Military Police Complaints Commission

Commission d'examen des plaintes concernant la police militaire

SECOND REVIEW OF AMENDMENTS TO THE *NATIONAL DEFENCE ACT* PURSUANT TO S.C. 1998, c. 35, s. 96:

MILITARY POLICE COMPLAINTS COMMISSION SUBMISSIONS TO THE INDEPENDENT REVIEW AUTHORITY

Date: June 23, 2011

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PREFACE

The Military Police Complaints Commission (MPCC or the Commission) is pleased to have the opportunity to participate in the second *National Defence Act* (NDA) review pursuant to *Statutes of Canada 1998*, chapter 35, section 96. As a creation of these 1998 NDA amendments, originally contained in Bill C-25 of the 1st Session of the 36th Parliament of Canada, MPCC is an important stakeholder with direct experience in the functioning of the legislation, specifically in respect of the military policing complaints regime created in Part IV of the Act (MPCC Book of Authorities, vol. I, tab 1).

In these submissions, the MPCC has limited itself to questions of legislative policy, and has not sought to address details of implementation or draft legislative language. However, the MPCC is prepared to provide such input and advice, either at the request of the independent review authority or in the context of subsequent consultations by the Government in preparing any new legislative measures to be tabled as a result of this review.

INTRODUCTION

MPCC: Who We Are and What We Do

The MPCC officially opened its doors for business on December 1, 1999 when NDA Part IV was proclaimed in force by the Governor in Council. Since its creation, MPCC has been involved in monitoring and reviewing more than 600 complaints related to military policing and has issued close to 200 reports, containing over 1500 findings and recommendations aimed at addressing complaints and at helping to ensure the highest quality and integrity of military policing.

MPCC provides independent civilian oversight to the military police (MP) of the Canadian Forces (CF). It does this through the monitoring and review of complaints about the conduct of MPs in the performance of "policing duties or functions" (conduct complaints) and through its exclusive jurisdiction to investigate and report on complaints about improper interference in MP investigations (interference complaints). MPCC‟s conclusions are non-binding and its reports are not legally enforceable. However, while the MP and CF leadership need not act on MPCC‟s findings or recommendations, they must provide written reasons for declining to do so. As such, the nature of MPCC‟s work is akin to that of a public inquiry, its influence being a matter of moral or political suasion through transparency and public accountability, rather than executive or adjudicative authority.

While the MPCC reports to Parliament through the Minister of National Defence, the Commission is both legally and administratively separate from both the Department of National Defence (DND) and the CF. Though part of the National Defence portfolio, MPCC is not subject to direction from the Minister in respect of its operational mandate. As such, the MPCC does not form part of the Crown, though it is part of the federal public administration and fully subject to federal government administrative rules and policies, such as those relating to financial administration, official languages, access to information and privacy, public service staffing, etc.

The MPCC‟s arm‟s-length status vis-à-vis DND and the broader Government is reflected, for example, in the fact that the Commission‟s legal counsel positions are staffed independently from the Department of Justice. In terms of its legal status and relationship with its associated

department (DND), the MPCC is similar to the Canadian Forces Grievance Board (created at the same time as MPCC), the RCMP Public Complaints Commission (vis-à-vis Public Safety and Emergency Preparedness Canada) and the Canadian Human Rights Commission (vis-à-vis Justice Canada).

The MPCC is headed by a full-time Chairperson and up to six other Members, who may be designated as serving on either a full-time or part-time basis. Presently, there is a full-time Chairperson and one part-time Member. One part-time member recently retired at the end of his term and the Commission anticipates that new members will soon be appointed. The Chairperson and the other Members are each appointed by the Governor in Council for renewable terms of up to five years. The Chairperson is the chief executive officer of the Commission. In addition to the Governor in Council appointed Members, the MPCC has a staff comprising 19 full-time employee positions (14 filled). The Commission also engages the services of outside experts on a contractual basis. The MPCC‟s regular annual operating budget is $3.4 million.

The Complaints Process at a Glance

Conduct Complaints are initially the main responsibility of the CF Provost Marshal (CFPM), and more particularly, his delegate, the Deputy Provost Marshal Professional Standards (DPM PS) (since April 1st, the Deputy Commander of the CF MP Group). The MPCC is notified of all conduct complaints and monitors their handling by the DPM PS. Where applicable, the DPM PS is to consider the possibility of resolving a complaint informally. Where informal resolution is not utilized, or is unsuccessful, the DPM PS conducts an investigation, unless he determines that the complaint: is "frivolous, vexatious or made in bad faith"; is more appropriately dealt with under another legislative scheme; or that "investigation is not necessary or reasonably practicable". Following the DPM PS investigation, he issues a report setting out his findings and the action to be taken in respect of the complaint.

A complainant dissatisfied with the DPM PS‟s disposition of their complaint is entitled to request a review by the MPCC. Once a review of a conduct complaint is requested, the MPCC takes over dealing with the complaint. The MPCC automatically obtains and reviews a copy of the relevant MP files, as well as any material provided by the complainant. The MPCC has considerable discretion in whether, and to what extent, it will conduct any further investigation of the complaint, beyond a "paper review" of the relevant material provided by the MPs and the complainant. The Commission frequently does conduct a further investigation, seeking additional records and/or conducting its own witness interviews.

Following its own file review or investigation, the MPCC issues an interim report setting out its findings and any recommendations in respect of the complaint, along with its supporting analysis of the facts and any relevant law, policies or policing "best practices". The interim report is sent to the CFPM, as well as to the Minister and the Chief of the Defence Staff (CDS). The CFPM is then required to provide the MPCC with a Notice of Action indicating any action that has been or will be taken with respect to the complaint and also indicating reasons for not acting on any finding or recommendation of the Commission. After considering the Notice of Action, the MPCC prepares and issues its final report. The MPCC final report goes to the same recipients as the interim report, but is also sent to the Deputy Minister, the Judge Advocate General (JAG) as well as the complainant and the subject of the complaint.

With **interference complaints**, the process is shorter as these go directly to the MPCC for disposition. Otherwise, interference complaints follow the same process as reviews of conduct complaints, with the exception that the CDS or the Deputy Minister (depending on whether the subject of the complaint is a CF member or a DND official), rather than the CFPM, provides the Notice of Action in response to the MPCC interim report.

Exceptionally, the MPCC Chairperson may decide to launch an MPCC investigation of a complaint "at any time", when he deems it to be in the **public interest** to do so. The Chairperson may further decide to call a hearing in respect of such a complaint. Where a public interest hearing is called, the Commission has the power to compel witnesses to attend, answer questions and produce documents and other material under their control. Otherwise, cooperation with the Commission‟s investigations is purely voluntary. Of the more than 600 complaints received since December 1999, MPCC has launched twelve public interest investigations, three of which resulted in the holding of hearings.[1]

MPCC‟s processes for dealing with complaints are inquisitorial and non-adversarial in nature, in that it is the Commission (rather than the parties to the complaint) that determines, on its own initiative, how a complaint will be handled and the extent of evidence and investigation required to properly dispose of it. Furthermore, MPCC is obliged by its enabling legislation (in NDA s. 250.14) to deal with all matters before it as informally and expeditiously as circumstances and considerations of fairness permit.

Particular Challenges of MP Oversight

The legislative regime for MP complaints contained in NDA Part IV is based in large measure on the regime for public complaints against members of the Royal Canadian Mounted Police (RCMP) set out in Parts VI and VII of the *Royal Canadian Mounted Police Act* (RCMP Act). However, that regime has itself undergone considerable review and scrutiny in recent years and was set for substantive reform and renewal in the form of Bill C-38 (*An Act to amend the Royal Canadian Mounted Police Act and to make consequential amendments to other Acts*) of the previous parliamentary session (MPCC Book of Authorities, vol. I, tab 4).[2] Bill C-38 represents the Government of Canada‟s main legislative response to the recommendations of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (Arar Inquiry), headed by Justice Dennis O‟Connor.

The MPCC has naturally confronted many similar challenges in carrying out its mandate as those faced by the Commission for Public Complaints Against the RCMP, as well as other police oversight bodies at the provincial level. There are inevitable "growing pains" in creating

[1] Of the three public interest hearings called by the MPCC, two related to complaints by Amnesty International Canada (AIC) and the British Columbia Civil Liberties Association (BCCLA), filed in 2007 and 2008, relative to the transfer of Afghan detainees to Afghan security forces in the face of an alleged risk of torture. MPCC hearings in respect of one of these complaints have been quashed on jurisdictional grounds by the Federal Court. The Commission‟s hearings regarding the other AIC/BCCLA complaint are completed and the Commission is presently preparing its interim report. The other public interest hearing held by the Commission related to the investigation of a sexual assault allegation against a cadet. The hearing was held in 2006 and the final report was produced in 2007.
[2] Bill C-38 was introduced in the House of Commons in June 2010 and died on the Order Paper on the dissolution of the 40th Parliament. It is expected to be re-introduced in the present Parliament.

relationships and building the necessary trust between the external oversight body and the overseen police service.

However, in providing independent oversight to a police force that is also part of the military, MPCC faces additional and unique challenges as a police overseer. For instance, the interference complaint mechanism – over which MPCC has exclusive jurisdiction – is unique to military police oversight. Moreover, due to the fact that MPs perform a bifurcated role in the CF, being both police and soldiers, the scope of matters to which MPCC"s oversight mandate applies has been the subject of some debate.

These unique aspects and challenges of MPCC"s work reflect the particular nature and demands of Canadian military policing itself. Unlike the military police members of many other armed forces, the CF military police have full peace officer status and authorities within their policing jurisdiction. The primary policing mandate of CF MPs is to maintain law and order within the military and, as such, MPs have enforcement authority over all CF personnel anywhere in the world in respect of both civil and military offences. However, they also exercise civil policing authority over all persons (i.e., including civilians) on DND property.

The previous MP command structure reflected the bifurcated nature of their duties as both peace officers and law enforcement specialists, on the one hand, and soldiers, on the other. Prior to April 1, 2011, most MPs fell under the general CF operational chain of command, while only those posted to the CF National Investigation Service (CFNIS), the CF Service Prison and Detention Barracks, the MP Security Service (which provides security services to Canadian diplomatic missions abroad), and the CF MP Academy, were under the command of the CFPM. However, in respect of their law enforcement duties, all MPs were subject to the technical direction of the CFPM, who has the power to suspend or revoke their MP credentials.

As of April 1, 2011, the MP command structure was reformed such that all MPs are under the command of the CFPM (also now known as the Commander of the CF MP Group) in respect of their policing duties; they remain under the general operational chain of command in respect of military operational duties.

On a more practical level of resources, Canada"s approximately 1,245 credentialed MPs[3] are spread out across Canada and around the world, and move around relatively regularly. This is also the case, of course, with the broader CF membership who the MPs police and with whom they interact. These realities necessitate a certain amount of travel to interview witnesses, although the Commission is flexible and pragmatic in this regard and also makes considerable use of less expensive alternatives, such as telephone interviews or sending written questions by e-mail.

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[3] While there are over 2,000 persons serving in the MP trade in the CF, as a result of the definition of "military police" in NDA s. 250, the NDA Part IV complaints regime applies only in respect of those members who are "credentialed" (that is, entitled to be in possession of an MP badge and identification card, and thus "peace officers" by virtue of *Queen's Regulations & Orders for the Canadian Forces* (QR&O) article 22.02 (MPCC Book of Authorities, vol. I, tab 18), NDA s. 156 and *Criminal Code* s. 2 (MPCC Book of Authorities, vol. I, tab 2)). See below further discussion re MPCC proposal # 2.

Our Submissions

MPCC‟s identification of problematic issues and proposals for renewal of Canada‟s MP oversight legislation cover four themes: 1) the scope of oversight; 2) MPCC access to information; 3) fair and efficient procedures; and 4) MP independence.

The MPCC sees no reason why the legislative review process should not be an interactive one and, as such, the Commission is pleased to receive feedback on its proposals from other NDA Part IV stakeholders as well as the independent review authority and to participate in a joint dialogue or discussion on areas of mutual concern.

We look forward to meeting with you and addressing any questions you may have. Please advise us of any additional information or clarification that we may be able to assist you with. MPCC‟s main point of contact for this legislative review is its Senior Counsel, Mr. David Goetz (telephone: 613-947-5633; email: David.Goetz@mpcc-cppm.gc.ca). However, myself and the entire MPCC team are at your disposal to assist in any way we can with your important task.

Glenn Stannard
Chairperson
Military Police Complaints Commission

Ottawa, June 23, 2011

I) THE SCOPE OF MP OVERSIGHT

A. Has NDA Part IV Been Engaged: Who Should Decide?

Presently, the legislation is silent on the characterization of complaints: that is, on the step of determining whether or not a complaint about an MP relates to the MP‟s performance of "policing duties or functions" per NDA s. 250.18(1) and s. 2 of the *Complaints About the Conduct of Members of the Military Police Regulations* (MPCC Book of Authorities, vol. I, tab 21).

This legislative silence is especially problematic in the context of the NDA Part IV scheme because, unlike some other civilian police oversight models, MPCC is not the only portal for complaints. In addition to the MPCC itself, conduct complaints may, per NDA s. 250.21, also be made to: the JAG, the CFPM or to any MP member. If any of these non-MPCC recipients of a complaint were to deem the complaint not to relate to an MP‟s performance of "policing duties or functions", there is a possibility that they could unilaterally decide not to engage the NDA Part IV procedure. In such a case, the MPCC could remain entirely unaware that a complaint was made, and the complainant would not receive an opportunity to present submissions to MPCC to argue that the complaint does fall within Part IV. Indeed, precisely such an approach has been taken in the past.

While the past seven years have witnessed an improved working relationship between MPCC and the CFPM, the Commission remains concerned with the approach taken in certain cases to the identification of NDA Part IV conduct complaints, both by the DPM PS‟s office and by frontline MP units.

In a recent example, a complaint about MP conduct, apparently in the performance of a "policing duty or function", was addressed by a member of the public to the Minister of National Defence and then subsequently forwarded by the Minister‟s office to the CFPM. On the basis that the complaint was not expressly addressed to the CFPM (or another official authorized to receive complaints per NDA s. 250.21), the CFPM chose not to invoke the NDA Part IV conduct complaints regime, instead opting to treat the complaint as an "internal" MP professional standards matter without independent oversight by MPCC. In the Commission‟s view, it is not in the public interest to keep a complaint out of the Part IV process simply because it was not transmitted to one of the authorized recipients in the first instance.

Moreover, within the past year, there have been two other cases where complaints made to local MP detachments about members‟ conduct failed to trigger the NDA Part IV conduct complaint process and where MPCC was not even notified of the existence of the complaints.

In one case, a member‟s former girlfriend complained to the member‟s detachment that he had pointed his firearm at her. The matter was referred to the CFNIS for criminal/service offence investigation, but no Part IV conduct complaint file was opened and MPCC was never notified about the complaint. The complaint came to the MPCC‟s attention five months later when the involved MP member filed a complaint with the Commission about the conduct of the CFNIS investigators who handled his case.

In the other case, an individual sought to complain about the conduct of a CFNIS investigator who had investigated the complainant for sexual assault. When he first sought to complain, he

was advised by the CFNIS detachment in question that he had to wait until his criminal case was over before making a complaint. In fact, this is inaccurate. While the CFPM generally postpones investigating complaints until related criminal proceedings have been completed, this is not a basis for declining to initiate a Part IV conduct complaint file and notifying the Commission of the complaint. Furthermore, some months later, when the detachment ultimately did accept the complaint, they referred the matter for a criminal/service offence investigation of the CFNIS investigator, but still did not open a conduct complaint file in accordance with NDA s. 250.21. Eight months later, when the CFNIS detachment advised the complainant that they would not be laying charges against the subject of his complaint, the complainant was then referred to MPCC"s website if he was interested in pursuing a conduct complaint. He did so, and so it was only at this point that MPCC became aware of the case. In the Commission"s view, however, the complaint should have been deemed to have been made, and the Commission notified, when the complainant first raised his concerns with the CFNIS detachment (note that complaints under Part IV can be made orally or in writing).

In yet another recent case, a person complained directly to the MPCC about the conduct of an MP who approached her vehicle and berated her for splashing a girl on the sidewalk on a base when the complainant drove by in her car. The subject MP was apparently in uniform, though it is not clear whether it was generic military dress only, or whether there was specific MP insignia. The complainant, in any event, knew the MP and was aware of his status as such. In the Commission"s view, there are not adequate facts to determine whether, even if the MP was not actually on duty at the time, his purpose in confronting the complainant or his demeanour nonetheless suggested that he was "putting himself on duty" or otherwise relying on his MP status in his apparently self-initiated interaction with the complainant. Nonetheless, when the Commission referred the complaint to the DPM PS for first instance investigation and disposition, the DPM PS unilaterally reclassified the complaint as an "internal" MP professional standards file falling outside the Part IV conduct complaints scheme.

The above cases are reflective of what the Commission perceives as a propensity within the MP branch, including the office of the DPM PS, to err on the side of exclusion of complaints from the Part IV process. For its part, the Commission fails to see what bad can come from engaging a process that includes greater transparency and is subject to independent oversight, and considers that, if anything, it is more appropriate to err on the side of engaging NDA Part IV.

Consistent with the spirit and purpose of independent oversight, the only appropriate method for determining, within the NDA Part IV scheme, whether a complaint is a "conduct complaint" or not, is for the MPCC to decide the issue. Indeed, this is consistent with the approach taken in other police oversight legislation in Canada. In legislative schemes where the role of the external oversight body is contingent on a certain characterization of a complaint, and where express provision is made for such characterization, it is invariably the oversight body which is assigned this role.[4] This is not surprising, of course, since to permit the overseen police service to

[4] See: *Police Act*, RSBC 1996, c. 367, s. 82 (re the British Columbia Police Complaint Commissioner) (MPCC Book of Authorities, vol. I, tab 9); *Police Act, 1990*, RSS 1990, c. P-15.01, s. 43 (re the Saskatchewan Police Complaints Commissioner) (MPCC Book of Authorities, vol. I, tab 10); *Police Services Act*, RSO 1990. C. P.15, ss. 59-61 (re the Ontario Independent Police Review Director) (MPCC Book of Authorities, vol. I, tab 15); *Police Act*, RSQ c. P-13.1, ss. 148 and 149 (re the Quebec Police Ethics Commissioner) (MPCC Book of Authorities, vol. I, tab 11); and

effectively determine the extent of oversight in respect of a complaint against it entails at least the perception of an institutional conflict-of-interest. Such a perception will, in turn, undermine public confidence in military police oversight and, ultimately, in military policing itself.

Nor would it be appropriate to provide for recourse to the courts every time an issue arises with respect to the characterization of a complaint. Given that the MP complaints process was intended to operate in an "informal and expeditious" manner (NDA s. 250.14), it is not reasonable for stakeholders or parties to a potential complaint to regularly refer differences in interpretation of the scope of the NDA s. 250.18(1) conduct complaint mechanism to the courts. This could create significant cost and delay for all involved in the process and reduce the accessibility of the complaints system for complainants.

While the courts would remain the ultimate arbiter as to the proper construction of the legislative complaints scheme, there should be a procedure within the NDA Part IV scheme for a simple and effective determination as to a whether an apparent complaint about the conduct of an MP is a "conduct complaint" within the meaning of NDA s. 250.18(1). The failure to provide such a mechanism undermines the values of efficiency and informality enshrined in NDA s. 250.14, and compromises the fairness of the complaints process, particularly for complainants, who may not even be aware that an independent body exists who may take a different view than the military police authorities on whether their complaint falls under Part IV of the NDA.

While the MPCC seeks to have the final say, subject to judicial review, as to the application of NDA Part IV to a given complaint, the MPCC does not propose a model whereby complaints may only be made to the Commission. MPCC supports preserving the current list of authorized conduct complaint recipients per NDA s. 250.21. While some complainants no doubt feel more comfortable bringing their complaints directly to the independent Commission, military culture is such that many CF members would be uncomfortable doing so. In this connection, there are a number of restrictions on communication by CF members in QR&O which, though they are in law subject to the members" statutory right to make complaints, may nonetheless deter those who lack legal training (but who are nonetheless obliged to review and be familiar with the terms of QR&O), or who may otherwise by unaware of the NDA provisions allowing for MP conduct complaints.[5] As a result, MPCC seeks a requirement that the authorized recipients refer complaints about MP conduct (or communications which could potentially be considered to be complaints about MP conduct) to the Commission for a determination as to whether the matter constitutes a conduct complaint for the purposes of NDA Part IV.

Since interference complaints may also be addressed to internal CF entities – i.e., the JAG and the CFPM – as well as to the MPCC, it would be useful for similar reasons to stipulate MPCC"s

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Police Act, SNB 1977, c. P-9.2, ss. 25.2 and 25.3 (re the New Brunswick Police Commission) (MPCC Book of Authorities, vol. I, tab 13).

[5] QR&O art. 19.14(2) states: "*No officer or non-commissioned member shall do or say anything that: (a) if seen or heard by any member of the public, might reflect discredit on the Canadian Forces or any of its members*;…". Moreover, QR&O art. 19.38 ("Communication with Other Government Departments") states: "*No officer or non-commissioned member shall enter into direct communication with any government department other than the Department of National Defence on subjects connected with the Canadian Forces or with the member's particular duties or future employment, unless the member is authorized to do so by or under (a) a statute of Canada; (b) QR&O; or (c) instructions from National Defence Headquarters*."

authority to determine (again, subject to judicial review) whether a complaint should be considered to be an "interference complaint" per NDA ss. 250 and 250.19(1).

MPCC‟s authority to characterize complaints at the in-take stage of the process should not preclude a subsequent redetermination of the question by the MPCC in light of further information. It is often the case that initial determinations as to the application of NDA Part IV must be made with limited information and that more, and sometimes different, information will come to light during the course of a complaint investigation.

Is There a "Complaint"?

Beyond interpreting the content and appropriate classification of a complaint, there is the further challenge of construing what communications should be considered to constitute a "complaint".

Ensuring transparency and oversight in the characterization and resolution of MP conduct complaints could well become illusory (even if both greater clarity in the definition of "policing duties or functions" and an enhanced role for MPCC in applying this definition are secured) if there is too much uncertainty and inconsistency in deciding whether a communication about MP conduct ought to be considered to be a complaint.

It is clear Parliament intended a broad category of potential complainants in relation to MP conduct. The Act specifically includes persons unaffected by the conduct in question, as well as both civilians and fellow CF members (including fellow MPs), as possible complainants. It further expressly provides for the possibility of oral complaints and stipulates a range of potential complaint recipients, including any MP member, as well as JAG legal officers, along with both the CFPM and MPCC organizations. Evidently, Parliament intended a conduct complaint mechanism that would be widely available and easily engaged.

The case of MPs presents a particular challenge as they are a police service operating within a larger hierarchical organization of which they form part. When a member of the public shares his or her concerns about the actions of a civilian police officer with one of the officer‟s superiors or with some other representative of the relevant police service, it will likely be apparent to those concerned that the police complaint process has been engaged, or at least is in the initial stages of being engaged (subject to the requisite formalities for a complaint in that jurisdiction). Yet, this may not always be so where concerns about the conduct of an MP come from other military personnel. In the military context, where there are pre-existing organizational as well as often personal connections between MPs and those to whom they provide their policing services, there are numerous formal and informal mechanisms and opportunities for raising concerns about MP conduct apart from explicitly and consciously making a complaint.

Clearly, not all communications critical of MP conduct should necessarily constitute an NDA Part IV conduct complaint. For instance, CF performance assessments of MPs by their superiors should obviously not be treated as complaints. Some allowance must be made for internal CF reporting requirements, where reports happen to contain concerns or criticisms of MP conduct in the performance of "policing duties or functions" and are either addressed to, or are forwarded to, recipients listed in NDA s. 250.21.

At the same time, it is important not to be too restrictive in triggering the NDA Part IV process. After all, in addition to ensuring independent oversight by MPCC, the Part IV process also ensures internal oversight by the CFPM of MP conduct and compliance with MP professional standards. It must also be recalled that NDA Part IV provides for informal resolution of complaints, of which the MPCC considers that greater use should be made, provided it is not at the expense of transparency and oversight (see MPCC proposals 14 and 15).

Relevant jurisprudence suggests that a narrow approach to discerning what constitutes a complaint is not appropriate in the context of professional oversight regimes such as NDA Part IV. The following principles can be distilled from a review of this jurisprudence:

- A communication that contains allegations of misconduct can constitute a complaint, notwithstanding that the communication was made for a separate purpose (*Creery v. College of Nurses of Ontario* (1978), 19 O.R. (2d) 631, 86 D.L.R. (3d) 153 (Div. Ct.) (MPCC Book of Authorities, vol. II, tab 32)).

- A communication that is diplomatically-worded and that merely expresses concern or requests that a matter be looked into can constitute a complaint (*Barry v. Law Society of New Brunswick*, 1989 CarswellNB 392, 102 N.B.R. (2d) 118 (Q.B.) (MPCC Book of Authorities, vol. II, tab 23), *Maxwell v. Law Society of New Brunswick* (1990), 65 D.L.R. (4th) 754, 103 N.B.R. (2d) 342 (Q.B.) (MPCC Book of Authorities, vol. II, tab 35); and *College of Physicians and Surgeons of British Columbia v. Barber* (1993), 87 B.C.L.R. (2d) 362 (C.A.) (MPCC Book of Authorities, vol. II, tab 31)).

- A communication that forwards or simply references the concerns of another person for review and consideration can constitute a complaint (*Maxwell, supra.*; and *Shuffler v. Calgary Police Commission* (1995), 31 Alta. L.R. (3d) 101, 125 D.L.R. (4th) 755 (C.A.) (MPCC Book of Authorities, vol. II, tab 39)).

In short, when interpreting legislation similar in purpose to NDA Part IV, the courts have held that someone can be deemed to have made a "complaint" even though they do not themselves appear to be "complaining" in the ordinary sense of the word.

Moreover, in the context of such legislation, the word "complaint" must be given an interpretation that will advance the purposes of the legislation (*New Brunswick School District No. 15 v. New Brunswick (Human Rights Board of Inquiry)* (1989), 62 D.L.R. (4th) 512, 100 N.B.R. (2d) 181 (C.A.) (MPCC Book of Authorities, vol. II, tab 36)). In the case of NDA Part IV, the legislative purpose is to provide enhanced professionalism of military policing through accountability and independent oversight.

1. MPCC proposes that:

> ***a) Those authorized to receive complaints per NDA section 250.21 be required to refer to the MPCC any communications received directly or indirectly by them which expresses a concern about the conduct of a military police member or about possible interference with military police activities;***
>
> ***b) The MPCC be given the exclusive authority, subject to the supervisory jurisdiction of the Federal Court, to determine whether a communication***

received by it, or referred to it by one of the other entities authorized to receive complaints per NDA section 250.21, constitutes a conduct or interference complaint for the purposes of NDA Part IV, including the authority to revisit such determinations on the basis of new information.

B. Who May be the Subject of a Conduct Complaint

The present definition of "military police" in NDA s. 250, when read with NDA s. 156 and the relevant provisions of the *Queen's Regulations & Orders for the Canadian Forces* (QR&O) (in article 22.02 (MPCC Book of Authorities, vol. I, tab 18)) covers CF members posted to military police positions who possess a Military Police Badge and a Military Police Identification Card, collectively referred to as "MP credentials". While this definition may be suitable for general NDA purposes, it can lead to confusion and perceived unfairness in the context of the oversight of military police under NDA Part IV.

At least two categories of persons who may serve in MP positions are excluded from oversight under NDA Part IV by the present definition:

1) Reserve Force MPs, who are generally not credentialed; and

2) Persons seconded to MP positions from outside the CF, who are not considered to be officers or members of the CF.

This exclusion can be problematic for a couple of reasons.

There is a potential for confusion among other CF members and civilians in terms of whether or not a person serving in an MP position, and possibly even visibly held out to be an MP (in terms of MP uniform markings and other kit), can properly be the subject of an MP conduct complaint under NDA s. 250.18. It is unfair to hold persons out to the public as MPs and yet deny the public access, on technical grounds, to a key mechanism for MP accountability and oversight.

Unfairness is also created where there is a complaint stemming from an incident involving more than one person serving in MP positions, yet certain of these persons whose conduct is implicated in the complaint cannot, for technical reasons, be made subjects of the complaint. In such a case, there is possible unfairness to the remaining MP members who are made subjects of the complaint. There is also possible unfairness to those excluded from subject status who are thereby denied the same guaranteed participation rights in the complaint process which may result in adverse findings regarding MP conduct in which they were involved.

The MPCC notes that, in the first independent review conducted by the late Justice Antonio Lamer in 2003 (MPCC Book of Authorities, vol. III, tab 44), it was recommended (Recommendation # 71) that the definition of "military police" for the purposes of NDA Part IV extend to those "**seconded to or working for the military police**". However, this recommendation was not accepted by the Government of the day as it was deemed to require further study. The Commission has, to date, not been apprised of the results of any such further study by DND or CF on this question.

The Commission‟s understanding is that two objections to an expansion of possible subjects of MP conduct complaints have been raised:

1) Overlap/conflict with the oversight regimes applicable to the seconded member vis-à-vis their "home" police service; and

2) The fact that the CFPM only exercises technical oversight – via the application of the *Military Police Professional Code of Conduct*[6] (MP Code of Conduct) (MPCC Book of Authorities, vol. I, tab 20) and the procedures governing the granting, suspension and revocation of MP "policing credentials" – over those who hold such credentials from him.

A number of countervailing points may be made in response to the foregoing concerns.

Regarding the first objection, the Commission would offer three points for consideration. First, in some instances, retired police or military police have been posted to MP positions and in such cases there is no other applicable police oversight regime. Second, given that MPCC‟s findings and recommendations are non-binding, any overlap with another police oversight regime would not, at any rate, result in conflicting legal obligations. Third, consideration ought to be given to the fairness to complainants in implicitly expecting them – once they are in fact made aware of a would-be subject‟s seconded status – to then engage yet another oversight body, possibly in a different jurisdiction.

Regarding the second objection, the Commission notes that this position assumes that the scope of the NDA Part IV conduct complaints process is, or ought to be, coterminous with the CFPM‟s MP technical authorities, which is not necessarily the case. Further, with the April 1, 2011 restructuring, the CFPM‟s authority over those posted to MP positions is in any event no longer confined to the MP technical chain and to the command of a few national MP units and offices. As such, the CFPM is now in a position to speak directly to any disciplinary, administrative or other remedial action taken in respect of MP conduct regardless of whether the MP in question holds policing credentials from the CFPM.

2. MPCC proposes that the definition of "military police" in NDA Part IV be expanded to include all those posted to MP positions.

C. What MP Conduct May be Complained About

1) <u>The Issue</u>

One question which has long presented a challenge to relations among the key stakeholders in MP oversight – MPCC, CFPM and the broader CF and DND – is the proper scope of application of the MP conduct complaint mechanism pursuant to NDA s. 250.18(1) and related regulations. For example, debate between these organizations has occurred as to whether or not MPs are subject to independent oversight by the MPCC per NDA Part IV when conducting professional standards investigations of their fellow MPs on behalf of the CFPM‟s DPM PS section. More recently, and publicly, this question has arisen in respect of MP handling of persons detained as a result of military operations in Afghanistan and their alleged failure to investigate decisions by

[6] SOR/2000-14, P.C. 1999-2213 (MPCC Book of Authorities, vol. I, tab 20).

military commanders to transfer such detainees to Afghan authorities; an issue which resulted in litigation in the Federal Court the outcome of which is discussed below in part I.C.4) of these submissions.

NDA s. 250.18(1) stipulates that a conduct complaint about an MP must relate to that MP"s performance of a "policing duty or function", and provides that the Governor in Council is to adopt regulations prescribing what MP "policing duties and functions" are for the purposes of that section of the Act. The contemplated regulations were adopted by the Governor in Council on November 18, 1999 (P.C. 1999-2065; in force as of December 1, 1999) and are in the form of s. 2 of the *Complaints About the Conduct of Members of the Military Police Regulations* (MP Conduct Complaint Regulations) (MPCC Book of Authorities, vol. I, tab 21). Section 2 of the MP Conduct Complaint Regulations provides as follows:

> "2. (1) For the purpose of subsection 250.18(1) of the Act, any of the following, if performed by a member of the military police, are policing duties or functions:
>
> (*a*) the conduct of an investigation;
>
> (*b*) the rendering of assistance to the public;
>
> (*c*) the execution of a warrant or another judicial process;
>
> (*d*) the handling of evidence;
>
> (*e*) the laying of a charge;
>
> (*f*) attendance at a judicial proceeding;
>
> (*g*) the enforcement of laws;
>
> (*h*) responding to a complaint; and
>
> (*i*) the arrest or custody of a person.
>
> (2) For greater certainty, a duty or function performed by a member of the military police that relates to administration, training, or military operations that result from established military custom or practice, is not a policing duty or function."

The purpose behind this definition is to circumscribe those activities where MPs are subject to the special oversight regime established in NDA Part IV. As indicated above, unlike civilian police services, MPs have a bifurcated role as both soldiers and police. MPCC agrees with the premise that not everything that MPs do should be subject to independent civilian oversight under NDA Part IV. The question has been: where does the legislation draw the line between those MP activities which properly attract special oversight and those which do not?

2) <u>CFPM and JAG Position: Implied Law Enforcement Context Requirement</u>

The traditional position of the CFPM and JAG has tended to be that only where the above-enumerated duties or functions are performed for the purposes of law enforcement can they validly be the subject of a conduct complaint per NDA s. 250.18(1). They have argued that this

perspective is supported by the legislative history leading up to the adoption of NDA Part IV, and the fact that the complaints regime, along with other more or less contemporaneous initiatives (both legislative and non-legislative), were motivated by a concern to ensure the professionalism and independence of the military police in the context of their law enforcement duties as peace officers.

3) DOJ Position: Other Implied Restrictions

More recently, in the context of litigation arising from the Commission‟s public interest hearings into complaints by Amnesty International Canada and the BC Civil Liberties Association regarding detainee transfers to Afghan security forces, the Department of Justice proposed a more restrictive interpretation of "policing duties and functions" in NDA s. 250.18(1). In this context, Justice has variously urged that s. 2 of the Regulations ought to be construed so as to exclude duties and functions:

1) not peculiar to MPs in comparison with other CF members;
2) unrelated to MPs‟ "peace officer" status; and
3) unrelated to the enforcement of the Code of Service Discipline, also described as the "service nexus" argument.

It may be noted that propositions 2 and 3 above are actually contradictory, since MPs‟ roles in enforcing the Code of Service Discipline are independent of their status as peace officers under the *Criminal Code* – a point that is discussed further below. It is also worth observing that these propositions have never been reflected in the actual treatment of complaint files by the CFPM. CFPM/DPM PS and MPCC continue to deal with conduct complaints in respect of MP conduct relative to the enforcement of both civilian penal law and the Code of Service Discipline.

4) The Federal Court Decision in *The Attorney General of Canada* v. *Amnesty International Canada and British Columbia Civil Liberties Association*

On September 16, 2009, Mr. Justice Harrington of the Federal Court – Trial Division issued the first, and so far the only, judicial pronouncement on the meaning of "policing duties or functions" and, by extension, the scope of the NDA Part IV conduct complaint mechanism (MPCC Book of Authorities, vol. II, tab 26).[7] This case was the result of judicial review proceedings initiated by the Attorney General of Canada which challenged the MPCC‟s jurisdiction over conduct complaints filed by the respondent complainants in 2007 and 2008.

The complaints were in respect of the transfer to Afghan security forces of persons detained by the CF in the course of military operations in that country, notwithstanding alleged awareness of a substantial risk that such detainees would subsequently face torture. Two of the complaints focussed on the direct involvement of MPs posted to Task Force Afghanistan in the actual detainee-transfer process (the "transfer complaints"). A third complaint alleged that MPs had failed in their duty to investigate possible crimes and service offences by CF commanders who ordered the detainee transfers (the "investigation complaint"). The Commission had initiated its

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[7] 2009 FC 918.

own investigations, and ultimately hearings, into these complaints under its public interest authority per NDA s. 250.38.

In this case, the Court decided that the investigation complaint was within the MPCC‟s jurisdiction, but that the transfer complaints were not. The Court found that the conduct of an investigation is a policing duty or function and that the MPCC‟s mandate includes oversight in cases of alleged failure to investigate.

With respect to the transfer complaints, the Court‟s conclusion was that, while MPs‟ involvement in the detention and transfer of Afghan detainees might be considered to involve the listed policing duty relating to the "custody of a person" per s. 2(1)(*i*) of the MP Conduct Complaint Regulations, it was nonetheless deemed not to constitute a "policing duty or function" since such duties related to "military operations that result from established military custom or practice" within the meaning of s. 2(2) of the Regulations.[8] Mr. Justice Harrington appeared to adopt a robust view of s. 2(2) of the Regulations, that is, one which considers that the provision represents a meaningful derogation from s. 2(1), and which can result in some duties that would otherwise have been considered part of policing being excluded from the Part IV oversight regime. He concluded that s. 2(1) and 2(2) were not mutually exclusive in the duties they could cover, but could overlap.[9]

5) The Need for Clarification

The Federal Court decision interpreting the Conduct Complaint Regulations was purposefully confined to the facts involved in the specific complaints at issue. Justice Harrington noted that, since he was rendering the first decision dealing with the jurisdiction of the MPCC, he thought it preferable "to say as little as possible with respect to submissions which did not influence my decision."[10]

As a result, there continues to be a need for clarification of the scope of military policing duties or functions subject to independent oversight. In particular, some of the interpretations proposed by CFPM/JAG and by the DOJ, as well as some of the potential implications of the Federal Court decision, if applied to other contexts, present practical and substantive issues for the Commission in interpreting and carrying out its mandate. Those issues create uncertainty as to the scope of the oversight regime in place for military police.

a) The Implied Restrictions Proposed by the DOJ

The propositions advanced by the DOJ in the context of their judicial review application raise serious issues, and could, individually or in combination, have the result of excluding most MP activities from independent oversight per NDA Part IV – including those clearly intended to be covered in light of the background to Bill C-25.

Other than to mention in the introduction to his reasons for decision that "the Attorney General‟s position may be somewhat overstated"[11], Justice Harrington did not comment on any of the

[8] 2009 FC 918, at paragraphs 12, 71, 72 and 77.
[9] 2009 FC 918, at paragraph 72.
[10] 2009 FC 918, at paragraph 70.
[11] 2009 FC 918, at paragraph 12.

positions advanced by the DOJ that are discussed here. Hence, the interpretations proposed by the DOJ have neither been rejected nor accepted by the Court. Although the propositions have also not been advanced by the CFPM or reflected in his treatment of complaint files, it is of concern to the Commission that the legislation was viewed as open to such interpretations. As a result, the Commission believes that legislative clarification is needed.

i) "Duties Unique to MPs" Approach

According to this proposed approach, duties and functions not peculiar to MPs, in comparison with other members of the Canadian Forces, ought to be construed as being excluded from Part IV oversight. In practice, this would exclude important parts of the MPs‟ core functions from independent oversight. Given the extensive law enforcement responsibilities of the general CF chain of command, if the prescribed "policing duties or functions" were read down so as to exclude those activities enumerated in subsection 2(1) which are not exclusive to MPs, oversight with respect to MP interactions with CF members would be extremely limited, if not eliminated.

Unlike civilian law enforcement, the enforcement of military discipline in the CF is a responsibility of the chain of command. As a result, the chain of command exercises enforcement authorities vis-à-vis CF members which, in the civilian world, are mainly associated with the police. For instance, all CF members have the authority, without a warrant, to arrest or order the arrest of other CF members of lower rank believed on reasonable grounds to have committed a service offence (NDA ss. 154 and 155). Additionally, CF officers may exercise their arrest powers under NDA ss. 154 and 155 against those of equal rank (NDA ss. 155 (1)(*b*)).[12] Arrest warrants in respect of suspected service offences – also issued by the chain of command – are addressed to "any person" (NDA s. 157(1)), rather than strictly to peace officers (as is the case with arrest warrants issued under the *Criminal Code*) or to MPs. It is also the chain of command, and not MPs, who perform a number of important post-arrest duties in the military justice system, such as the imposition of conditions of pre-trial release (NDA s. 158.6) and the first-level review of decisions to retain an accused in custody following arrest (NDA s. 158.2).

Furthermore, quite unlike the civilian world, in the CF, it is primarily the chain of command which lays charges for breaches of the Code of Service Discipline. Apart from the MP members posted to the CFNIS (and MP unit commanders in respect of their own subordinates), MPs do not lay charges for service offences (QR&O art. 107.02) (MPCC Book of Authorities, vol. I, tab 19), although, as peace officers under the *Criminal Code* (MPCC Book of Authorities, vol. I, tab 2), they do lay charges for civil offences (at least those under federal legislation).

Yet, it is an important part of the MPs‟ policing duties to investigate service offences. Their investigations relating to the Code of Service Discipline will in fact capture the bulk of MP interactions with the Canadian Forces members they are in charge of policing. As such, excluding Part IV oversight when MPs engage in those functions would dramatically reduce, and often eliminate, the availability of an independent oversight regime for CF members who wish to complain about their interactions with military police members.

[12] Where a CF member is engaged in "a quarrel, fray or disorder", other members may also arrest the member or order the member‟s arrest, without a warrant, if they are of higher rank to the arrestee, in the case of officers, or of equal or higher rank to the arrestee, in the case of non-commissioned members (NDA ss. 155(1)(*c*) and 155(2)(*b*)).

It may also be pointed out that the opening words of s. 2(1) of the Regulations provide an indication that the legislator was alive to the fact that the enumerated duties and functions were not, in the CF context, exclusive to MPs, but deliberately chose to link special MP oversight and accountability to them anyway. The opening words of s. 2(1) read: "For the purposes of subsection 250.18(1) of the Act, any of the following, *if performed by a member of the military police*, are policing duties or functions:…" [emphasis added]. Given that a conduct complaint can only relate to the conduct of military police members, per the wording of NDA s. 250.18(1) itself, the added stipulation may, at first glance, seem redundant and unnecessary. However, it may suggest a recognition that non-MPs also perform many of the enumerated duties or functions for which MPs are to be singled out for special scrutiny and oversight. To the Commission, these words suggest that, although non-MPs may perform the listed duties or functions, when it is an MP who performs them, they can trigger the NDA Part IV MP oversight and accountability regime – not because the activity is qualitatively special or unique within the CF, but because it is an MP doing it.

In any event, excluding from independent oversight the bulk of MP interaction with the very CF members they are tasked to police appears to the Commission to have the potential to defeat the purpose for establishing the Part IV oversight regime.

ii) "Reliance on Peace Officer Status" Approach

An interpretation of s. 2 of the Regulations which reads in a reliance on, or relationship to, MPs‟ peace officer status in construing the enumerated duties and functions is also problematic, and risks excluding from independent oversight many of the MPs‟ core functions.

MPs, like the general CF chain of command, do not rely on their peace officer status to enforce the Code of Service Discipline. As noted above, enforcement authorities relative to the Code of Service Discipline are addressed to certain key personnel in the chain of command (unit commanding officers and superior commanders and officers commanding sub-units who have been given delegated disciplinary authorities). Peace officer status is given to, and relied upon by, MPs (and other CF members, where applicable) in order to enforce civilian law, not military law.

The main reason for MPs to be able to enforce civilian laws is to enable them to exercise policing authorities over persons not subject to the Code of Service Discipline (i.e., civilians). This is necessary because there are civilians who work on, live on, visit or transit DND property where MPs exercise general policing authority. When it comes to CF members, the Code of Service Discipline will cover most conduct which could also constitute civilian offences (criminal or statutory) such that, strictly speaking, peace officer status will rarely have to be resorted to by MPs when they police CF members.

Hence, a narrowing of the enumerated "policing duties and functions" in s. 2 of the Regulations to those related to MPs‟ peace officer status would reduce the availability of independent oversight to target almost exclusively the conduct of MPs in relation to civilians.[13] Under such a

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[13] It would capture some MP-service member interactions, but only where the MP was dealing with the service member as a regular citizen, rather than as a service member per se (ie when the MP was enforcing general federal or provincial law rather than the Code of Service Discipline). In many cases, the decision to investigate a CF member for either a breach of the Code of Service Discipline, on the one hand, or of federal or provincial law, on the

construction of "policing duties and functions", CF members could not make conduct complaints about their treatment by MPs in the enforcement of the Code of Service Discipline. As discussed above, enforcing military law is an important part of the policing duties carried out by MPs, and will account for much of the MPs" interactions with the CF members they police. As such, excluding military law enforcement from independent oversight would detract considerably from the value and meaning of the NDA Part IV oversight regime and would seem to be contrary to Parliament"s intentions in establishing it.

The Commission has found several indications that the intent behind the legislation establishing it was to include oversight over military law enforcement by MPs. In the wording of NDA s. 250.18(1), Parliament went out of its way to expressly emphasize that military members as well as civilians could make complaints.[14] If an approach linking independent oversight to the exercise of peace officer powers was adopted, the Commission submits that a contradiction would be created in that there would be very few cases where military members could in fact make complaints.

Also, it should be remembered that the incidents involving members of the Canadian Airborne Regiment in Somalia in 1993 (along with the Dickson Report (MPCC Book of Authorities, vol. III, tab 45) and the Somalia Inquiry report (MPCC Book of Authorities, vol. III, tabs 41 - 43) are recognized as providing the specific background and impetus to the 1998 NDA reforms under review, including the MP complaints regime in Part IV. Since the events in question occurred outside of Canada, they necessarily engaged policing and prosecutorial actions under the Code of Service Discipline, rather than the *Criminal Code* per se. While liability for many of the most serious offences charged depended on liability for relevant *Criminal Code* offences, such criminal liability was engaged only through NDA s. 130, which makes commission of a *Criminal Code* or other federal offence a service offence under the Code of Service Discipline. As such, those involved faced MP investigation and courts martial proceedings. Yet it was concerns about the adequacy of the professionalism and independence of the MPs in the very context of those events in Somalia which led to the enactment of NDA Part IV. It would be most ironic and detrimental to MP accountability if MP involvement in enforcing the Code of Service Discipline – which, as was the case with the Somalia episode, can involve very serious criminal misconduct – were to fall outside of NDA Part IV.

Further, it appears to the Commission that some specialization in, and sensitivity to, the military aspects of military policing, including issues around enforcement of the Code of Service Discipline, was desired and intended in creating a unique MP oversight body. If Parliament"s intention in enacting NDA Part IV had been merely to provide for independent oversight over MPs" civil policing activities, the reasons for creating a new police oversight body strictly for the MPs become less clear, and the Commission"s understanding of its role as a specialized body is put in question.

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other hand, will be dependent on internal MP policies, which are subject to change. It is submitted that the availability of independent oversight, for its part, should not be dependent on the MP policies applied to determine whether to proceed under military or civilian law.

[14] Subsection 250.18(1) provides in part that: "Any person, *including any officer or non-commissioned member*, may make a complaint under this Division about the conduct of a member of the military police…" [emphasis added].

Finally, it should be noted that the proposed approach of linking oversight to peace officer status is not easy to reconcile with the approach suggesting that only duties unique to MPs be subject to Part IV, since peace officer status itself is not exclusive to MPs within the CF.[15] This approach is also impossible to reconcile with the "service nexus" argument examined below, as they would each exclude from oversight a different portion of the MPs" work, with the final result that no independent oversight would remain.

iii) „Service Nexus" Approach

The "service nexus" approach creates the opposite problem to the two proposed approaches reviewed above. Under this approach, "policing duties or functions" would be understood as including only those activities related to the enforcement of the Code of Service Discipline. In other words, all MP dealings with civilians, or even with service members in the context of enforcing civilian laws, would be excluded.

This approach would raise serious issues, as it would leave civilians with complaints about the conduct of military police members without any recourse to independent oversight. Not being members of the Canadian Forces, civilians do not have access to internal CF grievance mechanisms. The absence of any recourse for a civilian who feels aggrieved by the conduct of a military police officer would be troubling.

Further, this proposed interpretation of the legislation appears contrary to the intentions behind the enactment of Part IV and to the language of the legislation. If Parliament had intended to limit independent oversight to the enforcement of service discipline, NDA s. 250.18(1) could have been addressed more specifically at CF members as potential complainants, instead of stipulating as it does that "any person" can make a complaint about the conduct of an MP.

Also, the wording of the second item in the list of prescribed "policing duties and functions" in paragraph 2(1)(*b*) of the Regulations – "the rendering of assistance to the public" – would be inexplicably overbroad if only interactions with other military personnel were intended to be covered.

A legislative intent to limit the conduct complaint mechanism to MP activities relative to the enforcement of the Code of Service Discipline, that is, to Part III of the NDA, would have been simple to capture in NDA s. 250.18(1) or in s. 2 of the Regulations. Instead, with the exception of a reference to NDA s. 156 in the definition of "military police" in s. 250, one finds not a single express reference to NDA Part III, or any of its provisions, anywhere in Part IV of the Act or in the MP Conduct Complaint Regulations.

Finally, it should also be noted that the wording of the MP Code of Conduct (MPCC Book of Authorities, vol. I, tab 20) – which was part of the same legislative package of reforms as NDA Part IV and the MP Conduct Complaint Regulations (MPCC Book of Authorities, vol. I, tab 21) – in no way suggests that it is limited in its scope of application to MP conduct in the

[15] Other officers and non-commissioned members involved in domestic operations related to civil disorder or other emergencies disruptive of regular civil authority ("aid to the civil power") may also enjoy peace officer status for the purposes of such operations (*Criminal Code*, s. 2 "peace officer" (*g*)(ii) (MPCC Book of Authorities, vol. I, tab 2) and QR&O art. 22.01(2); see also NDA s. 282 re "constable" status of CF personnel called out for service in aid of the civil power).

enforcement of the Code of Service Discipline. In the MP Code of Conduct, someone affected by potential MP misconduct is referred to simply as a “person”, and not specifically as a CF member.

b) The Implied Restriction Proposed by the CFPM and JAG: The Law Enforcement Context Requirement

The CFPM and JAG have taken the position that the policing duties and functions enumerated in the Regulations can only be subject to Part IV oversight if they are performed for the purpose of law enforcement. This proposed approach has not been commented on by the Federal Court, and remains a source of uncertainty and disagreement between the MPCC and the CFPM.

The MPCC has found the interpretation proposed by the CFPM and JAG difficult to reconcile with the language of the legislative mandate for the MPCC and with the purpose behind the legislation to ensure accountability and independent oversight for the military police.

The MPCC recognizes that it is MPs‟ particular duties in the area of law enforcement which justify a special and enhanced oversight regime in comparison with other soldiers. However, it does not necessarily follow that such an oversight regime would only be concerned with MP conduct in that specific context. After all, the conduct of MPs in other contexts may well reflect on their competence and suitability as law enforcement specialists. The same is true of other police officers and indeed other regulated professionals. Certainly lawyers are not held to a higher standard of conduct by their professional governing bodies only within the discrete confines of their legal practice. A lawyer who commits fraud or perjury, even outside the context of his or her work as a lawyer, would be a legitimate concern to his or her bar or law society.

It is well recognized in the broader field of professional regulation and discipline that the scope of professional oversight – in terms of the categories of activities of a regulated professional which may come under scrutiny – may well extend beyond those core professional roles and responsibilities whose importance to society at large led to the special regulation of a profession in the first place. This being the case, it is not obvious to the Commission why MPs‟ professional accountability should be precluded where, for instance, an MP: mishandles or falsifies evidence for a CF Board of Inquiry; is rude or hostile in responding to someone trying to file an MP conduct complaint; or physically abuses or negligently allows the escape of a person detained in connection with military operations. An approach excluding such behavior from the Part IV complaints regime is difficult to reconcile with the MPCC‟s independent oversight mandate, at least when the activities involved are otherwise clearly within the functions listed in the Regulations. The activities enumerated in s. 2(1) of the MP Conduct Complaint Regulations are quintessential policing competencies, and misconduct or poor performance in these areas, regardless of the presence or absence of a law enforcement context, is a legitimate concern for those responsible for overseeing and ensuring the professionalism of MPs.

Even the MP Code of Conduct (MPCC Book of Authorities, vol. I, tab 20), which formed part of the same package of legislative reforms as the Part IV complaints regime[16] and through which

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[16] The Code of Conduct, authorized in NDA s. 13.1 (which was added by Bill C-25), was passed as a regulation by the Governor in Council less than a month after the MP Conduct Complaint Regulations (MPCC Book of Authorities, vol. I, tab 18).

the CFPM"s DPM PS section assesses all conduct complaints,[17] captures MP conduct both within and beyond the law enforcement context. Pursuant to s. 4(*e*) of the MP Code of Conduct, for example, MPs are prohibited from intimidating or retaliating against "any person who makes a report or complaint about the conduct of a member of the military police". This provision relates, at least partially, to the conduct of MPs relative to what could be described as a non-law enforcement process (the NDA Part IV complaints process). Paragraphs 4(*j*) and (*g*) of the Code target MPs" unlawful discharge or dangerous or negligent use of weapons. Given that MPs are soldiers as well as police professionals, MPs carry and use weapons for purposes other than law enforcement, but the paragraphs contain no restrictions about the circumstances where they apply. Similarly, the prohibition on suppressing, misrepresenting or falsifying information in any report or statement in s. 4(*h*) of the Code is broad enough to cover any official report or statement required in the course of MPs" military duties, and not just those related to law enforcement.

The MP Code of Conduct also allows, in s. 4(*l*), for the possibility of complaints over a broad range of activity which may be outside the context not only of law enforcement duties but also of general CF duties, where the conduct in question "is likely to discredit the military police or […] calls into question the member"s ability to carry out their duties in a faithful and impartial manner". It is clear that there are norms and standards apart from those derived from the policing profession whose violation by an MP would be considered discreditable conduct per s. 4(*l*) of the MP Code of Conduct. Indeed, the stipulation in s. 5 of the Code ("Presumed Discredit") that a conviction for a federal or provincial offence of a certain gravity is to be presumed to constitute discreditable conduct strongly suggests that the Code is not exclusively concerned with the conduct of MPs in their policing role – and, indeed, it indicates that the Code even reaches into the private conduct of MPs.

Naturally, the professional oversight body, whether internal (CFPM) or external (MPCC), must be sensitive to the fact that different contexts potentially require that MP conduct be judged according to different paradigms or sets of values. It is submitted that both the CFPM and the MPCC possess the necessary specialization to apply the appropriate standards and criteria, taking context into account, when evaluating complaints. Indeed, it may well have been a recognition of the need for this sensitivity to the unique context and range of MP duties which led Parliament to create a distinct and specialized civilian oversight body for the military police. In the Commission"s view, the plain wording of the legislation is also more consistent with a broader understanding of the meaning of "policing duties or functions" and a more holistic and integral view of MP professional accountability.

Subsection 2(1) contains no caveat or qualification that the enumerated activities only constitute a "policing duty or function" when performed for the purposes of law enforcement. A good number of the enumerated activities are liable to be performed by MPs in a variety of contexts other than in respect of their law enforcement duties – most particularly: "(*a)* the conduct of an investigation"; "(*b*) the rendering of assistance to the public"; "(*f*) attendance at a judicial proceeding"; and "(*h*) responding to a complaint". Indeed, some of these activities must be performed by MPs in the context of dealing with NDA Part IV complaints – the very context in

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[17] It should be noted that there is nothing in NDA Part IV which expressly links or limits the assessment of MP conduct in the context of disposing of a conduct complaint to an application of the MP Code of Conduct, but that the Code is obviously an important source of MP norms and values.

which the MP Conduct Complaint Regulations were adopted. As such, the Commission has difficulty in accepting an interpretation of the Regulations which would imply that it was drafted without an understanding that MPs perform some of the s. 2(1)-enumerated activities in non-law enforcement contexts. In the circumstances, the absence of any caveat or qualification limiting the meaning of “policing duties or functions” to the law enforcement context suggests to the Commission that no such limitation was intended.

The reality of military policing is that, unless posted to a non-MP position, credentialed MPs constantly retain their peace officer status (subject to the limits of their jurisdiction) and their particular authorities and mandate in respect of enforcing military discipline. Such policing responsibilities are not put in abeyance merely because an MP happens to be assigned to a non-policing tasking at a given moment. For example, an MP assigned to non-policing duties on a base may have occasion to witness the commission of service or criminal offences. Naturally, the MP does not turn a blind eye to misconduct and breaches of the law simply because he or she happens to be carrying out a non-policing assignment at the time.

This reality brings into question the very feasibility of determining with precision when an MP is acting in a law enforcement capacity. Any distinction between policing and non-policing contexts becomes especially illusory where the complaint is one of omission, i.e., an MP‟s alleged failure to act on the member‟s policing responsibilities and authorities.

As a result, the MPCC submits that the proposed implied law enforcement context requirement is unworkable and irreconcilable with the level of accountability and independent oversight which is necessary for military policing and which was intended to be put in place through Part IV of the NDA.

c) Section 2(2) of the Regulations and the Potential Implications of the Federal Court Decision

Another issue which has arisen for the Commission in the exercise of its oversight mandate has related to subsection 2(2) of the Regulations and, more particularly, the extent to which it can subtract activities which may otherwise be considered part of the enumerated policing duties and functions from oversight under the Part IV complaints regime. In this respect, the Federal Court has found that s. 2(2) can operate to exclude even duties that are part of policing (MPCC Book of Authorities, vol. II, tab 26). Depending on how this decision is subsequently interpreted and applied, and on how much overlap is considered to exist between the duties listed in s. 2(1) and the “exclusions” listed in s. 2(2), the MPCC submits that the potential implications of the Federal Court decision, if applied in other contexts, may result in the exclusion from oversight of many important functions of the military police and, as such, may impede achievement of the necessary level of accountability for MPs.

It appears to the Commission that s. 2(2) of the Regulations does not reflect a legislative intention to substantively subtract areas of MP activity otherwise captured in s. 2(1). Because s. 2(1) contains no cross-referencing language, such as “subject to subsection (2)”, and because s. 2(2) uses the phrase “[f]or greater certainty”, rather than “notwithstanding”, the Commission‟s understanding is that s. 2(2) generally serves to confirm that activities not enumerated in s. 2(1) – considered to fall into the categories of either “administration”, “training”, or “military

operations that result from established military custom or practice" – are excluded from the definition of "policing duties or functions".

If the recent Federal Court decision is viewed as opening the door for a more robust role for s. 2(2), the scope of activities which could be excluded from independent oversight could, in the Commission‟s view, lead to a drastic reduction of the level of accountability for the military police, as well as to practical difficulty in the application of the Part IV complaints regime.

Subsection 2(2) excludes from NDA Part IV not merely MP conduct in the areas of "administration, training, or military operations that result from established military custom or practice" per se, but also any duty or function which merely "*relates to*" any of these domains. The words "administration" and "military operations" could, if interpreted broadly, cover an important range of activities and functions. In fact, given that the essence and *raison d'être* of military policing is to support military operations, virtually *all* military police activities could somehow be characterized as *relating to* "administration, training, or military operations that result from established military custom or practice". The possibility for such broad exclusions threatens the implementation of the independent oversight regime which was intended to be established when the Commission was created and could unacceptably limit military police accountability.

Further, a robust role for s. 2(2) leaves enormous room for debate and disagreement among NDA Part IV stakeholders as to whether a valid conduct complaint has been made. As such, it can create significant impediments for complainants in identifying the conduct which can be the object of complaints, and it can increase the potential for litigation, resulting in additional cost and delay for complainants and all other actors involved in the system.

If very general (and even cryptic) terms such as "administration", "training" or "military operations that result from established military custom or practice" have to be construed and applied for every conduct complaint received before the complaint can be accepted, the practical application of the Part IV regime will be made significantly more complicated and difficult.

Finally, as noted above, in many, if not most, MP duty situations, there will be considerable potential for fluidity between "policing" and "purely military" roles, responsibilities and expectations, as the MPs‟ mandate and authorities to enforce military discipline and federal and provincial law will generally not be put in abeyance while they are carrying out other taskings. As such, a broad interpretation of s. 2(2) of the Regulations which would allow for the exclusion from oversight of all duties *relating to* military operations, whether those duties are listed in the "policing duties and functions" enumerated in s. 2(1) or not, would be difficult to reconcile with the reality of military policing.

To the extent that the recent Federal Court decision can be viewed as endorsing such a broad interpretation of s. 2(2) of the Regulations, the application of the decision to other contexts has the potential to overly limit MP accountability, to create further litigation, and to prevent the complaints system from remaining accessible and user-friendly for complainants.

6) <u>Conclusion</u>

In this section of its submissions, the Commission has sought to outline the issues raised by some of the approaches proposed to interpret the scope of the MP activities that will be subject to

independent oversight, as well as by the potential implications of the Federal Court decision in this respect.

The Commission has no desire to expand the scope of its oversight mandate beyond what it understands that legislative mandate to be. However, the Commission is concerned that, without clarification, the current language of the Regulations could be interpreted in a manner that would be detrimental to the maintenance of the type of independent oversight and accountability regime which was envisioned when Part IV of the NDA was enacted. As such, the MPCC believes that it is imperative that Parliament provide specific clarification about the scope of "policing duties or functions" that are subject to independent oversight.

Such clarification would provide necessary guidance for complainants and would help to avoid time-consuming disputes and potential litigation regarding the scope of the NDA Part IV conduct complaints process.

Moreover, in the Commission‟s view, the definition of "policing duties or functions" should be moved to the Act itself and not left in the Regulations. This definition is central to the scope of the NDA Part IV MP oversight regime and should be converted to statutory form and determined by Parliament as a whole.

Regulations and other subordinate legislation are a convenient and well-established mechanism for legislating in relation to complex, detailed, and technical matters, especially where relatively frequent or urgent revision may be necessary. Yet, this is clearly not the case with the definition of "policing duties or functions". While leaving this definition to the regulations may have been useful in expediting the drafting and introduction in Parliament of Bill C-25 in 1997, the Commission sees no continuing rationale or justification for the delegation of legislative authority for this definition.

It seems at odds, both with the principles of independent police oversight and with the other measures put in place to ensure MPCC‟s operational independence from the executive, to have the very extent of the Commission‟s oversight mandate left in regulation form where it is subject to unilateral alteration by the Government of the day without involvement by Parliament. Indeed, in this respect, the delegated status of the scope of the "policing duties or functions" subject to the NDA Part IV process, including external oversight by MPCC, appears to be out of step with emerging international standards for oversight of law enforcement.[18]

It should also be noted that moving this all-important definition to the Act itself would improve its accessibility to members of the public, since statutes are more familiar to, and accessible by, the general public than subordinate legislation.[19]

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[18] Such standards have been derived by analogy from the 1999 UN General Assembly‟s "Paris Principles", establishing minimum standards for national human rights oversight bodies. See, e.g.: Commonwealth Human Rights Initiative, *Police Accountability: Too Important to Neglect, Too Urgent to Delay* (2005), at p. 64; and United Nations Office on Drugs and Crime, *Criminal Justice Assessment Toolkit: 2. Policing: The Integrity and Accountability of the Police* (2006), at p. 8 (MPCC Book of Authorities, vol. III, tabs 48, 49 and 50).

[19] Even within the context of regulations, the *Complaints About the Conduct of Members of the Military Police Regulations* (MPCC Book of Authorities, vol. I, tab 21) are particularly obscure and difficult to access, as they are not published in the *Canada Gazette* and are not available on public legal research and information web-sites, such as the Department of Justice‟s "Justice Laws Web-Site" and the Canadian Legal Information Institute (CanLII) site.

3. ***MPCC proposes that the meaning of "policing duties or functions" in NDA subsection 250.18(1) should be set out in the NDA itself and clarified. In order to ensure that a sufficient degree of MP accountability is achieved, the MPCC submits that the following clarifications are necessary:***

    a) ***A clear stipulation that the policing duties and functions subject to Part IV oversight include, but are not limited to, the enforcement of the Code of Service Discipline;***

    b) ***A clear stipulation that the policing duties and functions subject to Part IV oversight include, but are not limited to, those related to MPs' peace officer status;***

    c) ***A clear stipulation that the policing duties and functions subject to Part IV oversight are not limited to those that are unique to MPs;***

    d) ***A clear stipulation that the policing duties and functions subject to Part IV oversight are not limited to those performed for the purpose of law enforcement;***

    e) ***A clear stipulation that duties or functions can only be excluded from oversight where they are, strictly and exclusively, functions of administration, training or military operations that result from established military custom or practice; and***

    f) ***A clear stipulation that in the interpretation of the definition of "policing duties and functions", the list of included duties prevails over the list of excluded duties in the event of any overlap between them.***

D. Authority to Probe and Report on Systemic Issues

The MPCC has always considered that its mandate to investigate and report on conduct and interference complaints extends to any related systemic matters that may have caused or that are related to the alleged misconduct or interference. The ability to probe and report on systemic problems adds considerable value to the MPCC"s work and is arguably the most important result of dealing with a complaint.

In the view of the Commission, Part IV clearly includes the mandate for the Commission to examine the issues at the root of the conduct under review as a result of the complaints before it. Once a complaint is determined to fall within the Commission"s jurisdiction because of the nature of the conduct complained about, the legislation sets no limits on what and how the Commission can investigate in relation to this complaint.

It is expressly contemplated in the legislation that the MPCC will make *recommendations* and findings pursuant to its review and investigation of complaints and that, at least in the case of conduct complaints, its recommendations will, for the most part, be directed at the CFPM. Until recently, the CFPM only had a command relationship with certain MPs and, as such, had less

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This is because the Regulations were enacted in part pursuant to s. 12(1) of the NDA and as a result are deemed exempt from publication under the *Statutory Instruments Act* and *Statutory Instruments Regulations*.

authority to address the individual issues raised by the complaint, not being in a position to take direct disciplinary or administrative action against the individual subjects of a complaint.[20] Yet, given his authority to advise and direct MPs on the proper procedures and policies through the technical chain of command, the CFPM was always in the best position to address any systemic issues identified in an MPCC report. Given these factors, it seems unlikely that the MPCC was intended to limit itself to making recommendations solely concerning the individual MP members involved in a complaint, when those recommendations are addressed to the person with the authority to correct the broader issues with policies, procedures and training, but not always to address the MPs‟ individual behavior.

The CFPM is the keeper of the *Military Police Policies and Technical Procedures* (MP Policies). Since its creation, the MPCC has frequently made recommendations for changes to the MP Policies and these have generally been well-received by the CFPM. Indeed, there has been, in practice, no controversy between the MPCC and the CFPM on the MPCC‟s mandate to address systemic issues. The question has been raised by counsel for the Attorney General of Canada in the context of litigation over the scope and content of the MPCC‟s public interest hearings in respect of the conduct complaint concerning the failure to investigate potential violations committed by CF members in authorizing and carrying out the transfer of Afghan detainees to Afghan authorities. In this context, it was argued, for example, that even where the Commission has jurisdiction to investigate a complaint, it is precluded from interviewing witnesses who could provide information about the training received by MPs respecting the execution of the duties at issue in the complaint, or from otherwise inquiring into the issue of training in any way, because duties related to "training" are excluded from the definition of policing duties or functions by s. 2(2) of the Regulations.

Denying MPCC the authority to probe systemic issues related to complaints would preclude it from being able to inquire into the factors that may have contributed to causing the deficiencies and from making informed recommendations to address those causes.

While the Commission considers that its authority to investigate, and make recommendations regarding, systemic issues is implicit in its existing legislative authority, it is nonetheless important that its mandate be clear on this point: not only to avoid unnecessary jurisdictional disputes, but also to ensure that the scope of its informational authorities are clear. This will ensure any necessary access to information considered to be "personal information" under the *Privacy Act* (MPCC Book of Authorities, vol. I, tab 6), a context in which the Courts have tended to strictly construe legislative provisions which purport to authorize or require the disclosure of "personal information".

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[20] The CFPM could always suspend or revoke any MP‟s military policing credentials, but the MP Credentials Review Board, established in QR&O at around the same time as the legislation creating NDA Part IV and MPCC, has been specifically mandated to advise the CFPM on the suspension, revocation and reinstatement of MP credentials (MPCC Book of Authorities, vol. I, tab 18).

It may be noted that, in its recent overhaul of its police complaints regime, the Province of Ontario has seen fit to expressly stipulate in statute the authority of the external oversight body to probe systemic issues.[21]

From a policy standpoint, it simply makes sense for the MPCC to address any MP systemic issues related to a complaint when dealing with a complaint. If part of the goal of the complaints regime is to ensure that MP misconduct, or deficient conduct, or improper interference, are not repeated, then it is essential that the MPCC be able to examine systemic factors related to a complaint.

To reiterate, the MPCC believes that, while it is already authorized under the current legislation to address systemic issues, further clarification on this point would be useful.

4. ***MPCC proposes that it be expressly authorized to investigate and report on systemic issues related to complaints under NDA Part IV.***

E. Who May File an Interference Complaint?

In stark contrast with MP conduct complaints, the category of those who may make a complaint about improper interference in an MP investigation is extremely restrictive. Only those MP members conducting or supervising such an investigation may make an interference complaint under NDA s. 250.19(1).

Since its inception, the MPCC has received very few interference complaints, and some of these complainants have been clearly reluctant to come forward. It certainly takes considerable courage to make such allegations against the chain of command. It may be that it is expecting too much to rely solely on MP investigators and their supervisors to refer such matter to the MPCC. Indeed, if there is improper interference from a sufficiently senior level, the investigating MPs and their supervisors may not be fully aware of the interference or its true source.

Expanding the category of possible complainants to a broader range of MPs and CF members with knowledge of the relevant events should be considered. The definition of "member of the military police" for the purposes of NDA s. 250.19(1) should be expanded to include persons seconded to MP positions in the CF, thereby ensuring that seconded civilian police, who often occupy key positions in CFNIS, are eligible to make interference complaints. Such a change would automatically flow from the adoption of MPCC proposal # 2 above, regarding expansion of the definition of "military police" in NDA s. 250. In addition, it would be useful to broaden the category of potential interference complainant to any MP or CF member (at the time of the alleged interference) with knowledge of the relevant events.

The existing requirement in NDA s. 250.19(1) for belief on reasonable grounds as a prerequisite for making an interference complaint, as well as the authority in NDA s. 250.35(2)(a) for the Commission Chairperson to refuse to investigate frivolous or vexatious complaints, should suffice to prevent nuisance or frivolous complaints. Indeed, this threshold provides adequate

[21] See: the Ontario *Police Services Act*, R.S.O. 1990, c. P.15, s. 57 (MPCC Book of Authorities, vol. I, tab 15), a provision adopted in 2007 amendments to that Act following the recommendations of Justice Patrick Lesage in his 2005 report, *Report on the Police Complaints System in Ontario* (MPCC Book of Authorities, vol. III, tab 46).

safeguards to allow for an expansion of the potential population of interference complainants beyond MPs alone.

5. ***MPCC proposes that the category of persons who may make an interference complaint under NDA s. 250.19(1) be expanded to include persons seconded to MP positions in the CF as well as any MP or CF member (at the time of the events giving rise to the complaint) with knowledge of the events in question.***

F. Interference with What MP Duties or Functions?

Presently, an interference complaint may only be made against alleged improper interference with a "military police investigation". While the concept of an "investigation" can be construed broadly, it is important that the legislation not convey the impression that improper interference with other policing functions is appropriate, or may not warrant a complaint to the MPCC. Interference with the handling of evidence, attempts to improperly interfere with MP decisions relating to the laying of charges or attempts to interfere with MPs‟ intended testimony in court proceedings, for example, could all impact significantly on the MPs ability to carry out their duties. The Part IV complaints process should be available to address those situations, since the independence and integrity of MPs‟ policing discretion and judgment must be protected in all phases of the process.

The MPCC proposes that the current definition of "interference complaint" in s. 250.19(1) be modified to allow for complaints about improper interference with any policing duty performed by MPs.

6. ***MPCC proposes that NDA s. 250.19(1) be clarified and expanded to the effect that an interference complaint may be made in respect of improper interference with any policing duty performed by MPs.***

II) MPCC ACCESS TO INFORMATION

A. Documentary Disclosure Requirements

Presently, the only instances where MPCC has a statutory right to obtain information in support of its investigative and oversight responsibilities are when a review of a conduct complaint is requested (NDA s. 250.31(2)(*c*)), or when it exercises its subpoena power in the context of a public interest hearing (NDA s. 250.41). In the case of conduct complaint reviews, the MPCC‟s statutory rights are limited to obtaining relevant information from the CFPM, and do not include a right to obtain records in the possession of the CF or DND.

In practice, the CFPM and MP units in the field have been cooperative with MPCC interference complaint and public interest investigations by providing copies of necessary MP file materials in such cases. It would nonetheless be useful to clarify the disclosure obligations of the CFPM, and other relevant CF and DND authorities. While it is considered that such sharing of information is a "consistent use" of any related personal information under the *Privacy Act* (MPCC Book of Authorities, vol. I, tab 6), clarifying relevant disclosure requirements helps to avoid disputes over any future objections that may be raised.

Moreover, it detracts from the credibility of an oversight process to have an oversight body that is, or is seen to be, dependent on the voluntary cooperation of the overseen institution in order to gain access to basic and necessary information.

There is also always the risk the voluntary cooperation will cease, either generally or in regard to a specific case. In such events, it is not a wise expenditure of resources for MPCC to invoke its subpoena power by calling a public interest hearing (and incur the associated costs in time, money and formality), simply in order to have access to the basic documentary record relevant to a complaint which MPCC is charged by Parliament with investigating. In a case involving the RCMP Public Complaints Commission‟s access to RCMP information, the Federal Court of Appeal has taken a similar view, indicating that a discretionary hearing power should be used sparingly and not merely to obtain access to information where the Commission should have access to such information in the first place (MPCC Book of Authorities, vol. II, tab 30).[22]

It should be noted that Bill C-38 proposes (MPCC Book of Authorities, vol. I, tab 4), in clause 7 (new RCMP Act s. 45.37(1)) to confer on the RCMP Review and Complaints Commission the broad authority to request from the RCMP "any information under the control, or in the possession, of the Force that the Commission considers is relevant to the exercise of [the Commission‟s] powers, or the performance of [the Commission‟s] duties under this Act."

7. ***MPCC proposes that the CFPM, the CF and DND be required to disclose to MPCC all documents in their possession which may be relevant (in the MPCC's assessment) to any of its investigations (conduct, interference or public interest).***

B. General MPCC Authority to Request Records from CFPM

NDA s. 250.25 requires the CFPM to keep a record of all complaints received under Part IV of the Act, and to make the contents of such record available to MPCC on request. There has been disagreement in the past between MPCC and the CFPM as to whether this provision authorizes MPCC access to CFPM files related to complaints, or whether it only authorizes MPCC access to a list of complaints received. Regardless of the correct interpretation of NDA s. 250.25, the MPCC considers that it would enhance the MPCC‟s oversight effectiveness and efficiency to allow for selective access to CFPM/MP files related to the Commission‟s statutory duties.

By having access to CFPM/MP files before being seized with a request for a conduct complaint review per NDA s. 250.31, the MPCC could better perform its role of monitoring the handling of conduct complaints by the CFPM and make more informed and timely decisions on the exercise of its public interest mandate per NDA s. 250.38. Such a right of access by MPCC would also enhance the Commission‟s ability to monitor and verify compliance by the CFPM with complaint intake and notification procedures.

8. ***MPCC proposes that the CFPM be required to provide, on request, any information or records under his/her control or possession that the MPCC considers to be relevant to the exercise of its powers, or the performance of its duties under the Act.***

[22] *Canada (RCMP Public Complaints Commission) v. Canada (Attorney General)*, [2006] 1 F.C.R. 53, at paragraphs 61 and 62 (F.C.A.) (MPCC Book of Authorities, vol. II, tab 30).

C. Access to Witnesses: Expanded Subpoena Power and Duty to Cooperate

In addition to broader and stronger general provisions for MPCC access to relevant records, the Commission considers that it would be more effective and efficient for it to be able to require the cooperation of relevant witnesses, at least those who are members of the Military Police or of the Canadian Forces, in the context of any of its investigations under the Act, and not just in the context of public interest hearings.

MPs and members of the CF choose to participate in a regulated activity. As a result, it would be reasonable to impose an obligation on them to provide information to the Commission, which forms part of the regulatory scheme governing their activities. Given that the MPCC cannot impose sanctions, there would be no justification for exempting subjects of complaints from being compelled to provide information to the Commission. In fact, even where sanctions can be imposed, many professional governing bodies do have the power to compel professionals to cooperate.

As noted above, the Federal Court of Appeal has indicated that discretionary hearing powers, and the associated increases in the formality and cost of proceedings, should not be utilized solely to gain access to related powers of compelled cooperation (MPCC Book of Authorities, vol. II, tab 30).[23] Such recourse to the public hearing mechanism is also contrary to Parliament"s injunction to the Commission in NDA s. 250.14 to discharge its responsibilities as informally and expeditiously as possible in the circumstances.

While the subpoena powers presently conferred on the RCMP Public Complaints Commission are similar to those of the MPCC, it should be noted that Bill C-38 from the previous Parliament proposed to extend the subpoena power of the new RCMP Review and Complaints Commission to any complaint before it (clause 7, new s. 45.63) (MPCC Book of Authorities, vol. I, tab 4).

9. ***MPCC proposes that its current power of subpoena in the context of public interest hearings be extended to provide for a power to subpoena any member of the military police or of the Canadian Forces believed to have information relevant to any of its complaint investigations, whether or not public hearings are held. The general power to subpoena any relevant witnesses where public hearings are held should remain unchanged.***

In addition to an extended subpoena power, it would also be appropriate to provide for a duty to cooperate with MPCC investigations on the part of all CF and DND personnel, in respect of conduct and interference complaints.

Pursuant to the MP Code of Conduct (MPCC Book of Authorities, vol. I, tab 20), MPs other than the subject member are required to cooperate with CFPM investigations of complaints. As a result, the CFPM may have access to more witness information in a first instance investigation of a conduct complaint than will the MPCC on a review of the same complaint.

It may be noted that there is, through Defence Administrative Orders and Directives, a duty imposed on all CF and DND personnel to cooperate with investigations by the non-statutory National Defence and Canadian Forces Ombudsman.

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[23] Ibid.

10. MPCC proposes that a duty to cooperate with MPCC complaint investigations be imposed on all CF and DND personnel.

D. Access to Sensitive Information per the *Canada Evidence Act*

Sections 38 thru 38.16 of the *Canada Evidence Act* (CEA) (MPCC Book of Authorities, vol. I, tab 5) provide for a special regime of controls aimed at strictly controlling access to information which may be "potentially injurious" to international relations or to national defence or security". While the MPCC accepts the need for such controls, it also considers that a lack of efficient and effective access to such information where relevant to a complaint before it hampers the Commission‟s ability to provide credible independent oversight of military policing.

When the MPCC was created by Parliament in 1998, the present controls in the CEA on the disclosure of sensitive information and information potentially prejudicial to international relations or national defence or security did not exist. These provisions were originally contained in Part III of the *Anti-Terrorism Act*, which was introduced and adopted in the fall of 2001 in response to the events of September 11, 2001. The regime put in place prohibits the disclosure, in connection with a "proceeding", of potentially injurious information without the authorization of the Attorney General or the Federal Court. According to s. 38.01(6)(d) of the CEA, an exception is made for entities designated in the Schedule to the CEA (MPCC Book of Authorities, vol. I, tab 5), with the result that such entities can obtain disclosure of potentially injurious information without requiring the authorization of the Attorney General or the Federal Court. The Commission is not currently a designated entity listed in the CEA Schedule.

However, the legislation creating the Commission and the military police complaints process in NDA Part IV nonetheless foresaw, given the particular role and context of military policing, that the Commission would need to access highly sensitive information relating to defence and national security. Paragraph 250.42(a) of the NDA provides that when the Commission has called a hearing in respect of a complaint which it has taken up in the public interest per NDA s. 250.38, the Commission is exempt from the default requirement of holding the hearing in public, where there is likely to be disclosure of "information that, if disclosed, could reasonably be expected to be injurious to the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities."

This language is quite similar to the CEA‟s definition of "potentially injurious information" (per s. 38): "information of a type that, if it were disclosed to the public, could injure international relations or national defence or security". While it is nonetheless true that the intervening adoption of CEA ss. 38 – 38.16 has changed the rules applicable to the Commission in terms of access to information in the context of its hearings under NDA s. 250.38, it is still worth recalling that in the Commission‟s enabling legislation, Parliament seems to have contemplated Commission access to information that is at least as sensitive than that covered by CEA s. 38.

In this regard, the Commission is in the same position as the Commission for Public Complaints Against the RCMP (CPC) – whose enabling legislation served as a model for NDA Part IV (MPCC Book of Authorities, vol. I, tab 3). While the CPC is also not presently on the CEA Schedule, the Arar Inquiry has effectively recommended this. In his recommendations for a new, restructured RCMP oversight body (see, in particular, the explanatory text for recommendation 4(a)), Justice Dennis O‟Connor advised that the oversight body "must have

access to all relevant information and should not be refused information on the basis that it is secret or sensitive" (see Arar Commission Report excerpts: MPCC Book of Authorities, vol. III, tab 47)

Specifically, Justice O"Connor pointed to the "full access to all information" enjoyed by the Security Intelligence Review Committee, the Communications Security Establishment Commissioner and his own commission of inquiry, as exemplifying the degree of access to information he was proposing for the new RCMP oversight body. In each of these instances, the body in question had been added to the CEA Schedule. Notably, Justice O"Connor expressly indicated that he saw no reason why such access should not apply to both the oversight of the RCMP"s traditional law enforcement responsibilities as well as its national security activities.

As noted elsewhere in these submissions, the recommendations of the Arar Commission were endorsed by the Government in Bill C-38 of the previous Parliament. Specifically, clause 16 of the Bill would add the new Commission to the CEA Schedule of entities exempted from its restrictions on receiving "potentially injurious information".

In addition to Parliament"s expectation, it has also been the Commission"s experience that its complaint investigations require access to sensitive or potentially injurious information. The Commission has accessed such sensitive information in the past. Its personnel possess the necessary security clearances,[24] and the Commission has the ability to securely store and protect sensitive information within its facilities.

If the Commission is not added to the CEA Schedule it will mean that, in many instances, the Commission"s statutory authority to hold hearings in respect of complaints taken up by the Commission in the public interest will effectively be rendered nugatory due to the information-sharing restrictions in CEA ss. 38.01 and 38.02. In such instances, the Commission"s ability to credibly and fairly perform its intended oversight function will either depend on the Government"s discretionary decision to provide the information or on the Commission"s willingness to undertake time-consuming challenges in the Federal Court to the Government"s position against disclosure to the Commission. In the Commission"s view, neither of these approaches is in the interest of parties to complaints or of the public. Nor is such an approach heedful of Parliament"s injunction to the Commission to dispose of its cases as informally and expeditiously as possible in the circumstances.

The reality of military police operations, and consequently, the scope of this Commission"s oversight responsibilities, suggests that discretionary ad hoc disclosure arrangements per CEA ss. 38.03 and 38.031 would not sufficiently address the needs of the Commission so as to enable it to effectively and credibly fulfill its statutory mandate.

Given that Canadian military police may perform their various duties, including their "policing duties or functions" per s. 250.18 of the *National Defence Act* (NDA), anywhere in the world, including theatres of active military operations, it is not difficult to imagine scenarios where the investigation of a conduct or interference complaint under NDA Part IV could involve information "potentially injurious" "to international relations or national defence or national

[24] All MPCC employees and consultants who have access to MP materials must possess a minimum security clearance to the level of "Secret", and some such personnel actually have "Top Secret" clearance.

security” per CEA s. 38. Indeed, as observed above, this possibility was distinctly recognized by Parliament when it adopted the NDA Part IV complaints process, given that, in NDA s. 250.42(*a*), it expressly empowered the Commission to hold *in camera* hearings where information was likely to be disclosed that “could reasonably be expected to be injurious to the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities.”

This question of MPCC access to information covered by CEA s. 38 has arisen most acutely in the context of the recent public interest hearings into complaints by Amnesty International Canada and the British Columbia Civil Liberties Association, regarding Afghan detainee transfers, where protracted negotiations with the Government and litigation were necessary to obtain access to documents. In that case, the Government took the position that the Commission could only receive documents after they were vetted and redacted by Government, with no ability to discover the nature of the information redacted. In practice, this resulted in significant delays for the Commission to obtain documents required for the conduct of its hearings, and it made it difficult for the Commission to assess the reasonableness of the Government‟s redactions (and make informed determinations about whether to challenge any of the proposed redactions), not being allowed to view the redacted information. As a result, it was significantly more difficult for the Commission to carry out its role to thoroughly investigate the issues raised by the complaint and to ensure that all the information which could be provided to the complainants and to the public without risk of injury to national security, national defence or international relations was in fact provided.

It should also be emphasized that the practical implications for the Commission‟s work in its not being on the CEA Schedule extend well beyond both the conduct of public interest hearings and even beyond the Commission‟s access to “potentially injurious” information as defined in the CEA.

In its dealings with the Commission in respect of the Afghan detainee transfer complaints of Amnesty International and British Columbia Civil Liberties Association, the Government took the position that the restrictions in CEA s. 38 should apply vis-à-vis the MPCC whether or not it has called a public interest hearing in respect of a complaint – in other words, whether or not the relevant Commission process is actually a “proceeding” within the meaning of CEA s. 38 to which the application of its restrictions are technically limited. If applied generally, the effect of such an approach would be to require CEA s. 38 vetting of documents and information provided to the Commission in all its cases, regardless of the mode of proceeding. In the Commission‟s view, this would make for a wholly unworkable process and would frustrate the Commission‟s achievement of the objectives for which it was established.

Furthermore, it may be noted that, in addition to “potentially injurious information”, the CEA s. 38 regime also places restrictions and impediments on the disclosure of a broader category of “sensitive information”. The combined effect of CEA ss. 38.01 and 38.02 is to potentially preclude, or at least to significantly delay, Commission access to information considered “sensitive” under CEA s. 38 – that is, information merely “*relating* to international relations or national defence or security … of a type that the Government of Canada is taking measures to safeguard”. On its face at least, this broader category of information would appear to encompass virtually any information originating from or pertaining to the CF to which any level of security classification or privacy protection applies. This would mean that Commission access to even

the routine disclosure of MP files which it currently receives in respect of its complaint investigations could be denied or delayed.

11. ***MPCC proposes that it be added to the* Canada Evidence Act *Schedule of entities which are exempted from the relevant restrictions on the receipt of "sensitive information" or "potentially injurious information" within the meaning of s. 38 of that Act.***

E. Access to Solicitor-Client Privileged Information

While the MPCC recognizes the importance of protecting the sanctity of solicitor-client privilege, it is nonetheless the case that the legal advice sought and provided to MPs can, depending on the nature of the complaint allegations, be critical to determining the reasonableness of MP conduct. It must be noted that MPCC assesses subject MP conduct involving the exercise of policing discretion on a standard of reasonableness, not correctness.

While MPCC access to solicitor-client privileged information is not presently precluded (except in the context of a hearing), as a matter of law, such access is considered to be dependent on the special consent of the Department of National Defence and is only considered on an ad hoc basis. To provide credible and truly independent oversight, MPCC must have access to relevant information as of right. Moreover, the state of the law is such that the right to obtain access to solicitor-client privileged information will not be readily inferred, but rather, will only be recognized on the clearest legislative language.

Preventing MPCC access to relevant legal advice obtained by subject MPs in the impugned exercise of discretionary powers denies important evidence to the Commission in its search for the truth and creates unfairness in the process, often to the detriment of the subject MP. There is further unfairness to the parties to the complaint in that, on a review, the MPCC will not necessarily have access to the same information as would have been available to the initial complaint investigation by the CFPM (who has access to all information about any legal advice obtained by the MPs).

The Commission"s position as to the importance of being able to access such information, in appropriate cases, is not speculative, but is borne of its experience. There have already been a number of complaint files to whose proper resolution solicitor-client privileged information was critical.

Moreover, the sharing of solicitor-client privileged information with the MPCC for the purposes of its investigations would not compromise the privilege vis-à-vis other parties. The doctrine of "limited waiver" of privilege is well established in Canadian and British jurisprudence.[25] In any event, appropriate legislative provision could easily be made to address any concerns about the possible loss of privilege protection due to such information sharing.

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[25] *Interprovincial Pipe Line Inc. v. Minister of National Revenue* (1995), [1996] 1 F.C. 367 (T.D.) (MPCC Book of Authorities, vol. II, tab 34); *Ed Miller Sales & Rentals Ltd. V. Caterpillar Tractor Co.*, 1988 CarswellAlta 148 (Alta. C.A.) (MPCC Book of Authorities, vol. II, tab 33); *Nova Scotia (Attorney General) v. Royal & Sun Alliance Insurance Co*, 2000 CanLII 1080 (N.S.S.C.) (MPCC Book of Authorities, vol. II, tab 37); *Philip Services Corp. (Receiver) v. Ontario (Securities Commission)*, 2005 CarswellOnt 3934 (Ont. Div. Ct.) (MPCC Book of Authorities, vol. II, tab 38); and *British Coal Corp. v. Dennis Rye Ltd. (No. 2)*, [1988] 1 W.L.R. 1113 (Eng. C.A.) (MPCC Book of Authorities, vol. II, tab 25).

Finally, it should be noted that Bill C-38 of the previous Parliament would expressly authorize the RCMP Review and Complaints Commission to request solicitor-client privileged information whenever such information is "relevant and necessary to the matter before the Commission" (see clause 7, proposed new RCMP Act ss. 45.38 – 45.46: MPCC Book of Authorities, vol. I, tab 4).

12. MPCC proposes that its legislative authorities to request, require, receive and accept information and evidence be expressly stipulated to extend to information subject to solicitor-client privilege where such information is relevant to its disposition of the complaint, subject to any appropriate and necessary safeguards on the treatment of such information.

F. Easing Evidentiary Restrictions for Public Interest Hearings

In the context of a public interest hearing, the MPCC is authorized per NDA s. 250.41(1)(*c*) "to receive and accept any evidence and information that it sees fit, whether admissible in a court of law or not." Such a relaxation of traditional formal rules of evidence is typical for administrative tribunals, especially those with an investigative versus adjudicative mandate like the MPCC. However, the next provision of the Act, NDA s. 250.41(2) proceeds to enumerate important exceptions to the relaxed evidentiary standard enunciated in subsection (1). As a result, the MPCC is presently precluded from receiving or accepting, even on consent, the following categories of evidence:

> *250.41(2): …*
>
> *(a) any evidence or other information that would be inadmissible in a court of law by reason of any privilege under the law of evidence;*
>
> *(b) any answer given or statement made before a board of inquiry or summary investigation;*
>
> *(c) any answer or statement that tends to criminate the witness or subject the witness to any proceeding or penalty and that was in response to a question at a hearing under this Division into another complaint;*
>
> *(d) any answer given or statement made before a court of law or tribunal; or*
>
> *(e) any answer given or statement made while attempting to resolve a conduct complaint informally under subsection 250.27(1).*

MPCC takes no issue with the restrictions in paragraphs 250.41(2)(c) or (e), and its objections concerning the restriction in paragraph 250.41(a) are addressed in sections II) D and E (above) of these submissions.

However, in the MPCC"s view the restrictions in paragraphs 250.41(2)(b) and (d) are overbroad and unnecessary. The prohibitions are overbroad in that they are not confined to only incriminating information regarding the witness. The prohibitions are also unnecessary because in any event, given the non-adjudicative nature of MPCC"s proceedings, one cannot truly be incriminated in respect of such proceedings. To the extent the protection against self-

incrimination is truly relevant to MPCC proceedings, any necessary protection for witnesses is already provided in s. 13 of the *Canadian Charter of Rights and Freedoms*.

Moreover, the prohibitions apply equally to uncontested factual background matters as to contested issues. To the extent that they even preclude cross-examination on such earlier evidence, these prohibitions reduce tools available to assess witness reliability, and thereby impede the Commission‟s ability – and that of other parties to hearings – to uncover the truth. The requirement to require original witness evidence, rather than utilize existing testimony, even on uncontested issues, is also contrary to the MPCC‟s obligation to conduct its proceedings as informally and expeditiously as possible.

There is no parallel to the evidentiary restrictions in paragraphs 250.41(2)(*b*) or (*d*) in other federal legislation, even in Part VII of the RCMP Act, on which NDA Part IV was modeled. The equivalent RCMP Act provision to NDA s. 250.41(2)(*b*), s. 45.45(8)(*b*) is limited to incriminating information, and there is no RCMP Act equivalent to NDA s. 250.41(2)(*d*). Nor will Bill C-38 make any changes which affect this comparison.

MPCC commissioned an external legal opinion by administrative law expert Mark J. Freiman of Lerners LLP in Toronto on the scope of the evidentiary restrictions in NDA s. 250.41(2). In his opinion, Mr. Freiman concluded that the restrictions in NDA s. 250.41(2)(*b*) and (*d*) are neither appropriate nor necessary in the context of an MPCC public interest hearing (MPCC Book of Authorities, vol. III, tab 52).

13. ***MPCC proposes that the evidentiary restrictions on the MPCC receiving or accepting answers given before board of inquiries, summary investigations and previous tribunal proceedings, per NDA paragraphs s. 250.41(2)(b) and (d), be repealed.***

III) FAIR AND EFFICIENT PROCEDURES

A. Expand Access to Informal Resolution of Complaints

MPCC supports a greater use of informal resolution to resolve complaints under NDA Part IV. In the Commission‟s view, the restrictions on the use of informal resolution by the CFPM in respect of conduct complaints, set out in s. 3 of the MP Conduct Complaint Regulations (MPCC Book of Authorities, vol. I, tab 21), are excessive and should be revisited.

Many conduct complaints relate to MP policies (s. 3(*d*)), and the prohibitions on informally resolving complaints regarding "excessive use of force" and "the arrest of a person", not all of which are so serious that the possibility of informal resolution must be precluded, appear excessive. Furthermore, the precluded category of complaints concerning "abuse of authority" can be construed as covering fairly minor complaints about the exercise of police enforcement discretion, such as in the issuance of parking or traffic tickets.

However, greater use of informal resolution of conduct complaints must not come at the expense of the intended oversight of the handling of MP conduct complaints. Internally, the CFPM must continue to be engaged in all cases, even where the conduct of informal resolution is delegated to local MP authorities. MPCC must also continue to be advised of all complaints, including those resolved informally, as well as the terms of such resolutions. After all, even where individual

complainants may be satisfied with a resolution, broader systemic concerns may require further action, and the MPCC‟s public interest mandate is not contingent on the complainant‟s continued participation in the process (NDA s. 250.38(2)). In Bill C-38 of the previous Parliament, the proposed RCMP Review and Complaints Commission would have to be notified of the terms of any informal resolution of a complaint (proposed new RCMP Act s. 45.54(3): MPCC Book of Authorities, vol. I, tab 4). Similar requirements apply in respect of police complaints at the provincial level in Ontario[26] and British Columbia[27].

Furthermore, as with the definition of "policing duties or functions," and for similar reasons, MPCC considers that the categories of complaints for which informal resolution is precluded could also easily be set out in the Act itself, rather than in regulations.

MPCC also considers that the Commission should have similar powers to conduct informal resolution of interference complaints. In a number of instances where interference complaints have triggered formal MPCC investigations and reports, issues of lack of communication between the parties to the complaint and misunderstanding of command motivations and intentions, as well as of MP duties and responsibilities, clearly contributed to the filing of the complaint. An opportunity in appropriate cases for informal discussion between the affected parties could increase mutual understanding and appreciation of roles, responsibilities and intentions, and possibly avoid the need for formal investigations and findings (which are, after all, reported to very senior CF and DND leadership levels) in some cases.

14. ***MPCC proposes that the categories of conduct complaints for which informal resolution is precluded in s. 3 of the* Complaints About the Conduct of Members of the Military Police Regulations *be reduced and that any such exclusions be stipulated in the Act itself.***

15. ***MPCC proposes that the MPCC be notified of the terms of any informal resolutions of conduct complaints.***

16. ***MPCC proposes that the MPCC be authorized to have recourse to informal resolution in respect of interference complaints.***

B. Extending Right of Review to Subjects of Conduct Complaints

During its outreach program of visits to CF bases and MP units, a common complaint about the current conduct complaints system by MPs is that only a dissatisfied complainant may request a review of a complaint by the MPCC following initial disposition by the CFPM. This is viewed as a fairness issue by many MPs.

The MPCC appreciates the rationale behind the legislative decision to extend a right of review only to complainants. If an MP is sanctioned in any way as a result of a conduct complaint found to be substantiated by the CFPM, that MP has internal MP and CF means of challenging those sanctions: the MP Credential Review Board, CF grievance process, etc.; however, there is no comparable CF mechanism for a complainant to challenge the CFPM‟s disposition of a complaint.

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[26] *Police Services Act*, R.S.O. 1990, c. P-15, ss. 66(4)-(6) (MPCC Book of Authorities, vol. I, tab 15).
[27] *Police Act*, R.S.B.C. 1996, c. 367, s. 163 (MPCC Book of Authorities, vol. I, tab 9).

On the other hand, the MPCC would point out that, while there may be internal mechanisms for MPs to challenge sanctions imposed on them, these do not necessarily apply to findings by the CFPM which merely reflect adversely on an MP‟s conduct, but which do not lead to further action. A right of review for subjects would give them the opportunity to challenge adverse findings regarding their conduct, independent of any challenges to remedial measures taken against them. Also, unlike the various internal CF challenge mechanisms available to subject MPs, complainants have a voice in MPCC reviews of their complaints.

Presently, where a subject MP feels that they have been treated unfairly in the initial CFPM investigation of a conduct complaint against them, their only recourse under NDA Part IV is to file their own conduct complaint against the CFPM‟s DPM PS investigators. However, such fresh conduct complaints must first be referred to the CFPM for disposition before they may be reviewed by the MPCC. This is a rather inefficient process, and one in which the complainant subject member is unlikely to have much confidence, given that the CFPM will be called upon to assess his own investigative process. It would be much more efficient for the dissatisfied subject MP to be able refer the matter directly to the MPCC for a review. This is especially the case where the MPCC is already going to be called upon to conduct a review of the underlying complaint at the request of the original complainant.

17. ***MPCC proposes that a right to request a review by MPCC of a conduct complaint be extended to the MP subject of the complaint.***

C. Time Limit for Requesting Review

Pursuant to section NDA s. 250.2, there is a time limit of one year (after the events giving rise to the complaint) for a person to make a conduct or interference complaint, which can be extended by the Chairperson when considered reasonable in the circumstances. Under the legislation, there is presently no time limit provided for requesting a review of a conduct complaint after it has been investigated by the CFPM. MPCC considers that the stipulation of a default time-limit for requesting a review of a conduct complaint under NDA s. 250.31 would be appropriate, subject to the MPCC Chairperson‟s discretionary authority to extend any such time limit, as with the initial receipt of complaints.

The Commission advises, however, that given the mobility of possible complainants and subjects in the CF, and their liability to be deployed around the world for months at a time (presently, overseas combat postings, such as to Afghanistan, are for six month tours), in difficult and dangerous environments, a generous default time-limit would be appropriate.

18. ***MPCC proposes that a time-limit for requesting a review of a conduct complaint, subject to extension by the MPCC Chairperson, be adopted. In the MPCC's view, a default time-limit in the range of 120-180 days would be reasonable in the circumstances.***

D. Authorize MOU with CFPM re Parallel Investigations

In many cases, it may well be most appropriate to put administrative investigations, such as MPCC complaint investigations, on hold pending the completion of police investigations regarding the same events. However, in other instances, it is not necessary to hold such administrative investigations completely in abeyance pending the completion of related law

enforcement investigations, at least where provision can be made for appropriate coordination of investigative processes.

It is, of course, imperative that administrative investigative processes, like those conducted by MPCC, not do anything to impede or compromise the integrity of a police investigation or ensuing prosecution. At the same time, it is important not to unduly discount society‟s interest in timely administrative investigations which may provide an important forum for restoring public confidence in an institution (in the interest of the public as well as the members of the institution in question) and providing forward-looking recommendations to prevent future problems. Moreover, police investigations can take a long time, especially in complex cases, a problem exacerbated in the military police context where access to dangerous operational environments – with all the logistical challenges inherent therein – may be necessary, and perhaps on multiple occasions.

MPCC has had a successful experience with a coordinating arrangement which allowed it to make meaningful progress in an important public interest investigation while a parallel CFNIS investigation was ongoing (see the MOU included as an annex to these Submissions). The MOU developed between MPCC and CFNIS in that case provided generally for the timely sharing of information by CFNIS with MPCC, on condition of confidentiality pending completion of the CFNIS investigation, and that MPCC witness interviews would be conducted only after CFNIS was finished with a particular witness.

While MPCC does not consider that it necessarily requires express legislative authority to enter into such MOUs, it would nonetheless be helpful to have such authority made explicit. Such explicit authority would serve to remind relevant stakeholders of the possibility of parallel investigation by MPCC, and would also enhance the legitimacy and authority of measures agreed to by MPCC pursuant to such arrangements.

19. ***MPCC proposes that it be expressly authorized to enter into Memoranda of Understanding with relevant law enforcement entities in order to facilitate the conduct of parallel investigations in appropriate cases.***

E. Expressly Provide for Limited Standing at MPCC Hearings

In the context of a public interest hearing, NDA s. 250.44 presently requires the MPCC to grant full participation rights – that is, "full and ample opportunity, in person or by counsel, to present evidence, to cross-examine witnesses and to make representations" – to the parties to the complaint, and to "any other person who satisfies the Complaints Commission that the person has a substantial and direct interest in the hearing".

There have been situations where a person or entity, while demonstrating a "substantial and direct interest" in some particular aspect of a hearing, does not have such an interest in respect of other aspects of the hearing. However, the present wording of NDA s. 250.44 does not expressly contemplate the Commission being able to tailor a party‟s participation rights to the witnesses and issues to which their interest pertains. Such a lack of precision in the Commission‟s legislative authority puts the Commission in the difficult position of either granting a party the full right to cross-examine witnesses and make oral submission, even on matters beyond the scope of their interest – and thus risk unduly lengthening the hearing process – or granting no

rights of participation. The option of granting rights on a limited basis, not being provided for in the legislation, could lead to a challenge on judicial review.

It should be noted that the issue raised here is distinct from that relating to the granting of limited, intervenor-like participation rights to persons and entities who may have interests and expertise relative to matters in a public interest hearing, but who fall short of having a "substantial and direct interest" in the case. The Commission considers that its implied statutory authority is adequate to address these types of applications for standing.

> ***20. MPCC proposes that it be expressly authorized to grant more limited standing and participation rights to parties who demonstrate a substantial and direct interest in only certain aspects of a public interest hearing.***

F. Accessibility and Judicial Review Respondent Status

While not subject to appeal, decisions by the MPCC – which would include its findings and recommendations in its reports on complaints – are reviewable in the Federal Court by way of application for judicial review pursuant to s. 18.1 of the *Federal Courts Act*. Presently, by virtue of Rule 303 of the *Federal Courts Rules*, the MPCC, like other "tribunals", is presumptively not a proper respondent to such an application. Rather, the MPCC"s decisions are presumptively to be defended by the Attorney General of Canada. Only where the Court is satisfied, on a motion by the Attorney General of Canada that the Attorney General is "unable or unwilling to act as a respondent", may the Court substitute the "tribunal" (i.e., MPCC) as a respondent.

The text of Rule 303 of the *Federal Courts Rules* reads:

> Respondents
>
> 303. *(1) Subject to subsection (2), an applicant shall name as a respondent every person*
>
> *(a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or*
>
> *(b) required to be named as a party under an Act of Parliament pursuant to which the application is brought.*
>
> Application for judicial review
>
> *(2) Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent.*
>
> Substitution for Attorney General
>
> *(3) On a motion by the Attorney General of Canada, where the Court is satisfied that the Attorney General is unable or unwilling to act as a respondent after having been named under subsection (2), the Court may substitute another person or body, including the tribunal in respect of which the application is made, as a respondent in the place of the Attorney General of Canada.*

Although for the purposes of the judicial review regime established under the *Federal Courts Act*, the Commission is treated like any other administrative "tribunal", the Commission is quite distinct from the classical quasi-judicial paradigm on the spectrum of administrative bodies which may hold hearings. In addition to functioning in an inquisitorial, non-adversarial and non-adjudicative process, most often without the recourse to hearings, the Commission is expressly charged by NDA s. 250.14 to dispose of its cases as informally and expeditiously as possible in the circumstances.

In the Commission‟s view, it is somewhat anomalous that individual parties to complaints in this type of informal inquiry-like process should run the risk of having to defend Commission decisions in the Federal Court. Yet, in terms of the relatively limited experience to date with judicial reviews of MPCC decisions, complainants in particular have encountered this burden. This poses significant problems in terms of access to the complaints process for complainants, as most complainants will not have the expertise or resources necessary to participate meaningfully in the judicial review process, which will, in cases of jurisdictional challenges, often be engaged at the outset of the Commission process in dealing with their complaint.

Thus far, judicial review applicants in the form of private individuals – all former complainants to date – have tended to name either the Commission itself or the Attorney General as respondent. In these instances, where the Commission has been named, the Attorney General has (appropriately in the Commission‟s view) taken the position that he should be substituted as respondent pursuant to R. 303(2) of the *Federal Courts Rules*.

However, the Attorney General has taken a different view of the matter in those instances where the Attorney General either has been, or has represented, the judicial review applicant(s). In those cases, the Attorney General has named the complainant as sole respondent in its challenge to the legality of Commission decisions in respect of complaints. In other words, contrary to its position when not otherwise engaged with MPCC proceedings, the Attorney General has tended to view at least MPCC complainants as proper respondents per R. 303(1) when it is the one challenging MPCC‟s actions.

It should be noted that in those cases where it has been the one challenging MPCC‟s decisions, if the Attorney General had held to the view taken in the other cases, that parties to MPCC complaints were not "directly affected" by the proceedings and thus not proper respondents per R. 303(1), the Attorney General would have had little choice but to invoke R. 303(3) and move to substitute the MPCC as respondent. After all, R. 303 cannot be construed so as to allow the Attorney General to act as both applicant and respondent in a judicial review application.[28]

In the MPCC‟s view, there is no legal basis for the variations in the Attorney General‟s practice in this regard: complainants and subjects of complaints before MPCC either are, or are not, proper respondents in legal challenges to its decisions. The Commission‟s view is that they are not, or at least that they should not be required to fulfill this role on their own. The role per R. 303 of the Attorney General in acting as a sort of "gate-keeper" on tribunal involvement in judicial review applications in respect of their decisions is somewhat problematic when the Attorney General is the judicial review applicant. MPCC does not believe that R. 303 was

[28] See, e.g.: *Canada (Attorney General) v. Canada (Information Commissioner)*, 2000 CanLII 16342 (Fed. T.D.), at paragraphs 64-65 (MPCC Book of Authorities, vol. II, tab 29).

intended to provide the Attorney General, as a litigant, with a special right of election as to who it should face when it challenges a tribunal decision.

While the MPCC understands the legal policy basis for the reluctance to grant tribunals the standing to defend their own decisions on judicial review, the Commission respectfully considers that this policy, and its jurisprudential underpinnings, are really properly directed toward bodies which discharge more court-like adjudicative roles and operate in a more adversarial manner.[29]

MPCC, by contrast, plays a role akin to that of a public inquiry: it investigates an incident and reports non-binding findings and recommendations. While its investigative activities are triggered by a complaint made by a complainant and directed at the conduct of another person, the subject of the complaint, there is never any *lis*, or legal dispute or contest, between those "parties" to the complaint, and the Commission by itself and on its own initiative determines its process and the extent and manner of its investigation and its disposition of the complaint. The Commission can neither award anything tangible to the complainant, nor sanction the subject of the complaint.

The non-adjudicative nature of inquiries, and by extension inquiry-like bodies such as MPCC, is made abundantly clear in the 1997 Supreme Court decision in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)* (MPCC Book of Authorities, vol. II, tab 27),[30] where Cory J., for a unanimous Court observed (at paragraph 34) that:

> *A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter.*

Since the parties to the complaint "get" nothing in the way of a legally-recognized interest (apart from any resulting reputational effects) from the Commission‟s investigation and report, they cannot be presumed to have the same interest or motivation to defend the Commission‟s decisions, in contrast to parties to adjudicative processes.

Similarly, the inquisitorial nature of the Commission‟s processes means that parties to the complaint generally have no involvement in, or responsibility for, such decisions. As such, it is unfair to expect them to defend Commission decisions.

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[29] See, e.g.: David Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at p. 457 (MPCC Book of Authorities, vol. III, tab 51); and *B.C.T.F. v. British Columbia (Information & Privacy Commissioner)* (2005), 2005 CarswellBC 2650, 2005 BCSC 1562, 34 Admin. L.R. (4th) 78 (B.C.S.C.) (MPCC Book of Authorities, vol. II, tab 24).

[30] [1997] 3 S.C.R. 440, 1997 CanLII 323 (S.C.C.), 1997 CarswellNat 1387 (MPCC Book of Authorities, vol. II, tab 27).

This was, in effect, the view of the Federal Court in the context of a motion to add certain parties with standing before the Krever Inquiry into Canada‟s blood system – including parties served with a notice of adverse findings – as respondents in a judicial review application of the commission of inquiry‟s decisions (MPCC Book of Authorities, vol. II, tab 28). In construing and applying Rule 1602(3) of the former *Federal Court Rules* (the predecessor provision to R. 303 of the present Rules), Richard J. held that:

> *The Commission is inquisitorial in nature and, in my opinion, the result of this is that it has not been called upon to conduct a proceeding such as is contemplated by Federal Court Rule 1602(3) involving a decision between conflicting parties.*[31]

As a result, parties with standing before the inquiry, including those whose conduct was being investigated and reported on, were not proper parties to such a judicial review application.

There are many practical and policy reasons why the parties to an MPCC proceeding should not be considered the only appropriate respondents in judicial review proceedings challenging the Commission‟s jurisdiction or decisions. The Part IV regime was designed to provide eventual complainants with access to a process for resolving their complaints that would limit unnecessary formality and expense. Imposing a burden on complainants to participate in costly and complex court proceedings examining the limits of the Commission‟s jurisdiction or reviewing its decisions would considerably reduce the accessibility to the complaints system for the complainants. Many complainants will not have the knowledge or financial means to participate meaningfully in such court proceedings, and forcing them to do so in order to obtain resolution of their complaints would effectively exclude them from the system altogether. Further, many complainants will not have an interest in addressing any of the broader issues that may be raised in court proceedings about the Commission‟s overall jurisdiction and powers. As such, they will not be in a position to present the Court with all necessary information and arguments about the impact of potential judicial review decisions on the Commission‟s ongoing work.

For example, in the recent judicial review proceedings respecting the complaints about the Afghan detainee transfers, the complainants acted as respondents while the MPCC‟s participation was limited to that of an intervener status (with limits imposed on the issues it could address). In that case, the complainants, Amnesty International Canada and the British Columbia Civil Liberties Association, were institutional complainants who were able to obtain legal representation and to present a meaningful response to the judicial review application. However, the complainants‟ interests were limited to the facts surrounding their own complaints, and did not include consideration of the broader impact the case could have for the MPCC‟s mandate and work in other cases. Because of its limited intervener status, the Commission did not receive an opportunity to fully expand on all of the practical difficulties and potential consequences for its mandate and for civilian oversight of military policing of the various approaches proposed by the Attorney General to define the policing duties and functions subject to oversight. The potential implications of the Federal Court decision for other Commission cases, which are discussed above, could not be brought to the Court‟s attention by the Commission in the context of the proceeding. Further, when the MPCC sought leave to appeal the decision in order to clarify

[31] *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)* (1996), 1996 CarswellNat 347, 109 F.T.R. 144, at paragraph 5 (MPCC Book of Authorities, vol. II, tab 28).

some of those points, this was denied by the Federal Court of Appeal, in part because none of the parties to the proceedings elected to appeal.

On the other hand, while the MPCC considers that it is certainly preferable to have the Attorney General as respondent to a judicial review of its decisions, rather than a party to the complaint, there are also problems with this approach.

Given that the Attorney General is also the default legal advisor (along with the JAG) to those who are the subject of MPCC complaints, it potentially raises the appearance of a conflict-of-interest, at least in some cases, for the Attorney General to also be charged with defending MPCC decisions. The potential for such a conflict-of-interest also explains why MPCC legal counsel positions are, by exception, staffed with non-Department of Justice counsel. If it were otherwise, at least the appearance of MPCC‟s true independence from CF and DND would be compromised.

While the present rules do not preclude MPCC participation in judicial reviews of its decisions as an intervener, the Federal Court‟s decisions regarding when, and the extent to which, the Commission will be allowed to participate in judicial review proceedings (including any appeals) are highly discretionary and at times somewhat restrictive.

MPCC does not seek to prevent complainants and subjects of NDA Part IV complaints from participating or being named as respondents in judicial reviews of MPCC decisions. Rather, MPCC‟s concern is that, given the investigative (versus adjudicative) and inquisitorial (versus adversarial) nature of MPCC‟s processes, these parties should not be obliged to shoulder the burdens of doing so. As such, MPCC‟s view is that the NDA should require that the Commission be named as a respondent in judicial reviews of its decisions, but that the Act should be silent on the judicial review respondent status of parties to complaints.

It may be noted that the *Access to Information Act* and *Privacy Act* currently provide for the possibility of standing for, respectively, the Information Commissioner and the Privacy Commissioner, in reviews of decisions of federal departments and agencies against the release of information requested under those Acts (MPCC Book of Authorities, vol. I, tabs 7 and 6).[32]

> ***21. MPCC proposes that it be required to be named as a respondent in judicial reviews of its decisions.***

G. Automatic Extension of Members' Terms Where Cases Ongoing

The MPCC believes that it is inefficient and unfair to parties to complaints to have to either change the Commission Member(s) assigned to decide on a complaint, or redo certain stages of the process, to deal with instances where an assigned Member‟s term expires before completion of the complaints process in the context of a particular file. The Commission considers that it would be fair, efficient and appropriate for Member‟s terms to be automatically extended in respect of any outstanding files assigned to them prior to notification of their non-renewal as Members.

[32] *Access to Information Act*, s. 42 and *Privacy Act*, s. 42 (MPCC Book of Authorities, vol. I, tabs 7 and 6).

This issue is a particular concern in the context of public interest hearing files and other complex complaint investigations which are at an advanced stage at the end of the Member‟s term. Such provision would also enhance the integrity of MPCC‟s processes by countering any possible perception of political interference.

A precedent at the federal level of such a legislative provision may be found in s. 8(3) of the *Canada Transportation Act*, which authorizes the Chair of the Canadian Transportation Agency to allow a Member of the Agency to finish disposing of any matter that was before him or her on the expiry of that member‟s term of office (MPCC Book of Authorities, vol. I, tab 8).

> ***22. MPCC proposes that the terms of Commission Members be automatically extended in respect of complaint files assigned to them prior to the Member's notification that their term will not be renewed, pending the completion of those complaint cases.***

IV) MILITARY POLICE INDEPENDENCE

A. CFPM-VCDS Reporting Relationship

Effective April 1, 2011, a new MP command and control structure came into effect which, for the first time, brought all MPs under the command of the CFPM. In respect of military operational duties of a non-policing nature, MPs will continue to fall under the command of operational commanders. This is undoubtedly an important and welcome step forward in terms of the independence of military policing. However, in the Commission‟s view, further steps of a legislative nature are required to appropriately support and assure proper MP independence.

While the scope and quality of MP independence does not directly affect the functioning of the NDA Part IV complaints process, or the ability of the MPCC perform its mandate therein, it is nonetheless a matter of obvious interest and concern to the Commission.

The Commission is, after all, exclusively mandated to deal with complaints about improper interference in MP investigations. The creation of the novel interference complaint mechanism in Bill C-25, along with the creation of an independent civilian body to investigate such complaints (MPCC), were key elements in the post-Somalia package of reforms aimed at enhancing the independence and integrity of military policing, alongside other elements which addressed MP professionalism more generally (the MP Code of Conduct, the conduct complaint process, etc.). Other relevant non-statutory initiatives in this time period included the creation of the CFNIS and the establishment of the *VCDS-CFPM Accountability Framework* (MPCC Book of Authorities, vol. I, tab 22).

In establishing an MP unit whose members would focus full-time on investigations and who had a unique mandate to investigate "serious and sensitive" service and criminal offences, the creation of the CFNIS was obviously intended to support the goal of enhancing MP professional competence. However, it was also intended as a means of supporting MP policing independence where it was most important to do so. This is reflected in both the fact that the CFNIS was put outside the normal operational chain of command and put under the direct command of the CFPM, and in the fact that CFNIS members were authorized to lay service charges, an authority hitherto and otherwise restricted to the suspect‟s chain of command (MPCC Book of Authorities, vol. I, tab 19).

Of course, it was recognized that, at least to a certain extent, the independence, vis-à-vis the operational military chain of command, of the CFNIS (and, in turn, the "serious and sensitive" investigations they conducted) was ultimately only as good as that afforded to its commander, the CFPM. Two things were done to address this issue. First, command over the CFPM was placed at an unusually high level in the CF hierarchy: the VCDS. There are likely few, if any, other instances in the CF where an officer"s official chain of command has him or her reporting directly to someone fully three rank levels higher. Second, it being recognized that some formalized adaptation of the typical command relationship was appropriate, a special protocol was developed to govern the reporting relationship of the CFPM vis-à-vis the VCDS: the 1998 *Accountability Framework*.

The *VCDS-CFPM Accountability Framework* was signed on March 2, 1998 by the VCDS and CFPM of the day. Its stated intent was to "ensure the provision of a professional and effective military police service", and to recognize the "complementary objectives" of "the primacy of operations" and "the need for [military police] independence in investigations". Toward those ends, while confirming the authority of the VCDS to "give orders and general direction to the CFPM to ensure professional and effective delivery of policing services…", the Framework 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 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 (MPCC Book of Authorities, vol. III, tab 54).

In the First Independent Review of the Bill C-25 NDA amendments, the later former Chief Justice Lamer noted the "surprising" "legislative omission" in failing to establish the position and role of the CFPM in the NDA and considered the situation "contrary to Bill C-25"s goal of ensuring independence of key actors in the military justice system from influence or interference…"[33] (MPCC Book of Authorities, vol. III, tab 44). As such, Mr. Lamer recommended that that this be remedied by amending the NDA so as to define the various roles and relationships of the CFPM.[34] Mr. Lamer clearly took account of the *Accountability Framework*. He did not explicitly endorse its contents, but he did not raise any substantive concerns with it either. Rather, his main preoccupation regarding the *Accountability Framework*

[33] The First Independent Review by the Rt. Hon. Antonio Lamer P.C., C.C., C.D., September 3, 2003, at p. 74 (MPCC Book of Authorities, vol. III, tab 44).
[34] *Ibid.*, at p. 75 (Recommendation 58).

seems to have been the inadequacy of its non-legislative status to protect the CFPM"s independence.[35]

Since 2006, three different bills have sought to address the question of the statutory role of the CFPM and his/her reporting relationship with the VCDS. Bills C-7 (39th Parliament, 1st Session), C-45 (39th Parliament, 2nd Session), and C-41 (40th Parliament, 3rd Session) all died on the Order Paper at the end of their respective parliamentary sessions. The Commission has been given no reason to doubt that similar legislation will be tabled in the present parliamentary session.

The Commission certainly supports the move to legislatively enshrine the office of CFPM and the definition of the CFPM"s roles, duties, qualifications, and reporting relationships. However, the Commission notes that, in addition to providing this necessary legislative recognition and protection to the office of CFPM, as contemplated by Mr. Lamer, the bills proposed to date have included an express authority for the VCDS to issue directions to the CFPM in respect of particular investigations.[36]

Such a power over the CFPM by the VCDS in respect of MP investigations was not anything recommended, or even contemplated, by Mr. Lamer in his review. Nor is it consistent with the proposals of previous studies of military justice and military policing in 1998 and 1997 by LGen (Ret"d) Belzile and the late former Chief Justice Brian Dickson (MPCC Book of Authorities, vol. III, tabs 45 and 54). Indeed, the authority in question would clearly contradict and abrogate the terms of the 1998 *VCDS-CFPM Accountability Framework*. The Commission is unaware of any studies or reports suggesting that the terms of the *Accountability Framework* have proven to be problematic in allowing for legitimate and appropriate chain of command oversight of military policing. Given that the *Accountability Framework* provides for annual review, presumably it would have been modified or rescinded if there had been significant problems with it. The Commission is unaware of any such developments.

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 (MPCC Book of Authorities, vol. II, tab 40), 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*

[35] *Ibid.*, at pp. 74 – 75.
[36] See, e.g.: Bill C-41, *Strengthening Military Justice in the Defence of Canada Act*, Parliament of Canada, (40th Parl., 3rd Sess.), clause 4, proposed new s. 18.5(3). The relevant text of the two predecessor bills was the same in this respect.

> *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:*
>
>> *I have no hesitation, however, in holding that, like every constable in the land, he [the Commissioner of Police] should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act 1964 the Secretary of State can call on him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone. [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 the fact that in 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 (MPCC Book of Authorities, vol. III, tab 53), distinguished criminal and public law scholar, Professor Kent Roach of the University of Toronto Faculty of Law, concluded that the authority proposed in Bill C-41, clause 4, 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.

The Commission well appreciates that there are important differences between military and civilian policing. For instance, military police perform other military duties of a non-policing nature. However, in the Commission"s view, this fact does not diminish the applicability of the legal principle of police independence to the military police when they are conducting law enforcement investigations. Indeed, if the notion of independence of police investigations was not thought to be applicable to the military police, then one must question why Parliament created the interference complaint mechanism in NDA subsection 250.19(1).

In deliberations on the latest bill dealing with this matter, Bill C-41, departmental officials sought to justify the proposed authority for the VCDS on the grounds that it is necessary to deal with exceptional circumstances where the imperatives of military operations need to take precedence over law enforcement and optimal investigative practices and procedures. For its part, the Commission considers that proposed authority, certainly in the manner drafted to date, is unnecessary and overbroad in respect of such a scenario for the following reasons:

1. Even if the CFPM insisted, against the wishes of the operational chain of command, on the need to conduct an investigation in a particularly dangerous combat zone, it is the chain of command, and the not the CFPM, who controls the military resources and logistical support that would be necessary to enable such an investigation. The CFPM is simply not in a position to force an MP investigation against the will of the chain of command in an intensive operational environment.

2. Even without express statutory authorization, the VCDS, as the CFPM"s superior, retains command authority over the CFPM and, as such, already has authority to issue any legitimate instructions to the CFPM.

3. The proposed authority in subsection 18.5(3) is unlimited and contains no language restricting it to exceptional circumstances such as described above.

These officials have also suggested that any potential adverse effects of the proposed authority for the VCDS in respect of specific investigations is alleviated by the requirement, in proposed subsection 18.5(4), that the CFPM would have to make any such instructions "available to the public", and by the possibility that the CFPM could file an interference complaint with the MPCC against the VCDS.

For the following reasons, the Commission disagrees with this assessment:

1. The notion of making the instructions "available to the public" is not very specific. Strictly speaking, this requirement could be satisfied simply by permitting those members of the public who are aware of such instructions to inspect them at NDHQ.

2. There is no indication that the CFPM would not be subject to direction from the VCDS in selecting the method or timing of making such instructions available to the public.

3. The exception to the publication requirement in proposed subsection 18.5(5) – "if the Provost Marshal considers that it would not be in the best interests of the administration of justice" – is highly subjective and vague.

4. In any event, publication of such an instruction after the fact does not actually undo the mischief of intruding on the integrity and independence of a military police investigation in the first place.

5. It is likely that the proposed authority for the VCDS in subsection 18.5(3) would, in whole or in part, trump the interference complaint provision in current NDA subsection 250.19(1). While the CFPM could still make a complaint, it is difficult to see how the Commission could conclude that an instruction issued pursuant to statutory authority was "*improper* interference". Tort law – or, in Québec, the law of delicts or extra-contractual obligations – does recognize a doctrine of abuse of statutory authority, also known as misfeasance in public office, whereby officials may be liable in respect of unreasonable exercises of statutory authority which fall outside the contemplated purposes of the enactment. However, even assuming that this doctrine of civil liability has the effect of „reading-down" the scope or meaning of the statutory provision in question – which is far from clear – it seems likely that this doctrine would only address the more egregious abuses of the proposed authority. Yet the notion of "improper interference" in NDA subsection 250.19(1) has always been considered by the Commission to cover a broader range of conduct than deliberate misfeasance. If this were not the case, the interference complaint mechanism would offer little added assistance to military police in protecting the independence and integrity of their investigations beyond that provided by the criminal offence of obstruction of justice.

The proposed authority for the VCDS over the CFPM appears to be modeled after the present section 165.17 of the NDA dealing with the reporting relationship between the Judge Advocate General (JAG) and the Director of Military Prosecutions (DMP). As with their civilian counterparts, the independent judgment and discretion of both military prosecutors and MPs is fundamental to the fairness and integrity of the justice system.

While it is true subsection 165.17(3) of the present Act authorizes the JAG to issue instructions or guidelines to the DMP in respect of a particular prosecution, there are some important distinctions to be noted between the respective relationships of the JAG-DMP and the VCDS-CFPM. While the JAG and the DMP are both legal officers, the VCDS (unlike the CFPM) is not a peace officer. The law recognizes the legitimacy of intervention by superior peace officers and prosecutorial authorities vis-à-vis subordinate police officers or prosecuting counsel in the exercise of their discretion. However, this authority does not extend to those outside these respective professions whose members are subject to a special duty to uphold the law. Moreover, the JAG, unlike the CFPM, is insulated from the chain of command by virtue of the fact that the JAG is appointed by the Governor in Council, and is responsible directly to the Minister of National Defence, rather than to the CDS or VCDS.

Our research to date on this question indicates that the authority sought for the VCDS in respect of individual investigations is unprecedented in the context of police-executive or police-government relations, both in Canada and in those other common law countries which recognize the legal principle of police independence. Indeed, s. 31(4) of Ontario‟s *Police Services Act*, specifically prohibits local police boards from directing chiefs of police "with respect to specific operational decisions or with the day-to-day operation of the police force." Similar prohibitions are found in the policing statutes of Nova Scotia,[37] New Brunswick,[38] Manitoba,[39] and New Zealand.[40]

Furthermore, in the particular context of other military police services, we have found no equivalent express authorization for chain of command direction in specific investigations in the cases of either the UK‟s Royal Military Police or the US Army CID.

> ***23. MPCC proposes that the command relationship between the CFPM and the VCDS be statutorily defined in a manner consistent with the terms of the 1998 VCDS-CFPM Accountability Framework, and specifically in terms which avoid authorizing any external direction of the CFPM in respect of specific MP investigations.***

B. MP Access to Independent Legal Advisors

Like other CF members, MPs are typically advised on operational matters, including in respect of their law enforcement activities, by CF legal officers of the Office of the Judge Advocate General (OJAG). The potential problem with the present arrangement, from a policing independence perspective, is that OJAG lawyers also advise those whom the MPs primarily police: CF members. While other police services at various levels of government share legal advisors with government officials in respect of whom the police service exercises enforcement jurisdiction, the degree of overlap between the primary enforcement jurisdiction of MPs and the OJAG‟s client base appears to be a challenge unique to military policing.

Since Bill C-25 NDA amendments established separate divisions within the OJAG for prosecutorial and defence counsel services, CF members under MP investigation for suspected wrongdoing will have access to a separate and distinct pool of OJAG legal advisors from those who would typically advise the investigating MPs. Nonetheless, scenarios can readily be envisioned where, particularly in the case of members of higher rank or position, OJAG may already be involved in advising the member in a matter which subsequently becomes the subject of military police interest or even an actual investigation. At this earlier point, the CF member in question, who will not yet be identified as a suspect, will be advised by general OJAG counsel, rather than just those of the defence counsel services directorate. In short, MPs may be required to investigate matters which have been the subject of, or related to, OJAG legal advice.

A particular problem exists in respect of the investigative mandate of the CFNIS: serious and sensitive cases (which automatically includes those involving potential misconduct be persons of the rank of major or above), as well as all sudden death investigations within the military. The

[37] *Police Act*, S.N.S., s. 55(1) (MPCC Book of Authorities, vol. I, tab 14).
[38] *Police Act*, S.N.B., s. 3.1(2)(*c*) (MPCC Book of Authorities, vol. I, tab 13).
[39] *Police Services Act*, S.M., s. 28(4) (MPCC Book of Authorities, vol. I, tab 12).
[40] *Policing Act, 2008* (New Zealand), s. 16(2) (MPCC Book of Authorities, vol. I, tab 16).

CFNIS in particular are expected to investigate without fear or favour and to follow the evidence wherever it leads. Yet they are at present required to seek legal advice exclusively from the same organization of military lawyers who, in supporting their main institutional client (the CF chain of command), must have a particular sensitivity to anything which threatens to bring adverse publicity to the CF or DND, or which casts CF or departmental policies or decisions (particularly those taken at higher levels, in respect of which they may well have provided legal advice) in a potentially bad light, or which threatens to render the institution more vulnerable to claims of liability.

Such concerns are not solely those of the Commission, but have also been expressed by MPs themselves.

For instance, this concern was noted by the Commission in its final report in respect of its public interest investigation file MPCC 2007-003 (MPCC Book of Authorities, vol. III, tab 55). This case involved a conduct complaint regarding the treatment of three Afghan detainees who passed through CF custody in Kandahar, Afghanistan, in April 2006. The complaint related to apparent injuries to the detainees and whether these were appropriately addressed in the circumstances.

When this complaint was filed with the Commission in January of 2007, it also triggered a CFNIS investigation into the detainees treatment at the hands of CF members, including the MPs at the Task Force Afghanistan base at Kandahar Airfield. The CFNIS investigative team was headed by a case manager, who was an experienced criminal investigator seconded to the CF from the RCMP. The CFNIS case manager"s May 2008 report to the CFNIS chain of command included a section devoted to the challenges which confronted the investigation. The Commission noted and discussed these challenges in its April 2009 final report on the complaint (at paragraphs 201-217). The issues raised by the CFNIS case manager included various resource deficiencies, and some difficulties in obtaining timely cooperation with the investigation from relevant unit commanders in-theatre. One issue raised was that of a lack of access by CFNIS to independent legal advice. As the Commission wrote in its final report (at paragraph 211):

> *…in the view of the Case Manager of the CFNIS investigation, the lack of dedicated legal counsel, independent from the rest of the CF, and appropriately attuned to the CFNIS's particular needs, can serve to undermine the CFNIS's investigative independence. The Commission notes that "in-house" legal advisory services are now the norm in Canada, at least among the major civilian police services.*

While the CFNIS case manager wrote about the need for legal counsel independent from the rest of the CF, the Commission is not certain at this point as to the precise degree of independence necessary and appropriate for counsel advising the CFNIS. Moreover, the Commission is not certain as to the scale of the need for dedicated legal advisory services amongst the various MP components of the CF.

The Commission is, however, convinced that at the very least the military police should have access to a dedicated and partially autonomous legal advisory service within the OJAG structure. In the Commission"s view, such an advisory service could be similar to the current Director of Military Prosecutions and Director of Defence Counsel Services positions within the OJAG,

which were established in the Bill C-25 amendments to the NDA in 1998. Specifically, the Commission considers that the reporting relationship between the Director of Defence Counsel Services and the JAG, as set out in NDA s. 249.2 – wherein the JAG is not authorized to issue instructions or directions in respect of specific cases – would be the more suitable model for a similar OJAG Director of Military Police Advisory Services. Such a limitation would appropriately foreclose the possibility or perception of interference in MP investigative independence from or through the Office of the JAG.

24. ***MPCC proposes that the need for access to independent legal advisory services by all MPs in respect of their investigations be considered. This could be achieved through the creation of a Director of Military Police Advisory Services, modeled after the Director of Defence Counsel Services, within the Office of the Judge Advocate General to provide independent and dedicated legal support to the MP.***

V) LIST OF PROPOSALS

1. MPCC proposes that:

a) Those authorized to receive complaints per NDA section 250.21 be required to refer to the MPCC any communications received directly or indirectly by them which expresses a concern about the conduct of a military police member or about possible interference with military police activities;

b) The MPCC be given the exclusive authority, subject to the supervisory jurisdiction of the Federal Court, to determine whether a communication received by it, or referred to it by one of the other entities authorized to receive complaints per NDA section 250.21, constitutes a conduct or interference complaint for the purposes of NDA Part IV, including the authority to revisit such determinations on the basis of new information.

2. MPCC proposes that the definition of "military police" in NDA Part IV be expanded to include all those posted to MP positions.

3. MPCC proposes that the meaning of "policing duties or functions" in NDA subsection 250.18(1) should be set out in the NDA itself and clarified. In order to ensure that a sufficient degree of MP accountability is achieved, the MPCC submits that the following clarifications are necessary:

(a) A clear stipulation that the policing duties and functions subject to Part IV oversight include, but are not limited to, the enforcement of the Code of Service Discipline;

(b) A clear stipulation that the policing duties and functions subject to Part IV oversight include, but are not limited to, those related to MPs' peace officer status;

(c) A clear stipulation that the policing duties and functions subject to Part IV oversight are not limited to those that are unique to MPs;

(d) A clear stipulation that the policing duties and functions subject to Part IV oversight are not limited to those performed for the purpose of law enforcement;

(e) A clear stipulation that duties or functions can only be excluded from oversight where they are, strictly and exclusively, functions of administration, training or military operations that result from established military custom or practice; and

(f) A clear stipulation that in the interpretation of the definition of "policing duties and functions", the list of included duties prevails

over the list of excluded duties in the event of any overlap between them.

4. **MPCC proposes that it be expressly authorized to investigate and report on systemic issues related to complaints under NDA Part IV.**

5. **MPCC proposes that the category of persons who may make an interference complaint under NDA s. 250.19(1) be expanded to include persons seconded to MP positions in the CF as well as any MP or CF member (at the time of the events giving rise to the complaint) with knowledge of the events in question.**

6. **MPCC proposes that NDA s. 250.19(1) be clarified and expanded to the effect that an interference complaint may be made in respect of improper interference with any policing duty performed by MPs.**

7. **MPCC proposes that the CFPM, the CF and DND be required to disclose to MPCC all documents in their possession which may be relevant (in the MPCC's assessment) to any of its investigations (conduct, interference or public interest).**

8. **MPCC proposes that the CFPM be required to provide, on request, any information or records under his/her control or possession that the MPCC considers to be relevant to the exercise of its powers, or the performance of its duties under the Act.**

9. **MPCC proposes that its current power of subpoena in the context of public interest hearings be extended to provide for a power to subpoena any member of the military police or of the Canadian Forces believed to have information relevant to any of its complaint investigations, whether or not public hearings are held. The general power to subpoena any relevant witnesses where public hearings are held should remain unchanged.**

10. **MPCC proposes that a duty to cooperate with MPCC complaint investigations be imposed on all CF and DND personnel.**

11. **MPCC proposes that it be added to the *Canada Evidence Act* Schedule of entities which are exempted from the relevant restrictions on the receipt of "sensitive information" or "potentially injurious information" within the meaning of s. 38 of that Act.**

12. **MPCC proposes that its legislative authorities to request, require, receive and accept information and evidence be expressly stipulated to extend to information subject to solicitor-client privilege where such information is relevant to its disposition of the complaint, subject to any appropriate and necessary safeguards on the treatment of such information.**

13. **MPCC proposes that the evidentiary restrictions on the MPCC receiving or accepting answers given before board of inquiries, summary investigations**

and previous tribunal proceedings, per NDA paragraphs s. 250.41(2)(b) and (d), be repealed.

14. **MPCC proposes that the categories of conduct complaints for which informal resolution is precluded in s. 3 of the Complaints About the Conduct of Members of the Military Police Regulations be reduced and that any such exclusions be stipulated in the Act itself.**

15. **MPCC proposes that the MPCC be notified of the terms of any informal resolutions of conduct complaints.**

16. **MPCC proposes that the MPCC be authorized to have recourse to informal resolution in respect of interference complaints.**

17. **MPCC proposes that a right to request a review by MPCC of a conduct complaint be extended to the MP subject of the complaint.**

18. **MPCC proposes that a time-limit for requesting a review of a conduct complaint, subject to extension by the MPCC Chairperson, be adopted. In the MPCC's view, a default time-limit in the range of 120-180 days would be reasonable in the circumstances.**

19. **MPCC proposes that it be expressly authorized to enter into Memoranda of Understanding with relevant law enforcement entities in order to facilitate the conduct of parallel investigations in appropriate cases.**

20. **MPCC proposes that it be expressly authorized to grant more limited standing and participation rights to parties who demonstrate a substantial and direct interest in only certain aspects of a public interest hearing.**

21. **MPCC proposes that it be required to be named as a respondent in judicial reviews of its decisions.**

22. **MPCC proposes that the terms of Commission Members be automatically extended in respect of complaint files assigned to them prior to the Member's notification that their term will not be renewed, pending the completion of those complaint cases.**

23. **MPCC proposes that the command relationship between the CFPM and the VCDS be statutorily defined in a manner consistent with the terms of the 1998 VCDS-CFPM Accountability Framework, and specifically in terms which avoid authorizing any external direction of the CFPM in respect of specific MP investigations.**

24. **MPCC proposes that the need for access to independent legal advisory services by all MPs in respect of their investigations be considered. This could be achieved through the creation of a Director of Military Police Advisory Services, modeled after the Director of Defence Counsel Services,**

within the Office of the Judge Advocate General to provide independent and dedicated legal support to the MP.

ANNEX:

PROTOCOL BETWEEN THE MILITARY POLICE COMPLAINTS COMMISSION AND THE CANADIAN FORCES NATIONAL INVESTIGATION SERVICE IN RESPECT OF THE CONDUCT OF PARALLEL INVESTIGATIONS OF AFGHAN DETAINEE MISTREATMENT ALLEGATIONS