

Military Police
Complaints
Commission

Chairperson



Commission d'examen
des plaintes concernant
la police militaire

Président

February 16, 2011

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

Re: Bill C-41, the *Strengthening Military Justice in the Defence of Canada Act*.

Please find attached supplementary submissions from the Military Police Complaints Commission in relation to Bill C-41 for distribution to the members of the Standing Committee on National Defence. Myself and senior staff are available to meet with the Committee at any time to discuss any of the points we have raised. We do not consider that the MPCC's ongoing public interest proceeding in respect of a complaint by Amnesty International and B.C. Civil Liberties Association in any way precludes our engagement with the Committee on Bill C-41.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Glenn M. Stannard'.

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

Enclosures (1)

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SUPPLEMENTARY BRIEF OF THE MPCC REGARDING BILL C-41

Dear Honourable Members:

Further to the Military Police Complaints Commission's previous submissions to you on this matter, the Commission wishes to provide the following further submissions.

The Commission has followed with interest the Committee's meetings on Bill C-41. The Commission reaffirms its submissions of January 31, 2011, and wishes to add the following observations regarding two of its areas of concern.

1) Coming into Force of Clauses 101 and 117

As indicated in our previous submissions, clauses 101 and 117 of the Bill – which deal with the fixing of the next timetable for future legislative reviews and which would abolish the present five-year review requirement in S.C. 1998, ch. 35, s. 96 – are not covered by the Bill's "Coming into Force" provision, clause 135. Therefore, despite any willingness on the part of the Government to do so, there would be no possibility to delay the implementation of these provisions.

As such, the legislative basis for the much-anticipated second five-year review would be eliminated upon Bill C-41 receiving Royal Assent. It may be noted that, while the MPCC has been informally advised for many months now that the next legislative review was imminent, an independent review authority has still yet to be appointed to commence the process.

This problem could be cured by a simple amendment to Bill C-41 which would allow for a delay in the coming into force of at least clause 117 (the provision which would repeal the present 5-year review requirement) until the report of the next independent review is tabled in Parliament pursuant to S.C. 1998, ch. 35, s. 96.

2) Clause 4, Proposed New Subsection 18.5(3)

Contrary to Legal Principle of Police Independence

The Commission reiterates the concerns raised in our previous submissions regarding the possibility of "authorized interference" posed by this new provision. The Commission commends to you Professor Kent Roach's paper (which it forwarded with its previous submission) analyzing this provision, wherein this well-known criminal law expert concluded that the proposed authority for VCDS instructions to the CFPM in respect of specific investigations "violates core concepts of police independence", as recognized by the Supreme Court of Canada in *R. v. Campbell and Shirose* (1999). While the Military Police (MP) are not

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structurally independent of the Canadian Forces, the legal principle of police independence nonetheless applies to them when performing their law enforcement responsibilities.

Proposed Authority Unrelated to Dual Role of MPs

The Commission recognizes of course the dual role of MPs, being both police and soldiers. However, this duality is not relevant to a consideration of s. 18.5(3), since this proposed provision is specifically directed at MPs' law enforcement duties, i.e., police investigations.

Incorrect Analogy Between VCDS-CFPM and JAG-DMP

The Commission also understands that proposed s. 18.5(3) – (5) is based on the reporting relationship between the JAG and the Director of Military Prosecutions, as set out in NDA s. 165.17. However, as noted in our previous submissions, we do not consider this relationship to be an apt analogy to the VCDS-CFPM relationship. The JAG is, in effect, a senior prosecutorial authority to the Director of Military Prosecutions, somewhat similar to the relationship between a local Crown Attorney and a superior official from the Ministry of the Attorney General or Department of Justice. Moreover, the JAG is insulated from inappropriate influence by the chain of command on the exercise of prosecutorial discretion by the fact that he is appointed by the Governor in Council and reports directly to the Minister of National Defence (NDA s. 9.3(1)), rather than to the CF chain of command.

The VCDS, by contrast, is neither an MP nor a peace officer; and unlike the JAG, the CFPM is appointed by, and reports to, the chain of command.

Proposed Authority Not Confined to Exceptional Situations

While the MPCC does not question the motivation behind the provision, in point of fact, the provision contains no substantive limits or caveats on its use. Though it may well be intended for rare and exceptional operational circumstances, these are not spelled out in the Bill.

Interference Complaint Not a Check on Misuse of Authority

Finally, this Committee should not consider that the possibility of an interference complaint to the MPCC pursuant to NDA s. 250.19 would offer any useful check on possible abuse of s. 18.5(3). Apart from the fact that MPCC is only authorized to make non-binding findings and recommendations to CF and DND leadership, it is difficult to see how instructions authorized by statute could be found in law to be “improper interference”. In other words, while the CFPM could make a complaint about an instruction given under proposed s. 18.5(3), the Commission would be obliged to dismiss it.

In our view, if s. 18.5(3) were enacted into law, the concept of “improper interference” contained in NDA s. 250.19 would have to be “read-down” so as to exclude any such instructions given by the VCDS.

VCDS Already Has Necessary Authority to Exercise Supervision Over CFPM

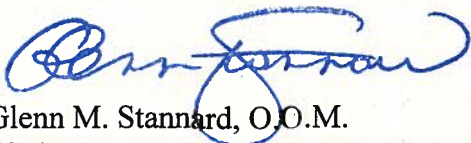
As indicated in our previous submissions, given that the CFPM is under the command of the VCDS, and that it is the VCDS, and not the CFPM, who controls operational resources, the Commission considers that the VCDS already has adequate authority to provide any legitimate direction to the CFPM in respect of law enforcement matters.

In Summary

In summary, in the view of the MPCC, the proposed authority in s. 18.5(3) for directions by the VCDS in particular MP law enforcement investigations should be deleted from Bill C-41 for the following reasons:

- It is contrary to Canadian law and traditions on the independence of police investigations from the executive, which is an underpinning of the rule of law.
- It is without precedent in Canadian policing legislation.
- It is based on an erroneous analogy by the drafters between the relationship of the VCDS and CFPM with that of the JAG and the Director of Military Prosecutions.
- It represents a significant step back from efforts since the 1990s to enhance and safeguard the independence of military police investigations:
 - Formation of the CFNIS, with its own authority to lay charges for service offences (unlike other MPs), and with its own separate chain of command headed by the CFPM.
 - Creation of the MPCC with its unique and exclusive mandate over MP interference complaints.
 - Development of a special *VCDS-CFPM Accountability Framework* (attached) in 1998 to balance the management needs of the VCDS while respecting the necessary independence for the CFPM in his law enforcement responsibilities in specific cases – proposed NDA s. 18.5(3) would effectively abrogate key terms of the *Framework*.
- It does not respond to any recommendation of the Lamer Report or to any other public study on military justice or military policing.

Sincerely,



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

Enclosures (1)

ACCOUNTABILITY FRAMEWORK

THE VICE CHIEF OF THE DEFENCE STAFF

AND

THE CANADIAN FORCES PROVOST MARSHAL

PURPOSE

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

PRINCIPLES

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

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

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

ROLES, RESPONSIBILITIES AND ACCOUNTABILITY

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

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

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

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

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

ROLES AND RELATIONSHIP WITHIN AN ACCOUNTABILITY FRAMEWORK

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5(A) THE VCDS WILL MONITOR LAW ENFORCEMENTS PATTERNS

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

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

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

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

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

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

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

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

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

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

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

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

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

8. PROVIDE ANNUAL REPORT

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

9. REVIEW OF ACCOUNTABILITY FRAMEWORK

This accountability framework will be reviewed annually.

Dated this 2nd day of March, 1998.

G.L. Garnett

Vice-Admiral

Vice Chief of the Defence Staff

P.M. Samson

Colonel

Canadian Forces Provost Marshal
