

Updating Civilian Oversight of Canada's Military Police: Achieving Results for Canadians

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Executive Summary

For a great many Canadians, the mention of Somalia recalls not only an impoverished developing nation, but memories of a collective shock as the national and international media reported a series of sometimes-tragic events during the deployment of Canadian Forces to that east African country in the early 1990's. Among the many systemic problems the resulting inquiry identified in Canada's military were important concerns about the administration of justice in the Canadian Forces.

The Government of Canada responded with a major overhaul of the *National Defence Act* in 1998, the largest part of which involved a significant modernization of the military justice system. These changes created a military justice system more in harmony with Canadian values of fairness and impartiality, and included the introduction of civilian oversight to the Canadian Forces Military Police, to be provided by a new Military Police Complaints Commission.

“Independent oversight is especially important for the military police and, in this regard, civilian oversight of police forces is particularly instructive. If an individual citizen complains to a civilian police force about improper conduct of its personnel, there is an expectation of and a right to a response. The situation should be no different in the military context.”¹

- The late Right Honourable Brian Dickson
Chief Justice, Supreme Court of Canada (1984-1990)

While considered somewhat novel at the time, few question the appropriateness of civilian oversight of military policing. Military police are in some ways different from their civilian counterparts, but the similarities are far more numerous and fundamental. Military police are peace officers. They possess the same extraordinary powers – and the same authority to exercise

these powers – as civilian police. They can arrest and detain people, not just members of the Canadian Forces, but anyone. They can, when necessary to protect their own or others’ lives, use lethal force against citizens.

Military police should be no less accountable to Canadians for their use of these powers than civilian police.

There is no question that the establishment of independent oversight by the Commission has been a positive development. At the same time, some five years after its introduction, it is clear the existing process for the investigation and review of complaints about the conduct of military police does not meet current standards of fairness, transparency and effectiveness for civilian oversight of policing. There are important gaps in the oversight body’s authority. Under the provisions of the current legislation, the resolution of complaints can often be needlessly cumbersome, thus providing poor value to Canadians.

In addition, the mechanism for detecting and investigating interference with military police – a key part of the Commission’s mandate – is less than adequate.

As a result of these shortcomings, some of the intended benefits of civilian oversight of military policing are at risk. Addressing these shortcomings and advancing both the effectiveness and the efficiency of civilian oversight of military police would not require a radical departure from the existing provisions of the Act. However, the Commission is concerned that an important opportunity to recognize and take actions that can correct these problems is slipping away.

The Government of Canada is now considering whether further amendments should be made to the *National Defence Act* following the five-year independent review of the Act, led by former Chief Justice Antonio Lamer.

The Complaints Commission believes a number of important issues still need to be addressed. Accordingly, the Commission believes this is an opportune time to issue this Special Report, in the hope of bringing the attention of Parliamentarians and all

¹ Canada. National Defence. *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, 25 March 1997, Chap. 10, p. 65.

Canadians to the importance of strengthening civilian oversight of Canada's military policing.

Henry Kostuck
Interim Chairperson

Some History

With the 1998 amendments to the *National Defence Act*, the Government of Canada updated the military justice system to more closely parallel the independence of our civilian system, while respecting the unique circumstances and culture of the Canadian Forces and the Department of National Defence.

These changes included recognition of the importance of a professional police service to the military justice system, clearly separating, on an institutional basis, the system's investigative, prosecutorial, defence and judicial functions. A new *Military Police Professional Code of Conduct* was put in place.

These changes were in keeping with the increased role for the military police in the military justice system called for in the 1997 *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*. That same report stated that, "With such an increase in responsibility and authority must come a corresponding professionalism and accountability. This responsibility should at all times be monitored by a process of oversight and review."²

To provide this accountability to Canadians, and to protect the integrity of military policing, a new Part IV of the *National Defence Act* came into force. This part of the legislation sets out the process for handling complaints about the conduct of military police, including provisions for military police themselves to complain if they believe anyone in the chain of command or a senior official of the Department of National Defence has interfered with their investigations. The Military Police Complaints Commission oversees these processes.

To ensure the integrity of the oversight body, Parliament directed that the Commission would operate apart from the authority of the Department of National Defence. The Commission is staffed entirely by civilians, and reports to

*"...effective and meaningful accountability is the one way to sustain and enhance public confidence in the administration of criminal justice. Public trust and confidence are cornerstones of effective policing."*³

- Gwen Boniface,
Commissioner,
Ontario Provincial Police

² Ibid., p. 65.

³ Gwen Boniface, Commissioner, Ontario Provincial Police, *Police Leaders' Perspective on Accountability, Building Ethical Frameworks and Civilian Oversight*, presentation to Canadian Association for Civilian Oversight of Law Enforcement, 25 June 2004, accessed at <http://www.cacole.ca/conference2004/presentations/CACOLE%20Speech%20June25%20-%20G%20Boniface.pdf>

Canadians through Parliament.

Its contributions have been recognized on a number of occasions by the Canadian Forces Provost Marshal. The Provost Marshal – the head of the military police – has written that, “...the work of the Military Police Complaints Commission has advanced military police accountability and assisted in promoting the highest ethical and professional policing standards throughout the Military Police Branch.”⁴

The Need for Change

Notwithstanding the substantial step forward represented by the 1998 amendments to the *National Defence Act*, the provisions for civilian oversight of Canadian Forces Military Police are falling farther and farther behind police oversight regimes of other jurisdictions in Canada and elsewhere, where the trend is toward increasingly robust civilian oversight.⁵ This is not surprising: Canadians continue to make it clear that they want more, not less, accountability from the public institutions. In its current form, civilian oversight of military policing cannot meet these ever-rising expectations:

- The transparency and fairness of the complaints process cannot be demonstrated in all situations.
- Military police conduct in a number of areas remains hidden from public accountability.
- Gaps in the system may be allowing interference to go undetected, posing an ongoing threat to the integrity of military policing.
- Time and money are being wasted in arguments over the wording and intent of the legislation.

Assuring Fairness and Transparency

1) Subjects of complaints should have the right to request a review

Simple fairness should dictate that the military police member who was the subject of a complaint should have the right to request a review of the disposition of the complaint. Under the current system, only the person who filed the complaint can ask the

⁴ Canadian Forces Provost Marshal, *Annual Report 2000*, p. 4

⁵ Honourable Patrick Lesage, *Report on the Police Complaints System in Ontario*, 22 April 2005, p. 57 (<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/LeSage/>)

Complaints Commission to review the way it was handled by the Canadian Forces Provost Marshal.

The only recourse for subjects of a complaint is to file a complaint of their own, necessitating a new investigation and the associated consumption of time and resources. If the subject of the complaint also had the right to request a review by the Commission, in most cases, a new investigation would not be required. Greater fairness and new efficiencies would be achieved.

In the First Independent Review of the 1998 changes to the *National Defence Act*, former Chief Justice Antonio Lamer recommended that,

“Once a conduct complaint has been resolved by the Canadian Forces Provost Marshal, the complainant or the member of the military police whose conduct was the subject of the complaint would have 60 days within which to request a review...”⁶ (*emphasis added*)

Implementing this simple change would do no more than give military police the same rights accorded to their counterparts in other Canadian jurisdictions, including British Columbia, Ontario, Alberta, Manitoba, Newfoundland and Nova Scotia, and elsewhere in the world.

2) *The public interest requires that the informal resolution process be subject to oversight*

In his 2005 review of the police complaints process in Ontario, the Honourable Patrick Lesage, former Chief Justice of the Ontario Superior Court of Justice, noted that informal resolution of a complaint provides an opportunity for everyone involved “to engage in a potentially more efficient and satisfactory process.”⁷

The *National Defence Act* recognizes the potential benefits of informal resolution, instructing the Provost Marshal – the head of the military police – to consider whether a complaint about the conduct of a military police member can be dealt with in an informal manner. If appropriate, and all parties agree, the Provost Marshal may attempt to resolve the complaint informally.⁸

If a complaint is disposed of through informal resolution, the Act requires the Provost Marshal to advise the Chairperson of the Complaints Commission of the resolution; however, the Commission’s authority

⁶ *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, An Act to amend the National Defence Act*, 13 September 2008, Recommendation 66, p. 83

⁷ *Report on the Police Complaints System in Ontario*, p. 70

⁸ *National Defence Act*, R.S.C. 1985, c. N-5, s 250.27(1)

In the military context in particular, it is essential to ensure that intimidation, whether real or perceived, plays no part in whatever informal settlement has been reached.

to be informed of the terms of any informal resolution and to monitor the process of informal resolution are disputed.

In his report on the police complaints system in Ontario, former Chief Justice Lesage recommends that,

“...records should be kept by the police service and the new [civilian oversight] body regarding the details of the complaint and the resolution. Where an informal resolution is deemed unsuitable by the new body, has been rejected, or has failed, the new body may refer the complaint for investigation.”⁹

Similarly, in a draft *Police Complaint Act* for British Columbia, the province’s Police Complaints Commissioner, Dirk Ryneveld, Q.C., includes the provision that,

“The terms of any informal resolution must be submitted to the commissioner for approval, and in deciding whether to grant approval, the commissioner may undertake such inquiries of persons, including the parties to an informal resolution, as the commissioner considers appropriate.”¹⁰

The Complaints Commission holds very strongly that as long as its authority to monitor and review the terms of informal resolutions of complaints is not explicit, the fairness and transparency of the complaint process will remain in doubt. This lack of review also reduces the effectiveness of the complaints process, since there is no way of knowing whether an informal resolution addresses any systemic issues that may have led to the complaint.

This power can be provided without damaging the integrity of the informal resolution process. Statutory measures can be put in place to ensure discussions related to the informal resolution remain confidential.

3) *The Complaints Commission should have explicit power to monitor the handling of conduct complaints by the Provost Marshal, including access to investigative materials and other information necessary to determine whether the complaint was dealt with properly*

The head of the military police has initial responsibility for the investigation of conduct complaints, although the Chairperson of the Complaints Commission may, at any time in the process, determine that it is in the public interest for the Complaints Commission to launch its investigation immediately and possibly hold a public hearing.¹¹

⁹ *Report on the Police Complaints System in Ontario*, p. 71

¹⁰ Police Complaint Commissioner, British Columbia, *Police Act Reform White Paper and Draft Police Complaint Act*, March 2005, p. 24

¹¹ *National Defence Act*, s 250.38

If the Chairperson is to make the best use of this public interest power, it follows that the Commission should have access to all necessary information about the complaint and the investigation initiated by the Provost Marshal. Indeed, the Act states that, “The Provost Marshal shall establish and maintain a record of all complaints received...and, on request, make available any information contained in that record to the Complaints Commission.”¹²

So far, however, the Canadian Forces has tended to take a very narrow view of what constitutes a ‘record of a complaint,’ providing the Commission with only the most basic information, rather than the investigative files and other materials needed to support an informed decision on the matter. In one instance, only after the Commission had expended the time and resources to prepare a court action, was the necessary information provided.

This situation impedes the Commission's ability to make appropriate and timely decisions and to provide the oversight intended by the legislation.

In situations where the Commission may have concerns about the Provost Marshal’s handling of a particular complaint but the complainant does not request a review – for any number of possible reasons – the Commission faces a dilemma: It can take drastic action and initiate a public hearing, or risk failing to address what could be a serious problem with some aspect of military policing.

While ordering a public interest hearing in this situation would allow the Commission to compel the Provost Marshal to produce the necessary information, it is an exceptional and potentially costly step. It seems absurd that the Commission could conceivably find itself calling a public hearing in order to determine whether it is in the public interest to call a public hearing.

A recent ruling by the Federal Court of Appeal underscores the importance of reserving the public hearing process for exceptional situations.¹⁴ Justice Létourneau wrote that,

“The holding of a public hearing to compel the [RCMP] Commissioner to perform a statutory duty imposed upon him by the Act is a costly procedure. It is

*“Too often, we...have to struggle to get every piece of paper necessary to do our jobs.”*¹³

Shirley Heafey, Chair,
Commission for Public
Complaints Against the
RCMP

¹² *National Defence Act*, s 250.25

¹³ Shirley Heafey, Chair, Commission for Public Complaints Against the RCMP, *The Need for Civilian Review of the RCMP on National Security Issues*, address to the Access and Privacy Conference, Edmonton, 17 June 2005, accessed at http://www.cpc-cpp.gc.ca/DefaultSite/Whatsnew/index_e.aspx?ArticleID=776

¹⁴ It is most interesting to note that Part VII of the *Royal Canadian Mounted Police Act*, dealing with complaints against the RCMP, was used as a model for the framing of Part IV of the *National Defence Act*, which sets out the military police complaints process and establishes the Military Police Complaints Commission.

certainly not the one favoured by Parliament or by the Commission [for Public Complaints] itself. Investigation is the rule, a public hearing the exception.”¹⁵

In any event, an explicit power to monitor police investigations of conduct complaints and/or have access to all relevant information is quickly becoming a standard feature of civilian oversight of law enforcement in Canada and around the world. It has been the law in the United Kingdom since 2002,¹⁶ and former Chief Justice Lesage of Ontario recommends it be added to the police complaint process in that province.¹⁷

4) *The scope of military police conduct subject to civilian oversight should be clarified*

The difficulty here is the restriction the Act imposes on the type of complaints that are subject to oversight, confining the Commission’s jurisdiction to complaints “about the conduct of a member of the military police in the performance of any of the policing duties or functions that are prescribed for the purposes of this section in regulations made by the Governor in Council.”¹⁸

These regulations – the *Complaints About the Conduct of Members of the Military Police Regulations* – list a total of nine “duties and functions,” ranging from the conduct of an investigation and the handling of evidence to responding to a complaint and the arrest or custody of a person.¹⁹ The Regulations specifically exclude from the process any complaints about military police duties or functions that relate to administration, training, or military operations that result from established military custom or practice.²⁰

These conditions may seem reasonable to the casual observer, but in practice, far from being clear, these exceptions have allowed certain complaints about the conduct of military police members to be classified as “internal matters.” Certainly, there may be issues that would be dealt with most appropriately within the military police organization. However, the Act does not oblige the Provost Marshal to tell anyone of the existence of a complaint that has been classified as “internal,” nor explain why such a complaint should be dealt with internally and not subject to independent review.

In other words, and perhaps contrary to the intent of the *National Defence Act*,²¹ an unknown number of complaints about the conduct of military police that may or may not

¹⁵ Royal Canadian Mounted Police Public Complaints Commission v. Attorney General of Canada, 2005 FCA 213, at para 62

¹⁶ *Police Reform Act 2002* (U.K.), 2002, c. 30, s 17 [<http://www.opsi.gov.uk/acts/acts2002/20030--c.htm#17>]

¹⁷ *Report on the Police Complaints System in Ontario*, p. 73

¹⁸ *National Defence Act*, s 250.18(1)

¹⁹ *Complaints About the Conduct of Members of the Military Police Regulations*, P.C. 1999-2065, 18 November 1999, s 2(1)

²⁰ *Ibid*, s 2(2)

²¹ s 250.21(2)(c)(i) “The person who receives a complaint shall...ensure that notice of the complaint is sent as soon as practicable to the Chairperson...”

be subject to civilian oversight can be filed and disposed of without the knowledge of either the Complaints Commission or the people of Canada.

This clouds the transparency of the process, and makes it impossible to determine whether either the complainant or the subject of the complaint have been dealt with fairly.

These exceptions also mean that military police are beyond the reach of public accountability for their conduct in significant areas of their responsibility.

By continuing to exclude the conduct of military police during military operations from oversight, serious incidents such as the alleged torture and harassment of prisoners at the Abu Ghraib prison operated by the U.S. military in Iraq or in Guantanamo Bay – and suspicions that senior officers attempted to cover up the alleged misconduct – could be beyond the reach of Canadian civilian oversight.

Where oversight of operational matters is concerned, it is worth noting that the mandate of the public inquiry into the deportation and subsequent detention of Mr. Maher Arar goes beyond exploring the actions of Canadian officials in the matter. The Government has also asked the inquiry to make recommendations concerning an independent, arm's-length review mechanism for RCMP activities with respect to national security.²² Again, the trend is toward more, not less oversight.

If there are to be limits on civilian oversight of military police conduct, transparency and accountability demand that these limits be considered by Parliament and set out in the Act, rather than through regulation, which can be altered at any time without substantive scrutiny by Parliament.

Moreover, it is highly questionable whether the military police themselves (the overseen) should be the ones to apply such limits to complaints. In his recent review of the Ontario police complaints system, former Chief Justice Lesage has recommended that the independent oversight body, rather than the police, should handle the screening and classification of complaints.²³ Indeed, in other jurisdictions where the extent of oversight applicable to a police complaint depends on the nature of the complaint, such as in Québec and British Columbia, it is already established in law that it is the oversight agency, and not the police, that makes this determination.

²² Public Safety and Emergency Preparedness Canada, *Deputy Prime Minister Issues Terms of Reference for the Public Inquiry into the Maher Arar Matter*, News Release, 5 February 2004, accessed at http://www.psepc-sppcc.gc.ca/publications/news/20040205_e.asp

²³ [*Report on the Police Complaints System in Ontario*, pp. 65-66.](#)

5) *Protections against interference with the activities of military police should be expanded and clarified*

Canada's military police complaints process is somewhat unique in that it allows military police conducting or supervising an investigation to complain if they believe a member of the Canadian Forces, or a senior official of the Department of National Defence has improperly interfered with their investigation.²⁴

²⁴ *National Defence Act*, s 250.19(1)

By including this provision in the legislation, the Government of Canada recognized the sometimes-difficult situation of the military police. Members are part of a professional police service, but they are also members of the Canadian Forces, and thus must respect their place in the chain of command. As the Somalia experience showed, it is essential for military police to be free to carry out their policing duties without intimidation or other interference from the chain of command or senior officials.

Nonetheless, protection against interference is not complete. Since its inception, very few formal complaints of interference have been filed, and there is a concern that these statistics do not provide an accurate reflection of the reality. The Commission questions why more allegations of interference are not being brought forward as formal complaints, and worries that fear of retribution may be a factor.

In discussions with military police, Commission staff have too often heard from members words to the effect that they ‘would never dream of filing an interference complaint,’ alleging that the risk to their career advancement is simply too great.

The legislation should include explicit protection against reprisal for any member of the Canadian Forces who files a complaint of any kind, interference or conduct, as recommended by Chief Justice Lamer in the five-year review of the Act.²⁵

Also, in terms of protecting military police from interference, Canadians may have difficulty understanding why military police are limited to complaining only about interference in their “investigations.”²⁶ The risk to the integrity of military policing posed by interference from the chain of command or senior officials extends to a whole range of policing duties and functions, from the conduct of an arrest to the handling of evidence. The complaints process should reflect this reality.

Furthermore, any person can file a conduct complaint, and the same should be true for interference complaints. Limiting the right to file a complaint of interference to a military police member who conducts or supervises an investigation also limits the Commission’s ability to assure the integrity of military policing.

“On too many occasions, we have seen the results of a lack of independence of Military Police from the chain of command. Important investigations that should have been conducted were not. Those that were conducted were sometimes delayed at the instance of superiors – and carried out with inadequate resources. Because of their position in the chain of command, Military Police may have felt intimidated when investigating senior officers.”

Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, 2 July 1997, Volume 5

²⁵ *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, An Act to amend the National Defence Act*, 3 September 2003, Recommendation 63, p. 81

²⁶ *National Defence Act*, s 250.19(1)

Finally, the extent of the Commission's investigative powers with regard to interference complaints should also be stated explicitly in the legislation. So far, access to documents relative to interference complaints has generally been given voluntarily, however the Commission should not have to rely on the goodwill of the organization it oversees in order to obtain documents and other materials relevant to the investigation of an interference complaint or, failing this, be forced to conduct a public hearing to gain access to the necessary information.

6) *The Complaints Commission should have the power of subpoena in the conduct of public interest investigations, as well as assurance of military police cooperation with its investigations*

Since the Commission began operations, the Chairperson has invoked the power to conduct an investigation of a conduct complaint as a matter of public interest on only a handful of occasions. These public interest investigations have involved complaints of a particularly serious nature, or that held the potential to have significant impact on the operations of the Canadian Forces Military Police.

Unfortunately, the Commission's ability to conduct a thorough investigation in such cases is hampered by its lack of authority to compel witnesses to provide statements or evidence. Several times, witnesses – most often members of the military police – that could have provided important information have exercised their right not to be interviewed. These individuals are not to be blamed for their refusal, because the Commission could not guarantee that any statements they may have made during the investigation would not be used against them in some future proceeding.

The legislation does provide the Commission with the power to compel testimony, and provide witnesses with the corresponding protections, but only when the Chairperson takes the exceptional step of calling a public hearing.²⁷ To refer again to the recent Federal Court of Appeal ruling, “The holding of a public hearing... is a costly procedure. It is certainly not the one favoured by Parliament or by the Commission itself. Investigation is the rule, a public hearing the exception.”²⁸

It seems only common sense that the power of subpoena and protections to witnesses should be available to the Commission for public interest investigations, ensuring there is no artificial pressure to conduct a public hearing in order to ensure a thorough investigation.

Indeed, where statements or documents from military police are required for an investigation by the Commission, the power of subpoena should not be necessary at all.

In most jurisdictions in Canada, police officers have a statutory duty to cooperate with investigations by oversight bodies. In Ontario, for example, it has been a requirement for

²⁷ *National Defence Act*, s 250.41

²⁸ *RCMP Public Complaints Commission v. A-G (Canada)*, 2005 FCA 213, at para 62

police officers and police services to provide all relevant documents and submit to interviews by that province's Special Investigations Unit since it was created in 1990.²⁹ In 1998, this provision of the Ontario Police Services Act was strengthened, and any police officer failing to comply with requests for information or to be interviewed by the Special Investigations Unit can be found in neglect of duty.³⁰ In keeping with the Charter of Rights provisions protecting against self-incrimination, officers identified as the subject of the investigation or complaint are not required to make a statement to investigators.

Conclusion

Over the past three decades, civilian oversight of law enforcement has become an essential ingredient in ensuring public confidence in police services across Canada and around the world. The capacity of civilian overseers to ensure public accountability of law enforcement grows in direct correlation to the transparency, fairness and efficiency of the mechanisms through which the oversight is delivered.

Over the past five years, the Complaints Commission has made every effort to make oversight of the Canadian Forces Military Police as transparent, fair, and effective as possible. Unfortunately, as the Police Complaints Commissioner for British Columbia has pointed out, “even the best administration cannot transcend the problems arising from inadequate legislation.”³¹

In the context of the ongoing five-year review of the *National Defence Act*, and the consequent likelihood that Parliament may consider amendments to the legislation in the coming months, this is an appropriate time for Canadians to reflect on these questions, and to consider whether the current process should be updated:

- Does fairness and efficiency require that the subject of a complaint (the military police member) also have the right to request a review of the disposition of the complaint?
- Does the public interest require that informal resolution of conduct complaints be subject to civilian oversight?
- Can the system be made more transparent and more efficient by clarifying the provisions for monitoring the handling of complaints?
- Can the credibility and professionalism of military policing and the Canadian Forces be further promoted by extending independent oversight to other aspects of on-duty military police conduct?

²⁹ The Special Investigations Unit was created by the government of Ontario in 1990 to investigate deaths or serious injuries arising in the course of policing.

³⁰ *Police Services Act*, Ontario Regulation 123/98, Part V Code of Conduct, s 2 (c) (i.1)

³¹ *Police Act Reform White Paper and Draft Police Complaint Act*, p. 3

- By expanding and clarifying the provisions for interference complaints, can we further safeguard the integrity of military policing?
- Can the complaints process be more transparent, efficient and fair by providing the Commission with the power of subpoena, with the corresponding protections for witnesses, in the conduct of its public interest investigations? Can accountability and efficiency be similarly enhanced by giving members of the military a legal duty to cooperate with investigations by the Commission?

The changes being proposed by the Complaints Commission are significant but hardly revolutionary. By updating the process in this way, civilian oversight of military police can keep pace with the current expectations and values of Canadians, and allow the Commission to continue to play its intended part in contributing to a military police service of the highest professional calibre.