

The Dangers of Police “Operational” Independence

KENT ROACH *

ABSTRACT

Police “operational independence” is an overbroad and confusing term. Moreover, the idea that those who govern the police have no role in anything that can be characterized as police operations was significantly to blame for the policing failures that led to the use of the *Emergencies Act* in February 2022 to clear the Ottawa occupation. The first part of this article examines the origins and meaning of police independence. It suggests that there is a growing consensus on limiting the ambit of police independence to the exercise of law enforcement discretion. The second part examines the juridical statute of police independence. It concludes that police independence limited to law enforcement discretion is an important constitutional principle and principle of fundamental justice. The third part argues for the codification of such limited law enforcement police independence in all Canadian policing acts. The Ottawa policing failures demonstrates that Justices Morden’s and Epstein’s attempts to limit the ambit of police operational in Ontario legislation have not been successful. Clear legislative definition of police independence as only applying to law enforcement decisions such as those relating to investigations, arrests and prosecutions is necessary.

KEYWORDS

Police Independence, Ottawa convoy, policing failures, constitutional principles, codification

* Professor of Law, University of Toronto. The views expressed in this article only represent the author’s views and should not be associated with those of any organization of which the author has been or is a member.

I. INTRODUCTION

Confusion about “police operational independence” is significantly to blame for the policing failures in Ottawa that led to the use of the *Emergencies Act*. Justice Rouleau, in his report, rightly recognized that “the contours of operational independence remain vague” and a “source of debate”.¹ Yet he only recommended specific training for police board members and the police about this confusing term. Much more should be done.

The phrase “police operational independence” should be removed entirely from Ontario’s idiosyncratic policing legislation, and not added to any other policing act.² Such a reform would improve needed civilian and democratic oversight of the police. Without such a reform, events like the February 2022 public order emergency could happen again and a declaration of a public order emergency would not necessarily stop policing failures. Why? Section 20 of the *Emergencies Act*³ provides that the declaration of an emergency does not affect the governance of police services. In other words, it does not deputize or subject provincial and local police services to federal control. This means that dysfunctional policing and police governance that leads to the use of emergency powers, as it did

¹ Canada, Public Order Emergency Commission, *Report of the Public Inquiry into the 2022 Public Order Emergency*, vol 2 Analysis (Part 2) and Recommendations, (Ottawa: POEC, 2023) (Chair: Hon Paul S. Rouleau) at 69. (Rouleau Report). I was part of Justice Rouleau’s research council.

² The provision in question provides that local police services boards “shall not direct the chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police force.” *Police Services Act*, RSO 1990 c. P.15, s. 31(4). The present act does not extend such restrictions to the powers of the Solicitor General to direct the OPP. *Ibid* s.17(2) Manitoba is the only other province with legislation that contains a similar phrase: *Police Services Act* CCSM cP94.5, s.28.4, s.17(2) “The police board must not give orders or directions on specific operational decisions, individual investigations or the day-to-day operation of the police service.” Nova Scotia’s *Police Act*. SNS 2004 c.31, s.55(1) (e) provides that police boards shall not exercise jurisdiction relating to “the actual day-to-day direction of the police department”. The other seven provincial police acts and the *RCMP Act* do not refer to operational independence. See British Columbia *Police Act* RSBC c. 367, s.26(4.1); Saskatchewan’s *Police Act*, 1990, SS 1990-91, c.P-15.01, s.31; Quebec’s *Police Act* CQLR c. P-13.1, s.304 ; New Brunswick’s *Police Act* SNB 1977 c.P-9.2, s.3.1(2) Alberta’s *Police Act* RSA 2000, c. P-17; *Police Act*, RSPEI 1988, c P-11.1 and *Royal Newfoundland Constabulary Act*, 1992, SNL 1992, c R-17.

³ RSC 1985 c.22 (4th Supp.).

in February 2022, could continue even after the federal declaration of an emergency.

The Rouleau Report adds to the long line of commissions and reports calling for greater clarity and better understanding of police-government relations. The legitimate ambit of police independence from government direction should be defined more narrowly and precisely in policing legislation.

What is Police Independence?

Both courts and commissions of inquiry have generally recognized some degree of police independence from government direction short of complete operational independence. A 1962 British Royal Commission confined police independence from governmental direction to “quasi-judicial matters” such as “the enforcement of the law in particular cases” including the “pursuit of enquiries and decisions to arrest and to prosecute”.⁴ Significantly it noted, however, that “the Commissioner’s policies as regards the disposition of his force and the methods he employs can be, and frequently are, challenged and debated in Parliament.”⁵

The origins of a broad understanding of police operational independence are contained in Lord Denning’s 1968 comments in *Ex parte Blackburn* that chief constables “must take steps so to post his men that crimes may be detected [and to] ... keep observation on this place or that” as well as whether to lay charges. “The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.”⁶ In 1981, the McDonald Commission warned about interpreting Lord Denning’s sweeping rhetoric to expand police independence beyond “police powers of investigation, arrest and prosecution.” For the McDonald Commission, nothing less than democratic control of the police was at stake and a narrow definition of police independence limited to law enforcement decisions was necessary if the police are to “operate in obedience to governments responsible to legislative bodies composed of elected representatives”, as they should in a democracy.⁷

⁴ United Kingdom, Royal Commission on the Police (1962) Final Report Cmnd. 1728 at paras 86-7.

⁵ *Ibid*, at para 91.

⁶ *R v Metropolitan Police ex parte Blackburn* [1968] 2 QB 116, at 135-6.

⁷ Commission of Inquiry Concerning Certain Activities of the RCMP *Freedom and Security Under the Law*, Vol 2 (Ottawa: Supply and Services, 1981) at 1013-1014 and 1005-1006. See also Royal Commission on the Donald Marshall Jr. Prosecution *Findings and Recommendations*, Vol 1 (Halifax: Queens Printer, 1989) at 232 stressing that while the police should be free to investigate and lay charges, democratically responsible

The Growing Consensus On Core Police Independence Over Law Enforcement Decisions

The Supreme Court's 1999 *Campbell* decision remains the leading Canadian judicial authority on the ambit of police independence. The Court carefully stated: "A police officer investigating a crime is not acting as a government functionary or an agent of anybody."⁸ Justice Hughes relied on *Campbell* in his 2001 review of the policing of the APEC protests to state that "[w]hen the RCMP is performing law enforcement functions (investigation, arrest and prosecution) they are entirely independent of the federal government and answerable only to the law." He quickly added, however, that "[w]hen the RCMP are performing their other functions, they are not entirely independent but are accountable to the federal government through the Solicitor General of Canada or such other branch of government as Parliament may authorize."⁹

The Arar Commission added that while "the doctrine of police independence from the executive in the context of criminal investigations" was connected to the rule of law, the RCMP is "generally accountable to the Minister. The Minister must be informed of RCMP conduct and be answerable to Parliament and the Canadian public....Without such answerability, we run the risk, particularly concerning activities that are not reviewed by the courts, of the police not being accountable to anyone."¹⁰

authorities "can set general policies with respect to all policing matters, including investigations."

⁸ [1999] 1 SCR 565, at paras 27 and 33. The Supreme Court has subsequently made reference to "the broad discretion" of police service boards "to determine what objectives and priorities to pursue, or what policies to enact." *Odhavji Estate v. Woodhouse* 2003 SCC 69, at para 66. For similar recognition of a "core" of police independence related to law enforcement see *R. v. Wellwood*, 2017 CMAC 4, at para 95; *6165347 Manitoba Inc et al v. Vandal et al* 2017 MBCA 81; *Canada (Deputy Commissioner, Royal Canadian Mounted Police) v. Canada (Commissioner, Royal Canadian Mounted Police)*, 2007 FC 564; *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 at para 219; *Greatrix v Williams*, 2018 ONMIC 6, at paras 139-140.

⁹ Commission For Public Complaints Against the RCMP, *Commission Interim Report* (Ottawa: 2001) (Chair: Hon Ted Hughes), ch.10.4, online, PDF: www.publicsafety.gc.ca/lbrr/archives/hv%207641.a8%20r6%202001-eng.pdf

¹⁰ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Public Works, December 2006), online, PDF: www.publicsafety.gc.ca/lbrr/archives/cn4052-eng.pdf at 459, 462-63.

Justice Tulloch, now Chief Justice of Ontario, stated in 2019 that “police independence protects police decision-making in core law enforcement functions from executive interference” with reference to those functions of “conducting criminal investigations, laying charges and making arrests.”¹¹

The Rouleau Commission and Police Independence

The Rouleau Commission’s general comments about police-government relations are consistent with the above trend in limiting police independence to core law enforcement discretion involving matters of investigations, arrests and charges. For example, Justice Rouleau wrote:

Ensuring that police are accountable to the public without being unduly influenced by political pressures is a delicate exercise. At this juncture, I find it sufficient to note that core law enforcement decisions such as whether to investigate, charge, or arrest someone belong to the police. That aspect of operational independence is clear from judicial decisions and statutes.¹²

He also added an important gloss to police discretion over law enforcement decisions by focusing on police discretion not to make arrests and lay charges during a protest. He observed: “front-line officers who observe criminality during a protest may also rely on their discretion not to arrest or forcefully engage with protesters.” The police may exercise this discretion not to make an arrest for a variety of reasons including “wanting to foster trust between police and protesters” or concerns that an arrest may place the safety of officers and others at risk. “Even when police observe criminality, de-escalation and the exercise of fundamental freedoms may be better served through techniques such as negotiating the form and location of protest activities.”¹³

This focus on law enforcement discretion, regarding when or whether to make arrests and lay charges, is also reflected in the standard clauses included in injunctions against illegal protests. For example, the injunction that Zexi Li obtained to stop the truck horns from honking in Ottawa had a clause that the police “shall retain discretion as to the timing and enforcement of this order, and specifically retain discretion as to the timing

¹¹ *Smith v Ontario (Attorney General)*, 2019 ONCA 651, at para 53. Justice Tulloch’s discussion of the mutual independence of both police and prosecutors was approved of by the Supreme Court in related litigation. *Ontario (Attorney General) v. Smith* 2021 SCC 18, at para 46. See also *Chambers v. Chatham-Kent Police Services Board*, 2007 ONCA 414, at para 32 suggesting that fixed terms contract for police chiefs are not inconsistent with police independence.

¹² Rouleau Report, vol 2, *supra* note 1, at 70.

¹³ Rouleau Report, vol 2, *supra* note 1, at 72.

and manner of arrest and removal of any person pursuant to this order”.¹⁴ None of these authoritative sources recognizes the broad and vague concept of police operational independence.

II. WHAT IS THE JURIDICAL STATUS OF POLICE INDEPENDENCE?

Police Independence at Common Law

The origins of police independence are in judge-made common law. In 1980, the Quebec Court of Appeal concluded that the “English common law” articulated in *Ex Parte Blackburn* was not relevant because “[i]t is the legislation of Quebec which must prevail...”.¹⁵ The McDonald Commission, in 1981, likewise concluded that the common law of police independence was displaced by s. 5 of the RCMP Act, making the Commissioner subject by statute to the direction of the responsible Minister.¹⁶ The Divisional Court in England concluded in 2017 that legislation had displaced the common law making it “impossible to see operational independence as beyond the supervision”¹⁷ of new elected Police and Crime Commissioners.

These sources also indicate that attention should be paid to the particular statute that governs the relation of the police to democratically accountable authorities. The Ottawa, Toronto and Windsor Police Service Boards were all prohibited under s. 31(4) of Ontario’s *Police Services Act* from directing the police “with respect to specific operational decisions or with respect to the day-to-day operation of the police force”¹⁸, but no such restrictions applied to the ability of Ontario’s Solicitor General to direct the OPP or the Minister of Public Safety to direct the RCMP.

¹⁴ Zexi Li v Chris Barber et al Ont SCJ order (7 February 2022), archived online, accessed February 9, 2022 (PDF):

<web.archive.org/web/20220209000940/www.ottawapolice.ca/en/news-and-community/resources/Li-Interim-Order--CV-22-00088514-00CP.pdf> at para 5(a).

¹⁵ *Bisatilon v Keable*, 1980 CarswellQue 1248; [1980] 62 CCC (2d) 340 (Que.CA) rev’d on other grounds [1983] 2 SCR 60. For a more recent Quebec Court of Appeal decision accepting police independence see *Chambly (Ville) c. Gagnon*, [1997] A.Q. No. 2256, at para 20, rev’d on other ground; [1999] 1 SCR 8.

¹⁶ Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police. Second Report. *Freedom and Security Under the Law*, vol 2 (Ottawa: 1981) at 1011.

¹⁷ *R. (Crompton) v Police and Crime Commissioners for South Yorkshire*, [2017] EWCA 1349 (Admin) at para 78-79

¹⁸ RSO 1990 c. P.15, s.31(4).

Police Independence as Constitutional Principle

The Supreme Court in *Campbell*¹⁹ related police independence from executive control to the constitutional principle of the rule of law. The rule of law, defined as the application of law to all, would be undermined if the government had the power to direct police to investigate or charge (or not to investigate or charge) specific persons. The concept of police independence as defined by the Supreme Court in *Campbell* constitutes both a common law and a constitutional principle.

A majority of the Supreme Court has, however, recently concluded that unwritten constitutional principles cannot invalidate democratically enacted legislation.²⁰ This then raises the question of whether police independence is also a principle of fundamental justice under s. 7 of the Charter.

Police Independence as a Principle of Fundamental Justice

In *R v Cawthorne*, the Supreme Court held that the constitutional principle that prosecutors must not act for improper purposes qualified as a principle of fundamental justice under s. 7 of the Charter.²¹ Like the related principle of police independence over law enforcement decisions, prosecutorial independence was a legal principle recognized by consensus in a range of cases and legal commentary.

Police independence, as conceived in *Campbell*, may be a principle of fundamental justice. It is a basic and long-standing tenet of the legal system that governments should not be able to direct police as to which persons should or should not be investigated and arrested. This legal principle is found in cases and commentary discussed above. This consensus, however, breaks down with respect to broader claims of police “operational independence”. As the Rouleau Commission stated, “the contours of operational independence remain vague” and “subject to debate” and operational independence has been opposed by some as “unclear, unmanageable and even undemocratic.”²² This is not the stuff of a basic principle of fundamental justice.

If core police independence is a principle of fundamental justice, this should not prevent police service boards or responsible Ministers from establishing policing policies and priorities. Ideally such policies will be established before a major event such as the convoy. If such policies have

¹⁹ [1999] 1 SCR 565, at paras 29, 18.

²⁰ *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34, at para 56-57.

²¹ 2016 SCC 32, at para 26.

²² Rouleau Report, vol 2, *supra* note 1, at 69-70.

not been established before the fact, however, they may have to be established during a critical event.

III. POLICE INDEPENDENCE AND THE FEBRUARY CONVOY

C. Inflated Claims of Police Independence, and Under-Governance of the Ottawa Police

Writing before the Rouleau Commission's report, I criticized the Ottawa Police Service Board for not having a public plan to govern the policing of protests on Wellington Street in front of Parliament.²³ Even if one accepts that the convoy was a unique "Black Swan" event, there are regular protests around Parliament. A local board that had policies with respect to labour and Indigenous protests, should have had one for demonstrations around Parliament. The police boards in Windsor and Toronto, which both performed better than the Ottawa board, also benefitted from having the mayor as a member, unlike Ottawa.

*"Wish we had the power to do something, besides watch."*²⁴

The Rouleau report reveals how overbroad definitions of police independence contributed to the failure to develop an effective policing plan. At one point, Ottawa police chief Sloly told the board chair that it "would be unlawful for him to provide certain information" to the Board.²⁵ He did not share the plan with the board and testified that at most, he would only have shared a heavily redacted version. Chief Sloly was concerned about leaks from the Board, which the Chair acknowledged had occurred. Nevertheless, Board members have important commitments to confidentiality and should be trusted with confidential information about police operations, necessary to discharge their legitimate oversight and governance functions. They can also, when necessary, have confidential meetings.²⁶ Justice Rouleau found that the Ottawa Board had: "a

²³ Kent Roach "The February Emergency" (2022) 70 CLQ 195, at 205-213; Kent Roach *Canadian Policing: Why and How It Should Change* (Toronto: Delve, 2022) at 77-85.

²⁴ Rouleau Report, vol 2, *supra* note 1, at 268, quoting Ottawa city councillor and police service board member Carol Meehan.

²⁵ When testifying before the Commission, Sloly resiled from that untenable position and as described by Justice Rouleau "he agreed that the OPSB was entitled to any information relevant to its oversight function and there were no legal impediments to providing this type of information." Justice Rouleau then added: "By suggesting the contrary, he discouraged board members from pursuing information to which they were entitled" Rouleau Report, vol 2, *supra* note 1 at 267.

²⁶ *Ibid*, vol 3, at 190.

diminished view of its own authority.” He also disapproved of Chief Soly’s reluctance to attend board meetings during the convoy and stated “Police services must prioritize board meetings, rather than view them as an impediment to policing.”²⁷

The above findings are important. However, they fail to place the poor performance of the Ottawa Police Service Board into a broader context. In 1995, Ontario’s Commission on Systemic Racism warned that police governance avoided “operational matters” even though they “are often of the greatest concern to the public.”²⁸

In 2012, Justice Morden found that the Toronto police service board erred by not receiving information about operational matters involving the G20 protests. The idea of separating policy and operations with the former being for the board and the latter being for the police was “impossible to apply in its own terms” and not an accurate interpretation of the statute.²⁹ Justice Murray Sinclair made similar findings in 2018 about a lack of policies with the Thunder Bay Police Service Board. He advised that the board needed to make policies about police “operational decisions” and “day-to-day operations” to the extent they resulted in systemic discrimination against Indigenous people.³⁰

Justice Gloria Epstein in 2021 found that Toronto police should have informed its police service board about critical aspects of the missing persons investigation she was reviewing as well as enforcement operations that affected police relations with the LGBTQ2S communities. Like Justice Morden, she interpreted s. 31(4) of Ontario’s *Police Services Act* not to preclude the board’s ability to receive information about operational matters and establish policies to govern operational matters and she warned “policy and operations are not watertight compartments” and policies that do not impact “on operations may justifiably be regarded as worthless.”³¹

²⁷ *Ibid*, vol 1, at 164.

²⁸ Commission on Systemic Racism in the Ontario Justice System, *Report of the Inquiry into Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queens Printer, 19 December 1995) (Chairs: Margaret Gittens and David Cole), at 344.

²⁹ *Independent Civilian Review into Matters Relating to the G20 Summit: Report* (Toronto Police Services Board, 2012) (Chair: Hon John Morden), at 56, 82.

³⁰ *Thunder Bay Police Services Board: Final Report* (2018) (Chair: Hon Murray Sinclair), at 63-4.

³¹ *Missing and Missed: Report of the Independent Review of the Missing Persons Investigations* (Toronto: Toronto Police Service Board, 2021) (Chair: Hon. Gloria Epstein), vol 2 at 49-50. I was director of research for this report.

D. Not Learning the (Complex) Lessons of the Morden and Epstein Reports

During the February emergency, the Ottawa Police Service Board asked to be educated about its own role. The then Inspector General of Policing refused to carry out such a crash program but did answer some questions about the Board's powers.³² Justice Rouleau concluded:

Unfortunately, this Inquiry has revealed that the guidance set out in the Morden and Epstein reports in this regard has not yet been fully realized. Throughout the protests in Ottawa, the OPSB had a diminished view of its own role. Its ability to provide proper oversight of the OPS was further undermined by Chief Sloly's resistance to providing it with relevant information.³³

Justice Rouleau added: "I wholly endorse the guidance in this regard as set out in the Morden and Epstein reports."³⁴ He expressed some frustration that the Ottawa Police Service had not learned the lessons of these reports: "the time is long overdue for all police services boards and chiefs of police to be bound to follow these best practices through legislative reform and detailed policies and procedures."³⁵

I agree with Justice Rouleau that the Morden and Epstein reports are fine documents. They do their best to interpret s. 31(4) of Ontario's *Policing Act* in a way that recognizes its prohibition on the board directing operational matters while allowing some democratic direction of the police and ensuring that the board is informed by the police about critical information. At the same time, it may be unrealistic to expect the municipal councilors, mayors and part-time provincial appointees who serve on police services boards to master or even read the nuanced statutory analysis in these lengthy documents.

One of Justice Rouleau's recommendations was that police service boards develop policies for large scale protests "consistent with the Morden and Epstein reports and their statutory-defined responsibilities"³⁶ and that governments should consider mandating such policies or incorporating them in their policing legislation.³⁷ This approach, however, runs the danger of incorporating Ontario's troubling and vague references to police

³² *Ibid*, vol 2, at 267ff.

³³ *Ibid*, vol 1, at 187. Justice Rouleau describes the Morden and Epstein reports as dispelling "misconceptions...about the prohibition against...directing the day-to-day operations of the police."

³⁴ *Ibid*, vol 3, at 180.

³⁵ *Ibid*, vol 3, at 282.

³⁶ *Ibid*, vol 3, at recommendation 4 at 283-4.

³⁷ *Ibid*, vol 3, at recommendation 5 at 285.

operational independence into other laws that already rightly reject such overbroad terms.

Some of Justice Rouleau’s findings recognize that the concept of police operational independence is too broad and blunt. For example, he did not agree with Ontario’s Deputy Solicitor General’s statements, that prioritizing OPP resources was an operational matter that should be left entirely to the OPP commissioner. Rather, he concluded that “this issue is more nuanced.” Although some allocations of police resources “may well constitute an operational decision to be made exclusively by the police... when the allocation might involve economic considerations, I would expect some direction or guidance from government in setting priorities. This is consistent, for example, with how police services boards set the priorities for their police services.”³⁸ It implicitly embraces the concept of operational police independence but tries to carve out “economic” considerations.

Elsewhere in his report, Justice Rouleau uncritically refers to the “valued principle that operational policing decisions are ultimately to be made by police, not politicians or third parties”³⁹ despite his earlier and correct recognition that “the contours of operational independence remain vague” and a “source of debate”⁴⁰. In my view, the Rouleau Report should have recommended that the problematic concept of police operational independence be rejected.

The Need for Clear Legislative Definition of Core Police Independence and Repeal of Operational Police Independence

A simpler and more direct remedy than incorporating the complex lessons of the Morden and Epstein reports into policing policies or legislation would be for Ontario to amend s.31(4) of its *Police Services Act* and the yet to be proclaimed ss. 38(5) and 60(5) of Ontario’s *Community and Safety Policing Act, 2019*⁴¹ to define and protect core police independence over law enforcement discretion and to abandon any reference to operational police independence.

If this is not done, the policing failures that led to the use of the *Emergencies Act* could well re-occur. Indeed, if the new legislation had been in place, both Ontario’s Solicitor General and local police services boards could have been prohibited from giving any direction with respect to police

³⁸ *Ibid*, vol 3, at 282.

³⁹ *Ibid*, vol 3, at 289.

⁴⁰ *Ibid*, vol 2, at 69.

⁴¹ SO 2019, c 1, Sch 1.

operations specific to the convoy. Such a hands-off approach dangerously assumes that the police will always get operational planning and the policies to guide their police operations right. It essentially renders the police self-governing with respect to specific operations.

Removing all references to operational independence in Ontario and Manitoba legislation (fortunately it does not exist in other Canadian policing legislation) would recognize the futility of seeking bright line distinctions between policies and operations. It could also help avoid confusion and shirking by democratically responsible authorities.

The best blueprint for such reform remains the 2007 Ipperwash Inquiry report, overlooked in the Rouleau report. Justice Linden proposed that core police independence “regarding law enforcement decisions in individual cases” (including questions of the timing of arrests and the discretion not to make arrests during public order events) be specifically defined without reference to the vague operational concept.⁴² He recognized that the respective degree of responsibility exercised by police, and by those in charge of their governance, necessarily evolves over time and in response to circumstances. Accountability for political directions to the police should be enhanced by requiring responsible Ministers and police boards to make these in writing, and presumptively in public.

Ontario’s un-proclaimed policing legislation adopts this reform. Unfortunately, it retains the problematic concept that police boards and the Minister responsible for the OPP should not be able to make directions with respect to “the conduct of specific operations.”⁴³ As I have argued elsewhere “the transparency of directions is a better safeguard than legal or semantic sparring over whether the board is directing ‘specific operations’ or ‘the day-to-day’ administration of the police.”⁴⁴

The February emergency underlines that advance planning will be unable to contemplate all contingencies. With climate change, political disinformation and polarization, emergencies will only increase and perhaps become less predictable. If we are not routinely to invoke emergency measures, with their onerous but proper accountability requirements, we may have to allow for policies to be established in the midst of ongoing and unanticipated critical events. While these policies should not dictate whom police should arrest or when, democratically responsible authorities should

⁴² Ipperwash Inquiry, *Report of the Ipperwash Inquiry*, vol 2, (Toronto: Queens Printer, 30 May 2007) (Chair: Hon Sidney Linden) at 358-7. I was part of the research advisory committee for this inquiry.

⁴³ Community Safety and Policing Act, 2019, *supra* note 41, s.38(5) and 60(5).

⁴⁴ Roach, Canadian Policing, *supra* note 23, at 88-89.

be allowed to make and then defend their decisions to the public, to legislative reviews, to inquiries and in court.

The Troubling Persistence and Recent Rise of the Concept of Police Operational Independence

Despite the growing consensus among courts and commissions that police independence is limited to the exercise of law enforcement decisions such as investigations and arrests, wider ideas of police operational independence continue, unfortunately, to be embraced. In the hearings of the Commission, the tension between police independence and political oversight was sometimes denoted first by the mayor of Ottawa and later by commission counsel and the Commissioner by the phrase ‘separation between church and state’.⁴⁵ This inappropriate phrase suggests an unrealistic separation between policy and operational matters that has long been rejected: from the 1981 McDonald Commission to the 2021 Epstein Report. It risks making the police immune from democratic directions in all matters that can be characterized as operational.

In November, 2022, a private-member’s bill, Bill C-303 was introduced in Parliament. It would amend the *RCMP Act* to provide that the federal Minister of Public Safety could issue written directions “to establish priorities, objectives and policies” to the RCMP. Precluded from such directions, however, would be:

- (a) operational decisions, including the day-to-day operations of the Force;
- (b) matters respecting law enforcement decisions in specific cases, such as those relating to investigations, arrests and prosecutions; or
- (c) any matter that would interfere with the Commissioner’s powers or authority conferred under subsection 5(1) in relation to the control and management of the Force.⁴⁶

Proposed subsection (b) would appropriately codify the core of police independence as it relates to law enforcement discretion. As suggested above, such a limited form of police independence has long been recognized. It has arguably become both a constitutional principle and a principle of fundamental justice under s. 7 of the Charter. Subsection (c) also appropriately recognizes that chief police officers should have the control and management of their police services.

⁴⁵ The unfortunate phrase was first used by Ottawa Mayor Jim Watson, Rouleau Commission Hearing Transcript, vol 4: 18 Oct 2022, at 115. Unfortunately, it was subsequently used by both commission counsel and the Commissioner. Rouleau Commission Hearing Transcript, vol 29: 23 Nov 2022, at 62, 174.

⁴⁶ “Bill C-303, An Act to amend the Royal Canadian Mounted Police Act” 44th Parl, 1st Sess. Canada, (1 Nov. 2022) First Reading.

The problem with Bill C-303 is that subsection (a) would import the problematic idea from Ontario policing legislation that police independence extends to “operational decisions” and “day-to-day operations”. The constitutionally protected core of police independence would be adequately protected if that subsection was simply deleted. If subsection (a) was enacted, it could cause the same problem that it has caused in Ontario.

IV. CONCLUSION

The Rouleau commission adds to a long list of commissions calling for clarification of police-government relations. Like other Commissions, it found Ontario police service boards have failed to adequately govern local police forces. Like Justices Sinclair, Morden and Epstein before him, Justice Rouleau found that the Ottawa police and its board had not absorbed the complex and nuanced lessons of the Morden report. Justice Epstein made similar findings about the Toronto police service board in her 2021 report as did Justice Sinclair in his 2018 on the Thunder Bay police service board. Something is not working.

The Ottawa Board, to its credit, called for training on its role. But training was not provided during the escalating crisis. Elaborate training would not be necessary if the problematic concept of police operational independence was repealed from the Ontario and Manitoba legislation and a more precise definition of police independence over investigative and charging decisions was enacted. Similarly, Parliament should delete reference to police operational independence from Bill C-303, legislation that otherwise properly codifies police independence regarding law enforcement.

One of the most important findings of the Rouleau Commission was that both the Ontario Solicitor General and the Ottawa Police Service Board were largely missing in action. Justice Rouleau suggested these authorities should learn the lengthy and nuanced lessons of the Morden and Epstein reports. But these lessons seem very hard for part-time police service boards to absorb. Moreover, they are only necessary because of Ontario’s codification of the overbroad concept of police operational independence. The Rouleau Commission failed to place the problematic concept of police operational independence into its proper legislative and historical context.

The overbroad, vague and controversial concept of police operational independence deserves a significant part of the blame for the ultimate use of the *Emergencies Act*. It could hamper effective police governance even

when the *Emergencies Act* is used. It should – indeed, in my view, it must – be abandoned.

