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Municipal Liability for Police Torts in the Province of Quebec*

Lorne GIROUX**

"Haven't we waited long enough for the elimination of this absurdity from the law?"

A.J. CASNER and E. FULLER
Municipal Tort Liability in Operation,
(1941) 54 *Harv. L. Rev.* 437, 462

* Version revisée d'un mémoire de maîtrise, présenté à la Harvard Law School, en mai 1970.

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Introduction

This paper will discuss what may appear to be a trivial subject in the field of Quebec municipal law — the problem of the liability of municipal corporations for torts committed by their policemen in the course of their duty. We start from a simple situation. A policeman has committed a tort against an individual. We assume that the municipal policeman is personally liable and that the party injured could sue and obtain judgment against him. The victim wishes to recover damages from the municipal corporation. Most of the time, the suit will be brought against both the policeman and the municipality. If there existed, in law, recourse against the municipality, the defendants would be jointly liable. At present, unless the policeman is acting as a "municipal constable", enforcing a municipal ordinance or by-law when the tort is committed, the aggrieved party has no recourse against the municipal corporation employing him. To question the soundness of this so-called "established rule" in Quebec law, to prove that it is unfounded in law as well as unjust and arbitrary and to study means to change it, defines the modest scope of this paper.

To discuss municipal tort liability might appear to be anachronistic when non-fault compensation schemes, boards of civilian review and municipal ombudsmen are "à la mode". Tort liability as a means of control of police action has inherent defects. It is control after the fact, when the harm is already done and it is often beyond the reach of those who, because they are poor, are more likely to be subjected to police abuse. Yet there are other considerations which justify our undertaking.

Given the incredible reluctance of the law to accept the obvious concept of municipal tort liability and the perverted state of the law on this matter, the author believes that this incremental change is a goal that is worth striving for, especially if this change could be brought about by the courts themselves. Furthermore if in 1970 an injured individual can only obtain an illusory judgment against an insolvent policeman and has no recourse against his employer, one can wonder what the chances would be of establishing more sophisticated controls of police action.

If municipal liability for police torts could be clearly established in the Province of Quebec, the number of suits resulting from police misconduct would undoubtedly increase. At present, victims are deterred from incurring the costs of a lawsuit which is likely to result in a meaningless judgment. The development of an effective legal aid system would help to bring this recourse within the means of the poor and would alleviate one of the most serious shortcomings of municipal tort liability as a way to control police behavior.

We shall first see the historical development of the case law on the matter. Our next step will be to analyse the different rationales relied upon by the courts to justify the present rule and to show that they are not only unfounded in law but that they also result in very inequitable consequences. We will then present the legal and policy

arguments for a judicial change. The last part of the paper will be devoted to the search for a viable and coherent strategy for a statutory intervention geared to avoid conflict between different desirable policies for the protection of the rights of individuals and the administration of justice.

Part I

History of the Case Law on Municipal Liability for Police Torts in Quebec

The first part of our study is devoted to a history of the case law beginning in 1871 and showing the evolution of the law on this matter. It will show how the law of municipal liability for police torts has been perverted in the Province of Quebec by the introduction of legal principles borrowed from the United States and Great Britain. At the outset, we find a holding that the French civil law should regulate the matter and that a municipal corporation is liable for police torts. In subsequent cases the courts began to use American and British rules saying that this matter should not be regulated by the *Civil Code*. Almost as soon as those principles were adopted, the courts began to modify them and, at the end of the evolution, came out with a new rule, a rule different from both the British and American ones. When the policeman is acting as a "municipal constable" enforcing a municipal regulation the municipality is liable for his wrongful acts but, when he is acting as "peace officer" enforcing the *Criminal Code*, there is no liability on the part of the municipal corporation.

1. A Forgotten Case : *Doolan* v. *Montreal*

The first reported case on municipal liability for police torts, *Montreal* v. *Doolan*,[1] was decided in 1871. Plaintiff, a carter and cabman, had been arrested by two policemen of the City of Montreal and, after detention released without any charge being brought against him. The cabman sued the city for the false arrest made by its servants "then and there acting under and by the directions of defendants, and in their employ, as such policemen".[2] The City pleaded first that it was not responsible for the acts of the defendants and, second, that the policemen were justified in making the arrest.

In the Superior Court, Mondelet J. dismissed the action on the ground that the city had established that in law it was not responsible for the conduct of the policemen.[3] On review by three judges of the

[1] (1871) 19 R.J.R.Q. 125, 1 R.L. 84, 3 R.L. 433, 18 L.C.J. 124, hereinafter referred to as the *Doolan* case.

[2] (1871) 19 R.J.R.Q. 125.

[3] *Ibid.* 126.

Superior Court, the judgment was reversed on the grounds that by its second plea the city had ratified the acts of its policemen.[4]

The city appealed to the Court of Queen's Bench (Appeal Side). A majority of the Court[5] held that the question of municipal tort liability should be regulated by French civil law and that the city was liable under this law.[6]

Badgley J. and Duval C.J. dissented. Justice Badgley said that the master and servant relationship did not legally exist between the corporation and the policemen. For this reason, the last clause of article 1054 C.C.[7] had no application:

> "The relation between the corporation and the city policemen is not that either of master and domestic servant, nor of "commettant" and "ouvrier" nor is it in evidence that the policemen, in this instance, were acting under the order, the direction and superintendance of the corporation."[8]

The judge relied on the opinion of Chief Justice Bigelow in the Massachussets case of *Buttrick* v. *Lowel*[9] holding that there is no master and servant relationship between municipal policemen and the corporation which cannot be held liable for their wrongful acts.[10] The opinion was said to founded upon substantial law and could be fully adopted. As to the second plea, the judge said that it was not essentially a plea of justification, that responsibility was not implied in its terms and that it should not be there but should be rejected as "mala praxis".

Chief Justice Duval dissenting, relied on English authorities and said that the distinction had been taken, and was founded in reason as well as in law, between legislative powers held by a municipal corporation

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4 *Ibid.* 129.

5 CARON, DRUMMOND and MONK JJ.

6 *Supra,* note 2 at 134.

7 "Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed."

8 (1871) 19 R.J.R.Q. 130-131.

9 *Buttrick* v. *City of Lowell,* (1861) 83 Mass. (1 Allen) 172.

10 "Police officers can in no sense be regarded as agents or servants of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the Legislature as a convenient mode of exercising a function of government, but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws; and other similar powers and duties with which police officers and constables are entrusted, are derived from the law, and not from the city or town under which they have their appointment. For the mode in which they exercise their powers and duties, the city or town cannot be held liable [...]. Nor does it make any difference that the acts complained of were done in an attempt to enforce an ordinance or by-laws of the city. The authority to enact by-laws is delegated to the city by the Sovereign power, and the exercise of the authority gives to such enactments the same force and effect as if they had been passed directly by the Legislature. They are public laws of a local and limited operation, designed to secure good order and to provide for the welfare and comfort of the inhabitants. In their enforcement, therefore, public officers act in their public capacity and not as the agents or servants of the city." (1861) 83 Mass. (1 Allen) 172, 173-174 *cited* at 19 R.J.R.Q. 131.

for public purposes and as a part of the government of the country and those private franchises which belonged to it as a creation of the law. Within the sphere of the former the municipal corporation enjoyed the exemption of government and so, in the case of a public officer, it is not responsible for the acts of those serving under it where the latter fill a public office and are not in its private service. He thought the case had to be decided in accordance with English law, the public constitutional law of the country. The city was not legally responsible for the damage sustained by the plaintiff.

Although the *Doolan* case, as decided on appeal, held that the civil law should regulate this matter, the headnote of the report gives the judgment of the Court of Review and not that of the Court of Appeal and thus expresses that "a city corporation is liable in damages for assaults committed by its servants, such as policemen when the assaults are approved and attempted to be justified by the corporation".[11] This may explain why this first case was often misquoted if not ignored.

Following the *Doolan* case, a number of decisions rendered by the Quebec courts held municipal corporations liable for wrongful acts committed by their policemen while in the course of their duty.[12] In most cases, the plaintiff sued both the constables and the municipal corporation which, very often assumed both defences and, in some of the decisions the court took into account the fact that the municipality joined defence with them.[13] But, in at least two early decisions following the *Doolan* case, the courts in Quebec made it clear that the question of municipal liability should be regulated by the *Civil Code* of the Province of Quebec enacted in 1866.[14]

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11 (1871) 19 R.J.R.Q. 125; 18 L.C.J. 124.

12 *Laviolette* v. *Thomas et al,* [1881] M.L.R. 1 S.C. 350, 8 L.N. 266 (false arrest); *Walker* v. *City of Montreal,* (1881) 4 L.N. 215 (illegal arrest); *Bruchési* v. *Village of Saint-Gabriel,* (1882) 6 L.N. 60 (illegal arrest and detention); *Latreille* v. *Ville de Saint-Jean-Baptiste et Cité de Montréal,* (1886) 20 R.L. 351 (false arrest); *Guénette* v. *City of Montreal,* [1888] M.L.R. 4 C.S. 69, 11 L.N. 267 (assault); *Viau* v. *Cité de Montréal,* (1889) 17 R.L. 511 (policemen refusing or neglecting to obey sargeant ordering them to protect plaintiff's house); *Noël* v. *Cité de Montréal et al,* (1890) 19 R.L. 704 (false arrest); *Gagnon* v. *Cité de Montréal,* (1890) 34 L.C.J. 212 (illegal arrest and injurious treatment of plaintiff's minor son wanted as witness); *Bigras* v. *Cité de Montréal et al,* (1892) 2 C.S. 227, 16 L.N. 125 (city liable for illegal arrest by its policemen but not for publicity in newspapers); *Higgins* v. *City of Montreal,* (1894) 6 C.S. 414 (arrest without warrant); *Walsh* v. *City of Montreal et al,* (1896) 8 C.S. 123, 10 C.S. 49 (Court of Review) (illegal expulsion of plaintiff from parish meeting); *Mousseau* v. *City of Montreal,* (1896) 12 C.S. 61 (illegal arrest and detention on a criminal charge); *Milton* v. *Paroisse de la Côte Saint-Paul,* (1903) 24 C.S. 541, 10 R.L.n.s. 364 (in this case, the court applied the general civil law rule that the "commettant" is not liable when the "préposé" is not acting "dans l'exécution de ses fonctions" and the corporation was held not liable because the plaintiff was unable to prove that they were acting in the scope of the duties for which they were employed).

13 *Pratt* v. *Charbonneau et Cité de Montréal,* (1890) 19 R.L. 250 *aff.* M.L.R. 7 Q.B. 24 (illegal arrest and seizure); *Courcelles* v. *Cité de Montréal,* (1891) 21 R.L. 503 M.L.R. 7 S.C. 154 (assault); *Dame Guay* v. *Cité de Sainte-Cunégonde de Montréal,* (1899) 5 R. de J. 549 (Search in private premises without warrant); *Lefebvre* v. *Corp. du Village de Verdun,* (1906) 12 R. de J. 301 (Ct. of Review) (illegal arrest).

14 *Harper* v. *Cité de Montréal et al,* (1908) 16 R. de J. 229. The City pleaded that it was not responsible for the acts of its policemen but the court, relying on

2. Creation of a New Rule

It was in 1888 with *Rousseau* v. *Lévis,*[15] that the law began to change. In that case, the Court of Review refused to hold the City of Lévis liable for a false arrest made by its policemen. Casault J., rendering the opinion of the Court, held that they were not the servants of the municipality who was charged by its statute to appoint and dismiss them, because their duties were specified by law and the corporation could not give them any orders as to the way they should fulfill their duty. A distinction was drawn between public and private corporations, the former being vested with part of the sovereign power. In the exercise of such authority the public corporation could not be held liable any more than the State and the relation of *commettant et préposé* did not exist between the corporation and its policemen.[16] Casault J. borrowed this reasoning from a host of American authorities and quoted Justice Bigelow in *Buttrick* v. *Lowell*[17] exactly as had done the dissenting judges in the *Doolan* case.[18] Those authorities were applicable because in both jurisdictions municipal institutions were seen as embodying delegations of sovereign power. He then proceeded to distinguish all former cases, including *Doolan,* by trying to show that in each one the municipal corporation had been held liable only because it has authorized or ratified the acts of its officers.[19] Furthermore, he held that the question had to be decided according to English and American law and not French civil law.[20]

The *Rousseau* case, as it will be seen, was a turning point of the case law on this matter. Borrowing the rule from another jurisdiction then justifying it because the matter should be regulated by English

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art. 1053 and 1054 C.C. held it liable for false arrest and illegal detention on a charge of forcible entry and burglary. *Levinson* v. *Cité de Montréal,* (1911) 39 C.S. 259. The court expressly stated that, although there had been ratification in the defence submitted by the city, it was not held liable for that reason but on the general principles expressed by art. 1053 and 1054 C.C. 39 C.S. 259 at 263. In 1866, in *Quebec* v. *Oliver,* 14 Q.L.R. 154, 15 R.L. 319 (Ct. App.) the City of Quebec was held not to be responsible for a false arrest on the grounds that policemen were appointed by and under the exclusive controls of commissionners appointed by law and could not be considered as being in the employ of the corporation as its servants or agents. This is an isolated case as the board of police commissioners was abolished in 1888 and the police force came under the direct control of the council of the City. S.Q. 51-52 Vict., C. 78 sect. 52.

15 (1888) 14 Q.L.R. 376, 12 L.N. 47, hereinafter referred to as the *Rousseau* case.

16 (1888) 14 Q.L.R. 378-379.

17 *Supra,* note 9.

18 *Supra,* note 10.

19 (1888) 14 Q.L.R. 381–383.

20 "On objecte que la question doit être décidée d'après le droit français et non d'après le droit anglais ou américain. Je dois d'abord dire que ce dernier n'est, sous ce rapport que l'adoption du droit anglais. Et je crois que la question en est une de droit public, les municipalités n'étant, comme déjà dit, que les délégués investis d'une partie des pouvoirs et des devoirs de l'autorité souveraine. Les rapports entre elles et les citoyens, pour la partie du gouvernement de l'état qui leur est confiée, pour l'observation et l'exécution des lois d'ordre public et de police, sont, par là-même, réglés et déterminés par le droit public. Et ce droit est, depuis la conquête, le droit anglais." (1888) 14 Q.L.R. 376, 383.

and American law, suggests the final form the law was to take. The rule, as expressed in *Buttrick* v. *Lowell*[21] which the Court quoted at length, is that it does not make any difference whether the acts complained of are done in an attempt to enforce an ordinance or by-law of the city or an act of the Legislature. Yet, in the end, the Court in the *Rousseau* case seems to say there might be a difference and implies that, had the policemen been enforcing a municipal ordinance, the city might have been liable:

> "Indépendamment de toute autre considération, revenant sur ce que j'ai déjà dit, que le service, pour lequel les agents de police sont, par une disposition statutaire expresse, nommés par la défenderesse, n'a pour elle aucun intérêt particulier, j'ajouterai qu'on ne peut certainement pas lui supposer un intérêt qui lui soit propre dans l'exécution et l'observation des lois publiques. Or les constables et les hommes de police, qu'elle est chargée de nommer, le sont, d'après le statut qui autorise leur nomination, pour veiller à l'observation de ces lois, aussi bien que des ordonnances du conseil municipal. S'ils pouvaient être ses préposés quant aux secondes, ils ne le seraient sûrement pas quant aux premières. Or, est-ce une loi générale que les deux agents de police ont voulu mettre à exécution, quand ils ont arrêté le demandeur, ou un règlement de la municipalité ? Leur acte n'était autorisé par aucun tel règlement, il ne l'était pas davantage par une loi ; et pourquoi supposerait-on que c'est plutôt l'un que l'autre que les deux agents de police ont voulu mettre à exécution, quand ils ont illégalement arrêté le demandeur ?" [22]

Four years later, in *McLeave* v. *Moncton*[23] the Supreme Court of Canada was confronted with the problem but, this time, the case arose in New Brunswick, a common law province. On appeal from the Supreme Court of New Brunswick which had set aside a verdict for the plaintiff in an action against the City of Moncton for unlawful entry and seizure by its policemen, the court ruled that "a police officer is not the agent of the municipal corporation which appoints him and if he is negligent in performing his duty as a guardian of the public peace, the corporation is not responsible." In delivering the unanimous opinion of the Court,[24] the Chief Justice expressly declared that the case ought not be binding in future decisions coming from the Province of Quebec because, unlike the rest of Canada, in Quebec the question had to be decided according to the *Civil Code*.

> "It must, however, be added, in order that there may in future be no misunderstanding as to the effect of this decision, that in respect

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21 *Supra*, note 9.

22 (1888) 14 Q.L.R. 376, 385. J. CASAULT'S distinguishing of precedent cases can also be faulted, thus, in the *Walker* case, *supra*, note 12 he saw ratification by the city in the fact that the constable had acted on the order of a sergeant. How can there be ratification of the acts of someone who is not the "préposé" of the corporation when he is receiving his orders from someone who is not "préposé" either?

23 (1902) 32 S.C.R. 106.

24 SIR HENRY STRONG C.J. and SEDGEWICK, GIROUARD, DAVIES and MILLS. The Court relied on *Buttrick* v. *Lowell*, (1861) 84 Mass. (Allen) 172, and Dillon *Municipal Corporations* (4e ed.) sect. 974.

> to torts, the law of Quebec may be quite different and that, therefore, the decision in this case ought not to bind this court in any cases of a similar nature occurring in the Province of Quebec. We have there to apply the common law as to torts as administered by the English courts solely, while in Quebec such matters are governed wholly by the provisions of the Civil Code." [25]

The warning given by Chief Justice Strong was not followed. The first Quebec case after the Supreme Court decision was *Tremblay* v. *City of Quebec.*[26] Andrews, who had been one of the three judges sitting in Review in the *Rousseau* case, saw no reason to disturb the judgment then given by Casault J.; in Quebec a municipal corporation was not responsible for the acts of its police officers, unless it had authorized or adopted such acts. At that time, cities seem to have been aware of the case law trend, and the action brought by the president of the Laval Association of Medical Students against the City of Quebec for "insulting and injurious language" addressed to him by one of its policemen while on duty was met by a blunt denial of responsibility on the part of the City. The evidence had established fault on the part of the policeman but Justice Andrews refused to hold the city liable. He considered the judgment in *McLeave* as conclusive. The reservation expressed by the Chief Justice was of no avail because nothing in the *Civil Code* stipulated whether a police constable was the *agent* of the municipal corporation appointing him. That question depended upon municipal organization and on the particular duty being performed by the constable. If such organization and such special duty did not make him in fact the agent of the corporation, nothing in the *Code* imposed liability on it.

Following the *Tremblay* case, the law was in a state of flux until 1922. First of all, in a number of decisions in which it was argued or taken for granted that the English and American law should be followed in this matter there was a subtle departure from the very rule that had been borrowed from the United States courts.

In *Huchette* v. *Cité de Montréal,*[27] Pagnuelo J. followed the *Rousseau* rule and held the corporation liable because, by pleading that the acts of its policemen were lawful and justified, it had assumed their responsibility for illegal arrest. The Court said that their duties were imposed by law and not by the municipality appointing them. For this reason the corporation could not be held liable not only when they were searching and arresting criminals or maintaining public peace, *but also when they were enforcing municipal by-laws.* In effect, the power to pass by-laws was given by the state and this authority gave them the same effects as if passed by the legislature; they are public laws of a local effect, with the object of insuring public peace and the protection of citizens. By enforcing those by-laws, police officers acted in their public quality and not as agents or servants of the city.[28]

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25 (1902) 32 S.C.R. 106, 111.

26 (1903) 7 C.C.C. 343, 23 C.S. 266, 12 R. de J. 171, (Sup. Ct.).

27 (1909) 37 C.S. 344.

28 *Ibid.* at 349.

In *Rey* v. *Cité de Montréal*,[29] De Lorimier J., speaking for the Court of Review, expressed the same view but added another element. The municipal constables, even if appointed by the municipality, received their powers under the criminal law as to their public functions. The *Criminal Code*,[30] in section 2(3)[31] specifically made them peace officers for the enforcement of all criminal laws and defined their powers and duties, especially those for arrest with or without warrant. This partial delegation of sovereign authority for the appointment of constables who by this very appointment became peace officers of the State for the enforcement of criminal laws was in conformity with English law and it became apparent that they could not be agents or servants of the municipality appointing them.[32]

Starting from the distinction borrowed from American municipal law between governmental and proprietary functions of municipal corporations, our courts then proceeded to make a further distinction between the duties of municipal police to enforce their own municipal regulations and, at the same time, the criminal law as enacted by the Federal Parliament. Thus, in 1911, in *Hughes* v. *Cité de Montréal*[33] Cross J., dissenting, expressed concern over this trend which was soon to be embodied in a judge-made rule:

> It is to be observed that municipal police have to perform duties of very different kinds, and the responsibility of the municipal corporation for their acts or omissions, varies correspondingly.
>
> Thus, on the one hand, it could not be successfully contended that a constable was so far the servant of the corporation that he could refuse to arrest a person found committing homicide or rob-

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29 (1910) 39 C.S. 151. In this interesting case, the plaintiff had received a bullet shot by a policeman, across a street, in the direction of a thief escaping arrest. A jury found for the plaintiff but the judgment was reserved for consideration by the Court of Review on the contention of the city that the members of the Montreal police force, engaged in work of that class, were not employees of the city for whose acts it could be held responsible. Delorimier, speaking for Charbonneau and Dunlop, followed the same pattern of reasoning as in the *Rousseau* case. The *Doolan* case was distinguished because the holding was said to be that the city was liable only upon ratification. The following cases, *supra*, note 12 were distinguished in the same manner. Not having ratified the acts of its policemen, the city could not be responsible.

30 [1906] R.S.C. ch. 146.

31 The English version is in sect. 2 (26) "peace officer includes [...] any police officer, police constable, bailiff, constable or other person employed for the preservation and maintenance of the public peace [...]."

32 (1910) 39 C.S. 151, 157-158.

33 (1911) 21 B.R. 32. In a suit against the City, plaintiff contended that the city was liable for bodily injuries suffered by his minor son when hit by fireworks during a political demonstration. No permit was secured for the demonstration but the city had sent policemen to keep peace. The majority held that the city was not liable having constributed nothing to the accident and also because policemen were then acting in a governmental function. Cross J., dissenting, said that, having known of a proposed demonstration the police inspector who was aware of it should have ascertained whether the organization committee had secured the required permit. As the evidence showed that there was negligent discharge of explosives in the handling of fireworks, the corporation had identified itself with this negligence by permitting the thing to be done by unlicensed and presumably incompetent persons.

> bery, on the ground that his employer had not instructed him to make the arrest. Municipal police are not the servants of the municipal corporation in respect of their acts which have relation to preservation of the peace or arrest for commission of crime.
>
> On the other hand, take the case of a constable who, in pretended execution of an ordinance respecting street-traffic, has laid hands upon a citizen, who stopped in the street to look at his watch, or to shake hands with his friend, on the ground that he would not "move on". To say, in such a case, that the municipal corporation could claim immunity from responsibility on the ground that the rule "respondeat superior" does not apply, because the constable had acted, not as its servant, but as the servant of the King, is to adopt a process of reasoning which does not commend itself to me.[34]

In the early twentieth century, like today, riots were not uncommon and a famous one occurred in Quebec City, in 1918, over the vital issue of conscription. As a result, the city had to call for army troops to restore order and a number of suits were initiated against the City of Quebec. One of them was for injuries sustained by citizens and allegedly made by unidentified soldiers during the repression of the riot.[35] Sir François Lemieux dismissed the case because, as municipal corporations could not be held liable for wrongful acts made by their constables while engaged in the repression of crimes against public order, *a fortiori* should it be so when the acts had been committed by militia men who had remained under their officers' command. In the course of his discussion of legal principles applicable he stated the rule in its definitive form: *in enforcing municipal ordinances and by-laws, municipal constables render the city liable for their wrongful acts but never in acting for or on the occasion of the repression of a public or statutory crime.*[36]

3. Plea for Reform : The *Chevalier* Case

In 1913, Belleau J. sitting in Review in *Chevalier* v. *Corporation de la Cité de Trois-Rivières*[37] attacked the rule which had been bor-

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34 (1911) 21 B.R. 32, 39-40.

35 *Blouin* v. *Cité de Québec,* (1919) 57 C.S. 207.

36 "Les corporations municipales n'ont pas telle mission, ni la juridiction de réprimer les crimes contre le droit commun ou ceux déclarés tels par le Parlement du Canada, ou encore les délits et infractions établis par la Législature [...].
[...] Les corporations municipales ont le pouvoir de mettre en vigueur leurs règlements, leurs ordonnances municipales et de contraindre le public à les respecter et à s'y soumettre en décrétant des peines et châtiments, amendes et emprisonnement et de recourir à la force constabulaire pour l'exécution de tels règlements et ordonnances qui n'ont dans tous les cas, qu'un caractère municipal. Et pareil cas les corporations peuvent être recherchées en dommages pour l'acte de leurs officiers ou constables spéciaux agissant relativement à des matières municipales, mais jamais par l'acte ou conduite de constables municipaux agissant pour ou à l'occasion de la répression d'un crime d'ordre public ou statutaire." (1919) 57 C.S. 207, 211-212. See also *Gratton* v. *Cité de Montréal,* (1917) 53 C.S. 259 (Ct. of Review) where the rule is implied.

37 (1913) 20 R. de J. 100, 43 C.S. 436 (Ct. of Review) *aff'g* 14 R.P. 235 (illegal arrest and detention).

rowed from American courts since the *Rousseau* case.[38] He first questioned the previous holding that English and American law should regulate the matter. Noting that this reliance on English law to determine the liability of municipal corporations had happened only in the case of certain municipal services having a public character such as police and fire protection, he came to the conclusion that there was no reason not to apply to municipal corporations, in the case of their policemen, the standard rules of liability as determined by the French civil law.[39] He proceeded to say there undoubtedly existed a master and servant relationship between the municipality and its constables. In extending their powers to be used in the public interest the state gave policemen broader functions and in exercising their powers they were delegates of the sovereign but one could not draw the conclusion that they were exclusively the servants of the state. If they have multiple functions, they represent the entity for which they are acting, and they render the state or the corporation liable depending upon the body for which they are acting.[40] He then argued that French law was different from English law on the matter.[41] At the end of his opinion, while admitting that municipal policeman migth and should be seen as agents of the State in some cases and that in those instances municipal corporations are not liable, he contested the application of the American and English rule of *absolute* non-liability. In his conclusion, he gave the test that should be applied:

> "En conclusion, je suis d'avis que les corporations municipales poursuivies en dommages pour l'acte de leur officiers de police doivent être tenues responsables, à moins qu'elles ne démontrent que leurs

38 In *Bourget* v. *City of Sherbrooke*, (1905) 27 C.S. 78 (false arrest) the *Rousseau* case was distinguished on the grounds that the City of Levis had a charter (S.Q. 36 Vict. c. 60) defining the duties and powers of its policemen. Thus, they were not agents of the corporation because it could not give them orders or instructions as to the manner of fulfilling the duties for which they were engaged. Their duties were described in detail in the charter. But the Charter of Sherbrooke (S.Q. 55-56 Vict. c. 51 sect. 66) merely provided that the city council could make by-laws for the good government, peace and welfare of the city and the duties and powers of the policemen and the manner in which they were to discharge their duties were defined in the by-laws of the city. Therefore, under its charter, policemen in the employ of the city of Sherbrooke were agents and servants of the city which appointed them. In *Lacombe* v. *City of Lachine*, (1916) 27 C.C.C. 313, 22 R.L. n.s. 528 (false arrest), although the city pleaded that the policemen at fault were not the agents of the corporation but acted merely as guardians of the public peace, the court held it responsible for the acts of the policemen " [...] who in these circumstances claimed to act, and did act, as agents of the said defendant for the maintenance of the public order which is within the jurisdiction of the defendant municipality;" 27 C.C.C. 313, 315.

39 43 C.S. 436, 441. The argument rests on article 356 (1) C.C. "Secular corporations are further divided into political and civil; those that are political are governed by the public law, and only fall within the control of the civil law in their relations, in certain respects, to individual members of society." See *infra* p. 436.

40 "Si leurs fonctions sont multiples, ils représentent celui dont ils remplissent les fonctions, et engagent la responsabilité de l'Etat, et de la corporation, suivant qu'ils agissent pour l'un ou pour l'autre." 43 C.S. 436, 442.

41 The contrary had been argued, particularly by CASAULT J. in the *Rousseau* case, *supra* note 15.

> officiers ont agi en dehors de leurs fonctions ordinaires, en dehors du service municipal pour lequel ils sont spécialement nommés, comme, par exemple, en exécution d'un mandat du Procureur Général ou de quelque autre mesure de sécurité générale." [42]

Despite judge Belleau's convincing demonstration that the liability of municipal corporations for police torts is not different from any other problem of civil liability and therefore should be decided in accordance with the principles given by the *Civil Code*, his efforts proved fruitless. His plea could not prevent the awkward rule which had emerged since the *Rousseau* case [43] from being accepted by the Court of Appeal and the Supreme Court of Canada.

4. Final Establishment of the New Rule

Cité de Montréal v. *Plante* [44] is usually considered as the leading case on the law of municipal liability for police torts in the Province of Quebec. It settled the question as to which law should regulate liability by holding that it should be regulated by English law. The case also confirmed the distinction already made between a "sergent de ville" enforcing municipal ordinances and by-laws and a "peace officer" protecting public order. There is no liability on the part of the city when a municipal policeman is acting in this latter capacity except when the city has ratified his actions. This could happen when a municipality permitted its constables to adopt an illegal and irregular conduct towards its citizens. The *Plante* case illustrated how the line was to be drawn.

A bailiff had gone to the plaintiff's home to sell household goods that were under seizure. Plaintiff, believing he owed no money, told the bailiff that he would not permit the sale and asked him to leave the premises. The bailiff then went to a police station and came back with two policemen. A battle ensued with sticks and bottles. The policemen received help from other constables and arrested plaintiff, his wife and two sons and sent them to jail. The following day they were charged with the criminal offence of assault on a peace officer when in the course of duty. On acquittal, the plaintiff sued the city in damages and the Superior Court upheld the action. The city appealed saying that its policemen had not acted with its authorization or for its benefit and that it had not approved their conduct.

All five judges of the Court of Appeal gave opinions in this case and they are different. Martin and Greenshields JJ. said that, as a general rule, the city is not liable when its constables are acting under the *Criminal Code* but the application or non application of the rule depends on the facts of the case. Here the city should be held liable because the policemen went there under orders received from their superior officer and accordingly they were considered constables under the

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[42] (1913) 43 C.S. 436, 448.

[43] *Supra* note 15.

[44] *Cité de Montréal* v. *Plante*, (1922) 34 B.R. 137.

control and employ of the city, not as peace officers acting on their own initiative. Dorion J., dissenting, held to the contrary. He said that there is no agency relationship between the municipal corporation and its policemen when they are acting as peace officers so appointed by law.[45] Tellier saw a tacit authorization on the part of the city in permitting its policemen to become involved in such extraordinary duties as helping bailiffs.[46]

Rivard J. first addressed himself to the question of which law should govern the case.[47] For him it seemed that the words "in certain respects" in article 356 (1) c.c.[48] had to be interpreted by way of the general law of corporations, that is, the public law. Even in this special case English doctrine and jurisprudence had to apply to municipalities.[49] Proceeding to explain the distinction between governmental and proprietary powers of the corporation, he said that while some of its officers exercise only one of these powers, police constables acted in both capacity.[50] From there he drew the distinction between the police officer as enforcer of municipal ordinances and by-laws, and the police officer as keeper of the peace and good order. The right inquiry was whether the city constables were acting under their powers as agents of the state or as *préposé* (agents) of the city. At that point, he departed from the

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45 " [...] Ils ont obéi aux ordres de leur supérieur, le sergent Witty, revêtu de ce commandement par la cité. Mais je ne crois pas que la hiérarchie établie par la cité dans le corps de police municipal, ait pour effet de la rendre responsable des actes discrétionnaires des constables simplement désignés par leur supérieur pour agir dans une circonstance où rien n'indiquait un acte illégal à commettre. Ils devaient se rendre sur les lieux, constater ce qu'ils avaient à faire et agir de leur propre autorité.
La ville ne peut pas, ne les ayant pas nommés pour cette fin, porter la responsabilité d'actes que la loi ajoute aux fonctions de ses constables." 34 B.R. 137, 144.

46 *Ibid.*, at 145, 146. For a similar case, see *Jalbert* v. *Cité de Montréal,* (1931) 37 R. de J. 95.

47 He compared the view taken by BELLEAU J. in *Chevalier* v. *Cité de Trois-Rivières, supra* note 37 and the test given there with the English and American rule and did not see much difference in their practical application because, even under the English rule, a municipal corporation would be liable for wrongful acts committed by one of its policemen in the execution of a duty of a local interest (" [...] dans l'exécution d'un devoir assorti au service particulier de la municipalité", 34 B.R. at 147). The principles laid out in *McLeave* v. *City of Moncton, supra,* note 23 should prevail in our courts... notwithstanding Justice STRONG's reserve. No mention was made of the *Doolan* case.

48 See *supra* note 39.

49 RIVARD J. borrowed this reasoning from CARROLL J. of the Court of Appeal in *Fafard* v. *City of Quebec,* (1917) 35 D.L.R. 661, 26 B.R. 139, *appeal dismissed,* 55 S.C.R. 615 which interpreted the words "in certain respects" in article 356 (1) C.C., *supra,* note 39 by referring to C. G. TIEDEMAN, *A Treatise on the Law of Municipal Corporations in the United States,* N.Y., Banks and Bros., 1897, n°· 324, p. 632, where the distinction is made between governmental and quasi-private duties of municipal corporations, 35 D.L.R. 661, 663-664. For a different interpretation of the same article 356 C.C. by the same judge *compare with Cité de Québec* v. *Conway,* (1921) 32 B.R. 242 at 246, *infra* note 138.

50 "Certains officiers des corporations municipales exercent des fonctions qui ne concernent que l'une de ces deux classes de pouvoirs; d'autres, comme les agents de police, sont engagés à la fois dans des fonctions d'intérêt général et dans des services d'utilité locale." (1922) 34 B.R. 137, 148.

position taken by Dorion and stated that whether acting as *municipal constables* or *peace officers* policemen were employees of the corporation, paid and controlled by it. When they were acting as peace officers and agents of the state the city was not liable, not because they ceased to be its employees, but because the corporation could not be more liable for those acts than the King could be. Here the constables and the city could not rely on the distinction because they were helping a bailiff to commit an unlawful act. Furthermore, there was sufficient proof of ratification by the city, especially in tolerating such a habit.

Ten years later, the Supreme Court of Canada approved the ruling in *Cité de Montréal* v. *Plante,*[51] in *Hébert* v. *Thetford Mines.*[52] Although this case is seen as a statement on the rule itself it is useful to analyse the facts and judgment of the Court. The appellant, a constable of the village of Asbestos, but employed and paid by a circus exhibiting in the village, fired upon a body of rioters and killed one of them. An action was brought against the appellant and the municipality in the interest of the widow and the children. The action was first dismissed against both defendants on the ground that the constable's act was justified, both under the criminal and civil law. That action was appealed, but only against the constable personally, who was held liable by the Court of Appeal, but finally exonerated of all civil liability by the Supreme Court.[53]

The policeman sued the respondent municipality for indemnity against loss sustained by him in defending the action brought against him. His action was met by a total inscription in law,[54] in which the city pleaded that the circumstances that were the bases of Hebert's action showed that he was acting under powers conferred upon him by criminal law, and in no way under the authority of the corporation. In the Superior Court the action was dismissed and the Court of Appeal upheld that judgment.[55]

The judgment of Rinfret, Lamont, Smith and Cannon JJ. was delivered by Rinfret. He did not question the rule arrived at in *Plante*[56] but mentioned it as being the law applicable:

> " [...] il serait inutile pour nous de tenter d'ajouter quoi que ce soit à ce qui a été dit par les juges de la Cour du Banc du Roi dans cette affaire de *Cité de Montréal* v. *Plante* où les principes qui doivent nous guider sont exposés d'une façon précise et complète." [57]

Since Hébert had maintained that he was acting as a peace officer to keep peace and order rather than as a municipal constable and having

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51 *Supra,* note 44.

52 *Hébert* v. *Thetford Mines,* [1932] S.C.R. 424, hereinafter referred to as the *Hébert* case.

53 [1931] S.C.R. 145.

54 *Id.* at 427, RINFRET J.

55 (1932) 52 B.R. 1. RIVARD J. simply referred to the *Plante* case, *supra* note 44 as to the law applicable to the case and said that, as there was no ratification alleged in the case, the city could not be held liable.

56 *Supra,* note 44.

57 [1932] S.C.R. 424, 430.

been discharged of all liability for that reason in the first action, he could not deny that position and try to avoid its consequences. But Justice Rinfret immediately added that, at any rate, if he should not be considered as having acted in his quality of officer of the State, he would not have rendered the municipality liable, but rather the circus company under the theory of *patron momentané* as applied in *Bain* v. *Central Vermont Ry.*[58]

Duff, agreeing with Rinfret added:

> "The appellant must fail, I think, because he was not the mandatory of the village. 1st: He was acting under the pay of the circus. 2nd: In any case, as constable, he was the minister of the law. In repelling the riot his duty was not to obey the municipality, or the officers of the municipality, but to act as the law prescribes. The principle is settled by numerous authorities to which it is unnecessary to refer."

This case should not be given the authority which it does not have. The Supreme Court merely approved the Quebec Court of Appeal's holding in *Montreal* v. *Plante*[59] and we have seen that the judges' individual opinions differed in many respects in the latter case. Even the approval of *Plante* can be seen as an alternate holding because it was also held that at the time of the riot Hébert was the employee of the circus. The Court did not face the issue of which law should rule on this matter; nor did it mention the *McLeave* case.[60] Moreover, it referred to the *Doolan* case[61] not as decided in the Court of Appeal but as decided in the Court of Review, where the holding was merely that a municipal corporation is liable when it has ratified the act of its constables.[62]

The question came again tot he Supreme Court of Canada in 1954 in *Roy* v. *Corp. of Thetford Mines and Doyon.*[63] Upon the complaint of a citizen, the appellant was arrested and detained without warrant by police officers of the municipality of Thetford Mines for alleged public indecency. Because he was suspected of being the author of certain obscene writings, a search was made of his house to find evidence. The search was unsuccessful. He was later charged with vagrancy and acquitted. The appellant then brought action in damages against the constable who had laid the charge and had applied for the search-warrant and also against the municipality on account of the acts of that constable and all others who had taken part in the events.

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58 (1921) 2 A.C. 412.

59 *Supra,* note 44.

60 *Supra,* note 23.

61 *Supra,* note 1.

62 Counsel for appellant cited *Doolan* v. *Corp. of Montreal,* (1868) 13 L.C.J. 71, which is the decision of the Court of Review. The Court said that there was no contradiction between that case and *Cité de Montréal* v. *Plante, supra* note 44 because both cases held that the city was liable when it had approved the acts of its policemen. If a contradiction between those two cases had to be found, the latter should prevail but there was no such contradiction. [1932] S.C.R. 424, 430–431. No mention was made of the *Doolan* case as decided by the Court of Appeal, (1871) 19 R.J.R.Q. 125; 18 L.C.J. 124. *Supra,* p. 411.

63 *Roy* v. *Corp. of Thetford Mines,* [1954] S.C.R. 395.

The action was dismissed by the trial judge. A majority of the Court of Appeal upheld the judgment on the grounds that the constable sued, Doyon, had acted prudently and had signed the warrants on orders from his chief. As for the municipality, although the chief of police was at fault, the city could not be held liable because the constable was acting as peace officer in the execution of functions added by law to his ordinary duties as employee of the corporation.[64] Roy appealed to the Supreme Court and after a first hearing there was another on the plaintiff's contention that, in the joint defence produced by the constable and the municipality, the latter ratified the acts of its officers by attempting to justify them.

The judgment was rendered by Fauteux J. The action against Doyon was dismissed. Turning then to the question of the liability of the corporation, he stated the rule as it stands now at the end of its evolution.

> "Les principes de droit touchant la question de la responsabilité des corporations municipales à raison des actes de leurs officiers de police sont précis. Généralement, et comme tout commettant ou mandant, une corporation municipale répond du dommage causé par la faute commise par ses préposés ou mandataires, alors qu'agissant dans l'exécution et limites des fonctions qu'elle-même leur a assignées. Aussi bien, engage la responsabilité de la corporation, l'acte fautif et dommageable que le policier municipal commet dans l'exécution et les limites de ces fonctions qu'elle-même lui donne et dont la principale est, évidemment, celle d'assumer l'observance des réglementations locales. Mais n'engage pas la responsabilité de la Corporation, l'acte fautif et dommageable que le policier municipal commet alors qu'agissant dans l'exécution et les limites de ces autres fonctions que l'Etat par les dispositions de la loi, *i.e.*, du *Code criminel*, lui attribue, en sa qualité d'agent de la paix, pour assurer l'observance de cette loi. Ainsi, préposé ou mandataires de différents commettants ou mandats, le policier municipal ne lie que le commettant ou le mandant dont il fait l'affaire ou pour le compte duquel il agit au moment où l'acte dommageable est causé." (*Hébert* v. *Cité de Thetford Mines*)
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> En l'espèce, il est certain qu'en procédant à cette détention de Roy sans mandat d'arrêt, en logeant contre lui l'accusation de vagabondage et en obtenant et exécutant un mandat de recherches à son domicile, tous ces officiers de police de la cité, participant dans chacun de ces événements, agissaient, non dans l'exécution et les limites des fonctions à eux données par la cité intimée, mais bien dans l'exécution et les limites de ce mandat légal, qu'au titre d'agents de la paix, ils ont reçu de l'Etat. De ce chef, la corporation intimée ne peut être responsable.[65]

Fauteux and Rinfret C.J. held that ratification could not be inferred from the mere fact that the corporation had assumed *arguendo* that if the constables had been its agents, they had not acted negligently. It was only an alternate defence, very common in Quebec practice, and by so arguing the corporation was acting prudently. Here again,

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64 [1951] B.R. 551.

65 [1954] S.C.R. 395 at 402, 403.

Doolan[66] was quoted, as decided in the Court of Review, not in the Court of Appeal, but this time it was distinguished: The Chief Justice said that in the *Hébert* case[67] the Court had only approved the rule as expressed in the *Plante* case.[68] Fauteux J. added:

> "(La présente cause) se distingue également de la cause de *Doolan* v. *Corporation of Montreal* [...] également mentionnée par cette cour dans *Hébert* v. *La cité de Thetford Mines* où le principe ci-dessus de la non-responsabilité des corporations municipales pour les actes commis par les sergents de ville en exécution du mandat qu'ils reçoivent de l'Etat, n'avait pas été plaidé et ou, de plus, on alléguait, ainsi qu'il appert aux raisons de M. le Juge Mackay, que les actes reprochés aux constables de la cité avaient été commis par les employés de la cité dans l'exécution du mandat qu'elle leur avait donné." [69]

Since those cases, the law on the subject is said to be settled in the Province of Quebec. The Quebec Court of Appeal has had occasions to apply it and, although it has used the rule to reach a decision whether a municipality should be held liable or not for the acts of its constables, the explanations given are not very clear.[70]

We have seen the historical evolution of the case law and the development of a judge-made rule of municipal liability for police torts in the Province of Quebec. This evolution culminated in the confirmation by the Supreme Court of Canada of the distinction between the municipal

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66 *Supra,* note 1.

67 *Supra,* note 52.

68 *Supra,* note 44.

69 [1954] S.C.R. 395, 404.

70 In *Cie Tricot Somerset* v. *Village de Plessisville,* [1957] B.R. 797, Justice PRATTE expressed the rule this way in holding the municipality not liable for failure of its policemen to end an illegal obstruction of plaintiff's property by its employees:

> "Certes, la responsabilité de la corporation municipale peut être engagée par les actes de ses constables, lorsque ceux-ci exercent une fonction proprement municipale. Mais en tant que gardiens de la paix publique, chargés de prévenir la commission des crimes, les constables de la municipalité ne tirent pas leur autorité du pouvoir qui les a nommés, mais de la qualité d'agent de la paix que l'Etat leur confère; et relativement à l'exercice de cette partie de leurs fonctions, ils ne sont pas les préposés de la corporation municipale, mais les représentants du Souverain. En conséquence, la corporation municipale, qui ne pourrait être tenue responsable de leurs actes, ne peut pas non plus être recherchée pour s'être abstenue de leur donner des ordres."
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> *Dame Fafard* v. *Cité de Québec,* (1917) 26 B.R. 139; *Cité de Montréal* v. *Plante,* (1932) 34 B.R. 137; *Fisher* v. *Oldham Corporation,* [1930] L.R. 2 K.B. 364; *Hébert* v. *Cité de Thetford Mines,* [1932] S.C.R. 424.

In *Cité de Lachine* v. *Dame Castonguay,* [1958] Qué. B.R. 497, the same Justice said:

> "Pour que la défenderesse doive répondre des fautes de ses agents, sous le droit commun, il faudrait que ceux-ci fussent ses préposés. Or, suivant une jurisprudence constante, les constables, dans l'exécution de leurs devoirs pour le maintien de la paix et du bon ordre, représentent l'Etat; ils ne sont pas les préposés de la corporation municipale qui les a choisis et qui les paie. Et dès lors que, dans l'espèce c'est à leur devoir de maintenir la paix et le bon ordre que les agents auraient manqué, leur faute n'a pas engagé la responsabilité de la défenderesse." [1958] Qué. B.R. 497 at 507.

policeman seen as "municipal constable" and the same policeman as "peace officer". We shall now try to find the legal justifications which the courts invoked in formulating the present rule. This, in turn, will permit us to test the legal soundness of the rule.

Part II

The Search for a Rationale

It is not easy to find, among all the body of case law a stable and definite explanation of the rule, as it evolved and as it is now. The starting point of this evolution is undoubtedly the idea that this matter should be regulated by English public law, as imposed at the time of the conquest. The main arguments are that municipal corporations, being public bodies, are regulated by the public law, which in Quebec is British public law,[71] and that article 356 cc. which says that, "in certain respects" they fall within the control of the civil law, should be interpreted according to English and American law.[72] From there on, the rule was borrowed where it was most readily available, in the United States courts, which had, after all, a similar system and where there was already a fair amount of certainty and opinion on the subject.[73]

1. The American Rule

Our courts, having borrowed the rule from American law, were not quite satisfied with it and they very soon brought about modifications in its substance.[74] The American rule rests on the distinction between governmental and propriatery functions. It states that police protection being a governmental function, the municipality cannot be held liable for acts of its policemen whether they be acting under a criminal statute or a municipal by-law. In exercising this function, the municipality is entitled to sovereign immunity.[75] The courts in Quebec did not see the

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71 *Rousseau* v. *Lévis, supra,* note 15; *Blouin* v. *Québec, supra,* note 35 at 211; F. P. WALTON, "The Scope and Interpretation of the Civil Code of Lower Canada", Montréal, Wilson & Lafleur, 1907, pp. 44–46.

72 *Supra,* note 49, also *Cie Tricot Somerset* v. *Plessisville,* [1957] B.R. 797 at 799.

73 *Rousseau* v. *Lévis,* (1888) 14 Q.L.R. 376 at 380 (cases and authorities cited).

74 See *supra,* p. 412.

75 W. L. PROSSER, *Law of Torts*, St-Paul, Minn., West Publishing Co., 1964, sect. 125 p. 1005; E. MCQUILLIN, *The Law of Municipal Corporations,* Chicago, Callaghan & Co., Vol. 16, sect. 59.79a, p. 330 foll; C. J. ANTIEAU, *Municipal Corporation Law,* Albany, N.J., Mathew Bender and Co., sect. 11.25, p. 98.73; Edwin M. BORCHARD, "Government Liability in Tort", (1924-25) 34 *Yale L. J.*, 129 at 131, 229 at 240; A. J. CASNER and E. FULLER, "Municipal Tort Liability in Operation", (1940-41) 54 *Harv. L. Rev.*, 437; M. S. SHAPO, "Municipal Liability for Police Torts", *U. Miami L. Rev.*, 475; C. F. DAKIN, "Municipal Immunity in Police Torts", (1967) 16 *Clev.-Mar. L. Rev.* 448; *McConnel* v. *St-Charles,* (1918) 204 S.W. 1075 (Mo); *Kingfisher* v. *Forsyth,* (1957) 132 Mont. 39, 314 P. (2d) 876.

enforcement of municipal regulations as a proprietary function and in fact, did not express the rule that way; while often starting the discussion with an argument paralleling the American distinction, they quickly shifted the emphasis to the dual role of the municipal policeman: peace officer, a duty imposed on him by the state but also, municipal constable enforcing local ordinances.[76] In the first instance, the courts said that there was no *lien de préposition* between the policeman and the corporation hiring and paying him,[77] while in the second case there was clearly one. Even today, when the constable is acting under a municipal by-law and, generally, when he is not acting as a "peace officer", the reasoning of our courts is based on our *Civil Code*, as if the municipal corporation were any other employer. Thus, when the policeman is not at fault,[78] or when he is not acting *dans l'exécution de ses fonctions*,[79] the municipal corporation cannot be held responsible. But when, in the scope of his duties as a municipal constable, he is at fault, the municipality is liable under art. 1053 and 1054 C.C.[80]

2. The British Rule

In holding that a constable acting as a peace officer is not the *préposé* of the municipality which hired him, our courts, save for rare exceptions,[81] have not used the British view of the legal status of the constable as expressed in *Enever* v. *the King*,[82] *Fisher* v. *Oldham*

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76 RIVARD J., in *Montreal* v. *Plante*, (1922) 34 B.R. 137 at 148; L. BAUDOIN, "Les aspects généraux du droit public dans la province de Québec", Paris, Dalloz, 1965, p. 370.

77 PRATTE J., in *Cité de Lachine* v. *Dame Castonguay*, [1958] B.R. 497, 507, *supra* note 70; *Gordon* v. *City of Montreal*, (1964) 50 D.L.R. (2d) 550, 564 (Ct. App.); *Riel* v. *Cité de Montréal et Bélec*, (1921) 32 B.R. 420; *Montréal et Archambeault* v. *Dame Mongeon*, (1920) 31 B.R. 526 at 532.

78 *Huneault* v. *Montréal*, (1938) 44 R. de J. 276; *Dansereau* v. *Montréal*, [1959] B.R. 892; *Lafontaine* v. *Montréal*, [1956] C.S. 275.

79 *Milton* v. *Côte Saint-Paul*, (1903) 24 C.S. 541, 10 R.L. n.s. 364; *Fournier* v. *Rivière-du-Loup*, (1937) 75 C.S. 460.

80 *Ouellet* v. *Québec*, (1939) 77 C.S. 130; *Prime* v. *Keiller, Rainville and Montreal*, [1943] R.L. 65; *Minogue* v. *Montréal*, [1945] R.L. 317; *Bazinet* v. *Saint-Hyacinthe*, [1947] C.S. 261; *D.* v. *Montreal*, [1947] R.L. 257; *Pelletier* v. *Rivière-du-Loup*, [1947] C.S. 344; *City of Sherbrooke* v. *Fortin*, [1960] B.R. 110, *appeal dismissed* in the Supreme Court of Canada, May 16, 1960, [1960] S.C.R. IX; *Cité de Saint-Michel et Bouthillette* v. *Dame Renaud*, [1960] B.R. 774; *Napper* v. *City of Sherbrooke*, [1968] S.C.R. 761, *rev'g*; [1968] B.R. 81; *Ville de Laval* v. *William D. Taylor*, [1970] C.A. 453; See also, *infra*, note 204.

81 See DORION (diss) in *Cité de Montréal* v. *Plante*, (1922) 34 B.R. 137 at 144; BOUFFARD (sitting ad hoc) in *St-Pierre* v. *Cité des Trois-Rivières*, (1935) 61 B.R. 439 at 441; *Morantz* v. *City of Montreal*, [1949] C.S. 101 at 105; in *Chaput* v. *Romain et al*, [1955] S.C.R. 834, KELLOCK J. rendering also the judgment of RAND J. relies on this theory to show that police officers, sued personally for entry and seizure without warrant made during an orderly religious meeting conducted by a minister of Jehovah's Witnesses in appellant's house, cannot rely on their superior's orders to justify their unlawful act (at 858) but TASCHEREAU J. speaking also for KERWIN and ESTEY, comes to the same conclusion using principles of civil law which should apply to the case (at 842). FAUTEUX and ABBOTT concurred with him.

82 (1906) 3 Comm. L.R. 364.

Corp.[83] and *Att. Gen. for New South Wales* v. *Perpetual Trustee Co.*[84] The British Courts have denied any master and servant relationship between the policeman and the local police authority and have asserted the independent character of his office; he is an officer whose "authority is original, not delegated, and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory rights independently of contract".[85] The Quebec courts on the other hand, clearly saw a *lien de préposition* between the police constable and the municipal corporation hiring him, at least with regard to some of his functions. What made them prone to decide that this relationship was to disappear with respect to functions of another category? The answer becomes evident after a study of the case-law. The existence of the *Criminal Code,* a federal statute, is at the root of the distinction. The courts' overriding concern with the *Criminal Code* tended to cloud their view of the problem, obscuring even the original distinction between proprietary and governmental powers. The fact that the *Criminal Code* is a federal statute became more important than the traditional British doctrine.

3. Influence of the Criminal Code

The *Criminal Code* was enacted in 1892[86] and as early as 1910, as we have seen in *Rey* v. *Cité de Montréal,*[87] our courts began to inject this argument into the discussion. The most compelling motive that the courts could put forward for the present distinction is the fact that on the one hand the constable is acting for the benefit of the city enforcing its own by-laws and ordinances and on the other hand, he is seen as acting for the benefit of the federal government, which, by the *Criminal Code,* gives him duties that are added to his ordinary duties as a municipal constable.

Evidence to support this interpretation comes from the fact that in all recent cases in which a municipality was sued by an individual having suffered damage from the act of a police constable, the real test was whether or not the policeman was acting under the *Criminal Code* or as a "peace officer" as defined by sect 2(3)[88] of the Code and when

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83 (1930) 2 K.B. 364.

84 [1955] A.C. 477 (P.C.).

85 Viscount SIMONDS in *A.G. for New South Wales* v. *Perpetual Trustee Co.,* [1955] A.C. 477 (P.C.) at 489-490. *See* Brian KEITH-LUCAS, "The Independence of Chief Constables", (1960) 38 *Public Administration,* (Pu. Ad.) 1; D. N. CHESTER, "Some Questions", (1960) 38 Pu. Ad. 11; G. MARSHALL, "Public Responsibility", (1960) 38 Pu. Ad. 213; *Royal Commission on the Police, Final Report,* Command Paper n°. 1728 at 22; C. A. CROSS, *Principles of Local Government Law,* 3rd ed., London, Sweet and Maxwell, 1966, p. 373; Bruce C. MCDONALD, "Use of Force by Police to Effect Lawful Arrest", (1966-67) 19 *Crim. L.Q.,* 435 at 457.

86 *The Criminal Code,* S.C. (1892) 55-56 Vict. C. 29. For a concise history see I. LAGARDE, *Droit pénal canadien,* Montréal, Wilson & Lafleur, 1962, p. 10.

87 *Supra,* note 29.

88 *Supra,* note 31.

this was ascertained [89] the outcome of the case was determined. In making this determination our courts can and do exercise some discretion.[90] A second support for the argument is that the Quebec courts have in fact held that the municipality is liable, not only when its constables have committed a fault while acting under its municipal by-laws, but also when they were acting under a provincial act having a penal character.[91] Thus, in 1954, in *Cité de Verdun* v. *O'Meara*[92] a lawyer sued the City of Verdun for a false arrest made by its constables under section 302 of the *Cities and Towns Act*.[93] They charged him with the offence of "personation" alleged to have been committed during a municipal election. Justice Marchand, rendering the opinion of the Court of Appeal, said:

> "La Cour supérieure a trouvé, avec raison, que l'arrestation du demandeur et la dénonciation faite devant la Cour du recorder, dans les circonstances recélées par la preuve, étaient de nature à lui causer de graves dommages et que la responsabilité de la Cité de Verdun est engagée, si les deux officiers agissaient alors comme les agents de la défenderesse.
>
> Sur ce point, la Cour supérieure a été d'avis qu'effectivement Martin et Priestly, à l'emploi de la Cité de Verdun, agissaient pour elle et on ne peut pas dire qu'ils étaient alors des représentants de l'Etat, ayant pour mission de protéger le public et de faire respecter la paix et l'ordre dans la cité.
>
> Le jugement qui condamne les trois défendeurs solidairement me paraît bien fondé." [94]

In *Constantineau* v. *La Cité de Jacques-Cartier*[95] a majority of the Court held the City liable in damages for the illegal and delictual acts of its "préposés" on the ground of indignities and ill-usage suffered by plaintiff at the hands of the said préposés when on the day of a municipal election he was deprived of his right to vote, arrested, imprisoned and finally released. The plaintiff was arrested under a warrant issued by the deputy returning officer on another charge (refusing to indentify oneself) under the same *Cities and Towns Act*.[96] Pratte J., dissenting, said that the returning officer was not a "préposé" of the defendant

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89 *Gagnon* v. *Québec*, [1951] R.P. 355; *Arseneault* v. *Cité de Jacques-Cartier*, [1958] C.S. 342; *Laporte* v. *Lavallée et la Ville de Saint-Laurent*, [1961] R.L. 492; *Perreault* v. *Montréal et Grand'maison*, [1965] R.L. 310; see also, *supra*, note 80.

90 See, *infra*, pp. 430 foll.

91 Section 92 (15) of the B.N.A. Act, 1867, 30-31 Vict. c. 3, provides that in each Province the Legislature may exclusively make Laws in relation to [...] (15). The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any matter coming within any of the Classes of Subjects enumerated in this Section. See *Toronto Ry.* v. *Toronto*, [1920] A.C. 446 (P.C.).

92 [1954] B.R. 671. Reported only in summary form. See *La Cité de Verdun et al* v. *A. John O'Meara*, n° 4552, Cour du Banc de la Reine (juridiction d'appel), district de Montréal, sept. 21, 1954.

93 R.S.Q. 1941 c. 233, now R.S.Q. 1964 c. 193.

94 *Supra*, note 92, notes du juge SAINT-JACQUES, pages 6 et 7.

95 [1968] B.R. 815.

96 *Supra*, note 93.

municipality but was an officer appointed by law whose powers and duties were determined solely by that law. Concerning the policemen who brought him to jail and kept him, he said that they only did their duty. They had to execute the warrant, and had to obey even against the will of the city council. If they had committed any fault, it was not as municipal constables but as peace officers and the city could not be held liable.[97]

Thus, it appears from these decisions of the Quebec Court of Appeal that the courts are willing to see a "lien de préposition" between the municipality and its policemen when they are acting not only under the municipality's by-laws and ordinances, but also when they are enforcing provincial penal laws and this further supports the interpretation of the case law as shifting towards a concept of *double commettant* (dual employer).

But there are more than inferences to support this interpretation, the Courts themselves have expressed the view which, we believe, is the result of this evolution.[98]

In *Montreal* v. *Plante*[99] Justice Rivard said:

> "[...] (l'agent de police) ne fait donc encourir la responsabilité de la municipalité que lorsqu'il agit comme sergent de ville pour l'exécution des lois des ordonnances et des règlements municipaux, lorsqu'il agit comme gardien de paix et du bon ordre, il est le préposé de l'Etat qui le reconnaît comme le délégué de la puissance souveraine et dans ce cas la corporation échappe à sa responsabilité parce qu'en nommant cet officier elle n'a été que le dépositaire de l'autorité de l'Etat." [100]

Justice Fauteux of the Supreme Court of Canada was even more explicit in *Roy* v. *Thetford Mines*[101] when he said:

> "[...] Ainsi, préposé ou mandataire de divers commettants ou mandants, le policier municipal ne lie que le commettant ou le mandant dont il fait l'affaire ou pour le compte duquel il agit au moment où l'acte dommageable est causé." [102]

Even those who advocated that this matter should be deal with in accordance with our *Civil Code* expressed the same idea of a *double commettant*.[103]

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97 [1968] B.R. 815 at 824-825.

98 H. IMMARIGEON, *La responsabilité extra-contractuelle de la Couronne au Canada"*, Montréal, Wilson & Lafleur, 1965, p. 221.

99 (1922) 34 B.R. 137.

100 *Id.* at 148.

101 [1954] S.C.R. 395.

102 *Id.* at 402. See also PRATTE J. in *Cie de Tricot Somerset* v. *Plessisville*, [1957] B.R. 797, 800; MONTPETIT J. in *Perreault* v. *Montréal et Grand'maison*, [1965] R.L. 310, 312-313.

103 H. PARENT, "Responsabilité des municipalités à raison des actes de leurs agents de police", (1928-29) 7 *R. du D.* 538.

> Par le fait de leur nomination, les constables ont, en outre des pouvoirs et des devoirs spéciaux beaucoup plus étendus. Le Code criminel les place,

So, it can be said that in the Province of Quebec the rule, even if borrowed partly from American and British jurisdictions, has had an evolution of its own in the case law and the fact that the *Criminal Code,* by sect. 2(3) makes a municipal constable a "peace officer" for the purposes of that act has had a considerable influence over that evolution.

As it is now, the law applicable to the liability of municipal corporations for "delits or quasi-delits" committed by their policemen is an original one which differs from both British and American law on this subject. The law in Quebec is also different from that of the other Canadian provinces.[104]

This very same conclusion was reached in 1948 by Justice Campbell of the Quebec Superior Court in *Morantz* v. *Montreal*[105] where he stated that the law should not be different in Quebec from the rest of Canada. According to him there was no logical justification for making any distinction between the enforcement of laws admittedly enacted for the general benefit of the public and the enforcement of the by-laws of a municipality adopted for the advantage and protection of the public in general. While the thought there might be circumstances where a

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en effet, dans la catégorie des "agents de la paix" avec toutes les conséquences qui en résultent [...]. Ces fonctionnaires, devenus "agents de la paix" cessent donc d'être les préposés de la municipalité qui les a choisis. Ils ont, dans l'exercice de leurs nouvelles attributions, un caractère d'une nature publique, tiré non plus du droit municipal ou civil, mais du droit public. Ils sont alors régis par une loi fédérale et deviennent des officiers de l'Etat. Il est évident que, s'employant au nom et pour le compte de ce dernier, c'est de lui qu'ils relèvent. Ils n'engagent plus leur commettant immédiat: la municipalité. Cette dernière n'a plus aucun contrôle sur eux. Prétendre que, dans les circonstances, une corporation municipale n'est pas responsable de ses gardes municipaux, ce n'est donc qu'affirmer un principe de droit civil. Et c'est en vertu du droit civil même qu'elle échappe à toute poursuite. Il n'y a pas lieu d'invoquer des privilèges et des exceptions, mais simplement de recourir à l'examen d'une question de fait, à l'aide de l'article 1054 du Code civil". (1928-29) 7 *R. du D.* 583, 585-586. For a discussion, see p. 61.

104 There is no liability on the part of the municipal corporation (except where waived by statute, see, *infra,* p. 69, for the acts of their policemen, whether acting by virtue of the Criminal Code or a municipal by-law. The law is a mixture of American and British principles, the courts sometimes relying on American cases and expressing the distinction between governmental and proprietary powers of municipal corporations as in *Bowles* v. *City of Winnipeg,* (1919) 45 D.L.R. 94 (Man.) where is was held that the City of Winnipeg was not liable for the negligence of a motor ambulance; more often invoking the English concept of the constable as an officer appointed to perform public duties of an executive character in the general administration of justice and using it to say that municipal policemen are not "employees" of the corporation and thus not subject to the jurisdiction of a Labour Relations Board as in *The Queen* v. *The Labour Relations Board, ex parte Fredericton,* (1955-56) 38 M.P.R. 26, (N.B.) at 39. See, generally: *Wishart* v. *Brandon,* (1887) 4 Man. R. 453; *Kelly* v. *Barton,* (1895) 26 O.R. 608, *aff'd* 22 O.A.R. 522; *Winterbottom* v. *Bd. of Comm'rs of Police of London,* (1901) 1 O.L.R. 549; *McLeave* v. *Moncton,* (1902) 32 S.C.R. 106, *aff'g* 35 N.B.R. 296; *Woodeforde* v. *Chatham,* (1904) 37 N.B.R. 21; *Nettleton* v. *Prescott,* (1907) 16 O.L.R. 538, *aff'd* 21 O.L.R. 561 (Ct. App.); *Waters* v. *Toronto,* (1913) 25 O.W.R. 173; *Gibney* v. *Yorkton,* (1915) 31 W.L.R. 523 (Sask.); *Pon Yin* v. *City of Edmonton,* (1915) 24 C.C.R. 327 (Alta.); *Beaudoin* v. *Halland McCarthy,* (1930) 38 O.W.N. 262 (H.C.J.); *Brutton* v. *Regina City Policemen Ass'n,* (1945) 3 D.L.R. 437 (Sask.); *Rex* v. *Labour Relation Bd. of N.S.,* (1951) 29 M.P.R. 66; *Myers* v. *Hoffman,* [1955] O.R. 965 at 971-973; I. M. ROGERS, *The Law of Canadian Municipal Corporations,* Toronto, Carswell, (1959), Vol. 2, sect. 209.4, p. 1043.

105 [1949] C.S. 101.

constable paid by a municipality would be its employee so as to render it liable under 1054 C.C. No such circumstances existed in the case and it was not useful to consider whether the policeman was seeking to enforce a municipal by-law or a particular article of the *Criminal Code,* or merely to enforce the law in general. In either case he was a peace officer charged with the duties imposed upon him by law. The acts or omissions of the peace officer in the discharge of these duties do not render the City liable save perhaps in the case of express authorization or subsequent ratification.[106]

Part III

Criticism of the Present Rule

1. The Rule Rests on an Artificial and Arbitrary Distinction

There is no doubt in our opinion that the present rule, resting on the distinction between a policeman acting as a peace officer seeking to enforce the *Criminal Code* and the same policeman acting as a municipal constable, seeking to enforce a municipal by-law seems to afford some certainty but is not satisfactory because the distinction is a tenuous one and our courts have felt themselves *à l'étroit* in its confines. It is easy to find "border line" cases where our judges have tried to avoid the hardship that might have resulted from a finding that the policeman was acting as a peace officer. Perhaps the best example can be found in *Carrière* v. *Cité de Longueuil.*[107] Two policemen were patrolling the streets in a police car around midnight when they saw a car with no lights on going through a stop light at an excessive rate of speed. A chase ensued in which one of occupants was shot by the policemen.

The parents of the youth sued the policemen who killed their son and also the city, arguing that at the time of the fatal shooting they were acting in the performance of their duties as police officers in the employ of the municipality. The policemen pleaded that when they saw the car they realized that the suspects were either car thieves or thieves fleeing after a burglary and that they were justified in acting as they did. The City, in a separate defence, first adopted the defendants' argument that the car was stolen and required forceful pursuit. According

106 Judge CAMPBELL'S opinion is only a *dictum,* because, on the facts of the case, he held that the plaintiff had not proved his case that he had been struck with a riding crop by the policeman who, he also held, was acting as a peace officer under the Criminal Code. He discussed the liability of the City because he thought it desirable to do so in case "this litigation should find its way into a higher court". [1949] C.S. 101 at 103. His view as to the law that should apply to such a case was not followed by the "higher courts". See, [1954] S.C.R. 395; [1957] B.R. 797; [1958] B.R. 497.

107 [1957] C.S. 143 *aff'd mem.* [1957] B.R. 341.

to the judgment, the city also pleaded that its own traffic regulations had been breached. Then in its defence the city added a paragraph to the effect that, at the time of the accident, the policemen were acting as peace officers and that it could not be responsible for their acts, not having approved or ratified them.

But the judge refused to see the facts this way. Those facts were proven to be true. He argued that the young men had attempted to steal more than one car that night and had finally succeeded. Their conduct was obviously criminal. But he held that these facts were known to the policemen only after the accident. The car theft was reported hours after its commission. When they first saw the car all the policemen knew was that a city traffic regulation had been violated. As he saw it, the policeman thus used excessive violence given the infraction [108] and the judge even said that after having stopped the car, instead of chasing the youth, they could have found the owner and made an inquiry as there had only been a breach of a municipal by-law. So the city was liable because the policemen were then its "préposés" and acting within the scope of their duties as such.[109] The Court also held that by pleading that its by-laws had been breached, it justified and approved the acts of its agents. At any rate, there was enough evidence that the policemen were then acting under the city ordinances.

The inequity of the rule is apparent if we contrast this case with the decision in *Beim* v. *Goyer*.[110] Two policemen were in a vehicle proceeding on Wilderton Street in the City of Montreal. They had with them a list of licence numbers of cars reported stolen. Approaching the intersection with a one-way street they observed a car proceeding in the wrong direction. Young Beim, the driver of the car, who was then fourteen years of age, effected a U-turn on seeing the policemen. The police officers were able to note the licence number of the car and realized that it was one of the automobiles reported stolen. After a wild chase one of the policemen shot Beim, allegedly by accident.

The trial judge, in accordance with the jury verdict, maintained the action as against Goyer but dismissed the action against the city. On appeal the dismissal of the action against the city was confirmed [111] but Goyer's appeal was maintained and the action against him dismissed.

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108 "Le tribunal ne peut accepter ni consacrer le principe que les violateurs des règlements de circulation peuvent être l'objet de telles représailles, même s'ils s'enfuient. Mieux vaut, pour une municipalité, perdre le bénéfice d'une amende que de tuer les gens. La jurisprudence est constante à l'effet que, même dans les cas d'arrestations ou de fuite des criminels, les agens de la paix et toute personne requise de les assister, doivent agir avec mesure et modération et n'employer que la force et les moyens nécessités par les circonstances". [1957] C.S. 143 at 1477.

109 *See* James BRIERLY, "Case and Comment — Municipality — Police Officers — Responsibility for Damage Caused while on duty", (1957-58) 4 *McGill L. J.* 84.

110 *Beim* v. *Goyer,* [1965] S.C.R. 638 *rev'g* (1964) 5 D.L.R. (2d) 550; [1964] B.R. 558, *sub nomine Gordon* v. *Goyer* and *Gordon* v. *Montreal.* See R. LECLERC, "Case and Comment — Beim v. Goyer", (1967) 13 *McGill L. J.* 516. This aspect of the case is not discussed by the author.

111 *Sub nomine Gordon* v. *City of Montreal,* (1964) 50 D.L.R. (2d) 550, 564.

Beim appealed to the Supreme Court from the judgment of the Court of Appeal dismissing his action against the policeman but there was no appeal as to the dismissal of the action against the city which had been confirmed by the Court of Appeal. The Supreme Court by a majority judgment (6–3) restored the judgment at trial finding Goyer at fault for carrying a revolver with finger on the trigger while running in a rough, rocky terrain after having fallen a number of times.

In the Court of Appeal, Rinfret J. said:

> "From the record it is clear that the respondent Goyer [...] was chasing Ralph Beim for car theft, and not for the infraction of a traffic regulation; consequently he was acting as a peace officer and not as a constable for the City of Montreal, so that responsibility on the part of the city did not arise." [112]

If we assume, for a moment, that, in the *Carrière* case, the policemen had known that Carrière had committed a theft, there is no doubt that the court would have found the policemen equally at fault, because they actually shot in his direction while for the same offence the Supreme Court held Goyer liable for a purely accidental shot. The cases are strikingly similar — in both instances there had been a criminal offence followed by a traffic violation and a chase. But, in the end, what distinguishes them as far as the liability of the city is concerned is that in the *Beim* case the policemen were able to take cognizance of the criminal offence after they had noticed the traffic violation and could therefore "transform" themselves from municipal constables into peace officers thereby depriving Beim of his recourse against the city. At the same time Goyer found himself alone with $32,036.80 and costs to pay.

Such a reasoning was pushed even further in the recent case of *La Fonderie Binette Inc.* v. *La Ville de Victoriaville* [112a] in which the same pursuit by two municipal policemen was separated in two distinct parts. By going through a stop light and refusing to stop when requested to do so by the policemen the Court held that the driver of plaintiff's car was violating a municipal by-law but by swerving from left to right at 70 m.p.h. on the main street and accelerating up to 115 m.p.h. on the highway the driver then committed a criminal infraction. Therefore, when the policemen shot at the car to stop it they were no longer acting as municipal constables but rather as peace officers. Hence the town could not be held liable for the damage they had done to the car because, at some point during the pursuit, they had ceased to be its servants to become peace officers. [112b]

Situations such as these show that in the end the distinction underlying the present rule is both tenuous and artificial. The situation is further complicated by the fact that sometimes there is a possible duplication of offences under the *Criminal Code* on the one hand, and provincial penal provisions and municipal by-laws on the other. Thus the

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[112] *Id.* at 564.

[112a] [1970] R.L. 80.

[112b] *Id.* at 83-84.

result as to the liability of the corporation might be different, simply because the information was laid under the *Criminal Code*, the provincial statute or the municipal by-law.[113] Sometimes our courts have stretched the municipal duties of constables so as to give recourse to the victim against the municipality.[114] In a surprising turnabout two Quebec lower courts seem to have disregarded the established rule and refused to exonerate the municipality even if the policemen were apparently acting as enforcers of the *Criminal Code*.[115]

2. No Liability on the Part of the Crown in Right of Canada

At this point the question to be asked is whether there is liability on the part of the Crown in right of Canada when the municipal policeman is acting as a peace officer seeking to enforce the *Criminal Code*. As we have seen before, our courts have implied that when acting as peace officers under sect. 2(3) of the *Criminal Code*,[116] municipal policemen were the "préposés", "représentants" or "employés" of the Crown. If they are found to be at fault while acting in that capacity, could the victim have a recourse against the Crown in hight of Canada?

The liability of the Federal Crown is determined by section 3 of the *Crown Liability Act* of 1953[117] which provides in part:

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113 In *Verdun* v. *O'Meara, supra,* p. 427 and note 92 and *Constantineau* v. *Jacques Cartier, supra,* note 95. Quere what would have been the result if, instead of an information on a charge of personation under s. 302 of the Cities and Towns Act. *Supra,* note 93, the information had been one under sect. 346 of the Criminal Code? What would have been the result in *Prime* v. *Keiller, Rainville* and *Montreal,* [1943] R.L. 65 and *D.* v. *Montreal,* [1947] R.L. 257, if the false arrests had been made not under the city's loitering by-law but under art. 160, 162 or 164 of the Criminal Code?

114 *Campeau* v. *Montréal,* (1921) 60 C.S. 233. (Furniture destroyed by policemen during a raid on a gambling house) critized by PARENT, *supra,* note 103 at 587; *Montréal* v. *Archambeault et Mongeon,* (1921) 31 B.R. 526. (Policeman not acting as peace officer but as "préposé" of the city in laying an information that plaintiff was the keeper of a bawdy-house and in writing a letter of notification under art. 228 a) sec. 2, (now art. 182) of the Criminal Code); *Brault* v. *Montréal,* [1944] C.S. 185. (Illegal arrest by constable apparently directing traffic, for obstructing a peace officer in the execution of his duties (Cr. C. art. 110 (1)). Court held that he was acting as a municipal constable) but cf. *R.* v. *Gilbert,* [1969] R.L. 232. (Constable directing traffic is peace officer in the meaning of art. 110 (1) Cr. C.); *Comtois* v. *Montréal,* [1954] C.S. 416. (Policeman held to be a municipal constable so as to render the city liable for his negligence in driving a car belonging to the city even if he was driving an informer from whom he obtained information to be used in the discharge of his duty as a member of the morality squad); *Lavoie* v. *Rivière-du-Loup,* [1955] C.S. 452. (Violent expulsion of pregnant woman from municipal arena. Policeman said to be acting as municipal constable to protect the interests of the city in the collection of an amusement tax).

115 *Procureur général du Canada* v. *Cité de Hull,* [1948] C.S. 235. (Excessive force used by municipal policeman in arresting a soldier); *Sawyer* v. *Poupart et Montréal,* [1953] C.S. 232. ("Third degree methods" used by municipal policemen to obtain a confession from a suspect arrested following a robbery. The Court, refusing to follow the *Morantz* case, *supra,* note 105, relied on 1054 C.C. and on *Procureur général du Canada* v. *Hull.*

116 *Supra,* note 31.

117 S.C. 1952-53, 1-2 El. 2 c. 30.

> "3(1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable. (a) in respect of a tort committed by a servant of the Crown [...]"

The act also provides that "servant" includes an agent and that, in respect of any matter arising in the Province of Quebec, "tort" means delict or quasi-delict.[118] To give rise to a cause of action against the Crown, the act of the servant complained of must give rise to a cause of action against the individual public servant or his personal representative.[119]

A person may be made to be an agent of the Crown by way of statute as it is the case for the Royal Canadian Mounted Police.[120] Thus an R.C.M.P. officer, whether acting under the *Criminal Code*, a provincial act or a municipal by-law can render the Crown liable for his wrongful acts. There is nothing in the *Criminal Code* or elsewhere in the Acts of Parliament which makes a municipal or provincial policeman an agent of the Crown.

In the absence of any statutory authority, the master and servant relationship between the Crown and its employees has to be determined according to the law of Quebec because Canadian Courts have long held that the liability of the Crown is to be determined according to the "... law of any province of Canada which would have been appropriate for the decision of a particular claim in respect of a tort or delict if it had arisen between subjects of the Crown."[121]

According to Quebec civil law the existence of a "lien de préposition" rests upon the power of a "commettant" to choose his "préposé" and to give him orders or instructions as to the way in which he performs his duties.[122]

If we apply these criteria to the relationship existing between the Federal Crown and municipal or provincial policemen, it is easy to see that they are not applicable. Even if by virtue of section 2(3) of the *Criminal Code*,[123] municipal or provincial constables are made peace officers, the Crown in right of Canada has no role to play in their appointment; they are chosen and appointed by the municipality or the Provincial Government. Furthermore, the Federal Government has no control whatsoever over them as to the manner in which they are to per-

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118 Sect. 2 (d).

119 Sect. 4 (2).

120 "For the purpose of determining liability in any action or other proceeding by or against Her Majesty, a person who was at any time a member of the force shall be deemed to have been at such time a servant of the Crown." Royal Canadian Mounted Police Act. S.C. 1959, 7-8 El. 2 c. 54 sect. 53.

121 Chief Justice STRONG in *City of Quebec* v. *The Queen*, (1894) 24 S.C.R. 420 at 430. See also House of Commons Debates, (1952-53) Vol. IV, pp. 3327–3330. For a general discussion on this question, see IMMARIGEON, *op. cit. supra*, n. 98 at 69-70.

122 *Bain* v. *Central Vermont Ry.*, (1919) 58 S.C.R. 131; André NADEAU, "La responsabilité civile délictuelle et quasi-délictuelle", in G. TRUDEL ed. *Traité de droit civil*, Montréal, Wilson & Lafleur, 1949, Vol. 8, p. 346.

123 *Supra*, note 31.

form their duties, even as enforcers of the *Criminal Code*. As we will see later, except in cases of riot the *Criminal Code* merely empowers them to act as peace officers and to enforce its provisions. This duty it is submitted is imposed upon them by the *Provincial Police Act*.[124] The duties imposed by the *Criminal Code* cannot be seen as the power of the Federal Crown to give them specific orders and directions as to the way in which they should perform those duties.

Thus when a municipal or provincial police officer is acting under the *Criminal Code*, he cannot be seen as being an agent or servant of the Crown so as to come under the ambit of the *Crown Liability Act* of 1953. Hence, in such cases, there would be no liability on the part of the Crown in right of Canada. This conclusion is empirically supported by the fact that the Canadian Department of Justice could not find in its files any example of a claim against the Federal Crown by a person having suffered damage from the faulty act of a provincial or municipal policeman acting as a peace officer under the *Criminal Code*.[125]

So, at the present time, apart from the special circumstances concerning R.C.M.P. officers, there is no liability on the part of the Crown in right of Canada for wrongful acts committed by a municipal policeman when acting as a peace officer seeking to enforce the *Criminal Code*. If and when the acts are subsequently ratified by the municipality the latter may be held liable and since *Roy* v. *Thetford Mines*[126] such ratification is likely to be rare.[127]

3. Liability Should Be Decided in Accordance with the Civil Code

While we may agree with judge Campbell in *Morantz* v. *Montreal*[128] that there is no reason to make a distinction between policemen acting as municipal constables and the same policemen acting as peace officers, we think that the law should go forward and not backward in this field. There is no reason why the city should not be held liable at all times. Not only is this solution a more equitable one but also it is the only one

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124 See *infra*, p. 442.

125 "Après recherches dans nos dossiers, il ne semble pas qu'une action ait été intentée contre la Couronne fédérale à la suite d'un acte fautif causé par un policier provincial municipal mais agissant comme agent de la paix, c'est-à-dire sous l'autorité du Code criminel. Il est par ailleurs possible de douter qu'une telle action puisse être fondée en droit, pour autant que la Couronne fédérale est concernée."

Letter from M[e] Paul Coderre, c.r., directeur, Division du droit civil, Department of Justice, Government of Canada, to the author, March 6, 1970.

126 [1954] S.C.R. 395.

127 There is a tacit ratification when the city has tolerated that its policemen engage in practices that are illegal or foreign to their normal duties; *Montreal* v. *Plante*, (1922) 34 B.R. 137, *supra*, p. 418; *Jalbert* v. *Montreal*, (1931) 37 R. de J. 95. In *Carrière* v. *Longueuil*, [1957] C.S. 143 at 147, judge TELLIER probably went too far when he said that, by invoking violation of its own by-laws, the city ratified the acts of its policemen.

128 *Supra*, note 105.

in accordance with the law which should regulate this matter, that is, the *Civil Code* and municipal laws.

The *Doolan* case[129] had been distinguished on the ground that the *ratio decidendi* was not that this matter should be decided in accordance with our civil law but rather that a municipality is liable when it has ratified the acts of its policemen. Even after the *Rousseau* case,[130] *Doolan* was cited as an authority supporting the view that rights of individuals against municipal corporations had to be determined according to our civil law. Thus in 1901 Justice Cimon of the Court of Appeals wrote:

> "Il y a longtemps qu'il a été décidé que les droits des individus contre les corporations municipales sont établis et régis dans cette province, par notre droit civil français, et c'est là notre jurisprudence constante depuis la cause de la *Corporation de Montréal* v. *Doolan*." [131]

In *Chevalier* v. *Trois-Rivières,*[132] Justice Belleau also relied on the *Doolan* case to show that this matter should be decided according to civil law principles.[133] So it should not be forgotten that the very first case decided by the Quebec Court of Appeals on this subject was decided according to the civil law and that only later was the case distinguished without being specifically overruled. The real holding of the case was forgotten.[134]

Another argument for the application of the civil law rests on the wording of art. 356 C.C.[135] which has been interpreted in the light of the common law by some of our judges.[136] This argument was made as early as in 1871 in *Brown* v. *Corporation de Montréal*[137] and has been repeated many times since.[138] Under art. 352 C.C. every corporation

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129 *Supra,* note 1.

130 *Supra,* note 15.

131 *Cité de Québec* v. *Mahoney,* (1901) 10 B.R. 378 at 408.

132 *Supra,* note 37.

133 "La première cause qui paraît s'être offerte à l'attention de notre Cour d'Appel est celle de *Doolan* v. *La Cité de Montréal,* 18 L.C.J. 124. La majorité de la Cour d'Appel y a décidé que la responsabilité de la corporation pour l'acte de ses constables devait être déterminée par le droit civil français [...]. La corporation avait défendu l'acte de son constable, mais les opinions suscitées indiquent clairement que le principe de la responsabilité des corporations, d'après le droit civil français, était soutenu indépendamment de cette circonstance." (1913) 43 C.S. 436 at 440. *See also Parker* v. *La Corporation du Canton de Hatley,* (1908) 32 C.S. 520, at 521-522.

134 See *supra,* p. 411.

135 *Supra,* note 39.

136 Justice RIVARD in *Montreal* v. *Plante,* (1922) 34 B.R. 137 at 147; *Fafard* v. *Québec,* (1917) 35 D.L.R. 661, 26 B.R. 139, *appeal dismissed,* (1917) 55 S.C.R. 615, *supra,* note 49.

137 (1871) 23 R.J.R.Q. 69. Municipal corporation held liable for injurious resolution passed by its council criticising the conduct of commissionners in expropriation proceedings.

138 *Quebec* v. *Mahoney, supra,* note 131; *Chevalier* v. *Trois-Rivières,* (1913) 43 C.S. 436 at 441; H. PARENT, *supra,* note 103 at 587; G. TRUDEL, *Traité de droit civil du Québec,* Montréal, Wilson & Lafleur, 1952, Vol. 2, p. 464:

> "La personnalité corporative se distingue d'abord de la personne humaine en ce qu'elle peut être politique. Sous cet aspect, qu'elle se dénomme l'Etat,

legally constituted is said to be an artificial person and art. 17(11) provides that the word "person" in the *Civil Code* includes bodies politic and corporate. According to article 356 C.C., even if municipal corporations are political corporations governed by the public law they fall in certain respects within the control of the civil law in their relations with individuals. Hence they are subjects to article 1053 C.C. which sets out that "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill." This liability should therefore be decided in accordance with article 1054 which stipulates in the last paragraph that "Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed."

It was sometimes said, as in *Montréal* v. *Plante* [139] that when policemen are acting as peace officers, the municipality could not be held more liable for their acts than the King himself. [140] Apart from the fact that on the federal and provincial levels the rule of immunity has been waived, it was never contended that the maxim *The King can do no wrong* has applied or should apply to municipal corporations [141] and there is no valid reason why a municipal corporation should benefit from it in the very particular case of a municipal policeman acting as a peace officer under the *Criminal Code*.

Similarly, the distinction between governmental and proprietary functions of municipal corporations can be said to be non existent in Quebec, as far as vicarious liability of the corporation for acts of its em-

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la province, la cité, le village, elle est d'abord régie par le droit public. Surtout dans sa création et dans l'exercice de ses pouvoirs législatifs, judiciaires, administratifs, elle se place au-dessus des individus et se trouve en marge du droit civil. Nos lois publiques d'inspiration anglaise, seront alors les règles uniques et les seules mesures de ses pouvoirs. Dans l'exercice de certaines activités les corporations publiques auront des rapports civils avec des individus: contrat, faits dommageables, faute, négligence, etc. Dès qu'elles posent un acte de cette nature elles deviennent soumises au droit civil. Ce droit seul, avec ses compléments tirés de l'ancien droit français, devient dès lors la seule norme de la responsabilité des corporations publiques. Chacun sait l'application quotidienne de ce principe dans les jugements condamnant les villes à indemniser les victimes de la faute commise en négligeant l'entretien des trottoirs [...]. C'est un simple aspect de la chose: G. TRUDEL, *op. cit.* at 464-465; H. IMMARIGEON, "La responsabilité de la puissance publique", in R. P. BARBE, ed. *Droit administratif canadien et québécois*, Ottawa, Editions de l'Université d'Ottawa, 1969, p. 670. The inconsistency of the other view is evident when we find that, one year before the *Plante* case, M^r^ Justice RIVARD himself held that, even if the City of Quebec had no special provision in its charter rendering it liable for damages resulting from neglect in the maintenance of streets under its control, it was nevertheless liable because all municipal corporations are subject to the ordinary provisions of the civil law in their relations with individuals! *Cité de Québec* v. *Conway*, (1926) 32 B.R. 242 at 246. (Citing *Québec* v. *Mahoney*, *supra*, note 131). H. Carl GOLDENBERG, "The Law of Delicts", Montréal, Wilson & Lafleur, 1935, p. 83.

139 34 B.R. 137 at 144 (Justice RIVARD), *supra*, p. 419.

140 A similar idea seems to be expressed by Justice PRATTE in *Tricot Somerset* v. *Plessisville*, [1957] B.R. 797 at 799.

141 *Levinson* v. *City of Montreal*, (1911) 39 C.S. 259 at 262; G. V. V. NICHOLLS, "The Responsibility for Offences and Quasi-offences under the Law of Quebec", Toronto, Carswell, 1938, p. 72.

ployees is concerned.[142] In *Chevalier* v. *Trois-Rivières*[143] Justice Belleau mentioned that in Quebec this concept borrowed from American law had been used in the case of policemen and firemen. Even for firemen, the idea that because fire protection is a governmental function, a municipal corporation cannot be held responsible for their faults while on duty has been discarded. In the Province of Quebec, municipal corporations are liable for wrongful acts committed by their firemen[144] and, even when they are exonerated from liability, our courts rely on civil law concepts rather than on the distinction between governmental and proprietary functions of local governments.[145] A municipal corporation can also be held liable for the failure of a doctor in the employ of the City Health Clinic to exercise the required degree of care in vaccinating a young child.[146]

Even in the case of policemen our courts have shifted emphasis from the American distinction to a notion of *double commettant* resulting from their reliance on duties imposed by the *Criminal Code*.

In fact, since the *Brown* case,[147] it is generally admitted by all authors in the Province of Quebec, that the liability of municipal corporations is to be determined in accordance with our civil law as enacted by the *Civil Code* of 1866, unless the *Municipal Code* of 1916 or the *Cities and Towns Act* or a special charter added special substantive or procedural rules. If there is nothing in the specific legislation applying to the municipality or if special dispositions do not cover the problem, one has to turn to civil law.[148]

As for the vicarious liability of municipal corporations, the *Municipal Code* provides that:

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142 The distinction can be found in some old cases dealing with liability of municipal corporations for damage caused during riots. *See Drolet* v. *Montréal,* (1851) 1 L.C.R. 408; *Darmet* v. *Montréal,* (1939) 67 B.R. 69 *aff'g* (1938) 76 C.S. 251; *contra, Gendron* v. *Sorel,* (1938) 76 C.S. 508; *Simard* v. *Sorel* unreported case, February 6, 1939. But in *Cité de Lachine* v. *Castonguay et Letellier,* [1958] B.R. 497 at 508 Justice PRATTE said that this question is still open. See also dictum of Justice RINFRET, in *Dame Cyr* v. *Montréal,* (1924) 62 C.S. 123 at 127-128. For a most complete study see P. KENNIFF, "L'ordre et la protection du public; à qui revient la responsabilité pour des dommages causés par des émeutiers?", *infra,* p. 464.

143 *Supra,* note 37.

144 *Dame Côté* v. *Cité de Québec,* (1928) 67 C.S. 409. (Theft and damages by firemen while fighting a fire); *Lanctôt* v. *Décarie et Paroisse Notre-Dame-du-Sacré-Cœur,* [1960] C.S. 337. (Accident caused by the fault of a volunteer fireman driving a truck loaned to the corporation).

145 *Vallières* v. *Cité de Montréal,* (1908) 33 C.S. 250. (Cas de force majeure).

146 *Cardin* v. *Cité de Montréal,* [1961] S.C.R. 655.

147 *Supra,* note 137.

148 L. BAUDOIN, *op. cit. supra,* note 76 at 366; J. BEULLAC, *La responsabilité civile dans le droit de la province de Québec,* Montréal, Wilson & Lafleur, 1948, p. 356; G. TRUDEL, *op. cit. supra,* note 138 at 65; H. IMMARIGEON, *op. cit. supra,* note 138 at 671; A. TREMBLAY, "Les institutions municipales du Québec", *in Droit administratif canadien et québécois, op. cit. supra,* note 138, at 176; Carl H. GOLDENBERG, *op. cit. supra,* note 138 at 82; R. DUSSAULT et T. DUPERRE, "La responsabilité de l'administration canadienne et québécoise", (1970) 11 *C. de D.* 199, 208 and note 43. *See also* Justice BRODEUR's opinion in *Cité de Québec* v. *United Typewriter,* (1921) 62 S.C.R. 241 at 248. Municipal corporations can also be obliged by quasi-contracts as defined by articles 1041 ss. C.C.; *De Bellefeuille* v. *Village de Saint-Louis du Mile-End,* (1880) 25 L.C.J. 18; *Thibault* v. *Ville de Montréal,* (1898) 14 C.S. 151.

> "The corporation is responsible for the acts of its officers in the performance of the duties for which they are employed as well as for damages resulting from their refusal to discharge or their negligence in discharging their duties, saving its recourse against such officers, the whole without prejudice to a recourse in damages against the officers by those who have suffered damages." [149]

Under the *Cities and Towns Act* [150] there is no such provision for the vicarious liability of the municipality [151] but the rule is nevertheless the same because the general principle of article 1054 C.C. applies in both cases. [152] A municipal corporation can avoid liability only when it can prove that damages were caused by a person not under its control [153] or when it can prove that its employee or officer was not acting in the performance of the duties for which he was employed. [154]

This is why our courts were not satisfied with the American or English rules. They could not reconcile them with the concept of vicarious liability of municipal corporations as determined by article 1054 C.C. As is often the case when foreign rules of law are borrowed and transferred to a system which is complete by itself, they do not fit very well. As we have seen, our courts came to create a whole new rule, a *double commettant* rule which has no counterpart in the English and American system from which it was originally borrowed.

4. Confusion as to the Scope of the Criminal Code

But why did the courts come to that *double commettant* concept? Why did they turn towards the Crown in right of Canada when the policemen were acting as peace officers?

The questions point to the source of all the legal confusion. Courts and authors have seen in the *Criminal Code*, a federal statute, a duty imposed on municipal policemen, as if by virtue of the *Criminal Code* the Federal Government were imposing special duties completely inde-

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149 Municipal Code, art. 143.

150 *Supra*, note 93.

151 Article 623 of the Cities and Towns Acts, *supra*, note 93 simply provides: "Every action, suit or claim against the municipality or any of its officers or employees for damages resulting from offences or quasi-offences, or illegalities, shall be prescribed by six months from the day on with the cause of action accrued, any provision of law to the contrary notwithstanding."

152 In *Levinson* v. *Montreal*, 39 C.S. 259 at 262, judge DEMERS said about art. 143 of the Municipal Code (formerly article 199): "Cet article consacre en termes formels notre jurisprudence dans l'interprétation des art. 1053, 1054 C.C." A. NADEAU, *op. cit.*, note 122 at 87 says: "Le principe à retenir c'est que les municipalités sont responsables des actes de leurs officiers et employés dans l'exécution de leurs fonctions. C'est en somme la règle que pose le droit commun de la responsabilité à l'art. 1054 c.c., av. dern. alin." *Cité de Québec* v. *Conway*, (1921) 32 B.R. 242 at 246, *supra*, note 138.

153 *Dallas* v. *Town of Saint-Louis*, (1902) 32 S.C.R. 120; *Brooks* v. *Township of Dundee*, (1908) 15 R. de J. 17.

154 *Gagnon* v. *Paroisse de Saint-Alphonse de Rodriguez*, [1949] C.S. 447.

pendent from those imposed on them by the municipalities or the Provincial Legislature.[155] Perhaps one of the best examples of this misconception is given by Immarigeon:

> "Ce fractionnement des services de police pose en matière de responsabilité des problèmes qui se trouvent compliqués par les dispositions du Code criminel. Celui-ci attribue en effet la qualité d'agent de la paix à différentes personnes sans tenir compte de leur appartenance à telle ou telle administration. Si bien que tous les membres de la police, qu'ils relèvent d'une municipalité, d'une province ou du gouvernement fédéral doivent obligatoirement veiller au maintien de la paix publique et au respect des lois pénales. Cette fonction qui trouve sa justification dans les dispositions du Code criminel leur est effectivement attribuée par le Parlement canadien."[156]

We submit that this is not the proper view. This function is not given to them by the Federal Parliament but by the Provincial Legislature and, more specifically, since 1968, by the *Police Act*.[157] Art. 2(3) of the *Criminal Code* defines a peace officer for the purposes of the Code and this definition encompasses a municipal constable or a provincial police officer. But one should not assign to the Federal Parliament a role which it does not have in this field. In Canada jurisdiction over the field of justice is divided between Ottawa and the Provinces. The Federal Parliament has legislative jurisdiction over criminal law and criminal procedure but the Provincial Legislatures have exclusive jurisdiction over the administration of justice in the Province.[158]

The *B.N.A. Act*, 1869, 30-31 Vict., c-3 provides at sect. 91 (27) that the Parliament of Canada has exclusive legislative authority over [...] "The Criminal Law, except the Constitution of Courts of Criminal jurisdiction, but including the Procedure in Criminal Matters". Sect. 92 (14) provides that "In each Province the Legislature may exclusively make Laws in relation to [...] The administration of justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and of Criminal jurisdiction, and including Procedure in Civil Matters in those Courts."

That is to say the Federal Parliament has exclusive jurisdiction over the text of the criminal law, over its content, over the definition of what constitutes a crime and over the procedure in criminal matters, but the administration of the Federal Act, the power over law enforcement is within the legislative competence of the Provincial Legislature. The legislative powers of the Provincial Legislature are not limited to the "Constitution, Organization and Maintenance" of Provincial Courts

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155 *Rey* v. *Montréal*, (1910) 39 C.S. 151 (Ct. of Review) at 157; *Saint-Pierre* v. *Trois-Rivières*, (1935) 61 B.R. 439 at 441; *Roy* v. *Thetford Mines*, [1954] S.C.R. 395 at 492; H. PARENT, *supra*, note 103 at 585; P. BEULLAC, *supra*, note 148 at 368.

156 H. IMMARIGEON, *op. cit. supra*, note 98 at p. 219.

157 S.Q. 1968, c. 17 as amended S.Q. 1968 c. 18 and S.Q. 1969 c. 22.

158 See separate statement by Mrs. MCARTON in *Report of the Canadian Committee on Corrections*, Ottawa, Queen's Printer, 1969, 492 hereinafter referred to as *Ouimet Report*.

but to the whole matter of the administration of justice,[159] including the actual law enforcement and, subject to sections 96, 100 and 101 of the *B.N.A. Act,* the words of Sect. 92 (14)

> "confer upon the Provincial Legislatures the right to regulate and provide for the whole machinery connected with the administration of justice in the Province, including the appointment of all the judges and officers requisite for the proper administration of justice in its widest sense, reserving only the procedure in criminal matters." [159a]

The fulfilment of that function requires that the Provincial Legislature be entrusted with the power to appoint those officers whose duty is to aid in the administration of justice and to entrust them with that duty:

> "The administration of justice could not be carried on in the Provinces effectually without the appointment of justices of the peace and police magistrates and the conclusion seems to me to be irresistible that it was intended that the appointment of these and other officers, whose duty it should be to aid in the administration of justice, should be left in the hands of the Provincial Legislature." [159b]
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> "Under its powers in respect of administration of justice when crime has been committed, the province puts the machinery of the criminal law in motion. This undoubtedly is one branch of the administration of justice, but the discovery of crime when it is merely suspected may, I think, also fall into that category. Provincial peace officers are charged with that duty amongst others." [159c]

Thus the Attorney General of the Province,[159d] or "counsel acting on his behalf"[160] is the proper authority[161] to prosecute and in-

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159 "La justice est, entre plusieurs autres, un domaine de juridiction mixte. C'est-à-dire que les deux niveaux de gouvernements peuvent avoir, à propos des mêmes questions, des perspectives fort différentes.
Délimitons le champ du débat. Dans le domaine de la justice criminelle et pénale, le gouvernement fédéral demeure seul maître du texte de la loi, tandis que l'administration elle-même appartient, dans sa totalité, aux provinces." *La société face au crime,* S.C. Québec, Editeur officiel du Québec, 1968, Vol. 1, p. 57, hereinafter referred to as *Prévost Report.*

159a STREET J. In *Regina* v. *Bush,* (1888) 15 O.R. 398 at 403-404 quoted with approval by DUFF C. J. in *Re Adoption Act,* [1938] S.C.R. 398 at 406.

159b *Id.* at 405 quoted with approval by DUFF C.J. in *Re Adoption Act,* [1938] S.C.R. 398 at 406.

159c MACDONALD C.J.A. In *Re Public Inquiries Act,* (1919) 3 W.W.R. 115 at 118.

159d By 17-18 El. 2 c. 38, sect. 2 of the *Criminal Code* was amended to give to the Attorney General for Canada the powers formerly exercised by the Attorney General for the Province over "proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of a violation of or conspiracy to violate any Act of the Parliament of Canada or a regulation made thereunder other than this Act." As to possible questions about the validity of this amendment, see *infra,* note 161.

160 *Criminal Code,* sections 2 (2); 474 (5); 476; 490.

161 J. E. C. MUNRO, *The Constitution of Canada,* Cambridge, Harvard University Press, 1889, p. 245. *See also, Attorney General* v. *Niagara Falls Bridge,* (1882) 20 Grant 34; 1 Cart. 813, "The power of making criminal laws is in the Legislature of the Dominion; but it has never been doubted that the Attorney-General of the Province is the proper officer to enforce those laws by prosecu-

dict[162] on behalf of the Crown.[163] He has also the power to direct a stay of the proceedings.[164]

In the Province the duty to enforce the criminal law, provincial acts and municipal by-laws is imposed by the Legislature under the *Police Act*. The *Criminal Code*, except in the case of a riot,[165] does not impose that duty on municipal or provincial policemen; it gives power to arrest[166] and imposes duties relating to criminal procedure.[167] But under the *Quebec Police Act* every city or town municipality has a duty to establish and maintain a police force in its territory and every other local municipality within the meaning of the *Municipal Code* is authorized to establish and maintain such a police force.[168]

Section 2 of the Act provides that members of the Quebec Police Force and municipal policemen shall be constables and peace officers in the entire territory of the Province while special constables shall be peace officers in the territory for which they are appointed subject to restrictions contained in the writing attesting their appointment.

By section 29 the Quebec Police Force is charged with the duty of maintaining peace, order and public safety in the entire territory of the Province, preventing crime and infractions against the laws of Quebec and seeking out the offenders. By section 54,[169] the duty to maintain peace, order and public safety is given to every municipal police force and each member thereof. Sections 64 and 65 extend the same duty to special constables whether named by a judge with the approval of the Attorney General[170] or by the mayor so empowered by a by-law of a municipality contemplated in section 52.[171]

So, the duty to enforce criminal law, as defined by federal statute (the *Criminal Code*), is not given by the Federal Parliament but is rather given by the Provincial Legislature under the authority of the

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tion in the Queen's Courts of justice in the Province", (1882) 20 Grant 34 at 38 *app'd* in *People's Holding Co. Ltd.* v. *A. G. of Quebec*, (1930) [1931] S.C.R. 452 at 459. "The primary right to appear in any criminal proceeding at any stage is at all times in the Attorney-General of the province. I would doubt the constitutionality of any Federal legislation that might attempt to exclude him." PORTER C.J.O. in *Regina* v. *Yuhasz*, (1960) 32 C.R. 344 at 352.

162 *Criminal Code*, sections 478; 489.

163 I. LAGARDE, *op. cit. supra*, note 86 at 26.

164 *Criminal Code*, sect. 490.

165 *Id.* sect. 33 (1); 70.

166 Arrest without warrant; *Criminal Code*, sect. 435; 171 (2); 180 (2); 437. Arrest with warrant: *Id.* sect. 445.

167 Delivery of the arrested person to a justice. *Id.* sect. 438 (2); service of summons, sect. 441 (3), of subpoena, sect. 606; duty of peace officer in case of remand, sec. 456 (3).

168 *Police Act, supra*, note 157, sect. 52.

169 As amended by S.Q. (1968) 17 El. 2 c. 18 sect. 1.

170 *Police Act, supra*, note 157, sect. 64. This special constable is appointed for the period determined by the judge appointing him and has jurisdiction in the territory which he designates.

171 *Id.*, sect. 65. The mayor may use this power only in case of emergency and the constable is appointed for seven days and has jurisdiction in the territory of the municipality and in any other territory under the jurisdiction of the municipality.

B.N.A. Act.[172] The courts should not look beyond the Provincial law to determine what should be the liability for wrongful acts of municipal or provincial policemen.

This is not the first instance where the presence of a uniform Canadian criminal law has been the cause of some confusion in Quebec law because of the tendency of our courts to follow English authorities in cases that should have been decided under the civil law. For a while it was held that in damage claims for abuse of process, a plaintiff could not succeed unless he established lack of a probable cause and malice.[173] But our courts have reacted and shown that this matter should be decided in accordance with article 1053 C.C. and following of the *Civil Code* and that malice is not a requirement of the responsibility contemplated by that article.[174]

In 1962 the Quebec Court of Appeals refuted similar contentions that the English law should apply in a case[175] arising out of an investigation, under the *Municipal Bribery and Corruption Act,*[176] and involving allegations of corruption and malfeasance against fifty-eight police officers or former police officers and five members of the Executive Committee of the City of Montreal. The inquiry had been ordered in 1950 at the request of seventy-four taxpayers of the City of Montreal and the plaintiffs-respondents, Me Jean Drapeau and Me Plante, were attorneys for the citizens who had petitioned for the inquiry.

In two separate actions plaintiffs sued defendants in damages for false, malicious and libellous statements contained in a petition for the

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172 R.S.A. 1955, c. 136, sect. 3; R.S.B.C. 1960, c. 288, sect. 11 (1); R.S.M. 1954, c. 208, sect. 4; R.S.S. 1965, C. 114, sect. 14; R.S.O. 1960, C. 298, sect. 43, 46, 47; R.S.P.E.I. 1951, c. 112, sect. 5 (2). See I. M. ROGERS, *op. cit. supra,* note 104, pp. 1032 and 1040. See also *Priestman* v. *Colangelo,* [1959] S.C.R. 615 at 618 and 633; *Myers* v. *Hoffman,* [1955] O.R. 965 at 971.

173 C. V. V. NICHOLLS, *op. cit. supra,* note 141 at p. 31. "It was even said on occasion that the English common law alone should govern in defamation because it concerns public policy and public law, and in the abuse of criminal process because the Canadian criminal law is based on the English common law. The fallaciousness of these statements needs no comment." See also "Case and Comment", (1948) 26 *C.B.R.* 1482: "Since the conquest of New France Quebec courts have shown a tendency to follow English authority in cases that should have been decided under the civil law. At one period the tendency was particularly noticeable in actions for abuse of process or, as the Quebec courts loosely called it, "malicious prosecution". The reference to English authorities in this field is partly to be explained by a more or less vague feeling that judicial process is a matter of public law and that, since much of Quebec's public law came from England, English authorities should be applied to the misuse of judicial process. There was greatest justification for this feeling where, as frequently though by no means always happened, the process the plaintiff alleged had been misused was part of the federal criminal law [...]. Whatever the reason, the grafting of common law principles, often imperfectly understood by civilians, on the civil law confused Quebec law, made it less certain, and complicated the task of the lawyer who had to advise a client." 26 C.B.R. (1482-1483).

174 *Prime* v. *Keiller, Rainville and the City of Montreal,* [1943] R.L. 65; *Sirois* v. *Dame Bernier,* [1948] B.R. 615; Justice FAUTEUX in *Lamb* v. *Benoit,* [1959] S.C.R. 321 at 362.

175 *Langlois* v. *Drapeau* et *Langlois* v. *Plante,* [1962] B.R. 277.

176 R.S.Q. 1941, c. 241 now R.S.Q. 1964, c. 173.

issuance of a writ of prohibition presented to the Superior Court in 1951 by defendants-appellants.

The Superior Court maintained the action in damages[177] and the defendants appealed to the Quebec Court of Appeals. The defendants first contended that the common law should apply to this case. The inquiry concerned a criminal matter as did the writ of prohibition and therefore the action should be decided according to English common law. The court refused to follow this reasoning claiming that it resulted from confusion between Federal and Provincial law. *The Municipal Bribery and Corruption Act* was a municipal law within the jurisdiction conferred to the Province. The law of the Province was thus the applicable law and had to be found first in the written laws adopted by the Province and, if there were no written laws, then, the English common law was to govern. Articles 1003 and others of the *Code of Civil Procedure* applied and one could refer to English common law only to interpret or complement the law of the Province in the absence of applicable enactments.[178]

The defendants offered a second argument. English law, they said, gave an absolute immunity to lawyers, parties and witnesses before courts of justice. They could not be sued in defamation for what they said or wrote before the courts of justice. Since the organization of our courts of justice is a part of the public law originating from English common law, this immunity, an essential element of the organization of our courts of justice, should be decided according to English common law. This contention was also rejected by Chief Justice Tremblay:

> "Ce que l'on oublie, c'est qu'il faut avoir recours au droit commun anglais seulement si la loi provinciale est muette sur le sujet. En effet, en vertu du par. 14 de l'art. 92 de la constitution, la province seule a la compétence législative en matière d'organisation des cours provinciales. C'est donc d'abord dans la loi provinciale seule qu'il faut chercher la solution de notre problème. Ce n'est que si nous n'y trouvons pas cette solution que nous pourrons recourir au droit commun anglais, vu qu'il s'agit de droit public. Or dans le cas présent, la solution se trouve à l'article 1053cc tel qu'interprété et appliqué par les tribunaux ayant juridiction pour décider des litiges nés dans notre province. Il suffit de se demander si une personne commet une faute en rendant public devant une cour de justice un fait de nature à nuire à la réputation d'une autre personne." [179]

This reasoning is pertinent to our situation. Even if the provincial or municipal policeman is acting under the *Criminal Code,* the administration of justice within the Province, including the power and duty to organize municipal or provincial police forces, is a jurisdicton belonging to the Provincial Legislature. Hence the solution to the problem of whether or not a municipal corporation is liable for faults committed by its policemen or whether or not the Provincial Government is liable for the acts of the Provincial Police Force should be looked for in the

177 [1960] R.L. 209.

178 [1962] B.R. 277 at 281-282.

179 [1962] B.R. 277 at 283.

law of the Province of Quebec.[180] It is only if this solution cannot be found in our law that we should look to the English common law. The solution to our problem is given in article 1054 of the *Civil Code* and also in the *Municipal Code* at section 143. This latter section is not reproduced in the *Cities and Towns Act* but as section 143 of the *Municipal Code* is a restatement of the general rule given in the *Civil Code,* this omission is not important.

This general principle has been applied in 1960 to the Crown in right of the Province of Quebec in a case where a member of the Provincial Police Force had made a false arrest under the *Criminal Code* on a charge of keeping a bawdy-house.[181] The plaintiff had been the victim of an error in identification and the Government of the Province was held liable as being the employer and "commettant" of the police.[182]

In 1965, in a somewhat different case, Justice Miquelon of the Superior Court refused to hold the Provincial Government liable for a fault of omission attributed to one of its policemen.[183] The police officer had stopped a car driven by one Tremblay and belonging to one Larouche who was a passenger at the time. Both men were apparently drunk. They were held for a time and then, after being given coffee, were released. The police officer followed them for ten miles and decided that there would be no danger in allowing them go on their way. Later on Tremblay's automobile collided with another car and killed the wife of the petitioner. On a petition of right against the Crown in right of the Province, Justice Miquelon said that the fault of the policeman was in having erroneously thought that the driver and passenger were not in such a condition as to justify arrest under the *Criminal Code.*

The Court first held that petitioner, by virtue of statute of limitations, had lost his right of action against the policeman and that consequently, if the Government of the Province could be said to be his "commettant" under 1054 C.C., the right of action against it would also have been lost.[184] The Court then addressed itself to the question of whether the policeman could be said to be a "préposé" of the Government of the Province under 1054 C.C. While admitting that the Government is liable for any fault committed by a police officer driving a car, the court said that in this case the police officer was exercising his discretion. Quoting *Morantz* v. *Montreal* the judge seemed to express the British view that the police officer are not servants of the state. "Their duty is not to the State but to the public."[185]

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180 Apart from the fact that the administration of justice is a provincial responsibility, the same argument could also rest on the provincial jurisdiction over "Municipal institutions in the Province", (B.N.A. Act, sect. 92 (8)) and over "Property and Civil Rights", (B.N.A. Act, sect. 92 (13)) because it is a problem of civil liability.

181 *Langlais* v. *La Reine,* [1960] C.S. 644.

182 "Considérant que le requérant a établi qu'il avait été arrêté par suite d'une erreur commise par des officiers de police employés et préposés du gouvernement de la province de Québec", [1960] C.S. 664, 650.

183 *Fortin* v. *La Reine,* [1965] C.S. 168.

184 *Id.* at 170.

185 *Id.* at 176.

In our opinion, the correct solution is that given in *Langlais* rather than in *Fortin*. There is no reason not to apply article 1054 C.C. to the Provincial Government for wrongful acts of the members of the Provincial Police Force even when they are acting under the *Criminal Code*. In the *Fortin* case, Justice Miquelon relies on *Morantz* which was not followed by our courts and it is difficult to distinguish the rationale for the learned judge's conclusion.

So while it might be said that the law is not settled on this question, one can argue in light of the existing case law that there is liability of the Provincial Government for the faulty acts of its policemen.

5. Policemen are Servants of the Municipality

So far we have argued that the Quebec courts should apply the Quebec law, both *Civil Code* and Provincial statutes, to the problem of liability of municipal corporations for wrongful acts of their policemen. Borrowing rules from different systems of law not only confuses the law but, most of all, has permitted our courts to avoid facing the real issue which they would have had to face had they applied the civil law rule expressed in art. 1054 C.C. If this article is held to apply, as we think it should, then the logical question to follow is whether a policeman may be said to be an employee of the municipality. If there is a "lien de préposition" the municipality should be liable like any other employer.

It is significant that in the cases where the civil law was said to apply our judges squarely met the issue and had no difficulty at all in holding the municipality liable. Applying to the municipality the test already mentioned,[186] they said that not only did it have the power to choose its policemen but also it had control over their work, power to give them orders and to dismiss them.[187]

In *Harper* v. *Cité de Montréal*[188] Mathieu J., after deciding that the case should be decided in accordance with articles 1053 and 1054 C.C. held the city liable for false arrest by its policemen because not only did it have freedom of choice as to hiring its constables and policemen but it also had the power to give them instructions and orders and to supervise the performance of their duties.[189] In the *Chevalier* case[190] Justice Belleau followed the same reasoning and dealt explicitly with the objection that policemen are acting in a public capacity and as peace officers when they are seeking to enforce criminal laws. They may be peace officers in such an instance, but, most of all, they are agents and servants of the municipal corporation whose duty is not only to enforce

186 *Supra*, p. 434.

187 *Harper* v. *Montreal*, (1908) 16 R. de J. 229, 232; *Levinson* v. *Montreal*, (1911) 39 C.S. 259, 262; *Chevalier* v. *Trois-Rivières*, (1913) 43 C.S. 436, 442.

188 (1908) 16 R. de J. 229.

189 *Id.* at 232-233.

190 *Supra*, note 37.

its ordinances and by-laws but also to insure the security of the citizens.[191] In *Montreal* v. *Plante*[192] even Justice Rivard, who was of the opinion that this matter was regulated by English law, acknowledged the fact that, even when they are acting as peace officers, municipal policemen are no less employees of the municipality.[193]

Even the British common law view of the constable as an officer exercising original powers at his own discretion has been questioned. In 1962 the Royal Commission on the Police found it difficult to reconcile that status with the constable's position "as a member of a disciplined body subject to the lawful orders of his superior officers in the hierarchy."[194] The Commission noted that the common law view was not up-to-date, especially if seen in light of the fact that people with greater independence than that exercised by the constable were nevertheless seen as servants surgeons in the National Health Service, masters of ships and captains of aircraft, for instance.[195]

But the Commission did not want to make any recommendation to alter this common law status, mainly for the reason that this "anomalous situation"[196] was justified in view of the fact that a constable should exercise his duties in an impartial manner free from influence. He should be answerable to his superior and the courts only, and not made a servant of too local a body. Rather, to overcome the absence of municipal liability the commissioners recommended that "notwithstanding the constable's present status, and without derogating from it" a police authority be made liable under statute law for the wrongful acts of police officers. This was achieved by sect. 48 of the *Police Act* of 1964[197] by which a chief constable is made liable for torts committed by constables under his direction and control and in the performance of their functions in the same way as a master is liable for the torts committed by his servants in the course of their employment.[198]

Other authors have been more specific in their attack on the traditional status of the constable.[199] It is easily understood that nobody can give constables orders to compel them to breach their duty, but that does not mean that lawful orders cannot be given. English authors have questioned the original common-law position of constables[200] and have

191 (1911) 43 C.S. 436 at 442.

192 (1922) 34 B.R. 137.

193 "[...] ils n'engagent pas la responsabilité de la corporation, non pas parce qu'ils ne sont plus ses employés, mais parce que la corporation ne peut pas, pour leurs actes, être dans ce cas recherchée plus que le Roi." 34 B.R. 137 et 149.

194 Cmnd n°. 1728, *supra,* note 85 at 24.

195 *Id.* at 24-25.

196 *Id.* at 25.

197 U.K. 1964 c. 28.

198 The Bill does not follow the recommendations of the Commission which had objected to the idea that liability should attach to the chief constable. Cmnd n°. 1728, *supra,* note 85 at 65 and note 26.

199 D. N. CHESTER, *op. cit. supra,* note 85; G. MARSHALL, *op. cit. supra,* note 85.

200 "Whatever the correct view of this may be, it seems possible to conclude that the original common law position is in itself insufficient to support an unequivocal assertion about the independence of constables". G. MARSHALL, *op. cit. supra,* note 85 at 210.

even restricted the holding in the *New South Wales* and *Oldham* cases.[201] It is true that policemen exercise discretion in their day-to-day work, but does that mean that they are not the servants or "préposés" of the municipal corporation which employs them? What if some citizens are terrorized by fighting gangs? What if a neighborhood has complained to the city about a sudden increase of burglaries in the area? According to a former Chief of Police of the City of Montreal "Memos from City Hall kept coming to the police department"[202] asking for more frequent patrolling in the neighborhood, more policemen for an area, a report on the situation in a particular precinct, and so forth.

How can it be said that policemen are not "préposés" of the municipality when in *Tricot Somerset Inc.* v. *Plessisville,*[203] the constables did not want to act without specific orders from the municipality which did not want to become involved in a labor conflict?

In *Ville de Laval* v. *Taylor,*[204] the plaintiff was arrested by municipal policemen acting on orders received by one Valiquette, who had been appointed by the council to conduct an inquiry into frauds committed in the municipal treasury department and was subsequently released on orders from the town manager! The Court of Appeal held the city liable but felt compelled to justify its decision by saying that Valiquette was not conducting an inquiry as peace officer but rather an "administrative inquiry."

In *Montreal* v. *Plante*[205] and *Jalbert* v. *Montreal*[206] it was held that, even if the municipality could not be liable for acts of its policemen, it became liable by ratifying those acts, ratification consisting in the fact that the municipality had permitted its policemen to engage in practices having no relation with their duties. Why use this legal fiction of ratification? Are not courts in essence saying that the city is liable as any employer would be in such a case? Why not face the issue and say that the municipality is liable for the wrongful acts of its policemen because it failed to exercise proper control over their behaviour?[207]

In the United States, the argument that the principle of *respondeat superior* did not apply between a municipal corporation and its policemen has also been invoked by the courts to deny municipal tort liability for wrongful acts of policemen but it was mostly the result of a confusion between that doctrine and the problem of liability itself.[208] In fact, in those States where the courts have overcome the hurdle of the govern-

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201 *Id.* at 217-218.

202 Interview with Mr. J. A. St-Pierre, Director of the Quebec Police Force, Montreal, March 16, 1970.

203 [1957] B.R. 797.

204 [1970] C.A. 453, *supra,* note 80.

205 (1922) 34 B.R. 137.

206 (1931) 37 R. de J. 95.

207 "On condamne la corporation si elle a spécialement autorisé l'acte de son constable, mais je me demande comment cette autorisation spéciale peut le faire plus son préposé que l'autorisation générale qui découle de sa nomination et des instructions qu'il reçoit." Belleau J. in *Chevalier* v. *Trois-Rivières,* (1913) 43 C.S. 436 at 448.

208 See E. Fuller and A. J. Casner, *op. cit.,* note 75 at 439 and note 7.

mental proprietary dichotomy, they then had no trouble to find that there is a master and servant relationship between a city and its policemen.[209]

Even more fallacious is the reasoning that makes policemen agents of the Federal Government when they are enforcing the *Criminal Code*.[210] We have seen that there can be no "lien de préposition" between them and the Federal Government; they cannot be agents of the Federal Government when they are acting under the *Criminal Code*. And in fact why should the master and servant relationship disappear between them and the municipality or the Provincial Government which employs them, simply because they are enforcing a federal statute? All our judges agree that this *lien de préposition* between the constable and the municipality exists when he is seeking to enforce the city's by-laws or the city's charter. Why should it suddenly disappear when he is acting under the *Criminal Code?* In civil law it is not the nature of the employee's act which determines the existence of a *lien de préposition* between him and his employer, but rather the relationship existing between the employer and his employee, as well as the power of the former to choose his employee and the measure of control exercised over him.

Furthermore, in those cases where the courts have implied that in acting as a peace officer a municipal policeman becomes a *préposé* of the Federal Government, such a finding was not necessary for the result arrived at and is thus *obiter*. In *Montreal* v. *Plante*[210a] and *Roy* v. *Thetford Mines*[210b] the finding that there is no *lien de préposition* between the peace officer and the municipality is sufficient to dispose of the case. Anything that the court may add as to the relationship between a municipal policeman acting as a peace officer and the Federal Government is *obiter dictum*.

The modern view of the policeman and his function recognizes that he has a wide discretion in his everyday activities[211] but it also recognizes the fact that he is part of a hierarchical, administrative organization which in fact controls and directs, to a great extent, the way he acts.[212] The police officer has wide discretion to invoke or not

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209 See *Hargrove* v. *Town of Cocoa Beach*, (1957) 96 So. (2d) 130 (Fla.); *Town of Mount Dora* v. *Bryant*, (1961) 128 So. (2d) 4 (Fla. App.); *Jones* v. *Los Angeles*, (1963) 30 Cal. Reptr. 124 at 126, citing *Davis* v. *Kendrick*, (1959) 52 Cal. (2d) 517, 341, P. (2d) 673; *Brinkman* v. *City of Indianapolis*, (1967) 231 N.E. (2d) 169 (Ind. App.), motion to transfer denied by the Supreme Court, Aug. 7, 1968. See, *infra*, note 217.

210 See H. PARENT, *supra*, note 103.

210a (1922) 34 B.R. 137.

210b [1954] S.C.R. 395.

211 Wayne R. LAFAVE, "The Police and Non-enforcement of the Laws", [1962] *Wisc. L. Rev.* 104, 179; S. H. KADISH, "Legal Norm and Discretion in the Police and Sentencing Processes", (1962) 75 *Harv. L. Rev.* 904; J. GOLDSTEIN, "Police Discretion Not to Invoke the Criminal Process; Low Visibility Decisions in the Administration of Justice", (1960) 69 *Yale L. J.* 543; D. G. T. WILLIAMS, "The Police and Law Enforcement", [1968] *Crim. L. Rev.* 351.

212 James Q. WILSON, *Varieties of Police Behavior*, Cambridge, Harvard University Press, 1968; *Task Force Report; The Police*, Washington, U.S. Gov't Printing Office, 1967, p. 18; D. J. BORDUA and A. J. REISS, "Command Control and Charisma; Reflections on Police Bureaucracy", in R. QUINNEY [ed.], *Crime and*

to invoke the criminal process, but like every other employee his work hours, his beat, his assignments are predetermined by the organization of which he is a part. Very often such an organization has set up detailed rules of conduct for particular situations likely to arise and he is instructed as to the way he should behave in the most dangerous ones.[213] Such rules are enforced by the organization itself by way of internal sanctions.[214] Those rules may be devised by the Police Department itself, but at the top of the hierarchy there is always a link between this organization and the city itself. This usually consists in a general by-law of the city determining the duties of the chief of police, giving him responsibility over the police force and determining the general duties and powers of those under his command. The extent of delegation of powers from the city to the police authorities may vary from city to city but the *Police Act*[215] gives each municipality enough powers over its police force to justify easily a finding that there is a master and servant relationship between the corporation and its policemen. Thus, subject to other provisions of the *Act* and to by-laws that the Police Commission is empowered to make under section 17, every municipality may make by-laws providing for the organization, equipment and maintenance of a police force and the discipline of its members.

Furthermore, recent developments in the law of the Province of Québec show that the courts are now extending the relationship of master and servant into new situations.

Less than a year ago the Supreme Court of Canada unanimously held that it is now settled that there is a *lien de préposition* between a hospital and doctors as well as technicians and nurses who are its salaried employees.[216] Without going so far as to suggest that the power to hire, to pay and to dismiss is a sufficient measure of control to justify the existence of a master and servant relationship, we can predict that "hierarchical subordination" will increasingly be seen as a degree of control sufficient to render the employer liable for the negligent acts of its employees. If a hospital is held liable for the faults of a physician

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Justice in Society, Boston, Litle Brown, 1969, p. 194; J. H. SKOLNICK, "The Working Policeman, Police "Professionalism" and the Rule of Law" in R. QUINNEY [ed.], *Crime and Justice in Society, op. cit.*, at 250; "It must be recognized that the police is a hierarchical, administrative organization, the relevant analogy being administrative agencies in the economic sphere. One cannot continue to make the assumption that police officers individually and independently exercise public functions and thus should be controlled by rules laid down externally and directed to each officer singly. Rather police officers act in the way they do because they are members of a bureaucratic organization which can and does control their activities"; Paul C. WEILER, "The control of Police Arrest Practices: Reflections of a Tort Lawyer", in A. M. LINDEN [ed.], *Studies in Canadian Tort Law*, Toronto, Butterworth, 1968, 416 at 463.

213 For instance, Canadian police forces issue strict directives to their members with respect to the use of firearms in apprehending a person who takes to flight to avoid arrest. M. FAWCETT, *Case and Comment.* Police — Use of Firearms — Criminal Code — Justificable Force in Preventing Escape by Flight — Police Regulation, (1955) 33 C.B.R. 1178; *Ouimet Report, supra,* note 158 at 60.

214 See FAWCETT, *supra,* note 213 at 1178.

215 *The Police Act, supra,* note 157 sect. 53, as amended by L.Q. 1969, c. 22.

216 *Martel* v. *Hôtel-Dieu Saint-Vallier*, [1969] S.C.R. 745, 751, citing *Cardin* v. *Cité de Montréal*, [1961] S.C.R. 655, 29 D.L.R. (2d) 492.

who has much more discretion than the average policeman as to the way in which he should perform his duty, why can a municipality not be held liable for the tortious acts of its policemen who are subject to much stricter control?

Perhaps we should not have to go so far in trying to show the existence of a master and servant relationship between the policemen and the city. Having eliminated the doctrine of sovereign immunity and the distinction between governmental and proprietary functions of local governments the Appellate Court of Indiana simply relied on "common sense" to find that municipal police are agents of the city.[217] Our courts even when they felt bound by the standard Quebec rule, recently raised doubts about the assumption that the policeman ceases to be a servant of the city when he acts under the *Criminal Code.*

> "Il est peut-être difficile d'admettre la théorie que les agents de la Ville, lorsqu'ils agissent en vertu du Code criminel, cessent d'être les employés de la Ville et deviennent ceux de l'Etat. On peut se demander si les constables, qu'il s'agisse du Code criminel, des lois provinciales ou des règlements municipaux ne demeurent pas toujours sous l'autorité, la direction et les instructions de la ville." [218]

6. Policy Considerations

Other considerations justify an extension of municipal liability for all wrongful or negligent acts of their policemen in the course of their duty. The present situation is unjust and arbitrary both for the public and the policemen.

Municipal functions, especially police protection, benefit the population of the municipality as a whole. In the exercise of this function there are some costs resulting from accidents or wrongful acts. When the municipal corporation is immune from vicarious liability for the tortious acts of its policemen, those costs are borne either by the policemen or the victims alone. They are borne by the policemen alone if the victims can obtain a judgment against them, in the case of tortious conduct. They are borne by the innocent victims alone if they do not sue the policemen or if, as is often the case, the individual policeman alone cannot pay the judgment. The idea behind municipal tort liability is that an innocent victim should not have to support alone the costs of inherent malfunctions of an activity benefitting the whole population. Those costs, if the municipal corporation is held liable, will be spread over the whole population by way of taxes, thus relieving the innocent victim of a burden which might be financially intolerable and giving him a recourse at low cost for the community as a whole.[219]

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217 *Brinckman* v. *Indianapolis,* (1967) 231 N.E. (2d) 169, 172-173 (Ind. App.); (Petition to transfer denied by the Supreme Court on Aug. 7, 1968).

218 *Perreault* v. *Montréal et Grand'maison,* [1965] R.L. 310, 312.

219 E. BORCHARD, *op. cit.,* note 75 at 134; *Hargrove* v. *Cocoa Beach,* (1957) 96 So. (2d) 130, 133 (Fla.); *McAndrew* v. *Mularchuk,* (1960) 33 N.J. 172, 162 A. (2d) 820, 831; *Lexington* v. *Yank,* (1968) 431 S.W. (2d) 892, 894 (Ky.).

The situation is even more unjust and arbitrary when, as is the case now, the municipality is liable for acts of its policemen in some instances, while in other situations the same acts by the same policemen do not render the municipality liable. The policemen themselves are affected by such an arbitrary rule. They receive protection when they are acting as municipal constables but not when they are acting as "peace officers" and the distinction between those two situations is tenuous indeed as shown by the *Carrière* and *Beim* cases.[220]

Available information further demonstrates that the distinction can have a harmful effect on police efficiency. Municipal policemen, knowing that they receive no protection if they commit a wrong while acting as "peace officers" will even refuse to do work under the *Criminal Code* in some circumstances.[221] They have sought protection from the distinction by trying to impose on the municipality a contractual obligation to give them legal assistance and, where possible, indemnity against judgments in damages. The most complete protection is given by the collective agreement between the City of Montreal and the Montreal Policemen's Brotherhood, the most powerful policemen's union, whereby the City is required to assure a policeman's legal defence and to pay for any judgment rendered against any of its policemen even when he is acting as a peace officer.[222]

This policy exacerbates the unjust and arbitrary character of the distinction arrived at by our courts. The City, in fact, assumes liability in many circumstances but it still argues that in law it is not responsible for wrongful acts of its policemen when they are acting as peace officers. Furthermore it is an indirect liability of which the public and even the

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220 *Supra*, p. 430; "Faudrait-il commenter les cas de poursuites en dommages-intérêts contre les policiers traduits devant les tribunaux civils? Le policier doit de toute évidence connaître le dédoublement de personnalité dont il est investi. Il cumule en lui-même les attributions de "constable" et d'agent de la paix. Il est "constable" à l'emploi de la municipalité et payé par celle-ci, il est agent de la paix pour l'Etat. Il est "constable" pour faire observer les règlements; il est agent de la paix pour faire observer le code. S'il poursuit un voleur, il est agent de la paix et travaille pour l'Etat, s'il donne un billet de contravention, il est "constable".

N'est-ce pas là une conception irréaliste d'une fonction primordiale dans la société? N'y a-t-il pas lieu de reviser nos lois et nos textes?" André TESSIER, "Le policier est-il suffisamment protégé par la loi?" (1968) 28 *R. du B.* 319, 322.

221 "La règle actuelle qui n'était pas modifiée par la clause 33 de la convention collective avait un effet dommageable sur l'efficacité des policiers municipaux. Pour vous en convaincre, nous n'avons qu'à vous en référer à l'affaire Sicotte (*Alleged police brutalities suffered by suspect while in custody*) où les policiers de la ville de Québec qui ont été impliqués dans cette affaire ont refusé par la suite tout travail imposé en vertu du Code criminel." Letter from Me Claude SIMARD, legal counsel for the City of Quebec, to the author. May 11, 1970.

222 "Dans tous les cas où un employé serait poursuivi en justice par suite d'actes résultant de l'exercice de ses fonctions, la ville s'engage à lui assurer une défense pleine et entière, même dans le cas où il est considéré agissant comme agent de la paix; et à l'indemniser de toute condamnation résultant d'un jugement.

Cependant, l'employé aura droit d'adjoindre au procureur choisi par la ville son propre procureur." Collective Agreement between the City of Montreal and the Montreal Policemen's Brotherhood Inc. Section 26.

courts are unaware. It does not exist in most of the municipalities of Quebec and even in the largest municipalities which are bound by a collective agreement with their policemen, it is generally limited to the furnishing of legal services.[223] Most of all, it is a most uncertain protection for the public who might be deprived of it at the next round of negotiations between the city and its policemen. If anything, this practice shows that a change in the law is much needed and that a judicial pronunciation of tort liability of municipal corporations for tortious conduct of their peace officers would be more realistic than adhering to a rule of law which exists and survives by sheer inertia.

Another policy argument relevant to our discussion is advanced by Paul C. Weiler.[223a] There are inherent, almost inevitable, mistakes in law enforcement. If the cost of those mistakes is borne by the victims, then the function of the administration of justice is subsidized to the extent of those costs. In order that the authorities responsible for that function should be able to make the most efficient allocation of their resources, the social costs to the citizens for the violations of their rights, for inefficient administration of justice, and for unlawful conduct of policemen must be thrown into the balance and brought to the attention of the authorities. If they are supported by the victims alone, those social costs remain hidden, and there is a distortion in the cost benefit analysis.

It can be argued that municipal tort liability is not the best way to exercise control over police action. It is not within the scope of this paper to discuss the relative merits of tort liability as opposed to "boards of civilian review"[224] or even the so-called "exclusionary rule". But in view of the fact that the former does not exist in the Province of Quebec and that power to enforce the latter rests only in the Parliament of Canada[225], the deterrent effect of municipal tort liability is not to be overlooked. "Those who are required to pay the bills incurred as a

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223 In a survey of collective agreements between municipalities of 10,000 and more, only 4 out of 11 were found to give a protection similar to that given by the collective agreement between the City of Montreal and the Montreal Policemen's Brotherhood. Letter from Guy MARCIL, President, Montreal Policemen's Brotherhood Inc. to the author, March 23, 1970.

223a Paul C. WEILER, *op. cit. supra,* note 212 at 450-451.

224 Walter GELLHORN, *When Americans Complain: Governmental Grievance Procedures,* Cambridge, Harvard University Press, 1966, p. 170; H. BERAL and M. SISK, "The Administration of Complaints by Civilians against the Police", (1963-64) 77 *Harv. L. Rev.* 499; *The challenge of Crime in a Free Society: A Report by the President's Commission on Law Enforcement and Administration of Justice,* Washington, U.S. Gov't Printing Office, 1967, p. 103; Paul CHEVIGNY, *Police Power,* New York, Random House, 1969 (Vintage Books pap.), 258 D. J. WATCHORN, "Abuse of Police Powers: Reasons, Effect and Control, (1966) 24 *U.T.F.L. Rev.* 48, 64.

225 The *Ouimet Report, supra,* note 158, rejected an "inflexible rule" requiring the rejection of all evidence as neither necessary nor desirable but recommended the enactment of legislation permitting a court, in its discretion, to reject evidence illegally obtained. Such discretion is to be exercised by taking into consideration the wilfulness of the violation of rights, the urgency of the situation and the unfairness to the accused of the admission of evidence. *Ouimet Report,* 74 (1969).

result of the violation of the citizen's rights are likely to exercise stricter control over the actions of the individual police officer."[226]

One could fear that this deterrent effect will be lost if municipalities are shielded by insurance, but, apart from the fact that large municipalities might find it more economical to insure themselves out of a contingent fund,[227] the cost of insurance is likely to be in correlation with the risk involved, and a series of judgments against the corporation for improper practices indulged in by its policemen is likely to raise premiums, thus reviving the need for greater control. Furthermore, a clear recourse against the municipality in cases of police misconduct would undoubtedly increase the probability of victims pursuing their claims and the adverse publicity given to the municipality might prove in itself an effective deterrent.

So far, two Canadian provinces have enacted legislation to give recourse to victims of wrongful acts of municipal policemen. *The Alberta Police Act*[228] provides that a municipality may, "in such cases and to such extent as it thinks fit," pay damages or costs awarded against a member of the police force or a special constable in proceedings for a tort against him or any sum required for the settlement of any claim that has or might have given rise to such proceedings. The weakness of such a statutory scheme is that it does not give a direct right of action against the municipality;[229] it might increase the number of suits against individual constables but the deterrence argument would be best furthered by a direct right of action against the municipality. However, it eliminates the low visibility and uncertain character of the indirect result reached in Montreal by way of the collective agreement and makes it a permanent policy.

In Ontario, the *Police Act*[230] makes the chief of police liable as a joint tort feasor for torts committed by members of the police force under his direction or control in the performance or purported performance of their duty and the municipality shall pay any damages or costs awarded against him and, subject to the approval of the council, any sum required for the settlement of a claim under that provision. The Commissioner of Police of Ontario is also made liable jointly with Ontario Provincial Police officers for torts committed in the purported performance of their duties. Damages awarded against him are to be

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226 *Id.* at 74. See also GELLHORN, *op. cit. supra,* note 224 at 184; Jerome HALL, "The law of Arrest in Relation to Contemporary Social Problems", (1936) 3 *U. Chi. L. Rev.* 435; C. FOOTE, "Tort Remedies for Police Violations of Individual Rights", (1955) 39 *Minn. L. Rev.* 493, 514; J. L. CLENDENNING, "Police Power and Civil Liberties", (1966) 4 *Osgoode Hall L. J.* 174–179; WEILER, *op. cit. supra,* note 212 at 450.

227 L. T. DAVID, *Tort Liability of Local Government: Alternatives to Immunity from Liability or Suit,* (1959) 6 *U.C.L.A. L. Rev.* 1, 45.

228 *The Police Act,* R.S.A. 1955 c. 236 sect. 19a as amended S.A. 1967 c. 61 sect. 3.

229 Wayne R. LA FAVE, *Arrest: The Decision to take a Suspect into Custody,* Boston, Little Brown, 1965, p. 425.

230 *The Ontario Police Act,* R.S.O. 1960, c. 298 as amended S.O. 1965 c. 99 sect. 6 and S.O. 1966 c. 118 sect. 4-5.

paid out of the Consolidated Revenue Fund of the Province.[231] It should be noted that a similar result would be obtained if the courts decided to act on this matter in the Province of Quebec. If a claimant decided to sue both the individual officer and the municipal corporation employing him, and the Court found the corporation to be liable as his "commettant", they would be jointly liable (solidairement responsable).

7. The Courts and Stare Decisis

If a change in the law is needed, who should bring it and in what manner should it be done? In our opinion, the Quebec courts themselves should take the responsibility for carrying out or at least initiating this much needed improvement. It is often said that there is no "judge-made law" in the Province of Quebec,[232] yet this is a clear case of a rule created by our courts and, having tried to show that the outcome would have been different had our courts decided in accordance with the *Civil Code,* as indeed the Court of Appeal first did in the *Doolan* case,[233] we submit that the courts could and should take the initiative to restore the correct law. In fact, by eliminating the artificial distinction between a municipal constable and a peace officer and by applying articles 1053 and 1054 C.C. the Quebec courts would reestablish a rule which is not only legally sound but also more equitable and more in accordance with the true status of the policeman as a "préposé" of the municipality hiring him.

In light of the doctrine of "stare decisis" can our courts now change a rule which has been sanctioned by the Supreme Court of Canada? This seems to be an important question because in *Perreault* v. *Montreal et Grandmaison,*[234] the rule provided the rationale of the decision not to hold the city liable for an assault by its policemen while acting as peace officers. This objection can easily be refuted. First of all, it should be remembered that by holding that the *Civil Code* should regulate this matter our courts would in fact reestablish the rule as it was originally.

Also, the role of Supreme Court should not be over-emphasized. In this discussion the Supreme Court has always been careful not to impose any rule upon the Quebec Court of Appeal. In the *McLeave* case[235] the Supreme Court said that in Quebec the rule might be different, but it is the Quebec courts who refused to apply the *Civil Code.* In the *Hebert case,*[236] the Supreme Court simply followed the rule already laid down in *Montréal* v. *Plante*[237] and, furthermore, we have shown

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231 *The Ontario Police Act,* R.S.O. 1960, c. 298 as amended S.O. 1966, c. 118 sect. 43a.

232 A. RIVARD, *Manuel de la Cour d'Appel,* Montréal, Variétés, 1941, p. 61.

233 *Supra,* note 1.

234 [1965] R.L. 310, 313.

235 *Supra,* note 23.

236 *Hébert* v. *Thetford Mines,* [1932] S.C.R. 424.

237 *Cité de Montréal* v. *Plante,* (1922) 34 B.R. 137.

that it was only an alternate holding. In *Roy* v. *Thetford Mines*[238] the Supreme Court simply explained a rule which had already been created by the Quebec courts. If our courts decide to reform the situation, the Supreme Court in all likelihood will not interfere and will approve what will have been decided by the Quebec Court of Appeal, especially if Quebec judges decide to abandon English and American authorities and apply the *Civil Code*. Finally, it could be said on this problem that the error has been not to apply the *Civil Code* as early cases required. Furthermore, in Quebec, the Code prevails over judicial decisions, especially in light of the fact that the courts have erroneously held that article 1054 has no application.[239]

What would be the result if our courts were to face the issue? Who would be likely to bear the liability for wrongful acts of policemen? In applying article 1054 C.C., our courts would have to use a test similar to the one used by Justice Belleau in *Chevalier* v. *Trois-Rivières*.[240] As a result the Provincial Government would be held liable for the faulty acts of members of the Quebec Police Force and the municipal corporations would be held liable for wrongful acts committed by their policemen, whether they were acting under a municipal by-law, a provincial statute, or the *Criminal Code*. The only exception would be when the municipality could prove that, at the time of the acts complained of, the policemen were not in the course of their duties or were not under the control of the municipal police authorities. In short, policemen would render their employers liable unless it could be proven that they were not in the performance of the work for which they were employed or that they were under the control of another employer or police authority.

An example of this latter situation is provided by articles 79 and 82 of *The Quebec Police Act*.[241] The Lieutenant-Governor in Council is empowered, in case of a threat to public health or safety to order that the Director General of the Quebec Police Force assume the command and direction of the Quebec Police Force and of all municipal police forces. From that moment every member of the Quebec Police Force and of a municipal police force mentioned in the order in council, including its director or chief, comes under the command of the person so designated who is given the necessary authority to enforce, not only the laws of the Province, but also the by-laws of all municipalities whose police forces are designated in the order in council.[241a] On such an occa-

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238 [1954] S.C.R. 395.

239 RIVARD, *op. cit. supra,* note 232 sect. 86 at 55; W. FRIEDMANN, "Stare Decisis at Common Law and Under the Civil Code of Quebec", (1953) 31 *C.B.R.* 723, 746; J. G. CASTEL, *The Civil Law System of the Province of Quebec,* Toronto, Butterworth, 1962, pp. 229-230; *Vandry* v. *Quebec Ry. Light, Heat and Power Co.,* [1920] A.C. 662, 670 (P.C.); *Herse* v. *Dufaux,* L.R. 4 P.C. 468, 489. As to the current status of *Stare Decisis* in the Supreme Court of Canada, see B. LASKIN, *The British Tradition in Canadian Law,* London, Stevens, 1969, [Hamilyn Lectures, 21st Series] p. 66.

240 (1913) 43 C.S. 436, 448. See *supra,* p. 416.

241 *Supra,* note 157.

241a For an example, see Order in Council nº 2975, Quebec Official Gazette, Vol. 101, (1969), p. 5329.

sion liability for wrongful acts committed by municipal policemen during the period determined by the order in council, would not be borne by the municipal corporation employing them but by the Provincial Government because the municipal police forces are then placed under its control.

Thus, if we ask our courts to meet the challenge and to initiate this much-needed reform in our law we can easily foresee that, except in unusual circumstances, all municipal corporations having a police force in the Province of Quebec will be held liable for the acts of their policemen even when acting as peace officers under the *Criminal Code*.

Part IV

Strategies for Statutory Reform

The reform which we think is badly needed in the field of public liability for police torts could also be brought about by statutory enactment. This has been done in Ontario and, to a limited extent, in Alberta. But this possibility brings us to consider economic and policy considerations that have to be taken into account when we ask the question as to who should bear the responsibility. In other words, should the Provincial Government rather than the municipal body be held liable for faulty acts, not only of members of the Quebec Police Force but also of municipal policemen? [242]

There are good arguments in favor of such a solution. The Provincial Government has authority over law enforcement but it requires that all city or town municipalities take over that responsibility in their territorial jurisdiction by imposing upon them the duty to establish and maintain a municipal police force. It is only normal that the Provincial Government assume at least the social cost of indemnifying those who had to suffer from the fulfillment of that duty by the city or town.

Of even greater weight is the economic argument. Traditionally in in Quebec, the Provincial Legislature has delegated to municipal corporations the power to establish and maintain a police force within their territory. Before 1968 there was no duty imposed on any municipality. There was only legislation enabling every village corporation and every city or town to establish and maintain a police force. [243] In practice it meant that small municipalities could have a police force even if it was composed of only one or two policemen. According to the Dominion Bureau of Statistics, in 1968, eight municipalities having a population

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242 This is the solution advocated by M[e] N. ST-GEORGES, Secretary of the Quebec Police Force. See unpublished text of a speech given to "La Société de Criminologie du Québec" (Quebec Regional Session, Nov. 29, 1969), on file with the author.

243 *Municipal Code*, sect. 420 repealed by the *Police Act, supra*, note 157 sect. 95; *Cities and Towns Act, supra*, note 93 sect. 426 (19) repealed by the *Police Act, supra*, note 157 sect. 89a.

from 750 to 2,500 inhabitants had independent police forces, 41 with a population between 2,500 and 5,000 and 49 with a population between 5,000 and 10,000 people.[244] The Quebec Police Commission Report[245] states that as of December 31, 1968, out of 1,224 municipalities as defined in the Municipal Code,[246] 110 had a permanent police force and 260 had no regular police force but engaged part-time policemen when necessary. The great majority of these municipalities have populations of less than 2,000.[247] It can be assumed that many of these municipalities would find themselves in a very difficult situation if they had to be responsible for wrongful acts of their policemen even when acting under the *Criminal Code*. The Provincial Government would be more able to assume such a liability, especially if it is officially set out by statutory enactment, because in that event it is likely that the number of lawsuits will increase.

But there are other considerations that have to be taken into account. Both the Prevost Report and the Ouimet Report have criticized the evils resulting from the fragmentation of police forces.[248] There are at least 324 permanent police forces in Quebec and 279 municipal corporations engage part-time policemen when necessary.[249] Nearly one hundred of those permanent police forces have only one policeman, and 84 have less than six members.[250] The results as noted by the Prevost Commission are submission of the police force to the local political scene, arbitrariness and inefficient work, especially against organized crime.[251] To counteract this fragmentation, the Prevost Commission urged that the *Police Act* be amended so as not to require cities and towns to maintain a police force but to insist that municipalities use the powers given by law to enter into agreements with other municipalities to organize one jointly.[252] The recommendation of the Prevost Commission was to create large regional police forces.

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244 *Police Administration Statistics,* Ottawa, Dominion Bureau of Statistics, [1968] Table 27, p. 49.

245 *Quebec Police Commission, Annual Report,* Quebec, Quebec Official Publisher, [1968] Table IV, p. 55.

246 "Every municipality other than village municipalities, must at all times have a population of at least three hundred souls." *Municipal Code,* sect. 36; "Any territory, in order to be erected into a village municipality, must contain at least forty inhabited houses within a space of sixty superficial arpents and the taxable immoveable property in such territory must have a value, according to the valuation roll in force, of at least fifty thousand dollars." *Municipal Code,* sect. 37.

247 Any municipality with a population of not less than two thousand can by letters patent become a city or town municipality and thus cease to be governed by the Municipal Code. *Cities and Towns Act, supra,* note 93, as amended by S.Q. 1968 c. 55 sect. 12.

248 *Ouimet Report, supra,* note 158 at 89. "Il nous paraît absolument anormal et inquiétant qu'une population de six millions possède plus de quatre cents corps policiers différents et autonomes. Si jamais le risque d'un Etat policier s'est présenté au Québec, c'est dans ce contexte de morcellement et d'improvisation qui laisse constamment subsister le risque de l'arbitraire." 1 *Prévost Report, supra,* note 159 at 63, see also 85.

249 *Quebec Police Commission, Annual Report,* 1968, *supra,* note 245, Table III pp. 53-54.

250 *Id.* Table IV at 55.

251 1 *Prévost Report* 87; sect. *Prévost Report,* Tome III at 187, 224.

252 1 *Prévost Report* 64.

This task has been undertaken with the creation of metropolitan forms of government for the regions of Montreal, Quebec and Hull.[253] According to the former Minister of Justice this is the first step in a general plan to integrate all the police forces of the Province. By creating eight administrative regions for the Quebec Police Force the Government will be able to give them a regional security council with representatives of the Quebec Police Force, of municipal forces and the public. Then, the municipal forces within each region will be integrated and unified. The idea would be to give the Provincial Police Force greater jurisdiction over law enforcement in each region and leave to municipal police forces jurisdiction over traffic control, minor crimes and enforcement of their own by-laws.[254]

At best, this plan is wishful thinking given the traditional reluctance of local police authorities to give up their powers. At the present time, municipal police forces are autonomous within their territory. According to the Director, the Quebec Police Force exercises an original jurisdiction everywhere in the Province in matters of morality and control over the sale and distribution of alcoholic beverages but, in other matters, it intervenes in a municipality having its own police force when it is called by the local authorities. The Provincial Police Force also provides police protection for municipalities without municipal policemen.[255] Where there are municipal forces, the idea of extending the jurisdiction of the Quebec Police Force while reducing that of the local police will likely be met with strong local opposition.

The problem is then to insure that the public authority responsible for wrongful acts of municipal policemen is financially capable of supporting that cost, while at the same time making sure that the policy chosen will further the goal of integration of police forces in the Province. In our opinion there are two great weaknesses in the suggestion of making the Provincial Government liable for acts of municipal policemen. First of all, even if lawsuits are not the best way of controlling excesses in law enforcement what little beneficial effect they have would be lost because the Government would pay the bills without having immediate control over the conduct of the policeman while the municipal authorities, who employ the policeman will not be hurt because they do not have to pay if he violates the rights of citizens. The costs of bad law enforcement and improper conduct should be borne by those who are able to put a stop to such practices. Secondly, by having the Provincial Government support that responsibility, there will be a reluctance to integrate police forces. If small municipalities do not have to pay damages for the acts of their police officers they will retain their polices forces rather than submit to the jurisdiction of the Quebec Police Force.

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253 *Montreal Urban Community Act*, L.Q. 1969, c. 84, Division VIII, ss. 196–241; *Quebec Urban Community Act*, L.Q. 1969, c. 83, sect. 107; *Outaouais Regional Community Act*, L.Q. 1969, c. 85, sect. 107.

254 "Un espoir de Rémi Paul, Un seul corps de police d'ici cinq ans", Le Devoir, Montréal, Friday, Feb. 6, 1970 p. 1.

255 Information provided by Mr. J. A. ST-PIERRE, Director of the Quebec Police force, *supra*, note 202.

There remains the problem of giving a recourse to citizens without too much financial strain on the public authority bearing that cost. Municipal corporations are already responsible for the negligence of other employees.[256] They are also responsible for their negligence in maintaining roads, bridges, water courses and sidewalks in the condition required by law.[257] Judgments against the corporation can be paid by the treasurer out of the funds at his disposal, on the authorization of the council. If there are no funds available, the council shall order the treasurer to levy on the taxable property in the municipality a sum sufficient to pay the amount due, with interest and costs. The person in whose favor such judgment is rendered may obtain from the court the issue of a writ of execution against the corporation in default.[258]. Since 1968, the council of a municipal corporation may also proceed by way of a loan requiring the approval of the Quebec Municipal Commission and of the Minister of Municipal Affairs.[259] In some large cities, such as the City of Montreal, payments for the settlement of claims and for judgments are made out of an "Appropriation for Contingent Expenditures" entered each year in the budget. This appropriation is of a sum equal to one and one-half per cent of the probable revenue.[260]

The problem is not so great for large governmental units such as the Provincial Government or a big city. Rather, the burden is felt by small municipal corporations having a minimal population and a narrow tax base. Adding to their present liabilities, the possibility of judgment in damages for wrongful acts of their unique policeman when he is acting under the *Criminal Code* might be too great a burden. In the case of *Beim* v. *Goyer*[261] for instance, the award was $32,036.80 with interest and costs.

The best way to insure that small municipalities will be able to bear this new liability while at the same time furthering the goal of amalgamation or integration would be to require them to purchase liability insurance covering the faulty acts of their policemen. The *Police Act* requires all cities and towns to have a police force but this policy has been criticized by the Prevost Report as working against the goal of integration of police forces; this provision should be abrogated or replaced by one imposing the same duty on all municipalities having a population of 10,000 and more. As for municipalities below the fixed limit of 10,000, they should be empowered to establish and maintain a police force on the strict condition that they be able to furnish proof of insurance coverage for their policemen (including special constables) for an amount deemed sufficient by the Municipal Commission or the Police Commission. The act should also be amended to impose liability on municipal corpora-

256 *Municipal Code,* sect. 143.

257 *Municipal Code,* sect. 453, Cities and Towns Act, *supra,* note 93, sect. 429 (11).

258 *Municipal Code,* sect. 811-825; Cities and Towns Act, *supra,* note 93 sect. 628-641.

259 S.Q. 1968 c. 86 sect. 40, amending Municipal Code, sect. 812; L.Q. 1969 c. 55 sect. 151 amending Cities and Towns Act, *supra,* note 93 sect. 629.

260 *Charter of the City of Montreal,* 8-9 El. 2, c. 102 sect. 664b.

261 [1965] S.C.R. 638.

tions for all acts of their policemen acting in the course of their duty. The same liability should be imposed on the Provincial Government for acts of members of the Quebec Police Force.

A requirement that liability insurance be purchased by small municipalities having their own police force is not unreasonable given the fact that in Quebec liability insurance is extensively used by local governments who have long assumed liability for streets and sidewalks under their control. Under the Municipal Code, every municipal corporation is required to cause buildings and immoveables belonging to it to be insured for at least half their value.[262] The cost of liability insurance is small enough to justify this requirement. For the City of Quebec, with a population of 164,000 and a police force of 355 members, the annual premium is $14,100,[263] less than $40 for each policeman and less than $0.09 per capita. In Trois-Rivières, a city of 65,250, liability insurance was even cheaper in 1969. Both policemen and firemen, 156 in all, were covered at a total cost of $3,607. The cost for each member was $23.10 and amounted to less than ½ of 1% of the salaries paid by the city and the cost per capita was less than $0.05.[264]

Such a policy, however, has the advantage of not working at cross-purposes with the goal of integration. Small municipalities which would be unable to pay for sufficient insurance coverage would have to join with other municipalities to provide common police services to a population large enough to permit economies of scale. Since they are already empowered to organize joint police forces,[265] the law could permit them to enter into joint power contracts to purchase liability insurance and share the costs. If such contracts are impossible or uneconomical because of distance, low density of population or other factors, they would simply be "priced out" of the market and the Quebec Police Force would take over the law enforcement function in the jurisdiction.

Conclusion

We have studied municipal liability for police torts in Quebec, its evolution in the case law and we have criticized the distinction arrived at by the courts as being unfounded in law, unjust and arbitrary. Even if we have suggested a possible strategy for statutory reform, we strongly feel that the courts should not abdicate their responsibility to the Legislature.

The example of the United States shows that the Legislature should not be relied upon to change the law.[266] This is a clear case of "fossiliza-

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262 *Municipal Code*, sect. 356a.

263 Letter from Me Claude SIMARD, *supra*, note 221.

264 Information obtained from the City of Trois-Rivières, May 1970.

265 *Police Act, supra*, note 157 sect. 60 as amended by L.Q. 1969, c. 22, sect. 15.

266 K. E. VALANDINGHAM, *Local Government Immunity Re-Examined*, (1966-67) 61 *Nw. U. L. Rev.*, 237, 255.

tion'' of the law, by which the doctrine of *stare decisis,* blindly applied, has led courts into artificial and unrealistic distinctions to which they have clung. A vivid example of what one author has called ''cross-sterilization''[267] of legal concepts from one jurisdiction to another is furnished by *Buttrick* v. *Lowell,*[268] ''vintage Lincoln''[269] which was relied upon by an impressive number of state courts in the United States as well as by the Supreme Court of Canada[270] and courts in Quebec,[271] Ontario,[272] New Brunswick[273] and Manitoba.[274]

The same phenomenon has occurred in the United States and it appears the courts, which have been at the origin of the distinction between governmental and proprietary functions of local governments, will have to take the responsibility of restoring the situation.[275] Yet we seek much less from Quebec courts than is asked of the state courts in the United States. In Quebec the principle that municipal corporations are subject to civil liability as expressed by 1053 and 1054 C.C. has long been recognized. They are even liable when their policemen are acting as ''municipal constables''. What we are asking the courts is simply to extend that liability to cases where the municipal policemen are acting as ''peace officers'' seeking to enforce the *Criminal Code.*

It would be tragic if the courts of the Province of Quebec, after having created the distinction between ''municipal constables'' and ''peace officers'' should adhere to *stare decisis* and wait for the Legislature to change this anomalous judge-made rule. If municipal tort liability is clearly pronounced once and for all by the courts, it will induce the Legislature to devise a more perfect solution, such as the one suggested above in Part IV.[276]

RÉSUMÉ

La responsabilité des municipalités pour les dommages causés par les policiers dans le Québec

La protection publique est une fonction du gouvernement local qui bénéficie à toute la collectivité sous sa juridiction. Comme toute autre activité, de mauvaises pratiques sont parfois employées, des erreurs se

267 SHAPO, *op. cit.,* note 75 at 481.

268 *Supra,* note 9.

269 SHAPO, *op. cit.,* note 75 at 482.

270 *McLeave* v. *Moncton,* (1902) 32 S.C.R. 106.

271 See Part I.

272 *Kelly* v. *Barton, supra,* note 104.

273 *Woodeforde* v. *Chatham, supra,* note 104.

274 *Wishart* v. *Brandon, supra,* note 104.

275 See, *supra,* note 266.

276 "In this respect the principal contribution of the judicial abrogation movement will very likely be its influence on legislative consideration of the problem." VALANDINGHAM, *op. cit.,* note 266 at 263.

commettent, des dommages aux biens et aux individus sont causés par ceux que la municipalité emploie à cette fin. En 1970, triste perspective pour le citoyen lésé, il est souvent seul, avec le policier, à supporter le coût de ces erreurs parce que la corporation ne peut être tenue responsable.

La distinction entre le policier-constable, préposé de la municipalité, et le policier-agent de la paix, qui ne représente personne, est l'aberration fondamentale qui conduit aux situation illogiques et injustes que l'on rencontre en jurisprudence. Le développement de cette distinction résulte de l'importation dans notre droit de notions juridiques qui lui étaient étrangères et d'une application aveugle et parfois erronée de la doctrine du *stare decisis*.

L'auteur est d'opinion que cette distinction est sans fondement juridique valable en plus d'être logiquement et pratiquement insoutenable. Une fois démontrée l'applicabilité de notre droit civil à cette question et une fois éliminée la confusion quant à la portée du Code criminel, nos tribunaux eux-mêmes pourraient régler cette question définitivement en reconnaissant qu'il existe bel et bien un lien de commettant à préposé entre une corporation municipale et les policiers qu'elle emploie.

Le même résultat, la protection du public et aussi celle des policiers, pourrait être obtenu par l'intervention du législateur. Le problème est alors de déterminer quelle autorité devrait en supporter le coût. Certains sont d'avis que la province, pour des raisons évidentes de solvabilité, devrait être responsable statutairement des dommages causés par les autorités policières locales. L'auteur estime cependant que d'autres considérations justifient une solution différente. La première est que, afin d'inciter à une administration de la justice plus parfaite et de minimiser le développement de pratiques dangereuses, ceux-là mêmes qui administrent la protection publique au niveau local, les municipalités, devraient supporter le coût des erreurs commises. De plus, une telle solution n'irait pas à contre-courant de la politique de regroupement et d'amalgamation des forces policières locales recommandée par le Rapport Prévost *.

Pour assurer la solvabilité de l'autorité rendue responsable par la loi, aucune municipalité ou aucun groupe de municipalités ayant une force commune, de moins de 10,000 âmes, ne devrait être autorisée à maintenir une force policière à moins qu'elle ne fournisse aux autorités provinciales une preuve de solvabilité par assurance. Les collectivités locales financièrement incapables de supporter, par l'assurance, le coût des erreurs commises par leur force policière devraient être éliminées du marché de la protection publique. Dans ce cas, ce service devrait être assuré par la Sûreté du Québec. Les dommages fautifs causés par les membres de la S.Q. seraient évidemment à la charge de la province.

* S.C. *La société face au crime*, Québec, Editeur officiel, 1968, vol. 1, pp. 63 et 85.