

# The evolution of police powers

**Alan Young**

Most Canadians assume that organized, professional, state-employed policing has been part and parcel of the common law heritage from time immemorial. Nothing could be further from the truth. Police officers are historical upstarts who did not really play a significant role in law enforcement until the mid-19th century. Private security and community mobilization was the norm until the demands of the industrial revolution compelled the creation of an organized, cost-effective institution for the enforcement of criminal law.

When a professional police force was established, the “apparently unshakable

British dogma was that police spelt tyranny.” Nonetheless, concerns were allayed on the basis of the naive and idealistic hope that the concept of the “rule of law” would keep the police function within tolerable bounds. The rule of law dictates that no one is above the law and that the law applies equally to all concerned. Accordingly, the police could not be converted into a tyrannical standing army because they would have only the power and authority granted to them by law. I call the belief in the constraining power of the rule of law “naive” because lawmakers rarely address police powers as an issue of legislative reform and the dictates of the rule of law become muted

when there are few laws to serve as yardsticks for the scope of police power.

The false hope of the rule of law is demonstrated by the fact that in 1999 the Supreme Court of Canada (SCC) was asked to address the question whether police can engage in a “reverse sting” operation in which they sell illicit drugs and then arrest the buyers. In *Shirose* (1999), 133 CCC (3d) 257, the SCC assessed the legality of having the police warehouse a tonne of cannabis resin for the purpose of a disingenuous scheme to sell these drugs. The defence argued that this conduct clearly constituted an abuse of process on the basis that the investigative tech-

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## Dear Coordinator/Instructor:

Welcome to the inaugural issue of *Emond Montgomery's APB: Academic Publications Bulletin*. The objectives of *APB* are to provide full-time and part-time college instructors in the Ontario Police Foundations Program and Law and Security Administration Program with timely, useful information on new developments in the law, policing, and security administration, as well as reports on new texts and workbooks that have been developed by Emond Montgomery specifically for college courses.

This first issue of *APB* features an especially timely article, by Professor Alan Young of Osgoode Hall Law School of York University, on whether police officers can commit illegal acts in the course of carrying out their duties. Instructors are welcome to reproduce the article for classroom use or as the basis of a student assignment.

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Paul Emond

President, Emond Montgomery Publications Limited

nique was patently illegal. The police argued that they were justified in engaging in these illegal acts and that they were covered by the same public interest immunity that protected the Crown.

It is puzzling that jurists could still argue about the scope of police powers at the turn of the 20th century. Although the law has been recently amended to authorize “reverse sting” operations, until this amendment passed, there should have been no uncertainty with regard to the absence of authority for the police to engage in illegal acts of this nature. Not surprisingly, the SCC readily concluded that the police operation was illegal and was not protected by public interest immunity (however, the abuse-of-process argument raised by the defence was also rejected). What remains puzzling is that the SCC treated the question as a live issue. If we have proceeded for 150 years on the basis that the police possess only the limited powers granted to them by law, why did the SCC feel the need to conduct an extensive analysis of the issue? Surely this issue could have been resolved by a resounding, one-line dismissal of the specious argument that the

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police are justified in committing illegalities in pursuit of legitimate law enforcement objectives.

The answer to the puzzle lies in the fact that the historical commitment to the rule of law is more an abstract commitment than a practical one. Lawmakers continue to disregard difficult questions about police powers and many legislative gaps exist in terms of setting out an exhaustive, meaningful, and practical outline of police powers. As a result, courts have indirectly entered the lawmaking enterprise by employing a common law doctrine, the “ancillary powers” doctrine, to supplement legislative powers when the police power at issue was “reasonably necessary” for the effective execution of the officer’s duty. Allowing police powers to evolve by the accretion of common law decisions is fraught with pitfalls. The common law methodology is fraught with uncertainty, and although ambiguity may be the life-blood of the legal profession, it should be considered anathema to both the police and those governed by the police.

Jurists realize that, in principle, police have limited powers but, in practice, courts are compelled to address and fill the obvious gaps left by the failure of Parliament to create a comprehensive code of police powers.

As a result of the *Shirose* case confirming the 150-year-old understanding that the police have limited powers, the Parliament of Canada has decided finally to enter the fray. Instead of addressing specific instances of police power and trying to fill

some of the legislative gaps, Parliament has now proposed a bill that would provide the police with limited immunity to commit crimes in the course of their duties. Sir Robert Peel and other creators of modern police forces would roll over in their graves at the prospect that Parliament would turn the rule of law on its head to provide a licence for police officers to violate the law. I do understand that it is difficult for any lawmaker to anticipate and contemplate specific and exhaustive grants of police power as the police face, on a daily basis, exigencies that could have been contemplated only by an omniscient Parliament. However, the difficulty of the enterprise is no excuse for a retreat to public-interest immunity. We may no longer have reasonable fears, as we did 150 years ago, regarding the creation of a continental spy system and a standing army of uniformed police; however, the failure to maintain specific controls and limits on police powers can still serve only to trigger a divisive relationship between the police and the community. The police can have the power and authority of mighty Hercules but, without cooperation and respect from the community, the police will discover that there is a fine line between omnipotence and impotence. ■

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- *Interpersonal and Group Dynamics in Law Enforcement* by Bruce Bjorkquist (Conestoga College): approximately 180 pages; expected publication December 10, 1999; \$38.

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