
Volume 30
Issue 3 *Volume 30, Number 3 (Fall 1992)*
*Impact of the Charter on the Public Policy
Process*
A Symposium


Article 2

7-1-1992

Police Implementation of Supreme Court of Canada Charter Decisions: An Empirical Study

Kathryn Moore

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Citation Information

Moore, Kathryn. "Police Implementation of Supreme Court of Canada Charter Decisions: An Empirical Study." *Osgoode Hall Law Journal* 30.3 (1992) : 547-577.
<https://digitalcommons.osgoode.yorku.ca/ohlj/vol30/iss3/2>

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Abstract

Little empirical research has been done on the Charter's impact on the public policy process. This paper presents the results of an empirical research study designed to fill that gap. The study examined the manner in which a municipal police force and the RCMP implemented changes to procedures following two Supreme Court of Canada Charter decisions. The paper concludes that, while steps have been taken to develop a process by which Supreme Court decisions are implemented, the process would be improved if one body were allocated responsibility for the provision of interim information to the police.

Keywords

Canada. Canadian Charter of Rights and Freedoms; Canada. Supreme Court; Civil rights; Police; Canada

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POLICE IMPLEMENTATION OF SUPREME COURT OF CANADA CHARTER DECISIONS: AN EMPIRICAL STUDY[©]

BY KATHRYN MOORE*

Little empirical research has been done on the *Charter's* impact on the public policy process. This paper presents the results of an empirical research study designed to fill that gap. The study examined the manner in which a municipal police force and the RCMP implemented changes to procedures following two Supreme Court of Canada *Charter* decisions. The paper concludes that, while steps have been taken to develop a process by which Supreme Court decisions are implemented, the process would be improved if one body were allocated responsibility for the provision of interim information to the police.

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* Member of the 1990 graduating class of Osgoode Hall Law School. I want to thank Marc Gold, Alan Grant, Patrick Monahan, and the Centre for Research on Public Law and Public Policy at Osgoode Hall Law School, without whose help and support this project could not have been completed. Thanks also to Alan Young, Anthony Doob, and David Northrup for their invaluable input and advice. Finally, I want to thank all the people whom I interviewed for their generous contribution of time to the interviews and for their interest in the project. All errors and omissions are, of course, mine.

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I. INTRODUCTION

Since the enactment of the *Canadian Charter of Rights and Freedoms*¹ in 1982, vast tracts have been written analyzing its impact on the law, legal and political institutions, and the public policy process. The policy analysis has remained essentially speculative. There has been little *empirical* research on the extent to which the *Charter* has become a factor in government policy development, its influence on the choice of policy type and instrument, the impact of judicial decisions and government policies that have been developed with an eye to the *Charter's* requirements, nor on the manner in which these decisions and policies are implemented.² This paper presents the results of an empirical research project, which will begin to fill this gap in the understanding of the *Charter's* impact on Canada's policy process.

This project gathered information on how police implement Supreme Court *Charter* decisions affecting their operations. Three major issues were considered: first, the allocation of responsibility for policy making and implementation among the Ministry of the Solicitor General, the Ministry of the Attorney General, and the police; second, the procedure for the development of a response; third, the implementation procedure for these policies and the dissemination of information to individual police officers.

A comprehensive examination of the police process used to implement Supreme Court decisions was beyond this project's scope. Instead, a case study approach was adopted. In the fall of 1990, interviews were conducted with a medium-sized municipal police force in Ontario, the Royal Canadian Mounted Police,³ and a number of

¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

² See M.L. Friedland, "Controlling the Administrators of Criminal Justice" (1988-89) 31 *Crim. L.Q.* 280 at 281. Friedland points out that there has been little empirical examination of any area of law.

³ Hereinafter RCMP.

government officials. *R. v. Duarte*⁴ and *R. v. Brydges*,⁵ two recent Supreme Court judgments, served as the focus for the interviews and as a basis for more general discussions about the implementation process.

This approach was chosen for several reasons. The Supreme Court has been the most visible and prolific source of change since the *Charter's* enactment. Its decisions, therefore, provide a useful touchstone for empirical research. Since many *Charter* decisions mandated the reform of police practices, a research project on the police was logical.

The implementation process was also targeted in the hope that the research will provide a foundation for further academic study of the police and the *Charter's* impact. Participants in the process can use the results to clarify their responsibilities and to consider the desirability of reform. Judges need to be aware of this process so they can formulate decisions that can be implemented effectively. Judges also require this information to evaluate properly the good faith of the police under section 24(2) of the *Charter*. Justice Sopinka implicitly recognized the importance of the implementation process in *R. v. Kokesch*⁶ where he stated:

I do not wish to be understood as imposing upon the police a burden of instant interpretation of court decisions. The question of the length of time after a judgment that ought to be permitted to pass before knowledge of its content is attributed to the police for the purposes of assessing good faith is an interesting one, but it does not arise on these facts.⁷

Finally, information about the implementation process will provide a basis for further studies examining the nature of the *Charter's* impact on the public policy process. Has the *Charter* resulted in "tidal waves and earthquakes" in the institutions involved in the administration of justice as the police struggle to cope with an "Americanized" system of criminal procedure?⁸ Has the *Charter* been a successful agent for

⁴ [1990] 1 S.C.R. 30 [hereinafter *Duarte*]. See also the companion decision in *R. v. Wiggins*, [1990] 1 S.C.R. 62.

⁵ [1990] 1 S.C.R. 190 [hereinafter *Brydges*].

⁶ [1990] 3 S.C.R. 3 at 33.

⁷ *Ibid.*

⁸ See F. McGinn, "The Canadian Charter of Rights and Freedoms: Its Impact on Law Enforcement" (1982) 31 U.N.B.L.J. 177 at 181 and at 204: "Michael J. Murphy, former Police Commissioner of New York State commented [in response to *Mapp v. Ohio*, 81 S. Ct. 1684 (1961)]

progressive change? For example, does the process allow for the circumvention of decisions⁹ or, conversely, do participants develop new practices reflecting the broad spirit behind the decision? The answers to these questions are critical to an evaluation of the success of *Charter* decisions:

The success of the courts in moulding a balanced, distinctively Canadian jurisprudence on the *Charter*, and the manner in which these judicial holdings are taken up, absorbed, institutionalized and given practical expression by the police in turn, will have a profound bearing upon how free, even how democratic, our society actually is.¹⁰

II. THE IMPLEMENTATION PROCESS

The traditional elements of the public policy process are decision, implementation, impact, and evaluation. In the United States, substantial amounts of theoretical and empirical work have been done on the impact of decisions from the United States Supreme Court.¹¹ Much of the recent work in the impact area has focused on the implementation process.¹² These implementation studies provide important information about *why* a particular decision has the observed

that decisions arrived at in the peace and tranquility of chambers in Washington, or elsewhere, create tidal waves and earthquakes which require rebuilding of our institutions sometimes from their very foundation upward. ... The *Canadian Charter of Rights and Freedoms* contains remedies that will create in law enforcement and the administration of justice a Canadian version of the 'tidal waves and earthquakes' suffered by the New York Police Department after *Mapp*."

⁹ See *supra* note 2 at 282: "[T]here is usually some adjustment whenever a change has been instituted. ... Some writers even claim that there is total compensation or "homeostasis" for the change so that the status quo is maintained." See also D. Manwaring, "The Impact of *Mapp v. Ohio*" in D.H. Everson, ed., *The Supreme Court as Policy Maker: Three Studies on the Impact of Judicial Decisions*, 2d ed. (Carbondale: Public Affairs Research Bureau, Southern Illinois University, 1972) 1 at 26:

When a new judicial policy is unpopular, however, when it is seen by police and judges alike as unrealistic and fraught with danger, then it is inevitable that resort will be had to the many avenues of revision and evasion which are always and inescapably ready at hand. The Court cannot make its rulings popular; it can try to make them stick.

¹⁰ S.A. Cohen, "The Impact of Charter Decisions on Police Behaviour" 39 C.R. (3d) 264 at 264-65.

¹¹ So much work has, in fact, been done on the impact of judicial decisions in the United States that it is referred to as impact studies and is considered to be an interdisciplinary area combining law, sociology, and political science.

¹² See for example, T.V. Reid, "Judicial Policy-Making and Implementation: An Empirical Examination" (1988) 41 W. Pol. Q. 509; and T.R. Marshall, "Policymaking and the Modern Court: When do Supreme Court Rulings Prevail?" (1989) 42 W. Pol. Q. 493.

impact. Since there has been little comparable work done in Canada, American literature is a useful starting point for analysis of the implementation process.

The use of policy theory is not necessarily based on the assumption that judges are policy makers.¹³ Policy theory and analysis is as applicable to the implementation of judicial decisions as it is to the implementation of traditional policy decisions.¹⁴ In fact, the importance of the process used to implement judicial decisions is heightened by the nature of judicial decision making itself. The role of the courts is to react to cases brought before them and make decisions on the facts. They have no mandate to try to make decisions more broadly applicable. More importantly, they cannot modify decisions in response to implementation problems or in response to feedback from the participants.¹⁵ Decisions can only be altered in subsequent cases provided that similar cases come before the court. Once decisions leave the court they are subject, to some extent, to the whims of those charged with their implementation.¹⁶

¹³ On the issue of judges as policy makers, see, in addition to the materials already cited, R.A. Dahl, "Decision-Making in a Democracy: The Supreme Court as National Policy-Maker" in M.M. Shapiro, ed., *The Supreme Court and Public Policy* (Glenview: Scott, Foresman, 1969) 57; D. Gibson, "Judges as Legislators: Not Whether But How" (1987) 25 *Alta. L. Rev.* 249; and R.S. Abella, "Public Policy and the Judicial Role" (1989) 34 *McGill L.J.* 1021.

¹⁴ If judges are in fact policy makers, at least with respect to *Charter* decisions, it is arguable that they should play a more active role in the entire policy-making process. For example, if the courts decide that a given practice is unconstitutional, it would not be unreasonable for them, once that decision is made, to get input from the police about the best way to structure the decision so that it can be easily implemented. How this could be accomplished in the present adversary system is unclear. The Crown would probably be unwilling to present information "in the alternative" that would inevitably undermine its argument. Section 1 evidence would be tailored to justify the current police practice based, among other things, on the unavailability of alternatives. Section 1 does not, therefore, provide a useful vehicle for police perspectives on what the best alternative is. It is theoretically possible for the police to seek intervener status. Interview with Halton Crown attorney (26 October 1990) Halton Courthouse, Milton, Ontario. The public attitude towards such a powerful police lobby, however, might dissuade the police from making this application. Interview with members of the RCMP (10 December 1990) RCMP Headquarters, Ottawa, Ontario.

¹⁵ G.C. Edwards, *Implementing Public Policy* (Washington: Congressional Quarterly Press, 1980) at 159.

¹⁶ See F.J. Sorauf, "Zorach v. Clauston: The Impact of a Supreme Court Decision" in Shapiro, *supra* note 13, 65 at 73: "To rephrase the old saw, the precedent in reality consists of what influential partisans and decision-makers say the Supreme Court says it is."

Elements of the policy process are clearly not isolated stages.¹⁷ Nonetheless, implementation can be considered as a discrete step in the life of a particular policy. When analyzing the implementation process, the decision's merits are neither considered nor evaluated. The analysis focuses on the decision's form and on whether the changes required were accomplished. The elements of an effective implementation process can be classified loosely into four categories: communication, resources, dispositions, and bureaucratic structure.¹⁸

The most important element in the process of implementing Supreme Court of Canada decisions is effective communication of information to police. The police must know there has been a decision, what it says, and what they have to do to conform to its requirements. Decisions must be clear in order to meet these goals. Judicial decisions are, by their very nature, vague and ambiguous. This lack of clarity may impair effective implementation before the police receive the information. The decision's transmission may be ineffective if it is distorted *en route*, does not reach the police directly, or is selectively screened by the person receiving it. Finally, decisions must be consistent. If they are not, police discretion is increased and the Court's goals are less likely to be met.

To be able to effect the required changes once they have been communicated, police need ample resources. There must be adequate numbers of sufficiently skilled staff to make the required decisions, implement the changes, and, if necessary, monitor compliance. These human resources must be supplemented by physical resources. Less tangible resources are also required. The police need information on

¹⁷ See M.M. Atkinson & M.A. Chandler, "Strategies for Public Analysis" in M.M. Atkinson & M.A. Chandler, eds., *The Politics of Canadian Public Policy* (Toronto: University of Toronto Press, 1983) 7 at 15, who point out that the policy process is not a straight, assembly-line process: "the output of one stage of the policy process can serve as an input for the next."

¹⁸ The criteria for an effective implementation process and the factors that most often impede successful implementation have been discussed in a number of recent, comprehensive analyses, *supra* note 15. Edwards draws on the following discussion: C.A. Johnson & B.C. Canon, *Judicial Policies: Implementation and Impact* (Washington: Congressional Quarterly Press, 1984); D.J. Palumbo & D.J. Calisten, eds., *Implementation and the Policy Process: Opening up the Black Box* (New York: Greenwood Press, 1990); T. Younis, ed., *Implementation in Public Policy* (Brookfield: Gower Pub. Co., 1990); and R.A. Carp & R. Stidham, *Judicial Process in America* (Washington: Congressional Quarterly Press, 1990).

what is specifically required to satisfy the Court's requirements and the authority to enforce compliance with changed procedures.¹⁹

The attitude of the police is one of the most important factors influencing a decision's implementation. If police do not agree with the decision or think it will be difficult to implement, they will likely use any discretion given to them to minimize the required changes. Ideally, this impediment could be altered by instilling, through training, a positive attitude in police towards the *Charter* and its goals. Alternatively, police could be given positive incentives to comply or, as a last resort, police could be subject to negative sanctions for non-compliance.

The bureaucratic structure is the final factor influencing the extent to which decisions are effectively implemented. Bureaucratic structures tend to be highly fragmented, resulting in "diffusion of responsibility."²⁰ This fragmentation makes coordination among the various units difficult and often results in duplication of effort. Bureaucratic organizations also tend to rely heavily on "standard operating procedures."²¹ While these procedures save time and increase consistency in decision making, they are often not amenable to change.

Each of these factors can work with others to multiply obstacles to effective implementation. New and controversial policies face a myriad of difficulties. Judicial decisions are also susceptible to implementation problems: the channels of communication between the Court and the police are decentralized and indirect; there is fragmentation of responsibility for the development of a response to the decision; and the courts have neither the authority nor the resources to

¹⁹ Some commentators have questioned whether police officers' compliance with certain practices is always enforced:

If police officers violate a defendant's rights, the courts usually do not punish them, but merely exclude the evidence illegally obtained. Since officers' superiors in the police department may be quite sympathetic to their methods of obtaining evidence, they will probably be evaluated on the basis of the number of arrests they make rather than on the convictions resulting from these arrests. Thus, court sanctions will restrain police behaviour here only to the extent that police officers mind losing convictions."

J.W. Doing, "Police Policy Behaviour: Patterns of Divergence" (Special Issue 1978) 7 Pol'y Stud. J. 436 at 438, cited in *supra* note 15 at 71; S.L. Wasby, "Police Training About Criminal Procedure: Infrequent and Inadequate" (Special Issue 1978) 7 Pol'y Stud. J. 461, cited in Edwards, *supra* note 15 at 109, agrees: "[p]olice officers are seldom rewarded for compliance with Supreme Court defendant rights decisions, nor are they often punished for noncompliance with them."

²⁰ *Supra* note 15 at 137.

²¹ *Ibid.* at 130.

monitor compliance with the decision, nor to exercise any immediate control over those who implement it outside the judicial system. The theoretical work thus suggests difficulties with two key elements of the implementation process: the communication of information and the allocation of responsibility.

III. PARTICIPANTS IN THE PROCESS

The identification of participants in the policy implementation process was an important component of this research project. This task was complicated by the perception among judges and academics that the police are a monolithic, uniform body. In fact, as the results of this research disclosed, there is wide variation in size and responsibilities among police forces and among a number of other non-police participants in the policy implementation process.

Provincial police forces in Canada are governed by provincial statutes such as the Ontario *Police Services Act, 1990*.²² The police are self-contained and politically independent.²³ Each police force is responsible for modifying its procedures and is accountable only to its own board. Most police forces are divided into three basic units: operations, executive, and administration and support services (which includes training). The training officer, or the training department in larger forces, has the primary responsibility for disseminating information about changes in procedures.²⁴

²² S.O. 1990, c. 10 [hereinafter *Police Services Act, 1990*]. The *Police Services Act, 1990* replaces the *Police Act*, [hereinafter *Police Act*] R.S.O. 1980, c. 381. It was given Royal Assent on 28 June 1990; and sections 1 and 2 and Parts I-VI and VIII-X were proclaimed in force on 31 December 1990. The *Police Services Act, 1990* makes substantial changes to the old *Police Act*, including a declaration of six principles in section 1 to guide the provision of police services in Ontario, one of which is the "importance of safeguarding the fundamental rights guaranteed by the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code, 1981*". The new *Act* also clarifies the responsibilities of the Solicitor General with respect to policing, and creates the Ontario Civilian Commission on Police Services to replace the Ontario Police Commission, which will oversee both municipal boards and services to ensure compliance with certain standards.

²³ See P.C. Stenning, *Legal Status of the Police* (Ottawa: Law Reform Commission of Canada, 1982) at 101-31, for a detailed examination of the case law relating to the concept of police independence.

²⁴ Interview with senior administrator (23 November 1990) Ontario Police College, Aylmer, Ontario.

The Ontario Police College²⁵ in Aylmer, Ontario is directly accountable to the Policing Services Division of the Ministry of the Solicitor General.²⁶ The OPC trains all recruits in the province, except recruits to the Metropolitan Toronto Police Force, and provides specialized courses for more senior officers to upgrade their training. The OPC teaching staff is composed of permanent instructors and officers seconded from other Ontario forces. Each of the instructors prepares and updates the materials in the area for which he or she is responsible. Over 90 per cent of OPC course materials are prepared by the instructors themselves.²⁷ A well-developed internal communications system ensures that instructors receive the periodical literature relevant to their area of instruction and are thereby kept current with changes in the law.²⁸

The OPC previously distributed in-service training packages to training officers in the municipal police forces. These packages provided the training officers with, among other things, information on changes in the law and recommended responses. The distribution of these packages was discontinued in 1988. The OPC no longer proactively disseminates information on new developments, nor is it looked to as a primary resource for current information.²⁹ The OPC maintains some contact with officers in the field through materials distributed as preparation for promotional examinations. Individual instructors also maintain informal contacts with municipal police officers, Crown attorneys, and members of the Ministry of the Attorney General.³⁰

Recently, the OPC commenced a long-term initiative to increase their capability to provide immediate advice to municipal police forces in response to judicial and legislative changes in the law. As part of that initiative, the Ministry of the Solicitor General and the OPC agreed that OPC instructors could develop teaching positions in response to changes in the law. These teaching positions would identify and interpret

²⁵ Hereinafter OPC.

²⁶ *Police Services Act, 1990*, *supra* note 22, s. 3(2)l. Prior to the enactment of the *Police Services Act, 1990*, the OPC reported to the Ontario Police Commission.

²⁷ *Supra* note 24.

²⁸ *Ibid.*

²⁹ Interview with counsel, Legal Branch (19 November 1990) Ministry of the Solicitor General, Toronto, Ontario; and interview with senior officer (12 December 1990) Halton Regional Police Force Headquarters, Oakville, Ontario.

³⁰ *Supra* note 24.

pertinent legal issues and include a recommended policy or procedure. The positions are now used primarily by the instructors in the classroom and sometimes by the Ministry of the Solicitor General in the development of its legal opinions.³¹ The Ministry of the Solicitor General agreed that the opinions could be disseminated outside the OPC in response to direct inquiries as long as the OPC made it clear that the opinion was not a legal opinion and that the local Crown attorney should always be consulted. These teaching positions agree with the legal opinion subsequently developed "99.9 percent" of the time.³²

The RCMP are governed by the *Royal Canadian Mounted Police Act*.³³ The responsibilities of the RCMP are divided into four main areas: Operations, Law Enforcement Services and Protective Services, Corporate Management, and Administration. Each area is headed by a deputy commissioner³⁴ and is further divided into a number of directorates with specialized responsibilities. The country is also divided into regions or provinces headed by a commanding officer. Each division is responsible for meeting individual regional needs as well as fulfilling the general federal responsibilities of the RCMP.

Policy development is coordinated by the Operational Support Secretariat (part of the Enforcement Services Directorate) and is headed by a director who reports to the Deputy Commissioner, Operations.³⁵ The secretariat is the *father* of policy development for the RCMP while particular directorates have responsibility for policy

³¹ Interview with instructor (23 November 1990) OPC, Aylmer, Ontario.

³² *Supra* note 24.

³³ R.S.C. 1985, c. R-10. For an examination of the constitutional basis for the allocation of responsibility for policing between the federal government and the provinces, see A. Grant, *The Police—Policy Paper* (Ottawa: Law Reform Commission of Canada, 1980) at 16-20 and at 33-40. Grant concludes that the provinces derive their authority over policing from section 92(14) (the administration of justice), while the federal authority over the RCMP "appears to draw its constitutional authority from the 'peace, order and good government' provision of s. 91." *Ibid.* at 17.

For a more detailed examination of the various Police Acts in Canada, see *supra* note 23 at 65-100; P.C. Stenning, *Trusting the Chief: Legal Aspects of the Status and Political Accountability of the Police in Canada* (S.J.D. Thesis, University of Toronto, 1983); and Canadian Centre for Justice Statistics, *Policing in Canada 1986* (Ottawa: Minister of Supply and Services Canada, 1986).

³⁴ Canada, Solicitor General, *Annual Report* (Ottawa: Solicitor General of Canada, 1990) at 21-37.

³⁵ Interview with members of the RCMP, *supra* note 14. Note that the Operational Support Secretariat was, at the time of the interviews, the Enforcement Support Branch.

development in their areas of expertise. These individual directorates are referred to as *policy centres*.

The Operational Support Secretariat contains the Special Projects Section. At the time of the interviews, the section was headed by a legally trained member responsible for monitoring Supreme Court and Court of Appeal cases on criminal matters. Supreme Court criminal cases were sent directly by the Court to the Law Enforcement Reference Centre, and then brought to the attention of the appropriate policy centre by the Operational Support Secretariat. Interestingly, since the time of the interviews,

the Special Projects Section has been re-structured and the addition of personnel will allow it to systematically review and disseminate Supreme Court of Canada and appeal court decisions to the appropriate policy centre and divisions across the country within days. Also, the court decisions will be received directly and not through the Law Enforcement Reference Centre.³⁶

The RCMP obtains its legal advice from the Legal Services Directorate. The directorate was created by an arrangement between the RCMP and the Department of Justice in 1985.³⁷ All lawyers are seconded to the directorate by the Department of Justice. Although the directorate has input into all legal matters affecting the RCMP, both it and other areas of the RCMP continue to have direct contact with the Department of Justice.

Although each police force is ultimately responsible for its own decisions, other government organizations assume a great deal of responsibility for keeping police forces informed and recommending changes to procedures and practices. The three major organizations that interact with police organizations on an ongoing basis are: Crown attorneys; the Ministry of the Solicitor General and its federal counterpart; and the Ministry of the Attorney General and its federal counterpart, the Department of Justice.

The formal responsibilities and accountabilities of these organizations are set out in various statutory provisions, such as the *Crown Attorneys Act*,³⁸ the *Ministry of the Solicitor General Act*,³⁹ and the

³⁶ Letter from member of the RCMP to author (26 July 1991).

³⁷ Interview with members of the RCMP, *supra* note 14.

³⁸ R.S.O. 1980, c. 107.

³⁹ R.S.O. 1980, c. 288.

Ministry of the Attorney General Act.⁴⁰ Crown attorneys are responsible for the conduct of prosecutions and they often develop a close working relationship with police. When faced with legal dilemmas, it is to the Crown attorneys that the police will first turn for advice.⁴¹ The Crown attorney is an officer of the court, however, not the lawyer for police.⁴²

The Ministry of the Attorney General supervises all Crown attorneys. The Attorney General superintends all matters connected with the administration of justice and advises the government on all matters of law affecting any arm of the government.⁴³ The Ministry of the Attorney General in Ontario is divided into a number of divisions including the Criminal Law Division. This division has primary responsibility for overseeing Crown attorneys. This division also includes the Crown Law Office, Criminal, and the Criminal Law Policy section. These offices provide advice on criminal matters usually indirectly through contacts in the Ministry of the Solicitor General or through the local Crown attorney.

The Ontario Ministry of the Solicitor General is responsible for the administration of the *Police Services Act, 1990*. It is the Ministry to which police forces are indirectly accountable through the Ontario Civilian Commission on Police Services. The Ministry's responsibilities, at least with respect to policing, have been clarified in the new *Police Services Act, 1990*. The duties and powers of the Solicitor General, listed in section 3(2), include monitoring police practices, developing training programs, issuing directives and guidelines respecting policy matters, and operating the OPC. The *Act* also gives the Ministry the power to

⁴⁰ R.S.O. 1980, c. 271.

⁴¹ That this is so will be confirmed in Part V, below.

⁴² C. Lewis, "The Police and the Crown" in W.T. McGrath & M.P. Mitchell, eds., *The Police Function in Canada* (Toronto: Methuen, 1981) 104 at 107.

⁴³ The role of the Attorney General in the Canadian political and legal system has been the subject of much comment and debate. For a recent, thorough examination of the subject, see Royal Commission on the Donald Marshall Jr., Prosecution, *Walking the Tightrope of Justice: An Examination of the Office of Attorney General in Canada* by J.L.I. J. Edwards (1989). See also I. Scott, "Law, Policy, and the Role of the Attorney General: Constancy and Change in the 1980s" (1989) 39 U.T.L.J. 109.

impose definite sanctions for non-compliance with directives.⁴⁴ Previously, the Ministry had to rely on "moral persuasion."⁴⁵

Two segments of the Ministry of the Solicitor General are directly involved in the policy implementation process. First, on a technical level, the Policing Services Division disseminates information to the various police forces and other police organizations through various channels. One such channel is the Canadian Police Information Centre,⁴⁶ the police communications network.⁴⁷

Secondly, the Legal Branch, within the Policy and Program Development Division of the Ministry Office, provides legal services to the entire Ministry. The Legal Branch "assists in the development of policy and provides legal opinions and advice."⁴⁸ Although lawyers in the Legal Branch are technically seconded from the Ministry of the Attorney General (as are all lawyers working in the government), the Legal Branch works closely with and relies on the Attorney General's office. The Legal Branch interprets statutes and regulations, and prepares and reviews proposed legislation, regulations, legal documents, and litigation.

Despite the clarity with which these formal responsibilities are established, it is the informal connections between the government and the police organizations and the conventional modes of operating developed over time, which accurately reflect the role each of these institutions plays in the implementation process. Predictably, this informal role is the most difficult for researchers to discover.

For example, the appropriate role of the Legal Branch when advising police is controversial. There is no agreement on what the Legal Branch's role should be and little on what its role actually is. One individual interviewed suggested that the Criminal Law Division of the Ministry of the Attorney General had primary responsibility for interpreting those judicial decisions affecting the police. Ongoing legal advice should be provided by the municipal solicitor or the Crown

⁴⁴ *Police Services Act, 1990, supra note 22, s. 22.*

⁴⁵ Interview with counsel, Legal Branch, *supra* note 29.

⁴⁶ Hereinafter CPIC.

⁴⁷ Interview with counsel, Legal Branch (13 December 1990) Ministry of the Solicitor General, Toronto, Ontario.

⁴⁸ Ontario, Ministry of the Solicitor General, *Annual Report of the Solicitor General* (Toronto: 1987) at 4.

attorney.⁴⁹ Other participants in the process agreed with this characterization of the current responsibilities of the Legal Branch, but some expressed the opinion that a more active role for the Legal Branch might be helpful. It was suggested that the Legal Branch could develop timely, definitive opinions for the police.⁵⁰ Whether the Legal Branch consulted with the Ministry of the Attorney General would then be an internal matter, which would not shift ultimate responsibility for developing a response. It was recognized that this would not solve the problem of what the police should do while awaiting a legal opinion from the Legal Branch.

IV. BRYDGES AND DUARTE

The choice of *Brydges* and *Duarte* as sample cases was premised on several assumptions. First, because they are recent, well-publicized⁵¹ decisions, it was assumed that they would still be fresh in the minds of the study's participants and that pertinent documentation would be easily accessible. Rather than prohibiting a particular behaviour—as occurred in *R. v. Hebert*⁵²—both cases imposed a new requirement on the police. As a result, it was thought that a more extensive process would be required to implement the necessary changes. The two cases can be usefully contrasted with each other. *Brydges*, a relatively simple case, allowed police a transition period to make the necessary changes. *Duarte*, a more complex decision, changed the law immediately.

Brydges and *Duarte* will not be considered in detail. The focus of this study is not traditional legal analysis, but rather the issues that the participants perceived to be important. Several commentaries provide a

⁴⁹ Interview with counsel, Legal Branch, *supra* note 29.

⁵⁰ *Supra* note 24.

⁵¹ As an example of the publicity surrounding the two cases, the *Toronto Star* cited *Brydges* and *Duarte* as two of four cases decided by the Supreme Court in the previous year that made the "police forces [the] biggest losers over the year." "Supreme Court smiled on women, natives" *Toronto Star* (14 July 1990) D4.

⁵² [1990] 2 S.C.R. 151.

concise analysis of both cases.⁵³ Briefly, the Supreme Court held in *Brydges* that “as part of the information component of section 10(b) of the *Charter*, a detainee should be informed of the existence and availability of the applicable systems of duty counsel and Legal Aid in the jurisdiction, in order to give the detainee a full understanding of the right to retain and instruct counsel.”⁵⁴ This right exists whether or not the detainee has expressed concern over the affordability of a lawyer. The Supreme Court gave the police a thirty-day transition period to make the requisite changes to their cautions. The implementation of this apparently straightforward conclusion was immediately complicated by the fact that, at the time, duty counsel systems typically were not available immediately to an accused at a police station.⁵⁵

In *Duarte*, the Supreme Court considered the constitutionality of a police practice known as “participant or consent surveillance.” Part VI of the *Criminal Code* regulates electronic surveillance.⁵⁶ Section 184(1) makes it an offence for anyone to intercept private communications.⁵⁷ Section 184(2) permits interception only if judicial authorization has been obtained or if one of the participants in the private conversation consented to its interception.⁵⁸ The Supreme Court ruled that surveillance by an instrumentality of the state without prior judicial authorization was unconstitutional even if one of the participants consented to the interception. No meaningful distinction could be drawn between the expectations of privacy at stake in participant surveillance and third-party surveillance and, therefore, the same standard must apply to both. In *Duarte*, the evidence of the intercepted conversation was admissible because the police officers relied in good faith on the provisions of the *Criminal Code*. The good faith of the

⁵³ See, for example, P.B. Michalyshyn, “Brydges: Should the Police Be Advising of the Right to Counsel?” (1990) 74 C.R. (3d) 151; S.A. Cohen, “Not as Easy as it Seems: Closing the Consent Loophole” (1990) 74 C.R. (3d) 304; and M. Rabideau, “*Duarte v. R.*: In Fear of Big Brother” (1991) 49 U.T. Fac. L. Rev. 171.

⁵⁴ *Supra* note 5 at 215.

⁵⁵ Statistics Canada, *Legal Aid in Canada 1985* (Ottawa: Canadian Centre for Justice Statistics, 1986). In Alberta, where the *Brydges* case originated, “there was no duty counsel scheme in place enabling immediate consultation.” See Michalyshyn, *supra* note 53 at 155.

⁵⁶ R.S.C. 1985, c. C-46.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

police officers outweighed the seriousness of the *Charter* violation and the fact that proper authorization could have been obtained.

Duarte left three questions unanswered. First, how were police to obtain an authorization under section 186(1) if one of the participants consented to the interception? This problem arose because section 186(1) specifies that an authorization can only be given if other investigative means have been tried and have failed, are unlikely to succeed, or are impractical because of urgency. The existence of a consenting party would always be the other investigative means since the consenting party could testify in court about the conversation. Second, section 186(1) had been judicially interpreted to require the police to have reasonable and probable grounds in order to obtain an authorization.⁵⁹ In practice, participant surveillance is often used as a preliminary investigative tool. Were the police to be prevented from using electronic surveillance in this manner? Finally, did the ruling in *Duarte* apply only to the recording of conversations or to both recording and monitoring? Part VI of the *Criminal Code* draws no distinction between the two, but the decision in *Duarte* refers consistently to the recording of private communications. This issue was of great concern to the police because of the importance of electronic surveillance to officer safety.

V. POLICE RESPONSES TO BRYDGES AND DUARTE

The main purpose of this study was to obtain empirical information on police implementation of Supreme Court decisions. A sample of individuals representing most of the participants in the implementation process was interviewed. Representatives of the Halton Regional Police Force and the RCMP were interviewed. Interviews were also conducted with two Crown attorneys and representatives of both the provincial Ministry of the Solicitor General and the Ministry of the Attorney General.

Interviews were conducted between October and December

⁵⁹ *R. v. Finlay* (1985), 23 D.L.R. (4th) 532 (Ont. C.A.) [Leave to appeal refused 28 February 1986].

1990 and were generally in person, one-to-one meetings.⁶⁰ The conversations were structured informally around a series of questions tailored to the interviewee's particular responsibilities. These general, open-ended questions were designed to lead the conversation to desired topics rather than to elicit detailed information. This method of obtaining information proved advantageous, both because clarification and detail could easily be requested and because information not anticipated by the formal questions was obtained.

Since the information obtained from these interviews was descriptive rather than statistical, it is presented best in a narrative format. A chronological overview of the police response to *Brydges* and *Duarte*, describing what really happened, will be presented.

A. *Brydges*

The judgment in *Brydges* was released 1 February 1990. Early the next morning, a lawyer in the Legal Branch at the Ministry of the Solicitor General read about the decision in the *Toronto Star*. After counsel at the Ministry of the Attorney General were contacted, the Ministry assumed primary responsibility for the development of new wording for police cautions to detainees. The Ministry of the Solicitor General was to provide legal and practical input on draft wordings.⁶¹ The Ministry of the Attorney General sent a memorandum to all Crown attorneys in the province on 5 February 1990. The memorandum

⁶⁰ For more information on interview method and research design in general, see N.M. Bradburn & S. Sudman, *Improving Interview Method and Questionnaire Design* (San Francisco: Jossey-Bass, 1979); J.D. Fitzgerald & M. Cox, *Research Methods in Criminal Justice: An Introduction* (Chicago: Nelson-Hall, 1987); V. Jupp, *Methods of Criminological Research* (London: Unwin Hyman, 1989); and D.L. Jorgensen, *Participant Observation: A Methodology for Human Studies* (Newbury Park, Calif.: Sage, 1989).

⁶¹ This allocation of responsibility between the Ministry of the Solicitor General and the Ministry of the Attorney General is quite common. *R. v. Askov*, [1990] 2 S.C.R. 1199, was given as another example of this type of arrangement between the Ministry of the Solicitor General and the Ministry of the Attorney General. Since the decision in *Askov* was directed at the courts, the Attorney General naturally took the lead in developing a response. The decision, however, also had an impact on the police. For example, accelerating trial dates would force the police to assume additional costs and to work overtime to appear in court, to provide the necessary security, and to serve additional subpoenas. The Solicitor General, therefore, provided input to the Attorney General on the problems facing the police.

summarized *Brydges* and advised that new wording was being prepared.⁶² On 8 February 1990, the Assistant Deputy Minister of the Ministry of the Solicitor General sent a similar CPIC message to all police chiefs.

Over the next ten days, the Ministry of the Attorney General consulted with the Ministry of the Solicitor General and considered proposals from other provinces. Proposed wording was in place by 14 February 1990 and was circulated for comment. On 16 February 1990, the arrest coordinator was requested to begin the development of a teaching position to serve as an interim policy until final wording was obtained from the Ministry of the Solicitor General.⁶³

The wording was formally approved by the Ministry of the Attorney General on 1 March and was sent to the Assistant Deputy Minister of the Ministry of the Solicitor General. Before the information could be distributed to the police, a French translation and a Legal Aid, 1-800 telephone number were required. Prior to the release of the *Brydges* decision, the Ontario Legal Aid Plan had established a 1-800 number in the Metropolitan Toronto area, giving persons detained at police stations in Toronto access to duty counsel twenty-four hours a day. Expansion plans were accelerated in response to *Brydges*, but problems with Bell Canada delayed the implementation of the 1-800 number until the beginning of March.⁶⁴

The deadline imposed by the Supreme Court was reached on 2 March. Since this was a Friday, there was concern that the police would not have the information necessary to make the appropriate warnings for arrests made that night. The new wording, absent the French translation but including the telephone number, was sent out over CPIC on Friday in the form of a Provincial Alert. The Alert explicitly stated that the proposed wording was "the recommendation of the Ministry of the Attorney General."⁶⁵

⁶² Note that Supreme Court decisions are generally sent to the Ministry of the Attorney General in Toronto by its agents in Ottawa, and then copies of the decision are sent to Crown attorneys throughout the province. Interview with Regional Director of Crown Attorneys, Central South Region (7 November 1990) Courthouse, Hamilton, Ontario.

⁶³ The OPC, its role in the information dissemination process, and the nature of its teaching positions are discussed above.

⁶⁴ Telephone interview with Deputy Director, Ontario Legal Aid Plan (12 November 1990); and *supra* note 47.

⁶⁵ Halton Regional Police Force, computer bulletin, Alert message, received 2 March 1990.

This information was received by the Halton Regional Police and was brought to the attention of the training officer. A bulletin was entered into the force's Halton computer system to advise all members of new information including changes to procedures and practices. Terminals are located throughout the station and in most patrol cars. Police officers are required to check the computer when they begin their shifts and are deemed to have knowledge of the bulletins.⁶⁶ The Halton Regional Police Force received a memorandum from the local Crown attorney on 12 March 1990, which included a copy of the CPIC message.

The French translation was completed 12 March and, as with the new wording, was sent to the Assistant Deputy Minister of the Ministry of the Attorney General. On 15 March, a second CPIC was sent updating the original CPIC of 2 March. This bulletin included the new wording in English and French, the 1-800 number for duty counsel from Legal Aid, and additional information on the proper use of the duty counsel telephone number. The Assistant Deputy Minister sent a memorandum to all chiefs of police and the Commissioner of the Ontario Provincial Police on 28 March 1990. This memorandum repeated the 15 March CPIC and enclosed cards containing right to counsel information.

Prior to the *Brydges* decision and the implementation of the province-wide duty counsel number, the number in Toronto received an average of 300 calls per month.⁶⁷ After 1 April 1990 (the beginning of the fiscal year, which almost coincides with the 1 March deadline established in *Brydges*), the Toronto number averaged 550 to 600 calls per month. Outside Toronto, the 1-800 number averaged 700 to 800 calls per month. All together, 9,091 people were assisted by emergency duty counsel between 1 April and 31 October 1990 at an average cost of \$11.69 per person.

Subsequent judicial decisions have given the original implementors feedback on the adequacy of their response and this feedback has started the implementation process cycle again. For example, in late 1990, Justice Houghton of the Supreme Court of British

⁶⁶ Apparently, the "Hill Street Blues" roll-call meeting method of disseminating information is old-fashioned and no longer used. Interview with senior officer, *supra* note 29. Some forces will post bulletins to keep police officers informed; some detachments of the Ontario Provincial Police have required officers to sign the standing order once they have read it. In this way, the force ensures that officers stay current. *Supra* note 62.

⁶⁷ All numbers were obtained from the Deputy Director, Ontario Legal Aid Plan.

Columbia held that *Brydges* requires police officers to inform detainees that some lawyers offer free first consultations.⁶⁸ After reading about the case in *Lawyers Weekly*, a lawyer in the Legal Branch obtained a copy of the decision and sent it to the Crown Law Office, Criminal. On 9 December 1990, the Crown Law Office concluded that the case was probably an aberration and that additional changes to the wording were not required. The Legal Branch agreed with the Crown Law Office's decision. The case is not binding in Ontario and it is not a Court of Appeal decision. Therefore, it does not have sufficient legal weight in Ontario. Police forces were not informed of either the case or of the decision that no response was required.

In two very recent cases from the Ontario Court of Justice (General Division), judges have ruled that the right to counsel caution developed in response to *Brydges* was incomplete and, therefore, those accused were not informed adequately of their right to counsel. In both *R. v. Bautista*⁶⁹ and *R. v. Baldwin*,⁷⁰ the Court ruled that the caution was inadequate because it did not clearly convey to the accused that legal aid was free and could be accessed immediately. In anticipation of these difficulties, in June 1992, the Ontario Solicitor General advised provincial police forces to change the standard caution to include the 1-800 Legal Aid number.⁷¹

Although each RCMP division would ultimately adopt the wording approved by the provincial Ministry of the Attorney General, RCMP headquarters developed a suggested response to the case. Within three days of the *Brydges* decision, the Enforcement Support Branch was informed of the decision by the officer in charge of the branch, who had read about the decision in the newspaper. On 9 February 1990, the Enforcement Support Branch forwarded information on the decision to the Contract Policing Branch,⁷² the policy centre for issues involving arrest procedures. The Contract Policing Branch disseminated this preliminary information to all divisions.

⁶⁸ *R. v. Bethune* (15 October 1990), (B.C.S.C.) [unreported] [hereinafter *Bethune*]. See M. Zapf, "B.C. cops should have mentioned free lawyer consults?" *Lawyers Weekly* (7 December 1990) 11.

⁶⁹ (21 October 1992), Toronto 2276.

⁷⁰ (15 September 1992), Milton 2178.

⁷¹ *The Lawyers Weekly* (13 November 1992) 16.

⁷² Now the General Enforcement Branch.

The Contract Policing Branch contacted the Legal Services Branch on 13 February. Over the next ten days the two branches reviewed the decision and developed proposed wording. Legal Services contacted lawyers in the Department of Justice for their input and final wording was developed by 23 February. On 26 February, direction was sent, through CPIC, to all divisions suggesting the appropriate wording and a French translation.

B. *Duarte*

The judgment in *Duarte* was released on 25 January 1990. Within a day, all police forces in the province were advised by a CPIC message from the Criminal Investigation Services, Ontario⁷³ that consent interceptions may be illegal and/or that an authorization may be required. Halton received a copy of the decision approximately three weeks later. After scouring the text, it was determined that the apparent distinction drawn by the Supreme Court of Canada between recording and monitoring was significant. Halton concluded, therefore, that interception of communications with the consent of one of the participants was satisfactory if the police only monitored, not permanently recorded, the conversation.

A Halton Crown attorney confirmed this conclusion in a memorandum received by the Halton Police Force on 12 March 1990. The memorandum was written to clarify decisions made at an earlier meeting between the police and the Crown's office. It stated that, in emergencies, conversations could be monitored and recorded if authorization was obtained at a later date. In non-emergency situations absent authorization, conversations could be monitored, but not recorded, for the purpose of preserving officer safety. The OPC took a similar approach.⁷⁴

During this time, a small group within the Criminal Law Policy section of the Ministry of the Attorney General began to develop a policy. The input of those police forces most affected by the *Duarte* decision—the RCMP, the Ontario Provincial Police, and the Metropolitan Toronto Police Force—was sought. The individual in charge of the

⁷³ Hereinafter CISO.

⁷⁴ *Supra* note 31.

investigation unit was contacted and asked to develop questions. It should be noted that each of these forces has significant resources to develop their own responses to decisions. The Metropolitan Toronto Police Force, for example, employs a lawyer. While the policy's development continued, the Ministry of the Attorney General provided ongoing advice regarding the use of participant surveillance to Crown attorneys and, indirectly, to the police.

Counsel at the Ministry of the Attorney General, unlike the Halton Regional Police Force and the Halton Crown attorney, were developing a broad interpretation of the *Duarte* decision. In their view, no reasonable distinction could be drawn between recording and monitoring. They felt this distinction did not accord with the decision's reasons and was not consistent with the broad definition of "intercept" in Part VI of the *Criminal Code*.⁷⁵ As a result, counsel concluded that a judicial authorization was required for all interceptions.

Over the next few months, formal and informal connections were exploited to develop an appropriate response. Formal meetings were held, on average, every two months with representatives from various police forces, members of the Ministry of the Solicitor General and the Ministry of the Attorney General, and CSIS.⁷⁶ Halton also informally contacted other police forces to determine their response. Halton obtained a copy of an authorization often used by the Metropolitan Toronto Police Force as an example of an appropriate response.

Halton received a morass of conflicting advice from these contacts. Rather than attempting to issue general instructions to all police officers, Halton relied on the established procedure for the use of any type of electronic surveillance, which operated as a check on the unconstitutional use of participant surveillance. In the wake of *Duarte*, the Intelligence Bureau required an officer in a participant surveillance situation to turn off the recorder when an individual who was present was not aware the conversation was being recorded.

Halton remained unclear on the appropriate direction it should take until mid-summer when it received a copy of a legal opinion prepared by the federal Assistant Deputy Attorney General for the

⁷⁵ *Supra*, note 56, s. 183.

⁷⁶ For example, on 31 May 1990, the Ontario Provincial Police hosted the 1990 Southern Ontario Fraud Seminar for investigators from various fraud units at which *Duarte* was one of two major topics of discussion.

Deputy Commissioner, Operations of the RCMP. The opinion, dated 9 July 1990, was a comprehensive review of the *Duarte* decision and its implications for the use of participant surveillance in different situations. It concluded that a meaningful distinction could not be drawn between monitoring and recording or interception for evidential and safety purposes. Thus, authorization was required for participant surveillance except, possibly, in exigent circumstances. While the opinion was not binding on Ontario municipal police forces, it was the most authoritative and comprehensive direction yet received. Halton subsequently decided to incorporate this opinion into the standing order on participant surveillance then being developed.

On 25 January 1990, the same day as the decision, the Special Services Branch—the RCMP policy centre responsible for electronic surveillance—received a copy of the judgment from the Prince Edward Island division.⁷⁷ The Special Services Branch disseminated a telex to all divisions on 26 January. This telex suggested that all one-party consent surveillances be discontinued. The tentative wording does not reflect uncertainty about the implications of the *Duarte* decision. It would have been improper for the Special Services Branch to direct Division Commanders, senior officers in the RCMP hierarchy, to do anything.⁷⁸

By 30 January, the Special Services Branch had developed and forwarded a draft policy to the Legal Services Branch for review. The Special Services Branch wrote to the Enforcement Support Branch on 9 February and confirmed the basic outlines of the policy being developed. Legal Services approved an interim policy by 21 February and subsequently disseminated it to all divisions. The input of all directorates in headquarters was obtained and considered during the policy's development.

The RCMP National Policy on electronic surveillance was amended on 21 March. All electronic surveillance was prohibited unless prior judicial authorization under Part VI of the *Criminal Code* had been obtained. This policy applied whether the purpose of the interception was obtaining evidence or the safety of officers. The importance of intercepting the communications was based on the need to corroborate

⁷⁷ Note that the members interviewed could not explain why the first division to pick up the reasons in an appeal from an Ontario case was in Prince Edward Island. They pointed out instead how this demonstrated that every division keeps an eye out for important developments.

⁷⁸ Interview with members of the RCMP, *supra* note 14.

the informant's testimony. Legal Services forwarded its final legal opinion to the Special Services Branch on 11 July and a copy was sent to all divisions on 23 July. Revisions to the standard manuals were approved and implemented in due course.

Although not directly part of the implementation process, the RCMP also responded by informally lobbying the Department of Justice to make changes to Part VI of the *Criminal Code*. Members of the Enforcement Services Branch and the Special Services Branch decided to use the *Duarte* decision as a focus for broader discussions on the need for legislative amendments to Part VI. Although the Department of Justice was open to the suggestions of the RCMP, it was unwilling to act before the Supreme Court decided *R. v. Wong*⁷⁹ and *R. v. Garofoli*.⁸⁰ At that time, the Department of Justice anticipated that a long-term overhaul of the Part IV provisions would be required.

More than a year after the *Duarte* decision, police across the country were unsure whether the decision applied only to electronic recording or to monitoring as well. The issue is of pressing concern to police forces since they feel their safety in dangerous situations is compromised if they are not monitored by electronic surveillance.⁸¹

VI. EVALUATION AND RECOMMENDATIONS

While police have always had to respond to changes in the law, the pace of this change has historically been slow. Since the *Charter's* adoption, the police have been forced to modify their practices more often, faster, and with less warning. Eventually, practices are modified in accordance with the spirit of judicial decisions. As might be expected, the RCMP have an efficient and centralized approach to police implementation of judicial decisions. At the municipal level, however, the implementation process did not always function in a timely and accurate manner. Participants themselves agreed that the system required improvements. The most serious problems arose in the interim

⁷⁹ [1990] 3 S.C.R. 36.

⁸⁰ [1990] 2 S.C.R. 1421.

⁸¹ P. Moon, "Ruling removes 'life line', police say" *The [Toronto] Globe and Mail* (26 July 1991) A1.

between the decision and the final legal opinion, when police are left with little guidance.

Three critical elements for a successful implementation process are in place: communications systems, positive attitudes, and physical and human resources. The participants have CPIC, a technically sophisticated communications system, through which information is widely disseminated in a timely fashion. Internal communications systems are also strong. The Halton Regional Police Force makes active use of computer technology, and the OPC has a well-developed periodicals distribution system. The Ministry of the Solicitor General provides concise, constant information in its *Policing Services Division Newsletter*.⁸² All participants make extensive use of the media. Less formal communications networks among personal friends and acquaintances are also an effective means of disseminating information.

The negative attitude of those responsible for implementation is suggested by the theoretical work as an impediment to an effective implementation process. This factor was recognized by one participant who noted the importance of "selling" the *Charter* to the police.⁸³ Most of the comments, however, reflected the positive attitude of the interviewee to the *Charter*. Some expressed the belief that the *Charter* had been beneficial to the police because it ensured professionalism.⁸⁴ Others commented that police officers, in their professional capacity, did not care whether the *Charter* existed or not so long as somebody told them exactly what they had to do in order to comply with its requirements.⁸⁵ The most scathing criticism levelled by an interviewee was that the Canadian criminal procedure system was becoming totally Americanized.⁸⁶ Although sophisticated research is required to determine accurately the attitudes of the police and the impact of these

⁸² *Supra* note 24.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ Interview with senior officer (15 November 1990) Halton Regional Police Force headquarters, Oakville, Ontario.

⁸⁶ *Ibid.* Interview with members of the RCMP, *supra* note 14.

attitudes on the implementation process,⁸⁷ these comments provide some indication that attitudes are not a significant impediment to implementation.

The theoretical work suggests that the complexity of judicial decisions might impair the implementation process. Interestingly, the clarity of the decisions did not seem to be of pressing concern to the participants, nor was it viewed as a solution to the implementation problems facing police. In fact, until they were directly asked, most interviewees never mentioned the complexity of decisions as a source of difficulty. When concern was expressed, it focused on the discretion conferred on police by ambiguous decisions. One interviewee suggested that the complexity in *Duarte* was beneficial because it gave the police room to manoeuvre.⁸⁸ Other interviewees were more concerned with the possibility that police officers would be able to evade the spirit of particular Supreme Court decisions.

Finally, participants have access to a wide array of physical and human resources. Police forces have extensive practical insight into the problems associated with the use of electronic surveillance, for example. Government ministries employ large numbers of lawyers with constitutional and criminal law expertise.

Despite the strengths of these elements of the implementation process, other elements of the implementation process at the municipal level were considerably weaker. The failure to allocate responsibility and a lack of information impair the effective and timely implementation of Supreme Court decisions by the police.

The police are fully responsible for their own policy development and implementation. Responsibility for the final decision on the proper response to a Supreme Court decision, the manner in which that response is implemented, and the monitoring of compliance rests with the individual police force. Nonetheless, when Supreme Court decisions change police practices, the police need accurate information to help guide their decisions.

⁸⁷ See generally M. Gold *et al.*, *Public Perceptions of Justice: The Exclusion of Evidence Under the Charter* (Centre for Research on Public Law and Public Policy, 1990) [unpublished]; and J.F. Fletcher, "Mass and Elite Attitudes about Wiretapping in Canada: Implications for Democratic Theory and Politics" (1989) 53 *Pub. Opinion Q.* 225.

⁸⁸ *Supra* note 85.

The interviewees took the position that the collection of information concerning judicial and statutory developments is a role outside the modern function of community policing. Senior officers in the Halton Regional Police Force were adamant that the major problem with the implementation process was the failure of other components in the system for the administration of justice to take responsibility for informing police. One senior officer stated that under the current system the participants "are acting to the collective detriment of the judicial system as a whole."⁸⁹

No other organization is responsible for providing that information. Participants at the municipal level unanimously agreed that no "emergency response team"⁹⁰ similar to the Special Projects Section of the RCMP existed to monitor the courts for change and to swing into action when a decision was released. This *ad hoc* approach to implementation, while potentially effective, appeared to be the primary reason municipal police were not able to obtain the interim information required. Police rely on external sources, primarily the media,⁹¹ to learn about the existence of a decision and are then given little interim advice or direction pending the completion of a legal opinion. The information they do receive must be actively sought out. The transitional period provided in *Brydges* appears to be a recognition of that problem, and it is becoming a more common practice.

The lack of information was a related problem impairing the operation of the implementation process. Although the structural mechanisms for communication were in place, they were not being used. First, many participants in the process were not aware of work being done by others and thus needed information about the implementation process itself. The Crown attorneys interviewed, identified by others as front-line information sources for the police, were unsure what formal or informal systems were in place to assist the police. One attorney assumed that there was a constant flow of information from the Ministry of the Solicitor General.⁹² A senior administrator with the Ontario Police College did not know that the Ministry of the Solicitor General

⁸⁹ *Supra* note 85.

⁹⁰ A term used by counsel, Legal Branch.

⁹¹ *Supra* note 24.

⁹² Interview with Halton Crown attorney, *supra* note 14.

was working in conjunction with the Ministry of the Attorney General on the *Brydges* wording within hours of the decision's release.⁹³ The Halton Regional Police Force, while not a major user of electronic surveillance, was not contacted by the Ministry of the Attorney General and was unaware of their work on the development of a policy in response to *Duarte*.

Second, police do not have concise information immediately following a possible change in the law. In order to begin the decision-making process, they require interim advice outlining salient details of the case, relevant time limitations imposed by the court and, if necessary, suggested changes in practices pending the development of a formal opinion. These suggestions could possibly be based on a worst case scenario interpretation of the decision. It would then be the decision of the police force whether immediate changes were required or could be postponed until the final opinion.

The following recommendations, designed to ameliorate these difficulties, were developed with several goals in mind. Any changes to the system must help ensure that individual police officers receive timely and accurate information about required changes to their practices and procedures. Recommendations must be based on the stated and observed needs of participants, and effectively exploit resources currently available. Finally, any recommendations must recognize that, although several participants interviewed had worked in the past on the information networking systems in place and had recommended changes,⁹⁴ these initiatives had not achieved substantive results.

Change could occur on two levels. First, the current, informal *ad hoc* system could be fine-tuned so that it better serves the interests of participants. The first step in that process would be the provision of information that gives each participant a greater understanding of the role and responsibilities of other participants. For example, as a response to a decision is developed, all participants could be kept better informed about the progress of the work. This actually occurred when the Ministry of the Solicitor General sent all police chiefs a CPIC on *Brydges* a week after the decision.

The provision of interim advice to the police is the most significant step that could be taken to improve the current system. The

⁹³ *Supra* note 24.

⁹⁴ *Ibid.*; and *supra* note 62.

Ministry of the Solicitor General could achieve this with a slight change to the mandate of the OPC. The OPC currently develops teaching positions and is permitted to distribute these positions in response to an inquiry. These positions are not developed by a central unit, but by the individual instructor specializing in the area. The system, therefore, is similar to the RCMP's policy centre approach.

The OPC could be permitted to distribute these teaching positions on a proactive basis to all municipal police forces in the province. This information, developed by police specialists in the area, would serve the dual purpose of ensuring that the police are aware of the decision and suggesting a course of action, which could be used as the basis for the development of a policy by the force. The opinion's weight would be enhanced if, as is possible under proposed restructuring plans, the OPC obtained the resources to hire a lawyer.

The second approach to change involves a formal reorganization of responsibilities by either using current participants in new roles or creating new participants. The least dramatic change would be a clarification and expansion of the role of the Legal Branch of the Ministry of the Solicitor General. While the RCMP are obviously a more centralized police force than Ontario municipal police forces and have very different policing responsibilities, the relationship between the RCMP and the Legal Services Branch at headquarters could serve as a model for this expanded role. Like the Legal Branch of the Ministry of the Solicitor General, the Legal Services Branch maintains close ties with the Department of Justice. The RCMP Legal Services Branch is ultimately responsible for providing legal advice to the police force just as the Legal Branch of the Ministry of the Solicitor General could be ultimately responsible to the municipal police forces.

The Legal Services Branch of the RCMP does not develop the policies on which it advises. These policies are developed by the policy centre responsible for the issue subject to the coordination of the Enforcement Support Branch. Then they are delivered to the Legal Services Branch for input. The transformation of the Legal Branch of the Ministry of the Solicitor General into the final advisory body on legal matters would, therefore, require the centralization of policy development in one of the police organizations.

The OPC is the body most suited to the centralization of policy development. The OPC maintains current information on legal matters including judicial decisions and legislative changes. It already has a

system in place for the immediate development of teaching positions responding to changes in the law. The OPC also maintains contacts, both informal and formal, with all municipal police forces in the province. The position developed by the OPC could be revised and approved by the Legal Branch and then disseminated to the municipal police forces. It would include an explanation of why the change was required and why the policy was adopted.⁹⁵ The policy would provide police forces with authoritative direction on the issue and could be used by the police to implement the judicial decision and to address their practical concerns.⁹⁶ A formal reorganization along these lines would have to be initiated at a high level supported by adequate resources and cooperation among those affected.

A third, more drastic solution involves the creation of a new participant in the process. This participant could be a formal unit composed of representatives from police and government organizations. The unit would be responsible for monitoring the courts and legislatures for change, developing policy that implemented that change, obtaining input from police in the field, ensuring the policy complied with the legal requirements, and disseminating the information to all police forces.

This solution should be rejected for a number of reasons. First, resources already exist for the effective implementation of decisions and it would be excessively complicated to create a new unit. Second, imposing such a formal structure would eliminate the beneficial effects of the informal networks currently existing among participants in the process. Third, the unit would be no more able to provide fast interim advice to the police than the current implementation structure. Finally, it is possible that this unit would become politicized and susceptible to the pressures of too many competing interests.⁹⁷

⁹⁵ The importance of explaining *why* was emphasized by Regional Director of Crown Attorneys, Central South Region, *supra* note 62.

⁹⁶ This is the role which the OPC is advocating for itself; senior officers at Halton agreed that this was a satisfactory solution.

⁹⁷ Interview with senior officer, *supra* note 29.

VII. CONCLUSION

Despite methodological problems with case studies, the approach was suitable for this research. A large part of the research effort was devoted to identifying participants in the process through progressive interviews with those involved. More importantly, the participants' subjective perceptions of the process—critical elements of its effectiveness—could only be gathered in informal interviews. Objective facts were also obtained in the interview. These provided a concrete chronological overview of how police responded to the two decisions, as well as information from which general patterns could be perceived.

Nonetheless, this research represents only a starting point for a broader empirical examination of the implementation process. More extensive interviews could have been conducted with the provincial Ministry of the Attorney General and the federal Department of Justice. Information from the Metropolitan Toronto Police Force, one of the largest and most self-reliant municipal police forces in the country, would have provided a third contrast to the two forces interviewed.

Many participants mentioned that Supreme Court decisions were relatively easier to respond to since the Court was, right or wrong, the final word. Court of Appeal decisions or local provincial court decisions are more difficult, both because there is the possibility that these decisions would be overruled on appeal and because the police forces affected do not have the benefit of assistance from other forces. Discussion of the *Bethune* case, decided by the Supreme Court of British Columbia, provided an indication of how some participants cope with this uncertainty. Future studies could delve more thoroughly into this area.

The police have managed to cope with new requirements imposed by the *Charter* and have effectively implemented changes to standard procedures. Although these changes may not constitute "tidal waves and earthquakes," the *Charter* has clearly had an indelible impact on police forces and on the formal and informal relationships between police and government organizations. Supreme Court *Charter* decisions have required police to look for support outside the police force and have pressured government organizations to reassess their responsibilities to the police.

