Manitoba

Law Reform Commission

Commission de réforme du droit

SPECIAL CONSTABLES

November 1996

Report # 96

Canadian Cataloguing in Publication Data

Manitoba. Law Reform Commission.

Report on special constables.

(Report ; #96)

Includes bibliographical references.
ISBN 0-7711-1476-1

1. Constables -- Manitoba. 2. Peace officers -- Manitoba. I. Title. II. Series: Report (Manitoba. Law Reform Commission) ; #96

KEM486.A72L38 1996 344.7127'0528 C96-962016-0

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The Manitoba Law Reform Commission is an agency of and is primarily funded by the Government of Manitoba.

Additional funding is received from The Manitoba Law Foundation.

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CHAPTER 1

INTRODUCTION

For many people, the term "law enforcement" evokes the image of a uniformed police officer. However, although the police remain the primary agents of law enforcement, numerous other officials have been granted law enforcement powers by the provincial Legislature.[1] Liquor inspectors, vehicle safety inspectors, natural resource officers and municipal by-law enforcement officers are a few examples of other officials who are engaged in law enforcement.

Of course, the jurisdictions of various law enforcement officials differ, sometimes dramatically. Law enforcement jurisdictions are defined by several dimensions, including the law or laws an official is authorized to enforce, the powers available to him or her in enforcing those laws, the circumstances in which these powers may be used and the geographical area in which his or her authority is effective. By varying any of these dimensions, a jurisdiction can be tailored for a particular function.

Officers of the Royal Canadian Mounted Police, acting as Manitoba's Provincial Police, enjoy as broad a jurisdiction as can be conferred by the Province of Manitoba. They have the authority to enforce all laws in effect in Manitoba, may use all necessary force in order to do so and may act throughout the province.[2] Municipally-appointed police officers have a narrower geographical jurisdiction; they are authorized to act only within the geographical limits of the municipality in which they are employed. In addition, although they have the theoretical power to enforce all laws, in many cases, their authority is more limited.[3]

Law enforcement is also provided by officials (whom we will describe as "statutory enforcement officers") who are appointed to specialized jurisdictions pursuant to specific legislation. Typically, statutory enforcement officers are empowered only to enforce the statute under which they were appointed and, perhaps, one or two associated statutes. For example, liquor inspectors are appointed pursuant to *The Liquor Control Act* and have been given the jurisdiction by the Legislature to enforce that statute,[4] while natural resource officers are appointed pursuant to *The Wildlife Act* and have the jurisdiction to enforce that Act and

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[1]Law enforcement powers are also accorded to a variety of officials by the Parliament of Canada. However, these are beyond the scope of this Report.

[2]*The Provincial Police Act*, C.C.S.M. c. P150, ss. 4 and 5; *The Interpretation Act*, C.C.S.M. c. I80, ss. 22(1) and 19(1)(b).

[3]The City of Winnipeg Police Service exercises a broad authority to enforce all laws: *The City of Winnipeg Act*, S.M. 1989-90, c. 10, s. 454. However, although *The Municipal Act*, C.C.S.M. c. M225, s. 293(2), grants to municipal constables the same authority enjoyed by members of the Provincial Police, it seems that it is common practice for smaller municipalities to limit this jurisdiction. For example, our review of files made available to us by Law Enforcement Services, Department of Justice, has made us aware of Manitoba municipalities in which the municipal constable's job description includes enforcement of municipal by-laws and *Criminal Code* driving offences. A second category of crime, including low level assaults, break and enters, thefts and motor vehicle accidents involving injury or death are to be reported to the R.C.M.P. and can be investigated either by the municipal constable or by the R.C.M.P. Serious offences, such as murders, sexual assaults, robberies, frauds, kidnapping, arson and weapons offences are to be the exclusive responsibility of the R.C.M.P.

[4]*The Liquor Control Act*, C.C.S.M. c. L160, ss. 8(1)(h), 136(1) and 137.

associated statutes.[5] In a similar fashion, *The Municipal Act* permits municipalities to grant officials the jurisdiction to enforce municipal by-laws.[6]

Special constables, the subject of this Report, constitute a unique category of law enforcement agent. Unlike all other offices of law enforcement of which we are aware, including that of the police, the office of special constable has not been created by legislation. Instead, the Legislature has merely authorized appointments to an undefined office. *The Provincial Police Act* states:

> The Lieutenant Governor in Council may, as occasion requires, appoint such number of special or other constables or peace officers as he deems expedient and fix their remuneration, or he may confer the power of such appointment upon the commissioner [of the Provincial Police] or upon any other person.[7]

Although it sets out the jurisdiction of the Provincial Police, *The Provincial Police Act* says nothing whatsoever about the jurisdiction of special constables.

The failure of the Legislature to define the office of special constable has resulted in several serious problems. The first is that the capacity of the office of special constable to confer law enforcement authority is far from certain in Manitoba. It may be that, although the office of a special constable has been created, no significant powers or jurisdiction is conferred by appointment to that office. Chapter 2 is devoted to an examination of possible sources of a law enforcement jurisdiction for special constables and a discussion of the troubling questions which this examination reveals.

Another consequence of the Legislature's failure to set out the jurisdiction of special constables is that the purpose and function of the office have never been clearly defined. Historically, special constables were appointed only temporarily to assist regular constables in emergencies. However, in the absence of a considered policy concerning the office, special constables have come to be appointed in a wide variety of circumstances, generally on a long-term basis. As can be seen from the chart on the next page, the result is a total of over 2500 appointments made on behalf of a variety of employers and for a great many purposes.

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[5]*The Wildlife Act*, C.C.S.M. c. W130, s. 68(2). Natural resource officers may also enforce statutes such as *The Off-Road Vehicles Act*, C.C.S.M. c. O31, ss. 1(1), 30, 39 and 53.

[6]In addition to constables, municipalities may appoint a variety of inspectors (including veterinary inspectors, electrical inspectors, building inspectors and plumbing inspectors) as well as other enforcement officers: *The Municipal Act*, C.C.S.M. c. M225, s. 161.

[7]*The Provincial Police Act*, C.C.S.M. c. P150, s. 9(1).

SPECIAL CONSTABLE APPOINTMENTS IN MANITOBA[8]
(by employer)
(As of October 28, 1996)

Police		**1400**
R.C.M.P. (Auxiliary Constables)	104	
City of Winnipeg Police[9]	1176	
Brandon Police	68	
Dakota Ojibway Tribal Council	16	
Other Municipal & Town Police	36	
Federal Government		**27**
Atomic Energy of Canada, Ltd.	27	
Provincial Government		**559**
Chief Medical Officer	5	
Community Services and Corrections	2	
Consumer and Corporate Affairs	5	
Government Services	71	
Headingley Correctional Institution	12	
Law Enforcement Services	5	
Manitoba Horse Racing Commission	1	
Manitoba Liquor Commission	21	
Manitoba Lotteries Foundation	42	
Manitoba Public Insurance Corporation	22	
Manitoba Securities Commission	4	
Manitoba Telephone System	4	
Natural Resources	309	
Sheriffs and Bailiffs Office	41	
Taxation Division - Manitoba Finance	15	
First Nations		**126**
City of Winnipeg		**233**
Corps of Commissionaires	84	
Fire Department	18	
Parks Branch	12	
Unspecified Departments	119	
Other Municipal Governments		**20**

[8]Source: Law Enforcement Services, Department of Justice, Province of Manitoba.

[9]The "blanket" appointment of all members of the Winnipeg Police Service was renewed on May 16, 1996. The Winnipeg Police Service Personnel Office advised on September 10, 1996 that there are 1,176 serving members.

Public Institutions		**90**
Grace General Hospital	1	
Health Sciences Centre	49	
Misericordia General Hospital	1	
Seven Oaks General Hospital	7	
St. Boniface General Hospital	2	
University of Manitoba	20	
University of Winnipeg	1	
Red River Community College	9	
Private Sector		**88**
Canadian Pacific	13	
Eaton's	21	
Garden City Shopping Centre	1	
Inner-Tec Security Services	18	
Safeway	1	
The Bay	22	
Unicity Mall	1	
Westfair Food Ltd.	10	
Assiniboia Downs	1	
Other		**5**
Native Clan Organization	3	
Winnipeg Humane Society	2	
TOTAL		**2,548**

By using the office of special constable to empower a great number of law enforcement officials, those with the power of appointment to this office have gradually transformed it from an occasionally-used position to one which has a sizeable and permanent role in the enforcement of laws in Manitoba. The office has been used to create, in effect, whole categories of law enforcement officials where none have been created by legislation[10] and has also been used to expand greatly the jurisdiction of officials whose legislatively-conferred powers have been considered inadequate.[11]

It may be that this immense role in law enforcement is appropriate for the office of special constable; the provinces of Ontario and Alberta appear to have adopted similar approaches.[12] However, it is not the only option available. For example, Saskatchewan and British Columbia use the office of special constable in a much more limited fashion.[13] Indeed, Saskatchewan, which closely approximates Manitoba in size and population, has currently appointed only about 200 special constables.[14]

In our view, a decision concerning the purpose and function of the office of special constable should be made deliberately; it should not be made incrementally and by default. All available options should be carefully considered so that the most appropriate system of law enforcement for Manitoba can be instituted. We engage in just such a review of the available options in Chapter 3.

Other problems arise from the failure to come to a deliberate decision concerning an appropriate role for the office of special constable. Without a clear sense of the function of the office, no system of policies and guidelines can be developed to ensure that this function is being fulfilled. As a consequence, successive holders of the authority to appoint special constables have been forced to operate in an *ad hoc* fashion, using their own best judgment to make appointment decisions but without a clear sense of the "big picture". No policies have ever been designed to ensure that only those appointments which fit into an integrated system of law enforcement will be made, that appropriate individuals will be selected for appointment, that appointees will receive the training required for their tasks and that they will be properly supervised and held accountable for their use of the exceptional law enforcement powers conferred on them. Predictably, decades of *ad hoc* decisions have from time to time produced inconsistent, illogical and (arguably) inappropriate appointments and an almost complete lack of accountability on the part of special constables to those making the appointments.

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[10]For example, the numerous appointments which allow members of the Corps of Commissionaires, employees of hospitals and universities and others to enforce City of Winnipeg by-laws amount to the creation of a category of by-law enforcement officer.

[11]There are several examples of this, including the large number of natural resource officers who have been appointed special constables so that they may enforce laws other than *The Wildlife Act* and other associated statutes. Similarly, all members of the City of Winnipeg Police Service are the subject of a blanket appointment which extends their authority beyond City limits to the whole of the province.

[12] There are currently 1924 special constables appointed in Ontario in addition to 1083 volunteer auxiliary constables who work with municipal police forces, 108 First Nations constables appointed pursuant to self-administration agreements and 173 First Nations constables sponsored by the Ontario Provincial Police: Ontario Civilian Commission on Police Services, *Report to the Solicitor General and Minister of Correctional Services* (1995) 23. In addition, there are approximately 750 volunteer auxiliary constables who work with the Ontario Provincial Police: telephone conversation with Cathy Boxer-Byrd, Executive Assistant to the Chair, Ontario Civilian Commission on Police Services (July 9, 1996). Alberta has appointed nearly 2000 special constables who are employed by a variety of entities, including municipalities, government departments, the R.C.M.P., the Canadian Armed Forces and First Nations: telephone conversation with Judy Mackay, Acting Director, Policing Services, Public Security Division, Alberta Justice (July 9, 1996).

[13]In a telephone conversation on March 25, 1996, Barbara Murphy, Policy Analyst/Program Manager of Police Services for the Ministry of the Attorney General of the Province of British Columbia, advised that there were at that time 510 special provincial constables appointed in British Columbia.

[14]Telephone conversation with Tom Savage, Director of Police Commission Services, Saskatchewan Justice (May 24, 1996).

It is clear to us that, whether the office of special constable is to be used extensively for law enforcement purposes (as is currently the case) or whether it is to be used in more limited circumstances (an option which we explore in Chapter 3), it can no longer be approached on an *ad hoc* basis. It must be governed by policies and criteria which are based on clearly enunciated principles and are consistently applied. The remaining Chapters in this Report develop these policies. Chapter 4 focuses on the circumstances in which appointments should be made, the powers which should be conferred and the formulation of jurisdictional limits while Chapter 5 discusses the qualifications and selection of special constable appointees. Chapter 6 proposes a system which will ensure that special constables are held accountable for their use of the extraordinary powers conferred upon them. Chapter 7 deals with miscellaneous issues, such as the appointment of privately-employed individuals, the use of insignia and identification cards and a possible continuing authority on the part of magistrates and justices of the peace to appoint special constables. A complete list of our recommendations is set out in the final Chapter.

In preparing this Report, we consulted with a variety of individuals, both within Manitoba and in other provinces. We wish to acknowledge gratefully the assistance provided by the following individuals:

R.P. Chamberlain, Director, Law Enforcement Services, Department of Justice, Province of Manitoba;

Gerry Ferguson, Law Enforcement Services, Department of Justice, Province of Manitoba;

George Wright, Law Enforcement Services, Department of Justice, Province of Manitoba;

Marvin Bruce, Assistant Deputy Minister, Courts Division, Department of Justice, Province of Manitoba;

Mary Humphrey, Executive Director, Judicial Services, Department of Justice, Province of Manitoba;

David Cassels, Chief of Police, Winnipeg Police Service;

Lawrence Klippenstein, Deputy Chief of Police, Winnipeg Police Service;

Inspector Gary Walker, Winnipeg Police Service;

Nestor Bodnarchuk, City of Winnipeg Legal Department;

David Purvis, Chief of Enforcement and Special Investigations, Department of Natural Resources, Province of Manitoba;

David Wilkie, Elections Manitoba;

Greg Catteeuw, Director, Compliance and Regulatory Services Branch, Department of Highways and Transportation, Province of Manitoba;

Sergeant Graham Robinson, Community Policing Office, "D" Division (Manitoba), Royal Canadian Mounted Police;

Superintendent Frank Juhasz, Officer in Charge, Administration and Personnel, "D" Division (Manitoba), Royal Canadian Mounted Police;

Cathy E. Boxer-Byrd, Executive Assistant to the Chair, Ontario Civilian Commission on Police Services, Ministry of the Solicitor General and Correctional Services, Province of Ontario;

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Tom Savage, Director of Police Commission Services, Saskatchewan Justice;

Constable Gilbert Tessier, Cooperative Policing Program, Edmonton Police Service;

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CHAPTER 2

LEGAL STATUS OF SPECIAL CONSTABLES

A. INTRODUCTION

The reason for the appointment of over 2500 special constables in Manitoba is that these individuals require (or are believed to require) the authority to enforce the law in ways which are not available to ordinary citizens. However, as we have noted, *The Provincial Police Act*, which permits appointments to the office of special constable, is completely silent as to the law enforcement jurisdiction of special constables. This raises doubts whether those appointed to the office are actually granted any exceptional power to enforce the law.

Of course, the failure of *The Provincial Police Act* to authorize expressly the conferral of a law enforcement jurisdiction on special constables does not necessarily mean that they have no authority to enforce the law. A law enforcement authority may be provided by one or more of four potential sources of authority, namely:

(1) "peace officer" status by way of the *Criminal Code* and *The Interpretation Act* (Manitoba);

(2) a jurisdiction granted to them under English law which has been received into Manitoba law;

(3) provincial statutes which provide that special constables are to enforce them; and

(4) the authority of a police constable impliedly granted by *The Provincial Police Act*.

In this Chapter, we will examine each of these possible sources of authority. However, our analysis suggests to us that the authority of special constables to enforce the law is far from certain and that they may not, in fact, enjoy the powers they require to carry out the functions for which they have been appointed. We conclude by recommending that legislation should be enacted to correct this possible defect.

B. "PEACE OFFICER" STATUS

Most legal analysts who have investigated this area of the law have come to the conclusion that "[p]ersons who are appointed special constables are, under most circumstances, considered peace officers for the purposes of the *Criminal Code*. . . ."[1] Since *The Interpretation Act* of

[1]P.C. Stenning, *Firearms and the Private Security Industry in Canada* (Research Report prepared for the Solicitor General of Canada, 1979) 74. See also, J.H. McIntyre, *Special Provincial Constables: A plan for accountability* (Research Report prepared for the British Columbia Police Commission, 1991) 5: "It is generally accepted that a special provincial constable is a peace officer. . . ."

Manitoba and the *Criminal Code* contain almost identical definitions of "peace officer",[2] it may be assumed that these commentators would conclude that special constables are peace officers for provincial purposes as well.

Status as a peace officer is important because it brings with it extraordinary powers and protections which are not available to ordinary citizens. Of course, all members of society are permitted to engage in some aspects of law enforcement. For example, anyone can make a "citizen's arrest" whenever he or she finds someone committing an indictable offence.[3] However, both provincial and federal statutes give peace officers numerous law enforcement powers unavailable to other individuals. They are authorized to enforce a large number of federal and provincial laws and may arrest suspected law breakers in many circumstances in which ordinary citizens could not. Besides greater powers of arrest without a warrant, peace officers also have the exclusive power to arrest individuals when a warrant has been issued for their arrest.[4] In addition, peace officers are given the discretion to detain an arrested person or to release him or her after issuing an appearance notice or a summons to appear in court.[5]

Although, in theory, peace officer status is not required to obtain most search warrants,[6] "the discretionary nature of the power to issue such warrants . . . has in practice resulted in few of them being issued to persons who are not peace officers."[7]

Peace officers also enjoy the authority to use a necessary degree of force in performing their duties[8] and are exempt from *Criminal Code* firearm provisions so long as they are required to possess a restricted or prohibited weapon for the purpose of their duties or employment.[9] In addition, the law affords peace officers special protection from physical harm: resisting or wilfully obstructing a peace officer in the execution of his or her duties is prohibited and assaulting a peace officer engaged in his or her duties is an offence which is independent of other forms of assault.[10]

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[2]*The Interpretation Act*, C.C.S.M. c. 180, s. 22(1), definition of "peace officer", clause (c); *Criminal Code*, R.S.C. 1985, c. C-46, s. 2, definition of "peace officer", clause (c).

[3]*Criminal Code*, R.S.C. 1985, c. C-46, s. 494(1)(a). Indictable offences are considered more serious than those which are punishable by summary conviction and have the capacity to be punished more severely.

[4]*Criminal Code*, R.S.C. 1985, c. C-46, s. 495 and 514(2). For greater information concerning warrants of arrest, see *Criminal Code*, R.S.C. 1985, c. C-46, ss. 504-514.

[5]*Criminal Code*, R.S.C. 1985, c. C-46, s. 497. *The Summary Convictions Act*, C.C.S.M. c. S230, s. 13, allows a peace officer to commence prosecution for a provincial offence or breach of a municipal by-law by issuing the summons part of an offence notice to the alleged offender.

[6]The *Criminal Code*, for example, allows warrants to authorize "a person named therein or a peace officer" to search a building or area and to seize anything relating to criminal activity: *Criminal Code*, R.S.C. 1985, c. C-46, s. 487(1). Provincial statutes are often similarly non-directive in specifying those who are allowed to conduct searches. For example, *The Liquor Control Act*, C.C.S.M. c. L160, s. 140, permits searches to be carried out by "any person named."

[7]P.C. Stenning, *Postal Security and Mail Opening: A Review of the Law*, University of Toronto Centre of Criminology, p. 106, cited in McIntyre, *supra* n. 1, at 19.

[8]*Criminal Code*, R.S.C. 1985, c. C-46, s. 25(1)(b).

[9]*Criminal Code*, R.S.C. 1985, c. C-46, s. 92(1)(b). Some commentators have taken the view that the language of this provision is sufficiently ambiguous to allow all peace officers to claim an exemption: Stenning, *supra* n. 1, at 75. Indeed, Stenning and Cornish state "In becoming a peace officer, a person acquires an almost automatic right to wear a sidearm. . . .": P.C. Stenning and M.F. Cornish, *The Legal Regulation and Control of Private Policing and Security in Canada* (1975) 201. However, the British Columbia Court of Appeal seems to have taken the proviso seriously in *R.* v. *Molland*, [1970] 1 C.C.C. 219. In that case, a watchman in a Vancouver park who was given the powers of a police constable by legislation used a metal pipe to persuade people to leave the park at midnight. The Court commented at 221: "Even if it is conceded that the appellant was a 'peace officer or public officer' there is no evidence that the appellant carried the iron pipe 'for the purpose of his duties or employment.'"

[10]*Criminal Code*, R.S.C. 1985, c. C-46, ss. 129(a) and 270(1)(a).

It may be that in other provinces "special constable status . . . carries with it 'peace officer status'."[11] However, we are not certain that this is the case in Manitoba. An examination of statutes and case law leads us to the following observations which must be taken into account when considering this question:

1. The holder of an office listed in the definition of "peace officer" may not necessarily be a peace officer.

2. An individual who holds none of the offices listed in the definition of "peace officer" may nonetheless be a peace officer.

3. The powers and protections granted to a peace officer only apply to the extent of his or her jurisdiction.

4. The *Criminal Code* and *The Interpretation Act* do not confer on peace officers an independent authority to enforce the law; they merely grant additional powers and protections to those who have been granted law enforcement authority by another source.

We will discuss each of these in turn.

1. The holder of an office listed in the definition of "peace officer" may not necessarily be a peace officer

The definitions of "peace officer" which appear in the *Criminal Code* and in *The Interpretation Act* of Manitoba are virtually identical. The *Criminal Code* states:

> "peace officer" includes:
> . . .
> (c) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process, ...[12]

The meaning of this definition appears to be straightforward; in order to qualify as a peace officer, an individual must be appointed to one of the offices listed or must be otherwise employed for the preservation and maintenance of the public peace.[13] One of the offices is that of "constable". The obvious question appears to be: Is a special constable a "constable" as defined in the *Criminal Code* and *The Interpretation Act*? If so, a special constable would appear to be a peace officer and would appear to be afforded all the powers and protections enjoyed by peace officers pursuant to provincial legislation and the *Criminal Code*.

However, the courts have adopted an interpretation of this provision which suggests that this question is irrelevant. Case law instead suggests that, when determining whether he or she will be considered a peace officer, the office held by an individual, even if it is an office included in the definition of "peace officer", is less important than the individual's function in preserving and maintaining the public peace. For example, the fact that bailiffs are expressly included in the definition of peace officer was considered irrelevant by courts when dealing with "bailiffs"

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[11]Stenning and Cornish, *supra* n. 9, at 200.

[12]*Criminal Code*, R.S.C. 1985, c. C-46, s. 2. *The Interpretation Act*, C.C.S.M. c. 180, s. 22(1), definition of "peace officer", clause (c), adds the term "bailiff's officer".

[13]Since our focus does not include the service or execution of civil process, we will ignore this aspect of the definition.

whose function was to repossess goods on behalf of private businesses.[14] In a case which is even more pertinent to our discussion, a Manitoba Court was not prepared to find that special constables were automatically to be considered peace officers.[15]

It seems, then, that the courts will not necessarily treat police officers, police constables, bailiffs and constables as independent categories whose members will always be considered peace officers. Instead, the courts appear to have adopted a functional approach in the interpretation of this definition. In effect, they have read this provision to mean: "A peace officer includes . . . anyone who is engaged in preserving and maintaining the public peace the way most police officers, police constables, bailiffs and constables are." Whatever his or her title, an individual will be considered a peace officer only if he or she is engaged in preserving and maintaining the public peace.

2. *An individual who holds none of the offices listed in the definition of "peace officer" may nonetheless be a peace officer*

Clearly, the term "public peace" is critical in determining whether a person is a peace officer. As it is used in the definition of "peace officer", the "public peace" is a term with ancient roots. Courts have often equated the public peace with the medieval English notion of the "King's peace".[16] Although breaches of the King's peace were initially restricted to a narrow range of crimes, the concept of the King's peace was extended until it became the "legal name of the normal state of society."[17] In this sense, the public peace is not restricted to the absence of acts of violence or acts against the security of property, but the presence of security, order and decorum.[18]

This broad understanding of the "public peace" means that the category of those who are considered to be engaged in preserving and maintaining it is not restricted to those who enforce the criminal law. For example, an officer appointed for the purpose of enforcing the *Saskatchewan Temperance Act*,[19] a municipal by-law enforcement officer in the Northwest Territories,[20] an animal control officer in the Yukon,[21] a conservation officer empowered to enforce Manitoba's *Wildlife Act*[22] and a poundkeeper in the City of Winnipeg[23] have all been found to be peace officers because they were enforcing laws the breach of which would have violated the public peace.

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[14]*R.* v. *Doucette*, [1960] O.R. 407 (C.A.); *R.* v. *Wallace* (1959), 125 C.C.C. 72 (Ont. Mag. Ct.). In the latter case, the individuals fell within the definition of "bailiff" contained in the *Bailiff's Act*, R.S.O. 1950, c. 30, and in municipal by-laws. Moreover, they were licensed as bailiffs under municipal by-laws.

[15]*R.* v. *Presonka* (1979), 4 W.C.B. 154 (Man. Co. Ct.).

[16]The leading case in defining the "public peace" is *R.* v. *Magee* (1923), 40 C.C.C. 10 at 11-12 (Sask. C.A.). It has been cited by a number of cases which have dealt with the meaning of peace officer, including *R.* v. *Jones and Huber*, [1975] 5 W.W.R. 97 (Y.T. Mag. Ct.); *R.* v. *Orban and Douglas* (1972), 8 C.C.C. (2d) 518 (Sask. Q.B.); *R.* v. *Whiskeyjack and Whiskeyjack* (1985), 17 C.C.C. (3d) 245 (Alta. C.A.).

[17]*R.* v. *Magee*, *supra* n. 16, at 12.

[18]*R.* v. *Magee*, *supra* n. 16, at 11-12; *R.* v. *Jones and Huber*, *supra* n. 16. For a discussion of the public peace in the context of the history of the office of constable, see Law Reform Commission of Canada, *Legal Status of the Police* (Study Paper, 1981) 12-13.

[19]*R.* v. *Magee*, *supra* n. 16.

[20]*R.* v. *Laramee* (1972), 9 C.C.C. (2d) 433 (N.W.T. Mag. Ct.).

[21]*R.* v. *Jones and Huber*, *supra* n. 16.

[22]*R.* v. *Goy* (1969), 67 W.W.R. 375 (Man. Mag. Ct.).

[23]*Moore* v. *R.*, [1983] 5 W.W.R. 176 (Man. Co. Ct.).

3. *The powers and protections granted to a peace officer only apply to the extent of his or her jurisdiction*

Despite the fact that legislation grants extensive powers and protections to peace officers, the courts have made it quite clear that not all peace officers are entitled to all of these powers and protections at all times. Instead, these powers and protections will be available only when a peace officer is acting within the scope of his or her jurisdiction.[24]

This narrow approach is explicit in the provisions which grant peace officers extraordinary protections against assault or interference since they only apply when a peace officer is engaged in his or her duties.[25] However, a similar conclusion has been reached by the courts with respect to a peace officer's powers and authority. For example, a city constable who was appointed to enforce municipal by-laws was found to enjoy all the powers and protections of a peace officer when enforcing those by-laws. However, he did not have the power to require a driver to provide a breath sample because this was outside of his jurisdiction.[26] Similarly, although they are peace officers for the purposes of demanding breath samples of individuals who have been driving on a military base,[27] military police officers are not peace officers for the purposes of demanding breath samples in other cases.[28]

4. *The Criminal Code and The Interpretation Act do not confer on peace officers an independent authority to enforce the law; they merely grant additional powers and protections to those who have been granted law enforcement authority by another source*

The functional approach taken by the courts to the question of peace officer status and, in particular, the conclusion that an individual can be a peace officer for some purposes but not for others is problematic for some legal commentators. For example, Philip Stenning, one of Canada's most prolific writers in this area of the law, has described the form of logic incorporated in legislation as one which "approaches tautology."[29] He notes that "the whole object of determining whether a person is a 'peace officer' under section 2 of the *Code* is to discover the extent of his or her powers, duties, protections, etc." Yet, in determining whether a person is a peace officer, the courts are forced to examine his or her function, that is, his or her powers, duties and protections. "The somewhat anomalous result of these cases seems to be, therefore, that while an individual's] status determines his powers and duties, his powers and duties may also determine his status."[30]

The explanation for the apparently circular logic of the courts is provided by Chief Justice Dickson of the Supreme Court of Canada who stated:

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[24]The one case which took issue with this position is *R.* v. *Rodenbusch*, [1980] 3 W.W.R. 756 (Sask. Dist. Ct.). In that case, Rutherford D.C.J. stated: ". . . once a person is found to be a peace officer within the meaning of the definition it seems to me inescapable that he becomes a peace officer for all purposes where the term is used in the Code (which would include even making breath sample demands. . .)." (at 762). However, the Saskatchewan Court of Appeal in *R.* v. *Rutt* (1981), 9 Sask. R. 14 at 17, subsequently expressly stated its view that *R.* v. *Rodenbusch* was wrongly decided.

[25]*Criminal Code*, R.S.C. 1985, c. C-46, ss. 129(a) and 270(1)(a).

[26]*R.* v. *Laramee*, *supra* n. 20, at 444; *Wright* v. *The Queen*, [1973] 6 W.W.R. 687 (Sask. Dist. Ct.). See also *R. ex. rel. Reimer* v. *Ingram*, [1974] 5 W.W.R. 759 (Sask. C.A.); *R.* v. *Soucy* (1975), 23 C.C.C. (2d) 561 (N.B.S.C. App. Div.).

[27]R. v. *Smith* (1982), 67 C.C.C. (2d) 418 (B.C.S.C.), upheld in *R.* v. *Smith* (1982), 2 C.C.C. (3d) 250 (B.C.C.A.); *R.* v. *Nolan* (1987), 58 C.R. (3d) 335 (S.C.C.).

[28]*R.* v. *Harvey* (1979), 18 A.R. 382 (C.A.).

[29]Law Reform Commission of Canada, *supra* n. 18, at 62.

[30]Law Reform Commission of Canada, *supra* n. 18, at 64.

> On the level of principle, it is important to remember that the definition of "peace officer" in s. 2 of the Criminal Code is not designed to create a police force. It simply provides that *certain persons who derive their authority from other sources* will be treated as "peace officers" as well, enabling them to enforce the Criminal Code within the scope of their *pre-existing* authority, and to benefit from certain protections granted only to "peace officers."[31] [emphasis added]

As interpreted by the courts, therefore, the "peace officer" provisions of the *Criminal Code* and *The Interpretation Act* do not constitute an independent source of authority to enforce the law. They merely provide additional power and protection to those who have been validly appointed to a law enforcement function by some other source of authority. Unless an individual can point to a law enforcement authority which flows from another source of authority, he or she will not be considered a peace officer.

Among other things, these observations mean that merely appointing individuals to the office of special constable (the only action expressly permitted by *The Provincial Police Act*) will not necessarily grant them peace officer status. In order to be considered peace officers, special constables must have been given the power to enforce the law by some other source of authority. Since this authority is not granted by *The Provincial Police Act* (at least not explicitly), we must search for it elsewhere.

C. PRE-EXISTING JURISDICTION

It may be that special constables have an authority to enforce the law which does not arise from federal or provincial legislation but which springs from English law. In order to investigate this possibility, an understanding of the history of the offices of "constable" and "special constable" is required.

1. England

(a) Constables

"Constable" has been identified as a Norman term applied after the conquest of England to "a pre-existing office of great antiquity."[32] Initially, holders of this office were local community leaders with responsibility for all aspects of local government but whose key function was to "guard the peace". As power was increasingly exerted by the King, knights appointed by the sovereign and given the title "wardens of the peace" and, eventually, "justices of the peace" were given responsibility for many aspects of government, including the supervision of local policing.[33] By the late 15th and early 16th centuries, justices of the peace were empowered to issue warrants which constables were required to execute and were also authorized to control constables in other ways. In addition, it became common practice for constables to be sworn before justices of the peace after being selected by the community through local manorial courts. Later, as the influence and relevance of manorial courts declined and they began to default in their responsibility to appoint constables, justices of the peace took more and more responsibility in appointing and controlling these officers. This practice was legitimized by statute in 1662.[34]

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[31] *R.* v. *Nolan*, *supra* n. 27, at 345.

[32] Law Reform Commission of Canada, *supra* n. 18, at 12.

[33] Among the responsibilities of justices of the peace were the maintenance of jails, roads and bridges, the conservation of rivers, the payment of disabled soldiers, the supervision of malt production and the cloth trade and control of sellers of ale: W. Holdsworth, *A History of English Law*, vol. 4 (1966) 135-142.

[34] *The Poor Relief Act, 1662* (Eng.), 13 & 14 Car. 2, c. 12, s. 15.

The result of this evolution of the office was that constables were considered to have two sources of power: one inherent in the office and the other arising from royal authority.[35] Thus, a constable "was responsible first, by virtue of his office, for the preservation of the peace within his bailiwick and, secondly, for the execution of the orders and warrants of the justices of the peace."[36] The key feature of the dual nature of this office for our purposes is the inherent authority of constables to preserve the peace. This jurisdiction was not dependent on the grant of authority by the sovereign but arose from the mists of England's pre-Norman history.

The 19th century saw the development of a more modern system of policing in England. In 1829, the Metropolitan Police Force was established in London, its Commissioner and assistants, appointed by the sovereign, were named justices of the peace but exercised no judicial functions.[37] Instead, they were responsible for swearing in and directing members of the police force who were granted the powers of a constable at common law within the Metropolitan Police District.[38] Similar police forces were subsequently permitted, then required, to be established in all other English counties.[39] Again, the members of these forces were granted by statute all the powers of a constable at common law.[40] Although justices of the peace were still statutorily obliged to appoint parish constables,[41] the re-organization of the police made these appointments largely unnecessary.[42] Nevertheless, justices of the peace continued to retain some responsibility for policing as well as passing judgment on wrongdoers. Meeting in quarter or general sessions, they were responsible for selecting a chief constable for the county and two or more justices of the peace had to approve the chief constable's selection of other constables.[43]

(b) Special constables

The office of special constable has a much shorter history than that of constable. It is generally identified as originating in the late 17th century[44] but statutes first expressly authorized

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[35]Law Reform Commission of Canada, *supra* n. 18, at 28-34; D.J. Guth, "The Traditional Common Law Constable, 1235-1829: From Bracton to the Fieldings to Canada" in R.C. Macleod and D. Schneiderman, eds., *Police Powers in Canada: The Evolution and Practice of Authority* (1994) 3 at 5.

[36]*Halsbury's Laws of England*, vol. 36 (4th ed., 1981) 107.

[37]*The Metropolitan Police Act, 1829* (U.K.), 10 Geo 4, c. 44. The Commissioner and his assistants were not to sit at quarter sessions but were to act only "for the preservation of the peace, the prevention of crimes, the detention and committal of offenders, and the execution of the acts by which they are appointed": J.F. Stephen, *A History of the Criminal Law of England*, vol. 1 (1883) 197.

[38]Stephen, *supra* n. n. 37, at 197.

[39]Statutes in 1835 and 1839 permitted the creation of borough and county police: *The Municipal Corporations Act, 1835* (U.K.) 5 & 6 Will. 4, c. 76, ss. 76-86; *The County Police Act, 1839* (U.K.), 2 & 3 Vic., c. 93. In 1856, all English counties were required to establish a police force: *The County and Borough Police Act, 1856* (U.K.), 19 & 20 Vic., c. 69. See also Stephen, *supra* n. 37, at 198-200.

[40]*Municipal Corporations Act, 1835* (U.K.), 5 & 6 Will. 4, c. 76, s. 76; *The County Police Act, 1839* (U.K.), 2 & 3 Vic., c. 93, s. 8; Stephen, *supra* n. 37, at 198-199.

[41]*The Parish Constables Act, 1842* (U.K.), 5 & 6 Vic., c. 109, required justices to hold special sessions to appoint constables: Holdsworth, *supra* n. 33, at 209-210.

[42]Holdsworth, *supra* n. 33, at 210.

[43]*The County Police Act, 1839* (U.K.), 2 & 3 Vic., c. 93, ss. 4 and 5; *The County and Borough Police Act, 1856* (U.K.), 19 & 20 Vic., c. 69; Stephen, *supra* n. 37, at 199.

[44]Many legal commentators, in exploring the origins of the office, rely on L. Radzinowicz who states: "A statute passed in the reign of Charles II (13 and 14 Car. 2, c. 12) (The Poor Relief Act 1662) is the foundation of the subsequent legislation for the appointment of special constables, that is of constables appointed not, as in the ordinary course . . . but for a special emergency. As a general rule they acted under the immediate direction of the magistrates . . . .": Radzinowicz, *A History of English Criminal Law*, 1956, vol. 2, p. 215, as cited in New South Wales Law Reform Commission, *Special Constables* (Report #19, 1974) 8. See also P. Ceyssens, *Legal Aspects of Policing* (looseleaf, 1994; last update 1996) 1-34, who also relies on Radzinowicz on this point.

This assertion may be questioned; the term "special constable" does not appear in *The Poor Relief Act, 1662* nor is there any mention of riots or other emergencies which might necessitate the appointment of temporary officers. However, the Act does

the appointment of special constables in the early 19th century.[45] In times of emergency, justices of the peace were empowered to appoint special constables in order to assist local constables.[46]

Several facts point to the conclusion that special constables were historically seen as a type of constable. First, they were appointed and controlled by the same officials who appointed and controlled parish and police constables.[47] Second, statutes permitted the appointment to this office of anyone who was not legally barred from holding the office of constable.[48] The same standards for appointment therefore applied to both. Finally, and most persuasively, special constables enjoyed the same jurisdiction as regular constables for the duration of their appointment. *The Special Constables Act, 1831* specified that they were to "have, exercise and enjoy all such powers, authorities, advantages, and immunities, and be liable to all such duties and responsibilities, as any constable duly appointed now has within his bailiwick by virtue of the common law of this realm, or of any statute or statutes."[49]

This, then, was the law of England concerning special constables which became Manitoba law in 1870.[50]

2. Manitoba

Manitoba became a province on July 15, 1870. In 1874, Manitoba's Legislature enacted a statute declaring English law as of July 15, 1870 to be and to have been in force in Manitoba.[51] The Dominion Parliament passed similar legislation for Manitoba with respect to matters under federal jurisdiction in 1888.[52] As a consequence of this legislation, the law of England concerning constables and special constables became the law of Manitoba until and unless modified by statute.

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provide that, if a constable should die or leave the parish, two justices of the peace may appoint a new constable until the next manorial court or quarter-sessions can be held: *The Poor Relief Act, 1662* (Eng.), 13 & 14 Car. 2, c. 12, s. 15.

[45]*An Act for the more effectual Preservation of the Peace, by enforcing the Duties of Watching and Warding, until the First Day of March One thousand eight hundred and fourteen, in Places where Disturbances prevail or are apprehended* (U.K.), 52 Geo. 3, c. 17, s. 12.

[46]Sitting in a special meeting of general sessions, at least five justices of the peace were required to appoint special constables. They had to be convinced that ordinary officers appointed to preserve the peace were insufficient for the task due to disturbances or offences against the peace prevailing in the county: *An Act for the more effectual Preservation of the Peace, by enforcing the Duties of Watching and Warding, until the First Day of March One thousand eight hundred and fourteen, in Places where Disturbances prevail or are apprehended* (U.K.), 52 Geo. 3, c. 17, s. 2. The preamble of this Act states that it was occasioned by riots in Nottingham. By 1820, only two justices of the peace were required to appoint special constables in times of "tumult, riot or felony" or in anticipation thereof: *An Act to increase the Power of Magistrates in the Appointment of Special Constables* (U.K.), 1 Geo. 4, c. 37, s. 1.

[47]The first Act which expressly permitted the appointment of special constables specifically provided that they were to be subject to the control of the Chief Constable: *An Act for the more effectual Preservation of the Peace, by enforcing the Duties of Watching and Warding, until the First Day of March One thousand eight hundred and fourteen, in Places where Disturbances prevail or are apprehended* (U.K.), 52 Geo. 3, c. 17, s. 12. *The Special Constables Act, 1831* authorized the justices of the peace who had appointed special constables to "make such orders and regulations as may from time to time be necessary and expedient for rendering such special constables more efficient for the preservation of the public peace . . . .": *The Special Constables Act, 1831* (U.K.), 1 & 2 Will. 4, c. 41, s. 4.

[48]*An Act to increase the Power of Magistrates in the Appointment of Special Constables* (U.K.), 1 Geo. 4, c. 37, s. 1.

[49]*The Special Constables Act, 1831* (U.K.), 1 & 2 Will. 4, c. 41, s. 5.

[50]For an excellent review of the reception of English law in British colonies, including Canada, see. J.E. Côté, "The Reception of English Law" (1977), 15 Alta. L. Rev. 29.

[51]*An Act respecting the Court of Queen's Bench of Manitoba*, S.M. 1874, 38 Vict. c. 12, s. 1.

[52]*An Act respecting the application of certain laws therein mentioned to the Province of Manitoba*, S.C. 1888, 51 Vict. c. 33, s. 1.

(a) Constables

The use of the office of constable in what is now Manitoba predated the creation of the province. For example, laws enacted in 1866 provided for the appointment to three year terms of 12 "efficient householders" as constables by "the magistrates, specially assembled for that purpose". These constables were paid 12 pounds annually and were to swear an oath to "serve and execute all legal writs, and to maintain public peace and security." They could be suspended by a single magistrate or petty court and dismissed by the General court.[53] "These provisions reveal the essential characteristics of an English common-law constable - a local peace officer, generally subordinate to local justices and paid a modest salary for the performance of his duties."[54]

A more modern police force was envisioned by legislation enacted soon after Manitoba achieved provincial status. Based on the model developed in the federal *Police of Canada Act*[55] passed three years earlier, *The Police Act* of 1871 was intended to "establish an efficient and uniform system of police in this Province and to organize a competent Constabulary force for carrying out the same."[56] Besides creating a hierarchical structure, this legislation moved further from English law by granting the members of this force province-wide rather than merely local jurisdiction.[57]

Nevertheless, it is clear that the modernization represented by the new statute was built on the foundation of English law. For example, the Act did not specifically set out the duties and powers of members of this force. Instead, it appears to have incorporated by reference the common law authority of constables to preserve the peace when it stated: "Every Officer and man of the Force shall, from the time of his having taken the oath of office, and so long as he shall continue such Officer or Policeman, be a *Constable* . . . ."[58] Moreover, it specified that, in the performance of their duties, members of the force "shall have all the powers, authority, protection and privileges, which any Constable now has or shall hereafter by law have, or which the Constables of the respective counties or districts or parishes of this Province may now or hereafter have."[59]

Although new legislation, enacted in 1880, changed the structure and control of the police force,[60] the reference to police officers as "constables" was maintained for nearly 50 years. However, in 1920, *The Provincial Police Act*,[61] on which the current Act is based, brought about several important changes.

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[53] *Laws of Assiniboia* (1862-1868), ss. 32-34 in C.S.M. 1880.

[54] Law Reform Commission of Canada, *supra* n. 18, at 40. Blackstone has suggested that ". . . the laws of police and revenue (such especially as are enforced by penalties. . . .)" did not form part of the English law which was received by English colonies: 1 Bl. Comm. 107, as cited in Côté, *supra* n. 50, at 77. Côté suggests, however, that "the laws of police" would not have been intended by Blackstone to refer to police forces, since these did not exist at the time of Blackstone's writing. Instead, Côté suggests that the phrase should be taken to refer to ". . . provisions for local government and administration, such as curfews, licensing and regulation of taverns, harbor regulations, laws for safety in travel and factories, the manner of conducting local government and the like" (at 77-78). The fact that constables in Manitoba operated in much the same way as English constables also strongly suggests that English law with respect to the appointment and jurisdiction of constables should be seen as applicable to Manitoba.

[55] *Police of Canada Act*, S.C. 1868, c. 73.

[56] *The Police Act*, S.M. 1871, c. 11, preamble.

[57] *The Police Act*, S.M. 1871, c. 11, s. 7.

[58] *The Police Act*, S.M. 1871, c. 11, s. 7. [emphasis added]

[59] *The Police Act*, S.M. 1871, c. 11, s. 15.

[60] *The Public Officers Act*, C.S.M. 1880, c. 7, ss. 9-15.

[61] *The Provincial Police Act*, S.M. 1920, c. 102.

Perhaps as a result of the tragic and contentious Winnipeg General Strike the previous year, the 1920 statute represented legislative efforts to reorganize and re-energize the Provincial Police force.[62] One important feature of this Act was the amount of detail provided as to the jurisdiction of the members of the force. Whereas legislation after 1880 had given the Lieutenant Governor in Council exclusive responsibility for determining the duties of constables, the new Act set out their duties and powers statutorily. It charged members of the force "with the enforcement of the penal provisions of all laws in force in Manitoba."[63] More specifically, they were:

> (a) to perform all duties which now are or hereafter shall be assigned to constables in relation to the preservation of peace, the prevention of crime and of offences against the laws in force in Manitoba and the apprehension of criminals and offenders and others who may be lawfully taken into custody;
>
> (b) to execute all warrants and perform all duties which under the laws in force in Manitoba may lawfully be executed and performed by constables, police or peace officers;
>
> (c) to perform such duties as may from time to time be assigned to them by the commissioner.[64]

Although this section granted members of the police force the same jurisdiction as "constables", the Act omitted any statement that the members of the force were "constables". Instead, the offices held by members of the force were set out as follows:

> The commissioner and every officer and constable of the force is ex-officio a game guardian under "The Game Protection Act," an inspector under "The Manitoba Temperance Act," "The Public Amusements Act," "The Motor Vehicles Act" and "The Amusements Taxation Act," a peace officer as defined by the Criminal Code and such other officer as may be designated in any Act as being charged with the enforcement of the penal provisions thereof, and shall have all the powers necessary for the enforcement of the provisions of any such Act.[65]

In view of the failure of *The Provincial Police Act* to refer to members of the Provincial Police as "constables" and in light of the effort made to cloak members of the force with statutory authority, one might well ask whether the constables appointed pursuant to the Act still enjoyed any of the historic powers and legal status of a constable under English law. It may be that the Act created by legislation an entirely distinct category of law enforcement official which was cut off from its English roots.

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[62]The Winnipeg General Strike resulted in several deaths as the Royal North West Mounted Police charged and fired into a crowd of strikers on Main Street in June, 1919. Shortly thereafter, the primary labour leaders were arrested and tried. Although "specials" - special City police officers - were prominent during the strike, these were not special constables in a legal sense. They appear instead to have been individuals who were hired (at twice the normal rate of pay) to replace police officers who had been fired after refusing to sign a non-strike pledge: see K. McNaught and D.J. Bercuson, *The Winnipeg General Strike* (1974).

[63]*The Provincial Police Act*, S.M. 1920, c. 102, s. 4(1).

[64]*The Provincial Police Act*, S.M. 1920, c. 102, s. 5. This provision is virtually unchanged in the current statute: *The Provincial Police Act*, C.C.S.M. c. P150, s. 5.

[65]*The Provincial Police Act*, S.M. 1920, c. 102, s. 4(2). This clause currently reads: "The commissioner and every officer and constable of the force is ex officio an officer within the meaning of The Wildlife Act, an inspector under The Liquor Control Act, The Amusements Act and The Highway Traffic Act, a peace officer as defined by the Criminal Code (Canada) and such other officer as may be designated in any Act to enforce the penal provisions thereof.": *The Provincial Police Act*, C.C.S.M. c. P150, s. 4(2).

(b) Special constables

Early Manitoba legislation did not address the appointment or jurisdiction of special constables except to state that provisions regarding the creation of a police force should not be construed to "prevent the appointment of Special Constables in any case in which they may by law be appointed."[66] In 1880, however, a specific statutory power to appoint special constables was created by *The Public Officers Act*, which allowed the Lieutenant Governor in Council to

> . . . appoint such number of special or other constables, or peace officers, as to him shall seem expedient; or confer the power of appointment thereof upon the chief of police or upon any other person or persons he shall see fit; and he may define their offices and positions, and assign their duties. . . .[67]

Like police officers, special constables were identified in this Act as being "constables", unless the contrary appeared in their appointing instrument.[68] As noted, the intent of the Legislature appears to have been to incorporate by reference the authority enjoyed by constables under English law. However, the statute also expanded the traditional English jurisdiction of special constables by granting to them the power to execute their office ". . . in the whole or any part of the province"[69] rather than merely locally.[70] These provisions continued almost unchanged until 1920.

The Provincial Police Act of 1920 appears to have affected the legal status of special constables in several significant ways. First, as with police officers, the Act contained no statement that special constables were "constables". Indeed, the Act made no express statement concerning special constables' powers and duties, a situation which continues to this day and lies at the heart of our concern. Second, in addition to suggesting again that the power of the Lieutenant Governor in Council to appoint special constables could be delegated to the Commissioner of the Provincial Police,[71] *The Provincial Police Act* also contained a new provision which stated that "such special constables shall be under the direction of the commissioner [of the Provincial Police] unless the Lieutenant Governor in Council otherwise orders."[72]

The repeated association of constables and special constables in legislation and, in particular, the suggestion in *The Provincial Police Act* that the Commissioner of the Provincial Police should be given both the power to appoint and control special constables is strong

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[66]*The Police Act*, S.M. 1871, c. 11, s. 14. Presumably, this referred to the power of justices of the peace and magistrates under English law to make appointments of special constables. *The Provincial Police Act* currently contains a provision which reads: "Nothing herein limits or affects the power of the appointment of constables or of special constables in particular cases . . . wherein and wherever such a power of appointment exists.": *The Provincial Police Act*, C.C.S.M. c. P150, s. 9(3).

[67]*The Public Officers Act*, C.S.M. 1880, c. 7, s. 10.

[68]*The Public Officers Act*, C.S.M. 1880, c. 7, s. 11. This section states: "The chief of police and every subordinate officer, constable and person so created and appointed as aforesaid . . . shall . . . be a constable. . . ." Special constables are one of the categories of officer whose appointment is discussed in the previous section.

[69]*The Public Officers Act*, C.S.M. 1880, c. 7, s. 11.

[70]The need for an incorporation by reference of the common law jurisdiction of constables to preserve the peace may be called into question because *The Special Constables Act, 1831* (U.K.), 1 & 2 Will. 4, c. 41, s. 5, which had been received by Manitoba, provided that special constables enjoyed the jurisdiction of ordinary constables at that point in time. Constables in 1831 clearly enjoyed an inherent jurisdiction to keep the peace. However, as we note later in this Chapter, it may be that this English statute applied only to special constables who were appointed by magistrates and justices of the peace pursuant to it. In any event, the expansion of special constables' jurisdiction to include the whole of the province required specific legislative authorization, since constables in England in 1831 enjoyed only a local jurisdiction.

[71]*The Provincial Police Act*, S.M. 1920, c. 102, s. 9(1).

[72]*The Provincial Police Act*, S.M. 1920, c. 102, s. 9(2).

evidence that these statutes were not intended to alter the legal position of special constables as a type of constable nor the traditional practice of appointing special constables temporarily to supplement a police force in emergencies. However, two statutory changes in the 1930s disrupted the close connection between regular police and special constables. First, *The Provincial Police Amendment Act, 1932*[73] ratified an agreement between the governments of Manitoba and Canada whereby the duties which had been assigned to the Provincial Police force were to be assumed by the Royal Canadian Mounted Police. In this arrangement, which is still in place, the R.C.M.P. became the Provincial Police force and its members, when acting as part of this arrangement, took on the powers and duties of members of the Provincial Police.[74]

The second statutory amendment disrupted the relationship between special constables and the police more significantly. In 1936, one portion of the section governing the appointment of special constables was altered; rather than placing them "under the direction of the commissioner" unless otherwise ordered by the Lieutenant Governor in Council, the new section provided that special constables "shall be under the direction of such person as the Lieutenant-Governor-in-Council orders."[75] A similar provision may be found in *The Provincial Police Act* today;[76] the powers of appointment and control are currently exercised by employees of Law Enforcement Services, a branch of the provincial Department of Justice.

This amendment, although apparently innocuous, is significant in that it paved the way for the current situation in which the appointment and control of special constables takes place independently of the police force. It has allowed the appointment of special constables, not as special police officers serving temporarily in emergencies, but as permanent appointees with law enforcement roles which fall entirely outside the police hierarchy. Whatever their status in law, therefore, in practice, special constables are now no longer a sub-category of ordinary police constables but are instead a separate type of official.

3. Implications

It is difficult to determine what effect this history has had on the jurisdiction of special constables today. If in fact a jurisdiction for special constables existed before the 1920 Manitoba legislation and continues to exist, it must have been created either by an antecedent statute or by common law. We will examine both possibilities.

The statute most likely to have created an enduring jurisdiction for special constables is *The Special Constables Act, 1831*, which explicitly granted special constables the jurisdiction of constables as of 1831.[77] There is every reason to believe that this Act, along with other English law, was received as Manitoba law in 1870. We have been unable to discover any subsequent statute which repeals this Act and none which would have had the effect of displacing it by expressly defining the jurisdiction of special constables in some other way. If the 1831 statute is still in effect, special constables continue to enjoy the jurisdiction available to regular constables in 1831, including their inherent common law authority to preserve the peace.

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[73] *The Provincial Police Amendment Act, 1932*, S.M. 1932, c. 37; the equivalent provision is now *The Provincial Police Act*, C.C.S.M. c. P150, s. 15.

[74] In 1939, amendments to *The Provincial Police Act* permitted municipalities to enter into agreements whereby the Royal Canadian Mounted Police would provide municipal policing services: *The Statute Law Revision Act*, S.M. 1939, c. 62, s. 75; the equivalent provision is now *The Provincial Police Act*, C.C.S.M. c. P150, s. 16.

[75] *An Act to Amend "The Provincial Police Act"*, S.M. 1936, c. 31, s. 1.

[76] *The Provincial Police Act*, C.C.S.M. c. P150, s. 9(2).

[77] *The Special Constables Act, 1831* (U.K.), 1 & 2 Will. 4, c. 41, s. 5.

However, it is possible that the practice of specifying in early Manitoba statutes that special constables were "constables" and the lapse of this practice in 1920 may have affected the applicability of the 1831 statute. It may be that a statutory incorporation by reference for special constables of the jurisdiction of "constables" had the effect of displacing the English law.[78] If so, special constables' jurisdiction would subsequently have depended solely upon Manitoba statute. The failure of legislation after 1920 either to refer to a pre-existing jurisdiction or to create a new one in express terms may therefore mean that no jurisdiction exists.

Even if the 1831 Act remains good law, however, an argument could be made that it must be taken as a whole. The provision in the 1831 statute which granted special constables the jurisdiction of constables referred to special constables appointed by justices of the peace to act as constables in emergencies. Since the special constables with which we are concerned are not appointed by justices of the peace but rather pursuant to a statutory authority and since they typically function in roles which have little to do with "tumult, riot or felony", the jurisdiction referred to in the 1831 statute may not apply to them.

It may be, however, that special constables need not rely on *The Special Constables Act, 1831* but instead enjoy a common law jurisdiction which predated and survived all statutes. It is possible that a common law authority to preserve the peace existed for special constables prior to any legislation authorizing appointments to the office and that subsequent legislation did not displace but merely formalized this authority. If so, the common law jurisdiction of special constables would have been received as Manitoba law in 1870 and, unless altered by subsequent legislation, would remain relevant today.

We see three problems with this theory. The first is that we have found no evidence which suggests that special constables, as a category of officials distinct from regular constables, were being appointed prior to the first statute in 1812 which expressly authorized justices of the peace to make these appointments. On the other hand, it seems likely that justices of the peace, who had the authority to appoint regular constables, also had the authority to appoint "special" constables for a particular emergency on a temporary basis. This authority, if it existed, would have been based on the fact that the term "special" was descriptive and did not denote a distinct office; special constables were simply constables whose appointments were temporary in nature.

However, this leads to a second problem. We have just concluded that, if the office of special constable existed at common law, it did so by virtue of the appointment of special constables by justices of the peace and magistrates and by virtue of the fact that, for the duration of their appointments, they functioned as and were, in effect, constables. However, the system of law enforcement which prevailed in England centuries ago is difficult to compare with that of Manitoba in 1996. Justices of the peace no longer appoint either regular constables or special constables; their earlier broad responsibility for the administration of justice has been narrowed so that they now exercise only a judicial function.[79] Indeed, the parish constable no longer exists in Manitoba, having been replaced by a variety of statutorily-created law enforcement offices, including the provincial and municipal police.[80] Even if police officers can be seen as the equivalent of 19th century constables, however, a close relationship between special constables and the police does not now exist. Special constables are appointed by officials in the

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[78]Codification of the common law can have the effect of displacing it if the ouster of the common law is a necessary implication of the statute: R. Sullivan, *Driedger on the Construction of Statutes* (3d. ed., 1994) 308.

[79]Telephone interviews with Marvin Bruce, Assistant Deputy Minister, Courts Division, Department of Justice (August 23, 1996) and Mary Humphrey, Executive Director, Judicial Services, Department of Justice (August 23, 1996).

[80]See Guth, *supra* n. 35, at 3, and G. Marquis, "Power from the Street: The Canadian Municipal Police" in R.C. Macleod and D. Schneiderman, eds., *Police Powers in Canada: The Evolution and Practice of Authority* (1994) 24. Although Guth concedes that the municipal police constable is now "a creature of statute, severed from the provincial magistrate, . . . accountable to a political executive. . ." (at 18), he and Marquis point out some continuities between modern municipal police officers and their English ancestors.

Department of Justice who, unlike justices of the peace in the 19th century, are not responsible for the police or other law enforcement officials. Moreover, few, if any, special constables today are appointed to act with a full law enforcement authority to support the local police force in emergencies. Instead, special constables receive indefinite appointments, typically to perform limited or specialized law enforcement functions outside of the police hierarchy. Since neither the appointment nor function of special constables today can be equated to their 19th century English counterparts, claims to a 19th century English jurisdiction seem dubious.[81]

On the other hand, it may be that the factors which led to the recognition of the office of special constable in the 19th century still apply today. Although not appointed by justices of the peace and magistrates, special constables are appointed by an authority competent to do so. Moreover, like their 19th century counterparts, they perform important and, arguably, necessary law enforcement functions. Indeed, they still fill a supporting role for primary law enforcement officers (the police), are appointed for a particular purpose and are no less involved in "preserving the peace". These continuities in the office may lead to the conclusion that special constables continue to enjoy an inherent authority to preserve the peace arising from the common law.[82]

The third problem with this theory is that statutes which explicitly or impliedly set out a jurisdiction for special constables may have displaced the common law. A strong argument can be made that this was the effect of *The Special Constables Act, 1831*[83] which specified that the jurisdiction of special constables was to be identical to that of constables at that time. If so, any subsequent jurisdiction enjoyed by special constables would have to be statutory in origin. Although any jurisdiction they created was implicit, the same displacing effect may have been achieved by Manitoba statutes after 1880 which identified special constables as "constables." The lapse of this practice in 1920 would then have eliminated the statutory jurisdiction which earlier legislation had created.[84]

However, it may be that neither *The Special Constables Act, 1831* nor Manitoba legislation extinguished a common law authority by creating a statutory source of authority. One presumption in statutory interpretation is that "the legislature does not intend to make any change in the existing law beyond that which is explicitly stated. . . ."[85] Not only was no such declaration explicitly made in any of these Acts but, since any jurisdiction created by these statutes was identical to that of the common law, no conflict with the common law existed which might have implied an intention to displace it.

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[81]This argument may be strengthened by a recent case from the English Court of Appeal where, ironically, special constables were found to hold the office of constable. In *Sheikh* v. *Chief Constable of Greater Manchester Police*, [1990] 1 Q.B. 637, the Court of Appeal relied for its conclusion on two facts. The first, stated by Croom-Johnson L.J. at 648, was that legislation in 1914 evidenced the clear assumption that "when a 'special' was acting under the control of the chief constable he was exercising the office of a constable." The second, identified by Balcombe L.J. at 648-649 is that the oath required by legislation of special constable appointees referred to the office of "constable." Since neither of these facts apply to most special constables appointed pursuant to *The Provincial Police Act*, it may be that they are not "constables" in the common law sense of the term.

[82]Ceyssens, *supra* n. 44, at 1-35, also comes to the conclusion that "special constables do hold the office of constable, subject to the restrictions of the special constable appointment."

[83]*The Special Constables Act, 1831* (U.K.), 1 & 2 Will. 4, c. 41, s. 5.

[84]Indeed, it can be argued that the Legislature intended just this result in 1920. The degree to which *The Provincial Police Act* sets out details of the jurisdiction of Provincial Police officers strongly suggests a desire to create a "made in Manitoba" law enforcement office to replace that of constable in English law. If this was its intent with respect to the office of constable, it may be reasonable to view the failure of the Legislature to refer to special constables as "constables" not as an inadvertent omission but as a deliberate act.

[85]Sullivan, *supra* n. 78, at 368.

D. AUTHORITY FROM OTHER STATUTES

If special constables do not in fact enjoy an inherent jurisdiction to enforce the law as "constables" at common law, their authority (if it exists at all) must derive from statute. One possibility is that *The Provincial Police Act* serves no purpose other than to permit the appointment of special constables and that their authority to enforce the law is granted by the statutes they are to enforce. In other words, it is possible that *The Provincial Police Act* simply creates an office which can be used by the Legislature for the enforcement of other statutes.

The difficulty with this explanation, however, is that we have found only two provincial statutes which state that "special constables" are to enforce them. *The Wild Rice Act* is to be enforced by "officers", which the Act defines as including a "special constable appointed under any other Act of the Legislature or the Parliament of Canada".[86] *The Off-Road Vehicles Act* is enforced by "peace officers"; special constables are specifically included in the definition of "peace officer" contained in the Act.[87]

Clearly, if these statutes constitute the only sources of special constables' authority, their jurisdiction will be extremely limited. Indeed, in this case, the vast majority of those appointed pursuant to *The Provincial Police Act* would have no authority for the law enforcement functions they currently perform.

E. AUTHORITY FROM *THE PROVINCIAL POLICE ACT*

One final possible source of authority for special constables is *The Provincial Police Act* itself. Although the Act does not grant special constables an express jurisdiction, it may be read to imply that special constables share in the broad jurisdiction granted by the Act to regular police constables.

There are two arguments which support this view. The first rests on the historic connection between special constables and regular constables or police officers. As we have seen, the history of special constables in England strongly suggests that they were seen as no different than regular constables for the duration of their appointments.[88] Early Manitoba statutes also suggest that special constables were appointed for the same functions as regular police officers when circumstances demanded. Since there was little reason in 1920 to believe that special constables were anything but temporary police constables, it seems reasonable to conclude that the Legislature, assuming that special constables would continue to act in their traditional role, intended that the explicit jurisdiction granted to police constables would also be available to them.

The difficulty with this argument, of course, is that, even if this was the intent of the Legislature in 1920, it was based on an assumption which is no longer accurate. Very few, if any, special constables currently function as regular police officers in emergency situations. This legislative intention is therefore irrelevant for the vast majority of current special constables.

The second argument is that the Legislature cannot have intended to create a law enforcement office without granting its holders any power to enforce the law. Therefore, if a

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[86]*The Wild Rice Act*, C.C.S.M. c. W140, s. 1.

[87]*The Off-Road Vehicles Act*, C.C.S.M. c. O31, s. 1(1).

[88]An example of the lack of distinction in judicial thought between constables and special constables may be found in *R. v. Porter & Thomas* (1840), 9 Car. & P. 778, 173 E.R. 1050, where Coleridge, J. used the terms almost interchangeably. For example, he made the following statement: "I think the deceased was a good common constable, on 16th of August, 1840, he having been made a special constable under this Act of Parliament" (at 1052).

pre-existing jurisdiction cannot be attributed to the office of special constable, a statutory jurisdiction must be implied.

However, two points must be noted. First, the office is not devoid of any power; so long as they are appointed for this purpose, special constables have the authority to enforce at least *The Wild Rice Act* and *The Off-Road Vehicles Act*. Second, as evidenced by their approach to the definition of "peace officer", courts tend to interpret narrowly statutory provisions which grant law enforcement powers. Judges are likely to be reluctant to imply such an authority without clear evidence of the intention of the Legislature to grant it.

F. CONCLUSION

Our purpose in raising the question of the jurisdiction of special constables has not been to argue that special constables are currently acting without any exceptional authority to enforce the law; we merely suggest that it is entirely possible that current practices have developed without a great deal of thought being given to the legislation on which they are based. By relying on a statute which was very probably enacted either on the assumption that a jurisdiction for the office already existed or that special constables would continue to serve only as temporary constables in emergencies, the Lieutenant Governor in Council and those acting on his or her behalf may have inadvertently overlooked a defect in the law. As a result, solid arguments can be made that special constables today enjoy neither a statutory nor a common law jurisdiction.

In Chapter 3, we will discuss a number of roles for the office of special constable in a comprehensive system of law enforcement and we will note that it is possible to use the office in a much more minimalist fashion than is currently the case. However, whatever the proper role for the office, we have no doubt that the flexibility of an office like that of special constable is necessary in an increasingly complex law enforcement structure. It seems to us self-evident, therefore, that the legal foundation of this office should be firmly and unequivocally established; all doubts about the capacity of a special constable appointment to grant law enforcement powers should be extinguished. The best means for accomplishing this, in our view, is by way of legislative amendment.

RECOMMENDATION 1

The capacity of a special constable appointment to confer a law enforcement jurisdiction should be clearly established in legislation.

CHAPTER 3

THE FUNCTION OF THE OFFICE OF SPECIAL CONSTABLE

A. THE OPTIONS

As we have noted, the office of special constable has grown over the past decades from one which conferred a temporary and infrequently used law enforcement authority into one which is extensively used in nearly every area of law enforcement in the province. This evolution should not be seen as inevitable; the office has developed differently elsewhere. Moreover, law reform consists of distinguishing between the descriptive and the normative; what is may differ from what should be. Having been given the task of evaluating the office of special constable, we believe that it is incumbent upon us to consider whether the current manifestation of the office in Manitoba in fact best serves the law enforcement needs of this province.

The approach which Manitoba has adopted on an *ad hoc* basis is also used, on a more formal basis, by Alberta and Ontario. This approach uses the office aggressively to ensure the adequate enforcement of laws. The chief alternative is to rely more heavily on the Legislature to arrange for law enforcement and to employ the office of special constable only minimally to fill the "nooks and crannies" of law enforcement. Saskatchewan and British Columbia's policies seem to reflect a preference for this approach to special constable appointments.

The first approach, which Manitoba has followed in practice, views the office of special constable as a legitimate mechanism for the conferral of law enforcement powers. Applying this approach, the individual with the power to appoint special constables (whom we will call the "appointing authority") would consider whether particular laws are being adequately enforced in specific circumstances or in a specific geographical area. If not, the office of special constable would be available to confer an appropriate jurisdiction on an individual selected to carry out this function.

Of course, a variety of mechanisms other than a special constable appointment might be used to confer the appropriate authority. For example, if liquor laws required enforcement, an individual could be appointed an inspector by the Liquor Control Commission pursuant to *The Liquor Control Act*.[1] Similarly, if *The Wildlife Act* needed to be enforced, the Minister responsible for the administration of that statute could make an appointment pursuant to the authority granted in that Act.[2] However, the office of special constable might be a preferred mechanism in a variety of circumstances. For example, if a large number of statutes needed to be enforced by an individual, it might be administratively inconvenient to grant him or her numerous appointments pursuant to a variety of statutes; it would likely be more efficient to make a single appointment to the office of special constable.

In addition, a statute need not rely on a particular category of enforcement agent, identified in the Act, for its enforcement. Such a statute could still be enforced by agents with a general

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[1] *The Liquor Control Act*, C.C.S.M. L160, ss. 8(1)(h), 136(1) and 137.

[2] *The Wildlife Act*, C.C.S.M. c. W130, ss. 68(2) and 69.

law enforcement jurisdiction; in Manitoba, the R.C.M.P. and municipal police officers have this jurisdiction. However, the police are often unable to provide adequate enforcement of particular laws in specific circumstances or in a particular geographical area. In these situations, granting individuals the power to enforce these laws by way of a special constable appointment is an attractive alternative to hiring greater numbers of police officers.

A common result of this approach is the informal creation of new categories of officials as large numbers of new law enforcement agents are given similar or identical powers. In addition, this approach permits the expansion of the jurisdiction already granted to categories of officials by the Legislature.

The second approach would use the office of special constable in a much more limited manner. It would rely on the Legislature to design broad law enforcement schemes for the laws it enacts. Typically, special constable appointments would not be used to create whole categories of officials whenever the law enforcement scheme provided for in legislation was seen to be inadequate nor would the office be used to enlarge the legislatively-defined jurisdiction of large numbers of law enforcement officials. Indeed, from this perspective, an aggressive use of the office might be seen as an inappropriate circumvention of legislative authority. Instead, the office of special constable would be reserved for limited and unusual law enforcement roles which could not have been anticipated by the Legislature when determining the enforcement of statutes it enacts.

To illustrate the difference between these two approaches, it may be useful to examine two actual situations which have been dealt with by Manitoba's appointing authority. The first situation has arisen because of concerns that *The City of Winnipeg Act* fails to confer unequivocal authority upon the City to appoint individuals to enforce its parking by-laws.[3] Even if the City lacks this authority, it does not mean that validly enacted by-laws cannot be enforced; City of Winnipeg Police as well as the R.C.M.P. (as Manitoba's Provincial Police) clearly enjoy the authority to enforce them. However, as one might expect, the City is reluctant to divert the time and energy of highly-trained police officers from more serious offences to deal with parking violations; it prefers this task to be carried out by other individuals. In order to issue offence notices, these individuals must have peace officer powers and, since the authority of the City to grant these powers is uncertain, the use of the office of special constable for this purpose was proposed.

Applying the first approach, the current appointing authority has had no difficulty in appointing as special constables dozens of members of the Corps of Commissionaires, security guards at hospitals and universities and other individuals, conferring on them the authority to enforce Winnipeg's parking by-laws. This has, in effect, created a new category of law enforcement official with a specific, narrow jurisdiction. If the second approach were to be applied, however, few (if any) of these appointments would be made. In this case, the appointing authority would decline to act and might suggest instead that the problem should be referred to the Legislature which could, if it chose to do so, confer unequivocally on the City or another entity the power to appoint parking by-law enforcement officers.

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[3]In fact, this question does not appear to have been directly addressed in the Act. However, the statute does provide that the City may ". . . install, maintain, regulate and charge fees for the use of parking meters in the streets of the city and in public parking facilities operated by the city.": *The City of Winnipeg Act*, S.M. 1989-90, c. 10, s. 500(d). In addition, the City has authority to control traffic, including parking, within the City's limits: *The City of Winnipeg Act*, S.M. 1989-90, c. 10, ss. 516 and 517; *The Highway Traffic Act*, C.C.S.M. c. H60, ss. 79(3) and 93(1). The Act also provides:

> Where under this Act power is expressly given to the city or to the council to do, or enforce the doing, of any act or thing
>
> (a) all such powers shall be deemed also to be given as are necessary to enable the city or the council to do, or enforce the doing, of the act or thing; . . . .

The City of Winnipeg Act, S.M. 1989-90, c. 10, s. 107(a). This may well provide sufficient authority for the City to appoint parking enforcement officers.

A second example concerns natural resources officers. Once appointed to this post, these individuals have the power to enforce *The Wildlife Act* and other associated statutes. However, in carrying out their duties, they are likely to come across apparent violations of *The Highway Traffic Act*, the *Criminal Code*, the *Narcotics Control Act* and other statutes. Although the power of citizen's arrest is available to them, this power is ineffective when the suspected offence is not indictable (as is the case with most *Highway Traffic Act* offences) and when, rather than finding a crime actually being committed, they merely have reasonable and probable grounds to believe that someone is committing or has committed the crime.

In order to allow these officers to enforce laws other than those which the Legislature has specifically authorized them to enforce, the appointing authority in Manitoba has named large numbers of natural resources officers special constables and conferred on them a jurisdiction which greatly exceeds that conferred on them by the Legislature.[4] Again, however, if the second approach had been applied, very few of these appointments would have been made. Instead, the Legislature would have been asked to consider whether an expansion of the jurisdiction of natural resources officers was warranted. The second approach would permit appointments only if a single natural resources officer or a small group of officers were engaged in an unusual project or role which required the power to enforce additional statutes.[5]

These two approaches reflect substantially different views as to the proper functions of the Legislature and government administrators. The first takes the view that the Legislature is free to create classes of law enforcement officers and to confer law enforcement jurisdictions on these individuals. However, while these jurisdictions cannot be abridged except by the Legislature, nothing prevents their augmentation nor the creation of new classes of official. Therefore, it considers legitimate the use of special constable appointments to create new categories of law enforcement officials when those created by the Legislature are viewed as inappropriate or inadequate. Similarly, if the jurisdiction granted by the Legislature to certain law enforcement agents is insufficient or requires modification, it is considered appropriate to expand their jurisdiction by granting some or all of them additional powers. In effect, this view interprets section 9 of *The Provincial Police Act* as a functional grant to the appointing authority of a broad power to direct and control law enforcement in the province.

The second approach is based on the view that the Legislature, rather than government administrators, should design law enforcement schemes and confer appropriate jurisdictions on groups of law enforcement agents. According to this view, the massive use of the office of special constable to create new categories of officials or to alter the jurisdictions of those created by the Legislature is inappropriate and may even constitute an illegitimate usurpation of legislative authority. The fact that the Legislature has authorized appointments to the office of special constable is not interpreted to mean that the authority and responsibility of the Legislature over law enforcement has been delegated to the appointing authority. Instead, it concludes that the office was intended merely to fill the "nooks and crannies" between and within legislatively-created law enforcement schemes.

Both approaches have advantages. If the expansive approach is applied, all law enforcement agents except the police and those specifically created by legislation would be controlled by a single individual or governmental agency. Moreover, to the extent that the police

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[4]For example, in our review of current appointments, we have come across an appointment of a natural resources officer which gives this individual the power to enforce all provincial and federal statutes, including the *Criminal Code*.

[5]For example, it is possible that a natural resource officer, engaged in an undercover poaching investigation, could come across evidence of other criminal activity. In order to allow him or her to use the undercover identity to make arrests for a variety of crimes, a special constable appointment might be justified under the second approach.

and statutory enforcement officers have their jurisdictions altered by way of special constable appointments, this individual or agency will control them as well.[6]

Centralizing control in this fashion is efficient. It permits the development of a comprehensive plan for law enforcement and greater integration of various law enforcement schemes. It removes law enforcement from the shifting tides of the political process and places it in the hands of an individual or agency which can take the long view and develop the "big picture". In addition, because appointments can be made in a relatively speedy fashion, there is a much greater likelihood that law enforcement needs will be met promptly. By contrast, the second approach would require frequent references to the Legislature for amendments to legislation. The legislative process is time-consuming and will significantly delay changes to law enforcement schemes.

However, although it is clearly less efficient than the first approach, the narrower approach to the office of special constable has the significant advantage of democratic legitimacy. Removing control of law enforcement from the Legislature also reduces the control of the public over this important aspect of government. Effective and appropriate law enforcement affects every Manitoban for the better and its lack harms us all. Leaving responsibility for law enforcement in the hands of elected representatives ensures accountability to the people of Manitoba for the proper enforcement of legislation. Delegating it to government administrators reduces this accountability.

B. CONCLUSION

We believe that there is a great deal to be said for the approach which is currently applied in Manitoba. It is, in our view, sensible to allow a particular administrator or administrative entity with expertise and experience to direct law enforcement efforts over a long period of time rather than relying on legislators, who will visit law enforcement issues only sporadically, to develop consistent and coordinated law enforcement schemes. In addition, we note that the power to appoint special constables is now, and has traditionally been, held by officials in the provincial Department of Justice. This department has been given a general responsibility for the administration of justice in the province, including the administration of law enforcement. It makes sense, in our view, to grant to this department the authority to use the office of special constable as part of a strategy for general law enforcement in the province.

On the other hand, we have concerns about the lack of democratic legitimacy which must accompany a delegation of legislative authority to governmental officials. The conferral of the power of appointment on employees of the Department of Justice means that the only person who is directly accountable to the Legislature for the use of the power of appointment is the Minister of Justice and Attorney General who is not personally involved in any appointments. A more direct relationship between the appointing authority and the Legislature and the people of Manitoba is called for, in our view.

Therefore, we propose a compromise solution which will, we believe, result in the benefits of the first approach without sacrificing accountability. We recommend that, like Alberta and British Columbia, the authority to appoint special constables be granted to the Minister of Justice and Attorney General. The person holding this office is in a unique position to develop comprehensive and integrated plans for law enforcement in consultation with other Ministers. With the assistance of departmental officials, he or she is also able to ensure that the enforcement of new legislative initiatives are integrated into a broad plan for law enforcement and would be

[6]One of the most massive expansions of legislatively-created jurisdictions involves the "blanket" appointment of all City of Winnipeg police officers as special constables, giving them the power to act as police officers throughout the province rather than only within the City of Winnipeg.

better able than the Legislature to respond quickly to specific law enforcement needs. More importantly, the Minister can be held directly accountable to the Legislature for the use of the authority to appoint special constables. In our view, that level of accountability justifies and provides a safeguard for the aggressive use of the office of special constable to provide law enforcement powers whenever they are considered necessary.

RECOMMENDATION 2

The power to appoint special constables should be held by the Minister of Justice and Attorney General (who may be assisted by departmental officials). The Legislature should delegate to the Minister of Justice and Attorney General the authority to use the office of special constable to confer a law enforcement jurisdiction whenever he or she considers it to be necessary.

CHAPTER 4

APPOINTMENT OF SPECIAL CONSTABLES

A. INTRODUCTION

Clearly, the process by which special constables are appointed will be heavily influenced by the view adopted as to the proper role of the office of special constable. If the office is to be used to respond to any and all deficiencies in law enforcement, different criteria will be applied than if a minimalist position as to its role is taken.

However, some comments and recommendations concerning the appointment process can be made whether or not our recommendations with respect to the proper role of the office are adopted. These are largely based on our view that the office of special constable should produce both effective and appropriate law enforcement.

Effective law enforcement may be described as that which deters and punishes violations of the law. Canadians are, for the most part, law-abiding people and object when law-breakers are able to escape without punishment. They worry, with justification, that a failure to detect offenders and bring them to justice will encourage others to test the aphorism that "crime does not pay". Accordingly, Canadians spend a good deal of public money for police and other law enforcement officials in an effort to deter law-breaking. Clearly, effective law enforcement is a high priority.

At the same time, however, Canadians have no desire to create a "police state" in which law enforcement officials are an overwhelming and intimidating presence. They value privacy and resent unwarranted intrusions on it. They are committed to the rights enshrined in the *Canadian Charter of Rights and Freedoms*. Moreover, they recognize that the greater the number of people who are given a law enforcement authority and the greater the powers they wield, the greater is the risk of the misuse of those powers, either intentionally or inadvertently. Accordingly, Canadians understand that the goal of effective law enforcement must be tempered by the need for appropriate law enforcement measures.

The desire for a suitable balance between these two important but competing objectives will guide much of this and subsequent Chapters.

The appointment process involves many decisions, including the choice of an appropriate individual to be appointed to a law enforcement function. The issues surrounding the choice of individual will, however, be dealt with in the following Chapter. This Chapter will be entirely devoted to a discussion of the circumstances in which a special constable should be appointed and the form that such an appointment should take.

B. WHEN AN APPOINTMENT SHOULD BE MADE

1. Delineation of the Purpose or Function for Which an Appointment Is Sought

It seems to us that clear thinking about the appointment process must begin by defining the function for which an appointment is sought. Unless the scope of the function is identified early on, subsequent decisions will be rife with confusion.

Defining the purpose or function of a proposed appointment at the outset is particularly important because, unlike other offices, the jurisdiction of a special constable is not set out in legislation. The office of special constable is uniquely flexible because it does not, in itself, confer any power or authority; it is merely a mechanism by which authority or status can be conferred.[1] Therefore, in order to be meaningful, an appointment to the office must specify the jurisdiction being conferred. Clarifying the function or purpose of the appointment early on will greatly assist in this process.

An early identification of the purpose or function of a prospective appointment is also important because of the apparently widespread but mistaken view that, as a peace officer, a special constable is entitled to all the powers and protections available to a peace officer pursuant to the *Criminal Code* and other legislation.[2] As we have seen, peace officer status and authority is only applicable while the appointee is engaged in the function or purpose for which the appointment was made. Identifying the function or purpose of an appointment at the outset will allow an appointment to be drafted which makes this clear, thereby minimizing confusion and avoiding situations in which an appointee mistakenly exceeds his or her authority.

Three features of the function being sought will typically be present:

- the laws which the appointee will be authorized to enforce;[3]
- the circumstances in which these laws can be enforced; and
- the geographical area in which the appointee will have jurisdiction.[4]

These should be identified before the prospective appointment is assessed further.

One final note: we have referred to appointments being sought, which may be read to imply that we envisage some sort of application process for special constable appointments. We do not mean to make this suggestion. Our use of this language results from the fact that, in the past, appointments have usually been made in response to requests from governmental bodies, private employers, other organizations or individuals seeking the appointment. We fully expect that most appointments in the future will be initiated by similar requests. However, we do not intend to preclude the possibility of an appointment if the Minister should happen upon a situation in which an appointment should be considered even though no request has been made.

RECOMMENDATION 3

The function or purpose for which an appointment is sought should be clearly defined. This will typically involve a statement of:

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[1]This statement assumes either that a special constable appointment currently permits the conferral of a law enforcement jurisdiction or that our recommendation concerning legislative clarification of this issue has been implemented.

[2]This opinion has been expressed by officials both within Manitoba and outside the province.

[3]Authority may be sought to enforce all laws (both federal and provincial) or a narrower range of laws.

[4]This jurisdiction could extend to the whole of the province or might involve a smaller area, such as a municipality or even a particular piece of property.

- ***the laws which the appointee will be authorized to enforce;***
- ***the circumstances in which these laws can be enforced; and***
- ***the geographical area in which the appointee will have jurisdiction.***

2. Assessment of the Necessity of the Function

As we suggested earlier in this Chapter, the goal of effective law enforcement, taken by itself, could result in the appointment of huge numbers of individuals to law enforcement functions. However, the goal of effectiveness must be balanced by the goal of appropriate law enforcement. Massive numbers of law enforcement officials might well deter illegal activities but at a tremendous risk that their exceptional powers would be misused and that a climate of fear would be created. It is therefore necessary to consider whether, on balance, the function or purpose for which an appointment is sought is necessary for adequate enforcement of the laws in question in the circumstances and geographical area identified. No appointment should be made unless the appointing authority is satisfied that the function proposed is not superfluous and unnecessary but will in fact benefit the public by resulting in better law enforcement.

In making a determination about the necessity of the function being sought, the Minister may well wish to consult with the law enforcement authorities which have responsibility for enforcing the relevant laws in the circumstances and geographical area in question. The police or governmental body with jurisdiction to provide the function sought by the applicant may support the proposed appointment; they may lack the personnel or special knowledge needed to provide satisfactory enforcement of the law in the circumstances proposed by the applicant. On the other hand, law enforcement authorities may oppose the proposal and the contention that current law enforcement is inadequate. Although the opposition of these authorities should not have the effect of a veto, it should be taken seriously.

RECOMMENDATION 4

The function for which an appointment is sought should be examined to determine whether it is necessary in order to ensure proper law enforcement. If it is not necessary, no appointment should be made.

3. Consideration of the Need for Additional Powers

The purpose of a special constable appointment is to confer on an individual the powers to perform a necessary law enforcement function. However, in many situations, a prospective appointee will already enjoy the powers needed to perform the function in question.

As we noted earlier, every prospective special constable will already enjoy some law enforcement powers. Whether or not they have been appointed to a law enforcement office, everyone in Canada possesses the authority to arrest any individual he or she finds committing an indictable offence[5] and everyone has the power to use force to prevent a breach of the peace.[6] In addition, as an occupier of property or as an agent of such a person, a prospective appointee

[5]*Criminal Code*, R.S.C. 1985, c. C-46, s. 494(1)(a).

[6]Everyone in Canada is expressly allowed to detain anyone who is involved or about to become involved in a breach of the peace: *Criminal Code*, R.S.C. 1985, c. C-46, s. 30. In addition, everyone is entitled to detain anyone whom they find committing an indictable offence: *Criminal Code*, R.S.C. 1985, c. C-46, ss. 30 and 494(1). In either case, these detentions may only be made for the purpose of giving the arrested person into the custody of a peace officer.

has the power to prevent the commission of crimes on or in relation to that property.[7] These powers may be sufficient for the function for which a special constable appointment is sought.

Besides these widely available powers of law enforcement, we noted in Chapter 1 that many statutes give specified appointees (statutory enforcement officers) the power to enforce them. Moreover, the implications of the law concerning peace officers, which we explored in Chapter 2, are that anyone who is empowered to enforce the law is a peace officer within the scope of his or her jurisdiction and enjoys the powers and protections which accompany that status. Therefore, if the prospective appointee is a statutory enforcement officer, he or she will possess, in addition to the specific law enforcement powers granted by the statute, the powers and protections afforded to peace officers while he or she is engaged in his or her statutory enforcement function. Unless the statute in question is defective, a statutory enforcement officer will already possess the authority needed to enforce the statute and a special constable appointment will be superfluous.

In our view, the grant of additional powers by way of a special constable appointment should take place only if the prospective appointee is in need of additional powers to perform a necessary law enforcement function. If no additional powers are needed, none should be conferred since unnecessary powers serve no purpose but are vulnerable to misuse. Nor should a special constable appointment be made which merely duplicates powers already possessed by an appointee. Such an appointment is detrimental in that it is likely to create confusion. A statutory enforcement officer whose powers are duplicated by a special constable appointment will now be accountable to two authorities: the person or governmental body with responsibility for enforcing the statute in question and the Minister of Justice and Attorney General who has made the special constable appointment.[8] Moreover, supervising a special constable, reviewing files and maintaining records all add to the costs of government. These costs should not be incurred unless they are needed to provide a law enforcement function.

We suspect that at least some of the over 2500 current special constable appointments are unnecessary in that they either confer powers which are not needed to perform the function in question or duplicate powers which appointees already possess. In order to minimize exposure to the misuse of powers and to reduce confusion and duplication, we believe that all current special constable appointments should be reviewed to ensure their necessity. No current special constable appointment should be maintained and no new appointment should be made if powers already available are sufficient to perform the function or purpose for which an appointment is sought.

RECOMMENDATION 5

No special constable appointment should be made or maintained when the powers otherwise available to the applicant are sufficient to perform the function or purpose for which an appointment is sought.

4. Consideration of Other Forms of Appointment

When a law enforcement function is considered to be necessary and requires additional powers to be performed properly, some sort of mechanism must be used to confer those powers. However, the office of special constable is not the only such mechanism available. We noted in Chapter 1 that a great variety of law enforcement offices have been created by the Legislature;

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[7] *Criminal Code*, R.S.C. 1985, c. C-46, s. 494(2).

[8] We discuss in Chapter 6 the role of the Minister of Justice and Attorney General in ensuring adequate supervision and direction of special constables.

these may be used to grant individuals the power to perform the function in question. Indeed, in our view, when an appointment as a statutory enforcement officer can confer the powers necessary to perform the function or serve the purpose in question, it should be preferred over a special constable appointment. Respect for the Legislature dictates that the offices it creates should not be bypassed unless they are inadequate for a law enforcement function which is considered necessary.[9]

Moreover, even when the powers required for the function in question are not available through existing law enforcement offices, it may not be necessary or desirable to resort to a special constable appointment. Although we believe that the Minister of Justice and Attorney General should be empowered to use the office of special constable without reference to the Legislature, we also believe that, whenever practical, the Minister should demonstrate deference to the Legislature by asking that body to create new law enforcement offices with which to grant law enforcement authority.

References to the Legislature will be most practical and appropriate when large groups of agents require identical or similar powers for an indefinite period of time. We suggest, for example, that the two categories of law enforcement officials we highlighted in Chapter 3 might both be suitable candidates for a legislative reference. City of Winnipeg parking by-law enforcement officers and Natural Resources officers both exist in large numbers and currently receive all or part of their law enforcement authority by way of special constable appointments. If these powers are considered necessary and if they will be required indefinitely, it may be appropriate to ask the Legislature to create a category of official with the power to enforce City of Winnipeg parking by-laws[10] and to extend the powers of Natural Resources officers (or create a new category of Natural Resource officer) so as to make possible a grant to them by statute of the authority they now exercise by way of special constable appointments. Similarly, rather than using a blanket special constable appointment to extend the jurisdiction of Winnipeg police officers to the whole of the province, it may be appropriate for the Legislature to consider whether this expanded jurisdiction is necessary. If so, this larger jurisdiction could be set out in an amendment to *The City of Winnipeg Act* or in another statute.

Our recommendations do not mean that all or even most special constable appointments should be referred to the Legislature. Indeed, the benefits of using the office of special constable aggressively would be lost if the Minister felt obliged to seek the creation of new offices too frequently. When relatively few appointments of a similar type are made or when the appointment is anticipated to be of limited duration,[11] we believe the Minister should feel free to use the office of special constable in order to make needed appointments. We are simply seeking some balance between the use of ministerial discretion and the ability of the Legislature to control enforcement of the laws it enacts.

RECOMMENDATION 6

Before a special constable appointment is made, consideration should be given to the use of an existing law enforcement office (including appointment as a

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[9]For example, if someone needs authority to enforce *The Liquor Control Act*, the most appropriate course of action would be to appoint that person an inspector pursuant to *The Liquor Control Act* rather than to grant him or her the necessary powers by way of a special constable appointment.

[10]In creating such a category of official, the Legislature might wish to consider whether the authority to appoint individuals to this office might be properly held by a municipal official, such as the Mayor of the City of Winnipeg or the Chief of Police.

[11]An example of an appointment of limited duration is one which is being made on an experimental basis. The Minister might, for example, decide to grant some statutory enforcement officers more expansive powers for several months to determine their utility. If the trial is considered to have been successful, a more permanent arrangement which involves large numbers of appointees might then be formalized in legislation.

statutory enforcement officer) as a means of conferring the power or status necessary for the purpose or function in question.

RECOMMENDATION 7

When large numbers of identical or similar appointments are needed and are anticipated to be required indefinitely, consideration should be given to the creation by the Legislature of a new or expanded law enforcement office rather than the use of special constable appointments.

C. CONSIDERATION OF THE POWERS TO BE CONFERRED

In situations where a special constable appointment is the most appropriate mechanism by which to confer powers or status which are required to perform a necessary function or serve a needed purpose, the Minister must consider which powers should be made available to the appointee.[12] This will require a careful analysis of the purpose or function for the appointment. Our dual objectives of efficient and appropriate law enforcement require that all powers which are needed to perform the purpose or function properly should be granted but no unnecessary powers should be conferred.

A balance between the competing aims of effectiveness and appropriateness will be required when assessing the need for each power being sought. The possibility that a power may prove useful at some point must be weighed against the fact that, having been granted, this power will be vulnerable to abuse. In addition, we recommend in Chapter 5 that appointees should be properly qualified and trained to use every power which is conferred on them. Granting powers which are unlikely to be used will therefore require additional training, entailing an additional expenditure of time and money.

Of particular concern in this context is the power to carry and use restricted or prohibited weapons when performing a law enforcement function. Because of the grave danger posed by the improper use of firearms and other weapons, special attention should be paid to this issue. It is worth noting that Alberta prohibits special constables from carrying restricted or prohibited weapons in the course of their duties unless specifically authorized to do so by the responsible Minister.[13] This authorization is granted sparingly. For example, an application for authorization to carry a firearm cannot be made unless the special constable is employed by the Province or the federal government or has been empowered to enforce the *Criminal Code*.[14] Although we are not prepared in this Report to detail the circumstances in which the authority to carry a firearm or other weapons should be granted, we fully support the notion that an application for permission to carry them should be carefully scrutinized to determine whether this power is truly needed to perform the function for which the appointment is sought. Moreover, we suggest that the restrictions adopted by Alberta should be examined to determine if they are suitable for use in Manitoba.

RECOMMENDATION 8

An appointee should be granted all the powers, and only those powers, which are necessary to perform properly the law enforcement function for which the appointment is made.

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[12]For example, the power of arrest may be necessary for some law enforcement functions but not for others.

[13]*Special Constable Equipment Regulation*, Alta. Reg. 322/90, s. 2. The responsible minister is now the Minister of Justice and Attorney General.

[14]*Special Constable Equipment Regulation*, Alta. Reg. 322/90, ss. 2 and 5.

For the most part, the responsibility to enforce the criminal law in Manitoba has been shouldered by municipal police forces and the Provincial Police (in the form of the Royal Canadian Mounted Police). We believe this to be appropriate. Because of the danger of violence associated with enforcement of the *Criminal Code*, the *Narcotics Control Act* and other criminal legislation and because of the risk that the rights of individuals will be violated, it is important that those enforcing these statutes be well-trained and supervised. Police forces already have in place rigorous training programs and a hierarchical structure which provides supervision over individual officers. In our view, the primary responsibility for the enforcement of criminal law should remain with the police.

In some situations, however, a supportive role in criminal law enforcement may be played by someone who is not a police officer. If an appointment to this auxiliary function by the police authority itself is impossible or inappropriate,[15] an appointment to the office of special constable may be justified. However, such an appointment should be made on the understanding that the police retain a primary responsibility for the enforcement of the criminal law.[16] This may mean that limitations on the powers of the special constable need to be set. For example, a special constable could be granted the power to enforce the law respecting only those crimes which are exceptionally problematic in a particular community or could be authorized to perform only a narrow range of duties.[17]

Before an appointment is made which allows a special constable to enforce the criminal law, it is especially important that the local police force and the R.C.M.P. are consulted. Although we are not prepared to require, as Alberta does, that a protocol be developed between the local police force or R.C.M.P. detachment and the employer of the special constable,[18] we believe that it is imperative that the limited role of the special constable in the context of criminal law enforcement generally is clearly understood.[19]

RECOMMENDATION 9

Authority to enforce the criminal law should be granted to a special constable only on the basis that the police will retain principal responsibility for the enforcement of the criminal law and that the special constable will serve only in a supporting role.

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[15]The Commissioner of the R.C.M.P. has the power under federal law to appoint special constables supernumerary for a period of up to 12 months: *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, s. 7(1)(c).

[16]Alberta, for example, allows appointments which grant the power to enforce the *Criminal Code* only on the understanding that "the RCMP retain overall responsibility for policing. . . .": Alberta Justice, Public Security Division, *Special Constable Program Policy Manual* (Rev. 01/96) 18.

[17]Alberta's policies direct that an appointment will be limited to "particular criminal matters that are problematic for the community. For example, a special constable may have limited authority to arrest, detain or transport an impaired driver. In the case of break and enters, a special constable may have authority to maintain the scene until the RCMP arrive." Alberta's policies also state that "special constables generally do not conduct criminal investigations": *Special Constable Program Policy Manual* (Alta.), *id.*

[18]*Special Constable Program Policy Manual* (Alta.), *supra* n. 16, at 18.

[19]In making this recommendation, we do not intend to preclude the creative use of the office of special constable to provide police services in some situations. For example, Alberta has developed detailed policies with respect to First Nations policing and has used special constable appointments as a vehicle by which full police authority can be conferred on First Nations Police Officers: *Special Constable Program Policy Manual* (Alta.), *supra* n. 16, at 28-40. Our recommendation should not be construed as preventing such a scheme in Manitoba.

D. DESIGN OF THE APPOINTING DOCUMENT

Our dual goals of effective and appropriate law enforcement will be undermined if appointees and members of the public are unclear as to the nature and extent of the authority being conferred by a special constable appointment. Special constables who are unaware that a power is available to them will fail to take action when the use of this power is warranted. If they believe that they possess a power which has not been conferred, however, they are likely to take actions which exceed their jurisdiction, resulting in the violation of rights and making them vulnerable to civil suits and even criminal charges. Clarity is also important for members of the public. An underestimation of the powers of a special constable is likely to result in inappropriate resistance to legitimate actions by a special constable while an overestimation may cause a citizen to submit to inappropriate actions. By avoiding vague language and setting out unambiguously the scope of an appointee's authority, an appointing document will help to clarify matters for both special constables and the public.

Alberta's regulations require that the appointing authority set out "the authority, responsibility and duty that may be exercised by, and the territorial jurisdiction of" the special constable as well as any terms and conditions to which the appointment is subject.[20] After examining numerous special constable appointing documents currently in effect in Manitoba, we believe that even more specificity can be offered. In our view, when conferring a law enforcement authority, an appointing document should specify:

- the laws the appointee is entitled to enforce;
- the powers available to him or her in enforcing these laws;
- any limitations on the use of these powers, including the circumstances in which these powers may be exercised;[21]
- the geographical area in which this authority is effective; and
- whether the appointee is permitted to carry a restricted or prohibited weapon in the performance of his or her duties and, if so, the specific weapon or weapons permitted.[22]

When designing an appointment, it is important to avoid the use of titles as substitutes for a clear description of the purpose for the appointment or the authority being conferred. Because the office of special constable does not in itself imply a particular authority or specific powers, it serves no purpose merely to confer the title of "special constable" on an appointee; details of the authority being conferred must also be set out. Similarly, an appointing document which refers only to a title such as "loss prevention officer" or "security guard" provides little assistance in determining the specific powers being granted and the circumstances in which they can be used.

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[20]*Special Constable Regulation*, Alta. Reg. 357/90, s. 3(3)(b).

[21]For example, it may be desirable to grant a natural resources officer a power to enforce the *Criminal Code* where he or she comes across criminal offences in the course of his or her work. However, this does not necessarily mean that this officer should be engaged in criminal investigations.

[22]Because of the extraordinary dangers associated with restricted and prohibited weapons, we believe that information indicating whether the appointee has or does not have authority to carry them on duty should be contained in every appointing document.

RECOMMENDATION 10

An appointing document should specify:

- ***the laws the appointee is entitled to enforce;***
- ***the powers available to him or her in enforcing these laws;***
- ***any limitations on the use of these powers, including the circumstances in which these powers may be exercised;***
- ***the geographical area in which this authority is effective; and***
- ***whether the appointee is permitted to carry a restricted or prohibited weapon in the performance of his or her duties and, if so, the specific weapon or weapons permitted.***

RECOMMENDATION 11

An appointment should set out the purpose or function for which the appointment is being made; the use of titles as substitutes for this description should be avoided.

E. LEGISLATION

We recommended in Chapter 2 that legislation should clarify that the office of special constable can be used to confer a law enforcement jurisdiction on appointees. Since special constables will carry out a variety of functions and since we have recommended that each special constable be granted only the powers necessary to perform adequately the particular function, it will not be possible to set out in legislation a jurisdiction which can be applied uniformly to every special constable. Legislation can only provide a mechanism for tailoring a law enforcement jurisdiction to the function of each special constable. There are two ways in which this might be done.

The first option is to grant all special constables a broad jurisdiction (perhaps the authority to enforce all laws applicable in Manitoba) but to allow the Minister of Justice and Attorney General to limit this jurisdiction when making an appointment. This approach was taken by *The Public Officers Act* of 1880 which provided that special constables would enjoy the jurisdiction of constables at common law "unless the contrary shall appear in the instrument of . . . their appointment."[23] It is also used in British Columbia's legislation.[24] Such an approach would require the Minister to subtract from a broad law enforcement jurisdiction those powers which are not necessary for a specific appointee; the appointee would be allowed to exercise all law enforcement powers not specifically denied him or her in the appointing document.

The second option is to allow the Minister to confer on special constables a wide range of powers (up to and including the authority to enforce all laws applicable in Manitoba) but to provide that appointees will enjoy only those powers conferred on them by the appointing document. This is the approach which appears to have been adopted by Alberta's *Police Act*.[25] This option would require the Minister to set out in the appointing document the specific powers available to the appointee. A special constable would be able to exercise only those powers listed in this document.

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[23]*The Public Officers Act*, C.S.M. 1880, c. 7, s. 11.

[24]*Police Act*, S.B.C. 1988, c. 53, s. 10(1).

[25]*Police Act*, S.A. 1988, c. P-12.01, s. 42(2)(b).

We prefer the second approach for two reasons. First, it seems likely that granting a broad jurisdiction in legislation and then restricting it in an appointing document will prove confusing. In our view, it would be more straightforward simply to set out the powers of a special constable in the appointing document.[26]

Second, we believe that the second approach is more likely to result in a careful consideration of the issues we have discussed in this Chapter. In particular, because it would allow an appointee to exercise only those powers specifically granted in the appointing document, the second approach will encourage the Minister to consider which powers are needed by the appointee to perform the function for which the appointment is sought.

RECOMMENDATION 12

Legislation should allow an appointing authority to grant special constables a broad jurisdiction, but should ensure that special constables enjoy only the authority which is granted to them in the instrument of their appointment.

[26]Our discussions with Barbara Murphy of British Columbia's Police Services Division suggest that some special provincial constables have not taken seriously the limitations of their appointing documents, assuming broader police powers than are contemplated by the appointing authority: telephone interview with Barbara Murphy, Policy Analyst/Program Manager, Police Services, Ministry of the Attorney General, British Columbia (March 25, 1996). No such difficulties were reported by Judy Mackay, Acting Director, Policing Services, Province of Alberta.

CHAPTER 5

SELECTION OF SPECIAL CONSTABLES

A. INTRODUCTION

The carefully constructed appointment of a special constable, while necessary, is in itself insufficient to ensure that the function for which the appointment is being made will be performed effectively and appropriately. Defining the purpose of an appointment and the authority being conferred will serve little purpose if the individual appointed is incapable of exercising the jurisdiction properly. This Chapter will present recommendations which will assist the Minister of Justice and Attorney General in selecting suitable individuals to serve as special constables.

Because of the variety of purposes and functions for which special constable appointments will be made, it is not possible to set out in detail in this Report the standards which will be required of every appointee. To a great extent, these standards must be tailored by the Minister to fit the function for which an appointment is considered necessary. Nevertheless, we believe that basic standards can be developed which would apply to all special constables. In addition, we are prepared to make recommendations concerning the process by which specific standards for particular appointments are developed.

B. BASIC STANDARDS

British Columbia and Alberta, provinces which have recently developed systematic approaches to the appointment of special constables, have both established standards which are required of all special constable appointees. They present an interesting and useful contrast in their approaches. While Alberta has attempted to define in specific, explicit and objective terms the standards all special constables must meet, British Columbia has opted for a more subjective approach, granting the Attorney General (the appointing authority in that province) greater flexibility in selecting candidates for the office.

In British Columbia, all special constables are expected to be of "good character" and to possess "maturity" and an "exemplary background".[1] No effort has been made in British Columbia's policies to define these rather vague requirements; the Minister is therefore able to interpret and apply them as he or she sees fit. By contrast, although Alberta also requires that a special constable possess "good character",[2] it has attempted to develop objective tests to assess an applicant's maturity and background. Alberta demands that applicants be at least 18 years of age[3] and will not appoint anyone who has committed an indictable offence and who is not

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[1]British Columbia, Ministry of Attorney General, Police Services Division, Special Provincial Constable Program, *Governing Principles & Policies* (approved July 15, 1996) 6.

[2]*Special Constable Regulation*, Alta. Reg. 357/90, s. 2(b)(iv)(A).

[3]*Special Constable Regulation*, Alta. Reg. 357/90, s. 2(c)(ii).

eligible for a pardon in respect of that offence.[4] Alberta also requires that candidates be Canadian citizens or lawfully admitted to Canada for permanent residence.[5]

Of these two approaches, we prefer Alberta's. We believe that the explicit nature of the standards demanded of all prospective appointees in that province is fairer to applicants for the office; knowledge of the standards will allow them to determine whether an application for an appointment is worthwhile. In addition, objective standards lend themselves to an impartial and consistent application; subjective standards can easily lead to an arbitrary and unfair selection process.

We are also of the view that the standards established by Alberta for all special constables are appropriate; in our view, these qualifications will be necessary for all special constables, regardless of their particular functions. Therefore, we would require that all special constables should be at least 18 years of age and should be free of a conviction for an indictable offence or, if they have been found guilty of an indictable offence, they should be eligible for a pardon in respect of that offence. In addition, we view as sensible Alberta's requirement that, as a rule, candidates should be Canadian citizens or lawfully admitted to Canada for permanent residence. Although exceptions to this rule should be possible, we believe that it is reasonable in most cases to require that those who will enforce Canadian law should have demonstrated a commitment to Canada by way of citizenship or permanent residence.[6]

RECOMMENDATION 13

Special constables should be at least 18 years of age.

RECOMMENDATION 14

Individuals who have been convicted of an indictable offence should not be appointed special constables unless they are eligible for a pardon in respect of that offence.

RECOMMENDATION 15

In general, individuals should not be appointed as special constables unless they are Canadian citizens or lawfully admitted to Canada for permanent residence.

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[4]*Special Constable Regulation*, Alta. Reg. 357/90, s. 2(c)(iii). The *Criminal Records Act*, R.S.C. 1985, c. C-47, s. 4 as am. by R.S.C. 1985, c. 1 (4th Supp.), s. 45(F) as am. by S.C. 1992, c. 22, s. 4, provides that an offender may apply for a pardon five years after completing his or her sentence in the case of an indictable offence and three years in the case of a summary conviction offence.

[5]*Police Act*, S.A. 1988, c. P-12.01, s. 34(1). Alberta's legislation allows the Minister to make exceptions to this requirement where he or she believes that "the exemption will assist in improving the enforcement of law in Alberta": *Police Act*, S.A. 1988, c. P-12.01, s. 34(2), as am. by the *Government Organization Act*, S.A. 1994, c. G-8.5, s. 54(4).

[6]We are aware that the requirement that an appointee be a Canadian citizen or permanent resident may come under judicial scrutiny as a potential violation of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), (1982), c. 11. In *Andrews* v. *Law Society of British Columbia* (1989), 56 D.L.R. (4th) 1, the Supreme Court of Canada considered the admission requirement of Canadian citizenship established by the Law Society of British Columbia and concluded that it was in fact a *Charter* violation. We believe that the requirement we propose differs from that considered by the Court in *Andrews*. First, unlike the admission requirement in that case, we would not exclude from consideration for appointment individuals who are lawfully admitted to Canada for permanent residence. Second, we would allow exceptions to be made to this requirement in appropriate circumstances. Finally, as the British Columbia Court of Appeal noted in that case (a point with which at least one member of the Supreme Court agreed), a distinction can be drawn between lawyers and those, like civil servants and the police, who clearly perform a state or government function: *Re Andrews* v. *Law Society of British Columbia* (1986), 27 D.L.R. (4th) 600 at 614, per McLachlin J.A. and *Andrews* v. *Law Society of British Columbia* (1989), 56 D.L.R. (4th) 1 at 44, per La Forest J. *Re Austin and Ministry of Municipal Affairs, Recreation & Culture* (1990), 66 D.L.R. (4th) 33 and *Lavoie* v. *Canada* (1995), 125 D.L.R. (4th) 80, were cases involving permanent residents of Canada whose denial of government positions was held to be a violation of the *Charter*. However, as noted, our proposal would not deny an appointment to anyone who has been lawfully admitted to Canada for permanent residence.

C. SPECIFIC STANDARDS

The basic qualifications which we have recommended should be required of all special constables will not in themselves be sufficient to ensure the proper performance of the specific functions for which special constable appointments are made. In order to perform effectively and appropriately the function for which they have been appointed, special constables will require additional skills, knowledge and qualities of character.

Because of the diversity of functions for which special constable appointments will be made, standards which are applied to various appointments will have to be specifically designed. In designing these standards, we believe that two principles should be applied.

First, no appointment should be made unless the prospective appointee possesses the qualities or attributes needed to perform effectively and appropriately the function for which an appointment is considered to be necessary. Unless special constables have all these qualities, they will not be able to carry out in a proper manner the functions they have been assigned.

Among other things, this principle means that appointments should not be made on the strength of a promise that the prospective appointee will subsequently acquire the attributes necessary to perform the function in question. If an individual requires education or training to perform a function properly, it should take place before an appointment is made, not after. The Minister should be satisfied before an appointment is made that an applicant possesses all of the attributes needed to perform the relevant function effectively and appropriately.

Second, although an applicant should be fully qualified before being appointed, it serves no purpose to demand of applicants qualifications which have nothing to do with the proper performance of their assigned law enforcement function. Excessive standards will prevent the appointment of individuals who are capable of performing a function effectively and appropriately. In some cases, extraneous requirements may mean that an appointment will not be made even when it is necessary for adequate law enforcement and when a competent individual is available.

RECOMMENDATION 16

No person should be appointed to the office of special constable unless and until he or she is capable of performing effectively and appropriately the law enforcement function for which an appointment is sought.

RECOMMENDATION 17

The standards applied to prospective special constables should correspond to the qualities needed to perform effectively and appropriately the function for which the appointment is being made. Qualifications which are not required for the proper performance of this function should not be demanded of a prospective appointee.

With these principles in mind, we turn to a consideration of the two categories of attributes which are necessary for the effective and appropriate performance of functions for which appointments are made: qualities of character and particular skills and knowledge.

1. Qualities of Character

We cannot imagine a function which requires a special constable appointment which does not also demand that an appointee possess qualities of character such as common sense, self-discipline, honesty, maturity and good judgment. Although we have recommended that an attempt be made to "objectify" these qualities by demanding that all special constables be at least 18 years of age and either have no prior convictions for an indictable offence or be eligible for a pardon in respect of such an offence, these basic requirements are, in themselves, insufficient to ensure that an individual possesses the qualities of character needed to perform a particular function properly. Additional qualifications are required which will depend on the particular purpose or function for which an appointment is being made.

As noted, both British Columbia and Alberta have established the requirement of "good character" for special constable appointments. Undoubtedly, this term is intended to serve as a kind of shorthand to refer to the personal characteristics relevant to the function in question. However, although we have no doubts as to the good intentions of appointing authorities in British Columbia and Alberta, we are uncomfortable with the use of "good character" as a criterion for appointment. In our view, this term could easily be used improperly to eliminate from consideration those who, though capable of performing properly the function in question, are in some way disliked by the appointing authority. In keeping with the principle that no extraneous requirements should be demanded of appointees, we prefer to speak expressly of the qualities of character which are necessary for the proper performance of the function for which an appointment is sought.

2. Skill and Knowledge

In addition to particular qualities of character, special constables will almost invariably require specific skills and knowledge in order to perform their assigned tasks. Alberta has addressed these requirements by insisting on training;[7] British Columbia refers to both training and experience.[8] With respect, we suggest that both of these approaches are flawed. Although they may be means by which knowledge and skill are acquired, neither training nor experience can ensure that the applicant possesses the necessary skills and knowledge for a particular function. Therefore, rather than focusing on the training and experience possessed by a prospective appointee, we believe that standards should address a prospective appointee's actual skills and knowledge.

This is not to suggest that training will not be required by many, and perhaps most, candidates in order to acquire the skills and knowledge necessary for the function in question. In fact, we expect that most applicants will not be able to perform properly the function for which an appointment is being made until they have completed some form of training. In addition, in order to maintain their skills and knowledge at a high level, most appointees will require routine

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[7]Alberta requires that all special constables who are given the power to enforce the *Criminal Code* must complete police officer recruit training at a recognized police training facility; those who are assigned to enforce only selected provisions of the *Criminal Code* must complete police officer training in the relevant areas of the law: Alberta Justice, Public Security Division, *Special Constable Program Policy Manual* (Rev. 01/96) 41. Completion of police officer training is also required of applicants who are seeking the authority to carry a restricted weapon and they must, in addition, have met police standards within the previous year in the use of the weapon they wish to carry (at 20-21). Special constables who wish to use a prohibited weapon (such as an incapacitating spray) in the course of their duties must complete a recognized training course in the use of that weapon and must complete a refresher course every five years (at 23). Those who wish to carry a rifle or shotgun must complete training in the use and care of that firearm from an accredited instructor (at 24).

[8]*Governing Principles & Policies* (B.C.), *supra* n. 1, at 6.

"refresher" courses.[9] Moreover, as we will discuss in the following section, training programs can often be used by an appointing authority as a means by which applicants are assessed. However, in our view, the distinction between the qualities needed to perform a function and the means by which these qualities are acquired or assessed is an important one. Therefore, we believe that the Minister should not make an appointment simply on the basis of an applicant's experience or his or her completion of a training program; the appointment should be made on the basis of the prospective appointee's actual possession of the skills and knowledge which are necessary to perform the relevant function effectively and appropriately.

RECOMMENDATION 18

In order to receive an appointment to the office of special constable, an individual should be required to demonstrate possession of:

- ***the qualities of character needed for the proper performance of the function for which the appointment is being considered; and***
- ***the particular knowledge and skills required to perform the function effectively and appropriately.***

D. ASSESSMENT TECHNIQUES

A variety of devices may be used to judge whether a candidate meets the standards set for the function he or she wishes to perform. British Columbia's policies refer to "criminal record and reliability checks."[10] Alberta's background checks are more institutionalized and include detailed criminal and police record searches.[11]

Criminal records and similar checks are important, not only to determine that a candidate meets basic standards concerning convictions for indictable offences, but also to determine whether he or she possesses the character traits needed for the function in question. Even if an applicant has no convictions for indictable offences (or is eligible for a pardon in respect of any convictions), his or her record may raise serious questions about his or her ability to carry out the function for which the appointment is being considered.

We also advocate the thorough examination of an applicant's employment history. The presence or absence of the qualities of character necessary for a particular function is likely to be revealed by an employment pattern and by assessments offered by previous employers.

Of course, an examination of an applicant's history should not preclude the use of other techniques in assessing the character of a prospective appointee. For example, an interview with the candidate and discussions with referees may provide further information concerning the applicant's character.

A variety of techniques may also be used to assess the level of knowledge and skill possessed by an applicant. Written examinations and practical testing (including observation) will often be appropriate. Although the Minister may wish to conduct his or her own program of

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[9]Alberta currently requires that those special constables who require the authority to use firearms must complete refresher courses every year with respect to handguns and every five years with respect to prohibited weapons such as pepper spray: *Special Constable Program Policy Manual* (Alta.), *supra* n. 7, at 21 and 23. The same principle could be applied to all knowledge and skill required in order to perform properly the function for which a special constable appointment has been made.

[10]*Governing Principles & Policies* (B.C.), *supra* n. 1, at 6.

[11]Telephone conversation with Judy Mackay, Acting Director, Policing Services, Public Security Divison, Alberta Justice (October 16, 1996).

evaluation, testing may also form part of a training program in which a prospective appointee may have participated or is willing to participate. In this case, the Minister may find it more efficient to delegate to the training program responsibility for evaluating the prospective appointee's skills and knowledge.

There are, of course, dangers in this sort of delegation. The standards imposed by a training program may be insufficient to ensure that the applicant possesses all the abilities needed to perform properly the function for which he or she is seeking an appointment. In this case, additional evaluations may have to be conducted to ensure that the prospective appointee is, in fact, capable of carrying out his or her function properly. On the other hand, the standards set by the training program may be excessive, requiring skills and knowledge which are irrelevant to the function in question or demanding an excessive level of proficiency in necessary skills and knowledge.[12] These dangers can be avoided so long as the Minister is aware that no single training program will be suitable for all the functions for which appointments are made. Before delegating the assessment function, the Minister should be satisfied that the tests used are appropriate for the function for which the appointment is being considered.

RECOMMENDATION 19

The Minister should use appropriate evaluation techniques to ensure that a prospective appointee has the qualities of character and the skills and knowledge needed for the function for which an appointment is being considered.

RECOMMENDATION 20

All prospective appointees should be subject to a criminal record and police record search. In addition, the employment history of every candidate should be examined.

RECOMMENDATION 21

Responsibility for assessing a prospective appointee's skills and knowledge may be delegated to a training program where it has been determined that the standards used by the training program correspond to the qualities needed to perform properly the function for which the appointment is being considered.

A thorough consideration of a prospective appointee's qualifications cannot take place without his or her cooperation; the sort of background checks we have recommended require both that the prospective appointee provide accurate information and that he or she agree to the collection of information from other sources. We believe that prospective appointees should be obliged to cooperate fully in providing all information needed in order for the Minister to make an informed decision concerning the applicant's suitability for the appointment. A refusal to cooperate should give the Minister grounds to refuse to make the appointment.

Because of the importance we attach to the selection process, we also believe that the wilful provision of false information in the application process should be dealt with severely. The character of an applicant who deliberately provides false information in order to secure an appointment must be called into question, resulting in denial or revocation of the appointment. Although an individual whose application has been denied or whose appointment has been cancelled should be permitted to reapply for appointment, he or she should have to provide good

[12]The principle that a training program should be tailored to meet the particular skills and knowledge required for a specific function is manifested in Alberta's requirement that candidates who will be empowered to enforce only portions of the *Criminal Code* need only be trained in the specific areas they will enforce: *Special Constable Program Police Manual* (Alta.), *supra* n. 7, at 41.

reasons for the appointment to be made despite his or her dishonesty. In addition, to deter others from making false statements in support of a prospective appointee, we believe that it should be a provincial offence for anyone wilfully to provide false information concerning a candidate during the appointment process.

RECOMMENDATION 22

Prospective appointees should be required to provide any information required by the Minister in order to make an informed decision concerning their suitability for appointment.

RECOMMENDATION 23

The discovery that a prospective appointee or a special constable has provided false information when applying for an appointment process should result in a denial of his or her application or the cancellation of his or her appointment.

RECOMMENDATION 24

A provincial offence punishable by way of summary conviction should be created which prohibits the wilful provision of false information concerning a prospective appointee for the office of special constable.

CHAPTER 6

SUPERVISION AND DISCIPLINE

A. INTRODUCTION

It would be naïve and dangerous to assume that, once appointed, special constables will always appropriately use the authority conferred on them. Even qualified appointees exercising a carefully drafted jurisdiction will sometimes make errors in judgment and the possibility always exists that exceptional powers will be deliberately misused. It must be remembered that, whether accidental or deliberate, the improper use of the authority granted to a special constable can have devastating consequences for individuals and society at large.

In order to ensure that special constables perform effectively and prudently the functions for which they are appointed, we believe that they must be appropriately directed and supervised in the exercise of the authority conferred on them. More specifically, we believe that the improper use of their powers must be deterred by a system of discipline which includes the threat that their appointments may be withdrawn.

RECOMMENDATION 25

No special constable should be appointed unless arrangements have been made for his or her supervision and discipline in the exercise of the jurisdiction conferred by the special constable appointment.

Besides the power to make an appointment, an appointing authority also enjoys the power to suspend or withdraw it.[1] In other words, an appointing authority is empowered to take action to deal with inappropriate conduct on the part of a special constable and, by implication, has the responsibility to do so. The most straightforward approach to the supervision and discipline of special constables, therefore, would be to require the Minister of Justice and Attorney General to provide it. However, this approach faces practical difficulties; the cost of supervising special constables scattered throughout the province and performing a variety of functions would be enormous. We are advised that the expense of such an undertaking in fact precludes any current effort on the part of Law Enforcement Services to provide active supervision of special constables.[2]

The fact that active supervision of special constables is not provided by the authority which has appointed them does not mean that special constables are without supervision, however. All special constables in the province are currently employed by some entity to provide the function for which they are appointed. Like all employers, the organizations which employ special constables provide day-to-day supervision and direction for their employees. Like all employees, special constables are subject to disciplinary action on the part of their

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[1] *The Interpretation Act*, C.C.S.M. c. I80, s. 18(1)(a).

[2] Meeting with Gerry Ferguson and George Wright, Law Enforcement Services, Department of Justice, Province of Manitoba (May 14, 1996).

employers; they may even be dismissed from their employment as a consequence of improper behaviour.

Because special constable appointments are currently conditioned upon the continued employment of the special constable by a specified employer, the dismissal of a special constable will result in the automatic cancellation of his or her appointment. This means that employers have effective control over the status of individual appointees as holders of a public office. For practical purposes, employers of special constables have been delegated the responsibility for supervising appointees in the exercise of their public powers.[3]

It is worth noting that British Columbia and Alberta have also recognized the practical difficulties of requiring their Departments of Justice to provide supervision of special constables. As a consequence, both have adopted formally the same solution which has been implemented in Manitoba on an informal basis; in most cases, responsibility for supervising special constables has been delegated to their employers.

We have no difficulty in endorsing the practice of relying on employers to provide day-to-day supervision and discipline for special constables. It is certainly more cost-effective to adopt this approach than to require the Department of Justice to undertake this responsibility in all cases. Moreover, we suspect that, even if a corps of inspectors were hired to supervise and discipline special constables, employers would often still be better positioned to observe and react to a special constable's inappropriate behaviour.

Accordingly, we propose that the practice of delegating to employers responsibility for supervising special constables should be maintained. Indeed, we are prepared to extend this practice to situations where, rather than being employed for the purpose of carrying out a function for which a special constable appointment is required, an individual is prepared to perform this function as a volunteer. We suggest that, in this situation, the Minister should be able to delegate the responsibility for supervision to an organization which, although not the individual's employer, is qualified and willing to provide supervision of the special constable.[4]

In order to ensure that a special constable only operates under supervision, we propose that the current practice of making appointments conditional upon the individual's continued appointment by an authorized employer should be maintained. When the appointee is serving as a volunteer, the appointment should specify that it is effective only so long as the supervising organization is prepared to offer supervision and discipline.

RECOMMENDATION 26

In appropriate circumstances, the Minister should be allowed to delegate responsibility for supervising a special constable to the special constable's employer or some other suitable organization.

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[3]It should be noted that Law Enforcement Services still retains, and is sometimes forced to exercise, a power to suspend or revoke a special constable appointment regardless of the actions of the special constable's employer: discussion with George Wright, Law Enforcement Services, Department of Justice, Province of Manitoba (October 28, 1996).

[4]An example of this sort of situation is common in Ontario, where more than 1000 volunteers serve as auxiliary police officers with municipal police forces and 750 with the Ontario Provincial Police: Ontario, Civilian Commission on Police Services, *Report to the Solicitor General and Minister of Correctional Services* (1995) 17 and 23; telephone conversation with Cathy Boxer-Byrd, Executive Assistant to the Chair, Ontario Civilian Commission on Police Services (July 9, 1996). These individuals, though not employed by a police force, operate under its direction and supervision. Citizens may also volunteer to assist the R.C.M.P. in Alberta under the R.C.M.P. Auxiliary Police Program and may receive special constable appointments for this purpose: Alberta Justice, Public Security Division, *Special Constable Program Policy Manual* (Rev. 01/96) 26. Similar considerations apply in Alberta when a volunteer requires a special constable appointment to provide a service for a municipal police service or an authorized community special constable service (at 27).

RECOMMENDATION 27

When supervisory responsibilities are delegated to an employer, the appointment of a special constable should be conditional upon his or her continued employment with that employer. When some other organization is delegated supervisory responsibilities, the appointment should be effective only so long as that organization is prepared to offer supervision.

Although we believe that the practice of relying on employers to provide supervision should continue and would expand that practice to other organizations when appointees serve as volunteers, we have concerns about the informal manner in which responsibility for supervising and disciplining special constables is currently delegated. Because no formal arrangement is made with employers or other supervisory organizations,[5] the possibility exists that an appointment will be made when the organization is unprepared to carry out this responsibility in an appropriate manner. In some cases, supervisory organizations may even be unaware that the obligation to supervise special constables in the exercise of their public powers has been delegated to them.

We are also concerned about the absence of a systematic effort after an appointment has been made to ensure that supervisors are taking their responsibilities seriously. A failure on the part of a supervising organization to direct special constables appropriately and to deal promptly with the improper exercise of a special constable's powers is likely to result in the abuse of these powers.

As noted, Alberta and British Columbia also delegate responsibility for supervision and discipline to employers. However, their approaches are much more deliberate and explicit than Manitoba's and, we believe, represent an improvement over the current informal system used here.

B. ABILITY TO SUPERVISE AND DISCIPLINE

Not every organization which offers to provide supervision and discipline for a prospective special constable will have the ability to do so properly. British Columbia and Alberta require that, in order to receive permission to supervise special constables, an organization must furnish evidence that structures and procedures are in place to carry out this responsibility. In British Columbia, prospective supervisors must "establish and maintain acceptable procedures for receiving and investigating complaints".[6] In some cases, they may be required to enter into an agreement with the Police Commission "or such other public complaints body as may be determined by the Minister, to give effect to the role of that body with respect to public complaints relating to the conduct of [special constables]. . . ."[7]

Alberta's delegation of supervisory responsibility to a supervising organization is even more formal and structured than British Columbia's. An organization is not permitted to supervise a special constable in the function for which the appointment was made unless it receives formal authorization from the Minister of Justice and Attorney General to do so. Prior to receiving authorization, a prospective supervisor must submit four documents:

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[5]For the purposes of this Report, we will use the term "supervisory organization" to refer to authorized employers of special constables as well as organizations which are authorized to supervise special constables who are acting as volunteers.

[6]British Columbia, Ministry of Attorney General, Police Services Division, Special Provincial Constable Program, *Governing Principles & Policies* (approved July 15, 1996) 5.

[7]*Id.*

- written policies with respect to the duties, authority and responsibility of the prospective special constable,
- a written description of the standard of conduct which the special constable is to meet;
- disciplinary procedures to be followed if the standards of conduct are not met; and
- procedures for dealing with complaints.[8]

The contents of these documents must be approved by the Minister before an appointment will be made.

Although we see British Columbia's approach as an improvement over current practice in Manitoba, we believe that Alberta's more structured style is even better. In particular, we believe that the documents demanded of a prospective supervising organization in Alberta should be adopted for use in Manitoba. We believe that the preparation of these documents will be beneficial for the supervisor, the special constable and the Minister.

The first of these documents defines the function to be performed by a prospective special constable. As such, it will be invaluable to the Minister in assessing the necessity of the function and the authority which will be required in order to carry it out. In addition, this document will advise the appointee as to the nature and scope of his or her role. It will help prevent the special constable from exceeding the scope of his or her authority.

The second document required in Alberta sets out the standards of conduct which will be demanded of an appointee in performing his or her function. This will allow the Minister to determine prior to making the appointment whether the rules and policies established by the supervisory organization are sufficient to ensure the effective and appropriate performance of the function in question. After an appointment has been made, a special constable can use this document to measure his or her performance. Furthermore, because it will serve as the basis for discipline, the appointee will be protected from arbitrary disciplinary measures on the part of his or her supervisor.

The final two documents allow supervising organizations to tailor disciplinary procedures to their own needs while still ensuring that every special constable is subject to discipline which is adequate to protect the public interest. Although the public interest demands a disciplinary system which deters improper behaviour on the part of special constables, it is also important that a special constable be treated fairly. Alberta's sample disciplinary procedure (which is provided to prospective supervising organizations) emphasizes the need to allow an accused special constable to make full answer to all allegations and stresses that a decision must be based on evidence flowing from personal knowledge rather than hearsay.[9] While it insists that supervising organizations investigate and respond to all complaints concerning special constables, Alberta's regulations also require the creation of a disciplinary process which can respond to concerns about a special constable's conduct whether or not a complaint has been made.[10]

However, although we endorse Alberta's documentary requirements, we think that they are incomplete. Nothing required by the appointing authority in Alberta addresses the measures which will be taken by a supervisor in providing supervision of a special constable. We agree

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[8]*Special Constable Regulation*, Alta. Reg. 357/90, s. 3(2)(b).

[9]A copy of the sample disciplinary procedure Alberta provides to employers is appended to this Report as Appendix A.

[10]Regulations state that employers must investigate and dispose of complaints using the procedure set out in the employer's authorization. Where concerns about a special constable's conduct arise other than by a complaint, they are to be investigated and disposed of as if they had been reported in a complaint: *Special Constable Regulation*, Alta. Reg. 357/90, s. 9(2).

with Alberta that it is not sufficient to rely on complaints from the public or other sources in identifying improper behaviour on the part of a special constable; active supervision is required which may itself give rise to disciplinary action. Therefore, we suggest that a potential supervising organization should be required to satisfy the Minister that active measures will be taken to supervise a special constable's use of power.

One of the mechanisms which the Minister may wish to require of a supervising organization is a system of periodic evaluations. An evaluation is particularly important when supervision is not provided on a day-to-day basis. However, even when daily supervision is provided, periodic evaluations can be used to assess patterns in a special constable's conduct which, if left unaddressed, may prove problematic in the future. In addition, a formal evaluation process will give a special constable information which can be used to improve his or her performance.

Because the disciplinary process could result in the loss of a special constable's status as a public officer, we agree with Alberta that it should contain appropriate protections for appointees. For example, discipline should not be imposed on the basis of rumours or gossip but on the strength of credible evidence; an appointee should also be allowed to respond fully to allegations made about him or her. In short, the principles of natural justice should apply to the disciplinary process.

British Columbia's policies suggest that supervisors may be required to make arrangements with the Police Commission or some other public disciplinary body for the handling of complaints and disciplinary matters concerning the special constables they supervise. We see this as a sensible approach, especially for supervising organizations which are responsible for relatively few special constables. It may be that the Commissioner appointed pursuant to *The Law Enforcement Review Act* would be in a position to act in this capacity in Manitoba.[11]

Objections may be raised to the amount of "paperwork" which our recommendations will generate. We believe these objections to be unwarranted. The responsibility to supervise public officials in the exercise of their duties should not be taken lightly. We have recommended that they should be delegated to a supervising organization only when the Minister is satisfied that structures are in place which will ensure that this responsibility will be carried out in an appropriate manner. In our view, the Minister will not be in a position to make this determination until the information contained in these documents has been provided. Moreover, we believe that the burden of developing appropriate policies and procedures can be significantly alleviated if Alberta's practice of providing sample documents for use by prospective supervisors is adopted in Manitoba.

RECOMMENDATION 28

Before being authorized to supervise a special constable, a prospective supervising organization should be required to submit to the Minister and receive approval of:

- ***written policies concerning the duties and responsibilities in which the special constable will be engaged;***
- ***a code of conduct which will serve as the basis for the discipline of the special constable;***

[11] *The Law Enforcement Review Act*, C.C.S.M. c. L75, requires the appointment of a Commissioner to deal with complaints concerning members of police forces. If our suggestion were to be implemented, amendments to this legislation might be required.

- ***procedures for supervising and evaluating the special constable's exercise of his or her law enforcement jurisdiction;***
- ***procedures for receiving and dealing with complaints from members of the public and others concerning the special constable's exercise of his or her authority;***
- ***a disciplinary procedure with respect to all concerns or questions about the special constable's exercise of his or her authority, whether these concerns arise as a result of complaints or from the supervising organization's own supervision of the special constable.***

RECOMMENDATION 29

Disciplinary proceedings should comply with the principles of natural justice.

RECOMMENDATION 30

Consideration should be given to the use of the Commissioner appointed pursuant to The Law Enforcement Review Act for complaint and disciplinary matters involving special constables.

C. ON-GOING SUPERVISION

The preparation of well-considered policies and procedures for the supervision and discipline of special constables will not, in itself, ensure that diligent supervision takes place. Official policies and procedures can be ignored or subverted. Having been delegated the responsibility to supervise and discipline special constables on behalf of the Minister of Justice and Attorney General, supervising organizations must be held accountable for the exercise of this responsibility.

Alberta and British Columbia recognize the need to hold supervisors of special constables accountable for the proper exercise of their supervisory responsibilities and have established mechanisms to do so. Alberta begins by requiring the Minister to specify in a supervising organization's official authorization the policies and procedures which it has developed as part of its application and which it has committed to implement.[12] Specifying these details in an authorization establishes a set of standards which must be met by a supervisor. If a supervising organization knowingly allows a special constable to exceed his or her authority, act outside of his or her geographical jurisdiction or breach the standard of conduct to which he or she is subject, the supervisor's authorization can be suspended or withdrawn. Indeed, any failure on the part of a supervising organization to comply with the terms of the authorization can give rise to a withdrawal of the authorization.[13] A withdrawal of the authorization to supervise special constables will result in the cancellation of the appointments of those special constables for whom that supervisor has been given responsibility.[14] In addition, when the Minister concludes that a special constable has used excessive force in the performance of his or her duties or that a supervising organization has failed adequately to deal with a complaint, he or she may direct the supervisor to take specific action to rectify the situation.[15]

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[12]*Special Constable Regulation*, Alta. Reg. 357/90, s. 3(3).

[13]*Special Constable Regulation*, Alta. Reg. 357/90, s. 6.

[14]*Special Constable Regulation*, Alta. Reg. 357/90, s. 7, merely permits the cancellation of a special constable's appointment in these circumstances. However, Alberta's *Special Constable Program Policy Manual* states that the appointment will be suspended or cancelled if the authorization of the special constable's employer has been suspended or cancelled: *Special Constable Program Policy Manual* (Alta.), *supra* n. 4, at 25.

[15]*Special Constable Regulation*, Alta. Reg. 357/90, s. 9(3).

Alberta uses two methods to determine whether a supervising organization is complying with the terms of the Act, regulations and the supervisor's authorization. First, supervisors are required to prepare and submit reports to the Minister of Justice and Attorney General. All incidents in which a special constable uses force that results in an injury or in which, while on duty, he or she discharges a firearm must be reported.[16] In addition, supervisors must maintain and submit additional reports as requested by the Minister.[17]

Besides receiving reports from supervising organizations, Alberta's appointing authority (Alberta Justice) may also inspect supervisors and conduct investigations into specific concerns. The Public Security Division, Alberta Justice, is authorized to conduct "audits" of supervising organizations to ensure that they are complying with the Act, regulations or the terms of their authorizations. These audits may include an examination of a supervising organization's records.[18] In addition, investigations may be conducted whenever there are concerns that a complaint has not been properly investigated or that a special constable has used excessive force in the course of his or her duties.[19]

Although not as formalized as those of its neighbour, British Columbia's policies with respect to monitoring special constable supervisors parallel Alberta's in many respects. For example, the jurisdiction conferred on an appointee is to be made clear in the appointing document and a supervising organization is to "ensure that [special constable] duties do not exceed the limited authority conferred. . . ."[20] Like Alberta, British Columbia also requires regular reporting on the part of special constable supervisors; a failure to comply with reporting requirements may result in the withdrawal of an appointment.[21] In particular, supervisors must report in a timely fashion any disciplinary action which may affect an appointee's eligibility to hold an appointment.[22]

In our view, Alberta and British Columbia have taken appropriate steps to monitor supervisors of special constables and we believe that Manitoba should build on their example. In particular, we agree that the specific supervisory and disciplinary measures to which a supervisor has committed itself should be set out in its authorization. Changes to these policies and procedures should not be undertaken unilaterally but should have to be first approved by the Minister.

We also believe that reporting requirements provide a useful means by which supervising organizations can be monitored. Alberta's requirement that supervisors provide immediate reports of incidents in which special constables discharge weapons or use force which causes injury seems sensible to us and should be considered for use in Manitoba. We also suggest that the Minister should be informed in a timely fashion of any development which may affect a special constable's eligibility to hold the office. For example, the Minister should be advised when a special constable leaves his or her employment or when his or her job description changes materially.

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[16]*Special Constable Regulation*, Alta. Reg. 357/90, s. 8(3). No report need be filed when a special constable discharges a weapon while on a firearms training exercise or in order to destroy a wild or domestic animal: *Special Constable Regulation*, Alta. Reg. 357/90, s. 8(3)(b).

[17]*Special Constable Regulation*, Alta. Reg. 357/90, s. 8(1).

[18]*Special Constable Program Policy Manual* (Alta.), *supra* n. 4, at 46.

[19]*Special Constable Regulation*, Alta. Reg. 357/90, s. 9(3).

[20]*Governing Principles & Policies* (B.C.), *supra* n. 6, at 4.

[21]*Governing Principles & Policies* (B.C.), *supra* n. 6, at 3.

[22]*Governing Principles & Policies* (B.C.), *supra* n. 6, at 4.

The Minister may also wish to receive regular reports on the part of a supervisor of special constables. Annual or bi-annual reports could provide information concerning the number of incidents in which a special constable's powers have been used,[23] the disposition of complaints and disciplinary hearings involving special constables as well as efforts on the part of the supervising organization or special constables to ensure that special constables' skills and knowledge remain up-to-date.

Reviewing reports provided by supervising organizations will help in monitoring the activities of both supervisors and special constables themselves. However, like Alberta, we believe that the power to investigate and review the actions of supervising organizations should also be made available to the Minister and the Department of Justice. In most cases, we expect that investigations will be initiated by a complaint about the conduct of a special constable or a supervising organization. Nevertheless, concerns which justify an investigation may arise as a result of information from other sources as well.

Besides the power to investigate specific concerns, we believe that the Minister should be authorized to engage in inspections (or "audits") of supervising organizations. Even if used only selectively, a ministerial power to carry out random or periodic inspections would provide a significant incentive for supervisors to comply with the terms of their authorizations.

RECOMMENDATION 31

An authorization to supervise a special constable should set out:

- ***the special constable's duties, authority and responsibilities;***
- ***the standard of conduct which the special constable is to meet;***
- ***procedures for supervising and evaluating the special constable's exercise of his or her jurisdiction;***
- ***disciplinary measures which are to be followed if there are concerns that the special constable is exceeding his or her jurisdiction or that the special constable is not meeting the relevant standard of conduct;***
- ***procedures for dealing with complaints.***

RECOMMENDATION 32

Any amendment to the authorization of a supervising organization should be approved by the Minister before being instituted.

RECOMMENDATION 33

Consideration should be given to requiring supervising organizations to report immediately to the Minister:

- ***any discharge of a weapon by a special constable in the course of his or her duties other than that which occurs during training;***
- ***any incident in the course of his or her duties in which the special constable uses force which results in injury; and***
- ***information of which the supervisor is aware regarding a special constable's eligibility to hold the office, including any material change to his or her employment.***

[23]Among other things, this information would assist the Minister in determining whether the continued appointment of a special constable is necessary.

RECOMMENDATION 34

Consideration should be given to requiring supervising organizations to provide regular reports to the Minister.

RECOMMENDATION 35

The Minister should be empowered, in his or her discretion, to conduct inspections of supervising organizations and to investigate concerns that adequate direction and supervision of special constables for whom they are responsible are not being provided.

D. CONSEQUENCES OF A FAILURE TO SUPERVISE ADEQUATELY

As noted, we believe that a supervisor of special constables must be accountable to the Minister for the use of its supervisory authority. A failure to supervise and direct a special constable properly should have consequences, including the suspension and permanent withdrawal of the supervisor's authorization to supervise special constables. We are of the view that an authorization should be immediately suspended if the supervising organization:

- knowingly permits or directs a special constable to exceed his or her jurisdiction;
- knowingly permits or directs a special constable to violate the standards of conduct to which he or she is subject;
- fails to investigate adequately complaints about a special constable's conduct;
- fails to comply with the disciplinary or other procedures and policies to which it has committed and which are contained in the Act, regulations or the supervising organization's authorization;
- fails to provide reports or other information as required or as requested by the Minister.

As in the case of special constables themselves, we see the deliberate provision of false information on the part of a supervising organization as a serious breach of the public trust. In our view, such an act cannot help but cast significant doubts on the suitability of an organization to act as the supervisor of special constables. We therefore recommend that wilfully providing false information in an application or in a report to the Minister should also give rise to an immediate suspension of the supervising organization's authorization.

Although a suspension of an authorization should take place whenever the Minister has concluded that any significant breach of the supervisor's obligations has taken place, a more formal process is required, in our view, before a decision is made to withdraw permanently a supervisor's authorization. Such a decision should not be made unless the supervising organization has had an opportunity to respond to the evidence of wrongdoing. However, once circumstances have justified the suspension of a supervisor's authorization, we believe that the onus should fall on the supervisor to demonstrate that a permanent withdrawal of its authorization is not appropriate and necessary to protect the public interest.

Because our scheme, like Alberta's, relies heavily on employers and other organizations to supervise special constables, we agree with that province that the suspension or withdrawal of an authorization to supervise special constables should result automatically in the suspension or withdrawal of the appointment of all special constables supervised by that organization.

RECOMMENDATION 36

An authorization to supervise special constables should be subject to suspension and withdrawal if the supervising organization:

- ***knowingly permits or directs a special constable to exceed his or her jurisdiction;***
- ***knowingly permits or directs a special constable to violate the standards of conduct to which he or she is subject;***
- ***fails to investigate adequately complaints about a special constable's conduct;***
- ***fails to comply with the disciplinary and other procedures and policies to which it has committed and which are contained in the Act, regulations or the supervising organization's authorization;***
- ***fails to provide annual or specific reports or other information as required or as requested by the Minister;***
- ***deliberately provides false information to the Minister.***

RECOMMENDATION 37

An authorization to supervise special constables should be suspended immediately if the Minister concludes that a supervising organization has significantly failed in its obligation appropriately to direct and supervise special constables for whom it is responsible.

RECOMMENDATION 38

A supervising organization whose authorization has been suspended should be obliged to demonstrate why its authorization should not be permanently withdrawn.

RECOMMENDATION 39

The suspension or withdrawal of an authorization to supervise special constables should automatically result in the suspension or withdrawal of the appointments of those special constables supervised by that organization.

E. RESIDUAL AUTHORITY

Even in cases where an organization has been delegated the responsibility to supervise a special constable, we believe that an ability to deal directly with the special constable should be retained by the Minister. The need to retain a power to suspend or withdraw a special constable's appointment, for example, seems to us to be self-evident. This power may be exercised at the request of the supervising organization but the Minister should also be able to suspend or withdraw an appointment even over the objections of a supervising organization without being required to suspend the organization's authorization, thereby affecting all of the special constables supervised by that organization.

We also propose that a direct line of communication between special constables and the Minister should be retained for some purposes. We suggest, for example, that special constables should be obliged to report directly to the Minister any circumstance which impinges on their eligibility to hold the office. In particular, special constables should be required to advise the Minister whenever they have been charged with a criminal offence.

Direct communication between special constables and the Minister need not only be negative, however. In some cases, action by the Minister will be needed to protect special constables from their employers. For example, special constables may be directed by their employers to exceed their jurisdiction or to breach established standards of conduct. These individuals are placed in a difficult situation; if they comply with these directives, they will violate the terms of their appointment but, if they refuse, they may be dismissed from their employment. Special constables should be permitted in such a situation to advise the Minister of their employer's actions so that the Minister can take appropriate steps to deal with the problem. Moreover, we propose that legislation should expressly allow a special constable, without fear of punishment by his or her employer, to refuse to obey directions on the part of an employer to act in ways which violate the terms of his or her appointment.[24]

In order to protect a special constable from being forced to engage in actions which exceed his or her authority, the Minister could withdraw an employer's authorization to supervise special constables. However, this response will not protect the special constable from being punished by an employer for reporting the employer's inappropriate directions. We suggest that it should be a provincial offence for an employer to punish by dismissal or in some other fashion an employee who reports the employer's improper behaviour.

RECOMMENDATION 40

The Minister should retain a power to suspend or withdraw the appointment of a special constable.

RECOMMENDATION 41

Special constables should be obliged to report to the Minister any circumstance which impinges on their eligibility to hold the office, including the existence of criminal charges filed against them.

RECOMMENDATION 42

Special constables should be permitted to refuse an employer's directions to act in ways which violate the terms of the special constable's appointment; a provincial offence should be created which prohibits an employer from punishing a special constable who refuses such directions.

RECOMMENDATION 43

A provincial offence should be created which prohibits an employer from punishing an employee who reports to the Minister improper directions given by his or her employer.

[24]A similar provision is contained in *The Workplace Safety and Health Act*, C.C.S.M. c. W210, s. 43(1), which grants workers the right to refuse to perform work which is dangerous to their safety or health.

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CHAPTER 7

MISCELLANEOUS

A. APPOINTMENT OF EMPLOYEES OF PRIVATE BUSINESSES

In Manitoba, approximately 71 employees of private businesses currently enjoy appointments as special constables for the purpose of carrying out their employment-related duties.[1] These individuals operate as loss prevention officers and security guards and are employed by retail outlets, malls and private security firms to maintain order and deal with property offences.

Two reasons have been advanced for the practice of making these appointments.[2] First, by conferring on appointees the status of peace officers within the scope of their jurisdiction, the appointment expands their powers of arrest beyond those of an ordinary citizen. Rather than being able to arrest only those individuals whom they find committing an offence, appointees are authorized to arrest anyone whom they have reasonable grounds to believe has committed an offence.[3] This greater latitude not only increases the situations in which arrests can be made but also reduces the vulnerability of appointees to civil liability if they mistakenly arrest someone who has not committed an offence. Although the law on this point is somewhat unclear, it may be that a private person is liable for false imprisonment if he or she cannot prove that an offence for which a "citizen's arrest" is permitted has taken place.[4] By contrast, peace officers will

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[1]We have categorized these as "private sector" employees in the list of current special constable appointments in Chapter 1.

[2]Meeting with Gerry Ferguson and George Wright, Law Enforcement Services, Department of Justice, Province of Manitoba (May 14, 1996).

[3]*Criminal Code*, R.S.C. 1985, c. C-46, ss. 494 and 495. Section 494 allows private citizens the power to arrest anyone found committing an indictable offence or an offence on or in relation to property the arresting person possesses. By contrast, s. 495 grants to peace officers the power to arrest on reasonable grounds in the case of indictable offences. Although the power of arrest is only available for an offence which is not indictable when the suspect is actually found committing it, many of the offences with which security guards will be concerned are indictable or "hybrid" offences. For example, theft under $5000 is a "hybrid" offence because it may be punished either by indictment or by summary conviction: *Criminal Code*, R.S.C. 1985, c. C-46, s. 334(b). Hybrid offences are considered to be indictable offences by virtue of *The Interpretation Act*, R.S.C. 1985, c. I-21, s. 34(1)(a). See also *R.* v. *Huff* (1979), 50 C.C.C. (2d) 324 at 328-329 (Alta. C.A.); *Re. Monkman and the Queen* (1975), 26 C.C.C.(2d) 73 (Man. C.A.).

[4]There are, in fact, at least two and perhaps three identifiable lines of case law on the question of a private citizen's liability for false imprisonment in the case of an arrest. Both draw on common law and the *Criminal Code*, R.S.C. 1985, c. C-46, specifically ss. 25(1) and 494.

The first line of cases holds that, in order to justify an imprisonment, a private citizen must prove on a balance of probabilities that an offence which permits a "citizen's arrest" has taken place and that reasonable and probable grounds existed for belief that the arrested person had committed it: *Walters* v. *W.H. Smith & Son, Ltd.*, [1914] 1 K.B. 595; *Williams* v. *Laing* (1923), 55 O.L.R. 26 (C.A.); *Kendall* v. *Gambles Can. Ltd.*, [1981] 4 W.W.R. 718 (Sask. Q.B.); *Sears Canada Inc.* v. *Smart* (1987), 36 D.L.R. (4th) 756 (Nfld. C.A.). In fact, at least one leading case suggests that the test for a private citizen who seeks to escape liability for an arrest is that he or she must prove both that a crime has been committed and that the arrested person committed it: *Hayward* v. *F.W. Woolworth Co. Ltd.* (1979), 98 D.L.R. (3d) 345 (Nfld. S.C.T.D.)

The second line of cases holds that the person making the arrest need not prove that the offence had been committed; it is sufficient that he or she can demonstrate that reasonable and probable grounds existed for belief both that the offence had been committed and that the arrested person had committed it: *Karogiannis* v. *Poulos* (1976), 72 D.L.R. (3d) 253 (B.C.S.C.); *Dendekker* v. *F.W. Woolworth Co. Ltd.*, [1975] 3 W.W.R. 429 (Alta. S.C.); *Lebrun* v. *High-Low Foods Ltd.* (1968), 69 D.L.R. (2d) 433 (B.C.S.C.). (This view appears to receive some support from the majority of the Supreme Court of Canada in *R.* v. *Biron* (1976), 59 D.L.R. (3d) 409, a case which considered the culpability of an individual who resisted an arrest by a peace officer for an offence which would have permitted an arrest only if the person being arrested had been found committing it.) This

escape liability by demonstrating merely that reasonable grounds existed for belief that the arrested person had committed an offence.

The second and perhaps more important reason for making these appointments is that status as peace officers allows appointees to release suspects more quickly after an arrest. Peace officers may release a suspect on an appearance notice or with the intention of compelling his or her appearance in court by way of a summons.[5] By contrast, an individual who does not enjoy the status of a peace officer may only release an arrested person to a peace officer.[6] This forces security personnel who have not been appointed special constables either to transport the suspect to the nearest police station or to wait until a police officer can attend to take custody of the suspect and then release him or her. We are advised that, because of the level of activity in which City of Winnipeg police officers are engaged, several hours might elapse before an officer could attend to deal with a suspect arrested for shoplifting or a similar offence, resulting in a significant inconvenience for the arrested person and a large expenditure of time on the part of the security guard.[7]

Despite these practical reasons for the policy which has been adopted in Manitoba, we have a deep-seated unease about the wisdom of appointing privately-employed individuals as special constables. There are four reasons for our concern.

First, the appointment of privately-employed individuals places them in a conflict of interest. Although they are expected to exercise their public powers in the public interest, the continued employment of these special constables depends on the extent to which they act in the interests of their employers. The interest of the public and their employers may not always coincide and, when they clash, appointees may be inclined to favour their employers' interests over those of the public. As noted by the Oppal Commission in British Columbia, special constables,

> like municipal police or RCMP, exercise discretion when undertaking law-enforcement activities. Normally we expect police to exercise discretion in favor of the public good. However, a [special constable] working for a private organization with a profit motive may well exercise discretion in favor of private, rather than public, interests.[8]

Second, private businesses may not necessarily be appropriate supervisors of special constables in the scheme we have recommended. We have proposed that employers of special constables be given the responsibility to supervise and direct them in the public interest. However, the principal objective of private businesses is to generate profit for their shareholders, not to serve the public interest. Like their employees, therefore, private employers are also placed in a conflict of interest which may not be resolved in favour of the public. At the very least, a reliance on private businesses to provide supervision of special constables is likely to

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line of reasoning would appear to put a private individual on much the same footing as a peace officer when facing liability for false imprisonment as a result of an arrest. If it is in fact good law, the need for the appointment of security personnel as special constables in order to reduce their liability would appear to be obviated.

[5]*Criminal Code*, R.S.C. 1985, c. C-46, ss. 493-497.

[6]*Criminal Code*, R.S.C. 1985, c. C-46, s. 494(3).

[7]Meeting with Gerry Ferguson and George Wright, *supra* n. 2; meeting with Inspector Gary Walker, Winnipeg Police Service (June 14, 1996).

[8]British Columbia, Commission of Inquiry into Policing in British Columbia (W.T. Oppal), *Closing the Gap: Policing and the Community: Use of Non-Police Personnel Excerpts* (undated) F-36. Alberta's *Special Constable Program Policy Manual* echoes this concern. It notes that licensed private investigators and security guards are prohibited from being appointed as special constables. Although "in-house" security personnel are not required to be licensed in Alberta, the Manual states that they "can be considered to be in the same situation as are other security guards and private investigators. . . . There are concerns about the apparent conflict of interest between the private employer and the Crown.": Alberta Justice, Public Security Division, *Special Constable Program Policy Manual* (Rev. 01/96) 13.

require greater attention to questions of accountability than would be the case when governmental bodies and public institutions are responsible for supervision.

Third, it appears to us to be difficult (and perhaps impossible) to draw rational distinctions between different types of privately-employed applicants. For example, assuming that applicants and their employers meet the qualifications we have outlined, we fail to see a rationale for restricting appointments to employees of large retail outlets, malls or industrial complexes. Logically, thousands of small businesses, which may be victimized less frequently by crime but with effects just as serious as those suffered by large businesses, could also demand the appointment of their employees to this office. In addition, if "security personnel" are eligible for appointment, there appears to be no rational basis on which to deny the appointment of barroom "bouncers" and personal bodyguards. However, extending special constable appointments to these situations would result in an enormous increase in the number of public officials wielding law enforcement powers. This would heighten the risk that these powers would be misused even if appointees' competence were properly tested prior to their appointment and if they were properly supervised thereafter. In addition, the substantial increase in supervisory duties on the part of the Minister of Justice and Attorney General arising from such an explosion in the number of appointments would result in a dramatic increase in costs to government.

Finally, we have a philosophical objection to these appointments. In our view, the conferral of public powers for the exclusive benefit of a particular private individual, business or group of businesses is inappropriate. We believe that public powers should be used in the public interest. Using the office of special constable for the benefit of government departments or agencies, First Nations and municipalities meets this test. There may be value in using this power for the benefit of non-governmental but public institutions, such as hospitals and universities. However, retail outlets and other private businesses fall into another category, in our view. We see no reason why a private business should be able to use extraordinary public powers for its own benefit.

In addition to our reasons for objecting to this practice, we also have doubts about the necessity of the appointment of privately-employed individuals as special constables. It is significant, in our view, that both British Columbia[9] and Alberta strongly discourage the appointment of security guards as special constables. Alberta's Special Constable Program Policy Manual notes that licensed security guards are prohibited by law from being appointed and states that in-house (unlicensed) security guards are only appointed as special constables "where there is a compelling public interest in favour of doing so." It further provides:

> An applicant who is employed as in-house security for a company such as a retail store, must provide valid reasons that demonstrate that the appointment as a special constable would be in the public interest.[10]

We have contacted representatives of appointing authorities in the three other western provinces and Ontario and have discovered that none of them currently make routine appointments of this nature. Moreover, all of them advised that no major initiatives have been

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[9]Information concerning British Columbia's policy was provided in a telephone interview with Barbara Murphy, Policy Analyst/Program Manager, Police Services, Ministry of Attorney General, Province of British Columbia (March 25, 1996).

[10]*Special Constable Program Policy Manual* (Alta.), *supra* n. 8, at 13. The Policy Manual goes on to state: "A valid reason may be in a smaller community where the only appropriate applicant for a special constable position is also an in-house security guard."

This suggests two things. First, an individual will not be appointed so that he or she can use the powers granted by the appointment for the purpose of providing security for a private company. Second, even if a special constable appointment is needed for a function other than that of a security guard for a private company, an applicant's employment as a security guard will actually work against him or her; if any other candidate can be appointed, he or she will be preferred.

mounted on the part of security guards or their employers for this authority.[11] On the basis of this information, it would appear that privately-employed security personnel in major centres like Vancouver, Calgary, Edmonton and Toronto are able to carry out their duties without the powers which are considered necessary in Manitoba.

Our contacts with other provinces also suggest that there are alternatives to the appointment of privately-employed individuals which will nonetheless address the practical issues which have given rise to this practice in Manitoba. We are aware, for example, that the City of Edmonton Police Service has operated since 1982 a cooperative program with security personnel from a large number of retail outlets and other establishments. The police provide a three-day training course for security personnel and coordinate the regular exchange of information of use to security firms and in-house security personnel. In return, security personnel participating in the program complete the necessary paperwork when they make arrests and provide evidence in court with the result that the time spent by police on shoplifting and other similar crimes has been dramatically reduced. The benefits for retailers are evidenced by the fact that approximately 50 corporations and other institutions in Edmonton (involving approximately 120 stores and other sites) are currently involved in the program.[12] Similar programs have been instituted in the Greater Vancouver area and in Saint John, New Brunswick.[13]

In our view, programs such as these are to be preferred over the current practice in Manitoba. We believe that, properly implemented, this sort of program could offer many of the benefits which are currently achieved by the appointment of security guards as special constables without the disadvantages we have identified.

To be sure, a cooperative program may not serve all purposes and may not be appropriate in all circumstances. For example, when the consequences of a particular crime would have a substantial impact on the public generally and when the appointment of a security guard as a special constable would significantly reduce the likelihood of the crime taking place, a persuasive argument can be made that security personnel should be granted a power to arrest on the basis of a reasonable belief that a suspect has committed an offence.[14] However, we expect that such situations will be very rare.

Of course, in the relatively rare situations when the appointment of a privately employed individual is being considered, it should be subject to the same criteria as are applied to other prospective appointments: the authority conferred must be necessary to perform the function in question, the appointee must be fully qualified to perform the function and arrangements for the proper supervision of the appointee must be in place.

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[11]Telephone interview with Barbara Murphy, *supra* n. 9; telephone interview with Judy Mackay, Acting Director, Policing Services, Public Security Division, Alberta Justice (February 29 and May 15, 1996); telephone interview with Tom Savage, Director of Police Commission Services, Saskatchewan Justice (May 24, 1996); telephone interview with Cathy Boxer-Byrd, Executive Assistant to the Chair, Ontario Civilian Commission on Police Services (May 16, 1996); telephone interview with Len Griffiths, Director, Standards and New Programs Branch, Policing Services Division, Ontario Ministry of the Solicitor General and Correctional Services (May 24, 1996).

[12]Telephone conversation with Constable Gilbert Tessier, City of Edmonton Police Service (June 21, 1996). Winnipeg Police Chief David Cassells, who has had experience with the program in Edmonton, expressed satisfaction with its results: telephone conversation (July 9, 1996).

[13]Information regarding these programs was obtained through telephone conversations with Cst. Len M. Hall, Crime Prevention Division, R.C.M.P., Burnaby, British Columbia (July 2, 1996) and Sgt. Kevin McDonald, NCO I/C Training, Saint John Police Force, Saint John, New Brunswick (June 24, 1996).

[14]For example, assuming that the likelihood of actually finding someone committing such an offence is low but the probability of making an arrest on reasonable and probable grounds is high, the danger to the public associated with the theft of or damage to radioactive material might well justify granting an extraordinary power of arrest to security personnel responsible for guarding sites such as the Atomic Energy of Canada research station in Pinawa.

RECOMMENDATION 44

As a rule, privately-employed individuals should not be appointed special constables.

RECOMMENDATION 45

Alternative methods should be developed to address the problems arising from the need for privately-employed security guards to release arrested individuals to police officers. For example, cooperative law enforcement programs, such as those in place in Edmonton, Greater Vancouver and Saint John should be considered.

B. REPRESENTATION TO THE PUBLIC

The provinces of Alberta and British Columbia have taken steps to control the way in which special constables are represented to the public. Both prohibit special constables, unless authorized to do so, from holding themselves out to the public as being police officers.[15] In addition, both provinces require special constables, while on duty, to carry appropriate identification and to produce it upon request; British Columbia requires that the special constable's jurisdiction be set out on his or her identification card.[16]

We see a number of benefits flowing from these two requirements. First, they will have the effect of discouraging special constables from abusing their status by overstepping their authority. The use of insignia, markings, uniforms or words which suggest that an individual is a police officer suggest to members of the public that the individual has the power to enforce all laws throughout the province. This misapprehension may cause members of the public to accede to inappropriate actions on the part of a special constable. Worse, the appearance of a police officer and words which reinforce that impression may suggest to special constables themselves that they enjoy powers which are not available to them.

By contrast, uniforms and markings which identify an individual as someone other than a police officer suggest to an observer that he or she enjoys only limited powers. An identification card which sets out that individual's authority will also make clear the limits of his or her jurisdiction.

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[15]British Columbia, Ministry of Attorney General, Police Services Division, Special Provincial Constable Program, *Governing Principles & Policies* (approved July 15, 1996) 5; *Police Act*, S.A. 1988, c. P-12.01, s. 54(1); *Special Constable Program Policy Manual* (Alta.), *supra* n. 8, at 8-9. In order to ensure that no misleading message will be sent by the appearance of special constables, British Columbia insists that "the design of the uniform and identifying accoutrements" of special constables be subject to the approval of the appointing authority in that province: *Governing Principles & Policies* (B.C.), at 5. In Alberta, if inappropriate insignia or other markings are not removed at the request of the appointing authority, the employer's authorization may be withdrawn and the special constable and employer subject to punishment by way of a fine of up to $10,000 or a term of imprisonment of up to 6 months or both: Alberta, *Police Act*, S.A. 1988, c. P-12.01, ss. 54(2) and 57; *Special Constable Program Policy Manual* (Alta.), *supra* n. 8, at 8-9.

[16]*Governing Principles & Policies* (B.C.), *supra* n. 15, at 5; *Special Constable Regulation*, Alta. Reg. 357/90, s. 5. Although identification cards carried by special constables in British Columbia must be signed by the appointing authority, the Minister is not responsible for providing the identification cards: *Governing Principles & Policies* (B.C.), *supra* n. 15, at 5. In Alberta, Alberta Justice issues its own cards unless the special constable employer has been authorized to provide them: *Special Constable Regulation*, Alta. Reg. 357/90, s. 5(1)(b). Alberta has also established detailed guidelines for the photograph of the special constable which must appear on the card: *Special Constable Program Policy Manual* (Alta.), *supra* n. 8, at 15-16. Alberta provides detailed instructions concerning the loss of an identification card; it must be reported to the R.C.M.P. or local policing service and the special constable must complete a statutory declaration as to its loss in order to obtain a replacement: *Special Constable Program Policy Manual* (Alta.), *supra* n. 8, at 15. Both British Columbia and Alberta require the return of a special constable's identification at the end of his or her appointment: *Governing Principles & Policies* (B.C.), *supra* n. 15, at 5; Alberta, *Special Constable Regulation*, 357/90, s. 5(5).

Second, while the restrictions on uniforms, insignia and verbal communication as well as the contents of an identification card will discourage abuse of authority by suggesting that a special constable does not enjoy the powers of a police officer, an identification card which sets out a special constable's jurisdiction will assure members of the public that the special constable does in fact have the lawful authority to enforce certain laws and to act in certain ways to do so. Without this assurance, some members of the public may be inclined to dispute a special constable's jurisdiction and to challenge his or her authority. An identification card which contains information as to the special constable's jurisdiction will therefore facilitate the effective performance of his or her function.

RECOMMENDATION 46

Unless authorized to do so by the Minister, special constables and their employers should be prohibited from referring to themselves as "police"; uniforms, insignia and other markings and accoutrements should be designed so that members of the public can readily distinguish special constables from police officers.

RECOMMENDATION 47

While exercising their authority as special constables, appointees should be required to carry appropriate identification and to produce it upon request.

RECOMMENDATION 48

The identification carried by a special constable should identify him or her as a special constable and provide information concerning his or her jurisdiction.

C. APPOINTMENT BY JUSTICES OF THE PEACE AND MAGISTRATES

We noted in Chapter 2 that two or more justices of the peace in 19th century England were authorized by statute to appoint special constables in emergencies to augment the regular constabulary (whom justices of the peace and magistrates also appointed).[17] We also noted that, while it grants to the Lieutenant Governor in Council or designate the authority to appoint special constables, *The Provincial Police Act* specifically provides that this authority does not detract from any other authority to appoint special constables or peace officers which may otherwise exist.[18] There is some reason to believe that this provision may refer to a continuing authority on the part of justices of the peace and magistrates to appoint special constables.

Evidence in support of this conclusion includes a section in *The Provincial Court Act* which specifies that magistrates are to possess the powers of one, two or more justices of the peace, a provision which can be traced as far back as 1876.[19] This suggests that magistrates have been granted by statute the full jurisdiction exercised by justices of the peace in England in the

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[17]*An Act for the more effectual Preservation of the Peace, by enforcing the Duties of Watching and Warding, until the First day of March One thousand eight hundred and fourteen, in Places where Disturbances prevail or are apprehended* (U.K.), 52 Geo. 3, c. 17; *An Act to continue, until the Twentieth Day of June One thousand eight hundred and twenty, an Act of the Fifty second Year of His present Majesty, for the more effectual Preservation of the Peace, by enforcing the Duties of Watching and Warding* (U.K.), 58 Geo. 3, c. 52; *An Act to amend and continue, until the Twentieth Day of June One thousand eight hundred and twenty four, an Act of the Fifty second Year of His late Majesty, for the more effectual Preservation of the Peace, by enforcing the Duties of Watching and Warding* (U.K.), 1 Geo. 4, c. 24; *An Act to increase the Power of Magistrates in the Appointment of Special Constables* (U.K.), 1 Geo. 4, c. 37; *The Special Constables Act, 1831* (U.K.), 1 & 2 Will. 4, c. 41.

[18]*The Provincial Police Act*, C.C.S.M. c. P150, s. 9(3).

[19]*The Provincial Court Act*, C.C.S.M. c. C275, s. 42(1); *An Act respecting the appointment of police magistrates and other officers*, S.M. 1876, 39 Vict., c. 4, s. 3.

19th century. A similar power may also be held by justices of the peace. Although *The Provincial Court Act* limits the authority of justices of the peace to "hear, try and determine prosecutions, charges, matters and proceedings",[20] it does not appear to limit the broad, non-judicial authority of justices of the peace under English law.

It is not necessary for us to reach a conclusion as to whether justices of the peace and magistrates in Manitoba continue to possess the power to appoint special constables since we have concluded that such a power would be inconsistent with the principles proposed in this Report and should not exist. We are advised that justices of the peace and magistrates do not now and have not for many years felt the need to appoint special constables.[21] Moreover, neither we nor those responsible for the administration of justice in the province have been able to envision circumstances which would necessitate the appointment of special constables by justices of the peace or magistrates rather than by the Minister of Justice and Attorney General or other authorities with this power.[22]

RECOMMENDATION 49

Legislation should be enacted which specifies that justices of the peace and magistrates do not have the power to appoint special constables.

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[20]*The Provincial Court Act*, C.C.S.M. c. C275, s. 43 states:

> Notwithstanding any law or statute to the contrary, a justice of the peace whose appointment has been duly made and is in force may hear, try and determine prosecutions, charges, matters and proceedings in the following cases only:
>
> (a) In cases under municipal by-laws.
>
> (b) In cases under any Act of the Legislature or of the Parliament of Canada in connection with which it is specifically provided that a justice of the peace may hear, try, determine and adjudge prosecutions, charges, matters and proceedings in cases that arise under that Act.

[21]Telephone interviews with Marvin Bruce, Assistant Deputy Minister, Courts Division, Department of Justice (August 23, 1996) and Mary Humphrey, Executive Director, Judicial Services, Department of Justice (August 23, 1996).

[22]*Id.* The federal Commissioner of the R.C.M.P. has the power to appoint special constables supernumerary under federal legislation: *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, s. 7(1)(c). Electoral officials are also authorized to make appointments of special constables to maintain order at elections: *The Elections Act*, C.C.S.M. c. E30, s. 24; *The Local Authorities Election Act*, C.C.S.M. c. L180, s. 70.

CHAPTER 8

LIST OF RECOMMENDATIONS

The following are the recommendations contained in this Report:

1. The capacity of a special constable appointment to confer a law enforcement jurisdiction should be clearly established in legislation. (p. 23)

2. The power to appoint special constables should be held by the Minister of Justice and Attorney General (who may be assisted by departmental officials). The Legislature should delegate to the Minister of Justice and Attorney General the authority to use the office of special constable to confer a law enforcement jurisdiction whenever he or she considers it to be necessary. (p. 28)

3. The function or purpose for which an appointment is sought should be clearly defined. This will typically involve a statement of:

   - the laws which the appointee will be authorized to enforce;
   - the circumstances in which these laws can be enforced; and
   - the geographical area in which the appointee will have jurisdiction. (pp. 30-31)

4. The function for which an appointment is sought should be examined to determine whether it is necessary in order to ensure proper law enforcement. If it is not necessary, no appointment should be made. (p. 31)

5. No special constable appointment should be made or maintained when the powers otherwise available to the applicant are sufficient to perform the function or purpose for which an appointment is sought. (p. 32)

6. Before a special constable appointment is made, consideration should be given to the use of an existing law enforcement office (including appointment as a statutory enforcement officer) as a means of conferring the power or status necessary for the purpose or function in question. (pp. 33-34)

7. When large numbers of identical or similar appointments are needed and are anticipated to be required indefinitely, consideration should be given to the creation by the Legislature of a new or expanded law enforcement office rather than the use of special constable appointments. (p. 34)

8. An appointee should be granted all the powers, and only those powers, which are necessary to perform properly the law enforcement function for which the appointment is made. (p. 34)

9. Authority to enforce the criminal law should be granted to a special constable only on the basis that the police will retain principal responsibility for the enforcement of the criminal law and that the special constable will serve only in a supporting role. (p. 35)

10. An appointing document should specify:

    - the laws the appointee is entitled to enforce;
    - the powers available to him or her in enforcing these laws;
    - any limitations on the use of these powers, including the circumstances in which these powers may be exercised;
    - the geographical area in which this authority is effective; and
    - whether the appointee is permitted to carry a restricted or prohibited weapon in the performance of his or her duties and, if so, the specific weapon or weapons permitted. (p. 37)

11. An appointment should set out the purpose or function for which the appointment is being made; the use of titles as substitutes for this description should be avoided. (p. 37)

12. Legislation should allow an appointing authority to grant special constables a broad jurisdiction, but should ensure that special constables enjoy only the authority which is granted to them in the instrument of their appointment. (p. 38)

13. Special constables should be at least 18 years of age. (p. 40)

14. Individuals who have been convicted of an indictable offence should not be appointed special constables unless they are eligible for a pardon in respect of that offence. (p. 40)

15. In general, individuals should not be appointed as special constables unless they are Canadian citizens or lawfully admitted to Canada for permanent residence. (p. 40)

16. No person should be appointed to the office of special constable unless and until he or she is capable of performing effectively and appropriately the law enforcement function for which an appointment is sought. (p. 41)

17. The standards applied to prospective special constables should correspond to the qualities needed to perform effectively and appropriately the function for which the appointment is being made. Qualifications which are not required for the proper performance of this function should not be demanded of a prospective appointee. (p. 41)

18. In order to receive an appointment to the office of special constable, an individual should be required to demonstrate possession of:

    - the qualities of character needed for the proper performance of the function for which the appointment is being considered; and
    - the particular knowledge and skills required to perform the function effectively and appropriately. (p. 43)

19. The Minister should use appropriate evaluation techniques to ensure that a prospective appointee has the qualities of character and the skills and knowledge needed for the function for which an appointment is being considered. (p. 44)

20. All prospective appointees should be subject to a criminal record and police record search. In addition, the employment history of every candidate should be examined. (p. 44)

21. Responsibility for assessing a prospective appointee's skills and knowledge may be delegated to a training program where it has been determined that the standards used by the training program correspond to the qualities needed to perform properly the function for which the appointment is being considered. (p. 44)

22. Prospective appointees should be required to provide any information required by the Minister in order to make an informed decision concerning their suitability for appointment. (p. 45)

23. The discovery that a prospective appointee or a special constable has provided false information when applying for an appointment process should result in a denial of his or her application or the cancellation of his or her appointment. (p. 45)

24. A provincial offence punishable by way of summary conviction should be created which prohibits the wilful provision of false information concerning a prospective appointee for the office of special constable. (p. 45)

25. No special constable should be appointed unless arrangements have been made for his or her supervision and discipline in the exercise of the jurisdiction conferred by the special constable appointment. (p. 46)

26. In appropriate circumstances, the Minister should be allowed to delegate responsibility for supervising a special constable to the special constable's employer or some other suitable organization. (p. 47)

27. When supervisory responsibilities are delegated to an employer, the appointment of a special constable should be conditional upon his or her continued employment with that employer. When some other organization is delegated supervisory responsibilities, the appointment should be effective only so long as that organization is prepared to offer supervision. (p. 48)

28. Before being authorized to supervise a special constable, a prospective supervising organization should be required to submit to the Minister and receive approval of:

    - written policies concerning the duties and responsibilities in which the special constable will be engaged;
    - a code of conduct which will serve as the basis for the discipline of the special constable;
    - procedures for supervising and evaluating the special constable's exercise of his or her law enforcement jurisdiction;
    - procedures for receiving and dealing with complaints from members of the public and others concerning the special constable's exercise of his or her authority;
    - a disciplinary procedure with respect to all concerns or questions about the special constable's exercise of his or her authority, whether these concerns arise as a result of complaints or from the supervising organization's own supervision of the special constable. (pp. 50-51)

29. Disciplinary proceedings should comply with the principles of natural justice. (p. 51)

30. Consideration should be given to the use of the Commissioner appointed pursuant to *The Law Enforcement Review Act* for complaint and disciplinary matters involving special constables. (p. 51)

31. An authorization to supervise a special constable should set out:

    - the special constable's duties, authority and responsibilities;
    - the standard of conduct which the special constable is to meet;
    - procedures for supervising and evaluating the special constable's exercise of his or her jurisdiction;

- disciplinary measures which are to be followed if there are concerns that the special constable is exceeding his or her jurisdiction or that the special constable is not meeting the relevant standard of conduct;
- procedures for dealing with complaints. (p. 53)

32. Any amendment to the authorization of a supervising organization should be approved by the Minister before being instituted. (p. 53)

33. Consideration should be given to requiring supervising organizations to report immediately to the Minister:

    - any discharge of a weapon by a special constable in the course of his or her duties other than that which occurs during training;
    - any incident in the course of his or her duties in which the special constable uses force which results in injury; and
    - information of which the supervisor is aware regarding a special constable's eligibility to hold the office, including any material change to his or her employment. (p. 53)

34. Consideration should be given to requiring supervising organizations to provide regular reports to the Minister. (p. 54)

35. The Minister should be empowered, in his or her discretion, to conduct inspections of supervising organizations and to investigate concerns that adequate direction and supervision of special constables for whom they are responsible are not being provided. (p. 54)

36. An authorization to supervise special constables should be subject to suspension and withdrawal if the supervising organization:

    - knowingly permits or directs a special constable to exceed his or her jurisdiction;
    - knowingly permits or directs a special constable to violate the standards of conduct to which he or she is subject;
    - fails to investigate adequately complaints about a special constable's conduct;
    - fails to comply with the disciplinary and other procedures and policies to which it has committed and which are contained in the Act, regulations or the supervising organization's authorization;
    - fails to provide annual or specific reports or other information as required or as requested by the Minister;
    - deliberately provides false information to the Minister. (p. 55)

37. An authorization to supervise special constables should be suspended immediately if the Minister concludes that a supervising organization has significantly failed in its obligation appropriately to direct and supervise special constables for whom it is responsible. (p. 55)

38. A supervising organization whose authorization has been suspended should be obliged to demonstrate why its authorization should not be permanently withdrawn. (p. 55)

39. The suspension or withdrawal of an authorization to supervise special constables should automatically result in the suspension or withdrawal of the appointments of those special constables supervised by that organization. (p. 55)

40. The Minister should retain a power to suspend or withdraw the appointment of a special constable. (p. 56)

41. Special constables should be obliged to report to the Minister any circumstance which impinges on their eligibility to hold the office, including the existence of criminal charges filed against them. (p. 56)

42. Special constables should be permitted to refuse an employer's directions to act in ways which violate the terms of the special constable's appointment; a provincial offence should be created which prohibits an employer from punishing a special constable who refuses such directions. (p. 56)

43. A provincial offence should be created which prohibits an employer from punishing an employee who reports to the Minister improper directions given by his or her employer. (p. 56)

44. As a rule, privately-employed individuals should not be appointed special constables. (p. 61)

45. Alternative methods should be developed to address the problems arising from the need for privately-employed security guards to release arrested individuals to police officers. For example, cooperative law enforcement programs, such as those in place in Edmonton, Greater Vancouver and Saint John should be considered. (p. 61)

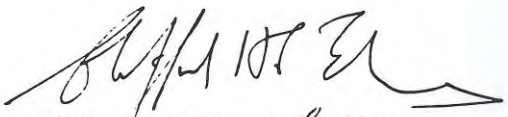
46. Unless authorized to do so by the Minister, special constables and their employers should be prohibited from referring to themselves as "police"; uniforms, insignia and other markings and accoutrements should be designed so that members of the public can readily distinguish special constables from police officers. (p. 62)

47. While exercising their authority as special constables, appointees should be required to carry appropriate identification and to produce it upon request. (p. 62)

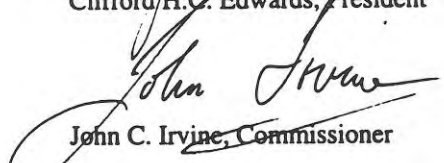
48. The identification carried by a special constable should identify him or her as a special constable and provide information concerning his or her jurisdiction. (p. 62)

49. Legislation should be enacted which specifies that justices of the peace and magistrates do not have the power to appoint special constables. (p. 63)

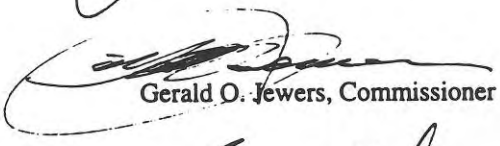
This is a Report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 12th day of November 1996.



Clifford H.C. Edwards, President

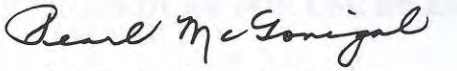


John C. Irvine, Commissioner



Gerald O. Jewers, Commissioner

Eleanor R. Dawson, Commissioner



Pearl K. McGonigal, Commissioner

APPENDIX A

SAMPLE DISCIPLINARY PROCEDURE FOR USE BY EMPLOYERS (ALBERTA)

HANDLING PUBLIC COMPLAINTS AND

ADMINISTRATION OF DISCIPLINE FOR SPECIAL CONSTABLES

When an employer of special constables receives a complaint that criticizes the conduct of a special constable in relation to the performance of his/her duty or function, or the employer otherwise becomes aware of the inappropriate conduct of a special constable, it is important that the action taken by the employer follows the course of natural justice. The special constable must be given the opportunity to answer the allegations of the complaint. The employer should obtain information and supporting facts from persons involved or others who may have knowledge of the matter, to ensure that all decisions are based on facts.

If at anytime before or during the investigation, the employer suspects the special constable has committed an offence in contravention of an Act of the Parliament of Canada or the Legislature of Alberta, other than a misconduct defined in the Special Constable Regulation, the matter should be referred to the police service with jurisdiction in the area where the offence is believed to have occurred.

The following model outlines a process for handling public complaints and internal discipline for special constables that may be used or adapted by a special constable employer. Some employers may already have a by-law, policy, procedures or a collective agreement that effectively addresses the spirit and intent of this procedure.

An employer using this model will be required to designate a person who:

(a) receives complaints;

(b) is responsible for the special constables;

(c) is authorized to hear appeals from complaints and administer discipline.

The person who receives complaints, investigates complaints and applies discipline may or may not be the same person.

The person authorized to hear an appeal should be a respected member of the community or a person holding an official position with the organization who is considered appropriate to review the disposition of the complaint. This person should not be an elected official to ensure there is a clear separation between the political and enforcement bodies. The decision of the person authorized to hear the appeal is final.

October 1992

HANDLING PUBLIC COMPLAINTS AND ADMINISTRATION OF DISCIPLINE FOR SPECIAL CONSTABLES

SUGGESTED MODEL

RECEIPT OF COMPLAINT

1. Complaints or other information about inappropriate conduct of a special constable shall be directed to the designated person who receives complaints at (provide address and telephone).

   All complaints must be accepted and dealt with according to the established policy. Complaints should be in writing. Complaints received verbally shall be recorded in writing.

2. The complaint shall immediately be forwarded to the designated person responsible for handling special constable complaints.

3. The designated person shall acknowledge receipt of the complaint in writing to the person making the complaint and the special constable against whom the complaint was made.

INVESTIGATION

4. The designated person shall investigate the complaint or have it investigated.

5. If the designated person is satisfied that a misconduct has been committed, he/she will take corrective disciplinary action.

6. The designated person may resolve minor complaints informally, with a solution that is satisfactory to all parties.

DISCIPLINARY ACTION

7. The designated person shall present the allegations that were made and the findings of the investigation to the special constable.

8. The special constable shall be given an opportunity to make a full response to the allegations and supporting evidence.

9. The designated person shall hear the explanation of the special constable and any other information that is relevant to determine the facts. He/she shall determine if the complaint is unfounded or unsubstantiated or that the special constable has committed a misconduct.

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10. If the designated person finds the special constable has committed a misconduct he/she may take one of the following disciplinary actions:

(a) warn the special constable;

(b) reprimand the special constable;

(c) suspend the special constable without pay for a period not exceeding _____ (period of time ie. hours/days etc.);

(d) recommend to the authorized employer that the special constable be dismissed.

NOTE: Other options can be added to this list that are appropriate to the organization or are in keeping with the terms of a collective agreement or an existing policy.

NOTIFICATION AND APPEAL

11. The designated person shall notify the complainant and the special constable in writing of the results of the investigation, the action taken and the right to appeal the decision. The complainant shall be notified of the person authorized to hear the appeal, and that the appeal must be filed in writing, within thirty (30) days of receiving the decision.

12. After reviewing the information, the person authorized to hear the appeal may dismiss the appeal, or allow the appeal. If the appeal is allowed, the person authorized to hear the appeal may impose discipline as outlined in paragraph 10 or vary the discipline to meet the circumstances.

13. The person authorized to hear the appeal shall notify the complainant and special constable in writing of the results of the appeal.

14. The decision of the person authorized to hear the appeal is final.

October 1992

REPORT ON SPECIAL CONSTABLES

EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

Although the original purpose of the office of special constable was to permit the temporary appointment of additional constables in circumstances of "Tumult, Riot or Felony", this extraordinarily flexible office has come to assume a permanent and important role in law enforcement in Manitoba. Over 2500 individuals currently hold special constable appointments in this province for a variety of purposes. Appointees include Winnipeg and other municipal police officers, auxiliaries of the Royal Canadian Mounted Police, officials in numerous government departments and agencies as well as employees of public institutions (such as hospitals and universities) and of private businesses (such as department stores and security firms). Special constable appointments have been used to expand the powers of individuals whose authority would otherwise be limited by legislation (such as Natural Resources officers and municipal police officers) and to confer law enforcement powers on individuals whose functions were not expressly contemplated by legislation (such as the individuals who have received the authority to enforce City of Winnipeg parking by-laws).

However, despite its widespread and well-established use in Manitoba, legitimate concerns exist about the office of special constable. One concern is that the office rests on an insecure legal foundation; it is not clear that law enforcement powers are in fact conferred by way of a special constable appointment. There is also concern that the appointment and supervision of Manitoba's special constables is not guided by explicit principles and policies. An *ad hoc* approach, such as the one currently applied in Manitoba, can easily result in inappropriate appointments, a rejection of appropriate appointments and a lack of adequate supervision after an appointment is made.

The Manitoba Law Reform Commission's Report on Special Constables addresses these issues, making recommendations which will provide a solid legal foundation for the office of special constable and explicit principles and policies for the effective use of the office in Manitoba.

INSECURE LEGAL FOUNDATION

Current Manitoba legislation concerning special constables, which has not been substantially amended since 1920, provides only that special constables may be appointed; it says nothing about any law enforcement jurisdiction which may be conferred by the appointment. As a result, concerns exist that an appointment may not in fact grant an appointee any power to enforce the law which he or she does not already possess as a citizen or as the holder of another law enforcement office. The Report examines four potential sources of authority for special constables and concludes that the legal foundation for granting a law enforcement jurisdiction by way of a special constable appointment is in doubt. It recommends that legislation should be enacted to establish clearly the capacity of a special constable appointment to confer a law enforcement authority.

USE OF THE OFFICE

Special constable appointments are used aggressively in Ontario and Alberta to confer a law enforcement jurisdiction whenever it is considered to be necessary. By contrast, Saskatchewan and British Columbia rely more heavily on their Legislatures to design law enforcement schemes for the laws they enact, reserving the office of special constable to fill the "nooks and crannies" within and between legislative law enforcement schemes. The Report suggests that the more aggressive approach currently taken in Manitoba is appropriate but that,

rather than relying on special constable appointments, the Legislature should be asked to create specific law enforcement offices when large numbers of individuals require similar or identical powers indefinitely. In addition, rather than delegating the power of appointment to officials in the Department of Justice, the Report recommends that this power should be reserved to the Minister of Justice and Attorney General who can be held accountable to the Legislature for its use.

CIRCUMSTANCES OF APPOINTMENT

Everyone in Canada has some law enforcement powers (such as the authority to make a "citizen's arrest") and numerous officials other than police officers have been given authority to enforce particular laws. Whether conferred on an ordinary citizen, a governmental official or a police officer, the purpose of a special constable appointment is to grant the appointee law enforcement powers beyond that which he or she already holds. In some circumstances, additional powers will be necessary for effective law enforcement. However, the Report points out that law enforcement powers are also susceptible to misuse. It therefore recommends caution in conferring them. No special constable appointment should be made unless the powers already available to a prospective appointee are insufficient to perform a necessary law enforcement function. Even when an appointment is necessary, only those powers which are needed to carry out this function should be conferred; powers which are conferred unnecessarily serve no purpose and are vulnerable to misuse. Finally, to ensure that both appointees and the public are clear about the authority which may be exercised by a special constable, the appointing document should set out in unambiguous terms the jurisdiction being conferred.

SELECTION OF APPOINTEES

The Report suggests that basic standards should be required of all prospective special constables: they should be at least 18 years of age, should not have been convicted of an indictable offence (or, if so convicted, should be eligible for a pardon) and, in general, should be Canadian citizens or lawfully admitted to Canada for permanent residence. Other standards will depend on the specific function for which the appointment is being made. The Minister should require that a prospective appointee has the qualities of character, knowledge and skills which are needed to perform the function properly but should not demand qualities which have little or nothing to do with the function in question. In order to assess candidates, the Report proposes a variety of tools, including criminal records and other background checks as well as testing of skills and knowledge.

SUPERVISION OF SPECIAL CONSTABLES

Although the Report endorses the current practice of relying on the employers of special constable to provide supervision of their use of authority, it recommends that a more formal structure should be established to ensure that appropriate supervision takes place. Every special constable appointment should be conditioned on the existence of an employer or other supervising organization which agrees to accept responsibility for the special constable's conduct. Supervising organizations should be required to develop policies with respect to the functions performed by the special constable, the standard of conduct expected of the special constable and the means by which supervision will be provided. In addition, the Report proposes that supervising organizations should be required to establish disciplinary procedures which can respond appropriately to a special constable's improper conduct, whether noted in a complaint from the public or by the supervising organization itself. A failure to provide appropriate supervision and discipline should justify the withdrawal of an authorization to employ a special constable and the termination of the special constable appointment.

MISCELLANEOUS ISSUES

Currently, nearly 100 security guards and other employees of private businesses hold special constable appointments. The Report notes that these appointments place special constables and their employers in a conflict of interest; although the powers being granted are public in nature and should be used in the public interest, private employers may be inclined to favour their own interests over those of the public. The Report points out that other provinces have not found it necessary to adopt this practice and recommends that, in general, privately-employed individuals should not be appointed special constables.

The Report proposes restrictions on the uniforms and insignia of special constables in order to ensure that they are not mistaken for police officers.

Finally, the Report concludes that a power to appoint special constables may still be held by magistrates and justices of the peace. Because this power has not be exercised for many years and is inconsistent with the principled approach set out in the Report, its abolition is recommended.

SOMMAIRE DU RAPPORT SUR

AGENTS DE POLICE SPECIAUX
(SPECIAL CONSTABLES)

SOMMAIRE

Même si elle a été créée afin de permettre la nomination temporaire d'agents de police ›plémentaires en cas d'émeutes, de révoltes ou d'actes délictueux graves, la fonction :raordinairement flexible d'agent de police spécial en est venue à jouer un rôle permanent et portant dans le domaine de l'application des lois au Manitoba. Plus de 2 600 personnes :iennent actuellement, à un titre ou à un autre, la qualité d'agent de police spécial dans la ›vince. Parmi ces personnes, nous retrouvons des policiers du Service de police de Winnipeg d'autres municipalités, les auxiliaires de la Gendarmerie royale du Canada, des fonctionnaires nombreux ministères et organismes gouvernementaux ainsi que des employés établissements publics (hôpitaux et universités) et privés (grands magasins et agences de :urité). Les nominations d'agent de police spécial ont servi à doter des particuliers ›tamment, les agents de ressources naturelles et les agents de police municipaux) de pouvoirs ›plémentaires, pouvoirs qu'ils n'auraient pas autrement en vertu des lois, et à conférer des uvoirs de police à des personnes dont les fonctions n'étaient pas expressément prévues par les s (notamment les personnes chargées de faire appliquer les règlements de la Ville de Winnipeg atifs au stationnement).

La fonction d'agent de police spécial suscite des préoccupations légitimes malgré qu'elle it d'usage généralisé et bien établi au Manitoba. L'une de ces préoccupations provient du fait 'elle repose sur un fondement juridique précaire; de fait, il n'est pas clair qu'une nomination à e d'agent de police spécial confère des pouvoirs de police. En outre, le fait que la nomination la surveillance des agents de police spéciaux au Manitoba ne soient pas guidées par des ncipes et une politique explicites est une autre source de préoccupation. Une approche provisée comme celle utilisée au Manitoba peut facilement se traduire par des nominations n appropriées, des rejets de nominations appropriées et un manque de surveillance convenable s agents de police spéciaux après leur nomination.

Dans son rapport sur les agents de police spéciaux, la Commission de réforme du droit ttaque à ces problèmes, formule des recommandations visant à asseoir la fonction d'agent de lice spécial sur un fondement juridique solide et énonce des principes et une politique en vue recours efficace à cette fonction au Manitoba.

ndement juridique précaire

Les lois manitobaines actuelles portant sur les agents de police spéciaux, lois qui n'ont pas it l'objet de modifications importantes depuis 1920, se contentent uniquement de permettre la mination d'agents de police spéciaux; elles ne comportent aucune disposition au sujet des uvoirs de police que peuvent conférer les nominations à titre d'agent de police spécial. En nséquence, on se demande si de telles nominations confèrent réellement des pouvoirs de police e leurs bénéficiaires ne possèdent pas déjà à titre de citoyen ou à un autre titre. Dans son pport, la Commission étudie quatre sources possibles d'habilitation des agents de police éciaux et conclut qu'est douteux le fondement juridique sur lequel repose l'attribution de uvoirs de police par voie de nomination d'agent de police spécial. Elle recommande doption de lois établissant clairement les pouvoirs de police que confèrent les nominations à re d'agent de police spécial.

ecours à la fonction d'agent de police spécial

L'Ontario et l'Alberta recourent abondamment à la nomination d'agents de police spéciaux ur conférer des pouvoirs de police chaque fois qu'elles le jugent nécessaire. Par contre, la

Saskatchewan et la Colombie-Britannique recourent davantage à leur assemblée législative pour concevoir des moyens afin de faire appliquer les lois qu'elles adoptent, réservant la fonction d'agent de police spécial pour combler les vides que laissent les moyens législatifs. La Commission indique que la manière de faire plus dynamique adoptée au Manitoba est appropriée, mais que l'Assemblée législative devrait, plutôt que de recourir à la nomination d'agents de police spéciaux, créer des fonctions de police particulières lorsqu'un grand nombre de personnes ont indéfiniment besoin de pouvoirs analogues ou identiques. De plus, la Commission recommande que le pouvoir de nommer les agents de police spéciaux soit réservé au ministre de la Justice et procureur général, qui peut être tenu comptable devant l'Assemblée législative, plutôt que de le déléguer à des fonctionnaires du ministère de la Justice.

Conditions de nomination

Tout le monde au Canada a certains pouvoirs de police (notamment le pouvoir d'arrestation par un simple particulier). En outre, bon nombre de fonctionnaires, autres que les agents de police, ont reçu le pouvoir de veiller à l'application de lois particulières. Qu'elle s'applique à un simple citoyen, à un fonctionnaire ou à un agent de police, la nomination à titre d'agent de police spécial a pour but d'accorder à son bénéficiaire des pouvoirs de police en sus de ceux qu'il a déjà. Il se révèle parfois nécessaire d'accorder des pouvoirs supplémentaires pour assurer l'application efficace de lois. Toutefois, la Commission fait remarquer qu'il peut y avoir abus de ces pouvoirs de police. Elle recommande donc qu'ils soient attribués avec circonspection. Il ne faudrait pas procéder à la nomination d'un agent de police spécial à moins que les pouvoirs que détient déjà le bénéficiaire potentiel soient insuffisants pour qu'il puisse s'acquitter d'une fonction de police nécessaire. Et s'il se révèle nécessaire de procéder à une telle nomination, seuls les pouvoirs essentiels à l'accomplissement de la fonction prévue devraient être attribués. Les autres pouvoirs attribués sont superflus et risquent d'être utilisés de façon abusive. Enfin, les pouvoirs conférés devraient être énoncés clairement sur le document de nomination. Ainsi, les bénéficiaires d'une telle nomination et le public sauraient exactement à quoi s'en tenir au sujet des pouvoirs pouvant être exercés.

Sélection des bénéficiaires de la nomination

Selon la Commission, il faudrait établir des qualifications de base que devraient avoir tous les agents de police spéciaux potentiels : ils devraient avoir au moins dix-huit ans révolus, n'avoir jamais été déclarés coupables d'un acte criminel (ou, dans le cas contraire, être admissibles au pardon) et, en général, être citoyens canadiens ou avoir été admis légalement au Canada à titre de résidents permanents. Les autres qualifications devraient être fonction des tâches déterminées pour lesquelles la nomination est faite. Le ministre devrait exiger que les candidats aient les traits de caractère, les connaissances et les aptitudes voulus pour s'acquitter convenablement de leurs fonctions, mais non des qualités qui ont très peu à voir ou rien à voir avec les fonctions en question. Pour l'évaluation des candidats, la Commission suggère une variété d'outils, notamment la vérification des casiers judiciaires, des antécédents et des aptitudes et connaissances.

Surveillance des agents de police spéciaux

Bien que la Commission endosse la pratique courante voulant que ce soit les employeurs qui surveillent l'usage que font de leurs pouvoirs les agents de police spéciaux qu'ils embauchent, elle recommande la mise en place d'une structure officielle visant à garantir une surveillance appropriée. Chaque nomination d'agent de police spécial devrait être subordonnée au consentement de l'employeur ou de tout autre organisme de surveillance à accepter de se tenir

garant de la conduite de leurs agents de police spéciaux. Il faudrait exiger que les organismes de surveillance se dotent d'une politique concernant les fonctions et la conduite des agents de police spéciaux ainsi que les moyens de surveillance. De plus, la Commission propose que les organismes de surveillance prévoient des mesures disciplinaires aptes à remédier à l'inconduite des agents de police spéciaux, que cette inconduite ait fait l'objet d'une plainte du public ou qu'elle ait été constatée par l'organisme de surveillance lui-même. Le manque de mesures de surveillance ou de discipline devrait être suffisant en soi pour justifier le retrait de l'autorisation d'employer des agents de police spéciaux et l'annulation de leur nomination.

Divers

Actuellement, près de 100 agents de sécurité et autres employés du secteur privé sont bénéficiaires d'une nomination d'agent de police spécial. La Commission fait remarquer que ces nominations placent les agents de police spéciaux et leurs employeurs dans une situation de conflit d'intérêts. Même si les pouvoirs conférés sont publics de par leur nature et qu'ils devraient être utilisés dans l'intérêt public, les employeurs du secteur privé peuvent être enclins à favoriser leurs propres intérêts par rapport à ceux du public. La Commission souligne que d'autres provinces n'ont pas jugé nécessaire d'adopter cette pratique et recommande que l'on s'abstienne, en règle générale, de nommer des employés du secteur privé à titre d'agents de police spéciaux.

La Commission propose également des restrictions applicables aux uniformes et aux insignes des agents de police spéciaux de sorte qu'on ne confonde pas ces derniers avec les agents de police.

Pour terminer, la Commission indique qu'il est possible que les magistrats et les juges de paix détiennent toujours le pouvoir de nommer des agents de police spéciaux. Parce que ce pouvoir n'a pas été exercé depuis de nombreuses années et qu'il est incompatible avec les principes et les méthodes énoncés dans le rapport, la Commission recommande son abolition.