

MILITARY POLICE
C O M P L A I N T S
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COMMISSION D'EXAMEN
DES PLAINTES CONCERNANT
LA POLICE MILITAIRE

Special Report

INTERFERENCE WITH MILITARY POLICE INVESTIGATIONS: WHAT IS IT ABOUT?

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December 2002

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A WORD FROM THE CHAIRPERSON

Members of the Military Police are an integral component of the military justice system and constitute the first link in the system's chain. Like their colleagues in civilian police forces, they are authorized to exercise special powers. Take, for example, their power to detain, arrest or search.

It is crucial that members of the Military Police be able to perform their police functions independently and objectively. As was noted recently by the Supreme Court of Canada: "*A police officer investigating a crime is not acting as a government functionary or as an agent of anybody.*"¹ The legislator has recognized this principle in the *National Defence Act*, in deciding to offer special recourse to members of the Military Police in the event of interference in their police investigations.

The Military Police Complaints Commission has the exclusive authority to handle this type of complaint. However, the Commission receives very few interference complaints each year compared to the number of conduct complaints received. This might seem surprising. I have observed that members of the Military Police and the Canadian Forces are not fully aware of this avenue of recourse and the principles behind it.

I am therefore particularly pleased to present an initial report, which I hope will help to correct this situation. This is a first step for the Commission. I sincerely believe that we should play a larger role in informing and raising awareness among members of the military community. To this end, we will begin publishing reports annually on subjects of interest to our clientele. Moreover, my staff and I are already discussing the next report. We hope that the enclosed document will attract enough interest and that we will count you among our readers of these reports, in the course of the years.

If you have comments or suggestions, please do not hesitate to contact us. The Commission is at your service!

Ottawa, December 2, 2002

Louise Cobetto
Chairperson
Military Police Complaints Commission

¹ *R. v. Campbell*, (1999), 1 R.C.S. 565, par. 28

SUMMARY

As members of both the military and the police, military police perform their duties within a very particular context. For this reason, they must follow varying standards of conduct, depending on whether or not they are performing police functions. In fact, as a police officer, while subject to a certain degree of supervision and guidance by supervisory members of the Military Police, they must be able to perform their policing duties independently of the Canadian Forces Chain of Command. However, because they are also members of the military, they must respect orders from their superiors, whether or not they are Military Police members. This dual role can result in members of the Military Police having to face difficult decisions and tackle delicate situations.

The Parliament of Canada recognized this situation when, in 1998, it amended the *National Defence Act* (hereinafter referred to as the “*Act*”) and provided recourse to the Military Police through section 250.19 of the *Act*. Military Police members may now submit a complaint to the Military Police Complaints Commission (hereinafter referred to as the “*Commission*”) if a member of the Canadian Forces or a senior official of the Department of National Defence interferes or attempts to interfere with police investigations. The Commission has the exclusive authority to handle interference complaints.

However, defining the concept of interference is not easy. Although the *Act* stipulates that intimidation and the abuse of authority are tantamount to interference, it does not precisely define the concept. It can be maintained that direct intervention

by a superior who is not a Military Police supervisor or by a senior official of the Department of National Defence constitutes interference. Indirect interventions can also be considered as interference when they involve attempting to compromise the work of a member of the Military Police, encouraging an individual not to collaborate, or leaking information. Each case should be examined individually. Nevertheless, it is also important to keep in mind that appropriate supervision and guidance by Military Police supervisory staff do not constitute interference. Military Police members, like their colleagues in civilian police forces, must be accountable for their actions.

It is important to differentiate the interference complaint as defined in the *National Defence Act* from that in the *Criminal Code*, despite the coexistence of these two avenues of recourse. The burden of proof required for an interference complaint of an ethical nature is less than that required for one of a criminal nature. For an interference complaint to be considered as valid, it is not necessary to establish the intent to interfere, nor must it be proven beyond a reasonable doubt. Finally, it is important to note that reports issued by the Commission Chairperson are not intended to punish, but rather to suggest concrete corrective measures to resolve the complaint and improve the military justice system in general.

During the next legislative review, the Chairperson intends to propose amendments to the *Act* to introduce protection against reprisals for Members of the Military Police.

INTRODUCTION

The purpose of this document is to shed light on the interference complaint process. In doing so, an awareness of the duties performed by the Military Police members is essential as this process exists first and foremost to support them in the performance of their duties. Attention should also be drawn to the dual role (military and police) inherent in the Military Police Service.

We hope this document will also assist Unit Commanders to identify potential situations in which their intervention could constitute interference. The concept of interference is discussed with examples of acts or failures to act that may constitute interference and, in some cases, obstruction. On the other hand, the importance of distinguishing the offence of obstruction, as defined in the *Criminal Code*,² from interference in the police ethics domain is underlined.

Finally, shortcomings of the *National Defence Act*³ are outlined in this Report, as well as the commitment of the Military Police Complaints Commission⁴ (hereinafter referred to as “the Commission”) to finding solutions.

The Need for Change

Before dealing directly with the subject of interference complaints, it is important to understand

the recent history that led to the creation of the Commission and its mandate.

Many amendments have been made to the *National Defence Act* in response, for example, to the recommendations of the Special Advisory Group on Military Justice and Military Police Investigative Services, of the Military Police Services Review Group (the Dickson and Belzile reports)⁵ and of the Somalia Commission of Inquiry.⁶

At the time, there were serious deficiencies in the military justice system and improvements in oversight, transparency and the effectiveness of the Military Police’s activities were needed. Among other things, the Commanders were not only responsible for operational priorities and resources allocations, they also had direct control of the investigations undertaken by the Military Police. Therefore, it came as no surprise that certain problems arose, such as a lack of co-operation by officers of the Canadian Forces and by enlisted personnel, difficulty in investigating superiors and restrictions imposed on investigations by Commanders. Also, Commanders had both disciplinary powers and judicial powers. Moreover, they could serve arrest warrants and search warrants, launch investigations, dismiss accusations of disciplinary or criminal offences and sit in judgment of most Military Police members. With the new

² R.S.C. 1985, c. C-46.

³ R.S.C. 1985, c. N-5.

⁴ *An Act to Amend the National Defence Act and to Make Consequential Amendments to Other Acts*, S.C. 1998, c. 35, at s. 82 amending R.S.C. 1985 c. N-5.

⁵ Canada, Special Advisory Group on Military Justice and Military Police Investigation Services, *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services* (Ottawa: Department of National Defence, 1997) (Dickson Report I); Canada, Special Advisory Group on Military Justice and Military Police Investigation Services, *Report on Quasi-Judicial Role of the Minister of National Defence* (Ottawa: Department of National Defence, 1997) (Dickson Report II); Canada, Military Police Services Review Group, *Report of the Military Police Services Review Group* (Ottawa: Department of National Defence, 1998) (Belzile Report).

⁶ Commission of Inquiry Into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy*, vols. 1, 2, 3, 4, 5. (Ottawa: Minister of Public Works and Government Services Canada, 1997).

amendments, the Commander's powers have been somewhat curtailed.

The independence of the Military Police from the Chain of Command had to be ensured, especially when investigations work involved serious disciplinary offences and cases of misconduct of a criminal nature. The urgency of winning back public confidence in the Canadian Forces, as well as the confidence of Canadian Forces members in their own organization, and of maintaining that confidence, was paramount.

To this end, following the recommendations made by the various working groups, the Commission was created as a civilian oversight body independent of the Department of National Defence and the Canadian Forces.

The Commission's Mandate

The Commission is mandated to monitor, review and report on complaints about the conduct of members of the Military Police in the performance of their policing duties and functions. As opposed to criminal or civil matters, the Commission's focus is ethical in nature.

Under section 250.19 of the *National Defence Act*, the Chairperson of the Commission has the exclusive power to investigate complaints about interference with Military Police investigations by any officer, non-commissioned member or senior official of the Department of National Defence. The Chairperson may decide at any time to conduct an investigation, to refuse to conduct one or to

direct that an investigation be ended for the reasons set out in subsection 250.35(2) of the *National Defence Act*, namely, if the complaint is frivolous, vexatious or is made in bad faith, if the complaint could more appropriately be dealt with under another procedure or if, having regard to the circumstances, investigation or further investigation is not necessary or reasonably practicable.

Further, section 250.38 allows the Chairperson, if she considers it advisable in the public interest, at any time during her investigation of an interference complaint, to cause the Commission to conduct an investigation. Finally, if circumstances warrant, the Chairperson may also call a hearing to investigate allegations contained in an interference complaint.

The interference complaint process is engaged as soon as a Military Police member files an interference complaint with the Commission. As a complainant, it is important that the Military Police member has confidence in the Commission. The subject of the complaint must also be convinced of the independence and professionalism of the Commission as well as of the integrity of the complaint process.

While similar civilian oversight bodies exist for the majority of provincial and municipal Police Services in Canada and for members of the Royal Canadian Mounted Police, no other body responsible for examining complaints about police officers has been given explicit power over complaints of interference.

THE MILITARY POLICE

The Duties of Military Police Members

Paragraph 7 of the *Security Orders for the Department of National Defence and the Canadian Forces*⁷ states that “[Military Police members] are the primary police force of jurisdiction and exercise of police authority (...).” Members of the Military Police, specially designated pursuant to section 156 of the *National Defence Act*, constitute an essential element of the military justice system. A “specially designated” member includes any officer appointed to perform military policing duties and any service member appointed as a Military Police member and having the skills required to exercise these functions. Military Police members must be in legitimate possession of a Military Police badge and an official Military Police identity card.⁸ Their principal role in the Canadian Forces is to maintain order and ensure respect for the law, including the *Code of Service Discipline*⁹ and criminal law. Military Police members therefore, have the power to make arrests, to conduct a search and a seizure, to investigate and to use force in certain circumstances.

In addition to the authority conferred on them by the *National Defence Act*, Military Police members have powers as peace officers within the meaning of section 2 of the *Criminal Code*, since this provision includes officers and non-commissioned members of the Canadian Forces appointed under section 156 of the *National Defence Act*.

Consequently, a Military Police member may lay charges under the *Criminal Code* in civilian courts when he acts as a peace officer. A Military Police member can also exercise certain powers, including the power to arrest set out in section 495 of the *Criminal Code*. Finally, a Military Police member, who has been assigned as an investigator in the Canadian Forces National Investigation Service, may also lay charges under the *Code of Service Discipline*.¹⁰

The *National Defence Act* provides that any person subject to the *Code of Service Discipline* who commits an offence under that Code, the *Criminal Code* or another federal statute, will be judged under the military justice system. Before exercising their police authority outside a Defence property, Military Police members must first ensure that another Police Service does not have greater jurisdiction over the matter in question. The existence of an apparent link with military service is essential. If it exists, the matter will be considered and dealt with as an offence under the *Code of Service Discipline*.¹¹ Outside Canada, Military Police investigations and reports must comply with international agreements and practices. However, in Canada, murder and manslaughter offences and the offences set out in sections 280 to 283 of the *Criminal Code* concerning the abduction of minors are beyond the jurisdiction of military courts. When an offence under the jurisdiction of civilian authorities is

⁷ Commission of Inquiry Into the Deployment of Canadian Forces to Somalia, *supra* note 5, vol. 1, at 100, quoting the Security Orders for the Department of National Defence and the Canadian Forces, *Military Police Procedures*, vol. 4, chapter 2-1, at para. 7 and following.

⁸ *Queen's Regulation and Orders for the Canadian Forces*, at s. 22.02(2).

⁹ *National Defence Act*, *supra* note 2 at Part III.

¹⁰ *Queen's Regulations and Orders for the Canadian Forces*, at s. 107.02 (c).

¹¹ Commission of Inquiry Into the Deployment of Canadian Forces to Somalia, *supra* note 5, vol. 1 at 100, paras. 8 and 9.

reported to the Military Police, the Military Police member must report it promptly to the Crown Prosecutor or to the appropriate Police Service. Investigations conducted by the Military Police in such matters will normally be conducted in parallel or concurrently with any investigation conducted by a civilian Police Service, and the results, if circumstances warrant, may be reported to the local authorities. In any event, such offences must be the subject of a Military Police report.¹²

The Military Police therefore has jurisdiction over all persons subject to the *Code of Service Discipline* regardless of their rank, situation or location.¹³ They also have jurisdiction over all persons, including civilians, who are on or in the property of the Department of National Defence.¹⁴ When a complaint is filed with a Commander or with the Military Police, or if there is reason to believe that an offence has been committed under the *Code of Service Discipline*, an investigation must be launched to determine if there are sufficient grounds for a charge to be laid.¹⁵

The investigation is assigned either to the Canadian Forces National Investigation Service, to the Military Police or to the Unit to which the suspect belongs, depending on the nature of the offence. Accordingly, if the matter involves an offence of a serious, delicate or complex nature, the Canadian Forces National Investigation Service will take charge of the investigation. If the

Canadian Forces National Investigation Service relinquishes its authority over a given offence, the Military Police will assume responsibility. Offences which are not of a serious, delicate or complex nature, falls under the jurisdiction of the Military Police or of the Unit to which the suspect belongs.

Finally, in addition to their police duties, Military Police members perform important military duties since, as part of operations, they are responsible for guarding and supervising detainees or prisoners of war, overseeing detention barracks and conducting route surveys.

Coexistence of a Dual Status

A Military Police member may decide, on his own authority, to investigate and to choose the methods to do so. However, it must also be born in mind that Military Police members are members of the Canadian Forces. As such, they have a dual role, which they must deal with at all times.

On the one hand, as Canadian Forces members, they are required to respect the orders of the Chain of Command. They may receive orders from their Commander about incidents requiring investigation and they report to him, operationally, on the police services and advice they provide. Their prospects for promotion are in part linked to their Commander's evaluation. It may therefore be difficult for Military Police members to

¹² *Ibid.* at 101, para. 10.

¹³ *Ibid.* at 100, para. 7a.

¹⁴ *Ibid.* at para. 7b; *National Defence Act*, *supra* note 2 at ss. 60(1) (c), 60(1) (f).

¹⁵ *Queen's Regulations and Orders for the Canadian Forces*, at s. 106.02.

treat their superiors as witnesses and, even more so, as suspects. Moreover, a comprehensive Military Police investigation could bring discredit on the Commander and the Unit to whom the Military Police member belongs or on the Canadian Forces. A strong sense of loyalty and obedience to the Chain of Command and of camaraderie with regard to military subordinates can result in difficult choices, especially when measures must be taken against colleagues or superiors.

The establishment of the Canadian Forces National Investigation Service ensured hierarchical independence in investigations involving matters of a serious, delicate or complex nature, because the Provost Marshal has supervisory and monitoring authority over the activities of the Canadian Forces National Investigation Service. However, in less important matters, the Military Police is under the responsibility of each Commander, and it is the latter who ultimately decides what measures to take when an investigation is completed.

On the other hand, in performing their policing duties, Military Police members must be able to act independently, without interference or influence, whether intentional or not, from the Chain of Command, or from members or non-authorized personnel. The policing duties fulfilled by

the Military Police are similar to those of other police forces and include law enforcement, crime prevention and investigations. To carry out these duties, Military Police members are invested with special powers, including the power to arrest, to search a person, to place a person into custody, the use of reasonable force and the ability, for investigators with the Canadian Forces National Investigation Service, to lay charges. These powers require respect for different professional standards than those required of a non-police member of the Canadian Forces.

To ensure respect for these standards, a Police Service must have a system that protects the individual against possible internal abuses of power and that ensures his ability to report while preserving the level of independence he needs to maintain public confidence. Military Police members appointed to the Canadian Forces National Investigation Service as well as Military Police members assigned to the bases/wings have a right to conduct their investigations without fear of interference. That is why the amendments to the *National Defence Act*, with the creation of the Commission, have resulted in a specific mechanism for responding to allegations of interference with Military Police investigations, among others, by the Chain of Command or by a senior official of the Department of National Defence.

INTERFERENCE COMPLAINTS

The Concept of Interference

In implementing the new reforms of the military justice system, it became necessary to find a balance between the authority of the Chain of Command over the Military Police and the independence of Military Police investigations as well as a balance between the absolute discretion of Commanders to lay charges and the need for procedural transparency and impartiality. One method of doing so was the adoption, by Parliament, of a provision allowing a Military Police member to file an interference complaint with the Commission when an officer, a non-commissioned member or a National Defence official interferes with, or intervenes in, an investigation the member is conducting or supervising. Subsection 250.19(1) of the *National Defence Act* reads as follows:

250.19(1) Any member of the military police who conducts or supervises a military police investigation, or who has done so, and who believes on reasonable grounds that any officer or non-commissioned member or any senior official of the Department has improperly interfered with the investigation may make a complaint about that person under this Division.

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

There is little jurisprudence to define what is meant by interference. If we attempt to describe some situations that could lead to undue intervention or interference, it can certainly be said that direct intervention by a superior, who is not a supervising police member, or a senior official of the Department of National Defence, in the performance of a Military Police member's work constitutes interference. Interference may also take the form of actions that, although taken indirectly, nevertheless could compromise the Military Police member's work. Encouraging civilians or Canadian Forces members not to cooperate with an ongoing investigation, threatening reprisals against such persons if they intend to co-operate and leaking true or false information can also constitute a situation of interference.

Interference may occur at any stage of an investigation. It could even take the form of a superior's neglect to lend his support or of his failure to intervene to end a situation that is detrimental to the proper conduct of an investigation. Accordingly, in its report,¹⁶ the Poitras Commission seriously questioned the attitude of the Director of the *Sûreté du Québec* at the time. The latter had assigned three of his investigators to examine alleged criminal offences involving police officers of his Force. Clearly, this investigation called into question the working methods of police officers of the *Sûreté du Québec* and threatened the organization's reputation. In the course of their investigatory work, the investigators encountered numerous obstacles and requested that the Director intervene with mem-

¹⁶ Québec, Commission d'enquête chargée de faire enquête sur la Sûreté du Québec, *Rapport de la Commission d'enquête chargée de faire enquête sur la Sûreté du Québec (Commission Poitras)*, (Ste-Foy : Les Publications du Québec, 1999).

bers of the *Sûreté du Québec* to put an end, among other things, to intimidation and the express invitation of a number of police officers not to co-operate with the investigators. However, instead of supporting his investigators by speaking firmly to the police officers and by neglecting to investigate allegations of threats and intimidation against one of the investigators, the Director's refusal to take action seemed to endorse the attitude of certain members of the Police Force who wished to preserve its image and that of its officials.

Once again, it should be noted that interference may come from sources other than the Chain of Command or Military Police superiors. Senior officials of the Department of National Defence could also interfere with a Military Police investigation for various reasons.

Intimidation and Abuse of Power may Constitute Interference

In performing his duties, a Military Police member may be subjected to intimidation by an officer, non-commissioned officer or senior official of the Department of National Defence. Such acts constitute interference pursuant to the *National Defence Act*.¹⁷ In order to more carefully define the concept of intimidation, decisions in criminal and police ethics cases were consulted.¹⁸ The Federal Court, in the footnoted case, reviewed many decisions and restated the elements that constitute the offence of intimidation:

the use of illicit means to force a person to perform an act or refrain from performing an act when he has the right to do so, the intention to do harm and the existence of actual damage. The Quebec Court also stated that intimidation implies threatening bodily gestures or the utterance of words likely to inspire fear in the person who is the object of such gestures or words.¹⁹

Abuse of authority may also constitute interference with a Military Police investigation. When there is abuse of authority, one or more of the following characteristics are present: wrongful, excessive or unfair use of authority, excess and abuse of power.²⁰ Essentially, abuse of authority consists of overstepping a power that has been conferred. The fact that a superior or a senior official of the Department takes advantage of his position of authority over a Military Police member in an excessive or inappropriate manner may therefore lead to interference.

Not All Intervention Constitutes Interference

The Military Police member is in charge of his investigation which includes the decision to provide information to the Chain of Command regarding an ongoing investigation. Operationally, the Commander may be informed of the subject matter of an investigation involving one of his members, unless the information given could adversely affect the investigation. However, as

¹⁷ *Supra* note 2 at s. 250.19(2).

¹⁸ Among others, *Banco do Brasil S.A. v. Alexandros G. Tsaviris (The)*, [1992] 3 FC. 735 (FC.A.).

¹⁹ *Dubuc v. Commissaire à la déontologie policière* (22 December 1999), Montréal 500-02-073800-992 (C.Q.).

²⁰ *Dumont et Gauvin v. Commissaire à la déontologie policière* (9 February 1995), Québec 200-02-007286-927 (C.Q.).

the Military Police Services Review Group stated in one of its directives:

An example of information which a Commander would not normally require would be when search warrants are to be executed or in what order witnesses will be interviewed. Such decisions are made by those with carriage of the investigation, and the knowledge of such details carries a risk of inadvertent disclosure to the wrong parties which could endanger the investigation and/or reputation of the Commander.²¹

A Military Police superior may advise a Military Police investigator on the performance of his investigatory duties and make suggestions. Consequently, supervising or overseeing a Military Police member in the performance of his duties does not automatically give rise to an interference complaint against a Military Police superior.

In *Wool v. Canada*,²² the Federal Court, Trial Division, refused to grant an injunction to a Royal Canadian Mounted Police Sergeant who had requested, among other things, that his Commander be forbidden from thwarting an investigation involving a former Yukon Minister, from assigning him to other duties, from removing him from the investigation or from taking any disciplinary actions against him.

Sergeant Wool had been appointed co-ordinator of a Unit assigned to investigate commercial

crimes in the Yukon. One of his investigations involved a former Minister of Justice who, according to Sergeant Wool, had intervened to shield a property developer from criminal charges. In various documents, Royal Canadian Mounted Police Headquarters, the Assistant Deputy Attorney General and the *ad hoc* prosecutor appointed by the Attorney General concluded that the evidence was insufficient to lead to a guilty verdict, although doubts existed as to the actions of the Minister, and they refused to bring him to justice. One of these documents acknowledged the competency of Sergeant Wool, but also his lack of neutrality in the matter.

The Sergeant claimed that his superior's orders prevented him from exercising his right to lay an information under section 455 of the *Criminal Code* (now section 504). Faced with the investigator's relentlessness, a series of measures were gradually taken to bring an end to the needless waste of time and money. The Commander first informed Sergeant Wool that he would no longer head the special Unit and then removed him from the investigation. Finally, his posting out of the Yukon was recommended.

In its reasons, which are pertinent to the subject of this report, the Federal Court concluded first:

A Commanding Officer is accountable to his superior and to the Crown, not to a staff-sergeant under him. He has the administrative discretion to decide what proportion of his resources will be deployed towards one particular investigation. (...)

²¹ Military Police Services Review Group, *supra* note 4, at directive 21.

²² [1981] F.C.J. No. 506 (T.D.), online: QL (FCJ).

As appears from the material filed by the applicant himself, full consideration was given to the continuation of the investigation by the special prosecutor, by the director of Criminal Investigation, by the Commanding Officer and by the Assistant Deputy Attorney General of Canada.²³

The Court added that it was not its role to take the place of properly appointed officials and to make administrative decisions in their place. In the Court's view, a Commander is certainly empowered to determine that an investigator, no matter how competent, has pursued a matter too long and has lost the necessary objectiveness. Regarding disciplinary actions, the Federal Court wrote that they are purely internal matters and that it is not up to the Court to monitor them, except in the case of abuse of power. In this case, Sergeant Wool did not establish that he had been treated unfairly.

This decision should not, however, constitute authorization for a superior to intervene in an investigation conducted by a police officer. Rather, we should remember one of the Court's conclusions to the effect that the duty of a police officer, in this case to lay an information, is not absolute and that its exercise is subject to legitimate orders received from his superior.

In short, an effective Police Service implies supervision and management of the members by a police superior. In the military context, the dual status of the Military Police member as a

police officer and as a Military must be considered. The Military Police member is accountable to superiors, who are also Military Police members, and to the Commander of his Unit. However, the supervision of the police work must be the privilege of superiors invested with the Military Police status.

At a higher level of the military hierarchy, even the autonomy of the Canadian Forces Provost Marshal is not absolute. In fact, the responsibility for developing general policies and directions and for setting priorities belongs to the Vice Chief of the Defence Staff.²⁴ In order to respect the principles of independence in the hierarchical relationship in the military justice system between the Provost Marshal and the Vice Chief of Defence Staff, both of them agreed to establish an Accountability Framework detailing their respective responsibilities. Written in 1998, this document responded to the recommendations of the Special Advisory Group on Military Justice and Military Police Investigation Services²⁵ and serves as a foundation for the future relationship between the Vice Chief of the Defence Staff and the Provost Marshal. To conform to this framework, the Vice Chief of the Defence Staff has the power to establish strategic policies of policing duties. However, the Vice Chief of the Defence Staff must keep his distance from the Provost Marshal in relation to investigations in process, which limits the possibilities of interference. In 2001, the Chairperson and Mr. Thomas G. Flanagan, S.C., Member of the Commission, were consulted during the independent revision of the

²³ *Ibid.* at paras. 17 and 18.

²⁴ *Military Police Policies and Technical Procedures*, (A-SJ-100-004/AG-000) chapter 1, Annex C.

²⁵ *Supra* note 4.

Accountability Framework. Moreover, they appreciated to have had the opportunity of expressing their opinion and of contributing to the improvement of the military justice system.

Some provincial police laws contain provisions on the division of powers between the government, a commission or municipality and the management of a Police Force.²⁶ The assignment of these powers to an entity outside the Police Force is not incompatible with the principle of the latter's independence.²⁷ However, situations of interference are not always easily identifiable and there is some confusion between the accountability of the police and its independence from the government.²⁸

In *R. v. Campbell*,²⁹ the Supreme Court of Canada, the Honourable William Ian Corneil Binnie writing, stated that, although the Commissioner of the Royal Canadian Mounted Police must report to the Solicitor General for certain purposes, he does not become an agent of government when he conducts criminal investigations and is not subject to any political directive.

It is understood that the government must fulfil its democratic mandate by ensuring that it has con-

trol over the police and is responsible for it. However, as a result of incidents that took place in Vancouver during demonstrations held in connection with the Asia Pacific Economic Cooperation Conference, Commissioner Ted Hughes wrote, "It is clearly unacceptable for the federal government to have the authority to direct the Royal Canadian Mounted Police's law enforcement activities, telling it who to investigate, arrest and prosecute, whether for partisan or other purposes. At the same time, it is equally unacceptable for the Royal Canadian Mounted Police to be completely independent and unaccountable, to become a law unto themselves."³⁰ Applying the principles set out in this report,³¹ it can be concluded that the Military Police, when performing its law enforcement duties, is completely independent of the non-military police Chain of Command and the government. When the Military Police perform non-military police duties, it is not completely independent, but it reports to the federal government through the Chief of the Defence Staff. The conduct of the Military Police would be reprehensible if, in respecting the illegitimate orders or directives of a senior departmental official, it acts contrary to the law, for example, the *Canadian Charter of Rights and Freedoms*³².

²⁶ Among others, *Police Act*, R.S.Q. c. P-13.1, ss. 50, 83, 86; *Police Act*, R.S.A. 2000, c. P-17, ss. 27(1), 31(1)a), 31(1)b), 31(1)c); *Police Act*, R.S.B.C. 1996, c. 367, ss. 7(1)a), 23(1), 26(2)a), 26(2)b), 26(2)c), 26(4), 25(5), 34(1).

²⁷ Paul Ceysens, *Legal Aspects of Policing* (Salt Spring Island: Earls Court Legal Press, 1997) at chapter 1.3, where the author refers to the British Royal Commission on the Police, 1962 and the McDonald Commission in Canada.

²⁸ *Ibid.* at chapter 1.3.

²⁹ [1999] 1 S.C.R. 565.

³⁰ Canada, Commission for Public Complaints Against the RCMP, *Commission Interim Report (following a public hearing into the APEC Conference)* (Ottawa: 2001) at 82, 83, online: Commission for Public Complaints Against the RCMP < <http://www.cpc-cpp.gc.ca/IPub/APEC/IAPEC.pdf> > (date accessed: June 2002)

³¹ *Ibid.* at 86; see also Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (McDonald Commission), *Freedom and Security under the Law* (Ottawa: Minister of Supply and Services, 1981).

³² *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* (Schedule B to the *Canada Act 1982* (U.K.) 1982, c.11

Distinction between Interference Complaints in the Police Ethics Domain and Criminal Code Obstruction

When a superior or an employee of the Department of National Defence hinders the progress of an investigation conducted by a Military Police member, the latter may decide to lay a complaint for obstruction under the *Criminal Code*. Resorting to this procedure does not affect the member's right to also file an interference complaint under the *National Defence Act*. The two remedies may be pursued in parallel, since a single act can in fact have more than one judicial consequence.³³ In fact, according to the principles developed by the tribunals, the conduct of an officer, a non-commissioned member or a National Defence official may be treated simultaneously under a process designed to look at ethical conduct following an interference complaint filed with the Commission and under an obstruction charge filed with a criminal court. However, it is essential to distinguish between the criminal offence of obstruction and interference under the *National Defence Act*, because the impact of each of these procedures is different.

Obstruction is defined in paragraph (a) of section 129 of the *Criminal Code*:

129. Every one who
- (a) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer;
 - (...)

is guilty of

- (d) an indictable offence and is liable to imprisonment for a term not exceeding two years, or
- (e) an offence punishable on summary conviction.

[emphasis added]

To convince the court that such a criminal offence has been committed, the evidence must show that, beyond a reasonable doubt, the accused committed the act; otherwise, he will be acquitted. Consequently, it is necessary to prove the following three elements: obstruction, the fact that the peace officer was executing his duties and the wilful nature of the act the accused is alleged to have committed.³⁴

The offence of obstructing the work of a peace officer in the execution of his duty therefore implies the evidence of a wilful act,³⁵ committed in the knowledge or expectation that its effect will be to hinder the work of the peace officer or make it more difficult.³⁶ Not only must the commission of the act be demonstrated, but also the intention to commit it. Further, wilful obstruction requires either a positive act or an omission to do something arising from a legal obligation.³⁷

In the situations described in the previous section, dealing with interference with an investigation conducted or supervised by a Military Police member, it cannot, in some cases, be shown beyond a reasonable doubt that an offence of obstruction has been committed. In fact, the

³³ *R. v. Wigglesworth*, [1987] 2 S.C.R. 541.

³⁴ *R. v. Dubien*, J.E. 2000-461 (Mun. Ct.); *R. v. Ure*, [1976] 6 A.R. 193 (Sup. Ct.).

³⁵ *R. v. Goodman* (1951), 99 C.C.C. 366 (B.C.C.A.).

³⁶ *R. v. Rousseau*, [1982] C.S. 461 (Qc.).

³⁷ *R. v. Lavin*, [1992] R.J.Q. 1843 (C.A.).

actions taken may sometimes be subtle in nature and the evidence will not allow a verdict of guilt against the suspect.

However, an interference complaint filed with the Commission does not require such a heavy burden of proof to be founded. Reasonable grounds to believe that there has been interference will be sufficient for the complaint to be dealt with by the Chairperson of the Commission. In addition, an involuntary or unintentional act may be the subject of such an investigation under the *National Defence Act*. If the investigation undertaken by the Chairperson or the Commission demonstrates that the act was involuntary or unintentional, this will certainly be taken into account by the Chairperson when she prepares her report. While the Chairperson does not have the power to impose fines, disciplinary actions or imprisonment, her intervention or that of the Commission can serve to rectify a situation,

make recommendations and suggest measures to be taken. The findings of her report are not necessarily limited to the individual named in the complaint and they may enable a Unit, the Canadian Forces or the Department of National Defence to mend its ways or take the appropriate remedial action to prevent a similar situation from reoccurring.

Finally, if necessary, the Commission may investigate a systemic situation. In addition, pursuant to subsection 250.32 (2) of the *National Defence Act*, the Chairperson or the Commission's investigations are not limited to the allegations set out in the complaint; it may also prove to be necessary to take a look at previous facts or documents which allow a better response of the complaint. The Chairperson's reports are intended to propose concrete corrective measures to resolve the complaint as well as to improve the military justice system in general.

CONCLUSION

Issues of a *Police Policy Bulletin*,³⁸ which have since been revised, recognized the danger that the influence exerted by persons within the Chain of Command can represent, particularly persons in senior positions. Accordingly, it was stated that a Military Police member must inform the highest ranking official of the local Military Police of any attempt at illicit interference with an investigation of a *Criminal Code* or *Code of Service Discipline* offence.³⁹ It was stipulated that, if the allegation of illicit influence concerns a superior who is specially designated under section 156 of the *National Defence Act*, the service member must address his complaint to that person's immediate superior in the technical network of the Military Police.⁴⁰ Finally, the suspension of the appointment of a member of the Military Police was even contemplated when that person was subjected to wrongful or illicit influence in the exercise of his duties.⁴¹ While it still remains difficult to identify the presence of interference, since each case requires individual review, this concept therefore existed well before the recent amendments to the *National Defence Act*.

Major changes have led to adjustments of values and procedures that were long the basis of the military justice system and the police. New concepts must now be integrated in day-to-day operations. There remains a great deal to accomplish. The Commission is aware of the reluctance that

Military Police members may have to make interference complaints against members who have higher rank out of fear of reprisals. Fear of a negative performance evaluation, of a denial of future postings, of a denial of promotion or of demotion are other examples that may prevent a Military Police member from filing an interference complaint. The *National Defence Act* does not give the Commission any specific power to intervene against an officer, a non-commissioned officer or a senior departmental official who has acted inappropriately after the filing of an interference complaint.

For example, in British Columbia, the *Police Act* provides for the discouraging of harassment, intimidation or reprisal toward a person who makes a complaint against a police officer⁴². A police officer who contravenes this provision would commit a disciplinary offence of discreditable conduct.⁴³ In Quebec, the *Police Act* specifically states that no person may harass or intimidate a police officer, exercise or threaten to exercise retaliatory measures against a police officer, or attempt or conspire to do so because the police officer has participated or cooperated in an investigation or intends to do so, relating to the conduct of another police officer that may constitute a breach of professional ethics or a criminal offence.⁴⁴ Furthermore, in Ontario, a Board of Inquiry, created under the *Police*

³⁸ As mentioned in Commission of Inquiry Into the Deployment of Canadian Forces to Somalia, *supra* note 5, vol. 1, No. 36 at 137.

³⁹ *Ibid.* more precisely: Police Policy Bulletin (A-SJ-100-004/AG-000) 3.2/95, at para. 25.

⁴⁰ *Ibid.* more precisely: Police Policy Bulletin, *supra* note 36, 3.2/95, at para. 27.

⁴¹ *Ibid.* more precisely: Police Policy Bulletin, *supra* note 36, 3.11/14, at para. 14-10.

⁴² *Police Act*, R.S.B.C. 1996, c. 367, s. 65.2. "A person who makes a report about the conduct of an officer or submits a complaint under this Act must not be harassed, intimidated or retaliated against for making that report or submitting that complaint."

⁴³ *Code of Professional Conduct Regulation*, B.C. Reg. 205/98, s. 5(c).

⁴⁴ *Police Act*, *supra*, note 25, at ss. 260 and 261.

Services Act,⁴⁵ decided that a police officer was guilty of misconduct in the arrest of a person who went to the police station to file a complaint.⁴⁶ The police officer performed a Canadian Police Information Centre check on the person, which revealed an outstanding warrant of committal in the amount of \$41.00. The Board of Inquiry concluded that, although the arrest was lawful, it was unnecessary since the police officer made the arrest only after the complainant swore at him. His conduct was qualified as an “impulsive act of retribution”.

The very perception that reprisals could take place can prompt a Military Police member to limit his investigation or bend to the undue intervention of a superior. He might, for example, decide to limit his searches or not complete them. The Military Police member then exposes himself to a conduct complaint and to significant consequences on his career if such a complaint should prove to be founded.

Any incursion on a police investigation must be very carefully considered. Appropriate instructions given by authorized managers do not constitute an infringement in the conduct of the investigation but there is a very fine line to be drawn here. Intervention by the Chain of Command could be perceived as, and may well constitute, interference in a police investigation. The Military Police Complaints Commission will pursue complaints of this nature vigorously.

The full exercise of the right to file an interference complaint and the effectiveness of this procedure

require basic protections for Military Police members against such reprisals. The Chairperson will propose amendments to the *National Defence Act*, during the five year review beginning in 2003, to include a mechanism designed to protect Military Police members who exercise the right to file a complaint and a means to discourage undue intervention, interference or threats. The Chairperson is also considering ways to reassure senior Military Police members faced with situations where they must choose between their responsibilities as officers and their duties as police members.

We invite you to forward to us your comments, suggestions or experiences. Your comments are very important to the Chairperson and the Commission and will promote awareness, enabling us to respond to the needs of the Military Police and to contribute, with even greater effectiveness, to a better military justice system.

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⁴⁵ Police Services Act, R.S.O. 1990, c. P-15.

⁴⁶ Spiegel v. Nehr (1993), 1 P.L.R. 427 (Ont. Bd. Inq.).

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