Military Police Complaints Commission
Chairperson

Commission d'examen des plaintes concernant la police militaire
Président

October 26, 2011

Mr. Jean-François Lafleur
Clerk of the Committee
Standing Committee on National Defence
House of Commons
131 Queen Street, 6th Floor
Ottawa, Ontario K1A 0A6

Re: Bill C-15, the *Strengthening Military Justice in the Defence of Canada Act.*

Please find attached the submissions from the Military Police Complaints Commission in relation to Bill C-15 for distribution to the members of the Standing Committee on National Defence.

Sincerely,

Glenn M. Stannard, O.O.M.
Chair

Enclosures (3)

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BRIEF OF THE MPCC REGARDING BILL C-15

Dear Honourable Members:

Bill C-15 was tabled in the House of Commons on October 7, 2011, and will likely soon be referred to your committee for consideration. The bill proposes a number of amendments to the *National Defence Act* (NDA), primarily related to the military justice system for the Canadian Forces (CF). While this bill does not directly address the jurisdiction or authorities of the Military Police Complaints Commission (MPCC or the Commission), one provision of the bill is of concern to the Commission.

Proposed Authority of VCDS to Direct MP investigations: s. 18.5(3) (in Clause 4)

The provision in question, in clause 4 of the bill, would create a new NDA subsection 18.5(3), which would expressly authorize the Vice Chief of the Defence Staff (VCDS) to direct the Canadian Forces Provost Marshal (CFPM) – the head of the CF military police (MP) – in the conduct of specific MP investigations. In the Commission's view, such an express authority is inconsistent with existing arrangements in place since the period following the troubled Somalia deployment which specifically sought to safeguard MP investigations from interference by the chain of command.

The Commission takes no issue with the general supervisory role of the VCDS vis-à-vis the CFPM set out in subsection 18.5(1), nor with the authority of the VCDS to issue general instructions to the CFPM in respect of the discharge of his responsibilities provided for in subsection 18.5(2). These provisions merely codify the existing relationship between the VCDS and the CFPM as set out in the 1998 Accountability Framework (attached) signed by the VCDS and the CFPM of the day.

However, the proposed authority of the VCDS to direct the CFPM regarding the conduct of particular military police investigations set out in subsection 18.5(3) represents an important departure from the status quo. This proposed authority would effectively abrogate key provisions of the Accountability Framework whose purpose was to adapt the command relationship of the VCDS and CFPM, such that the latter would retain appropriate independence from the chain of command in the conduct of individual law enforcement investigations.

While the March 2, 1998 Accountability Framework affirmed the authority of the VCDS to "give orders and general direction to the CFPM to ensure professional and effective delivery of policing services…", it specifically stipulated that "[t]he VCDS shall not direct the CFPM with respect to specific military police operational decisions of an investigative nature….", and also that "[t]he VCDS will have no direct involvement in individual ongoing investigations but will receive information from the CFPM to all necessary management decision making." The Framework elaborated further on these principles as follows: "The CFPM has a duty to advise

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the VCDS on emerging and pressing issues where management decisions are required...[h]owever, the degree of detail provided on the day to day investigations rests within the discretion of the CFPM"; and also provided that: "[t]he CFPM will monitor individual investigations and provide a general overview of investigations to the VCDS...[d]iscussions with the VCDS of specific details of any investigation are to be avoided unless specific circumstances warrant attention of management." The Accountability Framework was reviewed and endorsed by the Military Police Services Review Group, headed by Lieutenant-General (Retired) Charles Belzile, in its December 11, 1998 report to the VCDS.

The VCDS-CFPM Accountability Framework was developed the same year that Parliament adopted a series of amendments to the NDA (Bill C-25) aimed at overhauling the military justice system in the wake of troubling incidents during the CF deployment to Somalia in the early 1990s. Among the significant changes contained in Bill C-25 was the establishment in Part IV of the NDA of a statutory complaints process for complaints related to military policing and the creation of this Commission to provide an independent civilian oversight component for that process. An important and unique feature of this complaints regime was the provision for the making of complaints by military police members about "improper interference" in their investigations (NDA section 250.19). Such "interference" complaints can be made against any member or officer of the CF or senior official of the Department of National Defence, and an independent civilian body – this Commission – was given exclusive jurisdiction to investigate such complaints.

The foregoing legislative measures were accompanied by a number of non-legislative measures aimed at supporting the professionalism, independence and integrity of military policing, such as the creation of the CF National Investigation Service, effectively, the CF's "major crimes" unit, under the direct command of the CFPM. The Accountability Framework was another such measure.

More recently, the independence and integrity of military policing have been further supported through changes to the military police command structure: effective April 1st, 2011, all military police members – other than those deployed on military operations – are under the command of the CFPM.

The proposed authority for the VCDS in subsection 18.5(3) is thus out of step with efforts over the past 15-20 years to recognize and support the independence of military police within the CF, particularly when conducting law enforcement investigations.

Perhaps more importantly, the authority in question runs counter to Canadian law and practice regarding the independence of police investigations generally. In its 1999 decision in *R. v. Campbell*, 1999 CanLII 676 (S.C.C.), [1999] 1 S.C.R. 565, the Supreme Court of Canada affirmed that when engaged in the investigation of offences, police officers are answerable only to the law and do not act on behalf of the broader government. The unanimous Court wrote (at paragraph 29):

> It is therefore possible that in one or other of its roles the RCMP could be acting in an agency relationship with the Crown. In this appeal, however, we are

concerned only with the status of an RCMP officer in the course of a criminal investigation, and in that regard the police are independent of the control of the executive government. The importance of this principle, which itself underpins the rule of law, was recognized by this Court in relation to municipal forces as long ago as *McCleave v. City of Moncton* (1902), 32 S.C.R. 106. That was a civil case, having to do with potential municipal liability for police negligence, but in the course of his judgment Strong C.J. cited with approval the following proposition, at pp. 108-9:

> Police officers can in no respect be regarded as agents or officers of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government, but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are entrusted are derived from the law, and not from the city or town under which they hold their appointment.

Later in the judgment, the Court wrote (at paragraph 33):

> While for certain purposes the Commissioner of the RCMP reports to the Solicitor General, the Commissioner is not to be considered a servant or agent of the government while engaged in a criminal investigation. The Commissioner is not subject to political direction. Like every other police officer similarly engaged, he is answerable to the law and, no doubt, to his conscience. As Lord Denning put it in relation to the Commissioner of Police in *R. v. Metropolitan Police Comr., Ex parte Blackburn*, [1968] 1 All E.R. 763 (C.A.), at p. 769:
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> > I have no hesitation, however, in holding that, <u>like every constable in the land, he [the Commissioner of Police] should be, and is, independent of the executive</u>. He is not subject to the orders of the Secretary of State, save that under the Police Act 1964 the Secretary of State can call on him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; <u>but in all these things he is not the servant of anyone, save of the law itself</u>. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for

> law enforcement lies on him. He is answerable to the law and to the law alone. [Emphasis added.]

The Court's statement that the principle of police independence in the conduct of investigations "underpins the rule of law", while significant in itself, is even more so in light of its decision a few months before in the *Quebec Secession Reference* case, the same Court indicated that "the rule of law" was itself a binding unwritten constitutional principle.

In an independent opinion commissioned by the MPCC, distinguished criminal and public law scholar, Professor Kent Roach of the University of Toronto Faculty of Law, concluded that the authority proposed in clause 4, new subsection 18.5(3), "violates core concepts of police independence," and that, in light of existing Supreme Court jurisprudence, the proposed authorization of interference in particular military police investigations could well run afoul of the Constitution, specifically the unwritten constitutional principle of the rule of law. Professor Roach's report has been enclosed with this letter for your information and convenience. It is also available on the MPCC's web-site at http://www.mpcc-cppm.gc.ca/1100/1100-eng.aspx.

The Commission well appreciates that there are important differences between military and civilian policing. Military police do perform other military duties of a non-policing nature for which they fall squarely under full command of military operational commanders. Yet military police are also "peace officers" under the *Criminal Code* and are responsible for enforcing criminal and traffic laws in respect of any person (military or civilian) on DND property. Moreover, the authority proposed to be conferred in the new subsection 18.5(3) is, in any event, specifically and exclusively aimed at the heart of MPs' policing duties – the investigation of offences.

The bifurcated role of MPs in the CF does not, in the Commission's view, diminish the applicability of the legal principle of police independence to the military police when conducting law enforcement investigations. If it were otherwise, one must question why Parliament created the interference complaint mechanism in the 1998 NDA amendments which established this Commission.

Nor is the existence of the interference complaint mechanism an answer to concerns about the possibility of future abuse of this proposed authority for the VCDS. It is difficult to see how the Commission could find that instructions to the CFPM which have been expressly authorized by statute constituted "improper interference" in an MP investigation. Moreover, the Commission is, in any event, only authorized to issue non-binding findings and recommendations in its reports on complaints.

The 2003 report of the first independent five-year review of the 1998 amendments to the NDA – conducted by the late former Chief Justice Antonio Lamer – is said to provide the basis for man of the amendments proposed in Bill C-15. Yet, it should be noted that this report contained no recommendation for conferring such a power on the VCDS. To the contrary, Mr. Lamer's only concern with the 1998 VCDS-CFPM Accountability Framework was that its non-legislative status provided insufficient protection of the CFPM's policing independence.

As far as the Commission is aware, there have been no problems with the VCDS-CFPM Accountability Framework which justify its revocation, and proposed subsection 18.5(3) runs counter to various efforts over the years to shore up public confidence in the independence of military policing. For these reasons, and for the other legal and constitutional reasons noted above, the Commission respectfully suggests that proposed subsection 18.5(3) should be deleted from the bill.

French Version of Paragraph 250.42(c)

Finally, while Bill C-41 would make a number of improvements to the French version of NDA Part IV, one apparent drafting error in the French version of paragraph 250.42(*c*) has been overlooked in the bill. This provision authorizes the Commission to hold a public interest hearing *in-camera* where the following type of information is likely to be disclosed: "information affecting a person's privacy or security interest, if that interest outweighs the public's interest in that information." However, in the French version, the term "*les ressources pécuniaires*" is used to equate with the English "security interest". The French term is obviously a mistake, since it refers to "financial resources"; whereas the intent of the provision is clearly to address concerns about a witness' physical safety.

In the Commission's view, the French version of paragraph 250.42(*c*) could be corrected by substituting "*la sécurité*" for "*ressources pécuniaires*". This drafting error in the present NDA Part IV has previously been brought to the Department's attention by the Commission. In our view, the problem and the solution are both straightforward and carry no policy implications. Indeed, it seems likely that a court interpreting this provision would disregard the French version in order to avoid an absurd construction. This being said, however, both linguistic versions do carry equal interpretive weight, at least *a priori*, and Bill C-15 presents a convenient opportunity to rectify this error.

Should you have any questions for the Commission regarding this matter, please to do not hesitate to contact me.

Sincerely,

Glenn Stannard, O.O.M.
Chair

Enclosures (2)