Military Police Complaints Commission of Canada

Commission d'examen des plaintes concernant la police militaire du Canada

THIRD REVIEW OF AMENDMENTS TO THE *NATIONAL DEFENCE ACT*, PURSUANT TO SECTION 273.601 OF THAT ACT:

MILITARY POLICE COMPLAINTS COMMISSION SUBMISSIONS TO THE INDEPENDENT REVIEW AUTHORITY

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PREFACE

The Military Police Complaints Commission (Commission or MPCC) is pleased to have the opportunity to participate in the third *National Defence Act* (NDA) review, now conducted under the authority of section 273.601 of that Act. As a creation of the 1998 *National Defence Act* amendments (S.C. 1998, c. 35), originally contained in Bill C-25 of the 1st Session of the 36th Parliament of Canada, the 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. The background to the creation of the Commission, as well as its current method of operation, can be found in the companion Foundational Briefing document.

During the past two decades, the public's conception of law enforcement, and its appreciation of the need for robust oversight regimes, have evolved considerably. Often, such change has been precipitated by public inquiries into specific, controversial events – such as, British Columbia's 2008-10 Braidwood Inquiry into the tasering death of Robert Dziekanski at Vancouver International Airport; and the 2004-06 federal inquiry, let by Justice O'Connor, into the role of RCMP national security officials in the rendition of Maher Arar by the US to Syria, and his mistreatment and torture there at the hands of Syrian authorities (Arar Inquiry). More recently, there have been significant social and political responses to controversial police use of force episodes, especially in the United States – but also, and increasingly, due to events here at home. The Black Lives Matter movement is perhaps the most prominent example.

The legislative regime for complaints concerning the Military Police (MP) contained in Part IV of the *National Defence Act* 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, in 2013, subsequent to the last Independent NDA Review, the *Enhancing Royal Canadian Mounted Police Accountability Act* significantly overhauled the RCMP Act.[1] This Act represented a major part of the Government of Canada's response to the recommendations of the Arar Inquiry.

Oversight bodies in other areas, such the Office of the federal Public Service Integrity Commissioner, established in 2007, have also been given robust authorities to discharge their mandates.

The MPCC is now more than 20 years old. In the two decades since its creation, both the provinces and the federal government have established new, or significantly revised, independent police oversight bodies. These newer bodies have invariably surpassed the MPCC in the strength

[1] S.C. 2013, c. 18.

of their oversight authorities. As reforms and changes in oversight continue, the MPCC falls further behind, and its relatively modest legal authorities become increasingly outmoded.

INTRODUCTION

Particular Challenges of the MP Complaint Process

The process for dealing with MP conduct complaints is a mixed, internal/external one. The CFPM has the initial responsibility for dealing with a complaint. If a complainant is dissatisfied with the result of a CFPM's Professional Standards investigation, they can ask for a review by the Commission, a civilian review agency with no police or military affiliations, save that it reports to Parliament through the Minister of National Defence. The Commission's review may go beyond looking at the adequacy of the internal police investigation and conduct an investigation *de novo.* Upon receipt of the Commission's Interim Report, the only statutory obligation imposed on Military Police authorities is that they must respond to its findings and recommendations and provide reasons for not acting on recommendations should they decide not to follow them.

This shared, internal-external model of oversight was recommended by former Chief Justice Brian Dickson in 1997, who following the Somalia Inquiry led a special advisory group constituted to review the identified issues and recommend reforms for the military justice system. In part the report stated:

> *"The current trend in police forces around the world has been to adopt an oversight process that combines an internal and external review mechanism. In order for a police chief to be held accountable, he must be given the initial opportunity to resolve the dispute internally. This allows him to control the priority of investigative resources, in addition to providing critical expertise in the form of internal investigators who have inside knowledge of the police organization. It is paramount that the police force be able to enforce internal discipline by demonstrating to its members and the public that misconduct will not be tolerated. An independent review capability is equally essential to ensure confidence and respect for the military justice system."*

This model also recognizes that, unlike civilian police services, the Military Police is a police service within a larger hierarchical organization, the Canadian Armed Forces. This means that the oversight regime needs to take into account the fact that, as part of a military force, the Military Police chain of command is expected to assume responsibility for matters of performance and discipline to a greater extent than their civilian police counterparts. This includes being subject to a separate internal penal system in the form of the Code of Service Discipline (in NDA Part III), which can impose true penal consequences on all military members. Additionally, the CFPM is charged with enforcing the *Military Police Professional Code of Conduct*, and it is he or she who controls who retains their Military Police credentials.

In this military context, it would be anomalous for a civilian agency to direct and discipline MPs in the performance of their duties.

The situation is similar to the RCMP and the Civilian Review and Complaints Commission for the RCMP (CRCC). A complaint about a member of the RCMP is first dealt with by the RCMP itself. If a complainant is dissatisfied with the resolution of their complaint, they may bring it to the CRCC for review. The RCMP has traditionally considered itself to be a para-military organization, with a command structure similar to that of the military. It too had its own internal penal code which used to impose true penal consequences.[2] Only recently, has the RCMP been allowed to unionize, like their provincial and municipal counterparts. Historically, one of the RCMP's roles was as a reserve police service in the event of a strike by local police. So for reasons similar to the Military Police, the RCMP complaint system likewise follows a two-stage approach, with complaints initially being handled in-house and only later being sent to an outside civilian agency that provides recommendations only.

This dual, internal/external complaints process under Part IV does, however, have its challenges.

The question of jurisdiction is ever-present: at the complaint-intake stage; the planning and conduct of any investigation; and the drafting of our reports. No other police oversight body faces this challenge of having only certain of the duties of its overseen police members subject to the complaints process and external oversight. This said, after twenty years, the MPCC and the CFPM have managed to chart many of the grey areas of the jurisdictional divide. Dialogue, and some disagreement, do continue however. For this reason, the MPCC is proposing it be given the task of determining (subject to the supervisory jurisdiction of the Federal Court) whether or not the MP complaints regime in NDA Part IV applies in a matter or not (see below, Proposal #7).

Another special feature of the MPCC's work is that, unlike local and provincial police oversight bodies, the scope of the MPCC's work is national and, indeed global. Moreover, being military members, MP subjects, and many of our complainants, are frequently redeployed to different locales. This inevitably affects the logistical complexity of conducting complaint investigations.

On paper, the MPCC, for the purposes of conduct complaints, is largely meant to be a body of review. However, in reality, the MPCC's role in resolving conduct complaints has been much more dynamic and intensive.

Some files are significantly more complex and voluminous than others, yet they are all counted the same for statistical purposes. Our public interest hearings, though few in number, have often been as resource-intensive as a public inquiry. For instance:

[2] See, e.g., *R. v. Wigglesworth*, 1987 CanLII 41 (SCC), [1987] 2 SCR 541.

- **MPCC 2008-042 (Amnesty International Canada & BC Civil Liberties Association) Public Interest Hearing -** A public interest hearing into a third party complaint against members of the CFNIS and the CFPM for failing to investigate Canadian Task Force Commanders for their decisions to transfer Afghan detainees to the custody of Afghan security forces knowing that there was a significant risk of torture or other abuse at the hands of those security forces. As noted elsewhere, this case was subject to significant delays due to the MPCC not being on the Schedule to the *Canada Evidence Act*, and the unwillingness of the Attorney General to proceed with a disclosure agreement for sensitive information pursuant to section 38.031 of that Act. In all, the MPCC estimates a delay of some 20 months in receiving documents pursuant to its summonses issued under NDA subsection 250.41(1). The public interest hearing was the subject of an unsuccessful judicial review application by certain of the subjects of the complaint.[3] Ultimately, the hearings proceeded with 40 witnesses heard over 47 days of hearings and dealt with numerous motions. The witnesses included those providing background information on the structure of the CAF and the Military Police, as well as a panel of experts in international law. Witnesses were also called to address apparent gaps and problems in document production. This case involved the review of thousands of pages of documents. In all, the file took four years to complete which was of great concern to the Commission. The complaint was dated June 12, 2008 and substantive hearings began on April 6, 2010 (prior to that some background and contextual evidence was called and preliminary motions were heard) following which the Final Report was issued on June 27, 2012.

- **MPCC 2011-004 (Fynes) Public Interest Hearing -** This case was the result of a complaint by the family of a deceased CAF member who had committed suicide at CFB Edmonton in 2008. The complaint challenged the professionalism and objectivity of various MP investigations into the soldier's suicide, and the potential responsibility of his unit chain of command for not adequately responding to the soldier's mental health needs, as well as the handling of matters relating to his estate. This case involved the review of some 22,000 documents and the testimony of 90 witnesses over the course of 62 hearing days. The MPCC made 96 recommendations in this case.

Moreover, some of our public interest investigations, and even ordinary conduct complaint reviews, have approached this level. A few examples will illustrate the point.

- **MPCC 2007-003 (Attaran) Public Interest Investigation -** This was a public interest investigation into a third-party complaint alleging that Afghan detainees were injured while in CAF custody in Afghanistan. This investigation involved the review of some 5,500 pages of documentation and the interviewing of 35 witnesses. This case also saw the establishment, at the instance of our then Chairperson, Peter Tinsley, of a unique

[3] *Garrick et al v. Amnesty International & BC Civil Liberties Association,* 2011 FC 1099.

protocol between the MPCC and the CFNIS, which through coordination of witness interviews and information-sharing, allowed the MPCC to commence its complaint investigation while the CFNIS criminal investigation into the underlying events was ongoing. It is most unusual for an administrative investigation such as ours to proceed in tandem with a police investigation. This enabled us to complete our investigation considerably sooner than would normally have been the case. The protocol in this case is an example of the MPCC's creativity in, and inclination towards, finding a way forward when confronted with potential obstacles.

- **MPCC 2008-018 Public Interest Investigation -** This complaint related to the treatment of persons detained by MPs for mental health purposes. This public interest investigation involved the interview of around 25 witnesses. But this case is also an example of where the MPCC's investigation included a "best practices" review. This involved the MPCC surveying the policies and practices of various other police services with regard to their policies and practices in dealing with mental health detainees. This enabled us to see how Military Police policies compared with those of other police services and to make better informed recommendations. Such best practices reviews are frequently part of our complaint reviews and investigations, as we seek to extract as much benefit from each case as we can.

- **MPCC 2015-005 (Anonymous) Public Interest Investigation** - This is an ongoing public interest investigation into a complaint about the alleged abuse of detainees by MPs in Afghanistan in 2011. This investigation has involved 71 interviews and the review and analysis of over 3000 pages of documentation. It also required considerable effort to negotiate the inspection of hundreds of boxes of deployment-related records held at Canadian Joint Operations Command Headquarters which resulted in several weeks of review by MPCC staff for relevant documents. The MPCC is currently nearing completion of its Interim Report.

- **MPCC 2016-040 (Beamish) Public Interest Investigation -** This case concerns the CFNIS investigation of historical allegations of abuse of CAF trainees in 1984. The alleged mistreatment was intense and apparently fell outside the applicable training standards. A number of participants, including the complainant, claim the experience caused or contributed to their PTSD. For this investigation, the MPCC conducted 35 interviews and reviewed over 3000 pages of documentation. The MPCC is presently preparing its Interim Report in this case.

- **MPCC 2011-046 Conduct Complaint Review** - This case concerned the CFNIS investigation of the disappearance and death of an officer-cadet at the Royal Military College. Technically, this file was an ordinary conduct complaint review. However, the disclosure was massive, as the matter had been previously subject to a number of investigations by other agencies, including the coroner's office, the OPP and the RCMP.

> Apart from conducting 39 witness interviews, the MPCC had to review some 200,000 pages of documentation (70 gigabytes of data).

Yet, unlike public inquiries, we cannot dedicate all our resources to any single large and complex case. We must continue to address all the other complaint files that are open at any given time (not to mention the non-stop corporate reporting to central agencies, which is the necessary price of our independence from DND).

Finally, the sufficiency of the first-stage complaint disposition by the CFPM's office of Professional Standards has also been problematic over the years. Frequently, when the MPCC receives a request for review, it becomes apparent that the Professional Standards response to that complaint has been inadequate: witnesses not interviewed; allegations overlooked; records not examined, etc. Sometimes, the Professional Standards disposition has been otherwise non-responsive to the complainant, e.g., by misconstruing the complaint, or unduly limiting the scope of responsibility for the impugned MP actions.

An extreme example occurred recently with conduct complaint file MPCC 2016-027. This complaint arose from a CFNIS investigation into a house fire at a base housing unit. The CFNIS investigation ruled the fire accidental, and so did not pursue charges. The case was never referred to a prosecutor. The complainant filed a conduct complaint. The CFPM's Professional Standards office determined that the CFNIS investigation was fine and dismissed the complaint. The complainant requested a review by the MPCC. After reviewing the CFNIS investigation (and the fire marshal's report, which was not in the CFNIS investigation file disclosed to us, and did not appear to have been obtained by them in the course of their investigation), the MPCC determined that there were significant problems with the CFNIS investigation – so much so, that the MPCC felt it necessary to stop its review and send the case back to the CFPM, with a recommendation that further police investigation of the fire be undertaken. This was done, with the result that an accused is presently on trial for attempted murder and arson.

Sometimes Professional Standards' disposition of a complaint has been non-responsive deliberately for policy reasons. Recently for example, Professional Standards has declined to address conduct allegations that are framed by the complainant as breaches of the *Canadian Charter of Rights and Freedoms* (the Charter), and even those which are capable of being so framed. Despite not being a court of competent jurisdiction under section 24 of the Charter, there is no reason why Professional Standards cannot address the appropriateness of the underlying conduct, without purporting to make a Charter ruling. This is the approach the MPCC takes. Complainant's should not be penalized because they happen to describe MP misconduct in legal terms.

So, given the foregoing, in practice, the MPCC frequently does more than a simple 'paper' review. Even when the MPCC does conduct a purely paper review, these can be quite labour intensive, as was the case with MPCC 2016-027, discussed above.

To address this problem, the MPCC is now proposing that it be given the authority to send complaints back to Professional Standards with binding directions as to further investigation required (see below, Proposal #18). If adopted and implemented, this reform would enable the MPCC to better manage its caseload and move away from so much *de novo* investigation of conduct complaints, and allow it to focus its investigative resources on public interest and interference cases.

Our Submissions

The general theme of the MPCC's submissions is that the system of civilian oversight of military policing needs to be strengthened to ensure the confidence of complainants, subjects, and the public. As it stands, the system is too vulnerable to criticism on the grounds that it is insufficiently robust to provide the needed level of confidence in the professionalism, integrity, and independence of military policing.

That being said, the MPCC is not challenging the fundamental nature of its oversight mandate, which is one that is advisory, rather than adjudicative or directive. The lack of binding authority, however, needs to be balanced by a more robust oversight system with access to information that is timely and adequate for the nature of the cases it is called upon to investigate. A cooperative relationship between the Military Police leadership and the Commission is important, but a credible oversight regime should not hinge on this to the extent that the current model does.

In addition to urging better and quicker access to information, the MPCC's submissions relate to enhancing the efficiency and fairness of the complaints process. Overall, our proposed changes are intended to bring the Commission into closer alignment with current best practices in police oversight.

The MPCC sees no reason why the legislative review process should not be an interactive one and, as such, the MPCC is pleased to receive feedback on its proposals from other *National Defence Act* Part IV stakeholders as well as the independent review authority, and to participate in a joint dialogue or discussion on areas of mutual concern. In past legislative reviews, a number of our proposals do not appear to have been considered or seem to have been rejected without reasons or discussion with us. For instance, in the last legislative review, when we met with Justice Lesage in respect of our June 2011 submissions, he was very much attracted to our proposal that we be given the power to classify complaints, in terms of whether or not they fell within NDA Part IV (see current proposal #7). So much so, that he requested we provide draft legislative language for implementing our proposal, which we did. However, in his report dated December 31, 2011 (but released only in June 2012), this proposal was essentially ignored, with no explanation. There were also other MPCC proposals to which Justice Lesage had seemed favourably disposed when we met with him, but which did not end up being advanced – and often not even mentioned – in his report. Apparently, something caused him to change his mind about these issues, but no concerns were raised with us, and we had no opportunity to respond to whatever difficulty or objection may have arisen. As such, the MPCC is respectfully requesting

the opportunity to respond to any reservations or criticisms regarding its proposals before the review authority finalizes his report to the Minister.

Original signed by

Hilary C. McCormack
Chairperson
Military Police Complaints Commission

Ottawa, January 7, 2021

OUR SUBMISSIONS

I. EXPANDED ACCESS TO INFORMATION

A. Introduction

1. To put it plainly, the MPCC's legal authorities to gain access to information necessary to monitor, review and investigate complaints in an effective and credible manner are inadequate, and have been for some time. Such authorities are too few in number, too narrow in scope and too dependent on the goodwill of the overseen police service leadership. More secure and expanded access to relevant information is necessary for the MPCC to provide credible and effective civilian oversight of military policing, especially in those controversial situations where external oversight is most crucial for ensuring public confidence.

2. The stakes are high. Military Police exercise important policing responsibilities in Canada and they are the only policing authority for Canadian personnel on military deployments abroad. The types of cases that Military Police can become involved with, as we know from the long and intensive mission in Afghanistan, can easily test at least the perceived integrity and professionalism of military policing, and military justice generally. This perception on the part of the larger military community and the Canadian public is vital to upholding the rule of law, and often even to the success or failure of a mission.

3. The Canadian Armed Forces Military Police call themselves 'Canada's Front-Line Police Service', and so they are. They are at once soldiers and law enforcement agents, committed to the success of the chain of command's operational missions and to upholding the rule of law. They are part of the military chain of command and yet are expected, in fact required, to use independent judgement in performing their policing duties. They need to be prepared to investigate and, in some cases arrest and charge, other military members of higher rank. Needless to say, there can at times be tensions between their duties as soldiers and as police. Reconciling these responsibilities is no doubt often an unenviable task.

4. The Military Police need and deserve an oversight body that has the capacity to independently and credibly address Military Police conduct or interference complaints, identify problems and possible solutions, and dispel unfounded allegations and suspicions.

5. There are two fundamental qualities for such a police oversight body, or indeed, any credible "watchdog"-type body: 1) operational independence from the overseen organization; and 2) clear, legislative authority to command access to relevant information from the overseen entity.

6. It is in the area of authoritative access to information where the MPCC believes there to be considerable need for improvements. Toward that end, the MPCC has developed some specific proposals to enhance its access to information. There are already established precedents for many of these legislative authorities in the area of federal police oversight, specifically in the powers conferred on the Civilian Review and Complaints Commission for the RCMP (RCMP Commission) in the 2013 amendments to the RCMP Act following the recommendations of the Arar Inquiry.

7. The MPCC does not have the power to enforce its will on the Military Police leadership. It makes only non-binding findings and recommendations. Nor does the MPCC seek such authority. Strong authorities for the MPCC to access information could be considered an appropriate trade-off for the lack of authority to intrude on military chain of command relationships.

B. Documentary Disclosure Requirements

8. Presently, the only instances where the 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 (*National Defence Act*, s. 250.31(2)(*b*)), or when it exercises its subpoena power in the context of a public interest hearing (*National Defence Act*, s. 250.41). There is no statutory right to information in respect of an interference complaint or a public interest investigation, a significant anomaly. Nor is there a statutory right to access documents in the possession of the broader Canadian Armed Forces or the Department of National Defence. The MPCC has had to rely on the goodwill of Military Police Professional Standards for disclosure in interference complaints and public interest investigations. This is unacceptable for an independent, statutory oversight body. As the Federal Court has stated regarding the MPCC: "If

the Commission does not have full access to relevant documents, which are the lifeblood of an inquiry, there cannot be a full and independent investigation."[4]

9. Furthermore, the courts have indicated that it is not an appropriate use of a discretionary public-hearing power merely to secure cooperation in the disclosure of relevant information.[5]

10. It would also help the MPCC to better discharge its mandate by allowing it to have access to Military Police records at various stages of the complaints process (Annex A - Complaints Process Chart), as does the RCMP Commission.[6] Access to records at the earlier, monitoring stage of the conduct complaints process (i.e., when a complaint is first received, or is being dealt with by the office of Military Police Professional Standards) would better enable the MPCC to monitor the internal Military Police treatment of complaints. It would also allow the MPCC to make more timely and better informed decisions on the exercise of its public interest authority to take over the handling of a complaint from the Canadian Forces Provost Marshal (CFPM), which the Chairperson is authorized pursuant to subsection 250.38(1) of the *National Defence Act* to do "at any time". More timely and informed decisions for the MPCC to intervene in the public interest would save time and duplication of effort, as between the MPCC and the CFPM.

11. The timely access to information relevant to a complaint would also help the Commission fulfill its duty to deal with all matters before it as informally and expeditiously as the circumstances and the considerations of fairness permit.[7] An early resolution of a complaint can be considered part of "a general right to procedural fairness, autonomous of the operation of any statute."[8] In the case of matters before the Commission, an inordinate delay is unfair to a complainant who wants to see the results of an impartial review as soon as possible as well as to the subject Military Police member who is exposed to a degree of risk to his or her reputation, as well to deployment and career opportunities, while a complaint looms over them.

12. MPCC access to Military Police records after the conclusion of the complaints process would allow the MPCC to monitor the CFPM's implementation of reforms promised in the

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[4] *Garrick v. Amnesty International Canada*, [2013] 3 F.C.R. 146, para. 96.
[5] *Canada (RCMP Public Complaints Commission) v. Canada (Attorney General)*, [2006] 1 F.C.R. 53, paras. 61 and 62 (F.C.A.).
[6] *Royal Canadian Mounted Police Act*, s. 45.39.
[7] *National Defence Act*, s. 250.14.
[8] *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653.

Notice of Action under section 250.51 of the *National Defence Act*. Such knowledge would assist the MPCC in making helpful recommendations in subsequent cases.

13. The MPCC considers that the authority given to the RCMP Commission in subsection 45.39(1) of the *Royal Canadian Mounted Police Act* offers a good model for the type of provision that the MPCC is proposing. It states that the RCMP Commission is entitled to "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."

14. A notable feature of this provision is that it stipulates that it is the oversight body's view of the relevance of the information which is decisive. In the case of the MPCC, the Federal Court has already stipulated that it should be the MPCC's perceptions of relevance which guide the fulfillment of disclosure requirements to the MPCC.[9] Nonetheless, it would be useful to have this principle set out in the legislation in order to preclude time-consuming, and continuing, arguments about relevance with the CFPM, the Canadian Armed Forces, and the Department of National Defence, which only serve to undermine the credibility of the oversight process.

1) The MPCC proposes that Part IV of the *National Defence Act* be amended to require the Canadian Forces Provost Marshal, the Canadian Armed Forces, and the Department of National Defence to disclose to the MPCC all records under their control which, in the view of the MPCC, may be relevant to the performance of its mandate.

C. Access to Witnesses: Expanded Subpoena Power

15. In addition to its inability to compel access to documentary evidence, the MPCC has an extremely limited power to compel witnesses to provide testimony. Aside from being able to issue a summons to witnesses when conducting a public interest hearing,[10] the MPCC has no legal authority to oblige witnesses to give evidence. It is reliant upon the good-will of those with knowledge concerning complaints to cooperate voluntarily. The Commission's lack of authority to compel witnesses cannot be justified in the name of protecting witnesses from potentially adverse legal consequences of their testimony as the Commission is an administrative, not a

[9] *Garrick v. Amnesty International Canada*, [2013] 3 F.C.R. 146, paras. 88, 89, 94 and 97.
[10] *National Defence Act*, s. 250.41.

disciplinary body. As with access to Military Police records, the MPCC's discretionary public interest hearing powers, and the associated increases in the formality and cost of proceedings, should not be engaged solely to gain access to compelled cooperation.[11] After all, the MPCC is under a statutory direction to conduct its business as informally and expeditiously as possible, consistent with fairness.[12]

16. Canada's other federal police oversight body, the RCMP Commission, has been given the authority to summons witnesses in dealing with any complaint before it in any of its processes, not just its hearings.[13] The Military Grievances External Review Committee also has a power to issue witness summonses. The Grievance Committee has, in relation to the review of a grievance referred to it, the power "to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce any documents and things under their control that it considers necessary to the full investigation and consideration of matters before it."[14] A further example is that, in conducting an investigation, the Public Sector Integrity Commissioner has all the powers of a commissioner under Part II of the *Inquiries Act*.[15]

17. The legal ability to compel testimony would put the Commission into a similar position as the Provost Marshal. Under the *Military Police Professional Code of Conduct* there is a duty imposed on members of the Military Police to cooperate with Provost Marshal investigations. Under section 8 of the *Code*, no member of the Military Police is excused from responding to any question relating to an investigation into a breach of the *Code* unless the member is the subject of the investigation or is the assisting officer for the subject of the investigation. Another duty to cooperate is found in Defence Administrative Order and Directive 5047-1, Office of the Ombudsman. Annex A of that DAOD contains a Ministerial Directive that imposes a duty on all Canadian Armed Forces and Department of National Defence personnel to cooperate with investigations by the National Defence and Canadian Forces Ombudsman. Refusal or failure to assist the Ombudsman can result in the Ombudsman making a report of the matter to the Minister of National Defence.

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[11] *Canada (RCMP Public Complaints Commission) v. Canada (Attorney General)*, [2006] 1 F.C.R. 53, paras. 61 and 62 (F.C.A.).
[12] *National Defence Act*, s. 250.14.
[13] *Royal Canadian Mounted Police Act*, s. 45.65.
[14] *National Defence Act*, s. 29.21(*a*).
[15] *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46, s. 29. Under Part II of the *Inquiries Act*, R.S.C. 1985, c. I-11, a commissioner has the power to subpoena any person to testify and bring with them any relevant thing.

18. With compelled testimony comes legal protections. One example is subsection 45.65(3) of the *Royal Canadian Mounted Police Act* which states that evidence given, or a document or thing produced, by a witness who is compelled by the Commission to give or produce it, may only be used against the witness in perjury proceedings.[16] As it stands, witnesses who volunteer to provide evidence to the Commission are at risk of having that evidence used against them in other proceedings.

2) The MPCC proposes that Part IV of *the National Defence Act* be amended to give it the power to summon and enforce the attendance of witnesses before it and compel them to give oral or written evidence on oath and to produce any documents and things that the MPCC considers relevant for the full investigation, hearing and consideration of a complaint.

D. Access to Sensitive Information

19. Due to the policing mandate of MPs, the MPCC has, in the course of its work, encountered the need to gain access to what is called sensitive information[17] or potentially injurious information.[18] Parliament in 1998 expected that the MPCC should have access to sensitive information when relevant to its mandate. Paragraph 250.42(*a*) of the *National Defence Act* provides that the MPCC may exceptionally hold its public interest hearings *in camera* if it expects to receive information 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." The Commission has both secure facilities and security-cleared personnel to deal with sensitive information.

20. In the aftermath of the terrorist attacks in the United States on September 11, 2001, Parliament adopted sections 38 through 38.16 of the *Canada Evidence Act* (CEA) to provide for a special regime of controlling access to this kind of information which may be "potentially

[16] Another example of legal protection for a witness is subsection 29.23(2) of the *National Defence Act* which states that "No answer given or statement made by a witness in response to a question [before the Military Grievances External Review Committee] may be used or receivable against the witness in any disciplinary, criminal, administrative or civil proceeding, other than a hearing or proceeding in respect of an allegation that the witness gave the answer or made the statement knowing it to be false."

[17] "Sensitive information" is defined in section 38 of the *Canada Evidence Act* as "information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard."

[18] "Potentially injurious information" is defined in section 38 of the *Canada Evidence Act* as "information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security."

injurious" to "international relations or to national defence or security." Every participant in a proceeding is required to notify the Attorney General of Canada of the possibility of the disclosure of information that they believe is sensitive information or potentially injurious information. Such information shall not be disclosed, but the Attorney General may, at any time and subject to any conditions that he or she considers appropriate, authorize the disclosure of all or part of the information.[19] While a party or tribunal seeking access to such information for use in proceedings can challenge the Attorney General of Canada's claim that the information in question is injurious to interests like national security, this requires that the proceedings be delayed while the issue is litigated through the courts.

21. Alternatively, a body may be added to a Schedule of Designated Entities to the CEA, as provided for in paragraph 38.01(6)(*d*) and subsection 38.01(8). In these cases, the disclosure restrictions do not apply and the body can receive the sensitive information in question. The idea of access to sensitive information by certain bodies was addressed by Justice O'Connor in the Arar Inquiry. In his recommendations for an RCMP oversight body, Justice O'Connor recommended 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." [20] The concomitant obligation for investigative bodies receiving sensitive information was to put in place stringent non-disclosure requirements. Oversight bodies that do have full access to all information include the Security Intelligence Review Committee and the Communications Security Establishment Commissioner. According to the information provided to Justice O'Connor, neither of those review bodies has breached security obligations.

22. Thus, the MPCC's 'sister' oversight body in the area of federal policing, the RCMP Commission, was added to the CEA Schedule as a Designated Entity in 2013 as a result of recommendations in the Arar Inquiry. Other designated entities include the Privacy Commissioner, the Information Commissioner and the Public Sector Integrity Commissioner.[21]

[19] *Canada Evidence Act*, s. 38.01(1).
[20] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Public Works and Government Services Canada, 2006), p. 534.
[21] *Canada Evidence Act*, Schedule (Paragraph 38.01(6)(d) and subsection 38.01(8)).

23. From the list of currently designated entities, it seems that a body must have a reasonable prospect that it will encounter such sensitive information and must have in place sufficient safeguards against uncontrolled public disclosure of such information. If and when a body considers it necessary to make sensitive information public, the regular safeguards kick in, and such disclosure must be negotiated or litigated with the Attorney General of Canada.

24. In effect, therefore, being a designated entity for the purposes of the CEA Schedule does not remove, so much as defer, the special disclosure protections applicable to such sensitive information. Yet the effect of this change would be immensely beneficial in terms of the efficiency of the proceedings in question. For one thing, being on the CEA Schedule would significantly narrow, and possibly eliminate, the scope of information whose public disclosure would need to be negotiated or litigated. This is because, having access to the information up front, the MPCC would, over the course of its investigation, inevitably acquire a more refined understanding as to what records are truly relevant to the resolution of the complaint before it. In some cases, it may turn out to be unnecessary to refer to sensitive information in its report. In those cases, being on the CEA Schedule would obviate the need for Federal Court litigation altogether. In other cases, the MPCC could issue a provisional Final Report on a complaint with some information redacted pending the results of litigation in the Federal Court.

25. MPCC access to sensitive or potentially injurious information is not an academic or speculative concern. These provisions were invoked in the MPCC's public interest hearing related to the treatment of Afghan detainees (MPCC 2008-042). In that case, protracted negotiations with the government and litigation were necessary to obtain access to documents. The government took the position that the MPCC could only receive documents after they were vetted and redacted. In practice, this resulted in significant delays of many months for the MPCC in obtaining documents required for the conduct of its hearings. For instance, there was a period of twenty months, between March 2008 and November 2009 where the MPCC received no documents. Moreover, in 2010, then-Chairperson Stannard was forced to adjourn the hearing for a few weeks because of further problems with document production. The Government declined Commission offers to assist in identifying records of potential relevance, and thus expedite the vetting process. The MPCC was also obliged to call witnesses and spend valuable hearing time dealing with document production and vetting issues. Indeed, it can fairly be said that disputes and delays over document production hijacked the hearing process to a significant extent. All of

which made it significantly more difficult and time-consuming for the Commission to carry out its mandate. This could have been substantially avoided by having the MPCC on the *Canada Evidence Act* Schedule.

26. Nor were these problems with production of potentially sensitive documents confined to the especially politically sensitive Afghan detainee public interest hearing. More recently, in the current Anonymous Public Interest Investigation (based on an anonymous complaint about an allegedly illegal training exercise conducted by MPs in the Detainee Transfer Facility in Afghanistan in 2011), the MPCC confronted a delay of nine months before receiving disclosure from the CFPM. Much like justice, the delay of necessary oversight can be the denial of oversight.

27. Moreover, given the policing jurisdiction of the Canadian Armed Forces Military Police, it is only too easy to think of other scenarios where sensitive international relations or military information would be involved. For instance, it seems highly likely that a Military Police investigation into the operational conduct of members of the Canadian Armed Force's special forces units would involve sensitive information. Indeed, the Canadian Forces National Investigation Service did investigate the conduct of members of JTF2 in respect of operations in Afghanistan.[22] The MPCC received no complaints about these investigations. If it had, it is difficult to see how the MPCC could have dealt with such complaints without access to this type of information.

28. At the conclusion of the Afghanistan Public Interest Hearing from a complaint by Amnesty International/BC Civil Liberties Association, the MPCC recommended that it be added to the *Canada Evidence Act* Schedule, both in its December 2011 Interim Report and in its June 2012 Final Report (MPCC 2008-042). This recommendation was rejected. However, the MPCC has persisted in its efforts to advance this issue. The present Chairperson included a recommendation in the MPCC Annual Report for 2015 to have the Commission added to the CEA Schedule. This recommendation has been reiterated in subsequent Annual Reports.

29. There have also been petitions to Parliament from individuals (one law professor and one Member of Parliament) seeking the CEA scheduling of the MPCC. The Minister of Justice and

[22] Operation 'Sand Trap'.

Attorney General in response to one of these petitions to have the MPCC added to the CEA schedule, stated that the impediment to adding the MPCC to this list was that:

> "While the mandate of the MPCC allows it to conduct in camera (i.e., closed) **proceedings** if information identified in section 250.42 of the National Defence Act is likely to be disclosed, the scope of section 250.42 does not fully encompass "sensitive information" or "potentially injurious information."…[23]

30. The solution is a two-step process: (1) Amend s.250.42 of the NDA to encompass fully "sensitive information" and "potentially injurious information". This would be in keeping with Parliament's intention when the MPCC was created in 1998. (2) Add the MPCC to the CEA schedule. (Annex B - Government Response to Petition). It is within the Government's authority, rather than the Commission's, to provide the necessary legislative authorities, particularly related to the conduct of hearings, which would enable the Commission to be safely added to the Schedule. This is indeed what the Government and Parliament did with the RCMP Commission in the 2013 amendments to the RCMP Act.

31. In his 2011 report, the Second Independent Review Authority, former Justice Lesage, declined to support the MPCC's proposal to be added to the CEA Schedule. He did so based on the sensitivity and complexity of the issue, and his not having the benefit of more extensive submissions on the matter.[24] However, it must be noted that Justice Lesage's report was submitted prior to the issuance of the MPCC's Final Report in the Afghanistan Public Interest Hearing, and its related recommendation regarding CEA scheduling, as well as the petitions to Parliament, noted above. It must also be noted that the addition of the RCMP Commission to the CEA Schedule, along with the corresponding modifications to its hearing and evidence-handling procedures, through the enactment of Bill C-42 in 2013, had not yet occurred. Thus, the public policy and legal landscape have shifted since Justice Lesage issued his report in December 2011.

3) The MPCC proposes that it be added to the *Canada Evidence Act* schedule by first amending s.250.42 of the *National Defence Act* to fully address the hearing procedures and handling requirements necessary to receive "sensitive information" and "potentially injurious information"; and second, that it be added

[23] House of Commons, "Response to Petition no 421-01150" by Mr. Randall Garrison (Esquimalt-Saanich-Sooke), (2017).

[24] Hon. Patrick J. Lesage, CM, OOnt, QC, *Report of the Second Independent Review Authority to The Honourable Peter G. MacKay Minister of National Defence*, December 2011, (Second Independent Review), at p. 70.

to the Schedule of Designated Entities pursuant to paragraph 38.01(6)(d) and subsection 38.01(8) of the *Canada Evidence Act*.

E. Access to Solicitor-Client Privileged Information

32. At present, the MPCC is unable to access solicitor-client privileged information from the CFPM. This is the case, even though the CFPM has access to such information in initially disposing of the complaint, a distinction in treatment which undermines the value of the right to independent review of complaints. Despite this present legal restriction, it is nonetheless the case that the legal advice sought and provided to members of the Military Police is often highly pertinent to resolving complaints.

33. The MPCC receives many complaints about actions taken, or not taken, with the benefit of legal advice from either military or civilian prosecutors: searches and seizures, arrests, and the laying (or not laying) of charges. Two prominent categories of complainants are: 1) those charged with offences who believe they should not have been charged; and 2) alleged victims who do not understand why charges were not laid against their alleged perpetrator.

34. Based on their experiences, many complainants in such cases are dubious as to the professional competence and independence of the Military Police. In the view of the MPCC, it is not possible to fully and fairly explain Military Police members' charge-laying decisions without some knowledge of the pre-charge consultations between them and civilian or military legal advisors. While it can usually be assumed that members' charging decisions reflect the pre-charge legal advice they received, the status quo does not permit the MPCC to confirm that a Military Police subject member provided an accurate description of the evidence to the prosecutor, or that the ensuing legal advice was properly considered.

35. Nor is it appropriate for the MPCC to simply substitute its own assessment of the grounds for a charging decision, or the exercise of prosecutorial discretion, for that of Military Police subject members. Such exercises of a member's independent policing discretion and judgment are only properly and fairly reviewable on a standard of reasonableness, rather than correctness. While it is true that merely following legal advice does not operate as a complete defence to the consequential actions or decisions of a Military Police member, it is of critical importance in establishing the reasonableness of a member's decision.

36. Therefore, denying the MPCC access to solicitor-client privileged information in these types of case undermines the MPCC's ability to effectively and fairly review such complaints. At the same time, the MPCC considers that such access is unlikely to discourage Military Police members from being candid with their legal advisors or to avoid seeking legal advice altogether.

37. Beyond the challenge posed to the credibility and fairness of its complaints process by lack of access to solicitor-client privileged information, there is the further, significant burden of disputes with the CFPM as to the scope or applicability of privilege to a given situation.

38. For instance, it is well known that when, in the course of litigation, a party justifies its position on the basis of legal advice received, it is deemed, out of fairness, to waive that privilege for the purposes of that litigation. However, the position taken by the JAG legal advisors to the CFPM is that any privilege in legal advice provided to Military Police members in the course of their policing duties belongs to the Minister of National Defence, *and that only the Minister's actions can result in its loss or waiver*. Under this analysis, the CFPM himself could not disclose the legal advice received by any of his MPs, even if he wished to do so. In fact, generally speaking, the manner in which the privilege is asserted in the context of the MP complaints process appears to be based more on obscuring the involvement of JAG and other legal advisors for the Crown, than on promoting MP candor when seeking legal advice.

39. Another area of dispute relates to the CFPM's assertion of privilege over 'Crown briefs' – a compilation of materials reflecting the fruits of a Military Police investigation, which is forwarded to Crown counsel (or a military prosecutor) and is later disclosed to an accused person when charges are laid. The MPCC used to receive such briefs as part of its regular disclosure from the CFPM on complaint files. The brief is intended to enable a prosecutor to formulate advice for the investigating Military Police member as to whether charges should, or should not, be laid, and if so, which ones. While prosecutors may be asked for their assessment as to whether there are grounds for criminal or *National Defence Act* charges based on the elements of the offence(s), the Crown brief is also prepared and sent to the prosecutor in order to obtain advice on the exercise of prosecutorial or police discretion: that is to say, assuming that charges *can* be laid, *should* they be laid? The relevant factors here are whether the case presents a reasonable prospect of conviction and whether a prosecution is in the public interest. These are strictly

policy questions, rather than legal advice. Where charges proceed, the Crown brief forms the basis for the disclosure provided to the accused.

40. Even apart from the ensuing prosecutorial advice on the exercise of charge-laying discretion, the Crown brief itself can be an important source of information for the MPCC. It can directly address complainants' allegations that prosecutors' charge-laying advice to the Military Police was the result of incomplete, inaccurate or biased information supplied by Military Police investigators. One significant example of the utility of MPCC access to Crown briefs arose in the MPCC's first public interest hearing case, MPCC File # 2005-024. This was a complaint by the parent of a youth who was investigated for sexual assault against a fellow cadet at a cadet camp. The complaint was about the conduct of the principal CFNIS investigators. In that case, MPCC access to the Crown brief – over which the CFPM had **not** claimed solicitor-client privilege – enabled the MPCC to discover and report on the fact that a number of important exculpatory pieces of evidence had been omitted from the Crown brief by the CFNIS investigators. The MPCC's Final Report in this case may be found at: https://www.mpcc-cppm.gc.ca/enquetes-audiences-dinteret-public-interest-investigations-hearings/final-reports-rapports-finals/pih-aip-2005-024-fnl-rpt-eng.aspx (see Part V).

41. Parliament seems to have accepted the arguments for giving access to privileged communications for police oversight purposes, as it has already extended access to solicitor-client privileged information to a police oversight body. With Bill C-42, the RCMP Commission has been given wide powers of access to information – including solicitor-client privileged information – in order to carry out its oversight role. Moreover, these powers extend to the RCMP Commission's original police complaints mandate – that which it shares with the MPCC – as well as its more recently acquired national security oversight and proactive review roles. Subsection 45.4(2) of the *Royal Canadian Mounted Police Act* states: "Despite any privilege that exists and may be claimed, the Commission is entitled to have access to privileged information under the control, or in the possession, of the Force if that information is relevant and necessary to the matter before the Commission." While there are a number of other caveats, the principle of access to privileged information in the cause of a proper investigation of police conduct has been established.

42. One of the factors motivating Parliament to grant the RCMP Commission access to solicitor-client privileged information was explained by the former head of the Commission for Public Complaints Against the RCMP. He pointed out that one of the reasons the Arar inquiry was initiated was the fact that the RCMP oversight body of the day had been unable to obtain key information in support of its mandate. If the oversight body had broad rights of access, as did the public inquiry, that might obviate the need to create *ad hoc* commissions of inquiry.[25]

43. It should be noted that in proposing the selective penetration of solicitor-client privilege, we are not suggesting the complete sacrifice of that privilege. The privilege would still be in place vis-à-vis other proceedings. This is where the concept of a limited waiver comes in. A limited waiver means that otherwise privileged information may be used for a particular purpose or proceeding, but is not lost vis-à-vis other parties or fora.[26] The doctrine of limited waiver, which is increasingly widely accepted, challenges the traditional, but overstated and outmoded adage that waiver to one necessarily means waiver to all.

44. The creation and scope of a limited waiver of solicitor-client privilege can be defined in three ways. One of these is by statute. A number of statutes require that information must be disclosed for a certain narrow purpose prescribed by the statute. When such information is provided, the statute can explicitly provide that this does not constitute a general waiver of solicitor-client privilege. One example is found in subsection 36(2.2) of the *Access to Information Act*.[27] Under the Act, the head of a government institution may be obliged to disclose to the Information Commissioner a record that contains information subject to solicitor-client privilege. Subsection 36(2.2) states that this disclosure does not constitute a waiver of that

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[25] 41st Parliament, 1st Session, Standing Committee on Public Safety and National Security, Meeting 53, 22 October 2012, Paul Kennedy, as an Individual. This meeting examined Bill C-42, An Act to amend the Royal Canadian Mounted Police Act and to make related and consequential amendments to other Acts. Most of this bill came into force on 28 November 2014.

[26] *British Coal Corp v Dennis Rye Ltd No 2*, [1988] 1 WLR 1113 (Eng CA); *Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co.*, 1988 CarswellAlta 148 (Alta CA); *Interprovincial Pipe Line Inc. v MNR* 1996 1 FC 367 (Fed. TD); *M(A) v. Ryan*, 1997 CanLII 403 (SCC), [1997] 1 SCR 157; *Western Canadian Place Ltd v Con-Force Products Ltd* 1997 CanLII 14770; *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd*, 1998 ABQB 455, [1998] AJ No 575; *Nova Scotia (Attorney General) v. Royal & Sun Alliance Insurance Co.* 2000 CanLII 1080 (NSSC); *Philip Services Corp v. Ontario Securities Commission,* 2005 CarswellOnt 3934, 77 OR (3d) 209; *Jourdain v. Ontario*, 2008 CanLII 35684 (ON SC), 91 OR (3d) 506; *R v Basi*, 2008 BCSC 1242, [2008] BCJ No 1741; *Penner et al v P. Quintaine & Son Ltd* 2008 MBQB 216; *Kansa General International Insurance Company Ltd (Winding up of)* 2011 QCCA 1557; *Gowling v. Meredith*, 2011 ONSC 2686; and *Minister of National Revenue v. Thornton*, 2012 FC 1313.

[27] R.S.C. 1985, c. A-1.

privilege. Similarly, the Ontario *Legal Aid Services Act, 1998*[28] can compel the disclosure of privileged information to Legal Aid Ontario. Subsection 89(3) of the Act makes it clear that "Disclosure of privileged information to the Corporation [Legal Aid Ontario] that is required under this Act does not negate or constitute a waiver of privilege."

45. A limited waiver of solicitor-client privilege may also be established and defined by agreement. Though well protected in law, solicitor-client privilege, at the end of the day, belongs to the client, and the client is free to voluntarily waive privilege and to set terms and limits for doing so.

46. Finally, the circumstances which give rise to the loss of privilege in certain information will themselves generally suggest the scope and limits of that loss. So that, in a scenario where fairness demands that privilege is waived with respect to certain information in one proceeding, that privilege may still hold vis-à-vis other parties in other fora.

47. The MPCC considers that, as with the RCMP Commission, legislated access to solicitor-client privileged information, where necessary for the determination of a complaint, is required to address this issue. The Office of the JAG has generally been disinclined to ever advise in favour of waiving privilege, and as noted, takes the view that only the Minister's actions may lead to a waiver of privilege. More than that, we often differ over the scope of what information is actually privileged (Crown briefs, mentioned above, is an example). Worse still, the vetting of MP material disclosed to the MPCC pursuant to NDA Part IV is done by staff who are not legally trained, and who tend to redact any references relating to legal counsel. This has resulted in MPCC personnel being involved in numerous discussions and negotiations with CFPM legal advisors to have the redactions revisited and (sometimes) corrected. Indeed, the MPCC had set up a joint working group with the CFPM's legal advisors on redactions to CFPM disclosure with a view to ironing out such problems. But our success with minimizing and rationalizing redactions to disclosure is largely a function of the outlook of the particular JAG officers advising the CFPM at any given time.

48. The MPCC has made numerous efforts over the years to resolve, or work around, the issue of privilege in a way that respects the importance of privilege, while allowing access for

[28] S.O. 1998, c. 26.

limited purposes in certain cases. The Chairperson has met personally with RAdm Bernatchez, as well as her predecessor, on this issue. In a letter dated June 6, 2018, following up on her meeting with RAdm Bernatchez, the Chairperson raised the issue of MPCC access to solicitor-client privileged information on a limited basis, as well as the need for the MPCC to be able to have access in certain cases to sensitive information by being added to the *Canada Evidence Act* Schedule. On May 21, 2020, the Chairperson wrote to the JAG and the CFPM on the issue of MPCC access to Crown briefs, and is presently awaiting a response. In order to address their concerns about the complete loss of privilege in MP legal advice, the MPCC has sought to assuage those concerns by sharing the results of our legal research into the doctrine of limited waiver of privilege. The MPCC has also developed, and shared with the CFPM (on July 26, 2019), a template letter for requests for waiver certifying the Chairperson's belief in the necessity of the privileged information and setting out the applicable terms, limits and safeguards for the secure sharing of the relevant information. We are presently awaiting feedback from the CFPM and have followed up on several occasions with the JAG legal advisor to the CFPM. However, without a basic legislative right of access, we consider that these types of measures can bring only limited relief to the problem.

4) The MPCC proposes that Part IV of the *National Defence Act* be amended so as provide the MPCC with access to solicitor-client privileged information in cases where it is relevant to a fair disposition of the complaint.

F. Easing Certain Evidentiary Restrictions for Public Interest Hearings

49. In the context of a public interest hearing, the MPCC is authorized by paragraph 250.41(1)(*c*) of the *National Defence Act* "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 rules of evidence is typical for administrative tribunals, especially those with an investigative versus adjudicative mandate like the MPCC. The modern focus is on the principles of the reliability and the necessity of evidence, rather than on traditional rules of evidence that can serve to exclude valuable evidence.[29]

[29] An example of the relaxing of a traditional rule of evidence can be found in *R. v. Khelawon*, [2006] 2 S.C.R. 787, para. 42, where the Supreme Court noted that if hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

50. In the next subsection of the Act, a number of exceptions to this general principle are enumerated. Subsection 250.41(2) of the *National Defence Act* prohibits the MPCC from receiving in a hearing the following categories of evidence:

> (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).

51. If the proposal discussed in the previous section (E) were adopted, then paragraph (*a*) above would need to be modified with respect to solicitor-client privilege. The MPCC has no issue with the restrictions in paragraphs (*c*) or (*e*). However, in the MPCC's view, the bolded restrictions in paragraphs (*b*) and (*d*) above are overbroad and unnecessary.

52. The intent of these two provisions is to protect witnesses who have been subject to compelled testimony in other proceedings from having this evidence admitted in an MPCC public interest hearing. However, such a blanket prohibition has the potential to exclude highly relevant information from an MPCC hearing, except through the time-consuming and cumbersome means of calling such witnesses in order to obtain their evidence directly. This is hardly the expeditious and informal type of proceeding envisioned by *National Defence Act* section 250.14 and paragraph 250.41(1)(*c*). These prohibitions are overbroad in that they are not confined to a witness's self-incriminating information. In any event, given that the MPCC's proceedings are non-penal, non-disciplinary, and indeed non-adjudicative, in nature, it is difficult to see how someone could be truly incriminated in an MPCC proceeding. Moreover, the prohibitions apply equally to uncontested factual background matters and to contested issues. To

the extent that they even preclude cross-examination on such earlier evidence, these prohibitions reduce the tools available to assess witness reliability, and thereby impede the MPCC's ability – and that of the parties to the hearings – to uncover the truth.

53. The provenance and purpose of paragraphs 250.41(2)(*b*) or (*d*) are not apparent. Their inflexibility is at odds with the admonition to the MPCC to deal with all matters before it as informally and expeditiously as the circumstances and considerations of fairness permit. In other courts and tribunals, statements made before other adjudicative bodies are admissible, so long as their authenticity can be proved. The weight given to those statements is a separate issue, but it is for the body assessing the out-of-court statement to make that assessment and not have it excluded from consideration altogether. The ability of the MPCC to assess evidence for itself is reflected in paragraph 250.41(*c*) of the *National Defence Act* which gives the Commission the power to receive and accept any evidence and information that it sees fit.

54. If the issue is one of the reliability of statements made outside of a Commission hearing, paragraphs 250.41(1)(*a*) and (*b*) of the *National Defence Act* give the MPCC the power to compel a witness to appear before it and give testimony under oath. Such a power can be invoked if there is any question about accepting into evidence prior testimony. Furthermore, section 250.44 of the *National Defence Act* affords complainants and subjects at a hearing the opportunity to present evidence, cross-examine witnesses, and make representations. These powers can be used if needed to prevent the improper use of statements from prior proceedings.

55. There does not appear to be any parallel to the evidentiary restrictions in paragraphs 250.41(2)(*b*) or (*d*) in other federal legislation, including in Part VII of the *RCMP Act* regarding the RCMP Commission's authority to receive evidence at its public interest hearings. The equivalent *Royal Canadian Mounted Police Act* provision to the prohibition on receiving into evidence any statements made before a board of inquiry or summary investigation (paragraph 45.45(8)(*b*)), is limited to incriminating information. There is no corresponding *Royal Canadian Mounted Police Act* equivalent whatever to paragraph 250.41(2)(*d*) of the *National Defence Act* which forbids the MPCC from taking into evidence any answer given or statement made before a court of law or tribunal.

5) The MPCC proposes that Part IV of the *National Defence Act* be amended such that the evidentiary restrictions in *National Defence Act* paragraph 250.41(2)(*a*) be modified with respect to solicitor-client privilege, and that paragraphs 250.41(2)(*b*) and *(d)* be repealed.

G. Addition of the MPCC to *Privacy Regulations* Schedule II

56. A special challenge confronted by the MPCC flows from the fact that the Canadian Forces Military Police Group is not administratively separate from the broader Canadian Armed Forces/Department of National Defence. One consequence of this is that information and records that are not scanned into the Group's Security and Military Police Information System (SAMPIS) by members of the Military Police may be beyond the control of the CFPM, because the CFPM does not control the broader Canadian Armed Forces/Department of National Defence information technology and management systems.

57. As a result, the CFPM may be unable to disclose relevant Military Police information to the MPCC, even though it may be stored on workplace computer networks or devices. The broader Canadian Armed Forces/Department of National Defence do not consider themselves bound by the CFPM's disclosure obligations under Part IV of the *National Defence Act.* As such, records inevitably contain some amount of personal information and offices in the broader Canadian Armed Forces/Department of National Defence feel bound to resist disclosure to the MPCC in accordance with the *Privacy Act*. This has led to relevant information not being made available to the MPCC, or at least to significant delays in obtaining such information.

58. For instance this has been an issue in the ongoing Public Interest Investigation in Beamish (MPCC 2016-040). In this case the complainant was able to obtain certain information via a *Privacy Act* request which was not part of disclosure provided to the MPCC by the CFPM. The reason given for this discrepancy was that some military police members failed to scan relevant emails into their investigation file, rendering them outside the control of the CFPM despite the fact that they were on DND servers.

59. Moreover, it is not difficult to envision other situations where records containing personal information, which is beyond the control of the CFPM, would be relevant to an MPCC investigation. Records relating to a member of the Military Police which are under the control of another part of the Department of National Defence could be relevant. This could even

encompass Military Police-related records that are under the control of the CFPM, but the CFPM is reluctant to provide them, such as disciplinary records. Records relating to non-Military Police Canadian Armed Forces members could be highly pertinent to the investigation of interference complaints which often involve non-Military Police members as subjects of the complaint. Records relating to Military Police members or operations may be in the hands of Global Affairs Canada in the case of overseas operations. In domestic operations records may be with the Ministry of Public Safety and Emergency Preparedness. In the case of joint policing operations, records may be with the RCMP.

60. In situations where non-Canadian Forces Military Police Group records have been unsuccessfully sought, or where the request has caused significant delay, the MPCC has been advised that access to such material would have been possible if the MPCC had been an investigative body designated for the purposes of paragraph 8(2)(*e*) of the *Privacy Act*. Under that paragraph, personal information may be disclosed to an investigative body specified in the regulations, on the written request of the body, for the purpose of enforcing any law of Canada or a province or carrying out a lawful investigation, if the request specifies the purpose and describes the information to be disclosed. The investigative bodies able to receive personal information are set out in Schedule II to the *Privacy Regulations*.

6) The MPCC proposes that it be added to the list of designated investigative bodies in Schedule II of the Privacy Regulations.

II. MORE FAIR AND EFFICIENT PROCEDURES

A. Introduction

61. In addition to seeking more robust and modern legal authorities for accessing information, the MPCC also sees a number of ways to update the procedures for dealing with complaints so as to render the process for dealing with them more efficient and fair.

B. Authority to Identify and Classify Complaints

1) Overview of the Problem

62. Part IV of the *National Defence Act* is silent as to when the MP conduct complaints process, including the oversight mandate of the MPCC, has been triggered. Standing to make an interference complaint is limited to Military Police members conducting an investigation or in the supervisory chain of command with respect to the investigation. These are easier to identify and interference complainants are more knowledgeable about the complaints process and how to engage it. As such, the question of complaint classification and identification is largely one that pertains to conduct complaints.

63. A valid conduct complaint is a complaint about the conduct of an MP member in the course of the performance, or purported performance, of his or her "policing duties or functions". "Policing duties or functions" is defined in section 2 of the *Complaints Against the Conduct of Members of the Military Police Regulations (the Regulations)*. This provision reads 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.

64. Such a definition is needed of course because Military Police are soldiers as well as police. They perform a variety of duties that do not, and ought not, attract the special oversight regime established in Part IV of the *National Defence Act* for their policing duties.

65. The problem of complaint classification and identification also arises at least in part because the MPCC is not the only portal for MP conduct complaint. Conduct complaints may also be made to: the Judge Advocate General, the CFPM or to any member of the Military Police. If another recipient of a complaint were to determine that it was not a valid conduct or interference complaint, they could choose unilaterally not to forward a copy to the MPCC and not to engage the *National Defence Act* Part IV process.

66. Indeed, this has happened. There have been times when the CFPM has failed to notify the MPCC of complaints received because the complaint was not initially addressed to one of the authorized complaint recipients per NDA s. 250.21 (this issue is addressed in the next subsection), or because it was (unilaterally) determined not to be related to "policing duties or functions." Sometimes the MPCC would only find out about such complaints when the complainant sought to request a review under NDA s. 250.31. Obviously, this is problematic for oversight purposes. Complaints that ought reasonably to be subject to MPCC review may not get that opportunity, and the MPCC may be unaware of complaints that should trigger public interest consideration under NDA s. 250.38.

67. While an alternative solution might be to require all conduct complaints to be addressed to the MPCC, such a reform is not advised for a number of reasons.

68. First, it would not provide the required authoritative determination as to whether or not a complaint is a valid conduct complaint. CFPM Professional Standards might still take a different view of a complaint from the MPCC, which would mean that Professional Standards would not conduct its initial review or investigation of the complaint. The result would be, in many cases, that the MPCC would, on review, have to undertake a full investigation of a complaint, rather than simply review the complaint, with the benefit of the Professional Standards investigation, as the legislation intends.

69. Second, it should be recognized that there is, within the military, a cultural norm or tradition against raising concerns with external agencies or institutions. In fact, there is a prohibition on Canadian Armed Forces members making what are called "improper comments". It is stated in the following terms: "No officer or non-commissioned member shall do or say anything that if seen or heard by any member of the public, might reflect discredit on the

Canadian Forces or on any of its members."[30] Canadian Armed Forces members are also ordered not to communicate with other government departments unless authorized to do so.[31]

70. As such, it is suggested that the current authorized addressees for conduct complaints, as set out in NDA subsection 250.21(1) be preserved.

2) Complaint Classification: Is it about "Policing Duties or Functions" (NDA s. 250.18(1) / Regulations s. 2)?

71. At the present time, while we usually agree with CFPM Professional Standards on the classification of complaint, compared with some previous eras, such fundamental matters should not be left to depend on the personalities of incumbents of positions within the CF MP Group HQ and their legal advisors. Moreover, there are still areas of disagreement as to what constitutes a "policing duty or function", such as the conduct of CFPM Professional Standards investigations and the responsibility of MP supervisors in investigations. The question of whether or not complaints fall within NDA Part IV is an area of ongoing discussion and disagreement, and the MPCC values the perspective of the CFPM in this area. However, there should be, subject to judicial review, someone in the NDA Part IV process who is charged with making the judgment call as to whether or not a matter is properly an NDA Part IV complaint.

72. From the perspective of preserving the integrity of independent oversight, in the MPCC's view, it is the only logical candidate for this role. Allowing members of the overseen police service to make such a decision raises at least the perception of a conflict of interest. A number of jurisdictions in Canada have taken steps to avoid this problem. In those jurisdictions where the admissibility of a complaint, or the role of the external oversight body, hinges on how a complaint is characterized, it is uniformly the oversight body to whom this responsibility is assigned.[32] The only exception appears to be the Military Police complaints process in Part IV of the *National Defence Act*.

[30] *Queen's Regulations and Orders for the Canadian* Forces, Article 19.14(2).
[31] *Queen's Regulations and Orders for the Canadian Forces*, Article 19.38.
[32] British Columbia: *Police Act*, RSBC 1996, c. 367, s. 82; Saskatchewan: *Police Act, 1990*, SS 1990-91, c. P-15.01, s. 43; Ontario: *Police Services Act*, RSO 1990, c. P-15, s. 59 (see per new legislation, not yet in force: *Community Safety and Policing Act, 2019 (being Schedule 1 of the Comprehensive Police Services Act, 2019*, SO 2019, c. 1) s. 157); Québec: *Police Act*, CQLR c. P-13.1, ss. 148 and 149.

73. Clearly, for an overseen police service to have the role of deciding which complaints against its members were and were not subject to outside scrutiny is illogical and inappropriate from an oversight perspective. It is a non-starter. The most logical way to avoid concerns about the misidentification, or disputed identification, of *National Defence Act* Part IV complaints is to have the issue determined by the MPCC, subject to the supervisory jurisdiction of the Federal Court.

74. Having the MPCC involved in classifying and construing complaints at the outset would have other benefits as well. There would less likely be significant differences in the interpretation of a complaint, as between CFPM Professional Standards and the MPCC. This would reduce the number of instances where MP subject members need to be named as subject members at the review stage when CFPM Professional Standards did not consider them subjects in the first instance, which is more fair to such subjects. In fact, this recently occurred in three conduct review cases; namely, MPCC 2016-037, 2018-022 and MPCC 2019-038.

3) Indirectly Received Complaints (NDA s. 250.21)

75. Turning to NDA section 250.21, there is a further complaint identification problem relating to how complaints come to be received by the designated addressees in subsection 250.21(1). In the past, there have been instances where complaints admittedly about MP conduct in the course of "policing duties or functions" have nonetheless been treated as non-NDA Part IV, "internal" complaints, by CFPM Professional Standards: the reason being that the complaints were not received by the subsection 250.21(1) recipient *directly* from the complainant. In such instances, complainants who were unaware of the NDA Part IV process have addressed complaints to the Minister of National Defence, the Chief of the Defence Staff, or their Member of Parliament.

76. Complaints of this nature are invariably forwarded for action to the CFPM. In the view of the MPCC, such complaints should be treated as MP conduct complaints pursuant to NDA subsection 250.18 regardless of their routing. After all, Parliament clearly intended the broadest possible range of people to be complainants. "Any person", as used in NDA subsection 250.18(1) should surely include people who, for whatever reason, have addressed their complaint in the first instance to someone other than one of the designated recipients in subsection 250.21(1). There is no principled reason for treating such complaints as falling outside the scope

of MPCC oversight. On the contrary, considering that the complainant has gone to the trouble of engaging senior external authorities, there is every reason to ensure that such complaints are included in the NDA Part IV process. In the mind of such complainants at least, their complaints raise matters of public interest, and so they should be subject to the public complaints process, including independent oversight by the MPCC.

77. The necessary legislative fix for this problem may be as simple as extending NDA subsection 250.21(1) to include complaints received directly or *indirectly*.

4) Complaint Classification: "Internal" Versus "Public" Complaints

78. Another problem is the category of "internal" complaints itself. The MPCC recognizes there to be a legitimate need for a category of "internal" complaints that may be dealt with entirely by the CFPM Professional Standards. These would be those complaints which reflect concerns about MP conduct and performance raised by and through the MP chain of command. Naturally, MP conduct and performance are constantly subject to monitoring and assessment by supervisors and the rest of the MP chain of command. CFPM Professional Standards also conducts periodic audits of MP units. So there are myriad ways in which MP conduct and performance is commented and reported on within the CF MP Group chain of command. It is neither practical nor in the public interest to inject MPCC oversight into MP command and performance management systems.

79. As such, there is a need for an "internal" category of matters for the CFPM Professional Standards to deal with, which fall outside the "public" NDA Part IV process. Indeed, there has always been such a category operating on a *de facto* basis. However, because it has been a purely *de facto* category, and one administered entirely by the CFPM Professional Standards, the "internal" complaints category has become an unaccountable repository for all those complaints which the CFPM Professional Standards has deemed, often unilaterally, not to fall within NDA Part IV for one reason or another.

80. In the view of the MPCC, the integrity of the public oversight regime established in NDA Part IV requires that the CFPM be given legislative guidance on the use of the "internal" complaint classification. This should, as noted above, be limited to issues of conduct or performance which have arisen within the MP chain of command. Moreover, it should be made

clear that, as stated above, the MPCC should be ultimately responsible for determining whether a matter truly falls within the proposed legislative definition of the "internal" complaint classification.

5) The CFPM Framework Recommendation

81. Both previous Independent Reviews have recommended that the CFPM be required to develop a framework for the determination of whether conduct complaints triggered the jurisdiction of the MPCC. With all due respect, this recommendation makes no sense in the context of a MP complaints regime featuring external oversight. The notion that the overseen police service should determine the role of the oversight body is contrary to the very idea of independent oversight. Moreover, it seems apparent, from reading this recommendation in context, that it was unfortunately made erroneously, based on a misconception of the underlying issues. This subsection is intended to demonstrate this point.

82. In his Report of the First Independent Review, in a subsection entitled "Framework for Determining Public Oversight," former Chief Justice Lamer recommended that:

> the Canadian Forces Provost Marshal draft a framework that would set out the criteria to be applied by the Canadian Forces Provost Marshal to conduct complaints in order to determine whether or not the conduct complained of triggers the jurisdiction of the Military Police Complaints Commission.[33]

83. The purpose of this framework was to assist the CFPM with differentiating between those matters of MP conduct that fell "within the oversight of the MPCC," versus those which should remain "solely with the office of the Provost Marshal,"[34] referring to internal complaints. The question flowed from Chief Justice Lamer noting that the CFPM's Professional Standards office and the MPCC had differing MP complaint statistics. With due respect to the former Chief Justice, he seems to have misattributed the cause of the discrepancy in the complaint figures. Chief Justice Lamer seems to have assumed that CFPM Professional Standards kept, as "internal" complaints (versus the "public" complaints, subject to MPCC oversight), MP conduct issues of lesser seriousness. For he went on to observe that:

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[33] *The First Independent Review by the Rt Hon Antonio Lamer, PC, CC, CD, of the provisions and operation of Bill C-25, an Act to make consequential amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c.35,* September 3, 2003, (First Independent Review), Recommendation 64.
[34] First Independent Review, p. 81.

> Many breaches of administrative policy are deemed to be offences under the *Code of Service Discipline* by virtue of section 129 of the *NDA* and therefore a strict division between complaints that trigger independent oversight and those that do not would be impossible. Therefore, I feel that a framework for designation could be drafted by the Provost Marshal which would articulate those complaints that are most definitely breaches of an administrative nature, and allow for the establishment of criteria to be applied to conduct complaints which would assist in the designation of a complaint as one being subject to independent oversight.[35]

84. While the former Chief Justice makes an apt observation about the potential, literal reach of the military justice system, including the military police, that is not the issue at play with respect to the distribution of complaints as between "internal" and "public". In fact, the distinction between "internal" and "public" complaints within the CFPM's office of Professional Standards has to do with the sourcing of the complaint, rather than its seriousness. MP conduct issues that come up through the MP chain of command, regardless of their nature or relative seriousness, are treated as "internal" complaints; whereas complaints about MP conduct originating from a complaint by a member of the "public" (which, in this context, can mean civilian or military personnel) are treated as complaints, properly speaking, within the meaning of NDA subsection 250.18(1), and subject to MPCC oversight – again, regardless of relative seriousness.

85. Two points become clear about this recommendation when it is construed in its proper context. First, it was aimed exclusively at the CFPM for his or her internal application to complaints that are potentially of an "internal" nature. It is nowhere suggested that it should apply to the MPCC. Second, it focused on the seriousness of the underlying conduct being investigated by MPs, rather than on the nature of the impugned MP conduct. It cannot surely be doubted that a police officer can commit serious misconduct (falsifying records or evidence, abuse of authority) while investigating trivial misconduct, such as a traffic stop for a minor infraction. Thus, even properly confined to the issue of "internal" versus "public" complaint, as opposed to the application of the definition of "policing duties or functions", this recommendation makes no policy sense.

[35] First Independent Review, p. 82.

86. Thus the purpose of the framework proposed by the former Chief Justice was *not* to determine whether a complaint fell within the MPCC's oversight purview based on the subject-matter, or substance, of the complaint. This assessment is reinforced by the fact that Chief Justice Lamer addressed the matter of the definition of "policing duties or functions" in a separate subsection of his report (at pages 75-77). On the question of subject-matter classification of complaints (i.e., whether a complaint involves MP performance of "policing duties or functions"), Chief Justice Lamer only commented that he was "inclined to believe" that the handling of complaints by the CFPM's office of Professional Standards was indeed a "policing duty or function" (a long-standing area of difference between the CFPM and the MPCC), but declined to make a final pronouncement on the issue until the CFPM's position and role were set out in the NDA.[36]

87. Unfortunately, the Second Independent Review Authority adopted the Lamer Report recommendation extracted above, with little comment or analysis of it.[37] Even more unfortunately, and with all due respect to former Justice Lesage, the latter did so while conflating the issue of "internal" versus "public" complaint (sourcing of the complaint) with that of subject-matter classification – that is, the application of the definition of "policing duty or function" to determine whether a complaint is a conduct complaint within the meaning of NDA section 250.18 and the above regulations.

88. But as discussed above, it is a conflict-of-interest, and would undermine the integrity of the MP oversight system, for the MPs themselves to determine when NDA Part IV applied to a complaint, and when the jurisdiction of the MPCC was triggered. As also noted above, such an arrangement would conflict with norms now established in civilian oversight of police.

7) The MPCC proposes that Part IV of the *National Defence Act* be amended to stipulate that:

a. It is for the MPCC to determine whether a communication received by an authority mentioned in *National Defence Act* subsection 250.21(1) constitutes a conduct or interference complaint for the purposes of Part IV of the *National Defence Act*;

[36] First Independent Review, p. 76.
[37] Second Independent Review, pp. 68-69 and Recommendation 50.

b. Subsection 250.21(1) applies in respect of complaints received directly or indirectly by the officials designated as recipients of conduct complaints; and

c. "Internal" complaints within the purview of the CFPM, and which are not subject to the *National Defence Act* Part IV complaints process, are limited to those which arise entirely within the MP chain of command.

C. Right of Review for Conduct Complaint Subjects

89. During its outreach program of visits to Canadian Armed Forces bases and Military Police units, a recurrent complaint from members of the Military Police about the current conduct complaints system is that only a dissatisfied complainant may request a review of a complaint following initial disposition by the CFPM. This is viewed as a fairness issue by many Military Police members.

90. The MPCC appreciates the rationale behind the legislative decision to extend a right of review only to complainants. If a member of the Military Police is sanctioned in any way as a result of a conduct complaint found to be substantiated by the CFPM, that member has internal Military Police and Canadian Armed Forces means of challenging those sanctions (the Military Police Credentials Review Board, the Canadian Armed Forces grievance process, etc.) which are not available to a complainant.

91. On the other hand, while there may be internal mechanisms for Military Police members to challenge sanctions imposed on them, these do not necessarily apply to findings by the CFPM which merely reflect adversely on a member'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.

92. It is of vital importance for the Commission to be seen as independent of the Canadian Armed Forces in general and the Military Police command in particular. This has to do with the respect for and acceptance of Commission decisions. While one side of a complaint is likely to be disappointed by the Commission's decision, the goal of the Commission is to ensure that both sides agree that the process leading to the result was a fair one. The perception of fairness will be enhanced if the tribunal is not only seen as independent, but also impartial. If subjects of complaints were provided with a right to request a review by the Commission, it would serve to promote balance in the complaints process.

93. A right to request a review for subjects of complaints would also enhance morale among Military Police members. In a system where the Commission cannot compel people to furnish evidence, there is no incentive for Military Police members to do so if they are not allowed to bring matters to the Commission themselves. If the Commission gives them no recourse, there may seem less of an incentive for them to participate.[38] Those findings do not take the form of legal sanctions, but they can have important consequences if they reflect negatively on a Military Police member's reputation. The stress of waiting for a decision on the performance of their duties can also weigh on subject members. Any feeling that the Commission, or at least its legislative mandate, is biased in favour of complainants can only add to that stress.

94. The idea that the subject of a conduct complaint before the CFPM should have the right to request a review was adopted in the First Independent Review. Recommendation 66 of the former Chief Justice Lamer was that the *National Defence Act* be amended such that once a conduct complaint has been resolved by the Canadian Forces Provost Marshal, the complainant or the member of the military police whose conduct was the subject of the complaint would have a right to request a review.

8) The MPCC proposes that a right to request a review by the MPCC of a conduct complaint be extended to the Military Police member who is the subject of a complaint.

D. Extend Complaints Process to All Persons Posted to Military Police Positions

95. The present definition of "military police" which applies to the complaints process is set out in subsection 2(1) of the *National Defence Act.* That provision, when read with section 156 of the Act and Article 22.02 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), refers to Canadian Armed Forces 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 *National Defence Act*

[38] Section 8 of the *Military Police Professional Code of Conduct* imposes a duty on Military Police members to respond to any question relating to an investigation into a breach of the Code, but this duty to cooperate does not apply to the subject of the investigation.

purposes, it would be helpful if it were broadened to at least include persons seconded to Military Police positions.

96. There are two main reasons why the MPCC considers such a change to be desirable. One is that civilian police officers, who have regularly been seconded to Military Police positions with the CFNIS, are often assigned to the more challenging and sensitive cases. Such persons are in an ideal position to both recognize improper interference in investigations, and to come forward as interference complainants under subsection 250.19(1) of the *National Defence Act*. Yet, under the present definition of "military police," they are precluded from doing so.

97. The second reason to broaden the definition of "military police" is that it seems unfair to all concerned that a person performing the role of a member of the Military Police cannot, for technical reasons, be made a subject of a conduct complaint. This is unfair to the complainant who is able to implicate one investigator in a complaint, but not another even though they carried out the same duties. In cases where both the seconded officer and a Regular Force Military Police member are implicated in the conduct complained of, there would also be unfairness to the Regular Force member who can be required to face allegations of misconduct in a complaint while their seconded partner, who shared in their actions, does not have to face them. It is also unfair to the MP chain of command who would be deprived of being able to resolve issues relating to both individual or systemic conduct involving their subordinates for the sole reason that they are seconded members.

98. Not having seconded police officers be considered to be "military police" also deprives them of the rights afforded to subject Military Police members, such as being sent status reports on the progress of an investigation as well as receiving the MPCC's final report. Subject members are always afforded an opportunity to speak with Commission investigators and thereby give their version of their actions that are the subject of a complaint. It is important to note that even if a seconded police officer is made the subject of an MPCC complaint, they are still subject to whatever disciplinary actions their home service may wish to take since the MPCC is not a disciplinary body.

99. In the First Independent Review, Recommendation 71 was that "the *National Defence Act* be amended to provide that persons seconded to or working for the military police are deemed to be military police for the purposes of Part IV of the *National Defence Act*." In the

Second Independent Review, Recommendation 51 was to the effect that subsection 250.19(1) of the *National Defence Act* should be amended to allow persons seconded to Military Police positions to make interference complaints.

9) The MPCC proposes that the *National Defence Act* be amended to expand the definition of "military police" for the purposes of Part IV of that Act to include persons seconded to Military Police positions.

E. Expand Availability of Informal Resolution

100. The MPCC supports a greater use of informal resolution to resolve complaints under Part IV of the *National Defence Act*. At present, section 3 of the *Complaints Against the Conduct of Members of the Military Police Regulations* precludes the use of informal resolution by the CFPM in respect of the following categories of conduct complaints:

a. excessive use of force;
b. corruption;
c. the commission of a service or civil offence;
d. policies of the Canadian Forces Military Police;
e. the arrest of a person;
f. perjury;
g. abuse of authority; or
h. conduct that results in injury.

101. In the MPCC's view, these restrictions are overbroad and should be revisited. Many conduct complaints involve Military Police conduct that can be said to relate to Military Police policies (item (*d*) above). Moreover, the blanket prohibitions on informally resolving complaints regarding "excessive use of force" and "the arrest of a person" potentially cover situations that may not be so serious that they ought to preclude the possibility of informal resolution. 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.

102. However, greater use of informal resolution of conduct complaints must not come at the expense of the intended oversight of the handling of Military Police conduct complaints. The MPCC must continue to be advised of all complaints, including those resolved informally, as well as the terms of such resolutions. Under subsection 250.27(6) of the *National Defence Act*,

the CFPM must notify the MPCC of the fact that a complaint has been informally resolved, but the provision is silent about sharing the terms of the resolution. How a complaint was resolved is important because 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 (subsection 250.38(2) of the *National Defence Act* allows the Chairperson to investigate a complaint even if it has been withdrawn). The RCMP Commission moreover is expressly required to be provided with a copy of the terms and signified agreement for any informally resolved complaint (see subsection 45.56(3) of the *Royal Canadian Mounted Police Act*). The MPCC should be put in the same position.

103. The MPCC also considers that it should have the explicit power to informally resolve interference complaints. In a number of instances where interference complaints have triggered formal MPCC investigations and reports, issues of the lack of communication between the parties to the complaint and misunderstanding of command motivations and intentions, as well as of Military Police 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 in some cases.

104. Support for the MPCC's position on informal resolution can be found in the report of the Second Independent Review. Recommendation 52 of that report reads: "The categories of matters not eligible for informal resolution should be reduced. With respect to complaints informally resolved, I recommend the MPCC be advised of the terms of the informal resolution."

10) The MPCC proposes that section 3 of the *Complaints About the Conduct of Members of the Military Police Regulations* be amended to reduce the categories of conduct complaints for which informal resolution is precluded.

11) The MPCC proposes that it be notified of the terms of any informal resolutions of conduct complaints.

12) The MPCC proposes that it be expressly authorized to have recourse to informal resolution in respect of interference complaints.

F. Time Limits for Requesting a Review and for Providing the Notice of Action

105. Pursuant to section 250.2 of the *National Defence Act*, 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. However, there is no time limit for requesting a review of a conduct complaint following the CFPM's disposition. The MPCC considers that the stipulation of a default time-limit for requesting a review of the CFPM's disposition of a conduct complaint under section 250.31 of the *National Defence Act* would be appropriate, subject to the MPCC Chairperson's discretionary authority to extend any such time limit, where it was considered reasonable to do so.

106. Given the mobility of potential complainants and subjects in the Canadian Armed Forces, and their liability to be deployed around the world for months at a time in difficult and dangerous environments, a relatively generous default time limit would be appropriate, relative to, for example, the 30-day deadline for seeking judicial review from a decision of a federal board or tribunal under subsection 18.1(1) of the *Federal Courts Act*. Subsection 45.7 (1) of the *Royal Canadian Mounted Police Act* requires a complainant who is not satisfied with a decision of the Force concerning their complaint to refer the complaint to the RCMP Commission within 60 days, if they want it to be reviewed.

107. Both the First and Second Independent Reviews endorsed the idea of a time limitation on requests for reviews. In Recommendation 66 of the First Independent Review, former Chief Justice Lamer suggested both the complainant and the subject would have 60 days to request a review. If a review was not requested within that period, the case would be deemed closed. In Recommendation 53 of the Second Independent Review, former Justice Lesage held that there ought to be a time limit of 90 days for requesting a review of a conduct complaint after it has been investigated by the CFPM. The Commission recommends a 90-day time limitation.

108. Another stage of the process where timeliness is presently unregulated is the issuance of the Notice of Action in response to the MPCC's Interim Report. The MPCC is unable to proceed to its Final Report and conclude its process without having first considered the Notice of Action.

109. It is the CFPM who prepares the Notice of Action in response to the MPCC's Interim Reports in the case of all conduct complaints, except where the CFPM himself or herself is a subject of the complaint. The Chief of the Defence Staff is responsible for the Notice of Action for conduct complaints where the CFPM is a subject of the complaint,[39] and for all interference complaints where the subject of the complaint is a member of the Canadian Armed Forces.[40] Where the subject of an interference complaint is a senior official of the Department of National Defence, the Deputy Minister is responsible for the Notice of Action.[41] Finally, where the subject of an interference complaint is either the Chief of the Defence Staff or the Deputy Minister, the review of the MPCC Interim Report and the preparation of the Notice of Action falls to the Minister.[42]

110. A number of details would need to be worked out in order to implement such a time limit for the production of the Notice of Action: the length of the permitted delay; whether the time limit should be the same for all the officials who are required to produce Notices of Action (or if the more senior departmental officials – the Chief of the Defence Staff, the Deputy Minister and the Minister – should automatically have a longer deadline); whether there should be the possibility of obtaining an extension of the time limit from the MPCC; and, what should be the consequences for a failure to comply with the deadline. However, the priority for purposes of this review should be on establishing the principle of a deadline for production of the Notice of Action, in order that representatives of the overseen police service cannot unnecessarily delay the MPCC's Final Report. The Commission recommends a 90 day time limit for the production of the Notice of Action subject to extension by the Chairperson. The Commission is of the view that where the time limit is not adhered to and no request to extend is received, that the Commission be permitted to issue its Final Report.

111. The potential negative consequences of not requiring a Notice of Action to be furnished within a certain period of time can be seen in what has happened with the RCMP Commission. Similar to the MPCC situation, the *Royal Canadian Mounted Police Act* does not set a time limit

[39] *National Defence Act*, s. 250.26(2), read with s. 250.51.
[40] *National Defence Act*, s. 250.36(*b*), read with ss. 250.5(1)(*a*) and 250.51.
[41] *National Defence Act*, s. 250.5(1)(*b*), read with s. 250.51.
[42] *National Defence Act*, ss. 250.5(2) and 250.52.

on the Commissioner of the RCMP's response to RCMP Commission interim reports.[43] In the RCMP Commission's 2019-2020 Annual Report, the Chairperson writes of her dismay about the length of time that it takes for the Commissioner of the RCMP to provide a response to RCMP Commission interim reports, with the average length of time for a response having risen to 17 months (the CFPM's normal delay is nowhere near this length). This issue is of significant concern to her, as lengthy delays serve to obscure transparency, dilute the effects of findings and reduce or eliminate the value of recommendations.[44] The Chairperson goes on to say that Canadians have a right to know if the RCMP Commission's findings and recommendations have been accepted and if RCMP policies, procedures and training have been adjusted as a result.

13) The MPCC proposes that a 90 day time limit for requesting a review of a conduct complaint, subject to extension by the MPCC Chairperson, be adopted.

14) The MPCC proposes that a 90 day time limit be imposed for the production of the Notice of Action, subject to extension by the MPCC Chairperson. In the absence of a Notice of Action within the stipulated time frame or an application to extend, the MPCC may proceed to issue its Final Report.

G. Chair-Initiated Complaints

112. The MPCC believes that it has the implicit authority to initiate complaints on its own authority by the fact that "any person" pursuant to 250.18 may file a conduct complaint. The Commission seeks greater clarity on this important matter and is requesting explicit authority to do so which is in line with the MPCC's 'sister' organization, the RCMP Commission.

113. From time to time, issues arise in the news media which cast military policing in a negative light. Yet, for whatever reason (lack of awareness of the complaints process, e.g.), those involved in the events may not bother to file a complaint. This is rather unsatisfactory from the MPCC's perspective, given that, as we see it, our mandate is to help support public confidence in the military police. Important issues about military policing may be raised in the public domain, issues which could benefit from treatment by an independent and impartial body. Yet arguably, the MPCC must depend on complaints from individuals in order to become involved in a situation where MP actions have been impugned.

[43] Under subsection 45.76(2) of the *Royal Canadian Mounted Police Act*, the Commissioner of the RCMP is required to respond to an interim report "as soon as feasible." Under subsection 45.76(3), a final report may be issued "after considering the Commissioner's response."
[44] Civilian Review and Complaints Commission for the RCMP, *Annual Report 2019-2020*, June, 2020, p. 2.

114. An oversight body has a greater capacity to discern systemic problems than does an individual complainant. An individual complainant may perceive a problem in one event but the tribunal may determine that this problem is common to numerous events. It is by means of a tribunal-initiated complaint that a wider policy or training issue can be examined.

115. Currently, the scope of the Commission Chairperson's ability to call for a public interest investigation is not as clear as it is for some other tribunals. Subsection 250.38(1) of the *National Defence Act* (NDA) can be read as requiring there to be an existing complaint before the Chairperson can call for a public interest investigation. This impression is reinforced by subsection 250.38(3) of the Act which requires the Chairperson to notify the complainant and the subject of the complaint if there is to be a public interest investigation. On the other hand, as noted at the outset, since "any person" may make a conduct complaint under subsection 250.18(1) of the Act, the Chairperson – or any other personnel of the MPCC – may well technically be allowed to make a conduct complaint.

116. Further, the NDA Part IV complaints process does not make any particular accommodation for a Chairperson-initiated complaint. It would be treated like any other complaint, which could be problematic. For instance, it is arguable that the provisions requiring that informal resolution be considered and allowing the CFPM to screen out certain complaints as being inappropriate for the complaints process (respectively, NDA subsections 250.27(1) and 250.28(2)) should not apply to an MPCC Chairperson-initiated complaint. Yet under the current NDA Part IV process, the Chairperson's complaint would be treated like that of "any person".

117. This is in contrast to the situation with the Chairperson of the RCMP Commission. In addition to being expressly authorized to initiate a complaint, pursuant to subsection 45.59(1) of the *Royal Canadian Mounted Police Act* (RCMP Act), the RCMP Act exempts CCRC Chairperson-initiated complaints from RCMP Act section 45.61, which is the equivalent of NDA subsection 250.28(2) (which provides for the screening out of complaints that are deemed frivolous and vexatious, etc.).

118. In British Columbia, the police complaint commissioner can order an investigation if information comes to its attention concerning conduct that, if substantiated, would constitute misconduct, regardless of whether a complaint is made.[45]

119. Other non-policing oversight bodies also have a clear self-initiating complaint power.[46]

120. The power to initiate complaints is common to the office of an ombudsman and, according to a 2007 task force, was recommended as a feature of independent RCMP oversight in order to avoid having to create a separate ombudsman service.[47]

121. An entirely complainant-driven system depends on those complainants being willing to come forward and put their name on a complaint. This may be asking too much if it is a question of a subordinate complaining about their superior, particularly in a hierarchical organization such as the Canadian Armed Forces.

122. A concrete example of the importance of clarifying the Chairperson's power to initiate conduct complaints is the Commission's first self-initiated complaint (file MPCC 2020-013 (MPCC Registrar)). The subject matter of this public interest investigation came to the attention of the Commission by means of an interference complaint. While looking into the facts of that complaint, a Commission investigator was alerted to important questions that could be raised about the conduct of a number of Military Police members and their supervisors. Yet that conduct was not the subject of a complaint before the Commission, nor was it ever likely to be brought before the Commission. One of the potential complainants was medically incapable of launching a complaint while the other potential complainant had been left vulnerable by events, such that it would have been highly unlikely that this person would have brought the matter forward. The result was that the Commission had knowledge of potential misconduct by

[45] *Police Act*, R.S.B.C. 1996, c. 367, s. 93.

[46] Under subsection 30(3) of the *Access to Information Act*, where the Information Commissioner is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records, the Commissioner may initiate a complaint in respect thereof. Under subsection 40(3) of the *Canadian Human Rights Act*, where the Human Rights Commission has reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice, it may initiate a complaint.

[47] Task Force on Governance and Cultural Change in the RCMP, *Rebuilding the Trust*, 14 December 2007, p. 15. This report was prepared for the Minister of Public Safety and President of the Treasury Board to address the issue of rebuilding trust in the management of the RCMP.

members of the Military Police but no complaint from those most affected. In order to carry out its mandate to investigate the conduct of the Military Police in carrying out policing duties or functions, the Commission for the first time, has decided to launch its own conduct complaint.

123. Chairperson-initiated complaints are certainly in keeping with the scope of authorities granted to the Commission by Parliament. Subsection 250.18(1) of the *National Defence Act* states that "any person" may make a conduct complaint, while subsection 250.18(2) of the Act states that a conduct complaint may be made whether or not the complainant is affected by the subject-matter of the complaint. Moreover, when the Commission receives a conduct complaint, subsection 250.32(2) of the *National Defence Act* empowers the Chairperson to investigate any matter relating to the complaint. At any time the Chairperson may declare a complaint to be a matter of public interest and can even continue a public interest investigation if the complaint has been withdrawn.[48]

124. So Parliament has already granted to the Commission the power to act in the public interest. It would be consistent with this power for Parliament to grant the Chairperson the express power to self-initiate complaints, as it has done for the RCMP Commission. Such a move would assure the legitimacy of MPCC-initiated complaints, and would provide the opportunity to make necessary accommodations to the complaints process, as described above.

125. In the First Independent Review, former Chief Justice Lamer stated: "It is in keeping with the goal of independent oversight that the MPCC Chairperson have the authority to initiate an independent conduct complaint" while then cautioning that this authority must be used judiciously. Recommendation 62 of the Lamer Report read that "the *National Defence Act* be amended to allow the Chairperson of the Military Police Complaints Commission to submit a conduct complaint for investigation by the Canadian Forces Provost Marshal where the Military Police Complaints Commission Chairperson is satisfied that there are reasonable and probable grounds for such an investigation."

15) The MPCC proposes that Part IV of the *National Defence Act* be amended to make express provision for MPCC Chairperson-initiated conduct complaints and that *National Defence Act* subsections 250.27(1) and 250.28(2) should not apply to such complaints.

[48] *National Defence Act*, s. 250.38(2).

H. Additional Discretionary Authorities for Disposing of Complaints

1) Authority to Screen Out Conduct Complaints at the Review Stage

126. In the case of Military Police conduct complaints, it is the CFPM who, absent an MPCC declaration of public interest, is charged with disposing of them in the first instance.[49] One of the options given to the CFPM for disposing of a complaint is to decline to deal with it on the basis that:

> (a) the complaint is frivolous, vexatious or made in bad faith;
>
> (b) the complaint is one that could more appropriately be dealt with according to a procedure provided under another Part of this Act or under any other Act of Parliament; or
>
> (c) having regard to all the circumstances, investigation or further investigation is not necessary or reasonably practicable.[50]

Such a disposition is reviewable by the MPCC at the request of the complainant.[51]

127. With respect to interference complaints, the MPCC has the same screening authority that the CFPM has regarding conduct complaints.[52] The MPCC does not, however, have the authority – at least not explicitly – to screen out conduct complaints at the review stage.

128. By the time a complaint is at the MPCC review stage, the CFPM should be deemed to have already considered and rejected the application of the above-noted screening criteria to the complaint. This does not, however, diminish the need for the MPCC to be able to revisit the issue at the review stage. New information generated by the CFPM's investigation, or the contents of the complainant's request for review, may cast the complaint in a different light from what it seemed to be at the time of its initial submission. In such cases, the strictures against wasting time and resources on complaints that do not merit them still apply.

16) The MPCC proposes that it be given the authority to screen out conduct complaints at the review stage.

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[49] *National Defence Act*, s. 250.26(1).
[50] *National Defence Act*, s. 250.28(2).
[51] *National Defence Act*, s. 250.31(1).
[52] *National Defence Act*, s. 250.35(2).

2) 'Satisfied' Reports

129. Another category of cases which warrants more limited expenditure of effort and resources on the part of the MPCC would be where – after having reviewed the complaint, the CFPM's treatment of the complaint, and the request for review – the MPCC is satisfied with the CFPM's disposition of the matter, without seeing the need to take any further steps. In such cases, the MPCC should have the option of concluding the complaint review with a brief report or letter indicating its satisfaction with the CFPM's disposition of the complaint. This 'satisfied' report would be the MPCC's final disposition on the complaint and would avoid the additional time and effort in having to produce an Interim Report, and then wait for the Notice of Action before producing the Final Report.

130. At the RCMP, as with the MP complaints process, complaints about the conduct of a member are first considered by the Force itself. If a complainant is not satisfied with the Force's disposition of their complaint, they may bring it forward to the RCMP Commission for review. Under subsection 45.71(2) of the *Royal Canadian Mounted Police Act*, if, after reviewing a complaint, the RCMP Commission is satisfied with the Commissioner's report, it prepares and sends a report in writing to that effect to various parties, including the complainant and the member or other person whose conduct is the subject matter of the complaint. The MPCC believes that it should be afforded a power to express its satisfaction with a report of the CFPM that is similar to that already afforded to its 'sister' oversight body.

17) The MPCC proposes that it be authorized to dispose of a conduct complaint review by issuing a report indicating its satisfaction with the CFPM's disposition of the complaint.

3) Authority to Remit Conduct Complaint back to the CFPM for Further Investigation

131. Part IV of the *National Defence Act* makes it clear that the CFPM is to have the primary responsibility for dealing with conduct complaints. At the review stage, the MPCC "may investigate any matter relating to the complaint."[53] However, the clear intent of the legislation is that, in the normal case, the MPCC should be able to complete its review of a conduct complaint without conducting a *de novo* investigation. In practice, however, it regularly occurs that the

[53] *National Defence Act*, s. 250.32(2).

CFPM's investigative effort has been constrained by an unduly narrow interpretation of the complaint or of its mandate relative to the complaint.

132. In situations where the MPCC disagrees with the CFPM's more limited understanding of a complaint, its only option at present is to itself fill the void left by the CFPM's investigation – or lack thereof – with its own investigation. However, when done routinely, this approach can lead to the MPCC expending greater resources - including time, as well as person-hours - in fulfilling its review mandate than what Parliament intended.

133. A solution to this problem would be to give the MPCC the authority, at the review stage, to remit a conduct complaint, or an aspect thereof, back to the CFPM for further investigation. Where the MPCC chose to remit only part of complaint back to the CFPM, it would have the option of proceeding to review the unremitted aspects of the complaint.

18) The MPCC proposes that it be given the authority, at the review stage, to remit a conduct complaint back to the CFPM with directions as to further areas or avenues of investigation.

4) Discretion to Continue to Deal with a Complaint Despite Withdrawal

134. The way that Part IV of the *National Defence Act* is presently constructed, the complainant has the unrestricted right to withdraw a complaint by simply sending a written notice to this effect to the MPCC Chairperson.[54] After this point, the only means by which the MPCC can continue to address the complaint is by invoking its public interest investigation or hearing authorities.[55]

135. This situation is not entirely desirable. There are reasons other than the public interest significance of a complaint which can militate in favour of the MPCC completing a conduct complaint review or interference complaint investigation. An obvious one would be situations where the MPCC is concerned that a decision to withdraw a complaint has been improperly influenced by external pressures, inducements, or considerations not based on the public interest. Another reason to do so, would be that the withdrawal has come so late in the process that it would represent a considerable waste of the MPCC's resources and efforts if it were not allowed

[54] *National Defence Act*, s. 250.24(1).
[55] *National Defence Act*, s. 250.38(2).

the option of completing its treatment of the complaint. Indeed, this very situation arose in a recent case (MPCC 2017-026).

136. The MPCC considers that it should not be necessary for it to dilute its conception of public interest significance, per subsection 250.38(1) of the *National Defence Act*, in order to retain authority to complete a complaint. It should also be noted that the RCMP Commission already has the authority to investigate a complaint even though it has been withdrawn. Subsection 45.55(5) of the *Royal Canadian Mounted Police Act* states that despite the withdrawal of a complaint, it may be the subject of an investigation, review or hearing conducted by the RCMP Commission.

19) The MPCC proposes that it be given the authority, when it considers it appropriate in the circumstances, to complete its treatment of a conduct or interference complaint notwithstanding that the complainant has purported to withdraw the complaint.

I. Extension of Members' Terms Where Cases Ongoing

137. The MPCC believes that it is inefficient and unfair to parties to have the Commission Member(s) assigned to their case changed part-way through, or to have to redo certain stages of the process, in order to deal with the untimely expiration of a Member's term. The MPCC considers that it would be fair, efficient and appropriate for Members' terms to be automatically extended, at the Chairperson's discretion, in respect of any outstanding files that are still pending before them at the time of the expiration of their terms. 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 a Member's term.

138. Such provision would also enhance the integrity of the MPCC's processes by countering any possible perception of political interference. A precedent at the federal level for such a legislative provision may be found in subsection 8(3) of the *Canada Transportation Act*, which authorizes the Chair of the Canadian Transportation Agency to allow a Member of that Agency to finish disposing of any matter that was before him or her on the expiry of that member's term of office.

139. The extension of members' terms where cases are ongoing was supported in both the First and Second Independent Reviews. Recommendation 70 of the First Independent Review was to the effect that the *National Defence Act* be amended to provide authority to members of the MPCC whose terms have expired to complete their caseloads. In the Second Independent Review, Recommendation 55 stated that the term of MPCC Members should be automatically extended in respect of complaint files assigned to them prior to their notification that their term is not to be renewed.

20) The MPCC proposes that the terms of Commission Members be extendable, at the discretion of the Chairperson, in respect of complaint files pending before them at the time of the expiration of their terms.

J. Expanding Scope of Interference Complaints

140. At present, an interference complaint may only be made against alleged improper interference with a "military police investigation."[56] 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 Military Police decisions relating to the laying of charges, or attempts to interfere with a Military Police member's intended testimony in court proceedings, for example, could all impact significantly on the ability of the Military Police to carry out its duties.

141. The Part IV interference complaints process should be available to address situations that may be considered beyond the bounds of an investigation. The independence and integrity of Military Police members' policing discretion and judgment must be protected in all phases of the process.

142. An expansion of the scope of an interference complaint gained the support of former Justice Lesage in the report of the Second Independent Review. Recommendation 51 of that report states, in part, that subsection 250.19(1) of the *National Defence Act* should be amended to include improper interference with a policing duty or function.

[56] *National Defence Act*, s. 250.19(1).

21) The MPCC proposes that the scope of an interference complaint as set out in subsection 250.19(1) of the *National Defence Act* be amended to allow for complaints about improper interference with any policing duty or function carried out by a member of the Military Police.

K. CFPM to Report back to MPCC on Implementation of Recommendations

143. The key external accountability feature of the MP complaints process, for the Military Police as an organization, is that the CFPM must accurately advise the MPCC of the measures he or she is taking, or planning to take, in response to a complaint in the Notice of Action, and that the MPCC then is able to assess this response in its Final Report. In order to properly hold the CFPM accountable, the MPCC must be able to rely on the CFPM implementing his or her commitment in the Notice of Action. The MPCC must be able to assume, absent notification to the contrary, that accepted recommendations have been, or will be, implemented. If for some reason an accepted recommendation is not implemented, or not implemented as proposed and accepted, then the MPCC will need to be aware of this, and the reason, when contemplating future recommendations, in order to ensure that its recommendations are informed and useful. Accurate information about MPCC recommendation implementation is also important in allowing the MPCC's impact on military policing to be assessed.

144. Naturally, the MPCC is not in a position to track the implementation of the commitments made by the CFPM as to changes in MP orders, policies, and training, etc. As such, it makes sense to impose a duty on the CFPM to provide details to the MPCC on the implementation of its accepted recommendations, both in terms of timing and content.

145. The present CFPM has been very diligent about keeping the MPCC updated on the actions taken in response to a complaint, whether as a result of one of our recommendations or his own initiative. However, keeping the MPCC informed in this manner should not depend on the good will of the incumbent CFPM.

22) The MPCC proposes that the CFPM be required to advise the MPCC on the timing and manner of the implementation of the MPCC's recommendations as accepted by the CFPM.

L. Legislative Consultation with MPCC

146. While the MPCC is considered to be part of the National Defence Portfolio, that status does not mean that it has any input on the decisions made concerning its governing legislation. The MPCC has had no ability to internally (i.e., within the portfolio) advance its own legislative proposals, or even to argue for adoption of previous Independent Review recommendations (to be clear, the MPCC has no control over which Independent Review recommendations have been implemented versus those which have not), beyond a direct appeal to Parliament and the public. The MPCC has done this on occasion, through its Annual Report and other publications as well as parliamentary appearances. The MPCC has never been consulted on the various bills that have been submitted to implement previous independent legislative reviews, or to otherwise amend Part IV of the *National Defence Act*: Bill C-7, Bill C-41, Bill C-45, Bill C-15. Even the commencement of the Independent Review process was kept from us until the last minute, despite our regular inquiries.

147. However, the lack of any mechanism or practice of prior consultation with the MPCC before legislation affecting it is tabled is problematic, for the Department of National Defence, as well as for the MPCC. In order to draw attention to possible improvements to legislation the MPCC is forced to go public after the fact and put itself in the position of challenging the Department's legislative agenda.

148. The lack of consultation of the MPCC on bills that concern how it operates runs counter to such government policies as the Cabinet Directive on Law-Making. This document states that the decision to address a matter through a bill or regulation is made by Cabinet on the basis of information developed by a Minister's departmental officials. To provide this information, a department is urged to engage in consultation with those who have an interest in the matter. In the case of a bill, the principal means for conveying this information is a Memorandum to Cabinet, which should address the type of public consultation, if any, that the sponsoring Minister has held or expects to hold.

149. A companion government-wide policy document is the Cabinet Directive on Regulation. This document states that departments and agencies are responsible for identifying stakeholders affected by regulations, and meaningfully consulting and engaging with them throughout the

development, management, and review of regulations. In doing so, they should follow the Government of Canada's policies and guidance for consultation and engagement. These directives should be applied in the case of proposed bills or regulations that affect the Commission. A process of meaningful consultation of Commission staff would ensure that those with the greatest knowledge of how the Commission operates have an input into proposals that may affect how it carries out its mandate.

150. This Department's practice, at least with respect to the MPCC, appears to be out of step with best practices in terms of legislative development.

23) The MPCC proposes that the Department of National Defence be required to consult with the MPCC prior to tabling legislation, or promulgating regulations, specifically affecting the MPCC or Part IV of the *National Defence Act*.

III. MILITARY POLICE INDEPENDENCE

A. CFPM-VCDS Reporting Relationship

151. Subsection 18.5 of the *National Defence Act* establishes in statute the reporting relationship between the CFPM and the Vice Chief of the Defence Staff (VCDS). It is entirely appropriate that the CFPM report to, and be accountable to, a very senior officer of the Canadian Armed Forces for the overall conduct of military policing. This has been the case since the establishment of the office of CFPM in 1997. However, prior to the 2013 amendments contained in Bill C-15, it was deemed inappropriate for the VCDS to issue directions in respect of a particular MP investigation. This prohibition was formalized in writing in the 1998 VCDS-CFPM *Accountability Framework* which was signed by the VCDS and CFPM of the day.

152. This Framework, 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…", also 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 went on to say that the CFPM would monitor individual investigations and provide a general overview of investigations

to the VCDS, but it was in the purview of the CFPM to decide what information to share with the VCDS.

153. This aspect of the Framework was abrogated by the adoption of subsection (3) of NDA section 18.5, and the VCDS became expressly authorized to direct the CFPM in respect of specific MP investigations. While this provision has yet to be invoked, it raises an obvious concern regarding the independence of police investigations. Not only does subsection 18.5(3) run directly counter to the *Accountability Framework*, but it also runs counter to Canadian law and practice regarding police investigations generally. In its 1999 decision in *R. v. Campbell*, the Supreme Court 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.[57] The Court's statement that the principle of police independence in the conduct of investigations "underpins the rule of law,"[58] 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.[59]

154. The Commission has consistently opposed the adoption of NDA subsection 18.5(3): in Bill C-45, then Bill C-41, and finally in Bill C-15 which was given Royal Assent in 2013. The Commission's then-Chairperson made submissions to parliamentary committees studying the bill and appeared before the House of Commons Standing Committee on National Defence and Veterans Affairs (SCONDVA) on this issue, a copy of which is attached for your reference, along with an independent research opinion by Professor Kent Roach, which was commissioned by the MPCC. (Annex C – MPCC Submissions)

155. The authority conferred upon the VCDS is specifically and exclusively aimed at the heart of military policing duties, i.e., the investigation of offences. The fact that Military Police members have a dual role as police officers and as soldiers does not diminish the applicability of the legal principle of police independence to the Military Police when conducting law enforcement investigations. If it were otherwise, then questions must be raised as to why

[57] [1999] 1 S.C.R. 565, at paras 29 – 34.
[58] [1999] 1 S.C.R. 565, at para 29.
[59] 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at p. 240.

Parliament created the interference complaint mechanism in the 1998 *National Defence Act* amendments that established the Commission.

156. It is true that the First Independent Review Authority recommended that the position of CFPM be established and described in the NDA, like other key figures in the military justice system.[60] However, Chief Justice Lamer did so out of concern for protecting the CFPM's independence "from influence or interference."[61] The Chief Justice reviewed the 1998 VCDS and CFPM *Accountability Framework*, in part to get a better idea of the scope of the CFPM's duties and role. The only concern he expressed with the Framework was that its non-legislative status provided insufficient protection of the CFPM's policing independence, and that it did not "set out clearly Parliament's intent in creating the role of Provost Marshal... [which] leads to practical difficulties when interpreting laws and regulations regarding the Provost Marshal."[62] Chief Justice Lamer said nothing in his report about the need for the CFPM to be subject to direction in specific investigations by the VCDS or anyone else, quite the contrary. Therefore, it can in no way be maintained that NDA subsection 18.5(3) specifically was created in order to implement former Chief Justice Lamer's recommendations.

24) The MPCC proposes that subsection 18.5(3) of the *National Defence Act*, authorizing the VCDS to issue directions to the CFPM in respect of specific military police investigations, be repealed.

[60] First Independent Review, recommendation #58.
[61] First Independent Review, p. 74
[62] First Independent Review, pp. 74-75.

IV. LIST OF PROPOSALS

A number of the MPCC's proposals below have already been endorsed in previous independent reviews of the NDA (specifically proposals 8, 9, 10, 11, 13, 15, 20, 21), but the MPCC feels obliged to make them again as they have not yet been implemented. Proposals that fall into this category appear below in *italics*.

1. **The MPCC proposes that Part IV of the *National Defence Act* be amended to require the Canadian Forces Provost Marshal, the Canadian Armed Forces, and the Department of National Defence to disclose to the MPCC all records under their control which, in the view of the MPCC, may be relevant to the performance of its mandate.**

2. **The MPCC proposes that Part IV of the *National Defence Act* be amended to give it the power to summon and enforce the attendance of witnesses before it and compel them to give oral or written evidence on oath and to produce any documents and things that the MPCC considers relevant for the full investigation, hearing and consideration of a complaint.**

3. **The MPCC proposes that it be added to the *Canada Evidence Act* Schedule by first amending s.250.42 of the *National Defence Act* to fully address the hearing procedures and handling requirements necessary to receive "sensitive information" and "potentially injurious information"; and second, that it be added to the Schedule of Designated Entities pursuant to paragraph 38.01(6)(d) and subsection 38.01(8) of the *Canada Evidence Act*.**

4. **The MPCC proposes that Part IV of the *National Defence Act* be amended so as provide the MPCC with access to solicitor-client privileged information in cases where it is relevant to a fair disposition of the complaint.**

5. **The MPCC proposes that Part IV of the *National Defence Act* be amended such that the evidentiary restrictions in *National Defence Act* paragraph 250.41(2)(*a*) be modified with respect to solicitor-client privilege, and that paragraphs 250.41(2)(*b*) and *(d)* be repealed.**

6. **The MPCC proposes that it be added to the list of designated investigative bodies in Schedule II of the Privacy Regulations.**

7. **The MPCC proposes that Part IV of the *National Defence Act* be amended to stipulate that:**

    a. **It is for the MPCC to determine whether a communication received by an authority mentioned in *National Defence Act* subsection 250.21(1) constitutes a conduct or interference complaint for the purposes of Part IV of the *National Defence Act*;**

    b. **Subsection 250.21(1) applies in respect of complaints received directly or indirectly by the officials designated as recipients of conduct complaints; and**

c. "Internal" complaints within the purview of the CFPM, and which are not subject to the *National Defence Act* Part IV complaints process, are limited to those which arise entirely within the MP chain of command.

8. ***The MPCC proposes that a right to request a review by the MPCC of a conduct complaint be extended to the Military Police member who is the subject of a complaint.***

9. ***The MPCC proposes that the National Defence Act be amended to expand the definition of "military police" for the purposes of Part IV of that Act to include persons seconded to Military Police positions.***

10. ***The MPCC proposes that section 3 of the Complaints About the Conduct of Members of the Military Police Regulations be amended to reduce the categories of conduct complaints for which informal resolution is precluded.***

11. ***The MPCC proposes that it be notified of the terms of any informal resolutions of conduct complaints.***

12. The MPCC proposes that it be expressly authorized to have recourse to informal resolution in respect of interference complaints.

13. ***The MPCC proposes that a 90 day time limit for requesting a review of a conduct complaint, subject to extension by the MPCC Chairperson, be adopted.***

14. The MPCC proposes that a 90 day time limit be imposed for the production of the Notice of Action, subject to extension by the MPCC Chairperson. In the absence of a Notice of Action within the stipulated time frame or an application to extend, the MPCC may proceed to issue its Final Report.

15. ***The MPCC proposes that Part IV of the National Defence Act be amended to make express provision for MPCC Chairperson-initiated conduct complaints*** **and that *National Defence Act* subsections 250.27(1) and 250.28(2) should not apply to such complaints.**

16. The MPCC proposes that it be given the authority to screen out conduct complaints at the review stage.

17. The MPCC proposes that it be authorized to dispose of a conduct complaint review by issuing a report indicating its satisfaction with the CFPM's disposition of the complaint.

18. The MPCC proposes that it be given the authority, at the review stage, to remit a conduct complaint back to the CFPM with directions as to further areas or avenues of investigation.

19. The MPCC proposes that it be given the authority, when it considers it appropriate in the circumstances, to complete its treatment of a conduct or interference complaint notwithstanding that the complainant has purported to withdraw the complaint.

20. *The MPCC proposes that the terms of Commission Members be extendable, at the discretion of the Chairperson, in respect of complaint files pending before them at the time of the expiration of their terms.*

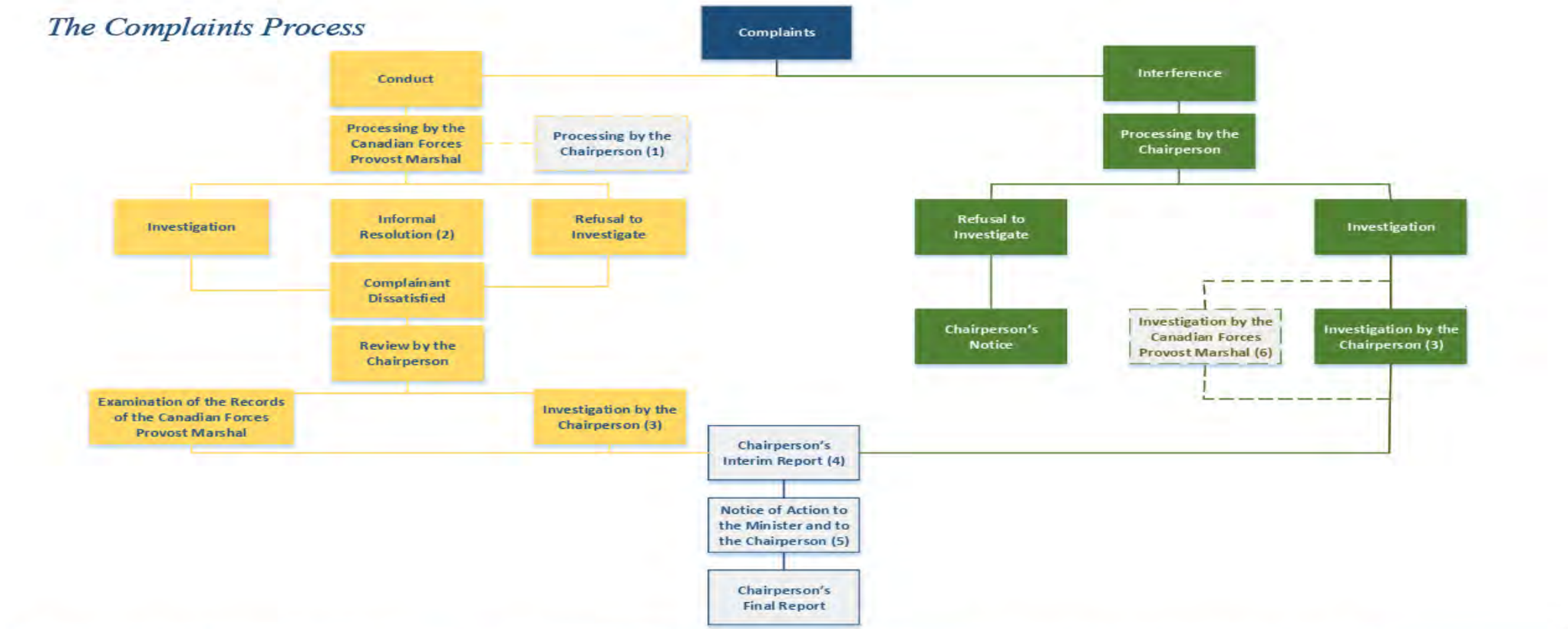
21. *The MPCC proposes that the scope of an interference complaint as set out in subsection 250.19(1) of the National Defence Act be amended to allow for complaints about improper interference with any policing duty or function carried out by a member of the Military Police.*

22. The MPCC proposes that the CFPM be required to advise the MPCC on the timing and manner of the implementation of the MPCC's recommendations as accepted by the CFPM.

23. The MPCC proposes that the Department of National Defence be required to consult with the MPCC prior to tabling legislation, or promulgating regulations, specifically affecting the MPCC or Part IV of the *National Defence Act*.

24. The MPCC proposes that subsection 18.5(3) of the *National Defence Act*, authorizing the VCDS to issue directions to the CFPM in respect of specific military police investigations, be repealed.

V. ANNEX A – THE COMPLAINTS PROCESS CHART



VI. ANNEX B – GOVERNMENT RESPONSE TO PETITION

RESPONSE TO PETITION

Prepare in English and French marking 'Original Text' or 'Translation'

PETITION NO.: **421-01150**

BY: **MR. GARRISON (ESQUIMALT-SAANICH-SOOKE)**

DATE: **FEBRUARY 15, 2017**

PRINT NAME OF SIGNATORY: **THE HONOURABLE JODY WILSON-RAYBOULD**

Response by the Minister of Justice and Attorney General of Canada

SIGNATURE
Minister or Parliamentary Secretary

SUBJECT

Access to information

ORIGINAL TEXT

REPLY

Section 38 of the *Canada Evidence Act* is a regime that protects "sensitive information" and "potentially injurious information", as defined in the Act, the disclosure of which could be harmful to Canada's international relations, national defence or national security. Entities that are listed to the Schedule of the *Canada Evidence Act* are exempt from the general notice provisions, set out in section 38.01 of the Act, where they have the ability to conduct closed proceedings to protect "sensitive information" or "potentially injurious information". The Military Police Complaints Commission (MPCC) does not presently have this capability.

While the mandate of the MPCC allows it to conduct *in camera* (i.e., closed) proceedings if information identified in section 250.42 of the *National Defence Act* is likely to be disclosed, the scope of section 250.42 does not fully encompass "sensitive information" or "potentially injurious information". As a result, the MPCC does not meet the strict requirements to be listed in the Schedule to the Act. The Government is committed to protecting Canadians by ensuring that Canada's national defence and national security interests are protected both at home and abroad. That is why tools such as the Schedule to the *Canada Evidence Act* are essential and are updated from time to time where required.

Page **1** of **1**

VII. ANNEX C – MPCC SUBMISSIONS IN RELATION TO BILL C-15

Military Police Complaints Commission
Chairperson

Commission d'examen des plaintes concernant la police militaire
Président

October 26, 2011

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

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

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

Sincerely,

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

Enclosures (3)

Canada

270 Albert Street, 10th Floor, Ottawa, Ontario K1P 5G8
Tel.: 613-947-5684 Fax: 613-947-5705 Toll free: 1 800 632-0566
www.mpcc-cppm.gc.ca

270, rue Albert, 10e étage, Ottawa (Ontario) K1P 5G8
Tél. : 613-947-5684 Téléc. : 613-947-5705 Sans frais : 1 800 632-0566
www.mpcc-cppm.gc.ca

Military Police Complaints Commission
Chairperson

Commission d'examen des plaintes concernant la police militaire
Présidente

BRIEF OF THE MPCC REGARDING BILL C-15

Dear Honourable Members:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

French Version of Paragraph 250.42(c)

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

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

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

Sincerely,

Glenn Stannard, O.O.M.
Chair

Enclosures (2)

ACCOUNTABILITY FRAMEWORK

THE VICE CHIEF OF THE DEFENCE STAFF

AND

THE CANADIAN FORCES PROVOST MARSHAL

PURPOSE

The purpose of this accountability framework is to outline the roles and relationship of the Vice Chief of the Defence Staff (VCDS) and the Canadian Forces Provost Marshal (CFPM) within an accountability framework which will ensure the provision of a professional and effective military police service.

PRINCIPLES

The primacy of operations as well as the need for independence in investigations are recognized. Striving towards these complimentary objectives through a transparent, timely and responsive process is crucial.

Competing interests and priorities must be balanced and addressed in an harmonious manner without sacrificing the integrity of military police services nor the operational requirements of the chain of command.

The need for swift administration of justice and discipline is acknowledged as well as respect for the rights of individuals.

ROLES, RESPONSIBILITIES AND ACCOUNTABILITY

Review and oversight of Military Police operations is the responsibility of the VCDS. The VCDS may give orders and general direction to the CFPM to ensure professional and effective delivery of policing services. The CFPM is accountable to the VCDS for developing and maintaining police standards which are consistent with those of other police agencies.

The orders and general direction of the VCDS may include matters of public, Departmental, Canadian Forces and strategic military police policy, ethical standards and requirements to comply with the laws of Canada.

The VCDS shall not direct the CFPM with respect to specific military police operational decisions of an investigative nature.

The CFPM is responsible for developing policies and plans to guide the day to day management of security and military police resources of the department and to exercise command and control over the Canadian Forces National Investigation Service (CFNIS) as well as to exercise technical control over other military policing activities.

The CFPM, as the senior advisor on military police matters to the VCDS and the Canadian Forces, is accountable to the VCDS.

ROLES AND RELATIONSHIP WITHIN AN ACCOUNTABILITY FRAMEWORK

1(A) THE VCDS WILL ESTABLISH GENERAL PRIORITIES AND OBJECTIVES FOR MILITARY POLICE SERVICES

The VCDS will establish general priorities and objectives in consultation with the CFPM and the chain of command which will form a part of the VCDS Business Plan. The VCDS will monitor the accomplishment of these priorities and objectives through periodic meetings with the CFPM and updating reports. In order to determine if priorities and objectives are achieving the intended results, feedback through Chief Review Services (CRS), the CFPM annual report, CFPM functional reviews or external audit may be utilized.

1(B) THE CFPM WILL ESTABLISH A PROCESS TO ACHIEVE PRIORITIES AND OBJECTIVES FOR MILITARY POLICE SERVICES

The CFPM will establish the necessary structures and assign CFPM resources to accomplish these priorities and objectives. The CFPM will conduct functional reviews and monitor accomplishments. The results of this activity will be reported annually to the VCDS.

2(A) THE VCDS WILL OVERSEE STANDARDS, POLICIES, AND TRAINING CONSISTENT WITH GENERALLY ACCEPTED POLICE PRACTICE IN CANADA.

The VCDS will provide oversight of military police standards, policies, and training consistent with generally accepted police practice in Canada.

An external audit conducted under the mandate of the VCDS will enable the VCDS to obtain an independent report indicating whether or not standards, policies and training are meeting generally accepted Canadian police practice and make recommendations for improvement.

2(B) THE CFPM WILL DEVELOP, ESTABLISH AND MONITOR STANDARDS, POLICIES, AND TRAINING CONSISTENT WITH GENERALLY ACCEPTED POLICE PRACTICE IN CANADA.

The CFPM will fulfil this role through periodic meetings with members of the military police, other forces military police services and policing agencies. The CFPM will require reports from members of the military police and conduct functional reviews to determine if standards, policies and training consistent with generally-accepted police practice in Canada are being met.

3(A) THE VCDS IS RESPONSIBLE FOR GENERAL ADMINISTRATIVE AND FINANCIAL CONTROL.

The VCDS will promote the acquisition of resources necessary to fulfil the general priorities and objectives which are established for military police services.

The VCDS will provide general administration and financial control in accordance with Canadian Forces, Departmental and Government of Canada regulations.

3(B) THE CFPM WILL EXERCISE INTERNAL ADMINISTRATIVE AND FINANCIAL CONTROL

The CFPM will monitor this activity through supervision, functional and periodic reporting requirements.

The CFPM will ensure costing of investigations and that appropriate approval is obtained for the purposes of controlling expenditures and efficient planning of resources.

The CFPM will ensure internal administrative and financial control is exercised in accordance with applicable Canadian Forces, Departmental and Government of Canada regulations.

4(A) THE VCDS WILL REPRESENT MILITARY POLICE INTERESTS AND CONCERNS TO THE SENIOR LEADERSHIP

The VCDS will act as a proponent of a professional and effective military police service to the senior leadership of the Canadian Forces and the Department.

The VCDS will raise military police concerns with senior leadership and transmit senior leadership concerns to the CFPM.

4(B) THE CFPM WILL RAISE MILITARY POLICE INTERESTS AND CONCERNS WITH THE VCDS.

The CFPM will raise military police interests and concerns with the VCDS through selected mechanisms including weekly meetings, reports, or meetings on an ad hoc basis if urgency dictates.

5(A) THE VCDS WILL MONITOR LAW ENFORCEMENTS PATTERNS

The VCDS will receive an annual report from the CFPM on these issues. The VCDS will identify major issues having Canadian Forces wide implications and provide requisite direction to effect positive change.

5(B) THE CFPM WILL COLLECT, ANALYZE AND PROVIDE INFORMATION ON LAW ENFORCEMENT PATTERNS.

The CFPM will implement systems to capture data on these issues, will provide analysis and distribute reports to the VCDS and others as necessary.

6(A) THE VCDS WILL ENSURE THE INTEGRITY OF THE INVESTIGATIVE PROCESS WITHIN AN OPERATIONAL PRIMACY ENVIRONMENT.

The VCDS will ensure integrity of the investigative process within an operational primacy environment through implementation of appropriate policies, and if necessary personally address issues with the chain of command. The VCDS will ensure that education and training are provided to the chain of command and the members of the military police to assist in understanding their respective roles. Audits will be conducted under the mandate of the VCDS to ensure compliance with these policies.

6(B) THE CFPM WILL ENSURE THE INTEGRITY OF THE INVESTIGATIVE PROCESS WITHIN AN OPERATIONAL PRIMACY ENVIRONMENT.

The CFPM will have primary responsibility for selection, recruiting, training and establishing professional standards for all members of the military police in furtherance of professional development.

The CFPM exercises command and control over the CFNIS and has technical responsibility for the military police; for routinely monitoring investigative reports; and for conducting functional reviews, particularly in high risk areas where the rights and freedoms of individuals are at stake (eg: search warrants, arrests, electronic surveillance, etc.)

7(A) THE VCDS WILL HAVE NO DIRECT INVOLVEMENT IN INDIVIDUAL ONGOING INVESTIGATIONS BUT WILL RECEIVE INFORMATION FROM THE CFPM TO ALLOW NECESSARY MANAGEMENT DECISION MAKING.

The VCDS will give general direction to the CFPM and monitor and review program activity, however, the day to day direction of individual investigations rests with the CFPM. The CFPM has a duty to advise the VCDS on emerging and pressing issues where management decisions are required. However, the degree of detail provided on the day to day investigations rests within the discretion of the CFPM in keeping with respective roles, responsibilities and principles enunciated in this document. Audits conducted on behalf of the VCDS will ensure investigative methods utilized are ethically appropriate and lawful.

To ensure that information sharing is carried out in a way which supports the primary of operations and investigative integrity, the VCDS will facilitate the chain of command and the military police working together to ensure a shared understanding of respective responsibilities and obligations with respect to information sharing.

7(B) THE CFPM WILL MONITOR INDIVIDUAL INVESTIGATIONS TO ENSURE REQUIRED INFORMATION IS GIVEN TO SENIOR LEADERSHIP

The CFPM will monitor individual investigations and provide a general overview of investigations to the VCDS. Discussions with the VCDS of specific details of any investigation are to be avoided unless specific circumstances warrant attention of management.

8. PROVIDE ANNUAL REPORT

The CFPM will provide an annual report, including statistics, trend analysis and analysis of law enforcement patterns, to the VCDS commencing 1 Apr 98.

9. REVIEW OF ACCOUNTABILITY FRAMEWORK

This accountability framework will be reviewed annually.

Dated this 2nd day of March, 1998.

G.L. Garnett	*P.M. Samson*
Vice-Admiral	*Colonel*
Vice Chief of the Defence Staff	*Canadian Forces Provost Marshal*

PROFESSOR KENT ROACH

Kent Roach is a Professor of Law at the University of Toronto where he holds the Prichard-Wilson Chair in Law and Public Policy. He is a graduate of the University of Toronto and Yale and a former law clerk to Justice Bertha Wilson of the Supreme Court of Canada. He was elected a Fellow of the Royal Society of Canada in 2002. His eleven books include *Constitutional Remedies in Canada* (winner of the 1997 Owen Prize for best law book), *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (short-listed for the 1999 Donner Prize for best public policy book), *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (short-listed for the 2001 Donner Prize), *September 11: Consequences for Canada* (named one of the five most significant books of 2003 by the *Literary Review of Canada*) and (with Robert J. Sharpe) *Brian Dickson: A Judge's Journey* (winner of the 2004 J.W. Dafoe Prize for best contribution to the understanding of Canada). Since 1998, Professor Roach has been editor-in-chief of the *Criminal Law Quarterly*.

Much of Professor Roach's current research is devoted to the study of comparative anti-terrorism law and his work on that subject has been published in Australia, Canada, Hong Kong, India, Netherlands, Singapore, South Africa, the United Kingdom and the United States. He served on the research advisory committee of the Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar and as research director (legal studies) to the Inquiry into the Bombing of Air India Flight 182. His monograph on the challenges of terrorism prosecutions was published as part of the Commission's research studies in 2010.

Professor Roach has frequently acted as counsel for interveners before the Supreme Court of Canada and the Courts of Appeal. He has appeared in many landmark cases including *R. v. Latimer* on mandatory sentences, *Dunedin Construction* and *Conway* on court of competent jurisdiction, *Ward v. British Columbia* on Charter damages, *Golden* on the constitutionality of strip searches, *Corbiere and Sauve* on the voting rights of Aboriginal people and *Williams*, *Gladue*, and *Wells* on the criminal justice and Aboriginal people. He received a Zeneith Award in 2010 in recognition of his pro bono work in these cases.

Professor Roach is also active in the Association in Defence of the Wrongfully Convicted and has taught a course on wrongful convictions for a number of years. In 2008, he was awarded a teaching award by the students at the University of Toronto Faculty of Law. He was the Director of Research for the Goudge Inquiry into Pediatric Forensic Pathology and co-authored a book published in 2010 on miscarriages of justice and forensic science in Australia, Canada and the United Kingdom.

POLICE INDEPENDENCE,
THE MILITARY POLICE AND BILL C-41

Prepared by:
Professor Kent Roach
University of Toronto
January 14, 2011

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Police Independence, the Military Police and Bill C-41

Kent Roach*

Executive Summary

This paper examines the provisions in Bill C-41 in light of the concepts of police independence recognized by the Supreme Court of Canada in *R. v. Campbell and Shirose* (1999) as adapted to the particular context of the military police. The author concludes that the independence of the military police to investigate both Criminal Code and Code of Service Discipline offences should be recognized as part of the unwritten constitutional principle associated with the rule of law even though the military police, like the civilian police, in some cases may not be able to lay charges on their own authority. The author concludes that s.18..5(1) and (2) of Bill C-41 recognizing the Vice Chief of the Defence Staff's (VCDS's) general supervision of the Canadian Forces Provost Marshal (CFPM) and allowing the former to issue general and public instructions or guidelines to the latter which is consistent with the balance that must be struck between military police independence and accountability, policy guidance and the management responsibilities of the general command. At the same time, however, the author concludes that s.18.5(3) violates core concepts of police independence as recognized in *Campbell and Shirose* by allowing the VCDS to issue instructions and guidelines in specific cases that can interfere with military police investigations. He also notes that this section would be inconsistent with the 1998 accountability framework between the VCDS and the CFPM and if enacted might result in various legal challenges.

Introduction

The concept of police independence from government is complex and involves what has been referred to as a "delicate balance."[1] On the one hand, the rule of law would be offended if anyone told a police officer that they must not or that they must investigate or lay charges against a particular person. Such directions are the stuff of police states and such interference with police investigations would bring the administration of justice into disrepute. On the other hand, the police, like others in government, must be accountable to superiors and ultimately to responsible Ministers and through them to the people. Absolute or complete independence "would run the risk of creating another type of police state, one in which the police would not be answerable to anyone."[2] Police independence from interference in individual investigations is vitally important, but so too is the ability of the government to provide general policy direction to the police and to be accountable for police conduct.

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*FRSC, Professor of Law and Prichard and Wilson Chair in Law and Public Policy, University of Toronto.

[1] *Report of the Ipperwash Inquiry* Volume 2 (Toronto: Queens Printer, 2007) at 303

[2] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Public Works, 2006) at 460.

Although police independence is a difficult and complex subject at the best of times, it is even more difficult and complex when applied to military policing. Much of this complexity is captured in the dual term military police. On the one hand, the military police are police officers. They are recognized as peace officers under s.2 of the *Criminal Code* and enforce the *Criminal Code* on Department of National Defence property. In addition, they have increasingly been recognized in the *National Defence Act* as an autonomous policing body within the military. On the other hand, military police are part of the military. As such, military police have been subject to chain of command concepts like other members of the military. A delicate balance is required between the law enforcement and military roles of the military police.[3] The Somalia inquiry revealed how the law of rule can suffer when the military and chain of command aspects of the military police overwhelm their law enforcement duties. At the other extreme, the complete independence of the military police from the chain of command would also be inconsistent with their military status.

The military police have evolved since the Somalia inquiry and the trajectory of these developments have been to stress greater independence for the important law enforcement role of the military police. Even though most military police remain under the control of commanders at the base and wing level, they are subject to the technical and regulatory command of the Canadian Forces Provost Marshal (CFPM). In 1998, the CFPM and the Vice Chief of Defence Staff (VCDS) agreed to an important accountability framework that allows the VCDS to exercise management responsibilities over the military police while at the same time not interfering with individual investigations. The 1998 amendments of the *National Defence Act*[4] also recognized the importance of the independence of the military police by allowing individual members of the military police to bring complaints to the then newly created Military Police Complaints Commission (MPCC) of interference by other members of the military in investigations. The MPCC has considered a number of such complaints and there is an evolving recognition of the importance that the non military police chain of command not interfere in military police investigations.

Bill C-41 responds to recommendations of the late Antonio Lamer, former Chief Justice of Canada[5], by providing statutory recognition for the office of CFPM. Consistent with the idea that the military police enjoy a degree of police independence from the Command structure, s.18 .3 of Bill C-41 proposes that the CFPM will hold office in good behavior for a four year term and can only be removed upon the recommendation of a formal inquiry and that the CFPM will

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[3] Andrew Halpenny "The Governance of Military Police in Canada" (2010) 48 Osgoode Hall L.J. 1; M.L. Friedland *Controlling Misconduct in the Military* (Ottawa: Supply and Services, 1995)
[4] *National Defence Act* R.S. N-5. S.250.19
[5] Antonio Lamer *The First Independent Review of the Provisions and Operations of Bill C-25* September 3, 2003 at 75 available at http://www.cfgb-cgfc.gc.ca/documents/LamerReport_e.pdf

develop and ensure compliance with "training and professional standards applicable to the military police."[6]

Consistent with the idea that the military police are not autonomous from the command structure, sections 18.5 (1) and (2) contemplate that the VCDS has powers of "general supervision" over the CFPM and can issue "general instructions or guidelines" to the CFPM which must be made public. Section 18.5(3), however, is more problematic in terms of the investigative independence of the military police because it contemplates that the VCDS "may issue instructions or guidelines in writing in respect of a particular investigation" and that these instructions may not be made public. The question that emerges is whether these proposed provisions strike the best balance between the demands of military police law enforcement independence and the accountability of the military police within the military command structure.

The first part of this paper will examine the concept of police independence. It will briefly examine the common law origins of the concept and its recognition by various commissions of inquiry in Canada. It will then focus on the Supreme Court's recognition of police independence in its 1999 decision in *R. v. Campbell and Shirose*[7] and in particular the extent to which police independence has been constitutionalized in Canada. As will be seen, the question of the extent to which police independence has been constitutionalized is a complex issue raising questions about the precise status of unwritten constitutional principles as well as the scope of s.7 of the Charter and the abuse of process doctrine.

The second part of this paper will examine the evolving nature of police independence in relation to the military police. This examination will involve some discussion of the role of the military police as discussed by the Somalia inquiry and two related reports by a task force chaired by the late Chief Justice Brian Dickson. It will explore possible distinctions between claims of police independence as they relate to the enforcement of the *Criminal Code* on Department of National Defence property and the enforcement of the Code of Service Discipline against members of the Canadian Forces as well as the frequent overlap between Code of Service Discipline and *Criminal Code* offences and the implications of such overlap for military police independence. It will also address whether any dichotomy between the status of police independence when the military police enforce the *Criminal Code* and when they enforce the Code of Service Discipline is sound or sustainable.

The third part of this paper will assess the degree to which Bill C-41 is consistent with police independence as recognized in *Campbell and Shirose* and modified to take account of the distinct dual role of military police as members of the military and law enforcement officers. It will briefly explore the concepts embodied in s.18.5(1) and (2)of Bill C-41 of the VCDS's general supervision of the CFPM including the idea that general instructions or guidelines from

[6] Bill C-41 S.18.4(c)
[7] [1999] 1 S.C.R. 565

the VCDS to the CFPM will be made public. The focus of the examination, however, will be on s.18.5(3) which contemplates that the VCDS can issue instructions or guidelines in respect of a particular investigation and that these instructions may not necessarily be made public. The question of whether s.18.5(3) violates core concepts of police independence as recognized in *Campbell and Shirose* will be examined and possible consequences of such violations will be explored. Suggestions for reforming Bill C-41 to better reconcile the competing values of independence for the military police in enforcing the law and accountability of the military police to the chain of command will be examined.

I. Police Independence

Police independence is an evolving and somewhat controversial constitutional concept. Philip Stenning concluded in 2000 that there is "very little clarity or consensus among politicians, senior RCMP officers, jurists including the Supreme Court of Canada, commissions of inquiry, academics, or other commentators either about exactly what 'police independence' comprises or about its practical implications..."[8]. I have suggested elsewhere that support can be found in the jurisprudence for four very different models of police/governmental relations ranging from full police independence to governmental policing and also including the recognition of core police independence over law enforcement decisions and democratic policing based on published directives from the government to the police. [9]

Before the 1999 Supreme Court of Canada decision in *R. v. Campbell and Shirose*, many would have maintained that police independence was at most a constitutional convention based on practice and principle. Constitutional conventions are commonly thought to be matters of wisdom, practice and principle that constrain the exercise of legal powers and are enforced by the relevant constitutional actors but do not override or invalidate legal powers. [10] After the *Campbell* case, however, police independence has been recognized as a constitutional principle that may be more directly enforceable by the courts. As will be discussed below, *Campbell* has qualified the reference in the *RCMP Act* to the police being under the direction of the Minister at least with respect to core investigatory functions such as the decision to investigate and lay a charge. There is a growing consensus in Canada about the core meaning of police independence as protecting police officers from interference with law enforcement discretion relating to the investigation and laying of charges. At the same time, there is more dispute about the peripheries of police independence especially as they relate to the ability of governments to provide policy direction to the police.

Ex Parte Blackburn

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[8] Philip Stenning, "Someone to Watch over Me: Government Supervision of the RCMP" in Wes Pue ed. *Pepper in Our Eyes: The APEC Affair* (Vancouver: University of British Columbia Press, 2000) at 113.
[9] Kent Roach "The Overview: Four Models of Police-Government Relations" in Margaret E. Beare and Tonita Murray *Police and Government Relations: Who's Calling the Shots?* (Toronto: University of Toronto Press, 2007)
[10] *Reference re Amendment of the Constitution* [1981] 1 S.C.R. 753.

The modern doctrine of police independence is generally traced to a 1968 British common law case, *Ex Parte Blackburn*, in which Lord Denning made the following oft-quoted statement:

> I have no hesitation in holding that, like every constable in the land, [the Commissioner of the London 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 upon 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 of the Metropolis, 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.[11]

Lord Denning relied on a number of British civil liability cases in stressing the independence of the police from the government. The Supreme Court of Canada in a 1902 civil liability case had similarly decided that "police officers can in no respect be regarded as agents or officers of the city. Their duties are of a public nature..... 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."[12] These civil liability cases were not concerned with general constitutional principle: they were concerned with the limited proposition that "there is no master and servant relationship between constables and their employers in the rather special sense which has been given that phrase in the law of torts."[13]

Commissions of Inquiry and the Recognition of Police Independence

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[11] *R. v. Metropolitan Police ex parte Blackburn*, [1968] Q.B. 116 at 135-136.

[12] *McCleave v. City of Moncton* (1902), 32 S.C.R. 106 at 108-109. For an examination of other early Canadian civil liability jurisprudence see Stenning *Legal Status of the Police* (Ottawa: Law Reform Commission of Canada, 1981) at 102-112. Professor Stenning concludes that "none of these cases, however, determines the implications of the constitutional status of the police in terms of their liability to receive direction of any kind with respect to the performance of their duties." Ibid at 110.

[13] Geoffrey Marshal *Police and Government* (London: Methuen, 1965) at 34; Geoffrey Marshal *Constitutional Conventions* (Oxford: Oxford University Press, 1984) ch. 8.

A number of commissions of inquiry have discussed the concept of police independence at some length. The McDonald Commission adopted a fairly narrow understanding of police independence and concluded that:

> The Minister should have no right of direction with respect to the exercise by the R.C.M.P. of the powers of investigation, arrest and prosecution. To that extent, and to that extent only, should the English doctrine expounded in *Ex parte Blackburn* be made applicable to the R.C.M.P.[14]

The McDonald Commission concluded that responsible Ministers should have extensive authority to be advised of and comment on a wide range of police activities, including areas traditionally considered to be police "operations." The Commission defended Ministerial involvement on the basis of democratic principles:

> We take it to be axiomatic that in a democratic state the police must never be allowed to become a law unto themselves. Just as our form of Constitution dictates that the armed forces must be subject to civilian control, so too must police forces operate in obedience to governments responsible to legislative bodies composed of elected representatives.[15]

The Commission rejected any distinction between "policy" and "operations" that would insulate "the day to day operations of the Security Service" from Ministerial review and comment. It concluded that the responsible Minister should have a right to be " . . . informed of any operational matter, even one involving an individual case, if it raises an important question of public policy. In such cases, [the Minister] may give guidance to the [RCMP] Commissioner and express to the Commissioner the government's view of the matter, but he should have no power to give *direction* to the Commissioner."[16]

The McDonald Commission's approach has had some critics. The Ipperwash inquiry criticized the idea that the Minister could give "guidance" to the police on operational matters that raised issues of policy without appearing to give direction.[17] The Air India Inquiry, however, seemed to express more support for the McDonald Commission's approach when it asserted that "preventing the government from making its views known to the police in national security matters would be unworkable." At the same time, however, the Air India inquiry did not propose that the Prime Minister's National Security Advisor (NSA) be able to provide guidance to the police when it stated "the reforms proposed by this Commission do not contemplate the NSA providing 'guidance' or 'direction' to the police, but merely information."[18] The subtle

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[14] Commission of Inquiry Concerning Certain Activities of the RCMP *Freedom and Security under the Law* (Ottawa: Supply and Services, 1981) at 1013.
[15] Commission of Inquiry Concerning Certain Activities of the RCMP *Freedom and Security under the Law* (Ottawa: Supply and Services, 1981) at 1005-1006.
[16] *Ibid* at 1013 (emphasis in original).
[17] *Report of the Ipperwash Inquiry* Volume 2 (Toronto: Queens Printer, 2007) at 358.
[18] Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 *Air India Flight 182 A Canadian Tragedy* Vol 3 (Ottawa: Public Works, 2010) at 54.

differences in approach between these two recent commissions confirms that there is still substantial doubt about the outer limits of police independence as they relate to the giving of policy guidance and direction from the government to the police, especially when those policy issues may crystallize and need to be addressed in the context of a specific case. Nevertheless, there is a growing consensus with respect to the core of police independence. Even the McDonald Commission accepted the core of police independence by affirming that the Minister should not be able to direct powers of investigation, arrest or prosecution.

The Royal Commission into the Donald Marshal Jr. concluded in 1989 that "inherent in the principle of police independence is the right of the police to determine whether to commence an investigation". The police should in an appropriate case be prepared to lay a charge, even if it was clear that the Attorney General would refuse to prosecute the case. Such an approach in the Royal Commission's views "ensures protection of the common law position of police independence and acts as an essential check on the power of the Crown." It concluded that the RCMP "failed in its obligation to be independent and impartial" in its investigation of two Nova Scotia cabinet ministers.[19] The RCMP refusal to proceed with an investigation without authorization from the Department of the Attorney General was "a dereliction of duty" and "a failure to adhere to the principle of police independence. It reflects a double standard for the administration of criminal law, contributes to the perception of a two track justice system and undermines public confidence in the integrity of the system."[20]

In his interim report into complaints arising from the APEC conference, Justice Hughes articulated the following propositions concerning police independence:

- When the RCMP are performing law enforcement functions (investigation, arrest and prosecution) they are entirely independent of the federal government and answerable only to the law.
- When the RCMP are performing their other functions, they are not entirely independent but are accountable to the federal government through the Solicitor General of Canada or such other branch of government as Parliament may authorize.
- In all situations, the RCMP are accountable to the law and the courts. Even when performing functions that are subject to government direction, officers are required by the *RCMP Act* to respect and uphold the law at all times.
- The RCMP are solely responsible for weighing security requirements against the Charter rights of citizens. Their conduct will violate the Charter if they give inadequate weight to Charter rights. The fact that they may have been following the directions of political masters will be no defence if they fail to do that.

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[19] *Royal Commission on the Donald Marshal Jr. Prosecution* (Halifax: Queens Printer, 1989) at 212-214.
[20] Ibid at 216

- An RCMP member acts inappropriately if he or she submits to government direction that is contrary to law. Not even the Solicitor General may direct the RCMP to unjustifiably infringe Charter rights, as such directions would be unlawful.[21]

There is a consistency between the first proposition articulated by Justice Hughes and those of both the McDonald Commission and the Marshal Commission. They boil down to police independence from interference with law enforcement functions of investigation, arrest and laying charges.

The Arar Commission concluded that while "the outer limits of police independence continue to evolve" its "core meaning is clear: the Government should not direct police investigations and law enforcement decisions in the sense of ordering the police to investigate, arrest or charge- or not to investigate, arrest or charge- any particular person." The Commission went on to state that this principle was rooted in the rule of law because "if the Government could order the police to investigate, or not to investigate, particular individuals, Canada would move towards becoming a police state in which the Government could use the police to hurt its enemies and protect its friends…"[22]

The Ipperwash Inquiry also suggested that it had become clear, largely because of *Campbell and Shirose*, that "the government should not direct the police on specific law enforcement decisions, including who should be investigated, arrested, and/or charged."[23] It recommended that Ontario policing legislation should be amended to make clear that the Minister should not be able to give directions to the police about law enforcement decisions in individual cases. [24]The Air India inquiry similarly proposed that once the Prime Minister's National Security Advisor decided to pass on information to the RCMP, he or she would have "no ongoing role in the investigation. It is a police matter. The RCMP is duty bound to conduct the investigation independent of any outside influence." At the same time, the National Security Advisor could "have contact with the RCMP about policy, dispute resolution or about general matters relating to the effectiveness of operations."[25]

Campbell and Shirose

The Supreme Court's 1999 decision in *Campbell and Shirose* involved two people, Campbell and Shirose, who were charged with drug offences as a result of a reverse sting operation in which RCMP officers sold them drugs. The Crown sought to defend the police conduct on the basis that the police were part of the Crown or agents of the Crown and protected

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[21] Commission Interim Report Following a Public Inquiry into Complaints that took place in connection with the demonstrations during the Asia Pacific Economic Co-operation Conference in Vancouver (Ottawa: Commission of Public Complaints, 2001) at 10.4.
[22] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Public Works, 2006) at 458
[23] *Report of the Ipperwash Inquiry* Volume 2 (Toronto: Queens Printer, 2007) at 318
[24] Ibid at 357 recommendation 71
[25] Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 *Air India Flight 182 A Canadian Tragedy* Vol 3 (Ottawa: Public Works, 2010) at 40.

by the Crown's public interest immunity. Binnie J. for the unanimous Supreme Court emphatically rejected such an argument:

> The Crown's attempt to identify the RCMP with the Crown for immunity purposes misconceives the relationship between the police and the executive government when the police are engaged in law enforcement. A police officer investigating a crime is not acting as a government functionary or as an agent of anybody. He or she occupies a public office initially defined by the common law and subsequently set out in various statutes. [26]

The Court noted that the police "perform a myriad of functions apart from the investigation of crimes" and that "[s]ome of these functions bring the RCMP into a closer relationship to the Crown than others." Nevertheless the Court stressed that "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."[27] The Court declared that this principle "underpins the rule of law" which it noted "is one of the 'fundamental and organizing principles of the Constitution'".[28]

The doctrine of police independence as recognized in *Campbell and Shirose* seems to qualify the terms of s.5 of the *RCMP Act* which assigns control and management of the Force to the Commissioner "under the direction of the Minister". Binnie J. explained:

> 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.[29]

The *Campbell and Shirose* case has given the doctrine of police independence from government with respect to law enforcement matters renewed vigor, but the precise extent of these new protections remain unclear.

The Supreme Court clearly indicated that the principle of police independence will not be engaged in all of the functions performed by the police, but that it will apply when the police are engaged in the process of "criminal investigation". As Justice Hughes commented about the *Campbell* case in his APEC report: "In respect of criminal investigations and law enforcement generally, the *Campbell* decision makes it clear that, despite section 5 of the *RCMP Act*, the

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[26] *R. v. Campbell* [1999] 1 S.C.R. 565 at para 27
[27] Ibid at para 29
[28] Ibid at para 18
[29] Ibid at para 33

RCMP are fully independent of the executive. The extent to which police independence extends to other situations remains uncertain."[30]

Although the Supreme Court relied on *Ex parte Blackburn* and civil liability cases upon which it is based, the Court defined the ambit of police independence in *Campbell* in a more limited fashion that related only to the process of criminal investigation as opposed to policy matters affecting the police. At the same time, *Campbell* did not purport to decide the outer limits of the principle of police independence. Even with respect to criminal investigations, it is unlikely that police independence as discussed in *Campbell* is absolute. Although the police would be free to commence investigations, a growing number of criminal offences including those involving hate propaganda and terrorism, require the Attorney General's consent before the commencement of a prosecution. [31] Such qualifications of police independence are designed to protect important values such as restraint in the use of the criminal law and are clearly authorized in statute.

With respect to most criminal investigations, *Campbell* stands for the proposition that police officers enjoy independence from the executive and should not be directed by their Minister either to commence or to stop a criminal investigation or to make or not make an arrest or to lay or not lay a charge.

The Constitutional Status of Police Independence

The Court in *Campbell and Shirose* derived the principle of police independence from the constitutional principle of the rule of law which stresses the importance of impartially applying the law to all and especially to those who hold governmental power. Indeed, the case raises the possibility that courts might enforce the principle of police independence as part of the unwritten constitutional principle of the rule of law.

Police Independence as an Unwritten Constitutional Principle Based on the Rule of Law

The principle of police independence is derived in *Campbell* from the constitutional principle of the rule of law. This raises the question of the status of constitutional principles in Canadian law. Before a series of recent decisions, the Canadian constitution had traditionally been divided between matters of constitutional law and constitutional convention. Constitutional law would include Canada's basic constitutional legal framework, for example the *Constitution Act*, 1867 and the 1982 *Canadian Charter of Rights and Freedoms*. Section 52(1) of the *Constitution Act*, 1982 provides that "the constitution of Canada is the supreme law of Canada" and that inconsistent laws are of no force or effect to the extent of their inconsistency. Constitutional conventions are commonly thought to be principles that constrain the way that

[30] Commission Interim Report Following a Public Inquiry into Complaints that took place in connection with the demonstrations during the Asia Pacific Economic Co-operation Conference in Vancouver (Ottawa: Commission of Public Complaints, 2001) at 10.2
[31] *Criminal Code* ss.83.24, 319(6).

constitutional actors exercise legal powers but that do not give courts the legal authority to invalidate clear statutory powers. [32] Thus, constitutional principles seem to lie somewhere in between constitutional laws which have clear overriding effect and constitutional conventions which are matters of political practice and morality.

Campbell and Shirose was decided in the wake of previous decisions by the Court that invoked unwritten constitutional principles in support of findings that governments not negotiate salaries with the judiciary in order to respect the unwritten principle of judicial independence and the Court's statement that the unwritten constitutional principles of federalism, minority rights and democracy should guide any decision involving the secession of Quebec from Canada. In the 1997 Judges References, the Court concluded that "the express provisions of the *Constitution Act, 1867* and the *Charter* are not an exhaustive written code for the protection of judicial independence in Canada."[33] The Court over a strong dissent by Justice LaForest looked to the preamble of the Constitution Act, 1867 as a source of enforceable legal principle. Most relevant to police independence is the Court's statement:

> The preamble, by its reference to "a Constitution similar in Principle to that of the United Kingdom", points to the nature of the legal order that envelops and sustains Canadian society. That order, as this Court held in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 749, is "an actual order of positive laws", an idea that is embraced by the notion of the rule of law. In that case, the Court explicitly relied on the preamble to the *Constitution Act, 1867*, as one basis for holding that the rule of law was a fundamental principle of the Canadian Constitution. The rule of law led the Court to confer temporary validity on the laws of Manitoba which were unconstitutional because they had been enacted only in English, in contravention of the *Manitoba Act, 1870*. The Court developed this remedial innovation notwithstanding the express terms of s. 52(1) of the *Constitution Act, 1982*, that unconstitutional laws are "of no force or effect", a provision that suggests that declarations of invalidity can only be given immediate effect. The Court did so in order to not "deprive Manitoba of its legal order and cause a transgression of the rule of law" (p. 753). *Reference re Manitoba Language Rights* therefore stands as another example of how the fundamental principles articulated by preamble have been given legal effect by this Court.[34]

The rule of law thus has a constitutional status that can temporarily sustain unconstitutional laws notwithstanding the clear wording of s.52(1) that they are of no force and effect. It also supports the concept of judicial independence.

In 1998, the Court indicated in the *Quebec Secession Reference* that "underlying constitutional principles may in certain circumstances give rise to substantive legal obligations

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[32] *Reference re Amendment of the Constitution* [1981] 1 S.C.R. 753.

[33] *Judges Remuneration Reference* [1997] 3 S.C.R. 3 at para 109

[34] Ibid at para 99.

which constitute substantial limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be specific and precise in nature. The principles are not merely descriptive, but also involve a more powerful normative force." [35] At the same time, the Court in that reference did not indicate that courts should enforce unwritten constitutional principles: rather they should guide the political actors as they negotiated in light of a clear vote in Quebec for secession.

More recently, the Court's enthusiasm for recognizing and enforcing unwritten constitutional principles including those based on the rule of law has waned. In 2005, the Court rejected the idea that prospective legislation that did not target specific legal persons was a constitutional principle by reasoning "that in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous legal principles of our Constitution, but in its text and the ballot box." [36] A key part of this decision was the idea that the Court was being asked to enforce an understanding of the rule of law that went beyond the text of the Charter and to apply it to the actions of the elected legislature.

In 2007, the Court again favoured the more restrictive text of the Charter over the idea that access to legal services is part of the rule of law in *British Columbia v. Christie* [37] In that case, it rejected the idea that general access to legal service was an unwritten constitutional principle that was part of the rule of the law. The Court defined the components of the rule of law in the following manner:

> The rule of law is a foundational principle. This Court has described it as "a fundamental postulate of our constitutional structure" (*Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142) that "lie[s] at the root of our system of government" (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 70). It is explicitly recognized in the preamble to the *Constitution Act, 1982*, and implicitly recognized in s. 1 of the *Charter*, which provides that the rights and freedoms set out in the *Charter* are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". And, as this Court recognized in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 750, it is implicit in the very concept of a constitution.
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> The rule of law embraces at least three principles. The first principle is that the "law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power": *Reference re Manitoba Language Rights*, at p. 748. The second principle "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative

[35] *Quebec Secession Reference* [1998] 2 S.C.R. 217 at 249. See also. See generally Robin Eliot "References, Structural Argumentation and the Origin of Principles of the Constitution" (2001) 80 Can. Bar Rev. 67.
[36] *British Columbia v. Imperial Tobacco* [2005] 2 S.C.R. 473 at para 66.
[37] [2007] 1 S.C.R. 873 at para 20. In *Charkaoui v. Canada* [2007] 1 S.C.R. 350 at paras 133-137, the Court also rejected the idea that an appeal or a rule against automatic detention was part of the unwritten constitutional principle of the rule of law and in *Babcock v. Canada* [2002] 3 S.C.R.3, the Court rejected the idea that the rule of law invalidated s.39 of the Canada Evidence Act that deprives the courts of access to Cabinet confidences.

order": *ibid.*, at p. 749. The third principle requires that "the relationship between the state and the individual . . . be regulated by law": [38]

Interference with police independence might possibly be held to be a principle based on the unwritten constitutional principle of the rule of law because interference with a police investigation would result in the law not being supreme over all persons including governmental officials, and because it would result in the most basic relationship between the individual and the state being regulated not by law but by the power and whims of those who interfered in police investigations. In extreme situations such as Somalia, a refusal to allow the military police to investigate allegations of serious crime might even be said to produce a lawless situation without "normative order."

In my view, courts would enforce police independence as an unwritten constitutional principle because of:

1) the valid precedent of *Campbell and Shirose* [39]

2) the enforcement of the principle of police independence would be directed against unauthorized, discretionary, arbitrary[40], and arguably unlawful attempts by the executive to interfere with police investigations and not generally against democratically enacted legislation[41] and

3) police independence as an unwritten constitutional principle is not inconsistent with the written text of the Constitution and, as will be discussed below, might arguably qualify as a principle of fundamental justice under s.7 of the Charter and/or as part of residual judicial discretion to stay proceedings as an abuse of process.

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[38] [2007] 1 S.C.R. 873 at paras 19-20.

[39] The Supreme Court has not cast doubt on *Campbell and Shirose*. In *Odhavji Estate v. Metropolitan Toronto Police*, the Supreme Court stated that "whereas the Police Chief is in a direct supervisory relationship with members of the force, the Solicitor General's involvement in the conduct of police officers is limited to a general obligation to monitor boards and police forces to ensure that adequate and effective police services are provided and to develop and promote programs to enhance professional police practices, standards and training. Like the Board, the Province is very much in the background, perhaps even more so." *Odhavji Estate v. Metropolitan Toronto Police* [2003] 3 S.C.R. 263 at para 70 In this case, the Supreme Court focused on the statutory language of the *Police Services Act* and did not make resort, as it did in *Campbell*, to the principle of police independence to limit references to Ministerial direction in the relevant act.

[40] The Court has stressed that the unwritten principle of judicial independence protects judges from arbitrary and discretionary removal from office. *Eli v. Alberta* [2003] 1 S.C.R. 857

[41] One possible exception would be if police independence was raised as a basis to invalidate a statutory requirement that the Attorney General or some other official such as a commanding officer consent to the laying of a charge. In such circumstances, courts would be less likely to use the principle of police independence as a basis for invalidating a democratically enacted law.

In summary, there is a strong case that following *Campbell and Shirose* that the courts might enforce police independence from interference with criminal investigations as an unwritten constitutional principle derived from the rule of law.

There are, however, some pragmatic considerations that might make courts reluctant to enforce such an unwritten constitutional principle so as to invalidate existing legislation or provisions such as 18.5(3) of Bill C-41 which might become law in the future. The first is that courts have not applied unwritten constitutional principles to invalidate legislation. In the 1997 Judges Reference, the Court used unwritten constitutional principles to make clear that commissions should be available to make recommendations about judicial salaries, but it based its decisions striking down laws on s.11(d) of the Charter.

Another concern is that there are various requirements in the *Criminal Code* that the Attorney General consent to the commencement of proceedings with respect to certain offences such as those relating to hate propaganda or terrorism. Nothing in *Campbell and Shirose* suggests that such legislation is suspect. Both the Arar and Air India commissions recognize and accept that police independence has been qualified by requirements that a Attorney General consent to the laying of terrorism charges. It has not been seriously contended that the doctrine of police independence as it is related to the constitutional principle of the rule of law can override these clear statutory requirements. It is also relevant that these statutory requirements apply in all cases in which particular charges are contemplated. In each of those cases, Attorneys General must make decisions but they also have their own constitutional status as law officers of the Crown.

This suggests that the core principle of police independence most likely to be enforced by the courts can be defined to prohibit arbitrary and discretionary interferences with police investigations. Such a core principle of police independence would not invalidate democratically enacted legislation such as requirements that Attorneys General consent to the laying of charges, but only arbitrary and discretionary attempts to interfere with the conduct of police investigations most notably decisions whether to start or continue an investigation and to make arrests.

Police Independence as a Possible Principle of Fundamental Justice

A prosecution that was the result of improper interference with a police investigation would violate rights to liberty and security of the person as protected under s.7 of the Charter. A criminal investigation that was foreclosed or truncated by improper interference with the police might also be held to result in state imposed interference with the security of the person by arbitrarily denying a person the benefits of a police investigation and perhaps imposing serious state-induced stress.

The test for whether a legal principle is a principle of fundamental justice is that the principle must be 1) a legal principle that is 2) generally accepted as fundamental to the way a legal system ought fairly to operate and 3) is capable of being applied with precision.[42]

Although the Court has rejected both the harm priniciple and the principle of the best interests of children as principles of fundamental justice, it might hold that the principle of police law enforcement independence as recognized in *Campbell and Shirose* is a principle of fundamental justice. It is a legal principle rooted in concerns about the rule of law that can be contrasted with more controversial policy issues. There is also a consensus starting from *Blackburn* through McDonald and including both the recent federal Arar and Air India inquiries that accepts the core meaning of police independence with respect to law enforcement discretion whether to investigate, arrest or charge are an integral part of any fair legal system. Finally, those authorities as well as *Campbell and Shirose* demonstrate that police independence can be defined with precision relating to unauthorized interference in police decisions whether to conduct an investigation, to arrest and to charge a person.

On the other hand, courts may be reluctant to recognize police independence as a principle of fundamental justice for pragmatic reasons related to the frequent statutory requirements that prosecutors or the Attorney General have to approve charges under some sensitive offences such as hate propaganda and terrorism offences as well as administrative arrangements in some jurisdictions that prosecutors have to approve charges through pre-charge screening procedures. Courts might be concerned that recognition of police independence under s.7 of the Charter might lead to invalidation of statutory and administrative charge approval requirements given the reluctance of courts to accept that s.7 violations can be upheld as reasonable limits under s.1 at least in non-emergency situations. This concern is not necessarily fatal to the recognition of police independence as a principle of fundamental justice. The courts could impose definitional limits on police independence so that it would be violated by discretionary and arbitrary interference with police investigations. Such a principle would not necessarily interfere with legislative or even regularized administrative procedures that fetter the ability of peace officers to lay charges.

Police Independence as a Basis for the Court's Abuse of Process Doctrine

Even if courts were reluctant to constitutionalize core police independence principles under s.7 of the Charter or to enforce them as an unwritten constitutional principle, they should be more willing to use them to inform their discretion under either s.7 of the Charter or the common law to stay proceedings to prevent an abuse of the court's process. The Supreme Court has recognized that courts have a residual discretion both under the common law and under s.7

[42] *R. v. D.B.* [2008] 2 S.C.R. 3 at para 46

of the Charter to stay proceedings on the basis of abuse of process defined as abuse that will be perpetuated by the conduct of the trial or that cannot otherwise be remedied.[43]

A prosecution that was tainted by improper interference with a police investigation might qualify as an abuse of process. The abuse of process doctrine, however, would not be able to remedy interference with police investigations that precluded the police from conducting a full investigation or making an arrest or a charge. In such circumstances, the only constitutional remedy might be to seek declaratory relief or damages under s.24(1) on the basis that the interference with the police investigation violated the right of a purported victim of an uninvestigated crime under s.7 of the Charter.

II. Police Independence and the Military Police

As mentioned in the introduction, the application of the constitutional principle of police independence to the military police requires consideration of the dual status of military police officers as police officers and as member of the military. The balance between the military police's dual status is best understood in historical context.

The Somalia Inquiry and the Independence of the Military Police

The Somalia inquiry stressed the place of military police in the chain of command. It observed that military police did not have the power to lay charges under the Code of Service Discipline [44]and that they could be directed by their commanding officer to conduct investigations. The Inquiry recognized that the military police could conduct their own investigation, but stressed that "the apparent freedom of MP to select investigative methods can be severely restricted by the commanding officer, particularly when the MP are 'first line' MP, meaning that they fall directly under the commanding officer's authority."[45] The inquiry also observed that "military police are part of the chain of command. They take orders from their commanding officers about which incidents to investigate, and their chances for promotion are affected by their commanding officer's assessment of them. This makes it difficult for MP to treat their superiors as ordinary witnesses or suspects."[46]

The Somalia inquiry found that the lack of military police independence was a deficiency in the conduct of the Armed Forces in Somalia. It concluded that there were 62 incidents in Somalia that should have been investigated by the military police, but were not including "allegations of serious criminal or disciplinary misconduct, such as mistreatment of detainees, killing of Somalis, theft of public property, and self inflicted gunshot wounds."[47] Some of the

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[43] *R.v.Regan* [2002] 1 S.C.R. 297
[44] Canada, Commission of Inquiry Into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy*, vol.1 Chapter 7, (Ottawa: Public Works and Government Services Canada, 1997). Vol 1 Chapter 7at fn 14
[45] Ibid at fn 89
[46] Ibid Vol 5 Chapter 40 at 1271
[47] Ibid vol 5 ch 40 at 1263

incidents, including the death of Shidane Arone, were subject to summary investigations by members of the military who were not military police, but the Inquiry found that these investigations were tainted by conflict of interest. The Commission found that "commanding officers can exert tremendous influence over investigations because Military Police fall within the chain of command. That influence may be intentional or unintentional, but it can affect the scope of an investigation and the resources available to carry it out....a commanding officer might be tempted to hinder ... a broad investigation if it might cast the commander, the commanding officer, the unit, or the CF in a bad light.[48]

The inquiry stressed that Commanding Officers had their own interests in not pursuing possible misconduct and were not peace officers, "subject to a peace officer's oath of office or code of conduct" and they have "no overriding obligation to advance the administration of justice".[49] The inquiry also found a "soldier first" attitude among the military police and that "in essence, Military Police investigate only to the point of satisfying the commanding officer. This poorly serves the needs of the military justice system, for the system in fact needs investigations that will support convictions, not simply satisfy commanding officers. At the same time, setting the commanding officer's satisfaction as the benchmark for deciding whether an investigation has been adequate fosters an environment ripe for command influence. "[50]

The Somalia inquiry recommended that "Military Police be independent of the chain of command when investigating major disciplinary and criminal misconduct."[51] To the end of promoting police independence, the inquiry also recommended the appointment of a Director of Military Policing. The Commission however warned that "total independence can never be guaranteed as long as Military Police are members of the CF; they will always face a subtle pressure to consider the impact of an investigation on the CF" and also concluded that prosecutors within the military should be able to lay charges as opposed to the military police in part because "there is no tradition of police independence in the military. Thus, the argument against charges being laid by the prosecutor as an interference with police independence has no application in the military setting. Certainly, there is no reason to think that having the prosecutor lay charges in the military setting would raise constitutional issues."[52] It should be noted that the latter conclusion was made in 1997 before the Supreme Court's decision in *Campbell and Shirose.*

The Dickson Reports

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[48] Ibid at 1272
[49] Ibid at 1284
[50] Ibid at 1285
[51] Ibid Recommendation 40.6 at 1296
[52] Ibid at 1297

In addition to the Somalia Inquiry, the Minister of Defence asked retired Chief Justice Brian Dickson to examine various matters concerning the military police and military justice. In its first report in 1997, the Dickson committee distinguished the "field and garrison duties" of the military police which "are essentially of a military nature:" and as such subject to "the established chain of command" from their investigative responsibilities "which are almost wholly of a policing nature" and should result in a discretion to lay charges and reporting "independently of the chain of command" and under the new position of Canadian Forces Provost Marshal.[53]

Like the Somalia inquiry, the Dickson committee warned that the power of commanding officers over the military police could compromise the investigative independence of the military police. It concluded that "for matters that are sensitive or of serious criminal nature, it is imperative that the investigation be conducted independently of the chain of command. This should include the final decision of whether or not to lay a charge."[54]

A 1998 follow up report after Chief Justice Dickson's death did not agree with a proposal made by the then CFPM that that position assume the command of all military police except those on field duties or deployment. It noted the importance of base/wing military police being subject to operational chain of command. It also noted that such military police would under the 1998 amendments of the *National Defence Act* be able to report interference with military police investigations to the newly created MPCC.[55]

The 1998 Accountability Framework between the VCDS and the CFPM

The 1998 report also approved of a 1998 accountability framework between the VCDS and the CFPM. The Committee approved of this framework in large part because it was "meant to ensure that the reporting relationship of the CFPM to the VCDS does not in any way compromise the independence of the CFPM in relation to the investigatory role of the military police."[56] To this end, the accountability framework contemplated that while the VCDS will establish "general priorities and objectives for military police services" and be responsible for "general administrative and financial control" but that the VCDS "*will have no direct involvement in individual ongoing investigations but will receive information from the CFPM to allow necessary management decision making.*"[57]

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[53] Rt. Hon Brian Dickson chair *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services* March 25, 1997 at ii, 30

[54] Ibid at 36

[55] Rt. Hon Brian Dickson and Lieutenant-General Charles Belzile chairs *Report of the Military Police Services Review Group* December 11, 1998 at 12

[56] Ibid at 14

[57] Ibid at 15 (emphasis added) quoting Accountability Framework of March 2, 1998 signed by VCDS G.L. Garnett and CFPM Samson. The commentary to the accountability framework elaborated on these matters by providing "The VCDS will give general direction to the CFPM and monitor and review program activity, however, the day to day direction of individual investigations rests with the CFPM. The CFPM has a duty to advise the VCDS on

Although the 1998 accountability framework was formulated prior to the Supreme Court's 1999 decision in *Campbell and Shirose,* it is broadly consistent with it by ensuring that the VCDS, who is not a peace officer, will not have direct involvement in individual ongoing investigations. The 1998 accountability framework also recognizes the legitimate management and policy oversight responsibilities of the VCDS and the need for the CFPM to provide the VCDS with information necessary to allow the discharge of those management responsibilities. As will be seen, Bill C-41, if enacted in its present form, would effectively abrogate the 1998 accountability framework by providing the VCDS with a statutory right in s.18.5(3) to provide instructions in specific cases.

The 1998 Amendments and the Recognition of the Concept of Improper Interference in Military Police Investigations

Section 250.19 of the National Defence recognizes that the MPCC in addition to complaints about the conduct of the military police may hear complaints by the military police about interference with their investigations. It provides:

1) Any member of the military police who conducts or supervises a military police investigation, or who has done so, and who believes on reasonable grounds that any officer or non-commissioned member or any senior official of the Department has improperly interfered with the investigation may make a complaint about that person under this Division.

(2) For the purposes of this section, improper interference with an investigation includes intimidation and abuse of authority.

Such interference complaints can be made to the Provost Marshal, as well as to the Chairperson of the MPCC and the Judge Advocate General. The Chairperson's findings in respect of an interference complaint shall be sent to the Minister, the Chief of Defence Staff in cases where the complaint was against an officer or a non-commissioned member, the Judge Advocate General and the Provost Marshal[58]. The Chief of Defence Staff has an obligation to respond and provide reasons for not acting on the Chairperson's findings and recommendations with respect to an interference complaint.[59]

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emerging and pressing issues where management decisions are required. However, the degree of detail provided on the day to day investigations rests within the discretion of the CFPM in keeping with the respective roles, responsibilities, and principles enunciated in this document....The CFPM will monitor individual investigations and provide a general overview of investigations to the VCDS. Discussions with the VCDS of specific details of any investigation are to be avoided unless specific circumstances warrant attention of management."

[58] *National Defence Act* s.250.36

[59] Ibid s.250.51

In 2002, the then Chair of the MPCC issued a paper on the power of the MPCC to hear complaints about improper influence in military police investigations. The Chair observed that:

> defining the concept of interference is not easy. Although the Act stipulates that intimidation and the abuse of authority are tantamount to interference, it does not precisely define the concept. It can be maintained that direct intervention by a superior who is not a Military Police supervisor or by a senior official of the Department of National Defence constitutes interference. Indirect interventions can also be considered as interference when they involve attempting to compromise the work of a member of the Military Police, encouraging an individual not to collaborate, or leaking information. Each case should be examined individually. Nevertheless, it is also important to keep in mind that appropriate supervision and guidance by Military Police supervisory staff do not constitute interference. Military Police members, like their colleagues in civilian police forces, must be accountable for their actions.

The Chair stressed that police independence was not absolute and allowed control by senior police officers. She stated:

> In short, an effective Police Service implies supervision and management of the members by a police superior. In the military context, the dual status of the Military Police member as a police officer and as a Military must be considered. The Military Police member is accountable to superiors, who are also Military Police members, and to the Commander of his Unit. However, the supervision of the police work must be the privilege of superiors invested with the Military Police status.
>
> At a higher level of the military hierarchy, even the autonomy of the Canadian Forces Provost Marshal is not absolute. In fact, the responsibility for developing general policies and directions and for setting priorities belongs to the Vice Chief of the Defence Staff. In order to respect the principles of independence in the hierarchical relationship in the military justice system between the Provost Marshal and the Vice Chief of Defence Staff, both of them agreed to establish an Accountability Framework detailing their respective responsibilities. Written in 1998, this document responded to the recommendations of the Special Advisory Group on Military Justice and Military Police Investigation Services and serves as a foundation for the future relationship between the Vice Chief of the Defence Staff and the Provost Marshal. To conform to this framework, the Vice Chief of the Defence Staff has the power to establish strategic policies of policing duties. ***However, the Vice Chief of the Defence Staff must keep his distance from the Provost Marshal in relation to investigations in process, which limits the possibilities of interference.*** [60]

In her 2002 report, the Chair of the MPCC reached the following conclusion:

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[60] MPCC Special Report *Interference with Military Police Investigations: What is it all About?* December, 2002 (emphasis added) available at http://www.mpcc-cppm.gc.ca/200/312-eng.aspx

> Applying the principles set out in this report, it can be concluded that the Military Police, when performing its law enforcement duties, is completely independent of the non-military police Chain of Command and the government. When the Military Police perform non-military police duties, it is not completely independent, but it reports to the federal government through the Chief of the Defence Staff. The conduct of the Military Police would be reprehensible if, in respecting the illegitimate orders or directives of a senior departmental official, it acts contrary to the law, for example, the *Canadian Charter of Rights and Freedoms*.[61]

This report recognized and applied the concept of law enforcement independence to the military police while also recognizing that the military police are not independent and subject to the chain of command with respect to non law enforcement matters.

Military Police Powers

The question of the extent to which the military police enjoy police independence also depends on the scope of their law enforcement powers. Section 2 of the *Criminal Code* defines peace officer. It does so broadly including mayors, justice of the peace, aircraft commanders and those exercising various powers under the customs, immigration and fisheries law. For our purpose the important section is s.2(g) which provides that "officers and non-commissioned officers of the Canadian Forces" are peace officers if they are i) appointed for the purposes of section 156 of the *National Defence Act* or ii) employed in duties that by regulation are of such a kind "as to necessitate that the officers and non-commissioned members performing then have the powers of peace officers."

The peace officer powers of the Military Police are perhaps most obvious with respect to the enforcement of the *Criminal Code* on Department of National Defence property. In *R. v. Nolan*[62], the Supreme Court of Canada ruled that while a military police officer is not a peace officer under s.2(g)(i) when exercising authority over civilians not subject to the Code of Service Discipline, he is one per s. 2(g)(ii), and thus could apply a breathalyzer demand to a civilian stopped on a public highway in relation to a breach of traffic regulations on an armed forces bases. To the extent that military police exercise peace officer powers under the *Criminal Code*, there is no reason to think that police independence as articulated in *Campbell and Shirose* would not apply to them.

The status of the military police as officers who enforce the Code of Service Discipline might at first glance seem somewhat different both because the authorization of such powers comes from the *National Defence Act* and related regulations and orders and because the code of service discipline serves the distinct purpose of keeping military discipline.

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[61] ibid
[62] [1987] 1 S.C.R. 1212

Section 156 of the *National Defence Act*[63] provides the basic statutory authorization for the military police to enforce the Code of Service Discipline. It provides:

> Officers and non-commissioned members who are appointed as military police under regulations for the purposes of this section may
> (*a*) detain or arrest without a warrant any person who is subject to the Code of Service Discipline, regardless of the person's rank or status, who has committed, is found committing, is believed on reasonable grounds to be about to commit or to have committed a service offence or who is charged with having committed a service offence; and
> (*b*) exercise such other powers for carrying out the Code of Service Discipline as are prescribed in regulations made by the Governor in Council.

The Code of Service Discipline is set out in the *National Defence Act*. It includes a wide variety of offences relating to misconduct in presence of the enemy, security, prisoners of war, operational offences, spying, mutiny, sedition, insubordination, quarrels, resisting or escaping from custody or arrest and hindering arrest, desertion, absence without leave, disgraceful conduct, abuse of subordinates, false accusations, drunkenness, malingering, low flying, improper driving or use of vehicles, false statements, resisting orders to supply DNA, assisting unlawful confinement, conduct to the prejudice of good order and discipline, causing fires, and stealing.

Many of the Code of Service Discipline offences relate specifically to military discipline and military matters, but many of them also overlap with *Criminal Code* offences. Indeed, section 130 of the *National Defence Act* makes it a service offence to commit acts or omissions either in or outside of Canada that would be punishable under the *Criminal Code* or any other Act of Parliament. The maximum penalty for Code of Service Discipline Offences can be life imprisonment and other penalties include reduction in rank, reprimand and dismissal with disgrace.[64] Code of Service Discipline offences are serious matters that can involve genuine penal consequences including loss of liberty and rank and the burden of a criminal record. The closer the Code of Service Discipline comes to tracking *Criminal Code* offences, the stronger the claim becomes that military police should enjoy the law enforcement independence and discretion contemplated in *Campbell and Shirose*, albeit independence that is subject to military police chain of command.

Andrew Halpenny, a lawyer with experience in this area, has recently observed that the transference of independence concepts taken from the civilian policing context is not perfect because "government per se has no relationship with the MP, since all government direction must flow through the Canadian Force's most senior commander, the Chief of Defence Staff."

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[63] R.S. 1985 c.N-5 (as amended)
[64] Ibid s.139

Nevertheless he admits that an analogy can be drawn between "the non-MP commanders" [65]who oversee and can issue orders with respect to MPs. He also makes the point that military police have many potential commanders whereas the civilian police are all subject to direction by a single Chief of Police.[66] Halpenny recommends that this situation be rectified by placing all MPs under the Command of the CFPM as opposed to the 10% of MPs who are subject to the CFPM's command in the National Investigation Service. A similar proposal was recommended to and rejected by the Dickson Working Group in 1989. Halpenny warns of problems created when MPs report to high ranking Base and Wing Commanders. Leaving aside the merits of this policy proposal as well the proposed creation of a military police service board, Halpenny's proposals accept that police independence under *Campbell and Shirose* apply to the law enforcement activities of the military police even while accepting that the military police exercise many other military functions that are properly subject to base and wing command.

Can/Should Military Police Independence be Bifurcated with Respect to Criminal Code and Code of Service Discipline Offences?

It could be argued that police independence should not apply to the enforcement activities of military police with respect to Code of Service Discipline offences. The best support for this argument is the military police, unlike the civilian police, do not have a general right to lay charges under the Code of Service Discipline. Article 107.02 of the Queens Regulations and Orders provides that Commanding Officers and those authorized by them lay such charges as well as an officer or non-commissioned member of the Military Police assigned to investigative duties with the Canadian Forces National Investigation Services (CFNIS).

The CFNIS generally investigates the most serious and sensitive offences, but only makes up about 10% of all military police.[67] Even in such cases, a Commanding Officer may under article 107.12 of the Queens Regulations make a decision not to proceed with a charge laid by the CFNIS though the CFNIS can, after consider the Commanding Officer's reasons, refer the charge directly to a referral authority.

The argument against recognizing police independence with respect to Code of Service Discipline offences would be that they are ultimately matters of military discipline and subject to the chain of command. It should be noted, however, that as discussed above, the civilian police enjoy police independence even though their rights to lay charges are sometimes restricted by statutory requirements for the consent of the Attorney General and sometimes by administrative pre-charge screening practices. The fact that the civilian police officers are not always free to lay charges does not take away from their claims to independence from interference in a law enforcement investigation.

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[65] Andrew Halpenny "The Governance of Military Police in Canada" (2010) 48 Osgoode Hall L.J. 1 at 4
[66] Ibid at 44
[67] Ibid at 44-45, 47

The above Queens Regulations governing the laying and proceedings of Service Discipline Offences are consistent with the idea that Commanding Officers must make and justify their decisions *after* the military police have conducted a full investigation free from chain of command influence.[68] This provides a system of checks and balances particular to military justice. In some respects, this is not that different from the checks and balances in the civilian justice system where the police are free to investigate but Crown Attorneys are also free not to proceed with charges. The fact that neither the military or the civilian police are necessarily always free to lay charges does not mean that their investigations should not be free from arbitrary and discretionary interference by non police officers in the executive. Full police investigations will allow for better accountability for decisions not to proceed with charges whether these are made by Crown attorneys in the civilian system or commanding officers in the military system. Indeed, it could be argued that full and unfettered investigations are even more critical in the military system if charging decisions are made by those who, unlike Crown attorneys, may have incentives to enforce the law fully.

In my view it would be a mistake to dismiss the role of police independence with respect to the Code of Service Discipline for at least four reasons.

First, the Code of Service Discipline especially with respect to the most serious offences overlaps considerably with the *Criminal Code*. Historical examples such as those revealed by the Somalia inquiry as well as torture prohibitions in the *Criminal Code* underline the importance of applying the *Criminal Code* and with it the rule of law to serious misconduct by the military. Although the torture provisions in the Criminal Code apply abroad, Code of Service Discipline offences incorporate other Criminal Code offences that might not necessarily apply to the activities of Canadian Forces outside of Canada.

Second, section 250.19 of the *National Defence Act* as added in 1998 in response to Somalia provides statutory recognition of police independence by allowing complaints to be made to the MPCC for all interferences with military police investigations regardless of whether they relate to the *Criminal Code* of the Code of Service Discipline.

Third, s.2(g) (i) of the *Criminal Code* does recognize that officers and non-commissioned members of the Canadian Forces appointed under s.156 of the *National Defence Act* to enforce the Code of Service Discipline are peace officers.

Finally, it would be difficult as a practical matter to bifurcate police independence. At the start of an investigation, especially one involving allegation of serious misconduct, it may not be possible to know whether the matter will be handled as a Service Discipline or a *Criminal*

[68] Chapter 2, paragraph 79 of the Military Police Polices and Technical Procedures A-SJ-100—004/AG-000 is particularly important in this regard in providing: "Except for technical police duties or functions, the MP personnel are subject to orders and instructions issued by their respective Commanders or on their behalf. Nevertheless, commanders may not direct specific investigative or law enforcement action. This is a mandate and responsibility of the CFPM and the MP technical net."

Code matter. Acceptance of chain of command (that is chain of command outside of the military police chain of command) influence with respect to Code of Service Discipline offences would undermine acceptance of police independence in other respects. It would also invite interference complaints under s.250.19 of the *National Defence Act*.

The above conclusion is not to say that Service Discipline Offences do not serve different purposes than *Criminal Code* matters. Military commanders have an important say in enforcing the Code of Service Discipline as a matter of military discipline and judgment. Nevertheless, their influence should be felt after the Military Police have been able to conduct their own investigation subject to military police procedures and the military police chain of command.

Summary

In summary, the law enforcement independence from arbitrary and discretionary interference by the executive was recognized in *Campbell and Shirose* as a constitutional principle derived from the rule of law even though in some instances the civilian police do not have an unfettered right to lay charges. Courts might enforce this principle either as an unwritten constitutional principle or through s.7 of the Charter or the abuse of process doctrine with respect to unauthorized, arbitrary and discretionary forms of executive interference with police investigations. This understanding of core police independence would mean that legislative or regular administrative arrangements that place limits on the ability of a police officer to lay charges may be acceptable and not run afoul of the constitutional principle of police independence.

The concept of police independence should be applied to the military police, albeit with allowance being made for the dual role of a military police officer as both a police officer and a soldier. The Somalia inquiry demonstrates the dangers of allowing chain of command interference with military police investigations. This danger is at least as great as the danger of Ministerial or political interference with civilian police investigation given the pervasive influence of chain of command concepts within the military. The 1998 enactment of s.250.19 of the *National Defence Act* can be seen as a statutory recognition of military police independence and a concern that military police have protections from chain of command (not including military police chain of command) influence in their investigations. No distinction is made in s.250.19 between military police investigations of *Criminal Code* and Code of Service infractions and in both cases the military police may have peace officer status under the *Criminal Code*. Such distinctions might be unworkable in practice given the extensive overlap between the *Criminal Code* and the Code of Service Discipline and the need for police independence from interference in all investigations.

III. Bill C-41 and Police Independence

Bill C-41 provides for many amendments to the *National Defence Act*, but the focus here will be on amendments that relate to the military police and how they relate to police

independence with a particular focus on s.18.5(3). At the same time, it is important to situate that section within its broader statutory and policy context.

Statutory Recognition of the Role of the CFPM

Responding to recommendations made by the late Chief Justice Lamer in his review of Bill C-25,[69] Bill C-41 proposes to codify the position of CFPM. Section 18.3 provides for the appointment of a CFPM who will hold office in good behavior for a renewable 4 year term and can only be removed for cause on the recommendation of an inquiry. The protections provided in s.18.3 for the CFPM are more substantial than those provided for the Commissioner of the RCMP or other police chiefs. This may well be appropriate given the influence of rank in the military and the fact that the CFPM will be outranked by others in the military structure including the VCDS . In any event, s.18.3 is consistent with and advances the idea that military police should enjoy some degree of independence from others who may outrank them in the military command structure.[70]

Reconciling Police Independence with Management Responsibilities: The Power of the VCDS to Provide General Supervision, Instructions and Guidelines to the CFPM

The discussion of police independence in part one of this paper focused on core police independence as recognized in *Campbell and Shirose* and concedes that the outer limits of police independence continue to evolve and require a careful balance between the demands of investigative independence and the demands of democratic accountability. In the civilian police context, the disputed outer limits of police independence involve the legitimate role of responsible Ministers and police boards in providing policy and management direction to the police. The Ipperwash Inquiry dealt with this issue at length in its 2007 report and stressed the importance of democratic policing that allows the responsible Minister to provide policy direction to the police in a transparent manner. It also recommended statutory amendments to provide a sounder and more transparent structure in this difficult area.

In the context of military policing, the analogue to democratic accountability through the responsible Minister or police board is the management role of the Chief of the Defence Staff and Vice Chief of the Defence Staff with respect to military policing. These complex matters are now governed by an accountability Framework struck between the CFPM and the VCDS in 1998. Section 1(A) of this Framework provides that the VCDS will establish general priorities and objectives for the military police services while the CFPM will establish a process to fulfill these objectives and priorities.[71] The 1998 framework also recognizes VCDS responsibility for

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[69] Antonio Lamer *The First Independent Review of the Provisions and Operations of Bill C-25* September 3, 2003 at 75 available at http://www.cfgb-cgfc.gc.ca/documents/LamerReport_e.pdf

[70] Section 18.3(2) provides that the CFPM should hold the rank of at least a colonel.

[71] Accountability Framework in Rt Hon Brian Dickson and Lieutenant-General Charles Belzile chairs *Report of the Military Police Services Review Group* December 11, 1998 Appendix B . The existence of an accountability framework is also recognized in Annex C of Chapter 1 of the Military Police Policies and Technical Procedures in

"general administrative and financial control". Such recognition of management responsibilities are consistent with civilian policing practices where the police cannot be totally independent from management and policy direction by the government. The 1998 framework contemplated that the VCDS could exercise legitimate management powers over the CFPM, but as will be seen, it drew a bright line and a stop sign at VCDS intervention in individual cases. The 1998 report of the Dickson task force reviewed and approved of the appropriateness of this Accountability Framework as a means to reconcile the competing demands of military police independence and accountability.[72] The 1998 Accountability Framework is an important and sound structure and it should not lightly be disregarded or abrogated.

Section 18.4 of Bill C-41 outlines the responsibilities of the CFPM as including:

(*a*) investigations assigned to any unit or other element under his or her command;
(*b*) the establishment of selection and training standards applicable to candidates for the military police and the ensuring of compliance with those standards;
(*c*) the establishment of training and professional standards applicable to the military police and the ensuring of compliance with those standards; and
(*d*) investigations in respect of conduct that is inconsistent with the professional standards applicable to the military police or the *Military Police Professional Code of Conduct.*

Section 18.4(a) is consistent with the recognition of the independence of the military police in conducting investigations because it contemplates that the CFPM as opposed to a base or wing commander will have responsibilities for "investigations assigned to any unit or other element under his or her command." The reference to unit under the command of the CFPM presumably refers to the National Investigation Service, but the reference to "other element under his or her command" seems to refer to other military police elements. Quite appropriately given the scope of military police independence, the CFPM would only be responsible under section 18.4 for investigations conducted by these other elements and not for their performance of non-investigative military duties.

The idea in s.18.4(c) that the CFPM is responsible for "professional standards applicable to the military police" also supports the idea of investigative independence of the police. Although the *Military Police Professional Code of Conduct* does not directly address police independence, some aspects of the Code of Conduct, in particular the prohibition in s.4 of the carrying out of duties in a discriminatory manner, misrepresenting information in a report or knowingly or improperly interfering with the conduct of the investigation, are consistent with the idea that the military police must discharge their duties in an independent manner. Section 7 of

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generally similar terms, subject to one important exception to be discussed below. For example, section 1 provides that "the CFPM is accountable to the VCDS for developing and maintaining police standards consistent with other Canadian law enforcement agencies" and para 6 provides for an accountability framework.

[72] Rt Hon Brian Dickson and Lieutenant-General Charles Belzile chairs *Report of the Military Police Services Review Group* December 11, 1998 chapter 3.

that Code is also significant because it mandates military police to report misconduct to those in the "military police chain of command."

Section 18.5(1) recognizes that the CFPM "acts under the general supervision of the VCDS and s. 18.5(2) provides that the VCDS may issue "general instructions or guidelines" about how the CFPM exercises his or her general responsibilities. Section 18.5(2) ensures the transparency of any "general instructions" by requiring the Provost Marshal to ensure that all general guidelines "are available to the public."

This provision is generally consistent with the recommendations made by the Ipperwash Inquiry in favour of a "democratic policing" model that would allow the responsible Minister to issue general policy directives to the police, provided those directives were public. In accommodation of the distinct military context and the reduced role of the responsible Minister with respect to the Canadian Forces, the accountability powers contemplated in s.18.5(1) reside in the VCDS as opposed to the responsible Minister. Nevertheless, the common idea is that police independence cannot be absolute because that would make the police unaccountable. In my view s.18.5(2) does not infringe the constitutional principle of police independence as articulated in *Campbell and Shirose* because it only provides for the VCDS to issue general instructions and guidelines that will be made public.

Section 18.5(3) and Specific Instructions from the VCDS to the CFPM in Respect to Particular Investigations

If Bill C-41 stopped at ss 18.5(1) and 18.5(2), it would have been consistent with a recognition of police investigative independence. Indeed, in my view, it would have provided a sound statutory framework for reconciling competing interests in investigative or law enforcement independence for the military police and the need to hold the military police accountable and subject to general policy and management direction by the military as represented by the VCDS.

Section 18.5(3) is far more problematic than sections 18.5(1) and.18.5(2) because it goes beyond the ability of the VCDS to provide "general supervision, instructions or guidelines" to the CFPM and purports to empower the VCDS to "issue instructions or guidelines in writing in respect of a particular investigation".

Proposed section 18.5(3) would displace and is contrary to paragraph 7(A) of the 1998 Accountability Framework which provided that "the VCDS will have no direct involvement in individual ongoing investigations but will receive information from the CFPM to allow necessary management decision making."[73]

[73] Accountability Framework in Rt Hon Brian Dickson and Lieutenant-General Charles Belzile chairs *Report of the Military Police Services Review Group* December 11, 1998 Appendix B . Unfortunately this important principle is

Moreover, section 18.5(3) is inconsistent with the core of police independence recognized in *Campbell and Shirose* because it would give a very high ranking member of the military explicit statutory powers to interfere in a police investigation by issuing instructions in respect of a particular investigations.

Section 18.5(3) goes far beyond statutory or administrative practices which limit the ability of police to lay charges. It allows the VCDS to provide instructions and guidelines in specific cases. These instructions could presumably include instructions not to investigate a particular person or matter or to investigate a particular person or manner. The VCDS would be issuing these instructions not as a peace officer but as the second highest ranking member of the Canadian Forces.

Section 18.5(3) does apply some restrictions on interference by the Chain of Command on police investigations. The specific instructions about particular investigations must come from the VCDS and not the immediate commanding officer of a military police officer. Indeed, chapter 2, 79 of the Military Police Polices and Technical Procedures [74] would presumably still apply when it provides that that while MPs are "except for technical police duties and functions" subject to command, that "nevertheless, commanders may not direct specific investigative or law enforcement action. This is a mandate and responsibility of the CFPM and the MP technical net." In other words, the proposed powers in s.18.3(3) only reside in the VCDS and they cannot be delegated to base or wing military commanders.

Nevertheless s.18.5(3) is in tension to the above policy and could only possibly be reconciled with it by suggesting that while commanders cannot provide instructions about investigations in particular cases, the VCDS can and should. As suggested above, the VCDS does have the ability to issue general guidelines and instructions to the CFPM, but it is difficult to understand why this power should extend to individual cases. It is also troubling that the proposed legislation would abrogate a key restriction in the 1998 Accountability Framework on the VCDS having no direct involvement in individual ongoing investigations. [75]As discussed above, the 1998 accountability framework was approved by the 1998 Dickson task force report and in my view is consistent with the subsequent 1999 decision in *Campbell and Shirose* recognizing police investigative independence as an unwritten constitutional principle derived from the rule of law.

Another troubling feature of s.18.5(3) is that while instructions from the VCDS in specific cases, unlike general instructions and guidelines under s.18.5(2), may not always be

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not reflected in the discussion of an accountability framework between the VCDS and the CFPM in Annex C of Chapter 1 of the Military Police Policies and Technical Procedure.

[74] A-SJ-100—004/AG-000

[75] Rt. Hon Brian Dickson and Lieutenant-General Charles Belzile chairs *Report of the Military Police Services Review Group* December 11, 1998 at 15 (emphasis added) quoting Accountability Framework of March 2, 1998 signed by VCDS G.L. Garnett and CFPM Samson.

made public. Section 18.5(5) empowers the CFPM not to make such specific instructions or guidelines available to the public when he or she determines that such availability would not be "in the best interests of the administration of justice."

The rationale for s.18.5(3) of Bill C-41 is unclear especially given its inconsistency with the 1998 Accountability Framework and its tension with police independence as recognized in *Campbell and Shirose*. Section 18.5(3) in some respects mimics s.165.17 of the *National Defence Act* as amended in 1998 which provides:

> The Director of Military Prosecutions acts under the general supervision of the Judge Advocate General.
>
> (2) The Judge Advocate General may issue general instructions or guidelines in writing in respect of prosecutions. The Director of Military Prosecutions shall ensure that they are available to the public.
>
> (3) The Judge Advocate General may issue instructions or guidelines in writing in respect of a particular prosecution.
>
> (4) The Director of Military Prosecutions shall ensure that instructions and guidelines issued under subsection (3) are available to the public.
>
> (5) Subsection (4) does not apply where the Director of Military Prosecutions considers that it would not be in the best interests of the administration of military justice for any instruction or guideline, or any part of it, to be available to the public.
>
> (6) The Judge Advocate General shall provide the Minister with a copy of every instruction and guideline made under this section.

The difference, however, is that the Judge Advocate General would under s.165.17(3) be issuing instructions and guidelines with respect to a particular case as a legal officer with responsibilities for the administration of military justice and not as part of the overall military chain of command. Section 18.5(3) is very different because it has the potential to allow the second highest ranking officer in the Canadian Force to shut down a military police investigation. In this respect it goes far beyond legislative or administrative procedures that prevent a police officer from laying a charge- it empowers a non peace officer member of the executive to issue instructions and guidelines with respect to a particular investigation and as such infringes core police independence and invites discretionary and arbitrary interference[76] with police investigations.

[76] The Court has stressed that the unwritten principle of judicial independence protects judges from arbitrary and discretionary removal from office. *Eli v. Alberta* [2003] 1 S.C.R. 857 and s.18.5(3) while provided in a law would permit arbitrary and discretionary interferences with individual investigations.

The best possible rationale for s.18.5(3) would seem to be an argument that the VCDS's legitimate policy interests should not be restricted to issuing general and prospective guidelines and instructions because policy issues can crystallize in an individual investigation. There is some support for this idea in the McDonald Commission which stressed the need for the responsible Minister to be informed of operations even in individual cases because they may raise important policy of operations issues. Yet even the McDonald Commission did not go as far as s.18.5(3) because it stated that:

> The Minister should have no right of direction with respect to the exercise by the R.C.M.P. of the powers of investigation, arrest and prosecution. To that extent, and to that extent only, should the English doctrine expounded in *Ex parte Blackburn* be made applicable to the R.C.M.P.[77]

This conclusion made in 1981 has, of course, been considerably strengthened by the recognition of police law enforcement and investigative discretion as a constitutional principle in *Campbell and Shirose* in 1999. The conclusion now seems inescapable that even when an investigation raises policy issues that the military police should be allowed to proceed with their investigation without interference from non-military police command structures including the VCDS. Command influence may play a role with respect to the laying of Service Discipline Charges, but they should not instruct the conduct of a military police investigation in a specific case. The policy issue may also result in the VCDS articulating general guidelines and instructions under s.18.5(2) to guide future investigations.

Reform Options

What should be done about s.18.5(3)? In my view, the best course would be to delete that section and the related sections 18.5(4) and (5) from Bill C-41. As suggested above, the remaining sections provide a sound statutory framework to reconcile the competing demands of police independence and accountability.

I do not think it advisable to amend s.18.5(3) to limit the ability of the VCDS to make instructions in specific cases to those under the Code of Service Discipline as opposed to the *Criminal Code*. As I indicated earlier, there is overlap between the more serious Code of Service Discipline offences and the *Criminal Code* and it may not be workable to know from the start which route would apply. In addition, there is a public interest in full investigations of Code of Service Discipline offences even if in the final analysis a decision is made by commanding officers not to prosecute them.

Another option would be to amend s.18.5(3) so that it only applied in minor cases. I do not think this is advisable given that the Code of Service Discipline runs the gamut from very

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[77] Commission of Inquiry Concerning Certain Activities of the RCMP *Freedom and Security under the Law* (Ottawa: Supply and Services, 1981) at 1013.

serious *Criminal Code* offences to relatively minor matters of military discipline and management. It is also very unlikely that the VCDS would take an interest in minor matters.

The transparency of s.18.5(3) could be increased by requiring that any specific instruction be made public. In some respects, this would follow the model used in Director of Public Prosecutions Act including the federal one when the Attorney General issues instructions to the DPP. Although such an amendment would increase transparency, it would also as suggested below invite challenges to the VCDS's instructions in individual cases. The analogy with the DPP/Attorney General model is also misplaced because even when the Attorney General intervenes in an individual case, he or she does so as a Law Officer of the Crown. In contrast, the VCDS would not be intervening in a military police investigation as a peace officer but as a the second highest ranking official in the military.

The Consequences of Section 18.5(3) Becoming Law

There may be significant policy and legal repercussions if s.18.5(3) becomes law. From a policy perspective, it would harm post Somalia developments which have increasingly recognized the investigative independence of the military police. Section 18.5(3) would place the CFPM in a very difficult position of complying with an instruction from the VCDS in a form that is specifically authorized in legislation but at the same time violating core police independence as represented by *Campbell and Shirose*. If enacted, there is also a strong likelihood that the exercise of powers under s.18.5(3) will attract interference complaints under s.250.19 of the *National Defence Act* and require the MPCC and the Chief of Defence Staff to reconcile these provisions, perhaps in different ways.

Legally, there is a possibility that s.18.5(3) might in an appropriate case be found to be inconsistent with the unwritten constitutional principle of police independence recognized in *Campbell and Shirose* and derived from the rule of law. As discussed above, it is not clear whether the courts would strike down democratically enacted legislation on the basis of an unwritten constitutional principle but it is possible. Even if the courts were not prepared to do so, they might well invalidate instructions issued under s.18.5(3) which they find to be an arbitrary and discretionary interference with the principle of police independence derived in *Campbell and Shirose* from the rule of law.

There is also a possibility that s.18.5(3) might violate s.7 of the Charter if as discussed above, police independence was accepted as a principle of fundamental justice. Courts would be influenced by the consistency in the McDonald Commission, the Marshal Commission, the Arar Commission, the Ipperwash Commission and the Air India Commission, which all recognized a core of police independence from interference in police investigations. In addition, the court would have to find that the interference with police independence resulted in an infringement of life, liberty or security of the person. Courts are reluctant to uphold s.7 violations under s.1. In any event, the VCDS's legitimate management and policy interests with respect to military

policing could be served by issuing general guidelines and instructions under s.18(5)(2) without issue specific instructions or guidelines in individual cases. Courts could also strike down s.18.5(3) and distinguish them from statutory or administrative requirements that require the Attorney General to agree to the laying of charges on the basis that s.18.5(3) permits interference with the entire police investigation and not just the laying of charges and the interference is by a person who is acting as a member of the executive and not as a law officer.

It is also possible that courts might find a prosecution that resulted from specific instructions under s.18.5(3) to be an abuse of process because of executive interference with police investigations.

Such legal remedies after the enactment of s.18.5(3) are far from ideal. Remedies in individual cases for the use of specific instructions under s.18.5(3) will be difficult to achieve especially if the VCDS's specific instructions or guidelines constrained a military police investigation and no charges have resulted. In circumstances of non-investigation and non enforcement, there may be standing issues and the affected people may not even know of the existence of specific instructions from the VCDS if the CFPM has decided that it would not be in the best interests of the administration of justice.

Section 18.5(3) if enacted will place the CFPM in a difficult position. The CFPM will as a member of the military have to accept specific instructions from the VCDS. At the same time, as a police officer, he or she may conclude that some instructions conflict with police independence and the duty of the police when "engaged in law enforcement" not to act "as a government functionary or as an agent of anybody."[78]

In most cases, it might be expected that the CFPM would make the VCDS's instructions in a specific case available to the public especially if the CFPM concludes that the protection of police law enforcement discretion and the investigative integrity of the military police are in the best interests of the administration of justice. The CFPM could also issue a complaint of interference against the VCDS under s.250.19 with respect to the issue of instructions or guidelines in individual cases. The matter would have then have to resolved by the MPCC which would have the difficult and unenviable task of reconciling its mandate under s.250.19 to hear interference complaints with the specific legislative authorization of instructions and guidelines in individual cases in s.18.5(3).

Even if in some cases, the CFPM accepted the instructions or guidelines from the VCDS without making an interference complaint, there is a danger of a lack of transparency if the CFPM decided that it was in the best interests of the administration of justice not to make the instructions public. There is a danger that instructions that resulted in an investigation and charges might never be known to the person charged. In such cases, the person charged would lose an opportunity to seek an abuse of process or Charter remedy and/or make an interference

[78] *R. v. Campbell* [1999] 1 S.C.R. 565 at para 27

complain. In cases where the instructions and guidelines resulted in no investigation and no charges, there is a danger that non publication could result or at least be perceived to result in a cover up of interference with a police investigation.

Indeed if the section is retained, it may be advisable to ensure that the MPCC receives a copy of the VCDS's specific instructions in each case regardless of whether the instructions are made public by the CFPM and regardless of whether an interference complaint is made under s.250.19.

Bill C-41 generally otherwise builds on the post-Somalia trajectory of recognizing the independence of the military police when conducting investigations. Unfortunately, however, s.18.5(3) has proposed a serious incursion on the core constitutional principle of police independence by authorizing specific instructions and guidelines from the VCDS to the CFPM in particular cases. This provision would violate a key aspect of the 1998 Accountability Framework between the VCDS and the CFPM which recognizes that the VCDS's legitimate management responsibilities do not involve instructions in individual cases. Moreover, s.18.5(3) also violates the constitutional principle of police independence in *Campbell and Shirose* which as suggested above should be applied to the investigative independence of the military police even if it does not always extend to the laying of charges.