Military Police Complaints Commission
Chairperson

Commission d'examen des plaintes concernant la police militaire
Président

January 31, 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-41, 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-41 for distribution to the members of the Standing Committee on National Defence.

Sincerely,

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

Enclosures (2)

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BRIEF OF THE MPCC REGARDING BILL C-41

Dear Honourable Members:

I am writing to you today to provide you with the Military Police Complaints Commission's (Commission) views on Bill C-41, the *Strengthening Military Justice in the Defence of Canada Act*.

The Commission supports most of the proposed amendments contained in the bill relative to military police and the Part IV complaints process in particular. However, the Commission does have some concerns with particular aspects of the bill, which we believe could easily be addressed by some simple amendments. In our view, these are discrete matters which would not affect the key principles being advanced in the bill. Specifically, the Commission has three suggested modifications to the bill.

Potential Conflict with Pending Second Independent Review of NDA

First, we note that the bill would, through clauses 101 and 117, replace the current statutory provision for an independent legislative review every five years of the amendments to the *National Defence Act* (NDA) contained in *Statutes of Canada* (S.C.) 1998, chapter 35 (Bill C-25 of the 36th Parliament, 1st Session) every five years with a requirement to conduct such a review every seven years. We further note that the effect of these changes would be to move the requirement for the next independent legislative review to seven years from the coming into force of the proposed new NDA section 273.601. While the Commission has no objection to modifying the length of the period in between independent reviews of the legislation, we note the bill contains no provision to preserve the requirement to proceed with the second such review whose commencement we understand to be imminent.

With over ten years of working with the NDA Part IV framework – and more than seven years since the first independent review by the late former Chief Justice Antonio Lamer – the Commission has developed a number of suggestions for improvements to the legislative scheme for independent oversight of military policing. We have been looking forward to the opportunity to put forward these suggested improvements in the context of the independent review process. However, it would appear that, if Bill C-41 is enacted into law prior to the completion of the upcoming review per S.C. 1998, ch. 35, s. 96, then there would no longer be a statutory requirement or basis for continuing with the review or for tabling the results in Parliament. The Commission would then not have another opportunity to provide its input to an independent review authority for a further seven years. Moreover, since clauses 101 and 117 of the bill are not addressed in clause 135 ("Coming into Force"), they would come into force automatically on

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Bill C-41 receiving Royal Assent. As such, there would be no opportunity for the Governor General in Council to delay proclamation of the changes to the timetable for independent review of the NDA in order to accommodate the pending second independent review per S.C. 1998, ch. 35, s. 96.

The Commission has been assured, and accepts, that the Department of National Defence (DND) is committed to proceeding with the impending legislative review, however, we consider that it would be preferable not to risk downgrading the legal status of this upcoming review from one that is statutorily mandated to one that would be discretionary. While we do accept and expect that the impending legislative review will proceed, the Commission would prefer that there not be any issue regarding the status and basis of the independent review authority's eventual report and recommendations.

In our view, any potential conflict between the pending second independent review of the NDA and Bill C-41 could be cured by an amendment which would either provide for, or allow for, a delay in the coming into force of clauses 101 and 117 until the report of the next independent review per S.C. 1998, ch. 35, s. 96 is tabled in Parliament.

"Authorized Interference"? Proposed New Subsection 18.5(3)

Second, we note that pursuant to clause 4 of the bill, the appointment, role, authorities and accountabilities of the Canadian Forces Provost Marshal (CFPM) would be set out in the NDA. While the Commission considers this to be a welcome development in principle, the proposed authority, in subsections 18.5(3) through (5), for the Vice Chief of the Defence Staff (VCDS) to issue instructions to the CFPM in respect of particular investigations is highly problematic in our view.

On March 2, 1998, the VCDS and CFPM of the day signed an *Accountability Framework* intended to "ensure the provision of a professional and effective military police service", and which recognized the "complementary objectives" of "the primacy of operations" and "the need for [military police] independence in investigations". Toward those ends, while confirming the authority of the VCDS to "give orders and general direction to the CFPM to ensure professional and effective delivery of policing services…", the Framework stipulated that "[t]he VCDS shall not direct the CFPM with respect to specific military police operational decisions of an investigative nature….", and also that "[t]he VCDS will have no direct involvement in individual ongoing investigations but will receive information from the CFPM to all necessary management decision making." The Framework elaborated further on these principles as follows: "The CFPM has a duty to advise the VCDS on emerging and pressing issues where management decisions are required…[h]owever, the degree of detail provided on the day to day investigations rests within the discretion of the CFPM"; and also provided that: "[t]he CFPM will monitor individual investigations and provide a general overview of investigations to the VCDS…[d]iscussions with the VCDS of specific details of any investigation are to be avoided

unless specific circumstances warrant attention of management." The VCDS-CFPM *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.

Nor does the proposed new subsection 18.5(3) respond to any recommendation of the First Independent Review in 2003 (the Lamer Report). To the contrary, in the analysis leading up to his recommendation to define the role of the CFPM in the NDA, it is clear that the late former Chief Justice Lamer's primary concern in this regard was the need to help ensure the CFPM's independence. Chief Justice Lamer's only concern with the *Accountability Framework* seemed to be the inadequacy, in his view, of its non-legislative status to protect the CFPM's independence, rather than its content and, in particular, its restrictions on the supervisory and oversight role of the VCDS vis-à-vis the CFPM.

In addition to negating a central pillar of the VCDS-CFPM *Accountability Framework*, in our view, such a provision contradicts a key recommendation of the 1997 Special Advisory Group on Military Justice and Military Police Investigation Services (Dickson Report). In its report to the Minister of National Defence, this Group recommended that the Canadian Forces National Investigation Service (CFNIS) be placed under the command of the CFPM precisely so that it could "operate independently of the chain of command". While the CFPM is no longer the Commanding Officer (CO) of the CFNIS, the CO CFNIS still reports directly to the CFPM and is under his command. Moreover, the proposal to authorize the VCDS to direct particular military police investigations is also at odds with Parliament's creation in NDA Part IV of the interference complaint mechanism and the Commission's mandate to investigate and report on such instances.

Perhaps most significantly, the proposed authority for the VCDS in clause 4 (s. 18.5(3)) of the bill seems inconsistent with the principle of police independence in the context of conducting criminal investigations and exercising policing discretion, as recognized by the courts in such cases as *R. v. Campbell and Shirose* [1999], 1 S.C.R. 565 (in paragraphs 27 – 36). In this decision, the unanimous Supreme Court noted that such independence "underpins the rule of law,"[1] which "is one of the 'fundamental and organizing principles of the Constitution'."[2] Indeed, this language in *Campbell and Shirose* raises the possibility that such police independence, as an underpinning of the rule of law, may constitute an unwritten constitutional principle, the existence and force of which have been recognized by the Courts in *Reference re Secession of Quebec* (1998)[3] and other cases. As such, the very constitutionality of proposed s. 18.5(3) may even be an issue.

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[1] [1999] 1 S.C.R. 565 at para. 29.
[2] [1999] 1 S.C.R. 565 at para. 18.
[3] [1998] 2 S.C.R. 217.

The foregoing legal concerns of the Commission would appear to be borne out by the independent legal analysis (attached), which the Commission has obtained from recognized criminal and public law scholar, Professor Kent Roach of the University of Toronto.

To be sure, the Commission's concerns with the proposed subsection 18.5(3) are based on concerns regarding principle, rather than with the anticipated practice. Indeed, the Commission has been assured that this authority is intended merely to support the VCDS' responsibility for resource management and the need to convey direction to the CFPM regarding the chain of command on operational matters. The Commission readily accepts these assurances and we do not doubt that the proposed provisions are intended to be used only exceptionally and for legitimate ends; and the transparency requirement in proposed subsection 18.5(4) would help to ensure that this was the case.

However, the Commission is concerned that the proposed subsection 18.5(3), which is expressed in unqualified terms, provides basic and general legitimacy to chain of command intervention in military police investigations. In our view, when situations arise where the exigent demands of military operations legitimately override those of law enforcement, the chain of command already has the necessary legal authority. This is certainly the case with the VCDS vis-à-vis the CFPM where a command relationship exists. Nor is the Commission aware of any other provision of the bill, or in the existing Act or regulations, which would interfere with the chain of command's lawful and legitimate exercise of authority vis-à-vis the CFPM or the military police generally so as to justify the proposed subsection 18.5(3) authority as a necessary correction or clarification regarding the legal status quo.

The proposed section 18.5 in clause 4 of the bill appears to be modelled after the present section 165.17 of the NDA dealing with the reporting relationship between the Judge Advocate General (JAG) and the Director of Military Prosecutions (DMP). As with their civilian counterparts, the independent judgment and discretion of both military prosecutors and MPs is fundamental to the fairness and integrity of the justice system.

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

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Our research to date on this question indicates that the authority sought for the VCDS in the proposed s. 18.5(3) is unprecedented in the context of police-executive or police-government relations, both in Canada and in those other common law countries which recognize the legal principle of police independence (specifically, England & Wales, Australia and New Zealand). Indeed, s. 31(4) of Ontario's *Police Services Act*, specifically prohibits local police boards from directing chiefs of police "with respect to specific operational decisions or with the day-to-day operation of the police force." Similar prohibitions are found in the policing statutes of Nova Scotia,[4] New Brunswick,[5] Manitoba,[6] and New Zealand.[7]

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

In the Commission's view, the proposed new subsections 18.5(3) through (5) in clause 4 of the bill should be deleted.

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 fairly significant drafting error in the present NDA Part IV has previously been brought to the Department's attention by the Commission, both in the context of the first five-year review in 2003 and in consultations the following year regarding implementation of the Lamer Report recommendations. 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 so the matter should be rectified and Bill C-41 presents a convenient opportunity to do so, given that it proposed to harmonize the French and

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[4] *Police Act*, S.N.S., s. 55(1).
[5] *Police Act*, S.N.B., s. 3.1(2)(*c*).
[6] *Police Services Act*, S.M., s. 28(4).
[7] *Policing Act, 2008* (New Zealand), s. 16(2).

English text of other provisions of the Act.

Conclusion

As indicated at the outset, the Commission considers that its concerns may be addressed through very specific amendments to the bill which would not detract from the principles advanced in the bill. Indeed, we believe that the proposed changes would reinforce and support these principles.

The Commission would be pleased to answer any questions or provide any further information to the Committee in respect of the matters raised in these submissions.

Sincerely,

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