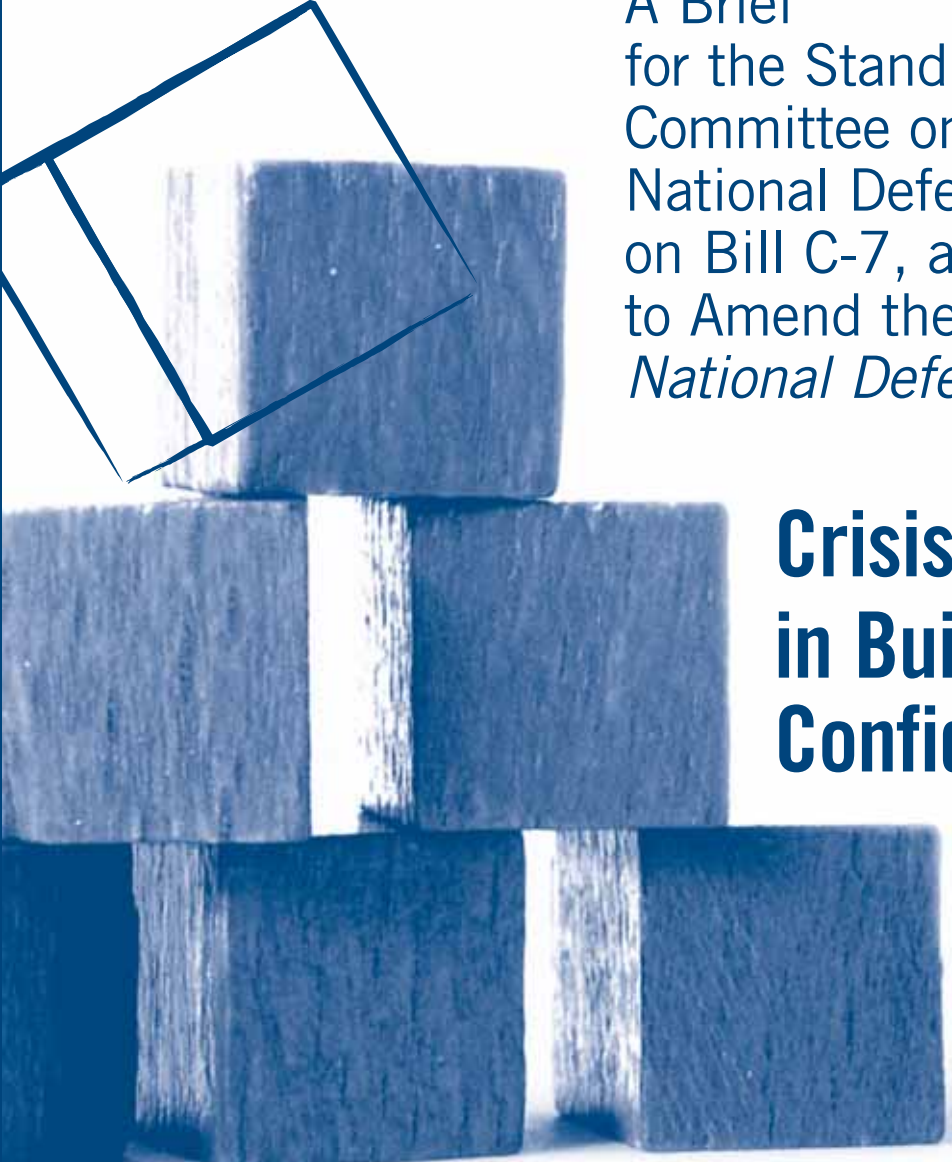




Military Police  
Complaints Commission  
of Canada

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



A Brief  
for the Standing  
Committee on  
National Defence  
on Bill C-7, an Act  
to Amend the  
*National Defence Act*

## Crisis in Building Confidence

Canada

A Brief for the Standing Committee  
on National Defence on Bill C-7,  
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## Crisis in Building Confidence

### Independent Oversight of Military Police

The police have extraordinary powers. Independent civilian oversight of police services has become an important accountability mechanism for the exercise of these powers, allowing the public to have confidence in its police services.

### *Introduction of Police Oversight to the Canadian Forces*

In 1998, amendments were made to the Act to reform the military justice system. This included the creation of a military police complaints system and the establishment of an independent civilian agency, the Military Police Complaints Commission, to provide oversight of Canadian Forces military policing. This step broke new ground in civilian oversight by extending the function to military policing; however, the oversight model itself was very modest amongst the models used by other Canadian jurisdictions at that time.

Since 1999, the MPCC has monitored the military police complaints process administered by the CF Provost Marshal, reviewed complaints upon request by complainants, investigated interference complaints, and in a small number of cases, invoked the public interest and initiated its own investigation.

### *Five Year Review*

Parliament understood that the 1998 reforms to the military justice system might require future refinement and legislated a five-year review to assess their impact and allow for further amendments. Between 2003 and 2005, a formal review was done; the MPCC published its own report about strengthening independent oversight, and Bill C-7 was developed, and subsequently tabled in 2006.

### *Bill C-7 – an opportunity*

This brief has been prepared to explain the full potential impact of Bill C-7 on oversight of the military police and to propose alternative amendments. Bill C-7, if passed, would systematically dismantle independent oversight of Canadian Forces military police. Parliament has an opportunity to choose, instead, to strengthen the oversight function, by considering a series of amendments that would improve the fairness, effectiveness and transparency of the current system.

*“Independent oversight is especially important for the military police and, in this regard, civilian oversight of police forces is particularly instructive. If an individual citizen complains to a civilian police force about improper conduct of its personnel, there is an expectation of and a right to a response. This situation should be no different in the military context.”*

*– The late Right Honourable Brian Dickson, former Chief Justice, Supreme Court of Canada*

# 1 Independent from the Canadian Forces

## The Military Police Complaints Commission:

Oversees CF Provost Marshal's handling of complaints about the conduct of military police:

- monitors the complaints process by CFPM
- reviews specific complaints when requested by a complainant

The only organization with the authority to investigate allegations of interference in military police investigations.

May deem a complaint to be in the public interest and undertake an investigation or public hearing at any time.

Reports on its findings, and makes observations and recommendations.

## Impact of Independent Oversight

### Policies and practices

73% of MPCC's recommendations have been accepted and as a result changes have been made to policies, and in many instances training, about:

- police discretion in laying of charges
- police involvement in family and civil matters
- conduct of surveillance operations
- note-taking and report-writing
- CFPM's handling of complaints

### Protecting the Public Interest

This jurisdiction has been used only ten times, in serious cases that merited independent scrutiny. They included the conduct of investigations related to:

- the poisoning of an NCO by soldiers under his command
- alleged fraud-related offences by a senior military police officer
- alleged sexual assault of a cadet
- allegations of improper search and breach of Charter rights of several youths
- alleged sustained harassment of a CF member by military police

### Building Confidence in the Complaints Process and Military Police

Complainants and military police members alike have indicated that the MPCC's independence from the CF and the Department is key to their confidence in the complaints process.

*"I cannot emphasize enough the importance of independent oversight of the military police. Oversight is essential to promote confidence in the investigative process and to ensure that both complainants and members of the military police are dealt with impartially and fairly."*

*– The Right Honourable Antonio Lamer, former Chief Justice, Supreme Court of Canada*

# 2

## Bill C-7 and its Effects

Bill C-7 has eleven amendments which directly affect the quality of the oversight function. Nine of the eleven limit, restrict, or otherwise significantly diminish the independent oversight of military police.

### Bill C-7, as introduced, would:

Virtually eliminate the MPCC's authority to intervene in the public interest

Render the monitoring function purposeless

Limit access to complaint files maintained by the military police

Deny access to information about the informal resolution of complaints

Deny access to information subject to "privilege"

Exclude groups, including those attached or seconded to the military police and others such as foreign officers seconded to the CF, from independent oversight

The bill provides just one enhancement to oversight: it would prohibit reprisals against persons who make complaints, in good faith, with respect to both conduct and interference

# 3

## Alternative Proposals to Strengthen Independent Oversight of Military Policing

The following changes to the NDA would clarify and enhance independent oversight:

Give those who are the subject of a complaint the right to request a review

Make all individuals who perform CF military police duties subject to independent oversight

Allow anyone, given reasonable grounds, the right to file an interference complaint

Allow complaints about interference with any aspect of police duties

Provide subpoena power for MPCC public interest investigations and also provide the legal protections that go along with compelled testimony

Impose a duty to cooperate on CF members and DND employees

Require CFPM to produce all documents and materials relevant to a specific complaint, including those related to informal resolution

Define police duties subject to oversight in the NDA



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***CRISIS IN BUILDING  
CONFIDENCE***

May 31, 2006

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## Table of Contents

I) Introduction .....	1
II) Military Police Oversight in Canada prior to December 1, 1999.....	3
<i>Background</i> .....	3
<i>Study and Reform of the Military Justice System</i> .....	4
<i>Bill C-25, 1998</i> .....	5
III) December 1, 1999 to 2006: Canada’s Experience in Military Police	
Oversight.....	6
<i>MPCC Mandate</i> .....	6
<i>Responsibilities</i> .....	6
Conduct Complaints – Monitoring .....	7
Conduct Complaints - Review .....	7
Interference Complaints .....	7
Public Interest Investigations and Hearings.....	8
Reporting .....	8
<i>Scope of Oversight</i> .....	8
<i>Impact of the MPCC</i> .....	9
On Policies and Practices .....	9
Protecting the Public Interest .....	10
Building Confidence in Military Policing and in the Complaints	
Process .....	10
<i>What has been learned so far about the effect of Part IV on oversight</i>	
<i>of military policing</i> .....	11
Bill C-25 .....	11
The Lamer Report .....	12
MPCC Special Report .....	13
IV) The Future of Canadian Military Police Oversight .....	14
<i>Bill C-7 and its Overall Impact on the Oversight Functions of the</i>	
<i>MPCC</i> .....	14
<i>Public Interest Jurisdiction</i> .....	15
<i>Complaint Monitoring Function</i> .....	15

Access to complaint records.....	16
Information about Informal Resolution of Complaints .....	18
<b>Disclosure</b> .....	19
Definition of items subject to disclosure .....	20
Exclusion of information subject to “privilege” .....	20
<b>Duty to Cooperate and Subpoena Powers</b> .....	21
<b>The Scope of Oversight</b> .....	22
Right of the subject of a complaint to request a review .....	22
Right to file an interference complaint.....	22
Police activities subject to interference complaints.....	22
Who can be the subject of a complaint.....	23
Police duties subject to oversight .....	23
<b>Special threshold for the MPCC Chair</b> .....	25
<b>V) Conclusion</b> .....	26

## I) Introduction

This brief has been prepared to assist the Standing Committee on National Defence, other parliamentarians and all interested stakeholders in understanding the full potential impact of Bill C-7, *An Act to amend the National Defence Act*, in respect of the role and function of the Military Police Complaints Commission.

A number of the amendments to the *National Defence Act* (NDA) proposed in Bill C-7 would, taken individually, have a significant impact upon the ability of the Military Police Complaints Commission (MPCC) to fulfill its mandate. Taken collectively, they significantly diminish the independent oversight of Canadian Forces military police and effectively eliminate proactive and systemic inquiries undertaken in the public interest.

In 1998 amendments were made to the NDA which included measures to reform the military justice system. Among these reforms were the creation of a military police complaints system and the establishment of an independent civilian agency, the Military Police Complaints Commission, to oversee Canadian Forces military policing.

Police have extraordinary powers, such as to detain citizens, or to use lethal force to prevent death or serious injury to the public or themselves. Civilian oversight of police services has become an important accountability mechanism for the exercise of these police powers. It is commonplace in democratic jurisdictions around the world. One of the profound impacts of civilian oversight has been to enhance the confidence and trust that the public has in police services.

As stated by the Honourable Justice Russell of the Federal Court of Canada (Trial Division), "...effective independent oversight of the police is an important matter. It is important in curbing potential police excesses, but it is equally important as a tool for enhancing police effectiveness and public confidence in the activities of the police".<sup>1</sup>

Canada has a different mechanism for civilian oversight of policing in virtually every jurisdiction. Collectively, they represent a wide range of models; there is no "one size that fits all". However, while Canada took the initiative of establishing an agency to provide independent civilian oversight of the military police, the model currently administered by the MPCC is modest compared to the powers and authorities of other independent oversight agencies in Canada. Moreover, the recent trend has been to make oversight mechanisms even more robust.

In order to comprehensively examine the concerns about diminishment of the role and function of the MPCC this brief contains five parts:

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<sup>1</sup> *Canada (Royal Canadian Mounted Police Public Complaints Commission) v. Canada (Attorney General)*, 2004 FC 830 at paragraph 39.

Part II, *Military Police Oversight in Canada prior to December 1, 1999*, provides background information about the events and context that led to the military justice reforms introduced in 1998.

Part III, *Canada's Experience in Military Police Oversight* describes the mandate responsibilities, and scope of authority of the MPCC; the impact that the MPCC has had on military policing; and what this experience has shown about the benefits and limitations of the enabling legislation.

Part IV, *The Future of Canadian Military Police Oversight* examines in detail the impact of Bill C-7 amendments upon independent military police oversight; and describes missed opportunities to address gaps, ambiguities, and limitations in the current NDA that would contribute to improving the oversight function.

Part V, *Conclusion* provides summary considerations for the members of Standing Committee on National Defence, other parliamentarians and all stakeholders.

## **II) Military Police Oversight in Canada prior to December 1, 1999**

On December 1, 1999, provisions of the *National Defence Act* (NDA) came into force that established Part IV of the Act to systematically address complaints regarding the military police and created the Military Police Complaints Commission (MPCC). Prior to this, there was no independent process for investigating and responding to complaints related to military policing and no independent civilian oversight of military policing in Canada. It is useful to revisit briefly the circumstances which brought Canada to this stage in the evolution of military policing.

### ***Background***

During the 1990s, Canadians in and out of uniform began to ask questions about the ongoing efficacy and fairness of Canada's military justice system:

Do we need a separate system of criminal justice for the Canadian Forces?

Does the *Canadian Charter of Rights and Freedoms* permit soldiers suspected of wrongdoing to be treated any differently from civilians?

Is the military justice system sufficiently capable of enforcing military discipline fairly and equitably?

The Supreme Court of Canada addressed the first two questions in its landmark decision in *R. v. Généreux* (1992). In that judgment, the Court made the case for retaining a separate military justice system and indicated that some deviation from civilian norms and rules of criminal justice were justifiable under the Charter.

The third question, however, remained pending. While not implicating any military police personnel, events in Somalia in 1993 and their aftermath nonetheless added a heightened sense of urgency to concerns over the military's ability to effectively police itself, especially where superior rank or the potential for adverse publicity were at play.

At this time, the military police were fully integrated into the Canadian Forces operational chain of command, though subject to some technical policy guidance by the Director General Security and Military Police. The operational chain of command controlled the resources available for policing services, made all decisions regarding charges under the Code of Service Discipline, and exclusively supervised and evaluated the performance of all military police assigned to it. As the Special Advisory Group on Military Justice and Military Police Investigation Services observed in its 1997 report (hereafter, the Dickson Report): "the ability of a military police investigator to conduct an investigation with complete independence is not assured."<sup>2</sup>

The importance of the integrity and accountability of military policing was particularly significant in Canada where, unlike some of its allies such as the

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<sup>2</sup> *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services, March 25, 1997, p. 34.*



United Kingdom, its military police have full “peace officer” status and thus have responsibilities for the enforcement of all criminal law, not just service offences. They possess the same powers and authorities as civilian police - they can arrest and detain anyone, not just members of the Canadian Forces, and in so doing, are entitled to use all reasonable and necessary force, including in some cases lethal force.

### ***Study and Reform of the Military Justice System***

From 1995 to 1998, a number of reviews were conducted that ultimately influenced changes to the military justice system and policing in particular. In 1995, an internal CF study, Operation “Thunderbird”, was launched to review the organization of military police services in the CF. That same year the Commission of Inquiry into the Deployment of Canadian Forces to Somalia was given its mandate. In 1997, the government appointed a Special Advisory Group on Military Justice and Military Police Investigation Services, headed by the late Rt. Hon. Brian Dickson, former Chief Justice of the Supreme Court of Canada, Lt.-Gen. (ret’d) Charles Belzile and J.W. Bird, a former Member of Parliament. This was followed by the Military Police Services Review which took place in the fall of 1998.

In response to these efforts, a number of initiatives were launched to enhance the capacity of the CF military police to provide professional policing services with a degree of independence from the chain of command:

- Greater emphasis was placed on the role of the technical military policing network, headed by the new Canadian Forces Provost Marshal (formerly, the Director General Security and Military Police).
- The Canadian Forces Provost Marshal (CFPM) was given primary responsibility for selection, recruiting and training of military police, as well as direct responsibility for the review of all military police functions.
- The CFPM would now report directly to the Vice Chief of the Defence Staff, and their relationship would be governed by a special “Accountability Framework” designed to ensure the former a certain amount of autonomy in policing matters.
- Training for military police was reviewed and enhanced, particularly in the area of investigative work.
- A special investigative unit within the military police branch, the Canadian Forces National Investigation Service (CFNIS), was established under the direct command of the CFPM (thus independent of the normal operational chain of command) with charge-laying authority and a mandate to investigate all serious and sensitive cases, or those cases requiring complex or specialized investigations.

Further to these internal reforms, measures were developed to introduce military police standards and independent oversight that would instil confidence in Canadian military policing. Independent civilian oversight was a hallmark of modern policing and was in jurisdictions across Canada in the form of police

services boards, police complaints commissions, and other agencies such as Ontario's Special Investigations Unit.

These new measures were introduced in 1998 when Parliament adopted amendments to the *National Defence Act* (Bill C-25) that reformed the military justice system and included a number of measures that dealt directly with military policing.

### ***Bill C-25, 1998***

Bill C-25 provided for the adoption of the *Military Police Professional Code of Conduct* (promulgated by regulation in December 1999<sup>3</sup>) and created a formal system for handling complaints about the conduct of military police and about improper interference in their investigations (a new Part IV to the NDA).

The new legislation established a new body, the Military Police Complaints Commission, (MPCC) independent of the CF and DND, to provide external civilian oversight to the complaints process, consistent with the principle of independent oversight as a part of modern policing. The Complaints Commission began operating in December 1999.

The purpose of the foregoing internal and legislative reforms was to instil confidence in Canadian military policing by adapting norms and practices from the broader policing profession and the RCMP model for police oversight consistent with the military context and mission. As the Dickson Report stated:

Independent oversight is especially important for the military police and, in this regard, civilian oversight of police forces is particularly instructive. If an individual citizen complains to a civilian police force about improper conduct of its personnel, there is an expectation of and a right to a response. This situation should be no different in the military context.<sup>4</sup>

With the adoption of NDA Part IV, Canada commenced a new era in the field of military police oversight.

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<sup>3</sup> SOR/2000-14 (P.C. 1999-2213).

<sup>4</sup> *Supra* note 2, p. 65.

### III) December 1, 1999 to 2006: Canada's Experience in Military Police Oversight

The 1998 changes to the *National Defence Act* represented the culmination of efforts to substantially modernize Canadian military policing. The establishment of a legislated military police complaints process, overseen by a new federal agency, the Military Police Complaints Commission (MPCC), inaugurated a new era, both in military policing and in police oversight. Beginning in December 1999, the CF military police began to operate with a level of external oversight somewhat comparable to their civilian counterparts.

This section describes the mandate, responsibilities, scope of the MPCC as set out in the 1998 legislation; summarizes the impact of its work since 1999; and identifies what has been learned in six and half years about the limitations and ambiguities in Part IV of the NDA, and the consequences for independent oversight of military policing.

#### **MPCC Mandate**

The MPCC was created to be an independent public agency, accountable to Parliament, through the Minister of National Defence, and to the Canadian people, with a mandate to review and investigate complaints concerning military policing and to make recommendations directly to the military police and national defence leadership.

“Our mandate consists of overseeing the process used by the Canadian Forces Provost Marshal to handle misconduct complaints and investigating allegations of interference in military police investigations. The Commission’s purpose in doing this is to maintain the values of integrity, trust and openness in military police investigations, promote the quality of police services and ensure compliance with standards of professional ethics.

The Commission will ensure that individuals who have complaints to submit or who are targeted by such allegations are treated fairly, objectively and impartially.”

*Louise Cobetto, Chair of the MPCC in the first annual report, 1999-2000*

#### **Responsibilities**

The complaints regime established by Part IV of the *National Defence Act* provides for four distinct processes depending on the nature of the matter. All Part IV complaints, wherever initially received, are copied to the MPCC, as is all subsequent correspondence related to the handling of the complaint. This allows the MPCC to be aware of all complaints from the outset, to monitor compliance with the process, and, as appropriate, to make a determination on whether there is an issue of “public interest” requiring the

#### **Areas of responsibility:**

1. Monitoring the investigation of police conduct complaints
2. Reviewing conduct complaints
3. Investigating complaints of interference
4. Conducting public interest investigations or hearings

Commission to investigate immediately (the MPCC's public interest jurisdiction is discussed further below).

### Conduct Complaints – Monitoring

Complaints about military police conduct are usually investigated in the first instance by the Canadian Forces Provost Marshal (unless amenable to informal resolution). Following an investigation, the CFPM reports to the complainant, the subject member, and to the MPCC on his findings and on any remedial action to be taken.

Various provisions of NDA Part IV require the MPCC to be kept informed throughout the period that a conduct complaint is being handled by the CFPM:

- the MPCC must be notified when a conduct complaint is received (s. 250.21(2)(c));
- the MPCC must be informed about any informal resolution of a conduct complaint by the CFPM (s. 250.27(6)(c));
- the MPCC must receive copies of the CFPM's monthly reports on the status of his investigation of the complaint (s. 250.3); and
- the MPCC must receive a copy of the CFPM's report on his investigation of the complaint and his proposed disposition of the complaint (s. 250.29).

In addition, section 250.25 allows the MPCC to request access to the CFPM's complaint records. These provisions together create the framework for the MPCC's monitoring function, which enables the Commission to learn about conduct complaints, and how they are being handled by the CFPM, even before the matter is referred to the Commission at the review stage.

### Conduct Complaints - Review

If the complainant is not satisfied with the investigation and disposition by the CFPM, he or she may request a review by the MPCC. At this stage, the MPCC gets directly involved with the complaint. The CFPM is obliged by the Act to forward all relevant materials to the MPCC who may conduct whatever further investigation on the matter is deemed necessary. The MPCC then issues its own report on the complaint with its findings and recommendations.

### Interference Complaints

Part IV of the NDA not only provides for independent civilian oversight in relation to complaints about the conduct of military police members, as one would expect of any police oversight regime, but also addresses the unique vulnerability of military police to improper pressure and influence by superiors in the chain of command. This was done by the creation of another category of complaint - "interference complaints". This allows military police members to initiate complaints against those in the chain of command or in a senior post within the Department who would attempt to improperly interfere in an investigation.

Interference complaints are the exclusive jurisdiction of the MPCC, which alone is responsible for these investigations (subject to the possibility of the CFPM investigating at the MPCC's request).

### Public Interest Investigations and Hearings

Overlaying these first two basic complaint categories – conduct and interference – the Chair of the MPCC may at any time deem a complaint of either type to be a matter of “public interest”. The main significance of such a decision, particularly notable in the case of a conduct complaint, is that it enables the MPCC to launch its own investigation of the complaint at any stage. In other words, in such cases, the Commission does not have to await the results of an initial investigation by the CFPM, as would normally be the case for a conduct complaint.

Also in contrast with a regular conduct complaint, the MPCC's involvement does not depend on the request of the complainant. Indeed, not only does the Commission's public interest jurisdiction operate independent of the complainant's wishes, but the Act specifically empowers the Commission to take jurisdiction in public interest cases even where the complainant seeks to withdraw the complaint, thus enabling the Commission to address systemic factors.

The other significance to designating a complaint a matter of public interest is that it empowers the MPCC to hold hearings in which it has the power to compel testimony (subpoena power) and provide corresponding legal protections to those compelled.

### Reporting

The MPCC's ultimate product is a report on the complaint with findings and recommendations addressed to the military police and CF/DND leadership (the CFPM, the Chief of the Defence Staff, the Judge Advocate General, the Deputy Minister and the Minister), as well as to the complainant and the subject of the complaint. The MPCC's findings and recommendations are not binding, but a refusal to follow them must be justified in writing. Once having considered written input from the relevant CF/DND officials, the Commission then issues its final report, all of which is subject to public scrutiny.

Thus, while the MPCC cannot impose its recommendations on the military police or the Department, it does have the final public word on the complaint and the adequacy of the response to it. This compromise between enhanced accountability and transparency on the one hand, and the preservation of the traditional military command structure on the other, arises from Part IV of the NDA.

### ***Scope of Oversight***

The NDA limits the scope of oversight of the military police in the following ways.

Firstly, only complainants may request the MPCC to review a complaint. Military police members who are the subject of complaints do not have the right to request a review of a complaint by the MPCC.

Secondly, the NDA limits the complaints process, and the corresponding oversight role of the MPCC, to the “policing duties or functions” of military police, to ensure external civilian oversight of military police in their special responsibilities and to avoid extending it to their generic military activities as soldiers. The definition of “policing duty or function” is for no specified reason left to the regulations. (The *Complaints About the Conduct of Members of the Military Police Regulations* were adopted by the Governor in Council in November 1999<sup>5</sup>).

### ***Impact of the MPCC***

#### On Policies and Practices

With the ability to review systemic issues – which may go beyond the personal concerns of individual complainants – oversight bodies can add significant value to their work by making important contributions on the prevention side.<sup>6</sup> For instance, problems with certain police policies or practices can be identified before further incidents occur, which might otherwise generate additional complaints in the future.

Since 1999, approximately three-quarters of the MPCC’s findings and recommendations have been accepted. Over this time, the MPCC’s findings and recommendations have helped to bring about a number of positive changes to military police policies and practices, including:

- creation of a policy on the use of policing discretion in the laying of charges;
- enhanced policies and training on involvement in family and civil matters;
- improved policies and training on the conduct of surveillance operations;
- enhanced training in note-taking and report-writing;
- a recent commitment to review existing policies to ensure appropriate resolution of the potentially competing demands of criminal investigations by military police and investigations by the chain of command into the same matter;
- improvements to the responsiveness and transparency of the CFPM’s handling of complaints through:
  - confirmation of issues for investigation with complainants at the outset;
  - providing the same details on findings and intended remedial action to both complainants and subjects of complaints; and

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<sup>5</sup> P.C. 1999-2065.

<sup>6</sup> Paul E. Kennedy, Chair, Commission for Public Complaints Against the RCMP, “The People’s Watchman”, Presentation to the Western Alumni, April 4, 2006 (available from the Commission for Public Complaints Against the RCMP’s web-site at [www.cpc-cpp.gc.ca](http://www.cpc-cpp.gc.ca)).

- providing greater clarity on proposed remedial action in cases where complaints are substantiated.

### Protecting the Public Interest

Through the use of its public interest jurisdiction, the MPCC has been able to launch investigations into incidents that might not otherwise have received appropriate independent scrutiny. This jurisdiction has been invoked only ten times, in cases that involved such important issues as:

- the conduct of a major criminal investigation into the poisoning of a senior NCO by soldiers under his command while on overseas deployment (*in this case, the credibility of the CFPM herself was under attack, and the MPCC, as an external and independent agency was able to examine the allegations with a greater perceived impartiality and credibility*);
- the conduct of a criminal investigation which led to charges related to alleged fraud-related offences by a senior military police officer (*the MPCC's recommendations fostered and promoted military police discretion as to when charges should be laid, which is essential to ensuring fairness to the people under investigation*);
- allegations of improper search and breach of the Charter rights of several youths upon arrest or detention (*faced with some very concerned parents and youths, the MPCC was able to review the cases together in a manner that was perceived as independent and credible and make appropriate findings, including a finding that Charter rights were breached, that searches were improper, and advised on the best practices to be followed in dealing with youths in cases such as this*);
- the conduct of a criminal investigation into the alleged sexual assault of a cadet (*faced with allegations of the breach of a youth's Charter rights and the possible withholding of exculpatory evidence from the prosecutor, the Commission invoked its power to call a public interest hearing to ensure that the facts are fully investigated and the issues are dealt with impartially in the interests of both the complainant, the subjects of the complaint and the public*);
- the alleged harassment of a CF member over a sustained period by military police members on a base (*although at a very early stage, this is the kind of case in which the Commission could potentially address certain systemic issues*).

### Building Confidence in Military Policing and in the Complaints Process

The public interest authority can be a valuable tool in providing assurance to both the public that is served by the military police and for the military police themselves. The ability of the MPCC to launch an investigation into a case that might not otherwise come to it, can serve to reassure the public that military police conduct in a matter of importance can be subject to immediate independent scrutiny where systemic issues can be addressed. At the same time, the MPCC's public interest jurisdiction is an ideal forum for the investigation of complaints where the military police might be in a conflict of interest, e.g.,

matters where very senior military police members are implicated or where the reputation of an important component in the military police organization is involved. Indeed, in one of the cases listed above, the CFPM requested the MPCC's intervention.

Another situation in which the CFPM might wish the MPCC to use its public interest authority would be cases where the subject of a complaint declines to cooperate with the CFPM's investigation (which the subject is entitled to do). If the MPCC declares it to be a matter of public interest and decides to call a hearing, anyone, including the subject of the complaint, can be compelled to give evidence, with the corresponding legal protections. In some cases, this may be the only way to get at the truth and thus ensure that the appropriate remedial action is taken to prevent a problem from recurring.

It should be noted, however, that the MPCC has rarely had to use its subpoena power. Although military police members who are the subject of a conduct complaint do not currently have the right to request a review by the MPCC following the CFPM's investigation, the Commission has in a number of instances been able to address issues of concern to subject members, and takes very seriously its responsibility to be scrupulously objective in assessing both sides of a complaint. As a result, the MPCC has often enjoyed excellent cooperation from rank and file military police members, although those members can be at risk over their voluntary, "non-compelled" statements.

Regardless of whether it is a public interest case, a review of a conduct complaint, or an interference complaint investigation, both complainants and military police members alike have indicated to the MPCC that the Commission's independence from the CF and the Department is key to their confidence in the complaints process.

### ***What has been learned so far about the effect of Part IV on oversight of military policing***

#### **Bill C-25**

Bill C-25 and the introduction of Part IV of the *National Defence Act* represented a new direction for military policing in Canada. As with any new process, and especially a new process involving oversight of one organization by another, there were some growing pains. The relationship between police organizations and their oversight bodies is, of necessity, one of tension.<sup>7</sup> The two will have common goals and common ground, but they cannot be partners nor be seen as such. Subject to this important caveat, the MPCC today enjoys a positive working relationship with the CFPM's office.

The impact of the work of the MPCC has been described above, and it is clear that the MPCC has had a significant effect on military police training, practices

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<sup>7</sup> See, e.g., Hon. George W. Adams, *Review Report on the Special Investigations Unit Reforms (prepared for the Attorney General of Ontario)*, February 26, 2003.



and policies. The exercise of its public interest authority has, in some instances, provided an important mechanism for learning the truth about the circumstances and events related to a complaint.

Despite the important contributions and overall success of the complaints process established in Bill C-25, the experience of the MPCC indicates that there are gaps and limitations in its responsibilities that affect both the fairness of the complaints processes and the scope of independent oversight of military police.

The model chosen for the RCMP in the 1980s, and subsequently adapted a decade later to the military police with Bill C-25, (with the exception of the interference complaint which is unique to the military police), was relatively modest in terms of the powers and scope of action conferred on the review agencies compared to the norms of the day. Moreover, the Chair of the Commission for Public Complaints Against the RCMP stated in a recent speech<sup>8</sup> that this model of police oversight was largely drawn from the recommendations of the Marin Commission in 1976, and has since been surpassed by more robust models, both in other countries and in Canada at the provincial level.

### The Lamer Report

The five-year independent review of the changes to the NDA was carried out in 2003 by former Chief Justice Antonio Lamer. This was an opportunity for the MPCC to identify some legislative amendments that would improve independent oversight. The Commission Chair at the time, along with the MPCC staff met with Mr. Lamer and the Commission also submitted a substantial written brief, with some seventeen recommended changes.

Some of the MPCC proposals were endorsed by Mr. Lamer in his report. While it was silent on other proposals, former Chief Justice Lamer nonetheless made clear his conviction that independent oversight of the military police should continue:

I cannot emphasize enough the importance of independent oversight of the military police. Oversight is essential to promote confidence in the investigative process and to ensure that both complainants and members of the military police are dealt with impartially and fairly.<sup>9</sup>

He also warned against any impairment of the MPCC's ability to fulfill the role intended by Parliament in Bill C-25.<sup>10</sup>

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<sup>8</sup> *Supra* note 6.

<sup>9</sup> *Rt. Hon. Antonio Lamer, First Independent Review of the Provisions and Operation of Bill C-25, September 3, 2003, p. 78.*

<sup>10</sup> *Ibid.*, p. 79.

## MPCC Special Report

Notwithstanding this expression of confidence and support from the former Chief Justice, the MPCC remained concerned that, even with the implementation of all the Lamer Report recommendations, it would not retain the ability to fulfill its oversight mandate with sufficient vigour and credibility. These concerns were expressed publicly in the Commission's Special Report of October 2005, entitled "Updating Civilian Oversight of Canada's Military Police: Achieving Results for Canadians."<sup>11</sup> In this report, the Commission highlighted six key areas where it believed improvements could be made to the current complaints system (these issues will be touched on in further detail in Part IV of this brief):

- right of review for subjects of complaints;
- the MPCC oversight of informal resolutions achieved by the CFPM;
- clearer authority for the MPCC to monitor the handling of conduct complaints by the CFPM;
- clarification, in the NDA itself, of the scope of military police oversight;
- expanded protection against interference in military policing;
- giving the MPCC a subpoena power for public interest investigations.

The more modern systems of oversight – exemplified most recently by the new police oversight regime proposed for Ontario in Bill 103 – tend to include such features as: the power to issue binding decisions; the power to conduct proactive audits and address systemic issues, instead of merely responding to specific complaints; and broad powers of access to information and materials in the possession of police.

Nonetheless, the features of military police oversight provided for in the 1998 NDA amendments helped to instil confidence among those who interact with military police members and who are directly affected by their services. In many ways, the arrival of independent civilian oversight of the military police was a key part of their recognition as a modern professional police force. Henceforth, complainants and military police members would know that, as in the world of civilian policing, their complaints were reviewable by an independent body.

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<sup>11</sup> Available on the MPCC's website at: [http://www.mpcc-cppm.gc.ca/300/301\\_e.aspx](http://www.mpcc-cppm.gc.ca/300/301_e.aspx).

#### **IV) The Future of Canadian Military Police Oversight**

This section of the brief describes in some detail the impact of the legislative amendments in Bill C-7 upon the oversight functions carried out by the MPCC and discusses more fully the existing gaps and ambiguities in the current NDA that affect the fairness of the complaints processes and the scope of independent oversight of military police.

The MPCC supports a number of the amendments proposed in Bill C-7, including: the possibility of term extensions for Commission Members to enable them to complete cases which are pending when their terms would otherwise expire<sup>12</sup>; prohibitions on reprisals against persons who make complaints<sup>13</sup>; and the 60-day time limit for requesting a review of a conduct complaint, subject to reasonable extensions by the MPCC<sup>14</sup>.

However, in light of other provisions in the bill, it is apparent that the general trend toward more robust police oversight has not been followed, nor have the gaps and limitations identified by the MPCC been addressed. If enacted in its present form, Bill C-7 will drastically reduce the scope of independent oversight of military policing provided by the MPCC and will leave the Commission with inadequate powers to credibly and effectively discharge what is left of its mandate. The cumulative effect of a number of the changes proposed in the bill would be to reduce NDA Part IV and the MPCC to offering merely the illusion of oversight.

#### ***Bill C-7 and its Overall Impact on the Oversight Functions of the MPCC***

Of the four oversight functions assigned to the MPCC in Part IV of the NDA and described in the previous section – monitoring of conduct complaints, review of conduct complaints, investigation of interference complaints, and public interest interventions – two of these (monitoring and public interest intervention) would be effectively eliminated.

Beyond this striking impact, the proposed amendments of Bill C-7 would limit access to complaint records and to information about informal resolution of complaints. It would limit disclosure by the CFPM. It would also impose on the Chair of the MPCC a special higher threshold, not borne by anyone else, for filing a conduct complaint. In sum, Bill C-7 would limit the scope of application of both complaints processes and of military police oversight as a whole.

In addition, Bill C-7 misses the opportunity to include a number of important changes that would enhance the oversight function, increase fairness to subject members, afford greater protections to witnesses, and increase efficiencies. The impact of the Bill C-7 amendments and the opportunities to improve oversight are described below in some detail.

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<sup>12</sup> Clause 80(1)

<sup>13</sup> Clause 81(2), new subsection 250.18(4), and clause 82(2), new subsection 250.19(3)

<sup>14</sup> Clause 94, new sections 250.31(1) and 250.311, and related amendments in clauses 90(3), 91 and 92(2)

### ***Public Interest Jurisdiction***

As previously discussed, the public interest jurisdiction enables the MPCC to intervene in a complaint at any stage and conduct its own investigation or hearing. This allows the Commission to address important systemic issues, conduct independent investigations into cases of particular public concern, and provide a forum for the handling of cases which the military police themselves could not address with a sufficient perception of credibility.

Clause 97(1) of Bill C-7 would restrict the MPCC Chair's use of the public interest powers to situations where the Commission is already seized of the complaint "while conducting a review".<sup>15</sup> The MPCC's authority to launch its own investigation into a conduct complaint would be gone.

This would defeat the purpose of the public interest jurisdiction, which is to enable the MPCC to investigate at any time "in the public interest", and not just reactively at the instance of a complainant. The public interest provisions have been invoked with restraint; that is in less than 3% of all complaints received under NDA Part IV – ten complaints over six-and-a-half years,<sup>16</sup> but all were significant matters.

No concern has ever been raised with the MPCC by the CFPM or any other CF/DND stakeholders about the number of public interest cases called by the Commission, nor have they challenged the Commission's right to convene a public interest investigation prior to having received a request for review. The Lamer Report did not suggest any need to restrain the MPCC's use of this provision.

The amendment in clause 97(1) is presented as merely an effort to harmonize the English and French versions of NDA section 250.38(1). This is not consistent, however, with the reality of how this provision has been interpreted to date, nor with the structure and purpose of NDA Part IV.

### ***Complaint Monitoring Function***

The principal reason that the MPCC has interpreted the English as opposed to the French version of section 250.38(1) to be consistent with the overall intent of the legislation is the fact that the *National Defence Act* assigned a monitoring role to the MPCC. Various provisions of NDA Part IV require the MPCC to be kept informed throughout the period that a conduct complaint is being handled by the CFPM. In addition, section 250.25 allows the MPCC to request access to the CFPM's complaint records. These provisions create the framework for the

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<sup>15</sup> Clause 94, in proposed new section 250.312, would reinforce this change by stipulating that the CFPM's disposition of a conduct complaint is final unless the complainant refers the complaint to the Commission for review.

<sup>16</sup> It is worth noting that none of the public interest cases described in the previous section could have been taken by the Commission under the proposed amendments. In fact, of the Commission's public interest cases to date, only one of them would have been possible under Bill C-7.

MPCC's monitoring function, which enables the Commission to learn about conduct complaints, and how they are being handled by the CFPM, even before the matter is referred to the Commission at the review stage.

If the MPCC had no ability to intervene in the handling of a complaint prior to a referral from the complainant following the CFPM's investigation, then the legislated requirement that the MPCC be informed of conduct complaints and their handling by the CFPM would serve no useful purpose. If, for example, the Commission saw something in a new complaint or its handling by the CFPM which suggested a serious problem with some aspect of military policing, there would be nothing it could do under Bill C-7, except await the decision of the complainant to request a review after the CFPM's investigation.

Bill C-7 does not explicitly state that public interest interventions and complaint monitoring are to be completely eliminated, but by limiting interventions to those cases in which the complainant requests a review, it effectively removes any potential benefit to be gained from the use of the public interest jurisdiction, and eliminates the need or reason to monitor complaints that are still with the CFPM.

#### Access to complaint records

##### *Records required for monitoring in the public interest*

In addition to weakening the purpose of the Commission's monitoring function, as described above; the bill also directly limits the scope of monitoring. Presently, section 250.25 permits the MPCC to request "any information contained in [the CFPM's record of complaint]." There has been some suggestion that this provision is merely intended to provide access to a register of complaint correspondence. However, the use of the term "*dossier*" in the French version of this provision is not consistent with such an interpretation, but rather suggests access to a complete "file".<sup>17</sup>

Bill C-7 is not purporting to harmonize the language in favour of either the English or French version of section 250.25. Instead, clause 87 would substantively amend section 250.25 of the Act to eliminate any meaningful access by the Commission to the CFPM's complaint records. Instead, the MPCC would be entitled to only those specific documents which it already receives under other provisions of the Act.<sup>18</sup>

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<sup>17</sup> In other words, section 250.25, properly construed, currently allows for MPCC access to the contents of a typical police file: police notes, witnesses statements, reports and other fruits of the investigation.

<sup>18</sup> Under clause 87, MPCC would be restricted to receiving only the following documents from the CFPM:

- a copy of the complaint;
- a copy of the acknowledgement of the complaint to the complainant;
- a copy of the notice of the complaint sent to the subject member;
- a copy of a notice to the parties to the complaint of a direction by the CFPM declining or terminating an attempt at informal resolution;
- a copy of a notice to the parties to the complaint of a direction by the CFPM declining or terminating a complaint investigation;

Access to complaint records allows the Commission to review documents and materials related to a complaint in order to better assess in a timely fashion whether the case is one where it should intervene in the public interest, without waiting for the CFPM to complete his investigation and for the complainant to request a review. Without this access, the Commission is forced to make a decision about the expenditure of the extra resources used in a public interest case (including in the event of public hearings, such things as fees and costs for legal representation and witness attendance, etc.), in the absence of key information – information that is in the possession of the CFPM and to which the Commission would have automatic access on a request for review.

As the Federal Court of Appeal noted in a decision last year with respect to the similar power of the Commission for Public Complaints Against the RCMP to hold hearings in the public interest, such hearings are a costly procedure and were not meant by Parliament to be used merely to obtain evidence to which the Commission should already be entitled – such hearings were meant to be the exception.<sup>19</sup> Indeed Justice Létourneau stated in the decision that it was “highly objectionable” to suggest that the Complaints Commission should be forced to hold a hearing simply to obtain relevant materials from the police force.

The MPCC has used its section 250.25 powers to request access to a few key documents from the CFPM in order to make rational and responsible choices in its use of its public interest jurisdiction and to avoid potentially unnecessary hearings. This is consistent with section 250.14 which charges the MPCC to perform its work as informally and expeditiously as possible, consistent with fairness. It is far more in keeping with these principles to request documents – which may well lead to a decision not to launch public interest proceedings (as has occurred in the past) – than it is to invoke the public interest power on the basis of limited information and then convene public hearings with a view to formally compelling the production of the very same documents through the Commission’s subpoena power. The other, less desirable, option is to do nothing and accept a lower standard of oversight in cases that may involve systemic problems or other important issues.

Instead of foreclosing the possibility of a general right of access to materials in military police files which are relevant to complaints, there is an opportunity to affirm and strengthen such a power for the Commission which would improve

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- a copy of reports on the status of the CFPM’s investigation;
  - a copy of the CFPM’s report on his investigation and disposition of the complaint;
  - a copy of the complainant’s referral of the case to MPCC for a review; and
  - notification from the CFPM that a complaint has been resolved informally.

With one exception, all the foregoing documents are already provided to MPCC by the CFPM as part of the current complaints process. The one exception – the complainant’s written referral to the Commission – is in fact an MPCC-generated document! See clause 94 (new subsection 250.31(2)(b)).

<sup>19</sup> *Canada (RCMP Public Complaints Commission) v. Canada (Attorney General)*, [2006] F.C.R. 53, at paragraphs 61 and 62 (F.C.A.).

and strengthen the structure of military police oversight in NDA Part IV. The Commission's access to military police information under section 250.25 represents the only such right of access by the Commission outside a conduct complaint review or a public interest hearing. For that reason any ambiguity about the meaning of section 250.25 should be clarified to ensure the Commission has sufficient access to discharge all its functions.

### *Records required for interference and public interest investigations*

The previous section described issues related to access to information during the review of conduct complaints. Section 250.25, or an enhanced version thereof, could fill other significant gaps in the present legislative scheme – the absence of any right of the MPCC to have relevant information disclosed to it when conducting an interference complaint investigation, and, similarly, when conducting a public interest investigation which does not result in a hearing.

In addition to the direct benefit of being able to require information, clear legislative authority in this regard would address the current potential difficulties related to compliance with *Privacy Act* restrictions on the sharing of documents containing “personal information” with external bodies such as the MPCC. Such concerns have recently been raised with the MPCC by the CFPM. While there is some optimism that these concerns can be resolved, it is nonetheless clear that the Commission's access to information necessary to the discharge of its duties in two important areas is somewhat precarious.

If the voluntary disclosure received to date in respect of interference and public interest cases were to cease for whatever reason, the MPCC would be put in the difficult position of having to choose between conducting incomplete investigations which lack credibility on the one hand and, on the other, convening public hearings and using its subpoena powers – with all the extra costs and delays that would entail – in respect of each and every interference complaint or public interest case.

### Information about Informal Resolution of Complaints

Bill C-7 would impair another aspect of the Commission's monitoring function by preventing it from being informed of the terms of informal complaint resolutions by the CFPM. Currently, section 250.27(6)(c) requires that the MPCC be notified of any informal resolution of a complaint. Clause 90(4) (new subsection 250.27(7)) would prohibit Commission access to the terms of such resolutions, absent the written consent of the parties to the complaint (i.e., the complainant and subject member).

The MPCC strongly supports informal resolution of complaints and respects the necessary confidentiality of the mediation process; however, the Commission's mandate of overseeing the disposition of complaints is compromised if it cannot review or even know the basis for the withdrawal of a complaint. The monitoring of informal resolutions is linked to the appropriate exercise of the MPCC's public interest mandate. Notwithstanding a complainant's satisfaction with a given

resolution, the MPCC, as the guardian of the public interest in the complaints process, ought to be able to assure itself that: the terms are fair and reasonable and consistent with similar cases; and that systemic issues (which may or may not be of concern to the complainant) are also addressed.

In the world of civilian police oversight, concerns have been expressed about the drawbacks of shielding informal resolution of citizen complaints against police from oversight. As former Superior Court Chief Justice Patrick Lesage noted in his 2005 report to the Attorney General of Ontario: “While the police claim that they are able to resolve many of the complaints informally, the lack of any real oversight of this process gives rise to concerns, either actual or perceived, regarding pressure exerted against the complainant to accept a certain resolution.”<sup>20</sup>

As a result of such concerns, recent studies of police oversight systems in Ontario and British Columbia have recommended that, not only should the oversight body be apprised of the terms of informal complaint resolutions, but also that it be required to approve such settlements.<sup>21</sup> In the case of the Ontario study, Mr. Lesage made the following recommendation:

Upon review of the complaint, the new [oversight] body should determine whether it might be suitably resolved through informal mediative type resolution.

...

Informal mediative resolution may be agreed upon at any time, but must be approved by the new [oversight] body.

...

Informal mediative resolution should be organized by the new [oversight] body and conducted by a neutral.

...

Where an informal resolution is deemed unsuitable by the new [oversight] body, has been rejected, or has failed, the new [oversight] body may refer the complaint for investigation.<sup>22</sup>

Mr. Lesage’s recommendations are now reflected in Bill 103, currently before the Ontario Legislative Assembly.

In the submission of the MPCC, given that military police and many complainants are in the military, the potential for perceived pressure on complainants to settle is certainly no less in the context of complaints under NDA Part IV.

### **Disclosure**

Currently, when the MPCC becomes seized of a conduct complaint at the review stage, section 250.31(2)(b) obliges the CFPM to disclose to the Commission “all

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<sup>20</sup> Hon. Patrick Lesage, *Report on the Police Complaints System in Ontario*, April 22, 2005, p. 69.

<sup>21</sup> *Ibid.*, pp. 70-71; and Police Complaint Commissioner (British Columbia), *Police Act Reform White Paper and Draft Police Complaint Act*, March 2005, p. 24

<sup>22</sup> *Supra* note 20, at pp. 70-71, Recommendation 12.



information and materials relevant to the complaint.” This statutory obligation is vital to the work of the MPCC. Bill C-7 would have the effect of narrowing the Commission’s scope of access to relevant evidence in two ways which are described below.

#### Definition of items subject to disclosure

In clause 94 (new s. 250.31(2)(b)), the bill would amend the description of the items subject to disclosure to the MPCC. Apparently, to achieve consistency with the French, the English version of section 250.31(2)(b) would be changed to require disclosure of any relevant “document” or information, instead of any relevant information or “materials”.

The MPCC’s concern here is that with the replacement of the term “document” for “materials”, the provision seems less likely to cover physical items of evidence that are not in documentary form. A key example would be video or audio recordings of military police interviews, copies of which the MPCC currently receives when reviewing conduct complaints. Written transcripts of such interviews would not be an acceptable substitute. Written transcripts do not necessarily show all those present at an interview or their demeanour, all of which is highly relevant when reviewing the conduct of such interviews. Moreover, relying on the police body that is the object of oversight to transcribe such evidence (which would presumably be necessary if the Commission lost its right of access to the tapes) would compromise the integrity of the effort. In addition, transcription adds unnecessary delay and cost to the process.

As with the proposed change to the public interest power, here again the English version better reflects the spirit of the legislation. Oddly, of the twenty-three separate changes proposed in the bill aimed at harmonizing the two language versions of NDA Part IV, these are the only two clauses (the other is clause 97(1)) where the drafters of the bill chose to amend the English, rather than the French.

#### Exclusion of information subject to “privilege”

This same amendment to section 250.31(2)(b) would also exclude from disclosure to the MPCC any information that is subject to a privilege under the laws of evidence. The most relevant of such privileged information to the work of the Commission is legal advice given to military police members and the information supplied by the member in obtaining the advice.

The MPCC fully recognizes the sanctity and importance of confidentiality in the solicitor-client relationship. However, it must be recognized that this is not private legal advice regarding personal affairs, but rather advice given to military police in connection with their official duties, and clearly available to the CFPM. The MPCC is not seeking to assess the quality of any legal opinion, but only the reasonableness of the military police member’s conduct in obtaining and following it.

It is easy to imagine the scenario where a military police member seeks to defend his or her decision to arrest, charge or search an individual or a residence on the basis of good faith reliance on legal advice. In a recent case before the Commission, a military police member was in fact vindicated in part on the basis of legal advice previously provided to him. Unless it can confirm the advice given and the basis for it, how does an independent oversight body credibly decide such a case?

While there are clear benefits to the oversight function to have disclosure of legal advice, it is difficult to imagine a situation where it would serve the public interest to conceal from the relevant police oversight body legal advice provided to the police.

### ***Duty to Cooperate and Subpoena Powers***

Presently, the legislation does not provide for a legal duty to cooperate with MPCC investigations, nor does the Commission have the power to subpoena witnesses (and offer the related protections) except in the case of public interest hearings.

Legislative reform to address these gaps would improve the effectiveness and efficiency of MPCC investigations and remove any artificial pressure on the Commission to take the costly and time-consuming step of holding public hearings solely to utilize the existing subpoena power limited to such proceedings. The MPCC is obliged, pursuant to section 250.14, to conduct its proceedings as informally and expeditiously as possible.

In the case of a duty to cooperate with investigations, it would merely put the MPCC in the same position as the CFPM (under the *Military Police Professional Code of Conduct*, military police members other than the subject of the investigation are obliged to cooperate with the CFPM's investigations). Moreover, a duty to cooperate has been imposed on all CF members and DND employees in respect of investigations by the Ombudsman (see Defence Administrative Orders and Directives # 5047-1, Annex A).

Similarly, a subpoena power for public interest investigations would enable the MPCC to have access to all relevant testimony and documents without having to call hearings.<sup>23</sup>

Combined with the concomitant legal protections that go with compelled testimony, such a power for the Commission also provides greater protection for witnesses who otherwise enjoy no protection from the use of their MPCC evidence against them in other proceedings. The Canadian Forces Grievance Board has such a power under the NDA.

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<sup>23</sup> Again, as Justice Létourneau for the Federal Court of Appeal noted in a recent case involving the RCMP and the Commission for Public Complaints About the RCMP, hearings should be the exception, rather than the rule in such matters. See *supra* note 19.

## ***The Scope of Oversight***

In addition to the above-mentioned limitations and missed opportunities represented by Bill C-7, there are also a series of issues related to the fairness and scope of oversight of military policing.

### Right of the subject of a complaint to request a review

Under the current legislation, military police members who are the subjects of conduct complaints do not have the right to request a review of their case by the MPCC. Only complainants have this right. Providing this right to the subjects of complaints would ensure balance in the complaints process and would also enhance morale among military police members, some of whom have found it unfair that only the complainant can refer a matter for independent review by the Commission. This proposed change was one of the recommendations included in the Lamer Report; however, it has not found its way into Bill C-7.

### Right to file an interference complaint

Unlike conduct complaints, which can be submitted by anyone, including persons unaffected by the conduct in question, interference complaints can only be submitted by the military police member conducting or supervising an investigation that is the object of alleged interference. It should be understood that there is a certain reticence on the part of some military police to file this type of complaint, due to real or perceived personal consequence. For example, in one case, a military police member spoke anonymously to Commission staff on three separate occasions before deciding to submit a complaint.

If others could also file such complaints, then the burden of standing up for the integrity of military policing could be shared by persons other than the military police members handling the case. This in turn would increase the likelihood of interference complaints coming forward, and the deterrent effect of this type of complaint would be enhanced, to the greater integrity and credibility of military policing. The existing “reasonable grounds” requirement applicable to interference complaints should serve to prevent interference complaints based on mere rumour or speculation.

### Police activities subject to interference complaints

There is a further opportunity to strengthen and build upon the foundations laid in Bill C-25 with respect to the unique challenge of interference in police investigations, by increasing the types of military police activities that can be the subject of an interference complaint.

In its submissions to Mr. Lamer, the MPCC proposed that the concept of interference be expanded to include all “policing duties or functions” (i.e., those activities in respect of which military police members are liable to be the subjects of conduct complaints), instead of solely in reference to “investigations” as is

presently the case. This would ensure that duties and functions such as arrest, search and seizure or charge-laying are included.

In the Commission's view, improper interference into the execution of an arrest or search and seizure, or into the laying of a charge, can be just as damaging to the integrity and effectiveness of military policing as interference in an investigation.

#### Who can be the subject of a complaint

There are three issues concerning who can be the subject of a complaint.

First, Bill C-7 excludes persons attached or seconded to the CF from being the subjects of conduct complaints,<sup>24</sup> contrary to Mr. Lamer's recommendation. Yet these persons represent themselves as being part of the military police and perform the same duties. A complainant who comes forward with a conduct complaint would surely be frustrated to discover that because the subject member is seconded to the military police unit that the MPCC would not be able to monitor or investigate his complaint.

Second, a similar situation is introduced by Bill C-7 for interference complaints. It would now exclude foreign officers attached to the CF from interference complaints even though they are otherwise subject to and empowered by the NDA.

Third, the current definition of "military police" in the NDA requires the person to hold credentials (a badge) in order to be subject to independent oversight. Many CF Reserve Force members serving in military police positions do so without credentials; however, they may acquire "peace officer" powers and status pursuant to article 22.01 of the *Queen's Regulations and Orders*. This means that even though they are performing policing duties or functions and hold themselves out to be military police members, they are not subject to independent oversight and cannot be the subject of a conduct complaint.

The Canadian public deserves a complaint process that is fair, transparent and effective. This requires that anyone who is represented by role or uniform and accoutrements to be a member of the military police branch and is performing a policing duty or function should be subject to independent oversight and be held accountable for their actions in the same way as are all other military police members.

#### Police duties subject to oversight

Presently, the NDA allows any person to make a complaint about the conduct of a military police member in the performance of any "policing duties or functions". The definition of these duties and functions are not included in the Act, but are defined through related Regulations as follows:

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<sup>24</sup> This change is proposed in clauses 81(2) (new s.250.18(5) and 82(2) (new s. 250.19(4)), although in the case of interference complaints, the precise scope of the exclusion is to be set by regulations.

2. (1) For the purpose of subsection 250.18(1) of the Act, any of the following, if performed by a member of the military police, are policing duties or functions:
  - a. the conduct of an investigation;
  - b. the rendering of assistance to the public;
  - c. the execution of a warrant or another judicial process;
  - d. the handling of evidence;
  - e. the laying of a charge;
  - f. attendance at a judicial proceeding;
  - g. the enforcement of laws;
  - h. responding to a complaint; and
  - i. the arrest or custody of a person.

(2) For greater certainty, a duty or function performed by a member of the military police that relates to administration, training, or military operations that result from established military custom or practice is not a policing duty or function.

It has been communicated to the MPCC that DND intends to seek amendments to the definition in the Regulations to limit the scope of military police oversight to only those activities performed by military police as they carry out criminal law investigations. There are several implications of this, the first relates to transparency and accountability, and others relate to scope and authority. These are described more fully below:

If there are to be limits on independent oversight of military police conduct, transparency and accountability demand that these limits be considered by Parliament and set out in the Act, rather than through regulation, which can be altered at any time without substantive scrutiny by Parliament.

The Commission submits that the current definition as construed in subsection 2(1) of the regulations, provides proper flexibility to fulfill its mandate. Limiting the scope to criminal law investigations would greatly restrict the types of conduct that could be investigated under Part IV of the NDA. For example, in the case of a military police member who is alleged to have lied under oath in the performance of his official duties, it should not matter that the alleged perjury took place in a civil or administrative proceeding, as opposed to a criminal trial. However, if the definition is restricted in this manner, this type of conduct would not be subject to independent oversight.

Subsection 2(2) of the Regulations specifically excludes from the process any complaints about military police duties or functions that relate to administration, training or military operations that result from established military custom or practice. This is an ambiguous section, even to CF members and is subject to wide interpretation. The result is that military police are sometimes considered beyond the reach of public accountability for their conduct in significant areas of their responsibility.

Any narrowing of the definition of “policing duties or functions” has the potential of restricting oversight from large and substantial areas of military policing including oversight of operational situations which were arguably the genesis of the creation of the Commission and hold the potential of international embarrassment. It is to be noted that there is no similar situational limitation in respect of interference complaints.

Another important issue is who decides if a complaint relates to “policing duties or functions”? The Lamer report recommended that the CFPM alone should design a framework that he would apply in classifying complaints as to whether or not they fall within Part IV of the NDA. Having the police force determine if a complaint against them should be subject to independent oversight is hardly a credible process, regardless of the unquestioned good faith of the CFPM. The integrity of independent oversight demands that the oversight body should have the final word on the classification of complaints. The Quebec and British Columbia legislatures have arrived at the same conclusion with respect to their police complaints systems. As well, former Chief Justice Lesage in his review of the Ontario police complaints system has recommended that the independent oversight body, rather than the police, should handle the screening and classification of complaints.<sup>25</sup>

### ***Special threshold for the MPCC Chair***

An amendment to section 250.18, clause 81(2) of the bill would single out the Chair of the MPCC and impose on him a special threshold of “reasonable grounds” for filing a conduct complaint. It is thought that this amendment arises from a misunderstanding about a proposal from the MPCC that the Commission be empowered to initiate investigations in the absence of a complaint. It seems this proposal was understood as a suggestion that the MPCC Chairperson should have a right to make a complaint; however, such a change was unnecessary as the right to make a complaint in section 250.18 already extends to “any person”. It is worth noting the effect of the Bill C-7 amendment would be to further limit the proactive role of the MPCC. In addition, the bill goes even further than the Lamer report recommendation on this subject by requiring that the Chairperson justify his decision to make a complaint in writing to the CFPM (the overseen) and the Minister.

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<sup>25</sup> *Supra* note 20, at pp. 65-66.

## V) Conclusion

The amendments proposed by Bill C-7, given their impact on independent oversight of military policing, beg the question: “Why?”

1998 amendments to the NDA, through Bill C-25, represented an important new initiative in military policing. These changes flowed out of a significant period of review and reflection about military justice and military governance generally that took place in the mid-1990s. This was the context in which independent civilian oversight of military policing was introduced. While the adopted model of oversight was relatively modest, even by the standards of the day, the oversight system which commenced in December 1999 has made an important contribution to enhanced confidence in and among the military police, and, more broadly, in the Canadian Forces.

Bill C-7, in its present form, represents a step back from the progressive albeit modest achievements of Bill C-25. Why?

Taken collectively, the bill’s amendments significantly diminish the independent oversight of Canadian Forces military police and effectively eliminate proactive and systemic inquiries undertaken in the public interest.

The trend in police oversight across Canada and internationally has been toward more robust oversight. Bill C-7, on the other hand, not only represents a step back from Bill C-25 itself to the status quo ante in some areas but also represents a missed opportunity to strengthen and improve the current system of military police oversight. Why?

If Bill C-7 were to be enacted in its present form, independent oversight of military policing would be confined to responding reactively to the concerns of complainants, rather than protecting the public interest. Moreover, even within this more narrow, reactive mandate, the MPCC will find its continued ability to provide effective and credible oversight hampered by further restrictions on its access to information and on the very scope of the complaints process. Why?

The independent oversight regime that would be left standing after Bill C-7 would, in some ways, actually be worse than a return to the status quo before the adoption of Bill C-25. This is because the remnants of the MPCC’s mandate would encourage the public perception that independent oversight of military policing was still in full force and effect in Canada, when this would simply not be the case. It is submitted that the principles of transparency and accountability require that independent oversight be more than an illusion.

Perhaps it will only be at the moment of some future incident which threatens public confidence in military policing or military justice that the realization will occur that what is left of military police oversight is inadequate to meet legitimate public expectations, those of the CF in general and also the expectations of the military police themselves.

It is understood that independent oversight is complex and that it takes time and experience by all parties to develop a system that balances transparency, accountability, fairness, and cost-efficiency. There was an expectation by Parliament that the significant overhaul of military justice and policing which Bill C-25 represented might not be perfect, and this was acknowledged in statute with the requirement for a five-year review.

This brief has described the impact and limitations of Bill C-7, and lays out a set of relatively modest alternative adjustments, which have no financial implications:

- Maintain the MPCC's authority to investigate, at any time, in the public interest;
- Strengthen the monitoring role assigned to the MPCC with respect to complaints handled by the CFPM, which include access to complete files and oversight of informal resolution of complaints achieved by the CFPM;
- Enhance the disclosure required of the CFPM in relation to production of relevant documents and materials to the MPCC;
- Impose a duty to cooperate to CF members and grant to the MPCC subpoena power for its public interest investigations combined with the concomitant legal protections that go with compelled testimony; and
- Clarify in the NDA itself the scope of military police oversight by defining "policing duties or functions" in the statute, by providing the right to request a review to subjects of complaints, by expanding protection against interference in military policing, and by making individuals performing policing duties or holding themselves out to be military police members subject to independent oversight.

This brief has sought to bring forward these matters to the honourable members of the Standing Committee on National Defence and other parliamentarians. The MPCC's purpose in so doing is to improve military police oversight and, as a result, enhance confidence in the integrity of Canadian military policing. It is now up to the honourable members of the Committee and other parliamentarians to choose between a revised system that significantly reduces the present standard of oversight and an alternative that substantially increases the effectiveness and efficiency of the process.