte Blackburn* quoted above.

The *Campbell and Shirose* case is significant in its recognition of the doctrine of police independence from the executive in the context of criminal investigations. In addition, the Supreme Court related the doctrine of police independence to the rule of law which has been recognized as a fundamental constitutional principle.[28] The Court derived the principle of the independence of the police from the constitutional principle of the rule of law which stresses the importance of impartially of applying the law to all and especially to those who hold state and governmental power. The Supreme Court has indicated that "underlying constitutional principles may in certain circumstances give rise to substantive legal obligations which constitute substantial limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be specific and precise in nature. The principles are not merely descriptive, but also involve a more powerful normative force."[29]

The principle of police independence derived in *Campbell and Shirose* from the constitutional principle of the rule of law seemed to qualify the terms of s. 5 of the *RCMP Act* which, as discussed above, assigned control and management of the Force to the Commissioner "under the direction of the Minister". Binnie J. explained:

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[25] Ibid. at paras. 28- 29.
[26] Ibid. at para. 29.
[27] Ibid. at para. 18.
[28] *Quebec Secession Reference*, [1998] 2 S.C.R. 217 at 249.
[29] Ibid. at 249. See also *Judges Remuneration Reference*, [1997] 3 S.C.R. 3.

> 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. [30]

The statutory powers of Ministerial direction in s. 5 of the *Royal Canadian Mounted Police Act* must now be read subject to the above decision. As Justice Hughes commented in his APEC report: "In respect of criminal investigations and law enforcement generally, the *Campbell* decision makes it clear that, despite s. 5 of the RCMP Act, the RCMP are fully independent of the executive. The extent to which police independence extends to other situations remains uncertain."[31]

The Supreme Court indicated that the principle of police independence will not be engaged in all of the functions performed by the police, but that it will apply when the police are engaged in the process of "criminal investigation". The RCMP will be involved in criminal investigations when they exercise their primary responsibility under the *Security Offences Act*[32] to investigate and prevent any of a number of offences that may involve conduct that that constitutes a threat to the security of Canada as defined in s. 2 of the *Canadian Security Intelligence Act*[33] or involve internationally protected persons as victims. In addition, the RCMP would be involved in the process of criminal investigation when they investigate the commission of any of a number of new criminal offences in relation to terrorism.

The *Anti-terrorism Act*, however, requires the approval of the Attorney General (defined as either the Attorney General of Canada or the Attorney General of the province) before proceedings for a terrorism offence under the Criminal Code or an offence under the *Security of Information Act* are commenced.[34] In addition, the consent of the Attorney General is required before the police apply for an investigative hearing[35] or lay an

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[30] *R. v. Campbell and Shirose* supra at para. 33.
[31] APEC Interim Report supra at 10.2
[32] R.S. 1985 c. S-7.
[33] R.S. 1985 c. C-23.
[34] *Criminal Code* s. 83.24; *Security of Information Act*, s.24.
[35] *Criminal Code* s. 83.28(3) and (4).

information as required under the recognizance with conditions (preventive arrests) powers given to the police to facilitate the criminal investigation of terrorism offences.[36] Although the exercise of investigative powers and the laying of charges fall under the doctrine of police independence as articulated in *Campbell and Shirose*, in the case of the new investigative powers set out in the *Anti-terrorism Act*, they are qualified by clear language in that *Act*. The requirement for the Attorney General's consent for commencing proceedings is designed to ensure some central control before a prosecution is commenced which may have implications for national security. The Attorney General may, for example, have concerns about the exposure of security investigations, intelligence or sources and he or she may also concerns about the need for restraint in the use of investigative powers and terrorism and security of information charges.[37] In addition, the Solicitor General (Minister of Public Safety and Emergency Preparedness) should also be informed, subject to the 2003 Ministerial Directions, of high profile or controversial national security investigations by the RCMP. As discussed above, however, a distinction has often been made between the ability of the responsible Minister to be informed about police matters and his or her ability to give directions to the police.

Issues for Discussion

Does the review and accountability focus of an arm's-length review mechanism diminish concerns about police independence that may be more pressing in the context of relations between a Minister with statutory powers of directions over the police?[38] What is the relevance of the distinction that many commentators have drawn between protecting police from control or direction with respect to criminal investigations as opposed to legitimate

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[36] Ibid. s. 83.3(1).

[37] The prior consent of the Attorney General is required to commence prosecutions for some other criminal offences such as hate propaganda and has been seen as a safeguard on the use of such laws. *R. v. Keegstra*, [1990] 3 S.C.R. 697.

[38] Issues of police independence may also arise with respect to legislative review of the RCMP's activities with respect to national security. The recent consultation paper entitled *A National Security Committee of Parliamentarians*, Ottawa, 2004 at 9-10 did not contemplate legislative review of the RCMP in part on the basis that "the RCMP is a police force, and as such, its investigations are carried out at arm's-length from government." It noted "the general practice, in Canada and elsewhere, of not engaging Parliament in the review of police investigations." It qualified this conclusion by noting: "This is not to say, however, that this matter may not be considered further after the Government receives Mr. Justice O'Connor's recommendations for an independent review of mechanisms for the RCMP's national security activities, bearing in mind the Government's responsibility for national security."

social interests in requiring the police to answer questions and provide information about their activities? Although a review mechanism such as the Commission for Public Complaints Against the RCMP, the Security Intelligence Review Committee for CSIS or the Commissioner of the CSE would be classified as part of the executive arm of government, can such a mechanism be established so as to be "arm's-length" from the government as well as the police? If such a review mechanism were limited to a retrospective review of RCMP activities and not ongoing oversight or approval or veto of the conduct of a police investigation, would concerns about police independence still be relevant in such a review process?

If police independence is a concern with respect to the review of police activities, does it have the same force in the national security context? Is it relevant that the doctrine of police independence depends in part on the idea that the courts will review police activities that result in the laying of charges, but national security policing may focus more on intelligence and prevention than prosecutions? Does this orientation affect considerations of police independence? What is the significance of requirements that the Attorney General approve of some prosecutions and the use of some investigative powers in the national security context? Does this qualify the role of police independence in the national security context? What is the relevance of the November 2003 Ministerial Directions to the RCMP with respect to national security investigations? Is the distinction between the responsible Minister being informed about high profile or controversial national security investigations by the RCMP as opposed to giving orders or directions about the conduct of particular investigations sound? Is it widely understood by the police and the public?