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The Law of Police Authority: The McDonald Commission and the McLeod Report

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1. *Introduction***

By the summer of 1977 it was apparent that the Royal Canadian Mounted Police had engaged in unauthorized break-ins and unlawful seizure in their zeal to protect the national security.¹ In response to growing public criticism and concern, then Solicitor-General Francis Fox announced the government's intention to establish a commission of inquiry into the scope and frequency of certain investigative techniques of the national police force.² The mandate of the McDonald Commission was to investigate RCMP procedures that were "not authorized or provided for by law".³ Although the July appointment of the Commission resulted in an announced moratorium on certain practices within the Force,⁴ the disturbing revelations continued. By the end of 1977, the catalogue of alleged wrongdoing included

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1. See, for example; The Toronto Star, May 23, 1977 "Metro Police Probing RCMP Praxis Break-in Role" at A2, The Globe and Mail, May 27, 1977 "Three Policemen Plead Guilty to '72 APLQ Break-in" at 1, The Toronto Star, June 21, 1977 "Break-in and Cover-up Push Ottawa to Brink of Inquiry into RCMP" at A1, The Montreal Star, June 20, 1977 "Unresolved RCMP Scandal" at A6, The Toronto Star, June 21, 1977 "National Inquiry Needed on RCMP" at B4, The Globe and Mail, June 25, 1977 "Canada Mad; where MPPs go to Jail and RCMP are Promoted" at 6.

2. Can. H of C Debates (July 6, 1977) at 7365-66.

3. Order-in-Council P.C. 1977-1911, passed on July 6, 1977, paragraphs (a), (b) and (c) pursuant to the authority granted by Part I of the Inquires Act, R.S.C. 1970, c. 1-13.

4. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, Second Report-Volume 1, *Freedom and Security Under the Law*, Ministry of Supply and Services Canada: August, 1981 at 11.

break-ins, illegal wiretapping, theft, barn-burning and a lengthy cover-up.⁵

Four years and some 12 million dollars later,⁶ the Commission submitted its final report to the government. The 2,000 page document⁷ contains an exhaustive analysis of the structure and problems of the security system and detailed recommendations for the future. The central thesis of the Report is that the police must at all times operate within the law and within the ambit of clearly delineated common law or statutory authority.

The response of the government to the conclusions and recommendations of the McDonald Commission was, from the outset, unenthusiastic.⁸ The Report was delayed for seven months before release to the public. During this time, the Department of Justice commissioned two legal opinions for virtually simultaneous release. These documents, written by retired Supreme Court Justice Wishart Spence and Toronto lawyer Robert Wright dispute McDonald's central thesis and suggest instead that it is not always a crime for the police to break the law in the line of duty. Nearly two years later, in June of 1983, yet another legal opinion was published by the

5. See, for example; The Montreal Star, October 28, 1977 "Fox admits RCMP raid on PQ offices" at A1, The Toronto Star, October 31, 1977 "Mounties burned Quebec farm, stole dynamite in 1973" at A4, The Montreal Star, November 10, 1977 "Fox admits Mounties opened mail" at A1, The Globe and Mail, November 1, 1977 "RCMP Crime; frightening is dereliction of duty of Solicitor's General and Prime Minister" at 4.

6. The Winnipeg Free Press, March 11, 1982 "Independent Opinions called Amazing, Amusing" at 14.

7. In fact the conclusions of the Commission are contained in three separate reports: First Report — *Security and Information*, published in October, 1979, 75 pp.; Second Report, Volumes 1 and 2 — *Freedom and Security under the Law*, published in August, 1981, 1300 pp., and; Third Report — *Certain RCMP Activities and the Question of Governmental Knowledge*, published in August, 1981, 530 pp. This analysis will concentrate on the Second Report — Volume 1.

8. See, for example; The Globe and Mail, March 16, 1981 "McDonald Report on RCMP a ringing indictment" at 6, The Globe and Mail, August 26, 1981 "McDonald Commission Raps RCMP for Institutionalized Lawbreaking" at 1, The Globe and Mail, August 27, 1981 "RCMP Will Continue Breaking the Law — Kaplan" at 1, The Montreal Gazette, August 28, 1981 "RCMP Acts are Legal-Chretien" at 1, "Ottawa Upstages McDonald Report" at 25, The Globe and Mail, August 28, 1981 "Ottawa Weak-willed on the RCMP Inquiry" at 7, The Globe and Mail, January 16, 1982 "Criminal Law Quarterly Rebutts McDonald Report Critics" at 11, The Winnipeg Free Press, March 11, 1982 "Independent Opinions Called Amazing, Amusing" at 14.

federal department of the Solicitor-General. The Report of the Federal/Provincial Committee of Criminal Justice Officials with respect to the McDonald Commission (hereinafter referred to as the McLeod Report) argues that the McDonald legal analysis is incorrect and proposes a substantially different approach to the law of police authority.

The conflict exemplified by the McLeod Report and the McDonald Commission raises a number of fundamental issues. The roots of the debate lie in our approach to criminal justice and the relationship between the individual and the state. The tradition of the common law is to provide the police with strictly limited authority within a broad ambit of duty. Infringements on individual freedom must be specifically and unambiguously authorized by a rule of positive law. The laws of arrest and search are examples of this authority-based approach to police power. This is the analysis adopted by McDonald with which McLeod is in fundamental disagreement. The McLeod Report suggests an expediency-based law of police powers with an after-the-fact test of justification. McLeod's analysis is based on an essential misconception which equates duty and responsibility with authority and power.

The very existence of a document such as the McLeod Report is perhaps as disturbing as its content. The authors of the Report are senior criminal justice officials at both the federal and provincial level.¹⁰ By actively soliciting critical responses to the McDonald Commission Report, the government has effectively involved the upper echelons of the criminal justice system in political advocacy. The role of these senior officials is to impartially uphold the existing law and not to advocate in the political forum for a substantial expansion of police powers.

9. Published by the Communication Division under the authority of the Honourable Bob Kaplan, P.C., M.P., Solicitor-General of Canada, June, 1983. The authors of the McLeod Report include; D.H. Christie, Q.C., Associate Deputy Minister, Dept. of Justice, Ottawa, Peter Engstad, Director of Law Enforcement Policy, Ministry of the Solicitor-General, Ottawa, Alan Filmer, Q.C., Assistant Deputy Minister, Ministry of the Attorney-General, Victoria, B.C., Serge Kujawa, Q.C., Associate Deputy Minister, Dept. of Attorney-General, Regina, Saskatchewan, Y. Roslak, Q.C., Director, Special Services, Dept. of Attorney-General, Edmonton, Alberta, Howard Morton, Q.C., Director, Crown Law Office, Criminal, Ministry of the Attorney-General, Toronto and R.M. McLeod, Q.C. (Chairman) Deputy Solicitor-General, Ministry of the Solicitor-General, Toronto.

10. *Id.*

The purpose of this article is to demonstrate that the common law, authority-based approach to police powers is the correct one both in terms of legal analysis and policy. The paper will begin with a brief description of the McLeod/ McDonald debate. The main body of the paper will be devoted to a consideration of the law of police authority. This will entail a discussion of the powers, duties and responsibilities of the police in Canada today and an extensive analysis of the relevant case law. Once the Canadian law of police authority is understood it will be possible to consider the McLeod Report both as a piece of legal scholarship and as an advocacy document.

It is anticipated that the legal analysis will lead to two conclusions. First, that the approach advocated by the McLeod Report is significantly flawed. Second, that the traditional common law approach to police powers which is predicated on the assumption of individual freedom is the appropriate limit on the police in contemporary Canadian society.

PART I: The Genesis and Nature of the Debate

1. The Facts: The Disclosures of 1976 and 1977

In March of 1976 former RCMP corporal Robert Samson was convicted of placing three sticks of dynamite outside the Montreal home of Melvyn Dobrin, president of Steinberg's Incorporated. The resulting explosion cost Mr. Dobrin \$1500, and Mr. Samson seven years. During his testimony Samson outlined his involvement with a 1972 break-in at the Agence du Presse Libre du Quebec (APLQ), a left-wing news agency. On the day of Samson's conviction then Solicitor-General Warren Allmand announced an RCMP investigation into the alleged break-in. A year later RCMP Chief Superintendent in charge of security and intelligence in Quebec, Donald Cobb, and two police inspectors were charged with criminal responsibility for the unauthorized break-in.

The APLQ disclosure was the first in a series of shocking revelations of illegal and unauthorized RCMP activity dating back as far as the 1950s. Although two commissions of inquiry had been established by the end of 1977, the outcome of the crisis which Corporal Samson perhaps unwittingly set into

motion remains uncertain.¹¹ At the very least it is clear that the events of 1976 and 1977 have forced both politicians and the public to admit that institutionalized police wrongdoing in pursuit of perceived goals has occurred.

The three officers charged in the APLQ break-in pleaded guilty on May 27, 1977 and on June 16 they were granted an absolute discharge. Although Solicitor-General Francis Fox downplayed the raid as "one act of misjudgment"¹² public reaction was mixed.¹³ On the day of the discharge, the Quebec government announced the establishment of the Keable Commission to investigate the entire affair.¹⁴ Pressure on the federal government to do the same increased as allegations of a lengthy cover-up, intentional ministerial blindness and another break-in at the Toronto offices of Praxis Corporation began to emerge. Editorial response was harsh as the following excerpt from the Montreal Star indicates:

Those who urge that, in the name of national security, police must be given extra-ordinary powers or the right to break the law when they feel it necessary, argue that those put in authority over us have such a profound sense of uprightness and responsibility that there is no need to constrain them by the rule of law. This story of a squalid burglary and five years of cover-up show how feeble those assurances are.¹⁵

By July 6 the federal government had agreed to establish a

11. Recently, legislation has been enacted which is specifically directed to the area of national security. The Canadian Security Intelligence Service Act, Vol. 7, No. 4, The Canada Gazette, Part III was assented to on June 28th, 1984. Section 12 sets out the main duty of the newly established service.

s.12: The Service shall collect . . . and analyse and retain information and intelligence respecting activities that may, on reasonable grounds be suspected of constituting threats to the security of Canada.

However, the broader question of the extent to which the police should be allowed to "break the law" in the line of duty remains unresolved. The existence of documents such as the McLeod Report attests to the political uncertainty which continues to becloud the issue.

12. The Montreal Star, May 27, 1977 "Trudeau denies raid cover-up" at A1.

13. See, *supra* note 1.

14. The Montreal Star, June 16, 1977 "PQ to probe police break-in" at A1. Rapport de la Commission d'enquête sur des opérations policières en territoire québécois (Québec: Gouvernement du Québec, 1981).

15. The Montreal Star, June 20, 1977 "Unresolved RCMP Scandal" at A6.

royal commission, but unfortunately for the RCMP the string of damning disclosures continued.

In August it was alleged that the RCMP had, in the early 1970s, opened files on members of the New Democratic Party because of fears of communist infiltration. In September the CBC investigative documentary, the Fifth Estate, revealed that illegal wiretaps and break-ins were a standard practice, approved at the highest levels. The investigative team quoted an RCMP officer as saying:

Break-ins are common practice Twenty-five percent of them probably are fishing trips with no real hard evidence at the time. We are taught how to pick a lock and are issued a little case with all the picking equipment that you carry in your suit pocket.¹⁶

Late October brought perhaps the most serious allegations — a January 1973 break-in at the Montreal headquarters of the Parti Québécois without search warrants or other legal authority; a contrived theft of dynamite engineered to discredit the separatist movement; and the deliberate burning of a barn which was supposedly a meeting place for separatist sympathizers. In November Solicitor-General Fox confirmed the existence of two RCMP investigative programmes — Operation Cathedral, which had illegally opened private mail between 1959 and 1976, and Operation 300, which had performed illegal break-ins for some twenty years. The Solicitor-General insisted throughout that the motives of those involved in the systematic and institutionalized illegality were of the “highest order”. By the end of 1977 the catalogue of RCMP wrongdoings was apparently complete and the press and public settled down to await the conclusions of the royal commission’s inquiry.

2. *The McDonald Commission: Its mandate and its conclusions*

On July 6, 1977 the McDonald Commission was established by an order-in-council, its mandate to investigate RCMP procedures which were “not authorized or provided for by law”.¹⁷ The Commission submitted three reports to the government: *Security and Information*, released in October of

16. The Globe and Mail, Sept. 21, 1977 “Wiretaps, break-ins by RCMP common — RCMP officers on CBC’s Fifth Estate” at 4.

17. See, *supra* note 3.

1979, which dealt with the disclosure of information whose release may be prejudicial to national security; *Freedom and Security under the Law*, released in August, 1981, which examined the existing system and the institutionalized wrongdoing within that system and suggested a plan for the future, and; *Certain RCMP Activities and the Question of Governmental Knowledge*, released in August, 1981, which provided a more detailed examination of specific incidents of alleged wrongdoing. My article is primarily concerned with the second report which contains the Commission's analysis of the law of police powers.

The Commission interpreted its mandate to require an investigation into acts which were offences under the Criminal Code or under other federal or provincial statutes, acts which were tortious, and acts which were beyond the statutory authority of the RCMP.¹⁸ Not surprisingly, the Commission based its analysis on a fundamental and ancient principle of our legal system, namely, the rule of law. The Report is premised on the assertion that the police must operate within the law and any infringement of either common law or statute must be specifically authorized. The Commission's conclusions with regard to the RCMP practice of surreptitious entry are illustrative of their approach.

. . . we must assert emphatically that it is wrong and unacceptable that any Canadian police force should act on the assumption that its members need only be concerned to avoid criminal offences: there are other illegalities. The policy of the RCMP has reflected an attitude that entries without consent or warrant or some other positive legal support are permissible because no criminal offence is thereby committed, as if that disposed of the matter. Leaving aside the few provinces that have Petty Trespass Acts, the police are faced with the "illegality" of the law of trespass. . . . The law of trespass is not to be brushed aside as of no account in deciding force policy. A trespass is a "wrong". It is *wrongful* to adopt policies that countenance and encourage trespass. If the law of trespass is an obstacle to the effective detection of crime, the law should be changed by the appropriate legislative body. Pending change, the law must be respected.¹⁹

18. See, *supra* note 4 at 17. In addition the Commission stated that it "did not intend to ignore the moral and ethical implications of police investigative procedures" (also at 17).

19. *Id.* at 122-23.

3. *The government's response*

The task of the McDonald Commission was an unenviable one given the nature of the alleged illegality and the fact that it had gone unchecked and unnoticed for years. Political unease with the work of the Commission was apparent from the outset.²⁰ The response of the government to the completed Report provides eloquent testimony to their dissatisfaction with any attempt to curtail RCMP investigative techniques. The government held the Report for seven months while actively soliciting legal opinions. In March of 1981 the editorial staff of the *Globe and Mail* wrote that the federal government was busy "scrubbing it [the Report] behind the ears and excising any lines which might compromise Ottawa's free-form concept of national security".²¹

In August, 1981 when the first volume of the Report was finally released, senior ministers were quick to defend the Force.²² Solicitor-General Kaplan insisted that the police should have the discretion to break the law when it seemed reasonable. When asked to elaborate the Minister replied: "I can't be very categorical about it. It's a matter of reasonable necessity in a particular case".²³

Although three Reports were solicited by the government in response to the McDonald Commission, this paper will focus on the McLeod Report, a 110 page document published in June of 1983. The McLeod Report purports to respond to the McDonald Commission in two ways; (1) by setting out a general approach to the law of police powers, and (2) by making recommendations with regard to specific investigative techniques. The Report's approach to the law of police powers

20. See notes 5 and 8.

21. The *Globe and Mail* March 16, 1981 "McDonald Report on RCMP a ringing indictment" at 6.

22. See, *supra* note 5. It is also interesting to note the defences suggested by senior ministers in 1977 as the illegalities were uncovered. For example, The *Globe and Mail*, October 29, 1977 "Police can sometimes break law technically, PM says" at 1, The *Globe and Mail*, November 3, 1977 "Can't tell Mounties how to conduct their daily operation — PM" at 1, The *Vancouver Sun*, November 3, 1977 "Mounties need special tools to guarantee security — PM" at A13, The *Globe and Mail*, November 7, 1977 "Fox suggests law change to allow RCMP to conduct illegal acts" at 8.

23. The *Globe and Mail*, August 27, 1981 "RCMP will continue breaking law — Kaplan" at 1.

is supported by a fifty page legal analysis which will be the focus of this discussion.

4. *The McLeod Approach*

The McLeod Report, while accepting the principle that the police must, at all times, obey the law, differs from the McDonald Commission in its interpretation of this principle. The authors believe it is necessary to look for the existence of specific criminal prohibitions in order to determine if the police are acting unlawfully. The Report relies on the fact that police officers have responsibilities and commensurate authority not vested in other citizens in order to justify its conclusion that in certain circumstances a police officer may infringe recognized rights of liberty and property. In order to ascertain when such infringements are acceptable it is initially necessary to examine the "ordinary law of the realm in a global sense"²⁴ and in particular the duties, responsibilities, rights and privileges of a police officer. The Report identifies a number of general policing responsibilities such as preserving the peace, preventing crime and protecting life and property while commenting on the inadvisability of strictly delimiting the ambit of police duty.

Having established the existence of a duty, the lawfulness of a particular police action is to be judged on the basis of the test enunciated in *R. v. Waterfield*, a 1964 English Court of Appeal decision.²⁵ The test, as set out in the Report involves a three step process. In order to determine whether a police officer is breaking the law it is necessary to:

- (1) consider what the police officer was actually doing and in particular whether his conduct was *prima facie* an unlawful interference with a person's liberty or property,
- (2) if so, it is then relevant to consider whether,
 - (a) such conduct falls within the general scope of any duty imposed by statute or recognized at common law, and
 - (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with that duty.²⁶

24. See, *supra* note 9 at 3.

25. *R. v. Waterfield*, [1964] 1 Q.B. 164 (C.A.).

26. See, *supra* note 9 at 4.

The application of the test is based on the assumption that in certain circumstances the existence of a police duty will necessarily imply a correlative power. In other words, the Report appears to suggest that the authority to unlawfully interfere with a person's liberty or property may exist simply because the police officer is acting within the scope of his duty. This exercise of implied power is judged after the fact, based on whether or not it was "justifiable". The Report recognizes that such a *post-facto* procedure will not always provide sufficient pre-event certainty. However, the authors believe that the test will enable the articulation of guidelines which will be sufficient to deal with most situations.²⁷

The Report advocates a "global" approach to the law²⁸ in which the acceptable parameters of a police officer's acts and omissions are different from those of an ordinary citizen precisely because the law has imposed special obligations with concurrent authority on the officer. The Report concludes that the *Waterfield* test, as interpreted by them, has been incorporated into the global law of the realm, providing a reasonable, yet effective means within the rule of law to discharge the duties and responsibilities imposed upon the police.²⁹

The authors of the McLeod Report assert that duty implies authority provided the use of that authority is justified. This assertion is clearly in error. A *post-facto* analysis of official action based on some vague concept of expediency flies in the face of the rule of law. The common law has long recognized that the exercise of police power which infringes protected rights must be based on specific legal authority. The police, however onerous their task, are not above the law. The McDonald Commission, in embracing this approach is in accord with both the traditions of the common law and the needs of contemporary Canadian society. The debate between the two Reports reflects fundamentally different conceptions of the nature of police power and as a necessary result, on the relationship of the individual and the state.

27. *Id.* at 5.

28. *Id.* at 14. This is in contrast to the "aspect" approach of the McDonald Commission, an apparently significant distinction which is never fully explained.

29. *Id.* at 50.

PART II: *The Law of Police Authority*

1. *Introduction*

In order to understand the law of police authority it is necessary to make an initial and crucial distinction between duty and authority. Like the McLeod Report, much of the writing in this area and a number of decisions have failed to grasp the fundamental difference between a police officer acting in accordance with authority and one who is performing his duty. Webster's English Dictionary defines duty as "an action, task required by or relating to one's occupation or position". Authority is defined as follows: "The power or right to give commands, enforce obedience, take action, or make final decisions; jurisdiction". Canadian policing statutes speak in terms of duty and that duty is expressed in the widest possible terms, i.e. the duty to preserve the peace, or to prevent crime. Authority-granting statutes like the Criminal Code are narrowly circumscribed in order to limit and clearly define the police officer's power to coerce certain behaviour. Once the distinction between duty and authority is understood the analysis of any impugned police action is straightforward. If the conduct infringes recognized rights it must be specifically authorized. The existence of a general duty becomes irrelevant. By confusing these concepts the authors of the McLeod Report imply that duty may often equal authority. Semantically speaking this is unlikely, legally it is simply untrue.

In order to clarify the Canadian law of police authority this part is divided into two sections: the first will examine the present statutory regime and its links with the common law and the second will discuss the case law. There are a number of statutory privileges accorded a police officer who is acting within his authority. Section 25 of the Criminal Code provides:

s.25(1) Everyone who is required or authorized by law to do anything in the administration or enforcement of the law . . . is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

This section is predicated on the existence of an authority at law to act and is not phrased in terms of duty. As such it affords protection for the use of reasonable force in respect

of required or authorized acts.³⁰ Similarly, s.26(2) of the Interpretation Act has been advanced as a general defence for certain investigative procedures.

s.26(2): Where power is given to a person, officer or functionary, to do or enforce the doing of any act or thing, all such powers shall be deemed to be also given as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing.³¹

Clearly, the section is relevant only when authority exists. Policing statutes do not create authority, they simply enunciate duties. Unless and until authority exists, s.26(2) is irrelevant.³² In addition the common law defence of necessity may be available for individual incidents of alleged lawbreaking.³³ These

30. This approach was expressed by Dickson, J. (as he then was) with whom three members of the Supreme Court agreed in *Eccles v. Bourque* (1974), 19 C.C.C. (2d) 129 at 130-31. The Alberta Court of Appeal also adopted this analysis in *Reference re an Application for an Authorization* (1983), 10 C.C.C. (3d) 1, 5 D.L.R. (4th) 601, 50 A.R. 1. The *Reference* case was appealed to the Supreme Court which has recently released its decision. In the *Interception of Private Communications Reference* (1985), 56 N.R. Part I, 43 at 54 Dickson C.J.C writing for the minority reiterates his position. "Section 25(1) does not augment the powers of the police beyond those otherwise given to them by the Criminal Code or at common law." The reasons of the majority, expressed in the companion case of *R. v. Lyons* (1985), 56 N.R. Part I, 6 at 34 are not based on s. 25(1).

31. Interpretation Act, R.S.C. 1970, c.1-23, s.26(2).

32. See *Colet v. The Queen*, [1981] 19 C.R. 84 at 92 (S.C.C.). *Reference re an Application*, *supra* note 30 at 4-5, and the *Interception Reference*, *supra* note 30 at 56-57. But note the majority reasons of Estey, J. in *R. v. Lyons*, *supra* note 30 at 34-36.

33. The availability of the defence of necessity depends on the particular fact situation involved. Clearly, necessity is not a defence for a procedure adopted as a matter of official policy and repeated in a number of different circumstances. The defence was rejected as long ago as 1765 in the decision in *Entick v. Carrington* (1765), 19 State Tr. 1029 at 1066, 95 E.R. 807 (K.B.).

With respect to the arguments of state necessity, or a distinction that has been aimed at between state officers and others, the common law does not understand that kind of reasoning nor do our books take note of any such distinctions.

See also *Morgentaler v. The Queen* (1975), 20 C.C.C. (2d) 449 at 477 (S.C.C.). At page 497 Mr. Justice Dickson (as he then was) writes:

If it does exist it can go no further than to justify non-compliance in urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible. No system of positive law can recognize any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value.

potential justifications will be discussed only peripherally since their application depends only upon a correct interpretation of the relevant law based on a clear understanding of the duty/authority analysis presented here. Although the existence of these privileges may make it less factually likely that a police officer will be convicted of breaking the law, they have no effect on the fundamental common law theory that police powers are authority-based.

2. *The Canadian Statutory Regime*

The police in Canada today are primarily creatures of statute. Legislative enactments at the federal and provincial level provide for the composition, administration and structure of the various police forces. In addition, the statutes impose certain duties on the police which are consistent with their traditional obligations at common law. For example, the Royal Canadian Mounted Police Act states:

s.18. It is the duty of members of the force who are peace officers, subject to the orders of the Commissioner,

(a) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime, and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders who may be lawfully taken into custody.³⁴

In Ontario, the Police Act provides in s.57 that:

s.57. The members of police forces appointed under Part II, except assistants and civilian employees, are charged with the duty of preserving the peace, preventing robberies and other crimes and offences, including offences against the by-laws of the municipality, and apprehending offenders, and commencing proceedings before the proper tribunal, and prosecuting and aiding in the prosecuting of offenders, and have generally all the powers and privileges and are liable to all the duties and responsibilities that belong to constables.³⁵

As can be seen, the current legal position of the police is defined in terms which refer to the traditional common law offices of

34. Royal Canadian Mounted Police Act, R.S.C. 1970, c. R-9, s. 18.

35. Ontario Police Act, R.S.O. 1980, c. 381, s. 57.

constable and peace officer. It is therefore necessary to consider briefly the evolution of those offices in England and Canada.

(a). *The common law offices*

Traditionally, the duties of the police were the duties of every member of the community. Medieval society was structured on a system of “universal interguardianship”³⁶ in which the community as a whole was liable for failing to apprehend robbers, and for providing itself with a “watch and ward” system.³⁷

William Lambard, in his book, *The Duties of Constables, Borsholder, Tithingmen, and such other Low Ministers of the Peace*, 1583, listed a number of powers specifically granted by common law and statute to prevent, pacify, and punish breaches of the peace.³⁸ These included powers of arrest and imprisonment and it seems clear that in preserving the peace the authority of these local officials was strictly limited.³⁹

The medieval system began to break down by the seventeenth century. Local offices were unpopular, unremunerated and often abused while the adequacy of the protection provided was questioned.⁴⁰ In 1753 the Bow Street Runners, a small body of paid, full-time constables was established. The creation of this force was the first step towards the professionalization of the police and the trend continued and expanded until 1829

36. Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant* (1936), 49 *Harvard Law Review*, 566 at 579.

37. These and other traditional practices were enacted in The Statute of Winchester 1285, 13 Edw. 1, c. 6 which is perhaps the first attempt to legislate on community protection. The hierarchy which evolved included constables, borsholders, tithingmen, headboroughs and sheriffs whose primary purpose was to conserve the local peace. See Philip Stenning, *Legal Status of the Police*, Study Paper prepared for the Law Reform Commission of Canada, July, 1981 at 13.

38. William Lambard, *The Duties of Constables, Borsholder, Tithingmen and such other Low Ministers of the Peace*, 1583 as cited in Stenning, *Id.*, at 11-12.

39. See generally, Stenning, *Id.* at 29-31. See also T.A. Critchley, *History of the Police in England and Wales 900-1966* (Revised Edition London: Constable, 1978); W.L. Lee, *A History of the Police in England*, 1901 Reprint, (Montclair, New Jersey: Patterson, Smith, 1971); L. Radzinowicz, *A History of English Criminal Law, Vol. III: The Reform of the Police* (London: Stevens and Sons Ltd., 1956).

40. Hall, see, *supra* note 36 at 580-81.

when Sir Robert Peel established the Metropolitan Police Force.⁴¹ Although Peel recognized that the responsibility of its agents was essential to an efficient police force,⁴² the reforms which he initiated were met with strong and vocal opposition. Champions of individual liberty saw the proposed establishment of a police force as an attempt to strengthen executive powers and particular care was taken “that the constables of the police do not form false notions of their duties and powers”.⁴³

In his study prepared for the Law Reform Commission of Canada on the legal status of the police, Stenning writes:

It seems clear that despite the degeneration in prestige and efficiency of the office-holders during the seventeenth and eighteenth century, . . . the essential legal authority and status of the constable, which had been established by the sixteenth century, did not significantly change during the ensuing three centuries. We can also be reasonably certain . . . that it was this office that was introduced into Canada in the eighteenth century, and for which provision was made in the Parish and Town Officers Act of 1793 (S.U.C. 1793, 33 Geo. III, c. 2).⁴⁴

The development of the modern police in Canada is primarily one of statutory evolution and expansion. For the purposes of this analysis it is sufficient to note that the roots of the contemporary office of constable are found in medieval England and that the tradition of the common law constable is one of strictly limited authority.⁴⁵

(b). *The duties of the police*

The primary function of the constable is the preservation of the peace — a function which is expressed in a number of more specific duties.

The first duty of a constable is always to prevent the commission of a crime. If a constable reasonably apprehends that the action of any person may result in a breach of the

41. *Id.* at 583.

42. 21 Hansard Parl. Deb. (N.S.) 872 cited in Hall, *Id.* at 584.

43. Lee, see, *supra* note 39 at 241.

44. Stenning, see, *supra* note 37 at 33.

45. For an interesting discussion of the historical development of the office of constable at common law see *R. v. Walker* (1980), 48 C.C.C. (2d) 126 at 137 (Ont. Co. Ct.).

peace it is his duty to prevent that action. It is his general duty to protect life and property. The general function of controlling traffic on the roads is derived from this duty.⁴⁶

These common law duties have been recognized within the various policing statutes. However the policeman acting in pursuance of duty is not by reason thereof given immunity from the law. Police power is neither more nor less than that of the average citizen in the absence of unambiguous authority at statute or common law.⁴⁷ In other words, the police may “break the law”, i.e. infringe on rights of liberty or property only when specifically empowered to do so.⁴⁸ The fact that a duty exists to, for example, prevent crime, in no way implies that all authority necessary to effectively prevent crime also exists. This belief in the ‘Rule of Law’ is exemplified in the writings of the great constitutional scholar A.V. Dicey.

Every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. . . with us every official, from the Prime Minister down to a constable or a collector of taxes, is under the responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person.⁴⁹

As a society, we recognize the importance of controlled and accountable power. In the words of Dicey: “the ‘rule of law’

46. Peter Harvey, “Police”, Vol. 36, *Halsbury's Laws of England* (4th ed. London: Butterworths, 1981), para. 320, p. 200. See also Great Britain: Royal Commission on the Police, *Final Report*, Cmnd 1728 (1962) at 22.

47. See *McLurg v. Brenton* (1904), 98 N.W. 881 at 882; *R. v. Ella Paint* (1917), 28 C.C.C. 171 at 174 (N.S.S.C.); *Re McAvoy* (1970), 12 C.R.N.S. 56 at 60 (N.W.T. Terr. Ct.); *R. v. Richardson* (1924), 42 C.C.C. 95 at 96 (Sask. K.B.); and in England, *Christie and Another v. Leachinsky*, [1947] A.C. 573 at 591, 602 (H.L.).

48. *R. v. Ella Paint*, *Id.* at 175.

49. A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. London: MacMillan and Co. Ltd., 1959) at 193-94.

in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens.”⁵⁰

Clearly the distinction between police duty and police authority is a fundamental one. Canadian policing statutes speak in terms of duty. The powers granted by s.57 of the Ontario Police Act are referable to the powers held by a common law constable. Similarly, the Alberta Police Act, in s.31, states:

s.31(1). Every member of a police force has the power and it is his duty to

- (a) perform all duties that are assigned to peace officers in relation to
 - (i) the preservation of peace.⁵¹

The power-creating aspects of this section are minimal and are related to the power of a peace officer at common law which was, as we have seen, strictly limited. It is a mistake to construe federal and provincial policing legislation as anything other than a general statutory scheme for the administration and composition of an effective police force.

This approach to the various Police Acts is in accord with generally accepted principles of statutory interpretation⁵² and the vast majority of both Canadian and English case law.⁵³ It is presumed that the legislature does not intend to alter the common law or to abridge existing common law rights unless

50. *Id.* at 202-03. In *Christie and Another v. Leachinsky*, *supra* note 47, Lord du Parcq noted at 602 “the reluctance of the courts to accord to the officer of the law any rights or privileges which are denied to private citizens”. 51. Alberta Police Act, R.S.A. 1980, c. p-12, s. 31.

52. See re general rule of strict interpretation: *Bowditch v. Balchin* (1850), 5 Exch. 378; *A.G. for Can. v. Hallett and Carey Ltd.*, [1952] A.C. 427 at 450-51 (P.C.); *Que. Railway, Light, Heat and Power Co. v. Vaudry*, [1920] A.C. 662 at 679-80 (P.C.).

53. See particularly *Chaput v. Romain*, [1955] S.C.R. 834, 114 C.C.C. 170, 1 D.L.R. (2d) 241 and *R. v. Custer*, Sask. C.A., as yet unreported, where the Court of Appeal at 6 did not disturb the finding at the first appeal level that “there is no statutory provision in *The Police Act* [R.S.S. 1978, c. p-15, particularly section 37 (3) (a)] which can justify unlawful interference with the liberty or property of the accused so as to justify the unlawful entry by the police”.

such intention is clearly and specifically stated.⁵⁴ The 1980 House of Lords decision in *Morris v. Beardsmore*⁵⁵ is unequivocal on this point. The case deals with the English Road Traffic Act⁵⁶ and a charge of failure to provide a breath specimen which was demanded by constables who were trespassers in the accused's home. Although there are issues which are specific to the English legislation, the case nevertheless stands as a ringing declaration of the need for specific statutory authority to infringe common law rights. In the words of Lord Diplock:

If Parliament intends to authorize the doing of an act which would constitute a tort actionable at the suit of the person to whom the act is done, this requires provision in the statute.⁵⁷

The court was unwilling to imply any greater authority than that specifically created by the statute. Lord Scarman states:

It is not the task of judges, exercising their ingenuity in the field of implication, to go further in the invasion of fundamental private rights and liberties than Parliament has expressly authorized. The importance of express provision is that it affords the citizen the opportunity, if he chooses to use it, to read and understand the extent to which his rights and liberties have been curtailed.⁵⁸

The Canadian Supreme Court in *Colet v. The Queen*⁵⁹ unanimously agreed that:

. . . any statutory provision authorizing police officers to invade the property of others without invitation or permission would be an encroachment on the common law rights of the property owner, and in case of any ambiguity would be subject to a strict construction in favour of the common law rights of the owner.⁶⁰

54. See P. St. J. Langan, *Maxwell on the Interpretation of Statutes* (12th ed. London: Sweet and Maxwell, 1969) at 116. See also S.G.G. Edgar, *Craies on Statute Law* (7th ed. London: Sweet and Maxwell, 1971) at 121-22 and E.A. Driedger, *The Composition of Legislation* (Ottawa: Queen's Printer, 1957) at 127.

55. [1980] 2 All E.R. 753, [1980] 3 W.L.R. 283 (H.L.).

56. English Road Traffic Act 1972 (c. 20), s. 8(2) (5).

57. See, *supra* note 55 at 757.

58. *Id.* at 763. This approach is reiterated by Lord Keith in *Finnigan v. Sandiford*, [1981] 2 All E.R. 267 at 271 (H.L.); "Parliament cannot be taken to have authorized any further inroads on the rights of individual citizens than it specifically enacted".

59. (1981), 19 C.R. (3d) 84 (S.C.C.).

60. *Id.* at 92.

Rules of statutory interpretation require that the judiciary err in favour of individual liberty rather than by empowering an official of the state with any additional authority,⁶¹ and this principle has been repeatedly recognized by the courts.

The *Colet* decision and its implications have recently been reviewed by the Supreme Court in the companion cases of *R. v. Lyons*⁶² and the *Interception of Private Communications Reference*.⁶³ Both cases involve the Invasion of Privacy provisions of the Criminal Code and in particular whether or not the specifically created authority to intercept private communications creates by necessary implication the authority to trespass when necessary to implant a listening device, *R. v. Lyons* deals with the admissibility of evidence obtained by means of an unauthorized entry while the *Reference* case simply asks the court to answer two questions: 1) Does an authorization given under Part IV.1 by necessary implication authorize entry for the purpose of interception? 2) Does a judge have jurisdiction to expressly authorize an entry for the purpose of interception? In both cases the court split 4:2 in favour of recognizing an implied authority to enter.⁶⁴

The majority decision, enunciated in *R. v. Lyons* and adopted in the *Reference* case is based on a narrow point of statutory construction. Mr. Justice Estey, with whom Beetz, McIntyre and Lamer J.J.'s concurred, decided that the process of "interception" authorized by the legislation is a single undertaking which, depending on the type of device chosen, may require a surreptitious entry. In his opinion the authority to trespass arises by "necessary implication and unavoidable inference"⁶⁵ from the statute. According to Estey, J. Parliament

61. See P. St. J. Langan, *supra* note 54 at 251-52. See also *R. v. Ella Paint*, *supra* note 47 at 175; *R. v. Richardson* (1924), 18 Sask. L.R. 209, [1924] 1 W.W.R. 920, [1924] 1 D.L.R. 1001 (Sask. K.B.); *R. v. Jaagusta*, [1974] 3 W.W.R. 766 at 768 (B.C. Prov. Ct.); *R. v. Erikson* (1978), 39 C.C.C. (2d) 447 (Ont. Dist. Ct.); *Finnigan v. Sandiford*, *supra* note 58; *R. v. Rao* (1984), 46 O.R. (2d) 30 at 90 (Ont. C.A.).

62. *R. v. Lyons*, *supra* note 30.

63. *Interception Reference*, *supra* note 30.

64. The issue has provoked a wealth of academic comment and analysis. See, for example Stanley M. Beck, *Electronic Surveillance in the Administration of Criminal Justice* (1968), 46 Can. Bar Rev. 643, Stanley Cohen, *Invasion of Privacy*, 1983, and David Watt, *The Law of Electronic Surveillance in Canada*, 1979.

65. *R. v. Lyons*, *supra* note 30 at 22.

must have realized that covert entry to install and remove certain types of devices was necessary. Therefore in granting authority to intercept with these devices the legislature was necessarily granting authority to enter. He writes:

Explicitness is a requirement before legislation may properly be found to be intrusive of these basic rights [privacy and property]. However, the need to express the obvious is not present in any of the canons of statutory interpretation.⁶⁶

Mr. Justice Estey is careful to note that these implied powers must be exercised with great caution and only in circumstances where necessity is clearly demonstrated.⁶⁷

The minority judgment of Chief Justice Dickson, with whom Chouinard, J. concurred is based on a strict approach to construction and an obvious concern with the implications of creating an implied authority to act illegally. Dickson, C.J.C. rejects the argument that the power is necessary to implement the legislation as an “appeal to convenience”⁶⁸ and notes that the omission of an authority to enter in the context of an extremely specific and detailed section suggests that the creation of such authority was not intended. He distinguishes between physical and conversational privacy and concludes:

I am not prepared to infer that Parliament, by authorizing invasion of privacy in one form, has thereby authorized invasion of privacy in another form . . . In my view, the decision in *Colet v. R.*, and the classic principle of statutory interpretation it embodies, are in the end dispositive of this case . . . Ultimately, the logic upon which *Colet* turns is the traditional legal protection accorded private property and the long-standing refusal of the judiciary to impair that protection where Parliament has not itself done so expressly.⁶⁹

A careful reading of the reasons of the majority in these two cases suggests that the decision is fact-specific and should

66. *Id.* at 17.

67. *Id.* at 23. Unfortunately, Estey, J. is unwilling to do more than suggest that judges in issuing authorizations, clearly specify what the interception process will entail. He cites s. 178.13(2)(d) which requires the authorizing judge to include in the authorization “such terms and conditions as the judge considers advisable in the public interest” as evidence of the judicial safeguard function envisaged by the legislature.

68. *Interception Reference*, *supra* note 30 at 51

69. *Id.* at 53, 58.

not be extended to augment police power. It is easy to understand Estey, J.'s concern with the efficacy of the legislation and the unavoidable necessity, in his view, of recognizing a limited authority to trespass. The authority created by Parliament to "intercept" is a specific indication that common law rights are to be encroached, and in the opinion of the majority the authority to "intercept" is specific enough to authorize trespass. However, in my opinion the minority judgment is more convincing. Chief Justice Dickson's insistence on the need for explicit authority to enter without consent is consistent with traditions of statutory interpretation long recognized at common law. It is also important to note that these cases deal with specific authority — granting provisions in the Criminal Code and not merely with a statement of general duty such as exists in policing statutes.

The case of *Chaput v. Romain*⁷⁰ is a 1955 Supreme Court decision in which the court considered an action against three officers of the Provincial Police Force who interrupted and dispersed a meeting of the Jehovah's Witness without lawful authority. The court's reasoning turns primarily on whether the officers had a defence to their unlawful acts based either on superior orders or The Magistrate's Privilege Act.⁷¹ The unanimous nine member court held that the Provincial Police Force Act⁷² had no bearing on the action and afforded no protection to the officers in question. In discussing the applicability of the Police Act, albeit in obiter, Taschereau, J., with whom Kerwin and Estey, J.J.'s concurred stated:

The Act respecting the Provincial Police Force has no application. It determines the duties and functions of the Force, the services that it must render, the direction that it must follow, its composition as well as the conditions of admission and the regulations that may be adopted. It contains no provision, the effect of which would be to exculpate a public officer who commits a delict or quasi-

70. See, *supra* note 53.

71. R.S.Q. 1941, c. 18.

72. R.S.Q. 1941, c. 47.

delict, whether or not he is acting in the performance of his duties.⁷³

Clearly, statutes such as the Criminal Code which authorize police officers to arrest without warrant or authorize search with warrant are specifically intended to abridge common law rights. Parliament has turned its collective mind to the desirability of such infringements and decided to authorize them. Statutes such as the Ontario Police Act or the RCMP Act can in no way be seen to create similar authority. Rather, they are employment statutes whose terms establish the administrative make-up, composition and rules and regulations governing the forces which they create.⁷⁴ The duty-imposing sections are simply statutory expressions which define police functions with respect to the community they serve and the government which employs them. To suggest that these sections may imply and create authority to act contrary to law contradicts recognized principles of interpretation and is inconsistent with the legislative intent that is evident on any examination of the statute as a whole.⁷⁵

In summary then, both the Supreme Court of Canada and the House of Lords, in accordance with traditionally accepted canons of interpretation have refused to encroach on common law or statutory rights in the absence of express statutory language. Although the recently decided *Interception Reference* suggests that opinions may differ on what is implied by specific language the court nevertheless maintains its allegiance to the rule of construction in favour of vested rights. Even in the context of authority-granting statutes such as the Criminal Code or the English Road Traffic Act the courts are reluctant to imply any additional powers. To suggest that statutes which

73. See, *supra* note 53 at 174. Similarly, in *Lamb v. Benoit*, [1959] S.C.R. 321, Rand, J. concluded that the unlawful actions of police officers could not be said to be "in their official capacity" or "in the performance of public duty" at 342. As a result a procedural defence to actions for malicious prosecution and unlawful arrest was unavailable.

74. See, for example, the Ontario Police Act, Part I, Division of Responsibility; Part II, s. 8, Creation, Composition, Remuneration of Boards, s. 28-40, Bargaining and Arbitration; The Royal Canadian Mounted Police Act, Part I, Constitution and Organization; Part III, Discipline.

75. The duty-imposing section of the RCMP Act is but one section of twenty-one in the Part dealing with Constitution and Organization. These other sections deal with such areas as the Commissioner, the Civilian Staff, Headquarters, Tenure of Office of Members, and Pay and Allowances.

merely impose and enunciate employment duties may be construed so as to authorize infringements of common law rights is to reject both the stated position of the courts and the accepted principles of statutory interpretation.

3. *The Case Law on Police Authority*

In Canada today, the majority of federal authority-granting provisions are to be found in the Criminal Code. However, underlying the specific statutory enactments is a long tradition of common law which severely restricts police power to infringe on protected rights. The vast majority of the case law in this area involves criminal charges such as assault or obstruction of a police officer in the execution of duty. The fact that the offences are described in terms of “execution of duty” may well explain the frequent confusion between the concepts of duty and authority. Most judgments however, recognize the fundamental principle that a police officer who is in breach of the law, either civil or criminal, is not in the execution of his duty.⁷⁶

Any discussion of the law in this area must begin with a consideration of one of the great common law cases, the mid-eighteenth century decision in *Entick v. Carrington*.⁷⁷ The issue in that decision was the legality of a warrant issued by the Secretary of State which purported to create authority to seize and apprehend the plaintiff as well as his books and papers. The reasoning of Lord Camden is justly famous as an assertion of the recognized common law principle that:

76. See *Halsbury's Laws of England*, 4th ed., *supra* note 46. Among the many judgments which recognize this principle are: *R. v. Walker* (1854), 169 E.R. 759 (C.C.); *Broughton v. Wilkerson* (1880), 44 J.P. 781; *R. v. Doyle* (1920), 35 C.C.C., 6 (Sask. C.A.); *Johanson v. The King, Daniluk v. The King* (1947), 89 C.C.C. 305, [1947] 4 D.L.R. 337 (S.C.C.); *R. v. Ryan* (1956), 18 W.W.R. 684 (B.C.C.A.); *Rice v. Connolly*, [1966] 2 Q.B. 414; *R. v. Middleton et al.*, [1969] 1 O.R. 275, [1969] 4 C.C.C. 197 (Ont. C.A.); *Tunbridge v. The Queen*, [1971] 4 W.W.R. 77 (B.C.C.A.); *Sandison v. Rybiak* (1974), 1 O.R. (2d) 74 (Ont. H.C.J.); *R. v. MacLeod* (1979), 61 A.P.R. 479 (P.E.I.S.C.); *Lindley v. Rutter*, [1980] 3 W.L.R. 660 (Q.B.); *R. v. Prince* (1981), 61 C.C.C. (2d) 73 (Man. Prov. Ct.); *R. v. Oake* (1981), 61 C.C.C. (2d) 129 (N.S. Co. Ct.); *R. v. Landry*, [1981] 63 C.C.C. (2d) 290 (Ont. C.A.); *McLorie v. Oxford*, [1982] 3 W.L.R. 423 (Q.B.); *Bentley v. Brudzinski*, [1982] Crim. L.R. 825; *R. v. Lis* (1984), 48 A.R. 157 (Alta. Prov. Ct.); *R. v. Wood* (1984), 52 A.R. 356 (Alta. Q.B.); *R. v. Custer*, *supra* note 50.

77. (1765), 19 State Tr. 1029, 95 E.R. 807 (K.B.).

. . . our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.⁷⁸

The need for a rule of positive law to authorize illegal official acts was asserted even earlier in the case of *The Queen v. Tooley*, decided in 1709.⁷⁹ The case involved a conviction of either murder or manslaughter, the seriousness of the verdict being dependent on whether or not the victim, who was a police officer, was acting in the execution of duty. The court stated:

The prisoners in this case had sufficient provocation; for if one be imprisoned upon unlawful authority, it is a sufficient provocation to all people out of compassion; much more where it is done under a colour of justice, and where the liberty of the subject is invaded, it is a provocation to all the subjects of England . . . if anyone against the law imprisons a man he is an offender against Magna Charta.⁸⁰

Clearly, over three hundred years ago the common law required that invasive official acts be justified by lawful authority. Similarly, in the 1864 case of *R. v. Lockley*⁸¹ the court considered whether the accused should be found guilty of murder or manslaughter when in resisting arrest they caused the death of an officer. The court concluded that in resisting an unlawful arrest the accused were justified in using necessary force, and that only the use of unnecessary violence causing death would result in a conviction of manslaughter. In the course of his reasons Shee, J. wrote: "It is sufficient, however, if the constable was on duty in uniform within his proper district . . . but then this does not raise any presumption that the acts done by him were done lawfully and in the proper execution of duty".⁸²

This attitude was adopted in Ontario as well. In an 1895 case involving an alleged illegal arrest and the statutory protection afforded to the officer involved Boyd, C. stated:

. . . a constable acting *colore officii* was not protected by the statute . . . where the act committed is of such a nature

78. *Id.* at 817.

79. (1709), 2 Ld. Raym. 1296, 92 E.R. 349.

80. *Id.* at 352-53.

81. *R. v. Lockley*, [1864] 4 F. and F. 155, 176 E.R. 511 (Crown Ct.).

82. *Id.* at 512.

that the office gives him no authority to do it: in the doing of that act he is not to be considered as an officer.⁸³

Four years later, Rose, J. reiterated this approach in discussing a case involving an unauthorized and unjustified handcuffing.

... while the Courts have always protected its officers in the discharge of duty, they never have nor indeed can they brook injustice being committed in the name of the law.⁸⁴

The twentieth century has seen this principle asserted time and time again. Although the existence of various empowering statutes has often complicated the reasoning, the essential concept has remained basically unaltered. A constable who is acting unlawfully, in arresting, in failing to comply with statutory provisions, or in entering or searching without warrant or authority is not in the execution of his duty.⁸⁵

The 1936 King's Bench decision in *Davis v. Lisle*⁸⁶ is perhaps typical of this approach. In that case, a police officer entered the appellant's garage without permission and without a warrant, in order to make inquiries regarding an alleged offence. The appellant directed the police officer to leave and when he refused to do so, assaulted him. The court held that a charge of assault in the execution of duty could not stand since once he was asked to leave the police officer became a trespasser and was not thereafter in the execution of duty. In the course of its reasons the court cited an earlier King's Bench decision, *Great Central Railway Company v. Bates*⁸⁷ which stated:

... the case has been put on the analogy of a person having a right as a matter of public duty to enter into premises ... It appears to be very important that it should be

83. *Kelly v. Barton; Kelly v. Archibald* (1895), 26 O.R. 608 at 622 (Chanc. Div.).

84. *Hamilton v. Massie* (1880), 18 O.R. 585 at 589 (C.P. Div.).

85. See *Halsbury's Laws of England*, 4th ed., *supra* note 46. See generally the cases cited in note 76. In *McLorie v. Oxford*, *supra* note 76, Donald, L.J. stated for the court: " 'In the execution of his duty' is not the same as 'on duty'. The essence of the offence is that the police constable is assaulted whilst he is acting within the limits of his lawful authority" at 426.

86. [1936] 2 K.B. 434. This case was specifically adopted by the New Zealand Supreme Court in *Matthews v. Dwan*, [1949] N.Z.L.R. 1037 and in *R. v. Ryan*, *supra* note 76.

87. [1921] 3 K.B. 578.

established that nobody has a right to enter premises except strictly in accordance with authority.⁸⁸

One of the most significant modern authorities on the law of police power is the 1964 English Court of Appeal decision in *R. v. Waterfield*.⁸⁹ The decision is often cited, primarily because of the test enunciated by Ashworth, J. in the course of his reasons.

In the judgment of this court it would be difficult, and in the present case it is unnecessary, to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was prima facie an unlawful interference with a person's liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognized at common law and (b) whether such conduct, albeit within the general scope of such duty, involved an unjustifiable use of powers associated with the duty.⁹⁰

The test is often used as a vehicle for determining the lawfulness of a particular police action. However, it is submitted that the test is often misinterpreted both on its own and in the context of the case. In addition, although the case provided some welcome clarity, *Waterfield* is not a culminating statement on the law of police duty and authority, but rather only one of many decisions in a large body of relevant case law.

The facts of the case are straightforward. The defendants, Lyn and Waterfield attempted to remove a car which was being watched by two police constables. The constables suspected that the car had been involved in a serious offence and, without charging or arresting the defendants, sought to prevent the car from being removed. The defendants were charged with assaulting a peace officer in the execution of duty when, in the course of removing the vehicle, one constable was threatened and one touched by the moving car. The issue for the court was whether or not the constables could be said to be acting in the execution of duty. The Crown contended that the constables were attempting to preserve for use in court evidence

88. *Id.* at 582.

89. See, *supra* note 25.

90. *Id.* at 170-71.

of a crime and that in pursuance of that duty they were entitled to detain the car without charge or arrest.

In the course of its reasons, the court enunciated the test set out above. The result, however, was an acquittal. While the Court recognized the existence of a duty to preserve evidence for use in court, the existence of that duty did not imply the authority to prevent the removal of the car. In fact, the court clearly recognizes that there is no authority, either at common law or by statute which, in the absence of an arrest or charge, empowered the constables to detain the car. In other words, the duty did not imply the authority to seize property and the court was unable to find any specific authority which in fact granted to the constables the power they purported to exercise. The constables were infringing on the respondents' property rights without specific authority and were therefore not acting in the execution of duty. The case is a strong judicial statement of the distinction between duty and authority since, even though the police officers were acting within the scope of their duty, they lacked the requisite authority to breach common law rights.

When considered in light of the actual result in the case the test as enunciated takes on added significance. Conduct by a police officer which infringes on common law rights of liberty or property is *prima facie* unlawful. The test goes on to say that in order to be lawful the conduct must be within the general scope of duty and in addition must involve a justifiable use of powers associated with duty. Clearly then, in order to apply the test the crucial question is; what powers are associated with duty? What authority has been granted to the police in the context of performing a general duty? Powers which infringe on recognized rights must be specifically enunciated either at common law or by statute. Chief Justice Dickson, in his dissenting reasons in the *Interception Reference* states:

The fact that police officers could be described as acting within the general scope of their duties to investigate crime cannot empower them to violate the law whenever such conduct could be justified by the public interest in law enforcement. Any such principle would be nothing short of a fiat for illegality on the part of the police whenever the benefit of police action appeared to outweigh the infringement of an individual's rights. For the *Waterfield* principle to apply, the police must

be engaged in lawful execution of their duty at the time of the conduct in question.⁹¹

In *Waterfield* the authority to detain the car did not exist. In Canada the authority to break-in, unlawfully seize papers or burn barns is similarly non-existent.⁹²

In *Johnson v. Phillips*⁹³ the Queen's Bench Division clearly recognized the important distinction between duty and power. In that case the court decided that a police officer in performing his duty to control traffic on public roads had the power at common law to compel disobedience to a traffic regulation (in this situation a one-way street). That authority, however, was strictly limited to situations in which a virtual emergency had arisen and it was reasonably necessary for the protection of life and property.⁹⁴ It is important to note that the court does not suggest that the duty to control traffic implies a general authority to break the law whenever it appears expedient.

We stress that we do *not* decide that a constable has powers, whenever he thinks it right, to order traffic to reverse the wrong way along a one-way street.⁹⁵

The court in *Johnson v. Phillips* cites as authority the 1974 case of *Hoffman v. Thomas*.⁹⁶ This is another excellent example of the crucial distinction between duty and authority which is at the heart of the common law. The case involved a motorist who refused to take part in a census when requested to do so by the respondent police officer. The court found that the constable had a duty to direct traffic and a power to regulate

91. See, *supra* note 30 at 56. The majority did not discuss the *Waterfield* principle.

92. This approach to *Waterfield* has been adopted clearly in a number of cases. For example in *R. v. Custer*, *supra* note 53 at 16-26 Chief Justice Bayda adopts a 4 stage approach: 1) What was the police officer actually doing?; 2) Was it *prima facie* an unlawful interference? 3) Was it within the general scope of duty? and 4) Did it involve an unjustifiable use of powers associated with duty? The Chief Justice determined that the police officer's unauthorized and forcible entry into the respondent's home was within the general scope of a common law duty to investigate a stabbing and apprehend an offender. However there was no power at common law or statute which entitled the officer to enter the house against the housholder's will. Therefore the constable was acting outside his lawful authority and was not engaged in the execution of duty. See also *Rice v. Connolly*, *supra* note 76, and *R. v. Dedman* (1981), 59 C.C.C. (2d) 97 at 109-111 (O.C.A.).

93. [1975] 3 All E.R. 682 (Q.B.).

94. *Id.* at 686.

95. *Id.*

96. [1974] 2 All E.R. 233 (Q.B.).

traffic because “of the danger to life and limb which unregulated traffic can present”.⁹⁷ However, this limited authority to regulate did not include the authority to compel participation in a census. The court stated:

When the police officer made his signal directing the appellant to leave the motorway and go into the census area, he made a signal which he had no power to make either at common law or by virtue of statute, and consequently . . . the giving of that signal cannot have been an act in the execution of his duty.⁹⁸

While the majority of Canadian cases adopt the interpretation of *Waterfield* previously submitted,⁹⁹ two Supreme Court decisions appear to suggest that police duty may indeed create limited authority to break the law.¹⁰⁰ Both have rightly been the subject of academic comment and criticism,¹⁰¹ given very limited application by the courts, and it is suggested that neither case provides an authoritative statement of general principle.

*R. v. Stenning*¹⁰² is an exceptionally unfortunate judgment which on its face appears to say that a trespass does not remove an officer from the execution of his duty. The facts of the case are admirably summarized in the following extract.

Constables arriving at business premises in the evening found a man outside beaten and bleeding. It was also discovered that a firearm had been discharged. A constable saw someone moving in the building. The police, unable to induce those within to open the building, entered through a window to search the premises. There two persons were found, who had been drinking heavily. A constable shook one to awake him in order to ask questions and was thereupon assaulted.¹⁰³

97. *Id.* at 238.

98. *Id.*

99. See, for example: *R. v. Middleton et al.*, *Tunbridge v. The Queen*, *Sandison v. Rybiak*, *R. v. MacLeod*, *R. v. Prince*, *R. v. Oake*, *R. v. Landry*, *R. v. Lis*, *R. v. Wood*, *supra* note 76; *R. v. Dedman*, *supra* note 92; *R. v. Custer*, *supra* note 53; and *R. ex rel Crewson v. Alexandre*, (1974) 4 W.W.R. 315 (Alta. Dist. Ct.).

100. *R. v. Stenning*, [1970] 10 D.L.R. (3d) 224 (S.C.C.); *Knowlton v. The Queen*, [1973] 10 C.C.C. (2d) 377 (S.C.C.). See also L.H. Leigh, *Police Powers in England and Wales* (London: Butterworths, 1975) at 33.

101. See, for example, A Grant, *The Supreme Court of Canada and the Police* (1978), 20 Crim. L.Q. 152 which comments on four significant decisions in the area of police authority including *Knowlton* and *Stenning*.

102. *R. v. Stenning*, *supra* note 100.

103. L.H. Leigh, *supra* note 100 at 32.

In a two and a half page judgment, half of which is devoted to a recitation of the facts, the Supreme Court simply states that the officers were acting in the course of their duties under the Police Act even though they were technically trespassers. The decision, which is remarkable both for its brevity and paucity of reasoning, cites no Canadian authority and refers only briefly to the test enunciated in *Waterfield*. The court appears to rely on the fact that the respondent was not, in fact, the owner or occupier of the building and that the trespass therefore was not an interference with his rights of property. According to the court, at the time of the assault neither the liberty nor property rights of the respondent had been infringed and the officers were in the execution of their duty at least with respect to the respondent.

Even on this limited ground the judgment is unsatisfactory. The duty identified was a broad and general one to investigate occurrences. It is clear that in performing this duty the constables were operating outside the strict letter of the law and were, in fact at the very least, committing civil trespass. While the respondent was almost certainly guilty of assault, by convicting him on the more serious charge of assault in the execution of duty, the court appears to have significantly expanded the concept of duty. While one can sympathize with the court's dislike of the violent and uncalled for conduct of the respondent, it is submitted that a significant expansion of the law of police powers is an inappropriate response. Because of its understandable reluctance to excuse the respondent simply because the charge was improperly laid, the court has fashioned a clearly result-oriented decision. According to *Stenning*, "technical" illegality committed during the course of investigation does not render an officer outside the execution of duty. Since it is difficult to conceive of a situation in which an officer is not arguably investigating an occurrence, potential liability for charges such as assault or obstruction in the execution of duty has been significantly expanded. Differentiating between merely technical as opposed to substantial police illegality is a cumbersome and unsatisfactory method of protecting the individual citizen from the overzealous officer. It is submitted that the case should be construed narrowly, and should be viewed as both a factual aberration and an unfortunately result-oriented decision, rather

than as a statement of general principle.¹⁰⁴ The decision stands in fundamental contradiction with not only *Waterfield*, the only case to which it refers, but also with the established traditions of the common law.

In *Knowlton v. The Queen*¹⁰⁵ the Supreme Court was again faced with an obstreperous individual whose conviction for obstructing a police officer in the execution of his duty was confirmed. The facts in the case were that the police, as part of security arrangements made in anticipation of a visit by the Soviet Premier, cordoned off a small area in downtown Edmonton. The police had no specific authority to block off the area in question or to prevent citizens from entering. The accused, a press photographer, forcefully insisted on his right to enter the restricted area and as a result was arrested on a charge of obstruction. At trial the accused was acquitted — the judge finding that the police, who were not enforcing any Criminal Code provisions or any by-laws were not in the execution of duty. This result was reversed on appeal.

The Supreme Court drew particular attention to the fact that the police were attempting to prevent an assault on Premier Kosygin such as had occurred earlier in the visit. The court purported to apply the *Waterfield* test and found that the police had a “specific and binding obligation to take proper and reasonable steps”¹⁰⁶ to prevent a renewed criminal assault on the visiting dignitary. Like *Stenning*, the decision in *Knowlton* is remarkably brief — four pages of which two are devoted to legal analysis. No Canadian authority is cited for the result and indeed it is difficult to extract a coherent legal justification for the decision. Chief Justice Fauteaux refers obliquely to the

104. In *R. v. Custer*, *supra* note 53 at 11 the Saskatchewan Court of Appeal struggled to distinguish *Stenning* and stated its ratio in the following lengthy and rather convoluted sentence: “If a police officer, in the course of making an investigation of a serious crime, finds himself on private property without license or leave from the owner (but not in defiance of an express objection by the owner or occupier), he is not acting *ipso facto* outside the limits of his authority in continuing the investigation; and the police officer’s “technical trespass” is no defence to a stranger to the property who is charged with assaulting the police officer engaged in the execution of his duty if prior to assault the police officer was not asked to leave and did not interfere with the stranger’s person or property”.

105. *Knowlton v. The Queen*, *supra* note 100.

106. *Id.* at 380.

principles underlying section 30 of the Criminal Code,¹⁰⁷ and suggests that the restriction of access to public streets was a reasonable and not unusual step in the circumstances. He also comments on the likelihood that the appellant was aware of the security situation which existed and on the fact that he was carrying an inadequate press identification card. While these facts may reduce any tenuous sympathy one has for the appellant's stubborn behaviour their legal relevance is marginal and is in fact not clarified by the court. In the *Waterfield* case to which the court refers, the accused were acquitted because there was no clear authority for the police officers to detain the car. Mr. Knowlton, on the other hand, was convicted based only on the authority of *Waterfield* and despite the fact that the court appears unable or unwilling to identify any specific authority for the police officer's actions.

It is respectfully submitted that this decision is wrong. The court was unable to identify any common law or statutory power to interfere with the appellant's freedom of access to public streets. The police therefore had a right to ask the appellant to respect the cordoned-off area, but had no power to compel his obedience. It is of course unfortunate that Mr. Knowlton insisted so vigorously on his rights and refused to co-operate with an eminently reasonable police precaution. However, the fact that a small minority of citizens will refuse to co-operate in like situations does not justify the rejection of fundamental principles.

Recently, in *Colet v. The Queen*¹⁰⁸ the Supreme Court appears to have recanted somewhat from its position in *Knowlton* and *Stenning*. The accused had been charged with a number of criminal offences arising out of his defence of his property. The police claimed the authority of a warrant to seize issued under the former s. 105(1) of the Criminal Code to justify their attempted entry on the accused's property. Ritchie, J. for the court wrote:

107. Section 30 of the Criminal Code reads: Everyone who witnesses a breach of the peace is justified in interfering to prevent the continuance or renewal thereof and may detain any person who commits or is about to join in or to renew the breach of the peace for the purpose of giving him into the custody of a peace officer.

108. [1981] 19 C.R. 84 (S.C.C.).

This appeal raises the all-important question of whether the property rights of the individual can be invaded otherwise than with specific statutory authority. It is true that the appellant's place of residence was nothing more than a shack . . . but what is involved here is the longstanding right of a citizen of this country to the control and enjoyment of his own property, including the right to determine who shall and who shall not be permitted to invade . . . [It] would, in my view, be dangerous indeed to hold that the private rights of the individual to the exclusive enjoyment of his own property are to be subject to invasion by police officers whenever they can be said to be acting in the furtherance of the enforcement of any section of the Criminal Code although they are not armed with express authority to justify their action.¹⁰⁹

The court is unequivocal in its recognition of the need for specific authority to infringe common law rights and, as such *Colet* is more clearly a statement of principle than either *Stenning* or *Knowlton*.¹¹⁰

The 1980 House of Lords decision in *Morris v. Beardsmore*¹¹¹ previously discussed is equally significant as an example of the evolution of the principles enunciated in *Waterfield*. Lord Edmund-Davies asserts:

. . . although policemen have been vested by statute with powers beyond those of other people, they are exercisable only by virtue of the authority thereby conferred on them and in the execution of their duty In this regard it is unthinkable that a policeman may properly be regarded as acting in the execution of his duty when he is acting unlawfully, and this regardless of whether his contravention is of the criminal law or simply of the civil law.¹¹²

109. *Id.* at 90-91.

110. In *R. v. Lyons*, *supra* note 30 at 35-36, Mr. Justice Estey attempts to distinguish *Colet*. He notes that the *Colet* decision is based on the distinction between the authority to search and the authority to seize. This distinction is well-recognized in the Criminal Code and, in Estey, J.'s opinion is not applicable to the authority to "intercept." He states: "The operation being regulated by Parliament in Part IV.1 was the interception of conversations, a separate, distinct and complete transaction" which may include entry. Chief Justice Dickson, for the minority in the *Interception Reference*, *supra* note 30 at 58 bases his decision on the principle enunciated in *Colet* and expresses grave doubts as to whether it can in fact be distinguished. See text, *infra* at 21.

111. See text *infra* at 20-21.

112. See, *supra* note 55 at 759.

Morris v. Beardsmore is an important decision in the law of police powers and has been followed in two more recent decisions in addition to being cited in Halsbury's fourth edition.¹¹³ The *Waterfield* test does not exist in a vacuum. In order to apply the test it is necessary to first understand the facts of the case and how the test was applied. Perhaps more importantly, *Waterfield* must be placed in context, as one decision in a long history of case law dating back to *Entick v. Carrington* and continuing to evolve today.

PART III: *McLeod/McDonald Revisited*

I. *Introduction*

When analyzing the effectiveness of any scholarly document it is important to keep in mind the biases, explicit or implicit, of the author. The McLeod Report is primarily and explicitly intended as a response to and criticism of the McDonald Commission. As such, the Report recognizes the legitimacy of certain invasive police practices. The perception that an expansion of police powers is necessary to preserve law and order is at the heart of this approach.¹¹⁴ The empirical validity of this assumption is accepted without question. Surely however, the implications of expanding police authority to interfere with recognized common law rights go far beyond a perceived need to combat crime.

The laws which control the exercise of police power lie at the heart of a legal system which is involved in balancing the need for effective law enforcement with the individual's right to be protected against the arbitrary use of authority. In the words of a senior British police officer.

The police, like laws, reflect the nature of the society which they serve. Corrupt societies deserve, and get, corrupt police. Totalitarian societies acquire omnipotent police. Violent

113. See *Finnigan v. Sandiford*, *supra* note 58 and *McLorie v. Oxford*, *supra* note 76 and *Halsbury's*, *supra* note 46.

114. For an interesting discussion of the "law and order" approach see Stanley A. Cohen, *Invasion of Privacy: Police and Electronic Surveillance in Canada* (1982), 27 McGill L.J., 619 at 625-29.

societies get violent police. Tolerant societies get tolerant police. Wise societies bridle police powers.¹¹⁵

The debate between McLeod and McDonald is not merely an exercise in legal minutiae or an academic squabble over an ancient doctrine. It is crucial therefore, when evaluating the McLeod position to look not only at the thoroughness of the legal analysis but also at the policy implications of the approach.

2. *The Legal Analysis*

While the McLeod Report reads well superficially it is surprisingly difficult to extract a coherent legal thesis. The Committee stresses concepts such as “the ordinary law”, “the global law” and “the ordinary law of the realm in a global sense”,¹¹⁶ which despite countless readings remained unclear to this reader.

Although one can perhaps excuse murky reasoning or stated bias, it is less easy to understand the type of legal scholarship on which the Report’s conclusions are based. The choice of legal authority is clearly made with a view to validate the conclusions reached, and not to state the existing law. The Committee has chosen to ignore all case law decided prior to 1959 and in fact with the exception of 3 cases has limited itself to post-1970 decisions. Although modern authority is clearly relevant, pivotal cases such as *Entick v. Carrington*, *Davis v. Lisle*, *Great Central Railway Co. v. Bates*, *R. v. Richardson*, *R. v. Ella Paint* and *Chaput v. Romain* are apparently ignored. In addition, although relying primarily on modern authority the Report fails to mention the significant *Beardsmore* House of Lords decision in *Morris v. Beardsmore*, and mentions the Supreme Court decision in *Colet* only in the context of a few specific examples of police technique and not in the legal analysis.

Equally troubling is the use of cases without placing the decisions and comments extracted therefrom in context. The case of *Schacht v. O'Rourke*¹¹⁷ is used as authority for the proposition that it is:

115. J.C. Alderson, “The Principles and Practices of the British Police” in *The Police We Deserve*, Alderson and Stead (eds.) at 39 cited in David G. Humphrey *Abuse of their Powers by the Police* (1979), L.S.U.C. Special Lectures, 570.

116. See, *supra* note 9 at 9-14.

117. [1976] 1 S.C.R. 53.

. . . inadvisable to attempt to frame a definition which will set definite limits to the powers and duties of police officers . . . It is infinitely better that the courts should decide, as each case arises whether, having regard to the necessities of the case and the safeguards required in the public interest, the police are under a legal duty in the particular circumstances.¹¹⁸

While this statement is indeed contained in the reasons of Mr. Justice Spence and is undoubtedly correct, the case is one involving the alleged negligence of a police officer and the subsequent injury to an innocent third party. As such, the court was discussing the relationship between the police officer's statutory duty and a possible duty of care owed in negligence to the respondent. The case is concerned primarily with the question of whether or not the officer was negligent or careless, and the liability of the police officer and/or the Commissioner of Police. It has nothing whatever to do with the concepts of authority and duty. Similarly, the authors use the case of *Priestman v. Colangelo and Smythson, Priestman v. Shynall and Smythson*,¹¹⁹ another negligence action to illustrate their application of the *Waterfield* principle. The Report states:

In our view the majority of the Supreme Court of Canada, in *Priestman*, held that the ordinary law of the realm relevant to the civil liability of police officers included not only the general law of negligence but also *Waterfield*.¹²⁰

It is difficult to conceive of how the Supreme Court could have intended this result since *Waterfield* was actually decided some five years later. Both of these Supreme Court decisions are used to buttress the Report's analysis — unfortunately neither is at all relevant.

Surprisingly, the Committee chooses to adopt Halsbury's third edition, paragraph 206 as an accurate statement of the general functions of a constable at common law.¹²¹ In Halsbury's 4th edition, published in 1981, the corresponding paragraph has been expanded to include a reference which seems to specifically refute the underlying thesis of the Report.

118. *Id.* at 65-66.

119. [1959] 124 C.C.C. 1, 19 D.L.R. (2d) 1 (S.C.C.).

120. See, *supra* note 9 at 53.

121. *Ibid.* at 25.

However, a constable is himself subject to the law, and he cannot claim immunity from it by reason only that he is acting in pursuance of his duty; indeed a constable who flouted the law (whether civil or criminal) could scarcely be said to be acting in the execution of his duty as such.¹²²

Possibly, the most recent edition of Halsbury was not available to the authors, but the case of *Morris v. Beardsmore* which is cited as authority was reported in 1980 and should surely have been unearthed in the course of research.

Apart from these scholarly difficulties, it is the contention of this paper that the analysis suggested by McLeod is legally incorrect. The Report attaches great significance to the case of *R. v. Waterfield* and indeed it adopts the *Waterfield* test as the appropriate measuring stick of police illegality. However, the test in *Waterfield* must be interpreted in light of the facts and the result in the case. Following *Waterfield*, which was decided in 1964, the law has continued to evolve while maintaining the position that the law of police powers is authority and not expediency based. The test in *Waterfield* turns on the justifiable use of powers associated with duty. In order to apply the test it is necessary to ascertain what authority is associated with the duty in question. This is the approach adopted by the *Waterfield* bench and numerous courts since the decision.¹²³ If the test is used without initially ascertaining the limit of existing authority it becomes meaningless. It is submitted that the legal analysis presented here demonstrates that no authority to infringe on protected rights of liberty or property can be implied simply from the existence of duty. The Report, in relying so heavily on an incomplete and misleading interpretation of *Waterfield* to the exclusion of both ancient and recent case law places its conclusions in doubt.

Finally, the McLeod Report attempts to buttress its duty/authority analysis by relying on the statutory nature of the police in Canada today. However, entrenched, traditional canons of interpretation, Supreme Court and other judicial authority, and a common sense approach to the statutes as a whole suggest that it is incorrect to construe them as authority-granting. It

122. See, *supra* note 46.

123. See, for example *Rice v. Connolly*, *Bentley v. Brudzinski*, *supra* note 76; *R. v. Dedman*, *supra* note 92; *R. v. Custer*, *supra* note 53.

seems clear that the various Police Acts are primarily administrative in nature and that the duty-creating sections are simple expositions of the traditional relationship between the peace officer and the community he serves.

3. *Policy Implications*

The implications of the McLeod Report go far beyond a mere technical adjustment of the existing law. The McLeod Report is designed to cultivate an attitude that accepts police illegality for the good of society as a whole. This approach diminishes the rights of the average citizen and would provoke controversy even if the document which advocated it was clear and scrupulously thorough. Unfortunately, as demonstrated throughout this criticism the legal analysis of the McLeod Report is vulnerable in the extreme.

The success of the police in our society is dependent in large part on the co-operation and trust of the public.¹²⁴ In the words of Mr. Justice Brandeis of the United States Supreme Court:

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.¹²⁵

Revelations of institutionalized RCMP wrongdoing were greeted with widespread outcry and debate.¹²⁶ As the agency to which we have arguably granted the “greatest power and

124. See the Report of the Canadian Committee on Corrections (Quimet Report), *Toward Unity: Criminal Justice and Correction* (Ottawa: Queen's Printer, 1969).

125. *Olmstead v. United States* (1927), 277 U.S. 438 at 485, 48 Sup. Ct. Rptr. 564 at 575.

126. See, *supra* notes 1 and 5,

widest discretion to interfere in our lives”¹²⁷ the police cannot be seen to disregard the law which they are empowered to enforce.

The Report suggests that for a number of the procedures investigated an appropriate response to the criticism leveled by the McDonald Commission would be the formulation of new and accurate policy guidelines. However, by defining police power by guidelines we define individual freedom by police discretion. This article’s brief consideration of the factual circumstances leading up to the establishment of the McDonald Commission suggests that the exercise of police discretion, no matter how well intended, may lead to unsavoury results. The Report of the Canadian Committee on Corrections (Ouimet Report)¹²⁸ recognized the need for a clear and concise statement of police power.

Police powers should not, however, require research to ascertain their existence and extent, but should be readily ascertainable and clearly defined.¹²⁹

The existence of clearly defined police powers serves two purposes. First, if a power is unambiguously created it suggests that the legislature has turned its mind to the problem and decided on the most appropriate course of action. Second, it is essential that police powers be accessible and understandable to the public which they are designed to protect. This promotes public confidence in the police and also encourages co-operation with their lawful activities.¹³⁰ In and of themselves policy guidelines, however detailed, create no substantive rights. If the rule of law is to have any significance it must mean that the law is discoverable, open, clear and relatively stable and therefore capable of guiding our behaviour.¹³¹

Clearly, it is in the public interest that the police be given the necessary authority to function effectively in their most difficult task. However, “it is equally to the public good that police power should be controlled and confined so as not to

127. See Cohen, *supra* note 114 at 634.

128. See, *supra* note 124.

129. *Id.* at 59.

130. In *Ghani v. Jones*, [1970] 1 Q.B. 699 (C.A.) Lord Denning wrote that “the lawfulness of the conduct of the police must be judged at the time and not by what happens afterwards” at 709.

131. See Cohen, *supra* note 114 at 633.

interfere with personal freedom".¹³² As a society we have recognized and authorized police powers to search, seize, arrest, detain and bear arms far exceeding the powers of the ordinary citizen. We also recognize that the basic purposes of the criminal law should be carried out with no more interference with the freedom of individuals than is necessary. To achieve order we are willing to pay a price in diminished civil liberties. However, at some point individual interests must predominate. The backdrop to this balancing process is the rule of law which is essential both to the maintenance of civil liberties and the establishment of an effective police force. In my opinion, the overwhelming policy consideration in the exercise of police power should be restraint.¹³³ The state should intervene only when and to the extent which such intervention is clearly authorized by law. Documents such as the McLeod Report imply that "law and order" will be more readily achieved if we simply allow the police to act outside the law in certain situations. In the words of one author:

The danger is not that our few prized liberties will expire in some loud, anguished and bloody battle, but rather that by slow degrees, by slight turnings of the screw, by steady constant erosion, they will silently disappear.¹³⁴

Conclusion

The McLeod Report is both surprising and dangerous. Surprising, because one would expect a high level of intellectual rigour from authors with such senior positions in our system of justice. Dangerous, because it encourages an ethos towards police power which is at odds with the tradition of the common law without providing sound authority for its position. In addition, the very existence of the Report suggests that senior officials within our system of justice are becoming advocates

132. J. Skolnick, *Justice Without Trial* (1966) at 10.

133. See generally the *Ouimet Report*, *supra* note 124, *Our Criminal Law*, Law Reform Commission of Canada Report, March 1976, particularly 19-30, and *The Criminal Law in Canadian Society*, Government of Canada, Dept. of Justice, Ottawa, August 1982, particularly 37-51. At 51 the Report states: "It seems justifiable and appropriate to endorse the general policy of restraint in criminal law, on the understanding that 'restraint' is a shorthand way of referring to principles of justice, necessity and economy."

134. See Cohen, *supra* note 114 at 633.

for government policy rather than impartial representatives of the existing law. This paper has attempted to outline the serious flaws in the McLeod Report while demonstrating the need for intense scrutiny of this type of advocacy document. It is hoped that the reader will accept the reasonableness and the necessity of the traditional common law approach to police authority; that is that every infringement of individual liberty or property by a person in authority must be justified by a rule of positive and unambiguous law. This simple principle is a cornerstone of our Anglo-Canadian legal heritage articulated in *Entick v. Carrington*, reflected in the modern day concept of the rule of law and reaffirmed with few exceptions in both English and Canadian courts. Public outcry or political embarrassment over institutionalized police wrongdoing does not justify the abandonment of a principle intrinsic to the relationship of the individual with the state. What is perhaps most troubling about the McLeod Report is not that the authors wish to state their preference for a particular policy regarding police powers, although this is troubling enough. Rather, it is the fact that what is clearly an advocacy document is presented as a concise statement of the existing law. It would be extremely unfortunate if fundamental policy decisions on the law of police powers were made on the basis of an inaccurate and inadequate understanding of the present law. As a society we are entitled to have such crucial questions determined against a backdrop of thorough and rigorous legal scholarship.