

**POLICE INDEPENDENCE,
THE MILITARY POLICE AND BILL C-41**

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Police Independence, the Military Police and Bill C-41

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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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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 Canada⁵, 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

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

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

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

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 Marshall 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.

¹⁹ *Royal Commission on the Donald Marshall 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

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

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

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.

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, arbitrary⁴⁰, and arguably unlawful attempts by the executive to interfere with police investigations and not generally against democratically enacted legislation⁴¹ 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.

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 principle 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 Discipline⁴⁴ 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

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 7 at 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

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

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 Marshal⁵⁸. 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

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:

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/300/315-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.

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."

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.

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

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

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 Policies and Technical Procedures⁷⁴ would presumably still apply when it provides 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

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 interference⁷⁶ 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

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.

Went Road