The organizing principles of constabulary discipline: Towards a rule of essential characterization for British Columbia's Conservation Officers

A special submission to the Legislative Assembly of British Columbia's parliamentary committee on reforming the Police Act

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Abstract

This article provides a detailed review of the BC Court of Appeal's recent (2020) decision in *Casavant v. Province of BC (BC Labour Relations Board)*, 2020 BCCA 159. The appellate division in *Casavant* nullified four labour arbitration decisions and one Supreme Court of BC decision which had previously been rendered against the appellant. Rather than allowing labour arbitration boards to decide matters of constabulary discipline pursuant to union and employer collective bargaining agreements, the division instead upheld long-standing principles involving the disciplinary jurisdiction over the Crown's constables. In reversing the previous decisions against the appellant, the division favoured case law and statutes which pertain specifically to a police constable's rights during disciplinary proceedings. In the appellant's case, however, he was an appointed special provincial constable employed by the Province of BC as an armed and uniformed provincial conservation officer (i.e., not a municipal police constable). Despite this, the court held that constabulary case law regarding police discipline applied to the role and job of a special provincial constable employed as a conservation officer. The decision in *Casavant* has raised many questions for unions representing conservation officers and has set a high threshold for the discipline and dismissal of conservation officers in the province. In January 2021 the Supreme Court of Canada dismissed two applications opposing the BC Court of Appeal judgment. This article further explores the extensive academic and legal research which was prepared prior to bringing on the appeal in *Casavant*. It argues that the appellate division's decision in *Casavant* is well grounded and that the principles applied by the court are long standing. Special provincial constables employed as conservation officers in British Columbia are part of provincial constabulary services. As such, it is appropriate and accurate to apply policing legislation, principles, and case law to the discipline and dismissal of conservation officers. Until such time as a provincial police board is established to oversee the functions, discipline, and dismissal of provincial law enforcement services, unions and labour arbitrators have no jurisdiction under collective agreements to review the discipline and dismissal of conservation officers who are appointed as special provincial constables. For very practical reasons argued herein, the review of discipline and dismissal of a special provincial constable, *while acting in their capacity as a constable*, remains the sole prerogative of the courts.

I. Introduction

This article reviews the recent BC Court of Appeal decision in *Casavant v. Province of BC (BC Labour Relations Board)*, 2020 BCCA 159 ("*Casavant*")[1] and the legislative structure that applies to special provincial constables appointed under Section 9 of the *Police Act*, RSBC 1996 c. 367 [2] and employed as conservation officers pursuant to Section 106 of the *Environmental Management Act*, SBC 2003 c. 53.[3]

The court's decision in *Casavant* reaffirms certain constabulary principles which apply to the discipline of special provincial constables (serving as conservation officers) and the investigation of alleged code of conduct offenses. Broadly, the appellate court's decision applies both *Police Act* regulation and the common law of constabulary discipline to appointed conservation officers who hold special provincial constable status.

It was held by the court that special provincial constables employed as conservation officers and *acting in their capacity as constables* are to be treated as part of the constabulary for the purposes of disciplinary defaults.

Arguments opposing the court's decision in *Casavant* were put before the Supreme Court of Canada in an application for leave to appeal made by the BC Government and Employee's Services Union, and an application to intervene by the Province of BC. Both the applications were dismissed in January 2021, leaving the decision in *Casavant* to stand as common law.

Until the decision in *Casavant*, regulations regarding the labour investigations of special provincial constables were not consistently applied by provincial government agencies. This lack of consistency resulted in uncertainty in the complainant's and responding officer's rights during investigative processes. This uncertainty, in turn, resulted in an ad hoc labour relationship between constables, their employing ministries, and the union that represents them.

The regulations respecting the investigation of complaints involving special provincial constables are there to protect both the public and the officer. They must not be deviated from and it is not open for unions or employers to investigate constables in a manner not provided for under the governing legislation.

However, the 'governing legislation' (i.e., statutes) for constabulary discipline is complex and contains many interpretive issues that are core functions of specialized areas in law, especially for British Columbia's special provincial constables. This article explores these interpretive issues and core functions within what I describe as the concept of 'organizing principles' for constabulary discipline. In conjunction with the organizing principles, an additional cardinal rule emerges as a principle in constabulary law. This is the 'rule of essential characterization'. The rule of essential characterization (which is covered further herein) dictates that an employer cannot simply state or assert that a constable is being removed from service for some reason or another (i.e., "we just don't like them", "they are unsuitable for the job" and so on). If the essence of the employer's claim

1 *Casavant v. Province of BC (BC Labour Relations Board)*, 2020 BCCA 159. Available at: **http://canlii.ca/t/j81d4**

2 *Police Act* [RSBC 1996] c. 367.

3 *Environmental Management Act* [SBC 2003] c. 53.

leaves the court to believe that the true nature and substance of the dispute was disciplinary then the 'essential characterization' of the dispute in its entirety is disciplinary. The employer and union are then bound to follow the processes established by the constable's governing statutes under the *Police Act* and not general labour proceedings otherwise available under a collective agreement.

In other words, an employer cannot allege that a constable committed a disciplinary default and then, in an effort to circumnavigate the *Police Act*, assert that the constable is simply unsuitable and being dismissed under a collective bargaining right in negotiation with the constable's union. When faced with allegations whose essential characterization is disciplinary in nature, the constable is entitled to the processes established under statute by virtue of the nature of the office of constable.

This article first provides for the reader a description of my personal positionality in relation to policing theory in Canadian society. This is followed by a brief factual background to the events which were before the appellate division (i.e., panel) in *Casavant*. Third, for legal context, the undisputed portions of the case litigation history are then provided. Fourth, a detailed discussion on the research leading up to this appeal is offered. Finally, concluding remarks are made.

II. Personal Positionality On Policing Theory

I started my career in policing with the Canadian Forces, Military Police. I worked in what was known as a 'field unit' (i.e., a uniformed, tactically-trained team that deployed with the infantry and performed various specialized functions at home and abroad). I began my service in the Canadian Forces Reserves and later served alongside the Regular Force army on full-time contract (i.e., Class 'C' service). As a young soldier I was trained in the Crown's policing systems and served both at home and abroad in this capacity (notably, my work training Indigenous police agencies in Afghanistan as a Police Operational Mentor). These life experiences have most definitely shaped my personal worldview on what is and what is not acceptable policing behaviour within society, and the difference between military and domestic police work (although that line is sometimes blurred to the detriment of society). It is not necessary to expand on my experiences as a conservation officer following my military service because this has been adequately addressed by the courts in *Casavant*.

My worldview on policing is quite simple. I believe that our domestic policing services have drifted (or 'mission creeped') into military-style operations. In my view, this drift has eroded community-centric principles (i.e., being a servant of your home community) in favour of unquestioning allegiance to the state (i.e., a loss of independence in police decision making). Often, this shift of allegiances is exemplified through the manner in which police force (i.e., violence) is used against human and non-human species within our society.

In my view, violence being exercised by the constable in an independent and accountable manner (and as a function of necessity in the role of constable) is fundamentally different than a military foot soldier using violent means to accomplish an executive objective and complete orders of the state. There is a clear delineating line between an army and a constable – or should be.

In almost overly simplistic terms, a military force serves the state, the constabulary should serve the people. Where a military force may well be ordered to take killing actions, the constabulary must never be ordered in such a way as it fundamentally removes the independent nature of the 'office of constable.' Sadly, in modern times violent police actions are often mobilized through the vehicle of state-sanctioned directives and orders, as if the constabulary were a military agency.

It was never the parliamentary intention for the constabulary, historically speaking, to be structured or behaving as if it were a military force. Such a situation would have squarely placed the constabulary into the spectrums of repressive state institutions (see for example Louis Althusser's discussions on Repressive State Apparatuses, RSAs[4]). Accepting that police are, and will always be, like the military because of their operational practices, ranking positions, state uniforms, job functions, armaments, and so forth, is a structuralist position I am strongly opposed to. Rather, I seek to assist the reader in thinking deeply, maybe even post-structurally, about the office of constable in hopes that we, as society, can return to the historical community-centric principles that have previously been in place.

While I approach this article as objectively as possible though an analysis grounded in history and law, I recognize that I am close to the text both personally and professionally and I am open about discussing my personal proximity in further debate. I am also transparent about my worldview and life's story. From my vantage point, there is a difference between qualified bias (i.e., experiential-based opinions) and prejudice (i.e., discrimination). I do not discriminate against environmental policing agencies nor the officers that serve within their ranks, indeed, constabulary service has been my own life's work. However, as a former senior constable myself, I do hold very strong opinions about the relationship between our policing services, the public, and non-human species. I view these unique perspectives as qualified bias.

It is my sincerest hopes that this article forms the backbone of an active and alive conversation and dialog. I seek to directly contribute to a greater public dialog and legal understanding of what environmental police constables are, and more importantly what they could be. To that end, I feel it necessary to clarify my intent with this article, which is not to *attack* but to *critically inform*. After all, are not all cases 'personal', to some extent? The law touches every one of us in our daily lives and we must be afforded the space to openly discuss our personal and societal experiences with the law in order to improve it for the betterment of all.

4 Althusser, L. (2001). Ideology and ideological state apparatuses: Notes towards an investigation. In *Lenin and philosophy and other essays*. p. 85-126. London: Monthly Review Press. Digital copy (1971) available from: **https://www.marxists.org/reference/archive/althusser/1970/ideology.htm**

III. Factual Background

The background to *Casavant* is largely undisputed. I was hired in 2013 by the Province of BC, Ministry of Environment. Following all probationary periods and training requirements, I was appointed under Section 106 of the *Environmental Management Act* as a conservation officer. In that capacity, I held an additional appointment under Section 9 of the *Police Act* as a fully armed special provincial constable, *without limitation*. I was subsequently attached to the Port McNeill RCMP detachment on northern Vancouver Island.

In July 2015, while serving as a provincial conservation officer and appointed special provincial constable, I was seconded to the Port Hardy RCMP detachment (a small community police station on Northern Vancouver Island). A local state of emergency had been declared and an evacuation order issued due to an interface wildfire. All hands were called on deck. As a provincial constable, I joined other emergency services in providing whatever help was needed.

While assisting the RCMP with evacuation and security-related duties, a public complaint was received alleging three bears had been rummaging in a resident's garbage while the fire raged a short distance away. From a distance, and without attending the location or speaking to the resident, the province believed the bears to be habituated to non-natural foods. As a result, simultaneous to performing other security duties, I received a provincial kill order for a mother bear and her two cubs. I euthanized the sow, but I declined the order to kill her cubs.

As recognized by the BC Court of Appeal, I had "[…] formed the view that killing the cubs in these circumstances would be inconsistent with Ministry policy" [respecting the handling and transportation of bear cubs].[5] Instead, the cubs were sent to a veterinarian for a medical assessment and then transferred to a wildlife re-habilitation facility where they were eventually released back into the wild, pursuant to standing provincial policies of the day.

A supervisor, not present at or attending the scene, filed a formal code of conduct complaint against me for not abiding by the kill order. I was accused of the disciplinary default of "dereliction of duty" (i.e., insubordination). A Notice of Complaint was issued to me. I was then suspended from my duties pending a performance investigation. Following two labour investigations, I was found to be generally "unsuitable" as an officer and I was dismissed as a conservation officer and special provincial constable.[6]

The BC Conservation Officer Service stated that they were exercising their rights under collective bargaining authorities and transferring me to a new employment relationship in a new ministry. I was dismissed as a conservation officer and my appointment under the *Police Act* as a special provincial constable was revoked as a result. I lost my security clearance with the RCMP.[7] My challenge to this disciplinary dismissal and forced transfer set in motion five years of litigation and legal challenges regarding the rights of special provincial constables during disciplinary processes.

5 In *Casavant* at para 4.
6 In *Casavant* at para 5.
7 In *Casavant* at para 7.

IV. Litigation History

As a conservation officer and special provincial constable, I was represented by a union – the BC Government and Employees' Services Union (BCGEU). It is one of the largest labour unions in British Columbia. However, out of its over 80,000 members, only approximately 525 (i.e., less than 1%) are special provincial constables, and even less are conservation officers (approximately 125 or less than ¼ of 1%). The union's initial legal advice was to treat the matter as one of a general labour dispute and file a grievance contesting the employer's dismissal. This was done. Two grievances were filed by the union.

Approximately seven months after the dismissal (February 2016), the matter proceeded to an arbitration hearing under the union and employer's Collective Bargaining Agreement. Following opening comments, the matter proceeded no further. A settlement agreement was reached between the union and the employer respecting my dismissal and transfer. Acting on union legal advice, I also signed the agreement. I did not return to my position as a conservation officer or special provincial constable. Writing for the majority of the BC Court of Appeal, Madam Justice Fenlon described these initiating labour proceedings as "ill-considered".[8]

After the union settled their grievances (a process in which I had no standing or rights of representation in my own defence), I then retained outside counsel who assisted with filing certain information requests under the *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165. Two labour investigation reports were recovered. First, a report written by a workplace psychologist retained by the employer (the "Forshaw Report"). Second, a report written by the employer's general labour investigator (the "Myhall Report"). There were concerns with both documents.

Instead of performing a workplace assessment, the Forshaw Report performed an individual assessment of my qualifications, attitudes, and personal beliefs as an officer and did so without my knowledge or consent.[9] The Forshaw Report cast me as unsuitable for service as a conservation officer and asserted that mistakes must have been made in recruiting. It was suggested that I be employed elsewhere. The author was later sanctioned by the College of Psychologists following an investigation into his conduct and report writing.[10] However, this was approximately a year after my dismissal and after all the decisions against me had been made.

The Myhall Report did not consider the operational policies or procedures respecting the discipline of conservation officers who were on duty and acting in their capacity as constables. This document also stated that I was unsuitable for employment as an officer and suggested that alternative arrangements be made.[11]

Both of these documents were withheld from the union and me during the initial dismissal and subsequent arbitration proceedings. Neither labour investigator was a qualified constable or authorized discipline authority pursuant to investigation procedures and process involving special provincial constables. In my view at the time, the reports constituted critical evidence regarding the lawfulness of the process that I was subjected to and the quality of accusatory information written about me without my knowledge.

8 In *Casavant* at para 1.
9 In *Casavant* at para 10.
10 In *Casavant* at para 10.
11 In *Casavant* at para 11.

Through counsel, I subsequently applied to the arbitrator to have the matter re-opened because of the withholding of these two documents. I argued they were critical evidence and spoke to the lawfulness of certain labour processes. The union and employer opposed my applications, stating they had exclusive control over the grievance processes, that the matter was settled, and that neither I nor my lawyer had standing before the arbitrator. The arbitrator agreed with the union and employer and denied my applications for standing as well as my application to have the union's settlement agreement reopened.[12]

With my counsel now barred from the proceedings, I filed with the BC Labour Relations Board (the "Board") as a self-represented litigant, arguing that I was a party affected by a flawed arbitration decision. The Board (as is later discussed in more detail) has authority to review arbitration decisions in the province. These filings (for the non-labour readers) are known as a Section 99 application under the *BC Labour Relations Code*, RSBC 1996. c. 244 (the "Code")[13] (I will describe this legislation later, suffice to say for now the Board is considered an expert tribunal, which means its decisions are rarely overturned by a court).[14]

I asked the Board to reopen the matter for the same reason presented to the arbitrator and to grant me standing before the arbitrator. I also asked for an oral hearing before the Board. My application was denied, and no hearing was held or allowed. The Board confirmed that the union had exclusive control over the grievance processes and that I was not a party to the union settlement agreement (despite my signature on the document). Therefore, I had no standing to pursue the matter further.

In such a situation I was entitled to request that the tribunal review its decision. This is known in labour proceedings as a 'reconsideration' or Section 141 application. I applied to the Board a second time, now asking for the Board to overturn its original decision and grant me standing and a hearing in order to bring my concerns about a flawed process forward. In this application, I provided to the Board all letters that my previous counsel had written to the arbitrator, I provided the Forshaw and Myhall Reports, I described that at the time of this dispute I was a special provincial constable who was serving as a conservation officer, and that certain statutory processes applied to me outside of the union's exclusive bargaining rights. My application for reconsideration was summarily dismissed without a hearing.[15]

Following this, I filed a petition for judicial review (of the Board's reconsideration decision) in the BC Supreme Court.[16] At judicial review, I advanced a primary jurisdictional argument and squarely challenged the Board's jurisdiction over constabulary discipline matters. I also advanced multiple alternative arguments, a decision I would not repeat again or recommend to others.

On reflection, I feel my alternative arguments frustrated the chambers proceedings and did little to help provide the jurisdictional clarity needed to be successful in oral argument. I did correctly advance the primary jurisdictional argument, but in retrospect I should have stopped there because my alternative tangents risked

12 In *Casavant* at para 12-13.
13 *Labour Relations Code* [RSBC 1996] c. 244.
14 In *Casavant* at para 14.
15 In *Casavant* at para 15.
16 In *Casavant* at para 16.

muddying the already dirty jurisdictional waters. I only succeeded in creating confusion where clarity lay in law and in principle. I seized defeat from the jaws of what should have been an early victory.

As a result, the chambers judge rendered a pointed finding that I had never raised the issue of jurisdiction before the Board. The petition was dismissed in a lengthy decision that addressed every one of my alternative positions but not the critical threshold issue of labour tribunal jurisdiction in constabulary discipline. There is a well-established military lesson here I learned as a young soldier and would have done well to remember during oral submissions at judicial review – accuracy, clarity, and brevity – then sit down and shut up.

I then narrowed my argument to the primary jurisdictional issue and rewrote the file (albeit now contending with a standard of review and daunting task of establishing overriding and palpable err in the chambers decision). I filed an appeal, arguing the record before the chambers judge clearly showed that, although I did not use the exact vernacular term 'jurisdiction' I had raised the issue of 'lawfulness' of the previous labour proceedings; that my rights to a distinct disciplinary process as a constable had been violated; and that the record contained multiple assertions to those affects, regardless of the vernacular phrasing.[17]

I argued, with the greatest respect, that the chambers judge had erred in her exercising of discretion against me not to hear the jurisdictional issue at judicial review and that the record supported my arguments regarding constabulary discipline as distinct and separate from union collective bargaining rights. I argued that the laws regarding constabulary discipline were well established *organizing principles* and that deviating from these principles would have far reaching consequences not just for my case but for all constables in British Columbia.

On appeal, it was found that the record did disclose multiple references to the lawfulness of the previous labour proceedings and that there had been an err in the exercise of judicial discretion. Madam Justice Fenlon, writing for the majority, stated that the lower court's discretionary decision to *not hear* the jurisdictional matter in my case for the first time on judicial review "[…] did not consider the settled nature of the jurisdictional question Mr. Casavant wished to raise".[18]

Although it was held that a court may very well exercise its discretion to decline hearing a matter for the first time on judicial review, Justice Fenlon concluded "[…] that rationale will be less compelling when the tribunal and the courts have expressed their views on the subject in earlier decisions […]".[19]

The appellate decision then went on to describe the settled nature of the jurisdictional question at play and applied the common law regarding disciplinary jurisdiction over the Crown's constables (generally) directly to special provincial constables.[20] The *Police Act, Special Provincial Constable Complaint Procedure Regulation*, B.C.

17 In *Casavant* at para 18.
18 In *Casavant* at para 41.
19 In *Casavant* at para 41.
20 In *Casavant* at paras 42-58.

Reg.206/98[21] was identified as the correct regulatory regime for investigating allegations and complaints against a special provincial constable appointed under the *Police Act* when acting in their capacity as a constable.[22]

The appeal was allowed, in part. The chambers decision was set aside and the proceedings before the arbitrator and Board declared a nullity – approximately five years after the initial dismissal.[23]

V. Discussion

Having the benefit of conducting the primary constabulary research for this case, I wish to explore the principles that were addressed at length in oral submissions and adopted by the appellate court in *Casavant*.[24] These principles require further examination in order to fully understand their impact on future government operations and union collective bargaining. I accomplish this under the four discussion sub-headings of (*a*) bargaining rights and the constable, (*b*) the history of community constables, (*c*) special provincial constable law in BC, and (*d*) a complete statutory scheme.

A. Bargaining Rights and the Constable

I will begin with general employee/employer relationships (which are different from constabulary offices, which I cover later). In brief, the legislative structure of the Code establishes the BC Labour Relations Board as an expert labour tribunal. It is, in practice, the supervising authority of British Columbia arbitration proceedings for unionized employees.[25]

The essence of unionized labour legislation, broadly speaking, is to protect the *exclusive* bargaining rights of employers and unions (as it is in most of Canada). It is not legislation for employees, nor is it legislation that protects employee's rights. Essentially, as a matter of well-established labour law, where employees have elected a union to represent them, the union is the master of the labour processes and the decisions made on behalf of the employee will not be interfered with unless the union member can establish that their union failed to represent them fairly (a virtually impossible threshold of review to meet, although it does happen in rare circumstances).

In overly simplistic terms, the theoretical rationale for this area of law is that the equitable distribution of labour (usually based on some version of appointment by merit), and the efficient resolution of workplace dis-

21 *Police Act, Special Provincial Constable Complaint Procedure Regulation*, B.C. Reg. 206/98.

22 In *Casavant* at para 59 & 61.

23 In *Casavant* at para 62.

24 In *Casavant* at para 51.

25 I pause here to note that this article deals expressly with unionized labour and not non-union relationships which are governed under different legislation and beyond the purpose and scope of this discussion. When I say 'general labour' in the context of this writing I am referring specifically to unionized labour.

putes, requires a broad picture view of *collective* contractual bargaining interests and not necessarily a narrow issue-by-issue perspective based on *individual* employment needs. In general labour law, collective employment interests of the many are favoured over the individual employee's interests and wants.

The delineation of the line between an individual employee's rights in the workplace, and the needs of the collective many, are left to the sole review of specialized labour tribunals who are considered experts in the contractual relationships between unions, employers, and employees – a jurisprudential experience courts of law rely heavily on throughout Canada and rarely interfere with as a matter of best legal practice.

The law on general union labour relations is well established and need not be repeated further here.[26] It is sufficient to recognize that, in order to enforce the above described collective rights, the Code provides very strongly worded privative clauses for the reviewing tribunal.[27] The Code also provides that the tribunal's jurisdiction is for matters that are within its *exclusive* expertise (i.e., general union labour disputes).[28] This expertise was described by the Supreme Court of Canada in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 as:[29]

> [33] [...] expertise is something that inheres in a tribunal itself as an institution: "[...] at an institutional level, adjudicators [...] can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions".[30]

In principle, a strongly worded privative clause means that a court of law will not interfere with a decision of the expert tribunal, unless for very specific and narrow reasons. One reason for court interference is if a tribunal exercised authority to decide a matter it has no statutory jurisdiction to hear or decide at first instance. That is, the tribunal decided a matter that was not within the exclusive expertise of its home statute or was a matter that it does regularly encounter in general labour relations. The disciplinary jurisdiction over the Crown's constables is one such unique and distinct area of law that falls outside the expertise of general labour relations tribunals.

In common law principle, by statute, and by regulation (a legal triangulation I refer to later as 'organizing principles') the jurisdiction of labour tribunals and unions in constabulary discipline matters has been prescriptively written out of collective bargaining interest, in favour of codified processes and investigative procedures for the individual officer during allegations of disciplinary default. There is therefore a distinction in law between

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26 See for example respondent's case law: *Howie v. British Columbia (Labour Relations Board)*, 2017 BCSC 1331 at para. 54, citing *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329 at para. 40; *B.C. Ferry and Marine Worker's Union v. B.C. Ferry Services Inc.*, 2012 BCSC 663 at para. 7 (aff'd 2013 BCCA 497), citing *Northstar Lumber v. United Steelworkers of America, Local No. 1-424*, 2009 BCCA 173.

27 *Labour Relations Code* ss. 99, 115, 136, 137, and 139.

28 *Labour Relations Code* s. 136.

29 In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. the relevancy of a tribunal's expertise is no longer a factor that a reviewing court needs to provide deference to. However, in labour law it is still a well-established principle which common law has yet to sift through.

30 *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at para 33.

the collective bargaining and member representation rights of a union and the individual rights of a constable who is the subject of a disciplinary process – unlike the majority of general labour proceedings (I will address the reasons for this distinctness further below). The Crown's constables are not, and never have been, within the *exclusive* expertise of a union labour board. The courts have always had final say in constabulary matters.

There is a cardinal principle that underscores the distinctness between the constabulary as office holders and the constabulary as employees of a government entity (whether that be municipal, federal, or provincial governments). The principle is quite simple but nevertheless critical to recognize. This is, *common labour law, collective agreements, and labour tribunals are separate and distinct from complete statutory schemes respecting the discipline of those who hold a constabulary office.* Constables have existed in service of the Crown long before organized unions or the labour movement ever received statutory protections. The constabulary operates independently of the executive branch of government, and most certainly it is separate from any contractual agreements the executive branch may have with unions. As noted by Mr. Justice J.A. Anderson in *Carpenter v. Vancouver Police Board*, 1985 BCCA 477 ("*Carpenter*"):[31]

> (8) The Police Act and regulations confer upon specialized tribunals with specialized functions the power to deal with all matters of discipline and, therefore, it cannot have been the intention of the legislature that matters of discipline be dealt with by an arbitrator or the Labour Relations Board. These specialized tribunals have special knowledge and experience in matters of discipline. These specialized tribunals are bound by specific procedures enacted for a specific purpose, namely, to deal with all aspects of discipline. On the other hand, labour arbitrators and the Labour Relations Board perform an entirely different function. *They have no special knowledge or experience in disciplinary matters and are not bound by any specific procedures. They are not equipped in any way to deal with matters of discipline.* (my emphasis added).
>
> [46] *In summary, the Labour Code was not designed to deal with matters of police discipline.* The legislature in enacting s. 56 of the Police Act gave the Lieutenant Governor in Council power to make regulations "*for the government of police forces*" including "*suspension, promotion, dismissal and punishment of members of police forces*" [the italics are mine] and in so doing, declared that "*suspension, promotion, dismissal and punishment*" were to be governed exclusively by the regulations made pursuant to the Police Act and not by the provisions of the Labour Code. *Any other interpretation would create delay, multiplicity of procedures, interference with a specialized tribunal appointed for a specific legislative purpose, administrative chaos and would also impair specific rights given to police constables by the Police Act and regulations.* (my emphasis added).

In *Casavant*, Madam Justice Fenlon upheld the court's foundation laid in *Carpenter* and further adopted this line of demarcation of tribunal jurisdiction through the Supreme Court of Canada's decision in *Shotton*[32] and the Saskatchewan Court of Appeal's decision in *Saskatoon*[33], concluding:[34]

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31 *Carpenter v. Vancouver Police Bd.*, 1985 BCCA 477. Available at: **https://www.canlii.org/t/216dv**

32 In *Casavant* at para 49 citing *Regina Police Assn. v. Regina (City) Police Commissioners*, 2000 SCC 14 [*Shotton*].

33 In *Casavant* at para 50 citing *Saskatoon Board of Police Commissioners v. Saskatoon City Police Association*, 2004 SKCA 3 [*Saskatoon*].

34 In *Casavant* at para 51.

> [51] Although the cases above involve municipal police officers and various provincial statutes, they stand for the principle that a labour board does not have jurisdiction to deal with a police disciplinary matter governed by a distinct process.

For constables who hold office, have specialized training, security clearances, experience, and statutory authorities, reviewing an officer's conduct requires expertise in policing, law enforcement, and an understanding of use of force, training, security procedures, safety protocols, a legion of operational procedures, codified definitions of disciplinary defaults, and other specialized matters. Not one of these constabulary factors are within the exclusive expertise of general labour boards, nor are they bargained for by a union as a matter of collective contractual right – such an assertion would be patently ridiculous as it would presume a union may negotiate the role, duties, authorities, and appointments, of a constable of the Crown – which it most surely cannot.

It follows that labour boards do not have the needed training or exclusive expertise to properly assess constabulary conduct. For this reason, they are barred from having exclusive jurisdiction over internal discipline of constables. Matters of constabulary discipline are therefore reserved for the constable's chain of command and appointed discipline authorities with expertise in such matters.

The proverbial jurisdictional sword, however, is admittedly somewhat double edged. While the organizing principles respecting constabulary discipline can ultimately (and often do) protect the individual officer from vexatious misconduct allegations, when a constable does behave inappropriately and is disciplined or dismissed, the union's rights to represent the constable and the constable's rights to review the actions taken against them are fairly limited and vary from province to province depending on the governing policing legislation. Suffice to say, generally speaking, there is usually some form of police complaint commissioner or civilian oversight police board that is able to review certain disciplinary decisions and provide the specialized review needed to award relief, or not. There is also a very structured processes for complaining about an officer's conduct. While those complaints processes vary across Canada and between municipal, federal, and provincial constabulary forces, one thing remains constant – *there is no right of complaint or review of constabulary conduct through any provision of a collective bargaining agreement*.

All of this is not to say that there is no employment relationship between the employer, the union, and constabulary members. There most certainly is. But this collective bargaining relationship excludes contract agreements within the parameters of disciplining a constable while they were *acting in their capacity as a constable* in the line of duty.[35] Any collective agreement that would purport to replace statutory requirements and processes of constabulary discipline would be inappropriate and subject to challenge in court. A collective agreement for constables pertains to employment matters not related to the office of constable. Matters such as uniform and boot allowances, safety equipment purchases, pay, overtime, vacation entitlements, work environment, and so forth.

It is noteworthy to explore the rationale for delineating the line between labour boards and the holders of an office. Many who hold office (constables, judges, cabinet ministers, councillors, mayors, and so forth), render decisions in their official capacity as the responsible decision makers. Inevitably, certain demographics of soci-

35 In *Casavant* at para 52.

ety will be affected and disgruntled with some of the decisions made. However, disagreeing with the substance of a decision is fundamentally different than complaining about the conduct of the decision maker while they were making a decision. It is the same for constables and the decision they make during day-to-day operations in fulfilling the functions of their appointed office.

To some degree, the holder of a constabulary office has a certain amount of independence in their decision making. As Lord Denning posited in *R. v. Metropolitan Police Com'r; Ex p. Blackburn*, [1968] 1 All E.R. 763 (C.A.) at p. 769:

> The office of Commissioner of Police within the metropolis dates back to 1829 when SIR ROBERT PEEL introduced his disciplined Force. The commissioner was a justice of the peace specially appointed to administer the police force in the metropolis. His constitutional status has never been defined either by statute or by the courts. It was considered by the Royal Commission on the Police in their report in 1962 (Cmnd. 1728). I have no hesitation, however, in holding that, like every constable in the land, he should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act 1964 the Secretary of State can call on him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone. [additional citations removed]

While the constable may very well be an employee of a government body, the day-to-day operations of the office require the individual officer to enforce certain statutes, make on-the-spot decisions, and respond to complex and fast changing scenarios while performing their official constabulary duties. These are not general labour matters between a union and employing government but rather decisions made in the context of the Crown's relationship with the citizenry. While officers are certainly employees of a government entity, they are not making decisions as employees, they are making decisions as constables while preforming the functions of their appointed office. This concept was also addressed by Mr. Justice J.A. Anderson in *Carpenter*:

> [50] I also note that while a police officer is an "employee of the Board" that a police officer continues to hold the "office of police constable".
>
> [52] Thus it will be seen that a police officer is not an "employee" in the ordinary sense of that word. He, by virtue of his "office" has, to a certain degree, a measure of independence […] *he cannot be dismissed from "office" except in strict accordance with the regulation and upon proof that he has been guilty of a "disciplinary default" beyond a reasonable doubt. It seems to me that having regard to the above it again becomes clear that an arbitrator appointed pursuant to the provisions of a collective agreement has no part to play in matters of internal discipline* (my emphasis added).

In this way, the constabulary has always been, to an extent, separate from the executive branches of the employing government and their union labour contracts. During disciplinary processes, the relationship is not between the exclusive *collective* bargaining rights of a union or executive branch of an employer but rather the *individual* constable of the Crown (who exercised the functions of a Crown office) and the *individual* member of the public alleging disciplinary default of conduct. It is a relational string between the Crown, more broadly, and the citizenry's contentions with the constables employed in service of the Queen. The appropriateness of enforcement actions are matters that are long standing since medieval times; especially the period post-Magna Carta (which is further discussed later).

The above discussion points frame the concepts of constabulary discipline, generally, and also specifically for Canadian police constables. What then do I say about other constables not employed specifically by police forces but rather other provincial law enforcement services? Do the same discipline principles apply? I argue they do, and I offer the statutory framework of British Columbia's special provincial constables employed as conservation officers as a case study. In support of this contention, I next provide a brief historical context of the Commonwealth constabulary, broadly. I then follow this history by those provisions of the *Police Act* that deal with special provincial constables employed (often) in alternative law enforcement agencies such as the BC Conservation Officer Service.

B. A Brief History of Community Constables

The academic literature on the development of policing and law enforcement operations is quite extensive (see for example: Chakrabarti, 2008[36]; Fry & Berkes, 1983[37]; Kempa, 2018[38]; Lyman, 1964[39]; Moylan, 1929[40]; Neyround, 2011[41]; Skinns, 2012[42]; Toch & Grant, 1991[43]).

Increasingly, global society has moved towards the para-militarization of the state's policing services. This is evident not only in the manner by which police now perform intra-state tactical operations, progressively enforc-

36 Chakrabarti, S. (2008). The thinning blue line? Police independence and the rule of law. *Policing*, *2*(3), 367-374.

37 Fry, L. & Berkes, L. (1983). The paramilitary police model: An organizational misfit. *Human Organization*, *42*, 225-234.

38 Kempa, M. (2018). *Police abuse in contemporary democracies*. M. Bonner, G. Seri, & M. Kubal (Eds.). Cham, Switzerland: Palgrave Macmillan.

39 Lyman, J. (1964). The Metropolitan Police Act of 1829: An analysis of certain events influencing the passage and character of the Metropolitan Police Act in England. *The Journal of Criminal Law, Criminology, and Police Science* 55(1), 141-154.

40 Moylan, J. F. (1929). Police reform before Peel: The Fieldings and the BOW Street Police. *The Police Journal*, *2*(1), 150-164.

41 Neyroud, P. (2011). More police, less prison, less crime? From peel to popper The case for more scientific policing. *Criminology & Public Policy*, *10*(1), 77-83.

42 Skinns, L. (2012). *Police custody: Governance, legitimacy and reform in the criminal justice process*. Hoboken: Taylor and Francis.

43 Toch, H., & Grant, J. (1991). *Police as problem solvers*. Boston, MA: Springer.

ing a wide array of economic and political agendas, but also in the overt foreign deployment alongside military forces during inter-state conflict, such as the RCMP's deployment in Haiti, Afghanistan, and other regions.

This state-centric view of constabulary identity runs counter to centuries of identity development rooted in the principles of impartial community service for the 'commonwealth' of the people, not unquestioning allegiance to the state's agendas and agency of employment. To go forward with this discussion we must first go back in time to the place from which the constable emerged.

Despite the existence of various forms of ancient 'policing', the modern constabulary is inherently the child of European rule of law and is divorced of many other forms of tribal and Indigenous community policing models. In Commonwealth countries (like Canada) and their provinces, policing is deeply rooted in the colonial history of the British Empire. The essence of the constabulary can trace its roots as peacekeepers prior to the Norman Conquest and Battle of Hastings in 1066.[44, 45]

The word *constable* has its roots in the Latin term *comes stabuli*, literally "officer of the stables." This is in reference to the responsibility of keeping the King's horses.[46, 47]

As the British Empire formed over time, largely as an emergence from the Roman Empire that preceded it, [48] there was a divergence from a focus on military force to policing the commons by consent of the people. What has been identified as the 'blue' tradition (i.e., police uniforms) stands in contrast to historical militaries or 'red' traditions (i.e., military uniforms).[49]

Constables traditionally served the local magistrates, landlords, and ultimately the judicial branches of the king's court – not a military leader nor the monarchy explicitly. In this way, the constable acted on behalf of and as part of the citizenry, "never as military foot-soldiers".[50] As Delloyd, J. Guth (1994) explains:

> […] Thus empowered, immediately by their communities, and ultimately by the Crown […] with authorization coming from below, flowing upwards out of their community, while from above, flowing downwards, came the authority of common law, meaning royal law. The first made them [constables] agents of their peers, the second made them officers of the law.[51]

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44 Guth, J. (1994). The traditional common law constable, 1235-1829: From Bracton to the Fieldings to Canada. In R. Macleod & D. Schneiderman (Eds.). *Police powers in Canada: The evolution and practice of authority* (p. 3-23). University of Toronto Press.

45 Emsley, C. (2011). *Theories and origins of the modern police*. New York, USA: Routledge.

46 Guth, J. (1994, p. 5 citing Oxford Dictionary).

47 Emsley, C. (2011).

48 Emsley, C. (2011).

49 Guth, J. (1994).

50 Guth, J. (1994, p. 5).

51 Guth, J. (1994, p. 5).

This understanding of the constable's authorities being connected both to the community and the Crown remains largely unchanged today. Within the medieval legal system, the constable possessed powers of arrest in service of the courts, as they still do in modern times.[52]

Following the years after the Magna Carta (1215), the duties of a constable shifted towards a more codified legal definition which re-enforced the early understanding of community service. Post-Magna Carta, the explicit protection of civil liberties and rights was a constabulary purpose. The constable's identity and duties were continually defined for the courts in the legal writings of *The treatise on the laws and customs of England*:[53]

> It is the duty of the constable to enroll everything in order, for he has the record as to the things he sees; but he cannot be judge, because […] judicial proceeding is lacking […] He has record as to matters of fact, not of judgement and law.

While a detailed examination of these early authorities is beyond the scope of this article, it is important to note that the essence of the restrictions described remain largely unaltered today. The constable is not a trier of fact, nor a judge, jury, or executioner. Rather, the constable is a witness of the Crown and officer of the law, an impartial presenter of the record with the explicit duty to protect civil liberties and rights, by force if necessary.

The emergence of the separation between military force and constabulary policing can be found within the *Statute of Winchester* (1285). The primary purpose of the *Statute of Winchester* was to arm "all males between the ages of fifteen and sixty" with "swords, bows, knives, and arrows" for "keeping the peace."[54, 55] The statute essentially created militia armies within the urban areas and streets of London. Supervising these newly armed civilians and controlling them became a concern for King Edward (1272 – 1307). To mitigate the potential for insurrection, the *Statute of Winchester* also required certain local provisions be taken. Guth (1994) further elaborates,

> […] [t]he crown entrusted supervisory control in each locality to its constable, not to any military agent […] [the statute] required that each district elect two constables to supervise this armed community and to report all offenders to royal judges when they came to circuit. If new law was needed, these judges should report to the king in Parliament "and the king will provide a remedy therefor." Anyone not answering the hue and cry must also "be presented by the constables to the justices assigned, and then afterwards by them to the king as aforesaid.".[56]

The hue and cry referred to by Guth[57] was a medieval process in which bystanders could be summoned to assist with the apprehension of fleeing criminals. Under the *Statute of Winchester*, a person (constable or common

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52 see for example *The treatise on the laws and customs of the realm of England*, Glanvill, circa 1170-1189).

53 Guth, J. (1994, p. 5-6. citing Vol. 4, p. 136, attributed to Henry of Bracton, circa 1210 – 1268, as translated from Latin by Samuel Thorne, 1977).

54 Guth, J. (1994, p. 6).

55 Summerson, H. (1992). The enforcement of the Statute of Winchester (1285–1327). *The Journal of Legal History 13*(3), 232-250.

56 Guth, J. (1994, p. 6 citing *Statute of Winchester: Statutes of the Realm*, 1285. Vol 1, p. 96-98).

57 see also Summerson, H. (1992).

person) who witnessed a crime was required to raise a cry in the town if the criminal fled the scene. That cry had to be maintained and spread from town to town until apprehension was made. All able-bodied persons were required to assist in this process.

Today, this concept remains within the jurisprudence of Commonwealth countries. For example, the *Criminal Code of Canada* Section 129(b) makes it an offense not to assist a peace officer when requested. By placing supervisory control into local hands instead of military personnel, citizens were closely tied to their local constable, with the constable reporting to the justice and the justice to the Crown. This formed the basis of a community-centred approach to policing by consent. As a result of the community-centred relationship between the constable and the Crown, "the crown had pre-empted continued feudal militarization with strictly controlled civilian solution of putting common-law officers and processes in charge".[58]

Between the late 1200s (i.e., post Magna Carta) and the mid-1700s, the role and identity of the constable continued to develop, largely as it related to peace of the land. Significant population increases in medieval London resulted in a variety of public safety and security challenges, culminating with the royal *Sessions of the Peace for Bedfordshire* (1355 – 1364) and the *Oxfordshire Sessions of the Peace* (1398).[59]

These sessions were aimed at investigating high-crime areas in Britain and formulating peace-keeping and peace-enforcement measures and recommendations. Eventually, various community law enforcement positions were created, each responsible for different aspects of city well-being. By the early 1400s, a sort of pecking order had established within the city between various groups of individuals with law enforcement appointments. The constable was at the top, reporting directly to the mayor and aldermen who did not sit "[…] in any political capacity but in their judicial roles as named royal commissioners of the peace within London".[60]

By 1419, the *Liber Albus* (or white book of London) further outlined the role of the constable. It was noted that constables would act as "peacekeepers" in support and assistance of various other less-authoritative roles such as curfew watchers and tax collectors – "only the constable had full powers of arrest; and also authority to chase throughout the whole city upon the hue and cry".[61] For the next two hundred years, the identity of the constable would continue to advance along with the common law and various statutes.

By the 1700s, constabulary identity began to move into what we recognize now as the modern constable. However, English policing records from the mid-1700s were mostly destroyed during 1881, when the new 'Police Office' opened in the same space as the police records storage facility across from the Royal Opera House in London.[62] As a result of the desire to create space, thousands of policing records were burned and little survived for the time periods before 1881. Despite this loss of information, it is generally accepted in history that two British magistrates from the early 1700s, Sir John Fielding and Henry Fielding, were the creators and formers of the 'new police'.

58 Guth, J. (1994, p. 7).
59 Guth, J. (1994).
60 Guth, J. (1994, p. 8).
61 Guth, J. (1994, p. 7, citing *The white book of the City of London*, 1419, translated H.T. Riley, 1861, p. 271-274).
62 Guth, J. (1994).

The Fielding brothers were, in their time, quite the publicists. During their careers as magistrates, they owned multiple newspapers, pamphlets, and magazines. The brothers wrote about crime by recounting detailed stories of prosecutions and arrests. The Fieldings urged readers to purchase their publications on grisly murders and recount them to their children as cautionary tales.[63] What academia does know about constabulary history comes from many of these historical news archives and publications. This information is often less than reliable.

While today we may refer to a business relationship between the press and a justice as a conflict of interest, Guth preferred to describe the issue as one of "journalistic and judicial exhortation."[64] When reading about constables from this time period it is difficult to ascertain what is true law enforcement operations, work, roles, and duties, and what was editorial communications for public interest.

Guth synthesizes early operational police writings of the Fielding's into 12 main points regarding the expectations and duties of a constable during the 1700s, paraphrased here as the responsibility to: develop informant networks; pursue and apprehend criminals regardless of jurisdiction; advertise specific crimes in the newspaper; repeatedly give media advice to share with the public on measures to protect against break and enters; establish fixed patrol patterns for constables and add surprise raids and random beats; send all fines to charitable groups, specifically, those that employ ex-cons or the less fortunate; conduct aggressive interrogations; create a public register of all stolen goods; prosecute sellers and receivers of stolen goods; advise on legislative reform for licencing laws; apprehend suspects by using rewards, bribes, stake-outs, line-ups, and surveillance; and allow military personnel to assist with riot control only under the direction of a local magistrate and constable (known today as an 'aid to civil power').[65]

From an organizational identity perspective, what has often been called the 'brotherhood' in law enforcement, finds its historical roots in one of the only writings the Fieldings produced specifically for constables. A 1758 pamphlet titled *An account of the origins and effects of a police set on foot* […] *Upon a plan* regurgitated much of earlier writings regarding the epidemic of crime and argued for constabulary planning. As Guth records, the Fielding pamphlet notes that magistrates:

> […] should keep the civil Power alive, that is to say, the constables; constantly instructing them in their Duty, and paying them for extraordinary and dangerous enterprises; and above all, promote harmony amongst them; for when the civil Power is divided it is nothing; but when Constables are collected together, known to each other, and bound by the Connections of good fellowship, Friendship, and the Bonds of Society, they become sensible of their Office, stand by one another, and are a formidable body.[66]

There are two important aspects in this early writing. First, as the reader can see from other quotes previous to this, the Fielding's command of the English language was quite advanced for their time in comparative terms.

63 Guth, J. (1994, p. 14).
64 Guth, J. (1994, p. 14).
65 Guth, J. (1994 p. 13-14).
66 Guth, J. (1994 p. 15).

I suggest this might be firmly connected to their extracurricular publishing activities. While this article is not an exploration on etymology, within this writing we see for the first time the use of the word *police* in a magistrate's title, followed by the use of *constable* in the actual writing.

The point made here is that *policing* is akin to the action of maintaining civil order and civil administration – *police* (as used therein) is not an office, it is not a position, it is an action. A constable is the holder of an office, an appointed and sworn position of the Crown with a far-reaching history dating back centuries. Our society employs constables who focus on the act of policing (i.e., police constables) and our society employs constables which focus on other acts pertaining to the peace and protection of people and property, such as the modern gaming commission, environmental protection officers, wildlife officers, air marshals, and specialized immigration services. The next iteration of the English constable starts with Sir Robert Peel's 1829 *Metropolitan Police Improvement Bill*.[67]

Sir Robert Peel is a notable British figure who served as prime minister on two occasions and was directly responsible for the establishment of the Metropolitan Police.[68] Arguably, much of our modern commonwealth law enforcement structures can be situated within the 'Peelian' policing model of 1829 during the early establishment 'police'.[69]

While Peel's model maintained policing operations at the municipal level, it also removed control from the community and placed authority over the constable in the hands of cabinet and executive staff.[70] The "erosion of the community principle began" when governments started advancing open and outside community hiring practices.[71] However, adding to this discussion, I suggest that framing the 'erosion of community principles', as related simply to outside recruitment strategies, ignores the organizational identity shaping that occurred under the Fieldings. For close to half a century before Peel, the constable had owed allegiance not strictly to the commons that they served, but to their organization of employment.[72] Erosion of community ties had been progressing for decades, it did not magically arrive with Peel in 1829.

Peel's advancement for the removal of the constable from community magistrate control becomes problematic when we consider who the constable's identity was tied to, moving forward— that is, appointed political staff within the executive branches of government. Without allegiance to their communities, the office of constable under Peelian principles became susceptible to organizational allegiances, political interference, and

67 Peel, R. (1829). *General instructions: Principles of law enforcement*. United Kingdom: Metropolitan Police. Available at: **https://www.ottawapolice.ca/en/about-us/Peel-s-Principles-.aspx**

68 see for example the Directory of National Biography, 1885-1900, Volume 44.

69 Lyman, J. (1964). The Metropolitan Police Act of 1829: An analysis of certain events influencing the passage and character of the Metropolitan Police Act in England. *The Journal of Criminal Law, Criminology, and Police Science* 55(1), 141-154.

70 Guth, J. (1994).

71 Guth, J. (1994 p. 17).

72 Moylan, J. F. (1929). Police reform before Peel: The Fieldings and the BOW Street Police. *The Police Journal*, 2(1), 150-164.

ultimate erosion of community trust. Similar to Guth's 1994 account of the Fieldings description of constabulary duties, Peel advanced nine basic functions of the constable, arguing first that the "basic mission for which the police exist is to prevent crime and disorder."[73]

Peel then goes on to infer the concept of policing by consent by stating "the ability of the police to perform their duties is dependent upon public approval of police actions."[74] Peel further advocates the need for constabulary services to maintain public trust and voluntary cooperation through "constantly demonstrating absolute impartial service to the law."[75] Within the final portions of his nine principles, Peel recognizes that physical force against the citizenry should only be used "to secure observance of the law or to restore order only when the exercise of persuasion, advice and warning is found to be insufficient."[76] His rationale for this approach is summed up in the recognition that public trust and cooperation are inversely proportional to the use of physical force, "The degree of cooperation of the public that can be secured diminishes proportionately to the necessity of the use of physical force."[77]

Finally, Peel attempts to situate the modern constable into the "historic tradition that the police are the public and the public are the police" and that police should "never appear to usurp the powers of the judiciary."[78] Peel closes his nine principles by stating, "The test of police efficiency is the absence of crime and disorder, not the visible evidence of police action in dealing with it."[79]

I would describe Peel's (1829) principles and approach as somewhat aggressive, police-centred, and para-militarized. Peel (1829) does not use the term *constable*, but rather *police*. Holding an office and being connected to the community as a *constable* appeared to be of little importance. What was of importance to Peel was that the actions taken during policing operations were perceived as legitimate, such that they not bring the government, broadly speaking, into disrepute. Placing priority of government image over relationships with the people is to value organizational allegiance over allegiances to the commonwealth of all under the constable's care. Peel's principles aggressively continued the notion of 'police versus the people', while at the same time softening the landing by suggesting the police are the people and the people are the police.

Peel studiously avoids the issue of policing as an action and constables as servants of the commons. His concepts not only framed the British constabulary at this time, but also then carried forward to the colonies that were under Imperial rule, a factor recognized by lawyer Mary Hatherly in her exemplary review of Canadian police.[80] While compiling a historical account of Canadian policing on behalf of the solicitor general of New Brunswick, Hatherly noted the English constable continued to develop in parallel with English colonies abroad;

73 Peel, R. (1829).
74 Peel, R. (1829).
75 Peel, R. (1829).
76 Peel, R. (1829).
77 Peel, R. (1829).
78 Peel, R. (1829).
79 Peel, R. (1829).
80 Hatherly, M. (1991). *New Brunswick policing study: Legal status of police Volume IV*. Department of the Solicitor General New Brunswick Fredericton, New Brunswick. Available at:
https://www.publicsafety.gc.ca/lbrr/archives/hv%208159.n2%20n4%20v.4-eng.pdf

there is little doubt the English constable was imported into Canada along with its faults, history, legal structures, and culture: issues which carry forward to modern times.

The role of a modern constable is expansive. Many modern Canadian jurisdictions have experienced continued paramilitarization of their constabulary forces since Canada has emerged as a country under the backdrop of English rule of law. At the time of this writing (2021), the constable in Canada is highly paramilitarized and deals with a wide range of social issues that are well beyond the traditional confines of law enforcement.[81]

With an ever-increasing mandate comes ever-increasing public concerns, complaints, and the need for balance. While independent civilian oversight has now been adopted as a standard practice within most policing models, arguably providing some level of unbiased review of constabulary actions, the root of constabulary identity derives its place from the commons, from the community the constable served – not by any police board or executive government branch.

As I have shown, however, the constable's community identity as 'the holder of an office within the commons' has been eroded over time in favour of organizational identity as state 'police' and enforcers of the state's will over others. But the organizing principles of the Commonwealth constable are still very present and alive in the legislative intentions of the Crown. I suggest that it is the responsibility of each constable to remember the office they hold and to remember that they serve the interests of the commons in conjunction with the interests of the Crown.

In concluding this section on general constabulary history, Sir Robert Peel (1829) is often cited as the beginning of the modern constable (as Lord Denning did in my previous quote). However, the modern constable did not begin with Sir Robert Peel and the discussion on what it is to be a constable should not end with Peel. My fellow police researchers should be cautious about creating a public narrative that the modern constable is 'all things Peel'. I fear that such an approach suppresses a more holistic view of constabulary origins, a situation which stifles the return to community-centric policing principles.

Instead, I advance the dialog that modern constables find their historical place within European rule of law, origins that can be traced back well before the nineteenth century – organizing principles which further date to the Roman era. Although I argue that the constable's relationship with the commons has been eroded in favour of service of the state, I attempt to highlight that this was not the original intent of the Crown.

I suggest instead that historical legislative intentions of the Crown were to create an impartial public constabulary service (in place of military force). A service that was first accepted by the community, with their power and authority reinforced by the judicial branches of government – not the executive, nonelected, branches of the state apparatus.

In my view, this legislative intention today remains intact in principle throughout Canada, British Columbia, and other Commonwealth jurisdictions, although it is often veiled under the costume of executive will and cov-

81 Roziere, B., & Walby, K. (2018). The expansion and normalization of police militarization in Canada. *Critical Criminology 26*, 29-48.

ered in the rubble of where community-centric principles used to stand tall. A constable does not have to pull back this veil far however to find that their independence from executive staff is still there, even if the shadow of authority appears distant in the day-to-day greyness of the job.

Allowing an executive branch of government to control a constabulary force results in a de facto domestic military agency. This style of police organization is not truly impartial, but rather responsible for enforcing the will of the state within its geographical boundaries. It is a form of modern oppression which violates the principles of constabulary policing by consent. It is an operational practice which runs counter to our well-established common law regarding the independence of the constabulary from the executive branches of government. It is up to our collective society and each individual constable to rediscover our Commonwealth roots of impartial service. In my view, this begins with each constable exercising their rights and responsibility associated with their office and enforcing the organizing principles of the constabulary as they currently lay in law.

C. Special Provincial Constable Law in British Columbia

In modern British Columbia, as with other Canadian jurisdictions, constabulary appointments come from the obvious parent legislation, the *Police Act*[82] (or similar statute). It is true that the primary purpose of the current *Police Act* in the Province of BC is to codify the operations of municipal policing departments. There is no contest, and it is undisputed in the legal community, that the *Police Act* and its regulations constitute a *complete* statutory scheme respecting the appointment, operation, conduct, discipline, and dismissal of municipal police constables.

However, in addition to municipal policing, the *Police Act* also grapples with provincial policing issues resulting from the disbandment of the BC Provincial Police Force (1950). The legislation therefore also addresses the rights of the province to use the RCMP as a provincial police force, the appointments of provincial constables, liability for the provincial government in provincial police lawsuits, and other such aspects of provincial operations. For this reason, while some may contest the framing of a special provincial constable as 'police' because they are employed by the province and not by a municipal police force (as was attempted by the Province of BC in *Casavant*), this is quite an erroneous view.

Caution is warranted when strictly applying the vernacular term 'police' to only identified police forces and their officers. There is no 'office of police' in modern Canadian law, as I have shown above. There is only the 'office of constable' and the correct phrasing to use is 'police constable' 'constable' or 'constabulary'. In this way, taking a broad and liberal interpretation of legislative intent, when statutes provide mechanisms for the appointment of special provincial constables these individuals are part of the constabulary. Although they are fulfilling specialized provincial policing functions under various titles, there is no doubt they are constables performing law enforcement (i.e., policing) duties – they are not 'less than police' as some union labour advocates and public service administrators may attempt to suggest. Section 9 of the *Police Act* states:

82 *Police Act* [RSBC 1996] c. 367.

Special provincial constables

9

(1) The minister may appoint persons the minister considers suitable as special provincial constables.

(2) A special provincial constable appointed under subsection (1) is appointed for the term the minister specifies in the appointment.

(3) Subject to the restrictions specified in the appointment and the regulations, *a special provincial constable has the powers, duties and immunities of a provincial constable*.[83]

(my emphasis added).

The definitions of the special provincial constable and provincial constable in the Police Act re-affirm that constabulary appointment above (quoted in Section 9).[84] Section 10 of the *Police Act* further defines the jurisdiction of constables in British Columbia:

Jurisdiction of police constables

10

(1) Subject to the restrictions specified in the appointment and the regulations, a provincial constable, an auxiliary constable, a designated constable or a *special provincial constable has*

(a) *all of the powers, duties and immunities of a peace officer and constable at common law or under any Act, and*

(b) *jurisdiction throughout British Columbia while carrying out those duties and exercising those powers.*[85]

(my emphasis added).

Special provincial constables are therefore duly appointed as constables under the appropriate legislation respecting police constables and policing operations in British Columbia. It follows that it is appropriate for our courts to apply the common law of constabulary discipline to individuals squarely within the legislative intent of the organizing principles of separating the constabulary from general unionized bargaining rights. This conceptual framework for interpreting legislative intent is further supported by the additional parameters of Section 6 of the *Police Act* which states:

Constables and employees

(1) The *Public Service Act does not apply to the provincial police force*, a provincial constable, an auxiliary constable, *a special provincial constable*, a designated constable or an employee of the provincial police force.

(my emphasis added).[86]

83 *Police Act* s. 9.

84 *Police Act*, Definitions: "special provincial constable" means a constable appointed under section 9.

85 *Police Act* s. 10.

86 *Police Act* s. 6.

Here we see that the Legislature was alive to the conflict between general employees and those employees employed as constables. The primary legislation respecting general provincial public service employees was expressly *not* made applicable to those employees who are appointed as special provincial constables.

This is more than a trivial point because it is Section 22 of the *Public Service Act,* RSBC c. 385[87] which establishes the need to have just cause for dismissing an employee, a factor that is then written into collective bargaining agreements.[88] This raises the question, if just cause does not need to be established because the *Public Service Act* is completely barred by statute, what then becomes the appropriate mechanism for disciplining and dismissing a special provincial constable? The answer is both by regulation and by common law.

Pursuant to the *Police Act*, the *Special Provincial Constable Complaints Procedure Regulation*, B.C. Reg. 206/98 (the "*Regulation*")[89] provides a skeletal framework for the investigation and resolution of alleged disciplinary defaults involving special provincial constables. However, it does not establish the rights to review any discipline imposed or the threshold that needs to be met for proving a disciplinary default. To address these additional concerns, we must turn to the common law regarding similar scenarios involving constables.

For the first point, the courts have always maintained ultimate authority over the review of constabulary discipline. I do not suggest otherwise, and it is not necessary to comment further on this point (although some unions would rather see the jurisdiction of the courts ousted in favour of tribunal proceedings). On the second point, constabulary case law clearly establishes that the threshold to be met for proving a disciplinary default is *beyond a reasonable doubt* (discussed below).

Therefore, while the *Regulation* is indeed skeletal, this is because it is largely left to the employing agency to establish its operational practices regarding the appointment of an appropriate Discipline Authority. Once assigned, pursuant to the *Regulation*, and presuming the matter was not resolved informally, the Discipline Authority's investigation must accord with best practices for investigating and imposing constabulary discipline.

For special provincial constables serving as conservation officers, disciplinary investigations are handled under the *Regulation*. It is not necessary for the purposes of this paper to describe each and every disciplinary default (of which there are many). What is important here is the threshold that must be met in proving that a constable committed such a default, regardless of the technical violation details alleged. For constables, and although this is administrative law, the threshold to be met in proving a disciplinary default is *beyond a reasonable doubt.*[90]

This is a vastly different standard to meet than the general labour standard of *just cause.*[91] To prove *beyond a reasonable doubt* that a disciplinary default occurred, the employing department must establish a case against the officer that, on review, does not have any alternative theory containing an explanation, mitigating factors, or lawful excuse. The constable does not have to prove anything. The constable is not required to prove they didn't do it (whatever 'it' happens to be). The ownness is on the pursuer. Most certainly the constable is not required to prove they are generally suitable to be a constable – this would amount to a reverse ownness and an obliga-

87 *Public Service Act* [RSBC 1996] c. 385.
88 *Public Service Act* s. 22.
89 *Police Act, Special Provincial Constable Complaint Procedure Regulation*. B.C. Reg. 206/98.
90 In *Carpenter* at para 52.
91 *Public Service Act* s. 22.

tion on the constable to prove a negative. It is an adversarial process to pursue a constable with allegations of disciplinary default and that constable is entitled to a very high degree of justice.

Departments employing constables in the past have tried other tactics to negate this high threshold. As in *Casavant*, a previous case *Deighton v. Vancouver Police Board* (1986), [1987] B.C.W.L.D. 278 (S.C.), resulted in an attempt by the employing agency to simply state the officer was generally unsuitable for service and therefore would be dismissed under a collective agreement and general labour rules. Citing *Deighton*, Madam Justice Fenlon noted in *Casavant*:

> [55] […] The employer did not follow the procedures set out in the *Police (Discipline) Regulations*. Instead, the Police Board relied on an article in the collective agreement, which gave the employer the power to terminate a probationary employee on the grounds that he is unsuitable for employment as a police constable. In addressing this argument, Wood J. said:
>
> > [8] […] The issue raised by this petition is whether or not Deighton can be dismissed from his employment in the absence of any formal hearing into the allegations of misconduct giving rise to that dismissal.
>
> [56] Mr. Deighton's employer took the position that the dismissal was genuinely motivated by his unsuitability and not by any alleged disciplinary default. It argued that the principles enunciated in *Carpenter No. 1* only applied when disciplinary defaults were the basis for a termination. The court disagreed saying:
>
> > [16] Similarly, in this case, *it is not possible to convert Deighton's dismissal into a labour relations matter merely by characterising him as unsuitable* […]. *The chief constable's conclusion that he lacked self-control, discipline and judgment results from allegations of conduct which, if they were proven, would amount to disciplinary defaults*. Those allegations have not been proven. Deighton has not even had a real opportunity to respond to them. However, it was only by accepting them as proven that the chief constable could reasonably draw the inferences that led to his conclusion.
> >
> > [Emphasis added by Madam Justice Fenlon in *Casavant*.]

The courts did not adopt the collective agreement approach suggested by the respondents but rather correctly (in my view) re-affirmed the rule of *essential characterization*. This is a cardinal rule which was further re-enforced and applied to special provincial constables in *Casavant* where Madam Justice Fenlon concluded that "[i]t is the essential character of the matters raised that is determinative, not the employer's characterization of the complaints as "unsuitability for employment"". [92]

If the essential characterization of the dispute is disciplinary (or would have been disciplinary if the employer proceeded correctly) then the *Police Act* must be followed as a matter of law and principle, an employer cannot simply reframe 'discipline' as a 'suitability' issue in order to avoid statutory responsibilities. It follows that all

92 In *Casavant* at para 55 & 56.

constables accused of a disciplinary default are entitled to a distinct investigative process under the *Police Act*.

I have heard the pleas of the activist labour lawyer and studious musings of media journalists, which propose that these organizing principles merely protect 'bad cops' and that we should do away with such protections and high standards in favour of more open and easier processes for dealing with police discipline and corruption where it may be alleged to exist. I could not disagree more.

Admittedly, yes, these organizing principles are what protect the rights of all constables in Canada. However, they are also the same organizing principles which protect the rights of citizens to complain about an officer's conduct. And as I have hopefully established, the review of an officer's conduct is a specialized task. To suggest that we must do away with the organizing principles of constabulary discipline is to invite an unqualified individual to make critical decisions about the constabulary – decisions which affect broader public safety and police service delivery. It is a chaotic suggestion I find fabulously ridiculous because it undermines the very concept of accountability – both for the public, the officer, and for the employing agency.

As this article focuses on the jurisdiction of constabulary discipline, I will not provide a detailed analysis of each of the defences available to a constable accused of a specific disciplinary default (of which there are many). That is beyond my purpose here. It is sufficient to note, generally, that many internal agency complaints against constables involve some form of "they aren't listening to me" allegation from a supervisor (i.e., dereliction of duty). In my view, these are rarely successful conduct allegations and have more to do with weak leadership and poor supervisory communications than they do with true constabulary misconduct (although there are some bad apples that prove the exception to this statement). I say this because, as I have shown previously, a constable has a certain amount of independence as the holder of an office and must be allowed to exercise the functions and authority of their post without unnecessary or unreasonable hindrance. Micromanaging a constable's on-duty actions can amount to fettering and subsequent personality clashes in the workplace – but these internal disputes are not usually a true matter of officer conduct on behalf of the Crown and towards the citizenry. In any event, such micromanaging most certainly restricts the efficient discharge of a constable's duties and the overall operations of the agency more generally.

Conversely, complaints from the public, or an agency's internal affairs department as part of a formal larger investigation, usually establish a spectrum of misconduct pertaining to either excessive use of force (i.e., hitting someone, the use of intermediate weapons, death or grievous bodily harm of a citizen, false arrest, and so forth) or abuse of one's authority while on duty (i.e., stealing, dishonesty, coercion, unauthorized use of police equipment for personal gain, and so on). In some cases, serious off-duty criminal activities may also fall into this category. It is these areas of serious constabulary misconduct that should be, and usually are, of high interest to the chain of command.

As a final note on special provincial constable law in BC, during the writing of this article (2021) a point of law was raised to me by general counsel for the union that was unsuccessful in *Casavant*. In brief, the union's counsel suggested that the framework of the BC *Police Act* includes a specific provision for municipal special constables and that this framework shows clear intent that special constables employed by municipalities are police while special constables employed by the province are not. As such, the robustness of the collective agreement for special provincial constables must take precedent over the common law of police constables. I do not find this argument persuasive in the least.

Aside from the use of the word *special*, a special municipal constable is not analogous to an special provincial constable employed in a full and unrestricted provincial policing capacity as a conservation officer. Auxiliary, reserve, and special constables for municipalities are typically unarmed officers employed in auxiliary roles under the supervision of full-time constables. In British Columbia, conservation officers are full-time provincial constables who are armed, in uniform, and on duty with unrestricted appointments under the *Police Act* – they are part of the provincial constabulary by history, organizational design, and statutory intent (as I will show further below). To suggest otherwise offends the organizing principles of the constabulary.

With the constabulary appointment of special provincial constables now defined, and the *Public Service Act* (including discipline and dismissal of employees under that *Act*) clearly barred when dealing with a constable, I will next address the concern of completeness of the statutory scheme I call *organizing principles*.

D. Complete Statutory Scheme

Hopefully I have brought the reader into the boundaries of understanding constabulary discipline as distinct from general labour discipline processes in a unionized context. Moving forward now, there is a threshold nuance in my previous statement "common labour law, collective agreements, and labour tribunals are separate and distinct from *complete statutory schemes* respecting the discipline of those who hold a constabulary office."

The *Police Act* and the *Regulation* are only two pieces of legislation respecting special provincial constables. Indeed, there are special provincial constables that are not working as provincial conservation officers and who hold a wide variety of special provincial constable appointments with varying restrictions depending on the tasks being performed. A question is then raised (and indeed was raised by the respondent before the appellate court in *Casavant*), if a law enforcement agency lacks a complete statutory scheme, can general labour law then be applied to a constable, where do we draw the line between constabulary discipline and suitability as an employee? More pointedly, are the *Police Act* and the *Regulation* enough to constitute a complete statutory scheme in and of themselves? These legal questions are yet uncanvassed by our courts at common law but are well worthy of future legal debate.

Rather than attempting to answer the above questions directly, which is beyond the scope of this article, I will utilize the BC Conservation Officer Service (BCCOS) as a case study to show how the interplay of constabulary legislation can form harmonious and complete statutory frameworks which the courts will, and indeed should, continue to enforce where there is clear legislative intent of an alternative discipline process for constables. For the BCCOS, historical background becomes important because, unlike other provincial agencies employing special provincial constables, the BCCOS was formally part of the BC Provincial Police Force – making the application of policing common law and constabulary statutes clearer for our courts.

The establishment of environmental law in British Columbia dates to 1858 (at that time primarily hunting legislation known as *game ordinances*). Environmental law enforcement has been the responsibility of various Crown departments for more than 100 years. When British Columbia became a province in 1871, the responsibility for environmental law enforcement was placed under the BC Constabulary (our police force at the time). Between 1905 and 1920, the formalizing of environmental law enforcement as a specialized policing area began under

the direction of the provincial game warden. In the 1920s, environmental enforcement responsibilities transitioned to the (then) BC Provincial Police.[93]

It is trite knowledge in the province that the BC Provincial Police were disbanded in 1950. Provincial policing was transferred under contract to the RCMP. The terms *game warden*, *bush cop*, and *game constable* were replaced in the early 1960s with the title *conservation officer*. Environmental law enforcement operations reverted to the responsible ministry of the day, where they currently sit under the (now) Ministry of Environmental and Climate Change Strategy, BC Conservation Officer Service (the "BCCOS").[94]

The BCCOS was established in 1980 as a law enforcement agency, although the agency's framework was in policy only and remained unlegislated for over 20 years.[95] The BCCOS was finally formalized in legislation in 2003 under Section 106 of the *Environmental Management Act*, SBC 2003 (*EMA*);[96] which provides, *inter alia*, that a chief conservation officer can be appointed and that this chief can then in turn appoint anyone he sees fit as a conservation officer. The chief has general supervision of conservation officers. *EMA* also provides that the chief may develop policies internal to the agency respecting the establishment of operational procedures pertaining to officer duties and the use of equipment and firearms. Disciplinary procedures are adopted under this authority.

Over the decades, the work of environmental law enforcement shifted, along with public expectations, from mere hunting and game laws into more complex areas such as water quality, commercial pollution, and general public safety. The complexity of the job of conservation officer is captured on the provincial government website:[97]

> The Conservation Officer Service has worked to protect the environment, the fish and the wildlife in British Columbia, as well as the safety of citizens for 110 years. What is today known as B.C.'s Conservation Officer Service began in 1905 […] Conservation Officers are highly trained, dedicated individuals responsible for enforcing 33 federal and provincial statutes, they hold Special Provincial Constable Status [sic] under the Police Act and have unrestricted appointment to enforce Acts and Statues, and protect

93 The Legislative Library of BC has digital copies of provincial game warden and commission reports available online between the years of 1905-1947. The years of 1948-1956 have not been digitized and are physically only available by special appointment with the reference librarian: **http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs2016_2/346798/index.htm**

94 see provincial game warden and game commission reports for the years of 1905 thru 1956 [50 sessional paper reports]. Detailed reference citations omitted here in the interests of space.

95 see annual ministry reports filed with the BC Legislature for the years of 1980 thru 2002 [35 annual ministry reports]. Detailed reference citations omitted here in the interests of space. Below selected dates available online.

- 1996-2001 online at: **http://www.llbc.leg.bc.ca/public/PubDocs/bcdocs/166458/index.htm**
- 2002-2005 online at: **http://www.llbc.leg.bc.ca/public/PubDocs/bcdocs/362856/index.htm**
- 2005-2017 online at: **http://www.llbc.leg.bc.ca/public/PubDocs/bcdocs/404607/index.htm**
- 2017-2019 online at: **http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs2018_2/688691/index.htm**

96 *Environmental Management Act* [SBC 2003] c. 53.

97 About the Conservation Officer Service. Available at: **https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/natural-resource-law-enforcement/conservation-officer-service/about-the-cos**

> the public and preserve the peace.

From this history it is easy to see the constabulary nature of the conservation officer job, generally speaking. In *Casavant*, I framed the issues on appeal as concerns of disciplinary jurisdiction over the Crown's constables.

My opening statement posited that the substance of the case "[…] concerns whether the *Environmental Management Act*, SBC 2003. c. 53. and *Police Act*, RSBC 1996. c. 367 (the 'Act(s)') comprise a complete statutory scheme respecting the discipline of Constables/Conservation Officers, as armed and uniformed Peace Officers appointed under the Act(s)". How then is a Special Provincial Constable disciplined for constabulary misconduct?

The *Regulation* provides:

> **Investigation of complaints**
>
> 4
>
> (1) If a supervisor does not attempt to resolve a complaint informally under section 5, the supervisor must
>
> (a) cause an investigation to be conducted into that complaint, and
>
> (b) promptly provide notice of the investigation to the respondent and the director.[98]

The special provincial constable supervisor is defined in the *Regulation* as:

> "**supervisor**" means, in relation to a special provincial constable, the person designated by the employer of the special provincial constable to supervise that special provincial constable.[99]

As I previously mentioned in the above section on special provincial constable law, the *Regulation* is somewhat skeletal and does not further define the investigative actions a specific supervisor must take, this is left to policy. Presumably, this legislative drafting was calculated as there are many variations to a special provincial constable appointment. As previously discussed, some special provincial constables (like conservation officers) hold full unrestricted provincial policing appointments, others do not. Taking a harmonious and liberal reading to the applicable statutes, we can see the *Regulation* places the requirement of investigating special provincial constables on the identified supervising officer. For conservation officers, this supervisory function is codified in statue, as is the provision to adopt further policies for disciplinary investigations. *EMA* states, in part:

> **Conservation Officer Service**
>
> 106
>
> (1) The Conservation Officer Service is continued.
>
> (2) The Conservation Officer Service consists of
>
> (a) a person employed in the ministry who is appointed by the minister as the chief conservation officer, and
>
> (b) the persons designated under subsection (3) (b) (i).

98 *Special Provincial Constable Complaint Procedure Regulation*, B.C. Reg. 206/98.

99 The *Regulation*, Definitions: "supervisor".

> (3) Subject to the direction of the minister,
>
> (a) *the chief conservation officer has general supervision over the Conservation Officer Service*, and
>
> (b) the chief conservation officer, or a member of the Conservation Officer Service de ignated by the chief conservation officer for the purpose, *may do all the following*:
>
> (i) designate persons employed in the ministry, each of whom the chief conservation officer considers suitable, as members of the Conservation Officer Service;
>
> (ii) establish standards and procedures, including, but not limited to, establishing training and retraining standards and specifying operational procedures for the efficient discharge of duties and functions by the Conservation Officer Service and its members;
>
> (iii) specify equipment, including, but not limited to, uniform apparel, vehicles and firearms to be used by members of the Conservation Officer Service;
>
> (iv) establish rules for the prevention of neglect and abuse by members of the Conservation Officer Service.
>
> (my emphasis added).[100]

There is therefore no ambiguity that a) the chief conservation officer is identified by statute as the supervising authority over special provincial constables employed as conservation officers and b) that a part of the supervisory functions of the chief's post are to establish operational rules and procedures respecting the conduct and behaviour of special provincial constables employed as conservation officers (and indeed, these codes of conduct and operational policies do exist under this framework).

I argued before the presiding divisional panel in *Casavant* that the primary issue (correctly framed) involved me, as an officer, performing constabulary duties; that the labour dispute only arose after an arbitrator, union, and the province proceeded against me in a disciplinary manner that was not provided for under the appropriate statutory frameworks for the investigation of special provincial constables; and that the supervisor's operational procedures established under *EMA* were adopted under statutory authority and provided the policy framework for proving a disciplinary default.

It followed that disciplinary jurisdiction of the chief conservation officer over the Crown's constables employed under him was an underpinning conceptual thread that ran through the appeal arguments, challenging the lawfulness of labour processes conducted outside of the statutory schemes. But were these statutory schemes *complete* in the sense that their existence barred any general labour discipline under collective bargaining agreements?

In a jurisdictional context, I impressed upon the appellate division the correlation between the *EMA* and the *Police Act*. The interplay of policy as a supporting function of law. The Legislature did not intend for officers to be disciplined in a manner outside of the Act(s)' legislative scheme. There is little doubt that conservation officers were formally police constables in the province and following the disbandment of the provincial police force the Legislature's intention of maintaining an environmental provincial policing service is clear.

100 *EMA* s. 106.

Together, the *EMA* (and operational policies adopted by the chief under its statutory authority) and the *Police Act* (and its *Regulation* respecting a supervisor's investigation of special police constables) therefore comprise a complete statutory scheme for the supervision, organization, operation, discipline, and dismissal of special provincial constables employed as conservation officers in British Columbia. It may not be so for other provincial law enforcement departments, but it is so for the BCCOS.

While there may be many questions yet unanswered regarding what does and what does not constitute a constabulary duty, and when the matter is not constabulary in nature if general labour arbitration could then take place, in *Casavant* it was established and recognized by the court that an allegation of failing to follow orders while in uniform, on duty, and acting as a constable squarely pertains to the performance of constabulary duties.[101] As such, it was not necessary to explore the variation or delineation of varying hypothetical potential scenarios. I was a duly appointed constable faced with a formal allegation of dereliction of a constabulary duty (i.e., that of failing to follow orders) – the *essential characterization* of the dispute was therefore pertaining to constabulary discipline and fell properly into the framework of the *Regulation* and the chief's authorities in *EMA*.

101 In *Casavant* at para 54.

Concluding Remarks

In this article I reviewed the BC Court of Appeal's decision in *Casavant*. I provided a detailed theoretical background on why constables are entitled to distinct disciplinary processes that are separate from union collective bargaining rights and, where the essential characterization of a constable's conduct is disciplinary, why labour boards do not possess jurisdiction to review the constable's conduct. I refer to the demarcation of disciplinary jurisdiction over the Crown's constables as *organizing principles*.

Constabulary independence from the executive and judicial branches of government is a long-standing principle which is a corner stone of overall rule of law in a democratic society. To suggest (as the respondents in *Casavant* did) that constables can be removed from their posts without following operational and regulatory schemes, shakes the foundation of constabulary independence. It is a position that calls into question well established legislative structures of how the Crown's constables operate in practice and how they are regulated within society. Such a situation would seriously repudiate the integrity of the constabulary and have far reaching impacts on society more broadly.

Many law enforcement practices and procedures affect the civil liberties and rights of the public. Whether it is the controversial practice of 'street checks', 'wellness checks', traffic enforcement, emergency response services, the procedures for enforcing code of conduct standards for officers, or a host of other enforcement activities under a never ending string of statutory offences, 'law' and 'law enforcement' affect almost every aspect of day-to-day civilian life – sometimes with dire consequences for those interacting with armed law enforcement officers. We need qualified individuals *and our courts* reviewing the conduct of the Crown's constables and holding them accountable when required, anything less would be a grave mistake with far reaching consequences.

For this reason, the organizing principles of the constabulary are jealously guarded and firmly affixed in law for the benefit of the constabulary and the citizenry.

All of which is respectfully submitted.

Dr. Bryce J. Casavant
April 2021