POLICE, POLITICS AND THE VALUE OF IMPARTIALITY

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I INTRODUCTION

The purpose of this paper is to explore the principle of impartiality in policing as it relates to political activity by individual police officers and police associations. As will be discussed in this paper, the separation of police from politics is based on the need to maintain both the appearance and reality of impartiality of police. This impartiality is fundamental to democratic policing and is reflected in the oath of police officers to uphold the law "without favour or affection, malice or ill-will". This impartiality preserves and promotes public confidence in police. Effective policing in a democracy depends upon the confidence and cooperation of the public.

The separation of police from politics is designed to prevent the politicization of police. It is achieved by compliance with two conventions: 1) limits on political control of police; and 2) non-involvement by serving police officers in politics. These conventions place restraints on both politicians and police from interference with each other's business. These conventions are two sides of the same coin. These conventions have a long history, which will be briefly described. These conventions may be under threat today. The threat comes from improper attempts both by politicians to influence police operations and by police officers and police associations to influence political agendas.

While they have their origins in the common law, these conventions have been codified to some extent in legislation. Federal and provincial legislation governing police services have been carefully designed to prevent the first threat by codifying the convention which protects police independence. Less legislative attention has been paid to addressing the second threat. This paper will review existing legislation and the potential challenges to such legislation.

II POLITICAL AWARENESS DISTINGUISHED FROM PARTISAN INVOLVEMENT

It is important to distinguish between police engaging in partisan political activity and police awareness and sensitivity to the political context in which policing occurs. The reason for making this distinction is to recognize that a complete separation between policing and politics is not realistic, since policing is an inherently political activity. [1] In the context of this discussion, engaging in political activities refers to the use of political pressure by individual police officers or police associations for the purpose of furthering a political party, cause, faction, person or idea. In contrast, acceptance of the political context of policing means being politically sensitive and aware of each situation, as well as working with and managing the political interests and players. Community policing accepts the reality of the latter concept.

The political dimension of policing is apparent in the various relationships (both fiscal and managerial) which occur between the police and municipal, provincial and federal governments. For example, control over police financial resources or budget has a political facet especially where funding is tied to specific policing activities or projects. Through these resource allocations, political decisions and preferences can directly or indirectly encourage police to focus on certain areas. Involvement in legislative changes is another area where politics enter into the picture given that police are often consulted on legislative reforms and political considerations are inescapably involved in policy and legislative reform. Community policing is another highly politicized area because it involves building alliances with the community to win support for police strategies. Professor Margaret Beare of Osgoode Hall Law School discussed the politics involved in policing in a research paper where she quoted from a Police Futures Group Study Series #3 *Police Executives Under Pressure*:

> While direct political involvement in policing may typically be more evident in the United States than in Canada however, Canadian police executives across the country acknowledge that they operate in a small 'p' political atmosphere. They claim further that the movement toward community policing has increased this politicization of their work:
>
> > 'To manage community policing effectively, police executives must build alliances with the community and win support for police strategies. Working like this is a delicate balancing act between competing demands. Police leaders must avoid offending some constituents while satisfying the demands of others. They must also apply the different policies of three levels of government, comply with

1 New Brunswick Department of the Solicitor General, *New Brunswick Policing Study, The Legal Status of the Police*, background paper, by Mary Hatherly, 1991, at 29.

> the direction of a local civilian governing authority, and submit to one or more police oversight body…maintain good relations with police unions, senior managers and operational officers….take heed of the courts, understand the criticism of academics, implement the management policies of finance departments, resolve the conflicting demands of different interest groups, advocate the rights of minority groups, and be ready to speak when the media requires it.' [2]

While the political dimensions to policing mentioned above should be acknowledged and are accepted, it is equally recognized that overt partisan political activity and influence are different matters which are a serious concern for policing. It is those latter political activities are the focus of this paper.

2 M. Beare, "The History and the Future of the Politics of Policing" background paper for the Ipperwash Inquiry, (2004) at 40.

III LEGISLATED INSULATION OF POLICE FROM POLITICAL DIRECTION

1. ORIGINS OF THE PRINCIPLE OF IMPARTIALITY

The concept of police impartiality is expressed in the fifth of the nine principles laid down by Sir Robert Peel in 1829 when, as Home Secretary, he established the London Metropolitan Police, which is regarded as the origin of our modern police services. Those principles are continually referred and adhered to by most democratic police services. The fifth principle reads as follows:

> 5. To seek and preserve public favour, not by pandering to public opinion, but by constantly **demonstrating absolutely impartial service to law, in complete independence of policy** and without regard to the justice or injustices of the substance of individual laws; by ready offering of individual service and friendship to all members of the public without regard to their wealth or social standing; by ready exercise of courtesy and friendly good humour; and by ready offering of sacrifice in protecting and preserving life. [emphasis added]

The principles of impartiality and independence of police from direct political control was essential to overcome the resistance of the English people to the introduction of a civil police service. Despite appalling crime rates, Britons feared that a police force controlled by the government would encroach upon their cherished civil liberties. This fear had been fuelled by memories of the military police, unleashed by Oliver Cromwell during the Commonwealth of 1649 – 60, and the reign of terror following the French Revolution of 1789, when the new Revolutionary Government used its state authority and police to imprison and execute anyone denounced as an enemy of the state, including members of the old regime. 3

The fears of that era were overcome through strict adherence by British police to the principles laid down by Sir Robert Peel. 4 Democratic policing, in which police are entrusted with special powers that are only exercised under certain conditions and with restraint, is now accepted as essential to the rule of law, in which all citizens are both equally subject to the law and entitled to equal protection of the law. This ensures the enjoyment of civil liberties in an ordered society. Democratic policing is based on a careful balance in which police enjoy a high degree of operational independence, but remain subject and accountable to civil authority. At the same time, the fears of political police have been proven time and

3 Sir Carleton Allen Kemp *The Queen's Peace* (London: Stevens & Son Limited, 1953) at p. 108

4 J.J. Tobias "Police and Public in the United Kingdom" *Police Forces in History* (London: sage Publications, 1975) at p. 100

again in modern history. Totalitarian regimes rely upon political police to repress dissent and maintain order for the benefit of the ruling party. They are, for this reason, often referred to as "police states".

2. INCOMPATIBILITY OF POLICE AND POLITICS

The principle of impartiality in policing appears to be well established and uncontroversial. The traditional bar against police participation in political activity is rooted in the principle of police impartiality. The independence of police from political control is well-accepted:

> The truth is that a police officer holds a public position, that of peace officer, in which he owes obedience to no executive power outside the police force. The chain of command therefore terminates at the chief constable, who is in effect an independent authority, and must act free from all political influence. 5

In terms of partisan political involvement by police, there are numerous authorities for the proposition that this type of activity is incompatible with the impartiality necessary to the fulfillment by police of their duties.

Paul Ceyssens, in the authoritative Canadian law text *Legal Aspects of Policing*, states the traditional view of political activity by police under the heading 6.12 "Political Activity":

> Participation in political activity has historically been considered incompatible with the impartiality necessary to the fulfillment by police of their duties, and most jurisdictions have formulated some type of restriction on the right of police officers to engage in political activity. The form of restriction ranges from simply prohibiting involvement in "partisan" forms of political activity, to regulating police political activity even where traditional political parties are not involved by prohibiting involvement in school boards and municipal councils through the imposition of a ban on "political activity" generally. 6

Ceyssens goes on, however, to note that "recent years have seen a movement in favour of greater political activity rights for police officers."

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5 H.W.R. Wade & C.F. Forsyth *Administrative Law* Seventh edition (Oxford: Clarendon Press, 1994) at pp. 152 - 153

6 P. Ceyssens, *Legal Aspects of Policing*, looseleaf (Saltspring Island, B.C.: Earlscourt, 1994).
Paul Ceyssens also explored the concept of police impartiality in 2000 in an article entitled "Off Duty Conduct: A Discussion Paper" prepared for the British Columbia Office of the Police Complaints Commissioner.

The principle of impartiality in policing was explored in 1988 by the Honourable René J. Marin, then Chairman of the Royal Canadian Mounted Police External Review Committee, in Discussion Paper 7: "Off-Duty Conduct" and in Discussion Paper 10: "Conflict of Interest." Justice Marin concluded that police involvement in politics was incompatible with the principle of impartiality:

> Active participation in politics has always been thought to be incompatible with the impartial and independent exercise of discretion which is such an essential element of police work. Indeed, the vaunted "independence" of the police has always been justified in terms of the need to protect the exercise of their authority from "improper political interference".[7]

The independence of the police is necessary to allow them to "discharge the duties of [their] office faithfully and according to the law", as they are sworn to do. [8] The Saskatchewan Police Commission, in a 1981 report, referred to the potentially distorting influence of political considerations on the exercise of police independence:

> In a social structure which operates under the rule of law, a great deal of importance is placed upon the role of the police. Ideally, they are an independent body designated by society to enforce the will of the people as evidenced by the laws enacted by the various law making bodies within the governmental framework. **Such independence is essential to be assured that there will be a fair and even handed enforcement which will not be unduly weighted by political**, racial, financial or other **influences which would serve to distort the process.**
>
> Clearly, such independence cannot be entirely accomplished because complete independence could just as easily lead to an autocratic abuse of power which would be unrestrained unless the persons exercising the power are responsible to some authority.[9] [emphasis added]

Earlier, Professor Michael Banton of the University of Edinburghdiscussed the importance of police impartiality in an essay titled "The Segregation of the Police Officer's Role in Britain":

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7 Royal Canadian Mounted Police External Review Committee, *Discussion Paper 7: Off-Duty Conduct,* background paper, by Hon. René Marin at 34.

8 *The Municipal Police Recruiting Regulations, 1991* P-15.01, Reg.5, Form 6 "Oath of Police"

9 Saskatchewan Police Commission, *Report of the Saskatchewan Police Commission on its Public Inquiry in respect of the Relationship between the Chief of Police and the Board of Police Commissioners for the City of Estevan,* by T.C. Wakeling, Q.C., Chairman, for the Commission, 1981 at 10.

> If the policeman is too much involved in community affairs and loyalties, he lacks the impartiality required of an authority figure. If, on the other hand, he is detached too much from the community, he no longer has the understanding of people's feelings which he needs if he is to exercise his discretion effectively.
> …
> If the public are to have confidence in the impartiality of the police it is essential that their exercise of the police role shall not be improperly influenced- or, perhaps almost as important, shall not *appear* to be improperly influenced – by their incumbency of private roles. This need to prevent conflict of interests, or an apparent conflict of interests, is important to many occupations. A member of parliament is required to "declare his interest" before speaking on any subject in which he has a financial concern. A scandal is aroused if a local council gives unduly favourable contracts to one of its own members who manage a building firm. To prevent this sort of conflict a policeman is forbidden to engage in any activity which might appear to compromise his role as a policeman. He may not identify himself with any controversial group in politics or religion.[10]

3. SCHEME UNDER THE POLICE ACT

The Police Act, 1990 of Saskatchewan is typical of legislation governing police in other Canadian jurisdictions. While the legislative references that follow are to that *Act*, similar provisions can be found in its counterparts across Canada. *The Act* is carefully designed both to insulate police from undue political interference and to allow for input by police into the development of policy affecting policing.

Although policing is primarily concerned with enforcement of federal legislation, especially the *Criminal Code* of Canada, and some provincial laws, primarily moving vehicle offences, policing is a municipal responsibility (s. 25). Although a municipal responsibility (in all but the smallest municipalities: s. 20), municipal council has no direct authority over municipal police. Operational control is vested in the Chief of Police (s. 35). Civilian governance and oversight are provided by the board of police commissioners (s. 31), the Saskatchewan Public Complaints Commission (s. 16), the Saskatchewan Police Commission (s. 19), and the courts. The latter judicial oversight is a matter of common law ensuring that police are accountable to the law.

The Supreme Court of Canada has recognized that police are public office holders separate from the executive branch of government. [11] The independence of police officers is emphasized in their oath of

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10 M. Banton, *The Policeman in the Community*, (New York: Basic Books, 1964) at 188.

11 *R v. Campbell* [1999] 1 S.C.R. 565 at 588 – 592, para. 27- 32.
"The Status of Police

office, in which they swear to "serve Her Majesty the Queen, uphold the principles in the *Canadian Charter of Rights and Freedoms*, preserve the peace, prevent crime and other offences, enforce the law and otherwise discharge the duties of my office faithfully and according to law."[12] In swearing to serve the Queen, police are bound to sovereign authority, placing them above politics and beyond the government of the day.

The Saskatchewan Police Commission itself exists to provide an authority independent from the provincial government, which is constitutionally responsible for the administration of justice, including policing. This responsibility is carried out by the Attorney General, who holds a special place in Cabinet based on the Attorney General's duty to also uphold the law.[13] It is not coincidental that the mandate conferred by the *Act* on the Commission (s. 19(1)) is identical to that of the Attorney General/Minister of Justice (s. 18). The Commission is established as an independent and non-partisan administrative body with administrative, quasi-judicial and legislative capacities. It also provides a forum through which police can provide input into policy and administrative matters affecting policing. The Commission is required, for example, to consult on proposed regulations with local boards of police commissioners, the Saskatchewan Association of Chiefs of Police and the Saskatchewan Federation of Police Officers (s. 12(2)). The minister is subject to a similar requirement before recommending appointments to the Saskatchewan Public Complaints Commission (s. 16(4)). While these are legal requirements, in practice there is more consultation with these representative bodies through, for instance, the Provincial Training Board for the Saskatchewan Police College. In this manner, the views of serving police officers are heard without the need for recourse to the political process.

In these and other ways, *The Police Act, 1990* supports the separation of police from politics and reinforces the principles of impartiality and independence of police. These principles, while now expressed in legislation, are found in earlier statements of Saskatchewan courts. The Saskatchewan Court of Appeal referred to these principles in its 1944 judgment in *Bruton v. Regina City Policemen's*

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." (para. 27)

12 *The Municipal Police Recruiting Regulations, 1991* Sask. Reg. 5/92, Form 6.

13 See sections 9 and 10 of *The Department of Justice Act*, S.S. 1983, c. D-18.2 ss. 9-10. Also see L. Sossins, "Speaking Truth to Power? The search for bureaucratic independence in Canada" (Winter 2005) 55 Univ. of Toronto L.J. 1 at 23.

Ass'n. Then Chief Justice of Saskatchewan Martin explained the scheme for separate governance of policing from the municipal council:

> The police commissioners constitute a separate department of municipal government; they are invested with special statutory powers and are independent of the municipal council except that they are dependent upon the council for moneys with which to maintain the police force. In providing for such a body to administer the police force, I am of the opinion that it was the intention of the Legislature to ensure a just and impartial carrying out of the duties which devolve upon the constables and peace officers and to place the chief of police, the officers and the constables of the force in a position where they are removed from the influence of persons who may attempt to interfere with the due performance of police duties such as the detention and arrest of offenders, the preservation of the peace, the enforcement of laws, and other similar duties with which the police officers are entrusted by law.
>
> Under the provisions of *The City Act* police officers and constables are appointed by the Board of Police Commissioners but this does not make them servants or agents of the city or of the police commissioners; they are appointed to perform a public service in which the city has no corporate interest; their duties are derived from the law and not from the city or the police commissioners, and in performing these duties they act not in the interests of the city but of the public at large.[14]

Bruton remains good authority and has been repeatedly cited in Saskatchewan decisions.

14 [1945] 2 W.W.R. 273, at 285–286, Martin, C.J.

4. IS THERE A NEED FOR THIS PROTECTION?

A. Increased Government Involvement and Interference with Police Activities

As mentioned in the Introduction to this paper, the separation of police from politics is designed to prevent the politicization of police and is achieved by compliance with two conventions: 1) limits on political control of police; and 2) non-involvement by serving police officers in partisan politics. The following discussion relates to the first convention.

The more that police officers become involved in politics, the more the line is blurred between government and police and the more politicians are tempted or invited to tread on police independence. Although police want operational independence, this is undermined when they actively seek political roles or identify their interests with the interests of politicians or political parties. Politicians and government officials appreciate the influence that police support can provide to their issue, platform, candidate or party. In combination, there is a real danger of eroding the principle of police impartiality and destroying public confidence in both the police and the government.

Police cannot have it both ways. If police want to maintain their independence from political interference, which is ensured by observance of the first convention, then police must continue to observe the companion convention on non-participation in partisan politics.

These are not fanciful concerns. Attempts by politicians and government officials to exert improper influence over police are a matter of public record. Some of these attempts have resulted in scandals and public inquiries. Allegations of government intervention in police activities were examined in the following judicial inquiries. These inquiries show that when inappropriate political direction of police operations is revealed, it is recognized as wrong and justly criticized. This recognition is a safeguard of the convention.

B. The Ipperwash Inquiry

The Ipperwash Inquiry was established by the Government of Ontario on November 12, 2003, under the *Public Inquiries Act*, with Justice Sidney Linden as Commissioner. Its mandate was to inquire and report on events surrounding the death of Dudley George, who was shot in 1995 during a protest by First

Nations representatives at Ipperwash Provincial Park. Justice Linden issued his report on 31 May 2007.15

Protesters had built barricades at Ipperwash Provincial Park to underline their land claim and to protest the destruction of a nearby burial ground. While the facts were not completely clear on what happened, it was alleged that the Ontario Provincial Police moved in to remove the protesters from the park. The police said they had no choice but to draw their guns because the protesters were armed. Further allegations were made that the Ontario Premier at the time, Mike Harris, issued the order for the police to rush the barricades in a night time raid.

The evidence-gathering part of the Inquiry stretched from 2004 through to 2006. Allegations of government interference surfaced many times. For example, a 17-minute tape recording surfaced that records a conversation between OPP Inspector Ron Fox and Inspector John Carson, the OPP commander overseeing the standoff at Ipperwash, prior to Dudley George's death. In it, they discuss the Premier's view that the government has "tried to pacify and pander to these people far too long" and to use "swift affirmative action" to remove them from the park. In another example, particularly shocking testimony came from former Ontario Attorney General Charles Harnick. Harnick testified in November 2005 that former Premier Mike Harris said "I want the f****** Indians out of the park," during a high level meeting about the Ipperwash occupation just hours before the fatal shooting of Dudley George. When Harris appeared at the inquiry in February 2006, he denied using that language. Justice Linden found otherwise.16 However, Justice Linden also found that Premier Harris "did not inappropriately direct the OPP on its operations at Ipperwash or enter the law enforcement domain of the police."17 Justice Linden did criticize the failure to separate political direction from police operational responsibility, finding that blurred lines of communication created an appearance of impropriety:

> There was a danger in these circumstances, both with the transmission of information from the Premier and Ministry to the provincial police and with the transmission of police information to the politicians. Even though there may not be actual interference by politicians in police operations, the public's perception of non-interference by the

15 *Report of the Ipperwash Inquiry* (http://www.ipperwashinquiry.ca/report)

16 *Ibid.* at volume 4, p. 46

17 *Ibid*, at Volume 4, p. 48

> government is a fundamental principle that the Premier, Ministers, and other politicians must adhere to."[18]

In his conclusions, Justice Linden noted that "The Ipperwash Inquiry is the fifth major Canadian public inquiry in the last twenty-five years to address police/government relations in detail. This issue has also been discussed at length in the United Kingdom, New Zealand, and Australia."[19] He observed of police/government relations that, "unlike the case in many other issues considered in this Inquiry, there has been little advancement or reform in the last twelve years in the legal and policy rules governing this fundamental constitutional relationship." He "concluded that the concept or doctrine of police independence needs to be modernized in light of an evolved understanding of how police and governments can and should work together in a modern democracy."[20] The Report made several recommendations on this relationship, including that explicit rules be legislated to govern ministerial direction of police.[21] Justice Linden explained that these

> "reforms will significantly reduce the perception and fact of inappropriate government interference. Clearer rules will also promote accountability, transparency and public confidence in key democratic institutions and leaders. Clearer rules are also likely to increase public safety and improve police and government decision-making during potentially volatile public order incidents."
>
> "Care must be taken to ensure transparency and clarity in these matters so that police and governments can both be called to account for difficult and controversial decisions, irrespective of how we strike the balance between police and government. When something goes wrong, as it tragically did at Ipperwash, the public has a right to know who made the key decisions and why. In an ideal world, proceedings such as this Inquiry would not be neccessary."[22]

18 *Ibid.*, at Volume 4, p. 48

19 *Ibid.* at Volume 2, p. 304

20 *Ibid.* at Volume 2, p. 91

21 *Ibid.* at Volume 2, pp. 377 - 379

22 *Ibid.* at Volume 4, p. 92

C. Sponsorship Scandal

Professor Kent Roach of the University of Toronto Faculty of Law (and former Dean of the University of Saskatchewan College of Law) discussed the sponsorship scandal in his paper, "Four Models of Police-Government Relationships". Professor Roach summarized the case in his paper:

> On May 11, 2004, the RCMP laid 12 fraud charges against Chuck Guite, a retired bureaucrat and Jean Brault, president of Groupaction Marketing Inc. The charges arose from a scandal over government spending that threatened the re-election prospects of the Liberal government and led to both Parliamentary committee hearings and the appointment of a royal commission.[23]

The findings of the Commission are not as relevant to the discussion of politicians and police, but the discussions around the RCMP investigation of the sponsorship scandal are relevant. Professor Roach suggested what can be learned from the sponsorship scandal about the police-government relationship:

> Jean Lapierre, often described as Prime Minister Martin's 'Québec Lieutenant' stated in an interview in April, 2004 that charges in the sponsorship scandal "would provide relief, because I think people want to see people found guilty. They want to see people accused and eventually found guilty, that's clear…I think people say 'Wait a minute, if something improper happened here, why hasn't someone paid for it?". These comments led the Justice Critic of the Official Opposition to allege that "By the Prime Minister's silence he is allowing his political friends to direct and influence the RCMP criminal investigation." Anne McLellan, the Minister of Public Safety with responsibility for the RCMP, stated that Lapierre's comments were "totally irrelevant" to the police investigation and that "the honourable member is very aware that no one pushes the RCMP." The Commissioner of the RCMP also denied that there was any political pressure on the police force. In light of the APEC findings, however, others were not convinced. Professor Pue for example stated "the question is still hanging out there. Can Canadians be assured that the RCMP is absolutely free of political interference from its political masters. The answer, broadly, is no.
>
> After the charges were laid, the leader of the Opposition, Stephen Harper, stated: "I think the timing of the charges after Mr. Lapierre demanded pre-election charges is more than a little suspicious…I would not want to speculate. It just seems to me that the timing is suspicious." A RCMP spokesperson again denied any political interference, stating "Our investigation is totally independent from whatever is going on in politics. We're just going step by step and turning over almost every stone we can to make the best investigation possible." Anne McLellan responded that allegations of political interference in the charging decision was "appalling and profoundly unacceptable" and also denied that the laying of charges in the political scandal would affect the calling of the election. The Québec Attorney General also participated in the laying of the charges because of a decision to proceed by way of direct indictment. Somewhat

23 K. Roach, "Four Models of Police-Government Relations" background paper for the Ipperwash Inquiry, (2004) at 26.

> surprisingly, the issue of police independence was not subsequently discussed in Parliament. The focus was not on constitutional principle but political matters relating to the sponsorship scandal. It remains to be seen whether allegations of political interference will be litigated… In the absence of such litigation or careful probing in Parliament, almost nothing is known about whether or how the police and the government interacted on this matter.
>
> The controversy over the timing of the police charges in the sponsorship scandal reveals the persistence of the problem of police-governmental relationships in Canada. Allegations of political interference can do damage both to the government and the police, but little has been done to clarify the basic principles of police independence or ensure transparent processes and protocols to prevent such allegations. 24

D. Hughes Inquiry

Commissioner Ted Hughes' APEC report ("Hughes Report") describes government interference in police operations at the Asia Pacific Economic Co-operation ("APEC") Conference held in Vancouver in November 1997. This Inquiry points to the dangers of improper political direction of police operations.

In summary, the allegations in the Hughes Report relating to government interference were that the police took the actions that they did (wrongful arrests, unnecessary roughness, use of pepper spray, police dogs, removal of protesters from certain areas, restricting freedom of expression at the site) in direct response to orders from the Prime Minister's Office. Commissioner Hughes found that there was indeed improper federal government involvement in at least two aspects. Both instances involved interference by Jean Carle, Director of Operations in the Prime Minister's Office. The first instance related to the arrest of protestors who set up tents and created a protest camp at a site near the APEC conference. Jean Carle's interference caused the protesters to be arrested by the RCMP despite the fact that they were peacefully protesting and there did not appear to be any real security concerns. The second instance related to the security perimeter that police erect around such events. Jean Carle insisted on having the security fences moved further back so that the protest area would be small and farther away from the route that those attending the APEC Conference would travel along. Fortunately for protesters, RCMP Superintendent Thompsett and Chris Brown did not entirely meet Jean Carle's orders and instead moved the security perimeter a good deal less than Jean Carle had wanted. Commissioner Hughes stated the following with respect to these two instances of improper interference:

24 *Ibid*. at 26 and 27.

30.4 Improper Federal Government Involvement

The federal government's role in the removal of the tenters from the grounds of the Museum of Anthropology on November 22 was one of two instances of its improper involvement in the RCMP security operation. I am satisfied that it was because of the government's intervention that the tenters were removed that evening. Were it not for that involvement, the contrary view of Site Commander Thompsett would have prevailed. As it happened, his view did not carry the day because of the acquiescence of other RCMP personnel, principally Supt. May, who had succumbed to government influence and intrusion in an area where such influence and intrusion were inappropriate.

The other instance of improper and inappropriate federal government involvement in the RCMP's provision of security services was with respect to the size of the demonstration area adjacent to the law school. In that case, the government's efforts did not prevail due to the intervention of others, including Site Commander Thompsett, on behalf of the protesters. Had those intervenors not prevailed, the security challenges the RCMP faced on November 25 may well have been increased.[25]

E. The Marshall Commission and the Nova Scotia Cabinet Ministers

The Marshall Commission, issued December 1989, conducted a full-scale public investigation into the operations of the justice system in Nova Scotia. While the wrongful conviction of Donald Marshall Jr. was the main focus of the Commission, it also examined two cases where Nova Scotia cabinet ministers had been the subject of RCMP criminal investigations but were never charged. In both cases, there was interference with the police investigations by the Attorney General's Office. With respect to this aspect, the Commission concluded:

> What the RCMP failed to do was to follow through on their stated 'principle that police officers have the right to lay charges independent of any legal advice received if they are convinced that there are reasonable grounds to do so'….It was improperly influenced by factors unrelated to the investigation itself, but it attempted to explain the decision not to proceed in evidentiary and discretionary terms. The RCMP put its working relationship with the Department of Attorney General ahead of its duty to uphold the law. [26]

25 Commission for Public Complaints Against the RCMP, *RCMP Act* – Part VII Subsection 45.45(14), *Commission Interim Report Following a Public Hearing Into the Complaints Regarding the Events that Took Place in Connection With Demonstrations during the Asia Pacific Economic Cooperation Conference in Vancouver B.C., in November 1997 at the UBC Campus and Richmond detachments of the RCMP* (Ottawa: CPC RCMP, 31 July 2001).

26 Nova Scotia, *Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: Queen's Printer, 1989) at 212-214.

The Commission stated that the RCMP's refusal to proceed with an investigation without authorization 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." [27]

27 *Ibid*. at 216.

IV LEGISLATED RESTRICTIONS ON POLICE INVOLVEMENT IN PARTISAN POLITICS

Legislation and Approaches in Other Provinces

The convention under which police officers voluntarily abstain from political involvement was generally respected in Canada in the past. The departure from this norm may be viewed as a reflection of a rights-based generation in which individual rights take precedence over responsibilities. As individual police officers and police associations have begun to challenge this convention, legislators in some jurisdictions responded by codifying traditional bars.

The 1990's saw a rise in political activity by police officers, often through their associations. At the same time, the Governments of Canada, Ontario, Québec and Newfoundland legislated limits on political activity by police officers. Before legislation was enacted by the Parliament of Canada and by the Ontario Legislature, discussion papers were commissioned by these governments. The following is a summary of the discussion papers and the legislation that was enacted.

A. The RCMP

The Royal Canadian Mounted Police External Review Committee reviewed several policing issues in the 1980's. In 1988, this Committee published a number of discussion papers, two of which discussed political activity by police. Both Discussion Paper 7 "Off-Duty Conduct" and Discussion Paper 10 "Conflict of Interest" explored the issue of political activity by police officers, but made no recommendations for legislation. When the *Royal Canadian Mounted Police Regulations, 1988,* were passed, the regulations prohibited members from running as candidates in elections. The *Regulations* also prohibited members from working for a candidate or a political party. In this way, the *Regulations* were very restrictive in terms of political activity rights.

In 1999 and 2000 the regulations relating to political activity rights were amended to be more permissive. These amendments were made in response to the 1998 judgment in *Delisle c. Canada (Procureur General),* where the Quebec Superior Court held that an absolute prohibition on political

activities violated the *Charter of Rights and Freedoms*. [28] (This case is discussed further in Part VI of this paper.)

The current regulations distinguish between separate categories of members according to whether they are part of senior management, are peace officers or are not peace officers. The starting premise for an RCMP member who is a peace officer is that he or she may participate in political activities while off duty and not in uniform, so long as that participation does not compromise any particular ongoing criminal investigation in which the member is involved or seriously impair the integrity or impartiality of the Force. The exception to this premise is the requirement for such a member to be on leave without pay in order to: a) solicit or receive funds; and b) to run for nomination or stand as a candidate in an election or for the leadership of a political party.

Where a member runs for nomination or stands as a candidate in an election, he or she is required to take a leave of absence which starts and continues during the time in which the member runs for nomination and/ or stands for election as a candidate. The way that the regulations are drafted, it appears at first glance that each leave of absence is separate for each stage of the process (i.e. nomination, candidacy). However, the regulations specify that this leave is continuous and runs for as long as the member is involved in the nomination and candidacy processes. In terms of the nomination process, the leave begins on the day on which the member enters the process and ends on either the day he or she withdraws or the day on which the nomination process is concluded. Where a member is a candidate in an election, the leave of absence begins on the day that the member becomes a candidate (i.e. when he or she wins the nomination) and ends whenever the member loses the election or withdraws. Where a member is elected, the leave of absence begins on the day after the election and ends on the day before the day on which the member assumes the duties of the elected office.

Where a member is elected in federal, provincial or territorial elections or as a leader of a political party, he or she cannot remain a member of the RCMP if the member chooses to assume the duties of any of those elected offices. Senior management members are subject to an absolute prohibition from engaging in political activities.

28 [1998] A.Q. No. 2663

B. Ontario

In 1991, the Ontario Ministry of the Solicitor General published a document entitled "Political Activity Rights for Police Officers in Ontario: A Discussion Paper". Three approaches were considered in the discussion paper:

1. No restrictions on political activity by police officers
2. Broad, but not unrestricted, political rights
3. Very restricted political rights.

While the paper did not make any recommendations as to the preferred approach, the approach that was eventually embodied in legislation was the second approach where broad, but not unrestricted, political rights were provided.

In summary, section 46 of the *Police Services Act* prohibits police officers from engaging in political activities except as the regulations permit. Ontario Regulation 554/91, *Political Activities of Municipal Police Officers*, sets out the activities in which police officers may engage. Participation of a public nature is allowed when an officer is not on duty and not in uniform. Participation as a candidate in a federal, provincial or municipal election requires a leave of absence without pay during the campaign and resignation from the force if elected. Reinstatement in employment within a period of six years is, subject to certain restrictions, available as of right upon ceasing to hold office. Police chiefs and deputy chiefs are not permitted to be candidates.

Where a leave of absence is required, there are provisions specifying when the leave starts and ends. For a municipal election, a leave of absence shall not begin earlier than 60 days before the polling day and shall not continue after the polling day. In terms of a federal or provincial election, the leave shall not begin earlier than the day on which the writ for the election is issued or later than the last day for nominating candidates and shall not continue after polling day. In addition, the leave shall not continue after the day the police officer withdraws from or loses the nomination campaign or, if the officer wins the nomination, after polling day.

Police officers are also allowed, without resigning or taking a leave, to be appointed to or run for election to a local board, such as a school board, public library board, local board of health or planning board. For obvious reasons, service on or participation in political activities in relation to a police services board is excluded. This right is also subject to the conditions that it not interfere with the performance of the officer's duties as a police officer, or place or be likely to place the officer in a position of conflict of interest.

The regulation permits a police officer while not on duty and not in uniform to express views on any issue not directly related to his or her responsibilities as a police officer. The officer must not, however, associate his or her position as a police officer with the issue or represent the views as those of a police service.

Where authorized to do so, however, an officer may express views on any issue, or attend and participate in a public meeting, as a representative of the service. No such authorization, however, is allowed during an election campaign to permit an officer on behalf of the service to support or oppose a candidate or a political party, or a position taken by a candidate or political party.

Finally, there are two express limitations on political activity. A police officer must not participate in soliciting or receiving funds, and must not engage in any political activity that places or is likely to place the police officer in a position of conflict of interest. This overriding obligation to avoid a conflict of interest is consistent with the way in which other public agencies have dealt with the liberalization of political rights.

C. Québec

The *Police Act* in Québec contains restrictions on the political activity in which police may engage. Certain levels of employees are completely barred from participating in any political activity (such as the Director General and deputy directors of the Sûreté du Québec, and the directors and assistant directors of other police forces). Police officers, other than those mentioned, cannot be candidates or engage in partisan activity within the area where they live unless they take a leave of absence. This application is required to be made to the highest competent authority and the letter of authorization shall

fix the dates on which the leave is to begin and to end. The legislation provides that the provisions of the *Election Act* also apply to police officers.

In the *Election Act*, the employee's leave begins on the day requested by the employee and ends on the thirtieth day following the expiry of the period for filing nomination papers if he or she is not a candidate or, if he or she is nominated, on the thirtieth day following the declaration of election.

D. Newfoundland and Labrador

Newfoundland and Labrador have RCMP and the Newfoundland Constabulary. The *Royal Newfoundland Constabulary Act, 1992* provides that a police officer shall not engage in political activity, except in accordance with the regulations. The *Royal Newfoundland Constabulary Regulations* provide that a police officer shall not wear the emblem, mark or insignia of a political party or in another way manifest political partisanship. This is the only legislation in Canada that appears to impose a complete prohibition on political activity by police.

E. Other Provinces

Discussion papers on police and politics have been also issued in New Brunswick, British Columbia and Alberta; however this has not yet led to legislation in the area of political activity by police officers in these jurisdictions.

In 1991, a *New Brunswick Policing Study: Legal Status of Police* Volume IV, written by Mary Hatherly was published which reviewed the place of politics in policing. No specific recommendations were made with respect to the issue. The New Brunswick legislation does not appear to have any specific provisions that limit the rights of an individual police officer to engage in political activities.

In 2000, Paul Ceyssens prepared a discussion paper for the Office of the British Columbia Police Complaint Commissioner entitled “Off-Duty Conduct”, which included a section dealing with political activity. British Columbia has no specific legislation dealing with political activity.

In 2000, a discussion paper entitled, *Policing Alberta*, was issued in which the question was posed as to whether police officers, individually or collectively, should be restricted from political involvement or activism. This discussion paper set up the framework for another document, *Report of the MLA Policing Review Committee*, which was released in July 2002. This report commented on the involvement of police associations in partisan politics:

> **Role of Police Officer Associations**
> There have been recent situations where police officer associations became active in partisan politics, and have adopted confrontational negotiating tactics including on job actions, in Alberta and other provinces. The Committee regards these with concern.
>
> Because of the special authority and powers police have been granted in our society, they must carefully guard their apparent, and real, neutrality in politics. The separation of police associations from partisan politics is a keystone of our justice heritage, a major factor in the strength and stability of the democracy we enjoy. 29

The Committee went on to recommend that police associations exercise self-restraint, with legislation as a last resort. In the final document released in 2004, *Government Policing Plan and Response to MLA Policing Review Committee Report,* the recommendation was that "Police officer associations should carefully monitor their partisan political activity. Legislation should be a last resort." A supplementary recommendation stated that if legislation was to be pursued that it should be in the *Police Officers Collective Bargaining Act*. The Provincial Plan stated the following with respect to these recommendations, "Police Officer Associations, through the Federation of Police Associations will be encouraged to implement this."

Manitoba, Saskatchewan, Prince Edward Island and Nova Scotia do not have specific provisions in their respective police legislation that limit political activities. The Saskatchewan Association of Chiefs of Police submitted a discussion paper to the Saskatchewan Police Commission in May 2007, expressing concern over increased political activity by individual police officers and police associations and asking the Commission to consider regulations to address this concern.

29 *Report of the MLA Policing Review Committee* (Alberta Legislature, July 2002) at pp. 44 - 45

V IS THERE A NEED FOR REGULATION?

Voluntary compliance with traditional conventions worked for decades. Why legislate?

Political Activity by Police Associations

John Sewell, former Mayor of Toronto, in his 1985 book, *Police: Urban Policing in Canada*, predicted the increasing danger of police associations engaging in overtly political activities. Mr. Sewell observed that police associations will be political where they deem it to be in their self interest. Mr. Sewell stated two concerns with police associations engaging in political activities:

> First, there is the long-standing tradition in Canada that civil servants may not participate collectively in political affairs. In some provinces, this tradition has been embodied in legislation. Political involvement by individuals is considered acceptable, but there is a line that is crossed when civil servants attempt to have collective influence on their masters. Police appear to breach this line without censure.
>
> Second, it is important that there be distinction between those who make the laws and those who enforce them. 30

In 1988, René Marin also commented on political activity by police associations in the Royal Canadian Mounted Police External Review Committee Discussion Paper 10: "Conflict of Interest". However, he did not delve into the ramifications of such conduct, likely because the RCMP does not permit unionization of its police officers. He stated the following:

> Moreover, a somewhat different set of considerations arises when police political activity is carried out through a police association. There have been occasions when police associations have taken direct and public interest in the outcome of a municipal election, and there may be other instances where members of police associations, in pursuit of their collective interests, have contributed funds or assistance to a campaign. Such interesting considerations are, unfortunately, beyond the scope of the present paper. 31

Because police associations only operate at the direction of and through individual police officers, any regulation of political activities by police should cover police associations if it is to be effective. To fail to do so allows individual officers to hide behind the cloak of their associations to carry out political activities they could not otherwise do directly.

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30 J. Sewell, *Police: Urban Policing in Canada* (Toronto: James Lorimer & Company, 1985) at 199.

31 Royal Canadian Mounted Police External Review Committee, *Discussion Paper 10: Conflict of Interest*, background paper, by Hon. René Marin at 59.

When police associations become tied to or even appear to become tied to a single political party or candidate, this is dangerous for democracy and can only serve to hurt public confidence in the police.

The 2002 Alberta Report of the MLA Policing Review Committee, mentioned above, articulates the concerns as follows:

> **Role of Police Officer Associations**
> There have been recent situations where police officer associations became active in partisan politics, and have adopted confrontational negotiating tactics including on the job actions, in Alberta and other provinces. The Committee regards these with concern.
>
> Because of the special authority and powers police have been granted in our society, they must carefully guard their apparent, and real, neutrality in politics. The separation of police associations from partisan politics is a keystone of our justice heritage, a major factor in the strength and stability of the democracy we enjoy.
>
> …effective policing depends on the respect, trust and confidence of the public. Actions on the job that may imply that police are acting in their own self interest instead of the interests of justice and of the public seriously impair the effectiveness of police. While police officer associations are important in ensuring that officers are fairly paid and have a positive work environment, they must not intrude into the realm of directing policing activities; that is the responsibility of the police commission and the chief of police. 32

One striking example where political activity by a police association resulted in major public controversy occurred in 2000 when the Toronto Police Association launched a fundraising campaign called "Operation True Blue". Under the campaign, which commenced in January of 2000, the Toronto Police Association utilized telemarketers to solicit contributions from the public. In return for a contribution of a certain amount, donors would receive a Toronto Police Association wallet card or decal (different colours denoted the level of the contribution), which they could display in the windshield of their car. Significant aspects of the campaign included collecting funds from the public to help the Association challenge those municipal politicians who the Association viewed as hostile to its interests and to help elect those who promised to support the Association's aims. The Association also compiled a list of people who did or did not support the campaign through financial contribution. Not surprisingly, these actions evoked public furor and became headline news.

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32 *Report of the MLA Policing Review Committee* (Alberta Legislature, July 2002) at pp. 44 - 45

There are obvious concerns with this type of behaviour. One concern is that it could create the perception in the minds of the public that contributing to the campaign might result in more lenient treatment at the hands of the police. Another concern is that the intrusive nature of the telephone solicitation could raise the possibility that the contributions would not be voluntary. The most troubling aspect is that the political purpose behind the campaign was clearly to intimidate politicians into adopting views and attitudes that were aligned with the Association. In response to these concerns, the Toronto Police Services Board passed a bylaw to regulate certain forms of fundraising by police officers. When challenged, the Toronto Police Association claimed that it was the Association's constitutional right to lobby, to express political opinions and to endorse candidates and political parties. When the Association refused to comply with the Bylaw, the Toronto Police Services Board applied to the court for an interlocutory injunction to restrain the fundraising activities of the President of the Association and the Association. 33 The court granted the Board's application for an interim injunction.

In a news release on February 3, 2000, the Ontario Association of Chiefs of Police (OACP) spoke out against the fundraising campaign:

> 'The fact that the Police Association Executives have dismissed public opposition to its campaign should cause concern and alarm to every citizen and publicly elected official at every level of government. A group of individuals, should not be allowed to tarnish nor diminish the vital role and respect police officers enjoy, for the benefit of the Executive's narrow agenda,' stated Robertson [Chief Ken Robertson, OACP President]. The True Blue initiative challenges public authority and police accountability – two fundamental cornerstones of a democratic society.
>
> The OACP maintains that Police Associations unlike other unions, have a gun, a badge, legal authority and access to information no other citizen can easily access. 'That makes them different' said Robertson, 'and our citizens and communities will not tolerate nor accept real or perceived intimidation in our society- that is the issue'.

While the Association ultimately abandoned this campaign in the face of growing public and political opposition, it continued to advance its agenda through the use of similar tactics. The Globe and Mail, in its lead editorial on October 30, 2000 titled "Whatever happened to 'serve and protect'", condemned the continuing actions of the Toronto Police Association to intimidate politicians, stating:

33 *Toronto (Metropolitan) Police Force v. Bromell* [2000] O.J. No 1674.

> In a democratic society, the state claims a monopoly on the use of force. We place the responsibility for administering it in the hands of police, soldiers, and other peace officers. No one compels them to take it on, but when they do so, certain of their political rights must be curtailed.

While Operation True Blue was one of the more notorious examples of political activity by a Canadian police association, there have been other types of activities which also cause serious concern, such as endorsing political candidates. Many police associations across Canada have started to endorse provincial and municipal candidates during election campaigns.

Some examples include the Toronto Police Association's endorsement of John Tory in the 2003 election for Mayor of Toronto and endorsement of 17 municipal candidates in the 2000 Toronto municipal election. These endorsements were sharply criticized by the Law Union of Ontario, which is a coalition of progressive lawyers, law students and legal workers. The Law Union asserted that this endorsement of candidates was illegal, since section 46 of the Ontario *Police Services Act* prohibits municipal police officers from engaging in any political activity except as the regulations permit. The regulation does not allow police officers to express views supporting or opposing candidates in an election. The police executives of the Toronto Police Association argued that they were not subject to the regulations because they were on leave. On the other side, it was argued that police officers retain their status while on leave and therefore that they would be subject to the regulations. The Toronto Police Board requested an interpretation of the regulations from the Province of Ontario, but never received a response.

There was also an endorsement of candidates by the Ottawa Police Association during the 2006 Ottawa municipal election. In that case, the Ottawa Police Association invited every mayoral and council candidate to declare their position on policing, following which the Association would publish a list of endorsed candidates. Again the argument was raised that this activity was prohibited by the regulations under the *Police Services Act*. Again, it was argued that the prohibition in the regulations only covers officers on active duty, but not those on temporary assignment from the force or working full time for the association. In a CBC news article, "Police union's plan to endorse candidates illegal: lawyer", dated March 3, 2006, Toronto lawyer Paul Copeland commented on the dangers of police endorsing political candidates:

> 'You don't want the police in effect controlling the politicians who are supposed to be controlling them,' said Toronto lawyer, Paul Copeland, who argues that police, like those in the army and judicial system, are expected to remain politically neutral.

It is not just in Ontario that these activities have been taking place. In the 2001 Calgary municipal election, the Calgary Police Association endorsed mayoral candidate Richard Magnus. The reasons identified by the Association for this endorsement were that Magnus wanted to get rid of photo radar, put more officers on the street and boost their salaries. The context for the endorsement was that the Association had been involved in protracted contract negotiations with the city. Again, self interest seems to be a major component in such endorsements.

There have also been endorsements by police associations of provincial election candidates. For example, in the 2003 Ontario Provincial election then Premier Ernie Eves won the endorsement of the Police Association of Ontario, Ontario Provincial Police Association, York Regional Police Association, Halton Regional Police Association and Toronto Police Association.

Saskatchewan has not been immune from this activity. For example, in the 2000 municipal elections, police associations endorsed mayoral candidates who committed to agendas promoted by police associations, including increasing the number of police officers back to the levels before budget-driven cut-backs of the late 1980s and 1990s. Because there is no legislation in this province that would prohibit this activity, there was nothing illegal about providing such endorsement or support. This endorsement was, however, criticized by *The Leader Post* lead editorial of October, 25, 2000 titled "Police should remain neutral". Police associations have since repeated and expanded public support for members of Council, especially mayoral candidates. What makes this support of the mayoral candidates of greater concern is that fact that clause 25(4)(b) of *The Police Act, 1990* provides that the mayor is automatically a member of the local board of police commissioners. Traditionally, most serve as chair of the board. In effect, then, police associations may develop a direct relationship with and expect favours from the civilian body overseeing the police service, bypassing the chief of police as commander of serving members.

Most recently, individual police officers from the three largest cities in Saskatchewan were nominated by the provincial opposition party and are running for election to the Legislative Assembly of Saskatchewan. This is a significant escalation of political activity, with individual police officers coming out from behind the cloak of police associations. This development mobilized the

Saskatchewan Association of Chiefs of Police to call upon the Saskatchewan Police Commission to consider enacting regulations to limit political activity by police.

The origins of this increased political activity appear to be from the United States of America. *The National Post*, in an article titled "Trend shows police unions getting what they want: U.S. firm trains in high pressure politics" on page 16 of its January 17, 2000 issue, described Canadian police associations following the example of their U.S. counterparts:

> The campaign to influence police service boards and control chiefs in Ontario is being driven in large part by labour tactics proven in the United States. …
> Craig Bromell, president of the powerful Toronto Police Association, said he and his associates also looked to the United States for a crash course on power politics. When he applied the American methods to Toronto, Mr. Bromell said he met with success."

While these tactics may succeed in the short-term, police associations likely do not consider the long-term deleterious effect of politicization of police or the historical reality of political influence on American police. This influence arises from the very different political origins of the United States and Canada.

Created in revolution against government, the United States sought to guarantee individual liberty through direct democracy and control of government institutions and officials. Most U.S. public officials, including those in the justice system, are either elected or directly appointed and responsible to elected leaders. This includes elected judges, district attorneys and sheriffs and appointed U.S. Attorneys, judges and chiefs of police. Many of those appointed have little security of tenure. It is not uncommon, for example, for U.S. Attorneys and local chiefs of police to be removed from office upon the President or Mayor who appointed them leaves office.

The politicization of policing in America, like the endemic corruption that afflicts many U.S. police services, has long been recognized as a serious issue. Edwin Delattre, in the noted U.S. text *Character and Cops: Ethics in Policing*, points to political interference of policing as "the greatest threat" to professional policing in America.

> Everywhere in America, and conspicuously in Washington, D.C., the greatest threat to honourable, professional, trustworthy policing is the interference of politicians who understand

> neither the nature of police work nor the tradition of higher standards for public servants than for the general public. 34

Earlier, Professor Cyril Robinson, of Pennsylvania State University, described the situation in municipal police departments as follows:

> Calls for police departments to be free of political control or interference have been frequent throughout police history, appear to be nationwide, and part of a larger movement to take the city government 'out of politics' through the employment of city managers and the like. 'Political control' has usually meant that police chiefs would rise and fall with the fortunes of the mayor; that the department would be used to further the mayor's career by campaigning for the mayor's candidates, to favour the mayor's friends, to arrest and harass his enemies, and to enforce the law on a politically selective basis."**35**

U.S. civil service reforms have attempted to move away from this model. It is not the model for Canadian police to follow.

34 Edwin J. Delattre, *Character and Cops: Ethics in Policing* 5th edition (The AEI Press, Washington, 2006) at p. 489
35 Cyril D. Robinson, "The Mayor and the Police" *Police Forces in History* (Sage Publications, Beverly Hills, 1975)

VI LEGAL RATIONALE FOR AND LIMITS ON LEGISLATED RESTRICTIONS

This part will discuss how other public servants are treated in terms of political restrictions in considering whether restrictions on police could be justified under the *Canadian Charter of Rights and Freedoms*.

It may be useful to consider how public servants and judges are treated in terms of their ability to exercise political rights. If one considers political activity rights as a continuum or scale, ordinary citizens would be at one end of the continuum and judges would be at the other end of the continuum. Public servants would be somewhere in the middle, moving in progression towards judges, depending on the level of the position. It is submitted that police officers would be closer to judges on this scale.

Why should police officers be treated differently from other public servants? There are two answers to this question. First, the principle of impartiality applies to other civil servants and has been invoked to support restrictions on their political activity. Second, police are different from most other public employees. They hold a public office and are granted extraordinary authority over their fellow citizens. They exist outside the executive branch of government and are more akin to the judiciary, which is barred from any political involvement.

The restriction on holders of non-political offices from holding political office goes back hundreds of years. Beginning in the sixteenth century, the House of Commons asserted as a matter of privilege the ability to exclude holders of certain public offices, the nature of which was incompatible from attendance in the House. This arose in reaction to attempts by the Crown to influence members of the Commons by patronage appointments. In excluding these office-holders from the Commons, the House sought to maintain the independence of its members by limiting the opportunity and temptation to curry favour with the Crown. This exclusion of certain office-holders became an accepted convention and was codified as the *House of Commons Disqualification Act 1957*, which disqualified judges, civil servants, members of the armed services, police, members of Commonwealth legislatures and members of independent administrative tribunals.36 Modern conventions seek to maintain the independence and neutrality of non-political office holders, by limiting both political influence and involvement.

36 de Smith, S.A, **Constitutional and Administrative Law** second edition, 1975 Penguin Education, at pp. 254 -255

1. Convention of Political Neutrality of the Civil Service

Under the British form of government, from which our public institutions are derived, it is a generally accepted principle that the public service be impartial. It has been stated to be "an essential prerequisite of responsible government."

Professor Lorne Sossin, of the University of Toronto Law School, explored the concept of political neutrality of the civil service as a constitutional convention in a 2005 paper. [37] Professor Sossin referred to six key principles of this convention, including that "Public servants do not engage in partisan political activities." [38] His discussion about the dangers of the politicization of the civil service is reminiscent of the concerns expressed for police:

> The interdependence of the bureaucratic and political domains of the executive can be threatened in two ways: first, when the political executive seeks to politicize the civil service for its own advantage; and, second, when civil servants act for partisan ends. It is in response to such threats that the courts, elaborating upon the convention of political neutrality, have played a central role."[39]

The Supreme Court of Canada upheld sanctions imposed on a civil servant who publicly criticized government policy in its 1985 judgment in *Fraser v. Public Service Staff Relations Board.* [40] Speaking for the Court, then Chief Justice Dickson recognized the legitimacy of restricting political activities by public servants on the basis of the principle of impartiality of the public service:

> As the Adjudicator pointed out, there is a powerful reason for this general requirement of loyalty, namely the public interest in both the actual, and apparent, impartiality of the public service. The benefits that flow from this impartiality have been well-described by the MacDonnell Commission. Although the description relates to the political activities of public servants in the United Kingdom, it touches on values shared with the public service in Canada:
>
> > Speaking generally, we think that if restrictions on the political activities of public servants were withdrawn two results would probably follow. The public might cease to believe, as we think they do now with reason

37 *Supra* note 9 and accompanying text.

38 *Ibid*. at 4.

39 *Ibid*. at 5.

40 [1985] 2 S.C.R. 455.

> believe, in the impartiality of the permanent Civil Service; and Ministers might cease to feel the well-merited confidence which they possess at present in the loyal and faithful support of their official subordinates; indeed they might be led to scrutinise the utterances or writings of such subordinates, and to select for positions of confidence only those whose sentiments were known to be in political sympathy with their own.
>
> If this were so, the system of recruitment by open competition would provide but a frail barrier against Ministerial patronage in all but the earlier years of service; the Civil Service would cease to be in fact an impartial, non-political body, capable of loyal service to all Ministers and parties alike; the change would soon affect the public estimation of the Service, and the result would be destructive of what undoubtedly is at present one of the greatest advantages of our administrative system, and one of the most honourable traditions of our public life.41

This rationale has justified legislative restrictions on political activity by civil servants.

In Saskatchewan, section 33 of *The Public Service Act, 1998* deals with provincial civil servants and permissible political activity. The purpose of the section is to protect employees from partisan political pressure and to protect their right to engage in the political process. Broad political rights are provided however, political activity is not to take place during work hours and an employee must ensure that political activity outside work hours does not "impair" an individual's usefulness. Section 33 provides as follows:

> **Freedom from political influence**
> **33**(1) No employee in the public service is to be:
> (a) compelled in any manner to take part in any political undertaking or to make any contribution to any political party; or
> (b) threatened or discriminated against in any manner for refusing to take part in any political undertaking.
> (2) No employee in the public service shall:
> (a) directly or indirectly use or seek to use the authority or official influence of his or her position to control or modify the political action of any other person;
> (b) during his or her hours of duty, engage in any form of political activity; or
> (c) at any time, take part in political activities in any manner that impairs the employee's usefulness in the position in which he or she is employed.

This idea that the level of political activity depends on the type of civil servant's position is discussed in the Saskatchewan Government's interpretation of section 33. On page 2 of a 2003 Public Service

41 *Ibid*. at 471.

Commission Memorandum entitled "Political Activity by Public Service Employees, it states the following:

> The term "impair their usefulness" is any instance where an employee's activities are preventing that individual from carrying out his/her duties objectively. Every situation is unique and should be determined separately. Generally speaking, an employee's opportunities to become involved in political activity will decrease as the employee's position becomes more senior**, more sensitive and more publicly visible**. [emphasis added]

This commentary is interesting in its recognition that the more sensitive or publicly visible an employee's position, the more concern there is about the ability of an individual to carry out his/her duties objectively. In comparison, a police officer's job would be more sensitive and publicly visible than most public servants.

In terms of civil servants seeking nomination as candidates in an election, *The Public Service Act, 1998* does not specifically require that they take a leave of absence. However, there are provisions in *The Labour Standards Act* which require an employer to grant a leave of absence to an employee who wishes to be a candidate in an election and to reinstate that employee (without loss of privileges or seniority) when the leave is over. The government has provided an interpretation with respect to the leave of absence provisions. On page 3 of the memorandum, it states the following:

> Because the legislation does not specify the duration or type of leave permitted in these circumstances, there have been some inconsistencies in the nature of leaves provided in the past. This situation was clarified for the 1995 provincial election, such that employees running as candidates in an election must take a definite leave of absence without pay once the writ is dropped. An employee will also be granted a reasonable leave of absence without pay earlier than when the election writ is dropped if the employee believes their political activity is impairing their usefulness. Similarly, if the employer is of the belief that an employee's political activity is impairing their usefulness as contemplated by 33(2) (c) above, the employer may require the employee to take a definite leave of absence without pay prior to the election writ being issued.

The leave of absence provisions in section 80 of *The Labour Standards Act* also apply to municipal employees who run for council. If elected, they are deemed by section 26.1(4) of *The Local Government Election Act* to have resigned their employment the day before the election. This statutory device avoids the conflict of being both a member of council and a municipal employee. While these public employees have the right to run for election, they must not only

take a leave of absence from the date of nomination, but also permanently give up their employment if elected.

2. Judges

As mentioned above, judges are at the far end of the scale in terms of political activity rights. Judges are extremely limited in their ability to engage in political activities. For example, judges are prohibited from becoming a candidate in a federal, provincial or municipal election. Section 65 of the *Canada Elections Act*, section 42 of the Saskatchewan *Election Act, 1996* and section 26.1 of *The Local Government Elections Act* all prohibit judges from being nominated or elected to a political office.

In addition to the specific legislative restrictions on political activity, there are also guidelines that judges follow in the Canadian Judicial Council's *Ethical Principles of Judges*. Guideline 6 deals with impartiality and states as follows: "Judges must be and should appear to be impartial with respect to their decisions and decision making." There are specific principles that apply to this statement that deal with political activity. While these are detailed and extensive, the restriction on political activity is succinctly stated at pages 28 – 29: " All partisan political activity must cease upon appointment."

3. Police

Some of the same considerations that apply to public servants and judges would equally apply to police officers. As mentioned above, police officers deal with sensitive issues and are more publicly visible than most public servants. Like judges, police hold a public office and have a high degree of discretion in the exercise of extraordinary powers over their fellow citizens. Their effectiveness depends upon public confidence in their impartiality. Like judges, partisan political activities carried on by police officers undermines public trust in this impartiality and diminishes public confidence. The commentary from D2 above is instructive in this regard. When a police officer makes public statements with respect to a particular position or in support of a particular political party this can lead to confusion about the nature of the relationship between the police and the executive and legislative branches. Just as in the case of judges, partisan actions and statements involve publicly choosing one side in a debate over another. In addition, where a police officer uses his or her affiliation with the police to become a candidate in an election this puts public confidence in the impartiality of the police at risk.

Police officers have been compared to judges in the case law. The Alberta Court of Queen's Bench, in a 1993 judgment in *Vanovermeire v. Edmonton (City) Police Commission*, placed police and judges in the same category, based on their public offices and public profile:

> I would also reject the [police officer's] contention that, because an incident took place involving a police officer of the E.P.S. outside of the city limits the E.P.S. should be uninterested and have no jurisdiction or duty to investigate the same. Whether we like it or not, many public servants and officials, because of their offices and positions are, in effect, "on duty" 24 hours a day, 7 days a week. I believe police officers are in this category. So are judges. It would be inconceivable to me that the Canadian Judicial Council, which has a statutory duty to review complaints made against Federal Judges, would not have the jurisdiction to investigate a complaint that a judge was behaving in an unacceptable fashion just because the incident happened after court sitting hours and in another province than that in which the judge normally sits. Surely the question of whether that judge's conduct has brought disrepute to the justice system has nothing to do with where it took place and whether it was within normal working hours. 42

The close analogy that can be made between judges and police officers would seem to support restricting political activity by police.

The rationale or principle behind impartial policing is the need to maintain both the actuality and appearance of a higher standard of ethical conduct. Any departure from the principle of impartiality, either actual or apparent, adversely affects levels of public confidence and trust. A significant secondary goal is rooted in efficiency. Not only is public confidence undermined by partisan activities, but so is employer confidence in the employee to act impartially.

Justice René Marin explains the legitimacy of this greater expectation for police officers as follows:

> Police services can legitimately demand the highest standard of ethical conduct from their members because of the exigencies of law enforcement. The socially and politically sensitive nature of public law enforcement requires officers to be impartial, honest and trustworthy. This obligation of impartiality stems from a number of sources. While police officers have a duty of loyalty and fidelity to their nominal employer, the board, municipality or government that pays them, the duties of police officers are specified by legislation rather than by the respective board. 43

42 [1993] A.J. No 347, at 13.

43 *Ibid*. at 15.

As the above excerpt articulates, police really are different than other types of public employees. Some of these differences include the investigatory powers that police have, the access to police intelligence which no other citizen has, the legal authority to detain and arrest people as well as the mere fact that police carry guns. Because of these differences, a higher standard of conduct is required. Policing authorities have accepted this higher standard in numerous decisions dealing with appeals from discipline and dismissal for misconduct.

Justice Marin went on to explain the nature of police employment which is different as well:

> Police employment is not an ordinary master-servant relationship; instead a police constable is regarded as a holder of an office. The paradigm formulation of the principle states:
>
> > …there is a fundamental difference between the domestic relation of servant and master and that of holder of a public officer and the State which he is said to serve. The constable falls within the latter category. His authority is original, not delegated, and is exercised at his own discretion by virtue of his office; he is a ministerial officer exercising statutory rights independently of contract. The essential difference is recognized in the fact that his relationship to the Government is not in ordinary parlance described as that of servant and master.
>
> Therefore, the obligation of impartiality inherent in the office of constable derives from the law itself. The doctrine of police independence involves the idea that police officers are servants only of the law. Police must not show favour in exercising their duties and upholding the law. Their presence is a social resource and should be allocated on the basis of need rather than personal interest. 44

The legal status and responsibility of police officers is also stated in H.W.R. Wade and C.F. Forsyth's text *Administrative Law*:

> The truth is that a police officer holds a public position, that of peace officer, in which he owes obedience to no executive power outside the police force. The chain of command therefore terminates at the chief constable, who is in effect an independent authority and must act free from all political influence, whether national or local. 45

Police officers cannot have it both ways. They enjoy the status of police officers. With that special status come certain duties and restrictions. As the Ontario Court of Appeal stated in its 1986 judgment

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44 *Ibid*.

45 H.W.R. Wade and C.F. Forsyth, *Administrative Law*, 7th ed. (Oxford: Clarendon Press, 1994) at 152 and 153.

in *Trumbley v. Metropolitan Toronto Police*, "the police officer has voluntarily accepted a vocation entailing duties which are peculiar to it and essential to its proper performance, duties to which ordinary citizens are not subject."[46]

4. Potential Charter Issues

Any restriction on political activities may constitute an infringement of rights guaranteed by the *Charter of Rights and Freedoms*. Sections 2, 3 and 15 have been cited as grounds supporting a challenge of restrictions. While this should give pause to the legislator, section 1 of the *Charter* also accepts that the law may place reasonable limits on these constitutional rights, provided they can be justified in a free and democratic society. This involves consideration of both the rationale for the restriction and the means employed.

Clauses 2(b) and (d) of the *Charter of Rights and Freedoms* provide as follows:

> 2. Everyone has the following fundamental freedoms:…
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;…
>
> (d) freedom of association.

Section 3 provides as follows:

> 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

The authorities cited in this discussion paper support the legitimacy of the rationale for placing restrictions on political activity by police. As the saying goes, however, "the devil is in the details". The following reviews court cases which may provide guidance on how reasonable limits can be fashioned.

The Supreme Court of Canada, in its 1991 judgment in *Osborne v. Canada (Treasury Board)*[47], held that a federal law which prohibited public servants from engaging in work for or against a political party

46 *Trumbley v. Metropolitan Toronto Police* [1986] O.J. No. 650, at para. 66 (Ont. C.A.); upheld [1987] 2 S.C.R. 577.

or a candidate was inconsistent with clause 2(b) of the *Charter* and was not saved by section 1 of the *Charter*. In coming to that conclusion, the Court considered that the federal law did not constitute a measure carefully designed to impair freedom of expression as little as reasonably possible, but rather banned all partisan related work by all public servants without distinction either as to the type of work or their role or level in the public service hierarchy. Speaking for the majority in *Osborne*, Justice Sopinka acknowledged the importance of the government objective of preserving the neutrality of the civil service as necessary to ensure loyalty to the government and the usefulness of the public service, stating:

> "It is beyond dispute that restricting partisan political activity is rationally connected to the objective of maintaining the neutrality of the public service." [48]

The problem with the federal law was, as stated by Justice Sopinka:

> "The need for impartiality and indeed the appearance thereof does not remain constant throughout the civil service hierarchy." [49]

The Court accepted that different policies, ranging from no restriction to absolute bars, might be justified for different groups of public employees. The Court in *Osborne* divided public servants into three groups depending on their employment status - a politically free group, an intermediate group and a politically restricted group - with different standards applying to each. [50] The question becomes then, in which group do police officers belong?

The House of Lords, in its 1990 judgment in *Champion v. Chief Constable of the Gwent Constabulary*, recognized the purpose of restrictions on political activity as necessary to maintain impartiality of the police. [51] In this case, a constable was elected to serve as a parent governor of a local comprehensive school, and served on the appointments sub-committee, which interviewed applicants for teaching positions and made recommendations for hiring. The Chief refused to allow the member to sit on the sub-committee. At issue was the interpretation of the regulation which required a police officer to

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47 *Osbourne v. Canada (Treasury Board)* [1991] 2 SCR 69.

48 *Ibid*. at para. 59.

49 *Ibid*. at para. 61

50 *Ibid.* at para. 65.

51 (1990) All E.R. 116.

abstain from "any activity which is likely to interfere with the impartial discharge of his duties or which may so interfere; and in particular a member…shall not take any active part in politics." Although the judgment addressed activity which is far less partisan than most political activity, the court's comments are instructive.

> Its object is to prevent a police officer from doing anything which affects his impartiality or his appearance of impartiality. Impartiality means favouring neither one side nor the other but dealing with people fairly and even handedly. The paragraph takes its colour from the particular prohibition on taking part in politics, which is an overtly partisan activity in which one favours one side to the exclusion of the other. It is activities that are likely to be seen in a similar light that are aimed at, activities that identify those taking part with a particular interest or point of view in a way which will, or may be thought to, make it difficult for them to deal fairly with those with whom they disagree…This restriction is not intended to protect police officers from the occasional embarrassing decision with which they may be faced during off-duty activities; it is there to ensure both impartiality and the appearance of impartiality.[52]

In the end, the House of Lords held that the regulation did not limit the constable's ability to sit on the subcommittee. The type of political activity in this case was not overt political activity and was therefore less of a concern than some other types of political activity, such as campaigning for a political office. The decision is useful in that it speaks about the importance of impartiality and differentiates between overt political activity and less overt political activity.

The only *Charter* case that deals specifically with police and their ability to engage in political activities is the 1998 case of *Delisle c. Canada (Procureur General)* mentioned above. [53] In that case, the Québec Superior Court held that a complete prohibition on political activity constituted an infringement of the member's freedom of expression and association. This involved a challenge to the previous RCMP regulations, which strictly prohibited any and all political activity by members of the RCMP. Importantly, there were no provisions that allowed for an unpaid leave of absence. Given this, the Québec Superior Court held that there was an infringement of the member's freedom of expression and association and, therefore, the statutory scheme violated clauses 2(b) and (d) of the *Charter*. These violations could not be saved by section 1, as the legislation did not infringe on the officer's rights as little as possible. The full decision is in French. The English summary states:

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52 *Ibid.* at 120, Lord Griffith.

53 [1998] A.Q. No. 2663.

> The violation of sections 2(b) and (d) of the Charter was not saved by section 1 as the legislation did not infringe on Delisle's rights as little as possible. Section 57 did not provide for an unpaid leave for RCMP members who wished to run for office, although such a scheme had already been proposed and was in force with respect to other employees in the public sector. The section went beyond the minimum infringement required to attain the government's objective. The court declared that section 57 was void. However, **it was clear that some restrictions of the rights of RCMP officers were necessary so that they could adequately fulfil their functions**. [emphasis added]

Following this decision, the Government of Canada introduced new regulations. While the absolute prohibition was removed, more nuanced, but still restrictive, limits took its place (as summarized above in Part V of this paper).

Although the *Delisle* case is the only case that dealt with political activity by police officers, it is important to note that the courts have consistently accepted that maintaining the police's impartiality and reputation are significant objectives even where *Charter* violations are alleged.

The British Columbia Court of Appeal, in its 1991 judgment in *Police Services Union, Port Moody, District 43 v. Port Moody Police Board*54, upheld a police department order prohibiting police officers from soliciting for contributions of funds in any context, where the fact that they are police officers is made known or stated or suggested that the police service or officers are in any way associated with the solicitation. While the Court found that there was a breach of clauses 2(b) and (d) of the *Charter*, it also concluded that the infringement could be justified under section 1 as it serves the important objectives of preventing perceived abuse of office and preserving the good reputation of the police service in the community. The restriction on solicitation was not overly broad and only impaired officers' rights minimally as it was specific to solicitations where the police service would be in any way associated with the fundraising. The order still allowed police officers to act in a personal or private capacity.

On the specific facts of the *Port* Moody case, the purpose of the solicitation was to collect funds for the publication of a drug and alcohol abuse handbook and was therefore not related to a political party or of a political nature. However, some of the considerations relating to the reputation of the police service mentioned in the case are similar to the considerations relating to politics and impartiality mentioned above. Some of these similar concerns include:

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54 (1991) 78 D.L.R. (4th) 79.

1. the potential for confusion to arise between the relationship of the police service and the activity, group, program or cause which is the subject matter of the solicitation or fundraising;

2. the potential for the public to feel pressured to give their financial support and therefore that the contributions would not be voluntary; and

3. the potential for some members of the public to provide financial support in order to put themselves in a privileged or special position in relation to the police or members of the police service thereby holding the perception that they might receive more lenient treatment at the hands of the police.

Ultimately, the principle that can be taken from this case is that the principle of impartiality of police is of sufficient importance to justify some limitations on individual police officer's rights. The court articulated this in its decision:

> The objective of order No. 123 is to prevent any perceived abuse of office, and preserve the good reputation of the police force in the community. In my view, the need to foster respect for the police by avoiding any perceived conflict of interest is of sufficient importance to warrant overriding a constitutionally protected right. The role of police constables is a special one and it is of substantial public importance that there be no question about the integrity of members of the force. 55

The courts have consistently held that requiring an employee to take a leave of absence is one way of accommodating employees who wish to seek elected office or engage in certain political activities. The Nova Scotia Supreme Court, in its 1986 judgment in *Fraser v. Nova Scotia (Attorney General),* held that legislation restricting political activity by civil servants violated the *Charter* and could not be justified as the restrictions did not impair the rights and freedoms as little as possible. The court held that the legislation could have been upheld if it had provided civil servants with the opportunity to take an unpaid leave of absence. Under the challenged legislation, a civil servant would be forced to resign if he or she wished to be a candidate in an election. The court also made some interesting comments on the effect of certain types of political activity thereby recognizing that some political activity is more apt to affect the perception of impartiality than other activities. The court stated the following with respect to these categories of activities:

55 *Ibid.* at page 28.

> (5) Candidature: I find that the requirement that a civil servant resign before seeking public office to be an unnecessarily harsh restriction. I consider that the same objective could be achieved by employing a system whereby an application could be made for leave of absence…
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> …
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> (7) Canvassing: This could present problems and place both the individual and the civil service in embarrassing positions. This may be a low-profile, and harmless activity if conducted reasonably but potentially explosive if conducted irresponsibly. This, if permitted, should, I think, be subject to guidelines.
>
> (8) Radio and television appearances: These I consider would be undesirable. They could link the civil servant in an adversarial way with either the present employer or with a change of government, the new employer.
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> …
>
> (10) Soliciting funds: It seems to me this could cause problems. It could place the civil servant in a difficult and sometimes compromising position.
>
> (11) Holding office in party organizations: Technically this appears harmless. However, it could become rather high-profile and invite problems. I consider guidelines would be needed. 56

The Court found that other types of activities such as the following were not as much of a concern: attending political meetings, paying membership fees to a political party, contributing to a political party, or putting up posters and signs related to a political party.

Although leaves of absence are considered one way of accommodating political activity, an argument has been made that the unpaid leave of absence requirement is overly harsh in terms of loss of income. This issue was discussed in *Ontario Public Service Employees Union v. Ontario (Attorney General).* 57 While this case was successfully appealed, the comments with respect to the leave of absence provisions would still be relevant as that aspect was not specifically dealt with on appeal. In the case, the requirement for a leave to be taken and the resulting loss of pay were attacked. The Court had little sympathy for these arguments and instead held that the leave was necessary to maintain impartiality and that where a person is not working it makes sense for them not to be paid.

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56 [1986] N.S.J. No. 124, at page 41-42 (N.S.S.C.).

57 [1988] O.J. No. 1409 (H.C.J.); reversed on other grounds [1993] O.J. No. 1722 (Ont. C.A.).

> But during the campaign period the usual and normal activities of a candidate for elective office could not in my opinion be anything but severely detrimental to his position as a public employee in the event he fails to win a seat and goes back to his job as he is entitled to do. Running for office is surely one of the most intense areas of partisan political activity. The collision of that activity with the conceded importance of maintaining an impartial public service is to my eyes obvious. No lesser provision than the requirement of leave of absence could be appropriate in the circumstances and in my view, the Oakes tests are fully met and s. 1 preserves s. 12(1). 58

There was also an attack on the requirement that the leave not commence before an election is officially called. The court commented on the timing of the leave requirement:

> …the limitation of the period of leave to a period beginning not earlier than the day on which the election is officially called. The applicants submit that this is a restrictive limitation which removes much of the advantage of the leave of absence provision, for frequently a nominating meeting is held before an election is formally called. Thus it is said the leave of absence period begins too late to be helpful in many instances. There appears to be some force to this submission but here again it is important to have regard to the totality of the regulatory scheme and not simply to isolate one particular aspect of it. Building upon my conclusions already expressed that a leave of absence without pay is an appropriate restriction, if the period of the leave of absence were extended long enough to cover any nominating meeting no matter how far in advance of an anticipated election that nominating meeting might be held, the affected public employee would be without pay for all of that period. I suppose it could be as long as a year. Public employees might not be prepared to forego their salaries for such a period. 59

Finally, and most recently, the Supreme Court of Canada rejected a challenge to Alberta legislation applying to school employees who wished to run for election as local school trustees anywhere in the province. 60 The legislation required school employees to take a leave of absence if they wished to run for election and deemed them to have resigned their employment if elected. The Court rejected challenges under sections 2(b) and 15 of the *Charter*, holding that the right to free expression guaranteed by section 2(b) does not grant the right to a statutorily created platform for expression61 and that the differential treatment of school employees was not based on any enumerated ground.62 The Court held

58 *Ibid.* at 17

59 *Ibid* at 18.

60 *Baier v. Alberta* 2007 SCC 31

61 *Ibid.* at paragraph 61

62 *Ibid*. at 65

there was no need to consider section 1, since no constitutional right was infringed. It would seem, therefore, that any similar limitation on police officers running for municipal office would be upheld.

While potential *Charter* violations are important to consider, limits on political activity are reasonably justifiable under section 1 of the *Charter* as long as the restrictions in the legislation are rationally connected to its objective, the legislation impairs rights and freedoms as little as possible and the severity of the limits are proportionate to the objective. Some of the specific principles that can be gleaned from the cases are as follows:

1. that the principle of impartiality and the reputation of the police are of sufficient importance to justify limitations on individual rights;

2. an absolute prohibition on political activity rights for all police (without leave of absence provisions) will constitute a *Charter* violation that is not reasonably justifiable; and

3. requiring an employee or officer to take an unpaid leave of absence where he or she wishes to engage in certain types of political activities is a preferred approach when limiting political rights, as it is less restrictive than a complete prohibition.

In other words, where legislation imposes restrictions on political rights, it can be saved by section 1 if the means employed are proportional to the aim. For example, the opportunity for the employee or officer to take a leave of absence will likely save any restriction on the right to run for election to public office. In this way the employee can still choose to engage in more partisan or political activities, however, they must take a leave of absence to do so. Given this, the courts will likely uphold legislation that is similar to the RCMP or Ontario legislation, even if slightly more restrictive in terms of the time frame for taking a leave of absence.

VII CONCLUSION

The traditional conventions which once served to separate police from politics are no longer as respected as they once were. The line has moved and is moving, pushed by individuals and associations seeking to further their interests. But those private interests may not accord with the public interest, which the police exist to serve. If a line is to be drawn, it should be made by the proper public authority based on an informed policy discussion. As discussed above, discussion papers have reviewed this issue and indicate a consensus to continue limits on political involvement by police.

Legislation limiting political activity by police officers has been enacted both at the federal and provincial levels. Legislation which strikes a balance between the rights of the public to receive a high degree of impartial and politically neutral policing services and the individual rights of police officers as members of their communities will likely withstand a *Charter* challenge, given the Court's recognition of the validity and importance of the need for impartiality in policing. Regulations that replace the traditional conventions should clarify political rights while ensuring province wide consistency and fairness. The approach used by the RCMP and the Ontario government differentiate between higher and lower ranks, permitting lower ranking police officers to engage in some political activity while off duty and not in uniform, but restricting other types of campaigning or political activity to only those officers who have taken a leave of absence. While this may entail some personal sacrifice by individual police officers over the ordinary citizen, the value of impartial policing to the community surely outweighs that individual interest.

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