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THE MILITARY POLICE COMPLAINTS COMMISSION OF CANADA: WATCHING THE WATCHERS

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The Military Police Complaints Commission of Canada has been in existence for a quarter century, and it is an opportune time to review Part IV of the National Defence Act, which created the Commission and set out its jurisdiction and powers. The Commission was created following the 'debacle' of the Canadian military deployment in Somalia in 1992–93. Reviews of that deployment identified as a problem the lack of independent authority of the Military Police. In granting Military Police greater autonomy, Parliament considered it important to also have civilian oversight of this police service, as has become common with civilian police services in Canada. The issue explored in this article is whether the Commission's governing legislation furnishes it with the legal tools it needs to carry out its oversight mandate, in light of changes to civilian oversight over the last 25 years. In examining the legislation, comparisons are made with the legislation governing the Commission's sister oversight body, the Public Complaints and Review Commission, which deals with complaints concerning the Royal Canadian Mounted Police.

La Commission d'examen des plaintes concernant la police militaire du Canada existe depuis un quart de siècle et le moment est bien choisi pour examiner la partie IV de Loi sur la Défense nationale, qui a créé la Commission et établi sa compétence et ses pouvoirs. La Commission a été créée après la « débâcle » du déploiement de la police militaire du Canada en Somalie en 1992–1993. Selon les examens de ce déploiement, le manque d'autorité indépendante de la police militaire représentait un problème.

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En accordant à celle-ci une meilleure autonomie, le Parlement considérait qu'il était également important qu'une supervision civile de ce service de police soit effectuée, comme c'est devenu fréquent pour les services de police civils au Canada. La question examinée dans le présent article est celle de savoir si la loi constitutive de la Commission lui fournit les outils juridiques dont elle a besoin pour exercer son mandat de supervision, compte tenu des changements apportés à la supervision civile au cours des 25 dernières années. L'examen de la loi entraîne des comparaisons avec la loi constitutive de l'organisme de supervision frère de la Commission, la Commission d'examen et de traitement des plaintes du public, laquelle se penche sur les plaintes visant la Gendarmerie royale du Canada.

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Introduction

The year 2024 marked 25 years in operation of the Military Police Complaints Commission of Canada (MPCC or Commission).[2] It is an opportune time to assess how the Commission has fared and whether and how the Commission's governing legislation could be amended so that it can better fulfill its mandate. Today, the Commission describes its mission as being "[t]o promote and ensure the highest standards of conduct by the military police, to deter interference in military police investigations and to enhance public confidence in military policing."[3] Its vision is "[t]o be an authority on independent civilian oversight of the police by providing an impartial, accessible and efficient complaints process."[4]

To provide for that oversight, Parliament enacted Part IV of the *National Defence Act* in 1999. This Part created the Commission and set out its jurisdiction and powers. The issue dealt with here is whether the Commission's governing legislation meets contemporary standards for police oversight bodies 25 years after it came into force. The context within which police forces operate and the expectation for effective oversight have changed considerably since the Commission opened its doors on 1 December 1999. Numerous serious incidents involving the police, such as the killing of Robert Dziekański at the Vancouver Airport and that of George Floyd in Minneapolis, both recorded for public viewing, have made the public more aware of issues of police misconduct. Incidents of this sort have led to calls for reform both in police practices and in police oversight.

Such calls for reform in the military police context led to the creation of the Commission and to understand why that was the case, some historical background is provided. That is followed by a discussion of the ways in which the Commission could be made more efficient and effective, with reference to the manner in which this has already been done for other oversight bodies.

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2 The Military Police Complaints Commission of Canada came into existence on 1 December 1999, by virtue of the adoption of Bill C-25, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1st Sess, 36th Parl, 1997–98 (assented to 10 December 1998) SC 1998, c 35. This bill amended Part IV of the *National Defence Act*, RSC 1985, c N-5 entitled "Complaints About or By Military Police." Division 1 of Part IV established the Military Police Complaints Commission.

3 Military Police Complaints Commission of Canada, "Mission, Vision, Values, and Mandate" (11 January 2024), online: <https://tinyurl.com/7c752vwu> [perma.cc/TXW6-BNGK].

4 *Ibid*.

Common Law Duty of Fairness

The changes that will be suggested to the legislation governing the Commission relate to the common law duty of fairness, which applies to every administrative tribunal, including the Commission, whose decisions affect the "rights, privileges or interests of an individual."[5] There are two fundamental principles in the duty of fairness: *audi alteram partem* (the right to hear the other side) and *nemo judex in sua causa debet esse* (no one should be the judge of their own case or the rule against bias). These two principles may also be expressed as the right to be heard and the right to an independent adjudicator. As for the first principle, it will be discussed in terms of the parties before the Commission having access to all the information they need to have a fair consideration of a matter on its merits. Should this access be improperly restricted, the decision of the Commission will be based on an incomplete record and the right to be heard will have been compromised. As for the second principle, it will be discussed in terms of the Commission being free of outside control, ensuring that all parties have the ability to come before it, and having the ability to seek out wrongdoing on its own initiative.

The duty of the Commission to ensure that its proceedings are fair relates to its duty to ensure that its decisions are reasonable. Just as the parties before it need wide access to information to have the Commission reach a fair decision, so, too, does the Commission need access to information in order to demonstrate that its decisions are justifiable or reasonable. As the Supreme Court decision of *Canada (Minister of Citizenship and Immigration) v Vavilov*[6] states, a reasonable decision is justified in light of the legal and factual constraints that bear on the decision. A reasonable decision is one that is justified in light of the facts.[7] This puts the focus on the nature of the Commission's fact-finding. If the goal is to allow the Commission to range widely in its investigations, then its governing legislation needs to facilitate that, since an administrative body cannot exercise authority which has not been delegated to it.

Police Oversight

Senator Gwen Boniface, the former Commissioner of the Ontario Provincial Police, noted the importance of civilian oversight of the police in these terms: "Effective and meaningful accountability is the one way to sustain and enhance public confidence in the administration of criminal

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5 *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at 645.

6 2019 SCC 65 [*Vavilov*].

7 *Ibid* at para 126, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

justice. Public trust and confidence are cornerstones of effective policing."[8] In order to fulfill the goal of instilling public confidence in the police, there are certain characteristics common to civilian oversight, as follows:

- Independence—both real and perceived. Oversight agencies are created by governments, but the carrying out of their mandate must be free of government direction;

- Establishment by statute, not by some lesser instrument of policy or governmental directive that can be changed without the approval of Parliament or a legislature;

- Sufficient resources to carry out the mandate. The creation of high expectations without sufficient resources will harm an oversight agency's credibility;

- Transparency of process and fairness to all, including the police. Maintenance of the integrity of the inquiry/investigative process will require some confidentiality, but, at the conclusion, all possible (e.g. non-privileged) information should be made available to both the complainant and the police officer who is the subject of the complaint;

- The expertise and experience of all involved in the oversight process must be sufficient to equip them for their role of investigation or decision-making; and

- Communications or "outreach" must be done with both the broader community and the police in order to ensure knowledge of the agency and understanding of its purposes. If rights are not known, they do not exist.[9]

An important question here is whether any amount of oversight can restore trust in a police service if it has gone. This question becomes more urgent when one considers the barriers to effective oversight, which include:

- Hostility, resistance, and obstruction by rank-and-file police officers, police department leaders, and police unions;

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8 Gwen Boniface, "Police Leaders' Perspective on Accountability, Building Ethical Frameworks and Civilian Oversight" (presentation delivered at the Canadian Association for Civilian Oversight of Law Enforcement Conference 2004, University of Toronto, 25 June 2004) [unpublished].

9 Peter Tinsley, "The Canadian Experience in Oversight" (presentation delivered at the United Nations Development Programme-sponsored Basra Justice Workshop, Jordan, 8–9 August 2009) [unpublished].

- The ability of police departments to routinely ignore recommendations made by civilian review agencies;

- Inadequate access to resources (funding, access to case information, etc.); and

- Police officers being routinely viewed as credible, with those more likely to be complainants often facing credibility issues because of criminal records, addictions, or mental health issues.[10]

As is the case with the MPCC, many oversight agencies do not have legislated requirements that law enforcement employees cooperate with them, allowing police officials to obstruct investigations. Many agencies, like the MPCC, are unable to impose discipline on the police departments and officers they oversee, allowing for police departments to ignore important recommendations.

Whatever its effectiveness, public expectations about the robustness of police oversight have increased significantly since the MPCC was created in 1999. As a result, there are now new or significantly strengthened independent police oversight bodies at the federal level with respect to the Royal Canadian Mounted Police and in the provinces. These bodies surpass the MPCC in their oversight authority. That authority is part of the practice in Canada of the democratic model of policing, which is policing based on public consent, answerability to elected officials, and adherence to the rule of law.[11]

A precedent for some of the amendments proposed for the Commission's governing legislation can be found in what Parliament has done for the Commission's sister oversight body, the Public Complaints and Review Commission.[12] For example, Parliament has seen fit to grant the Public Complaints and Review Commission access to solicitor-client privileged information in certain circumstances in order to fulfill its

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10 Kate Puddister, "Oversight and accountability for serious incidents in Canada: Who polices the police?" (2023) 66:3 Can Pub Administration 390.

11 *Ibid*.

12 Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021 (assented to 31 October 2024) SC 2024, c 25 [*Public Complaints and Review Commission Act*]. Subsection 3(1) establishes, as a replacement of the Civilian Review and Complaints Commission for the Royal Canadian Mounted Police, an independent body, called the Public Complaints and Review Commission, to review and investigate complaints concerning the conduct and level of service of Royal Canadian Mounted Police and Canada Border Services Agency personnel, and conduct reviews of specified activities of the Royal Canadian Mounted Police and the Canada Border Services Agency.

mandate. If the Military Police Complaints Commission is to meet public expectations of an oversight body, there cannot be the perception that it is not entirely independent of those it oversees or has not got access to all the information it needs to make a thorough and fair study of a complaint. That access needs to be guaranteed via statute, rather than being dependent upon the goodwill of the overseen body. While the recommendations for amendments are specific to the Commission's governing legislation, the general themes of independence and ease of access to required information are common to all oversight bodies.

Historical Background

Almost two centuries after they were formulated, we can still ground the work of policing and police oversight in Sir Robert Peel's Principles of Law Enforcement.[13] In 1829, Sir Robert created the Metropolitan Police in London, whose members can still be called "Bobbies," in honour of their founder. To guide this new organization, Sir Robert proposed nine principles under which it would become efficient in maintaining safety and security within the community under the law.

Two of Peel's principles are particularly apt for the work of the Commission. One is that the ability of the police to perform their duties is dependent upon public approval of police actions. The other is that the police must secure the willing cooperation of the public in voluntary observance of the law to be able to secure and maintain the respect of the public.

Peel's Principles, however, were designed to guide a civilian police service, while the MPCC oversees a military police service and the Public Complaints and Review Commission oversees what has been described as a paramilitary police service. The model for the creation of the North-West Mounted Police (NWMP) in 1873 was not so much the London Met but, rather, the Royal Irish Constabulary (RIC), created in 1822 as part of England's colonial rule of Ireland.[14] The RIC and the NWMP were created not so much as criminal investigation bureaus but more as instruments to carry out certain government policies. In the case of the NWMP (later the RCMP) that meant making western Canada suitable for

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[13] Halton Police Board, "Peelian Principles" (2024), online: <https://tinyurl.com/rj6fwhme> [perma.cc/UN3E-WC78]. Sir Robert's Principles are commonly referenced in the websites of police services today. The Halton Police Service says it is founded on and operates by the Nine Peelian Principles of Community Policing. In its view, "[t]hese principles focus on community development, relationship building, and prevention rather than a reaction to social problems."

[14] Chris Madsen, "Green is the New Black: The Royal Canadian Mounted Police and Militarisation of Policing in Canada" (2020) 3:1 Scandinavian J Military Studies 114.

an influx of settlers, including by joining the military campaign against the North-West Resistance in 1885. Uniforms were an important marker of the military-civilian distinction. The traditional English unease with a standing army led Sir Robert to reject the traditional red of British Army uniforms in favour of blue for the London Met. Sir John A. Macdonald, meanwhile, wanted the NWMP to be associated with the British military, hence the iconic red serge uniforms of the RCMP.

The issue is then whether public approval and cooperation differs when that public consists of military or paramilitary personnel as opposed to civilians. If by "the public" we mean the members of the Canadian Armed Forces subject to the authority of the Military Police, then, yes, at a certain point military matters took priority and the Military Police lost the willing cooperation of its public. The consequences of a breakdown of cooperation with the Military Police were evident in the tragic events of the Somalia deployment.

The call for greater public accountability for the Military Police came out of what was described in the late 1990s as "a developing sense of malaise with regard to Canada's military establishment."[15] Many of the troubles ascribed to Canada's military stemmed from what was called the 'Somalia debacle.'[16] This refers to the deployment of Canadian Forces to Somalia in 1992 and 1993. As the Commission of Inquiry into the Deployment of Canadian Forces to Somalia reported in 1997, the mission went badly wrong as systems broke down and organizational discipline crumbled. Part of this failure was ascribed to the lack of independence of the Military Police. Leaving investigations into misconduct in the hands of commanding officers meant that there were 62 incidents in Somalia that should have been investigated by the Military Police, but were not, including "allegations of serious criminal or disciplinary misconduct, such as mistreatment of detainees, killing of Somalis, theft of public property, and self-inflicted gunshot wounds."[17]

In terms of policing, the Somalia Inquiry's report stated that the practical limitations on the powers of the Military Police were that it was part of the chain of command, lacked investigative experience, had conflicting loyalties as soldiers and police, and there was a reluctance on the part of superiors to allocate sufficient investigative resources.[18] The

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15 *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services* (Ottawa: Department of National Defence, 1997) at i.

16 *Dishonoured Legacy: The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, vol 1 (Ottawa: Public Works and Government Services Canada, 1997) at xxix.

17 *Ibid*, vol 5, at 1263.

18 *Ibid* at 1262.

Somalia Inquiry's key recommendation concerning the Military Police was that it needed to be freed from the chain of command. Being in the chain of command affected the ability to investigate misconduct because Military Police were subject to the orders of commanding officers and police members saw themselves as soldiers first and police second.[19] Unlike members of the Military Police, commanding officers have no obligation to advance the administration of justice. Former Senator (and retired Lieutenant-General) Roméo Dallaire referred to the effects of command interference found in the aftermath of the Somalia Inquiry and commented that such interference "put the entire military justice system at risk by undermining the confidence of the troops, who began to question whether the system would be able to respond to their needs."[20] A more independent Military Police was part of the substantial reform to the military justice system needed if it were to be able to promote discipline, efficiency, high morale and justice.

The other major report on the Somalia deployment—the Special Advisory Group on Military Justice and Military Police Investigation Services, chaired by former Chief Justice and World War II veteran Brian Dickson—recommended an increased role for the Military Police in the military justice system. With increased responsibility and authority came a need for corresponding professionalism and accountability. That accountability could be enhanced by a process of oversight and review. The Special Advisory Group had this to say concerning oversight and review:

> 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. The situation should be no different in the military context ... An independent review capability is equally essential to ensure confidence and respect for the military justice system.[21]

Parliament responded to this recommendation and the 'Somalia debacle' more generally, by mandating the Commission to provide civilian oversight of alleged misconduct by the Military Police. One of the lessons taken from the Somalia deployment was that an independent review capability was essential to ensure confidence and respect for the military

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19 *Ibid* at 1285.

20 "Bill C-15, An Act to amend the National Defence Act and to make consequential amendments to other Acts", 2nd Reading, *Debates of the Senate*, 41-1, vol 148, No 163 (21 May 2013) at 1950 (Hon Roméo Dallaire).

21 Special Advisory Group on Military Justice and Military Police Investigation Services, *supra* note 15 at 82–83.

justice system.[22] Certainly the idea that civilian oversight is important for maintaining public confidence in the police is common on the civilian side of the ledger.[23] Today, the Commission is one of two federal police oversight bodies run by civilians (the other being the Public Complaints and Review Commission), along with civilian-run police oversight bodies in most of the provinces.[24]

Oversight Role of the Military Police Complaints Commission

There are a number of means by which a police service may be held externally accountable. These may be divided into five categories:

1. Political accountability to governing authorities through such things as the responsible minister being called to account for police actions in Parliament or a Legislature.

2. Legal accountability such as through the criminal process or civil lawsuits.

3. Accountability to administrative agencies such as complaints commissions, human rights tribunals, ombudspersons, and coroners' inquests.

4. Direct public accountability through, for example, freedom of information requests.

5. Special *ad hoc* accountability mechanisms such as public inquiries.[25]

As part of Category 3, the Commission describes its vision "[t]o be an authority on independent civilian oversight of the police by providing an impartial, accessible and efficient complaints process."[26] It reports its investigation findings and makes recommendations to both the Military

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22 *Ibid* at 83.

23 *Wood v Schaeffer*, 2013 SCC 71 at para 44.

24 See the Canadian Association for Civilian Oversight of Law Enforcement, "Civilian Oversight in Canada" (11 October 2024), online: <https://tinyurl.com/3338zacx>. CACOLE states that "civilian oversight agencies share a common goal: a positive relationship between the public and the police. This is achieved through an accessible and transparent complaint process, conscientiously monitored by independent and impartial civilian agencies."

25 Law Commission of Canada, *In Search of Security: The Future of Policing in Canada* (Ottawa: Public Works and Government Services Canada, 2006) at 88–89.

26 Military Police Complaints Commission of Canada, "Mission, Vision, Values and Mandate", *supra* note 3.

Police and the national defence leadership. These recommendations are not binding on the Canadian Armed Forces or the Department of National Defence, but they do provide the Military Police with the opportunity to improve the quality of its service. Both the Military Police and the Canadian Armed Forces leadership are obliged to provide written reasons for declining to follow Commission recommendations.[27]

The legislative mandate of the Commission is found in Part IV of the *National Defence Act*, "[c]omplaints about or by Military Police." Subsection 250.26(1) of that Part states that complaints about the conduct of Military Police members are first considered by the Provost Marshal, who is the head of the Military Police. If a complainant is dissatisfied with the handling of their complaint by the Provost Marshal, they can then go to the Commission. In other words, complaints about the police are first considered by the police and only at a second stage by an independent civilian authority. The problematic nature of this arrangement was noted by then Court of Appeal for Ontario Justice Michael Tulloch in his report on police oversight in Ontario in the following terms: "there was a deep mistrust of the public complaints process. Significantly, the fact that most complaints are referred back to the police service for investigation was seen as a major impediment to a good faith and impartial investigation."[28]

The model of oversight chosen for the Military Police has two principal drawbacks. One is that, in a complaint-based system of police oversight, the effectiveness of the system depends largely upon attracting meritorious complaints and an "insider" model does not do that. The second drawback is that it can make the civilian oversight body dependent upon the police for full disclosure of all relevant materials or even for determining what is considered "relevant." There is scope for the police to determine what should be considered by the oversight body, but the Federal Court has confirmed that, "at the end of the day, one principle must stand: it is for the Commission, not for the government, to determine ultimately what documents are relevant to its inquiry. If it were otherwise, the Commission would be at the mercy of the body it is supposed to investigate. This was clearly not the intent of Parliament."[29] The question raised here is what is the value added to the oversight process by having the police investigate themselves at first instance.

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27 *National Defence Act*, *supra* note 2, s 250.51.

28 Michael Tulloch, *Report of the Independent Police Oversight Review* (Toronto: Queen's Printer for Ontario, 2017) at Chapter 7.200 – Accessibility of the complaints process, para 19.

29 *Garrick v Amnesty International Canada*, 2011 FC 1099 at para 97 [*Garrick*].

The Commission acts through moral suasion rather than by imposing disciplinary measures or making findings of criminal or civil liability. It views its role as improving Military Police efficacy through the retrospective examination of Military Police actions. It emphasizes the importance of cooperation between itself and members of the Military Police when conducting its outreach sessions. Such cooperation is of benefit to the public, whose confidence in the Military Police is bolstered by the Commission's review. Cooperation also benefits members of the Military Police who can improve as police officers in light of the Commission's findings and recommendations. The Commission makes findings of fact which do not have legal consequences, but they can serve to tarnish reputations and have an effect on public opinion.[30]

Access to Information

A number of the suggestions the Commission has made in the past with respect to amending its governing legislation concerned the potential hampering of its ability to fully carry out its mandate due to various restrictions on its access to information. Those restrictions can be the result of legitimate concerns such as protecting information that is privileged or that touches on national security issues. Nevertheless, if the Commission is to fulfill the goal of Parliament to improve the quality of military policing through its findings and recommendations, it needs to be given the tools to access all information relevant to the Commission's mandate.

Access to all relevant information is one aspect of the common law duty of procedural fairness. Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal.[31] Whatever the tribunal, though, if its decision is based on an incomplete record then the right of the parties to be heard by a full presentation of their evidence will have been compromised. The duty of fairness has been put into the following terms by the Supreme Court:

> [T]he purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put

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30 *Canada (AG) v Canada (Commission of Inquiry on the Blood System)*, [1997] 3 SCR 440 at para 34.

31 *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 at 636.

> forward their views and evidence fully and have them considered by the decision-maker.[32]

So, a full panoply of the evidence should be made available for a decision of the Commission to be considered fair in the administrative law sense of the term. This is the implicit bargain made by the Commission with the parties that come before it—cooperate with us and give us all the information you can, and we will be able to make a better decision. The party who is not favoured by the final decision may not be happy with the result, but at least they will know they have had a full and fair hearing.

If the premise that greater transparency leads to greater public confidence in a public body is accepted, then more liberal access to information should be of benefit to the Military Police. Independent police oversight bodies were created to avoid the phenomenon of the "police investigating the police." The Latin expression *quis custodiet ipsos custodes* or "who watches the watchers?" encapsulates the problem of having those in authority overseeing others in positions of power. The method chosen to break out of a closed system has been to have the Commission exist on the outside of military policing, looking in. This means that the Commission is dependent on those inside the military policing world for much of the information it needs to fulfill its mandate. The greater and easier the flow of that information, the more public confidence in the Military Police should be promoted. The best way to ensure that flow is to require it through legislation. Broad, statutory guarantees of access to information can also help to minimize disputes about disclosure between the reviewing body and the object of its scrutiny. Those guarantees make disclosure the default position rather than the exception.

The negative effect on public confidence when the flow of information is restricted or even delayed was evident in the case of Colten Boushie. Mr. Boushie was killed in 2016 in an altercation with a farmer who was later found not guilty of second-degree murder. The RCMP investigated the killing and cleared its investigating officers of any wrongdoing following an internal investigation. On 6 March 2018, the Civilian Review and Complaints Commission for the RCMP (RCMP Commission) announced it was undertaking an inquiry into the RCMP handling of the file. The length of the inquiry has been explained in part as being due to the "RCMP's delays in responding to and delivering relevant materials" to the RCMP Commission.[33] The delay was another sign for Mr. Boushie's family

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[32] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 22.

[33] Guy Quenneville, "RCMP watchdog's probe into Colten Boushie case to wrap up by end of 2019", *CBC News* (16 October 2019), online: <https://tinyurl.com/4j4r99wk> [perma.cc/EVX6-56NG].

that their concerns weren't being heard by those in power.[34] The RCMP Commission delivered its report concerning the conduct of the RCMP members involved in the investigation of the death of Mr. Boushie on 22 March 2021. The length of the investigation meant that some materials requested by the RCMP Commission were destroyed upon the two-year anniversary of their creation pursuant to RCMP document retention policies.[35] The RCMP Commission has commented that "lengthy delays serve to obscure transparency, dilute the effects of findings and reduce or eliminate the value of recommendations."[36]

Access to Information: Commission Access to Documents

The lifeblood of the Commission, as is the case with any inquisitorial body, is information. As the Federal Court has said, "[i]f the Commission does not have full access to relevant documents, which are the lifeblood of an inquiry, there cannot be a full and independent investigation."[37] The *National Defence Act* does provide the Commission with some statutory rights of access to information. Paragraph 250.31(2)(b) of the Act obliges the Provost Marshal, in the case of a conduct complaint, to provide the Commission with "all information and materials relevant to [a] complaint"[38] and the Commission can exercise its subpoena power in the context of a public interest hearing (section 250.41). More significant than the Commission's statutory right to obtain documentary evidence, however, is the fact that there is no statutory right to obtain records in the possession of the Canadian Armed Forces or the Department of National Defence.

Here we can draw a contrast with the ability of other investigative bodies to access documents. Section 16 of the *Public Complaints and Review Commission Act* gives that Commission access to any information under the control, or in the possession, of the RCMP that it considers relevant to the performance of its duties.[39] Pursuant to section 100 of the

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[34] Catharine Tunney, "RCMP watchdog's review into Colten Boushie case delayed", *CBC News* (4 March 2019), online: <https://tinyurl.com/5c2cr774> [perma.cc/CQ2A-4HJY].

[35] Civilian Review and Complaints Commission for the RCMP, *Commission's Final Report: Chairperson-Initiated Complaint and Public Interest Investigation Into the RCMP's Investigation of the Death of Colten Boushie and the Events that Followed* (Ottawa: Public Works and Government Services Canada, 2021) at 4.

[36] Civilian Review and Complaints Commission for the RCMP, *Annual Report 2019-2020* (Ottawa: Public Works and Government Services Canada, 2020) at 2.

[37] *Garrick*, *supra* note 29 at para 96.

[38] *National Defence Act*, *supra* note 2, s 250.31(2)(b).

[39] This right of access is subject to restrictions on access to privileged information and confidences of the King's Privy Council for Canada.

Police Act, an officer in British Columbia investigating a municipal police department is entitled to access without a warrant or other order any record of the department.[40] In Manitoba, the investigative body is entitled to all materials relevant to a complaint under the control of the police service being investigated.[41]

There is an imbalance between the ability of the Commission to access documents and the abilities possessed by comparable agencies. It runs contrary to the intent of Parliament to have the Commission act in the public interest (see section 250.38 of the *National Defence Act*) if the Commission is not entitled to receive all the relevant information that is not excluded from examination by such things as the laws of privilege.

If the Commission had greater access to relevant documentation in the hands of the Canadian Armed Forces, and the Department of National Defence, it would help in dealing with complaints before it and in monitoring conduct complaints that are first being handled by the Provost Marshal. Access to records at the earlier, monitoring stage of the conduct complaints process would allow the MPCC to make more timely and better informed decisions on the exercise of its public interest authority to take over the handling of a complaint from the Provost Marshal, which the Chairperson is authorized pursuant to subsection 250.38(1) of the *National Defence Act* to do "at any time." Such decisions would save time and duplication of effort, as between the MPCC and the Provost Marshal. Access to records could also serve to facilitate the informal resolution of complaints at an early stage of the process. Parties may be more amenable to come to an agreement if they are confident that all of the facts they would wish to bring forward have been considered.

Timely access to information relevant to a complaint would also help the Commission fulfill its duty to "deal with all matters before it as informally and expeditiously as the circumstances and the considerations of fairness permit."[42] An early resolution of a complaint can be considered part of "a general right to procedural fairness, autonomous of the operation of any statute."[43] In the case of matters before the Commission, an inordinate delay is unfair to a complainant who wants to see the results of an impartial review as soon as possible as well as to the subject Military Police member who is exposed to a degree of risk to his or her reputation while a complaint looms over them. There are potential negative

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40 *Police Act*, RSBC 1996, c 367, s 100.

41 *The Law Enforcement Review Act*, CCSM c L75, s 12(2). Under subsection 12(4), claims of privilege concerning the materials requested may be determined by a judge of the Court of King's Bench.

42 *National Defence Act*, *supra* note 2, s 250.14.

43 *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at 668.

consequences to a subject's advancement in the military while a complaint remains unresolved. Thus, it is important for a subject Military Police member to have a swift decision. The Commission's governing legislation, though, does not require materials to be forwarded to it within a certain time-frame. Since the *National Defence Act* compels the Commission to explain why a complaint has not been resolved within six months,[44] it is reasonable for it to require bodies such as the Provost Marshal to send it all relevant information as soon as possible.

Access to Information: Commission Access to Witnesses

Another lacuna in the Commission's access to the information it needs to resolve complaints fairly and expeditiously is its inability to compel witnesses to provide testimony. Aside from being able to issue a summons to witnesses when conducting a public interest hearing,[45] the Commission has no legal authority to oblige witnesses to give evidence. It is reliant upon the good-will of those with knowledge concerning complaints to cooperate voluntarily. The Commission's lack of authority to compel witnesses cannot be justified in the name of protecting witnesses from potentially adverse legal consequences of their testimony as the Commission is an administrative, not a disciplinary body.

Again, a comparison with tribunals similar in their responsibilities to the Commission shows that they have been afforded more ample powers to gather evidence, in this case by issuing summonses to witnesses. The Public Complaints and Review Commission, for example, may, in relation to a complaint before it, "in the same manner and to the same extent as a superior court of record, summon and enforce the attendance of witnesses before the Commission and compel them to give oral or written evidence on oath or solemn affirmation and to produce any documents and things that the Commission considers relevant for the full investigation, hearing and consideration of the complaint."[46]

The Military Grievances External Review Committee also has a power to issue witness summonses. The Grievances Committee has, in relation to the review of a grievance referred to it, the power "to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce any documents and things

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44 *National Defence Act*, *supra* note 2, s 250.33(2).

45 *Ibid*, s 250.41(1).

46 *Public Complaints and Review Commission Act*, *supra* note 12, s 50(1)(a). More generally, the Public Complaints and Review Commission may ("receive and accept any evidence and other information, whether on oath or solemn affirmation or by affidavit or otherwise, that the Commission sees fit, whether or not that evidence or information is or would be admissible in a court of law," s 50(1)(c)).

under their control that it considers necessary to the full investigation and consideration of matters before it."[47] A further example is that, in conducting an investigation, the Public Sector Integrity Commissioner has all the powers of a commissioner under Part II of the *Inquiries Act*.[48]

The legal ability to compel testimony would put the Commission into a similar position as the Provost Marshal. Under the *Military Police Professional Code of Conduct*[49] there is a duty imposed on members of the Military Police to cooperate with Provost Marshal investigations. Under section 8 of the *Code*, no member of the Military Police is excused from responding to any question relating to an investigation into a breach of the *Code* unless the member is the subject of the investigation or is the assisting officer for the subject of the investigation. Without subpoena power, the MPCC has less power than the Provost Marshal to access information; an oversight body should not have less access to evidence than the organization it oversees.

In keeping with the subpoena powers of similar tribunals charged with similar legislated mandates, it would not be unreasonable for the Commission to be able to require the cooperation of relevant witnesses, at least those who are members of the Military Police or of the Canadian Armed Forces, beyond the context of public interest hearings. In his review of Bill C-25, which created the Commission, Antonio Lamer stated "I agree with the Grievance Board's suggestion that it be given a subpoena power. Currently, all kinds of administrative bodies that are called upon to inquire into matters are given a subpoena power."[50] With compelled testimony come legal protections, such as only being prosecuted for perjury.[51] As it stands, witnesses who volunteer to provide evidence to the

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47 *National Defence Act*, *supra* note 2, s 29.21(a).

48 *Public Servants Disclosure Protection Act*, SC 2005, c 46, s 29(1). Under Part II of the *Inquiries Act*, RSC 1985, c I-11, a commissioner has the power to subpoena any person to testify and bring with them any relevant thing.

49 SOR/2000-14, s 8 [*Military Code*].

50 Antonio Lamer, *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c.35, Submitted to the Minister of National Defence*, (Ottawa: Department of National Defence, 2003) at 109.

51 *National Defence Act*, *supra* note 2, s 250.45(2) states, in the context of those compelled to testify at a Commission public interest hearing, "[n]o answer given or statement made by a witness in response to a question described in subsection (1) may be used or receivable against the witness in any disciplinary, criminal, administrative or civil proceeding, other than a hearing or proceeding in respect of an allegation that the witness gave the answer or made the statement knowing it to be false."

Commission are at risk of having that evidence used against them in other proceedings.

Access to Information: Access to Sensitive Information per the *Canada Evidence Act*

A recurring issue for both courts and tribunals is that of how to deal with matters before them that deal with information that is considered "sensitive" or, more generally, may need to be shielded from public view. To a limited extent, this question has been addressed in the legislation that created the Commission. Paragraph 250.42(a) of the *National Defence Act* enjoins the Commission to hold its public interest hearings in public but gives it the ability to hold them *in camera* where information will likely be disclosed that "could reasonably be expected to be injurious to the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities."[52] Section 250.42 also allows for hearings to be held in private where information, if disclosed, could reasonably be expected to be injurious to the administration of justice, including law enforcement. So, Part IV of the *National Defence Act* foresaw that the Commission might need to have access to sensitive information relating to national defence and security.

Three years after Parliament adopted the legislation creating the Commission, the disclosure during a legal proceeding of sensitive information became subject to the *Canada Evidence Act*.[53] Section 38.01 of that Act requires that the Attorney General of Canada be notified anytime sensitive information[54] or potentially injurious information[55] might be disclosed in the course of a legal proceeding. Once notice is given, the information cannot be disclosed unless disclosure is authorized by the Attorney General of Canada or the Federal Court.[56] Section 38 then sets out the process by which the Federal Court determines whether disclosing the information in question can be allowed.

The MPCC experienced the problems of getting access to sensitive information in the course of its public interest hearing related to the

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52 *National Defence Act*, *supra* note 2, s 250.42(a).

53 RSC 1985, c C-5.

54 *Ibid*. "Sensitive information" is defined as ("information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard," s 38).

55 *Ibid*. "Potentially injurious information" is defined as "information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security."

56 *Ibid*, s 38.02.

treatment of Afghan detainees (MPCC 2008042). In that case, protracted negotiations with the government and litigation were necessary to obtain access to documents. The government took the position that the MPCC could only receive documents after they were vetted and redacted. In practice, this resulted in significant delays of many months for the MPCC in obtaining documents required for the conduct of its hearings. The Commission was obliged to call witnesses and spend valuable hearing time dealing with document production and vetting issues, making it significantly more difficult and time-consuming for the Commission to carry out its mandate.

The sensitive information issue was addressed by Justice O'Connor in the Arar Inquiry. In his recommendations for an RCMP oversight body, Justice O'Connor recommended that it "must have access to all relevant information and should not be refused information on the basis that it is secret or sensitive."[57] The concomitant obligation for investigative bodies receiving sensitive information is to put in place stringent non-disclosure requirements. Oversight bodies that do have full access to all information include the Security Intelligence Review Committee and the Communications Security Establishment Commissioner. According to the information provided to Justice O'Connor, neither of those review bodies has breached security obligations.

The *Canada Evidence Act* does provide for access to all relevant information when the information is disclosed to an entity listed in the Schedule to the Act. Paragraph 38.01(6)(d) of the Act provides that those entities in the Schedule can receive disclosure of sensitive or potentially injurious information without the need to get approval from the Attorney General or the Federal Court. The Schedule lists such entities as a service tribunal or a military judge for the purposes of Part III of the *National Defence Act* as well as the Public Complaints and Review Commission, for the purposes of the *Royal Canadian Mounted Police Act*, but only in relation to information that is under the control, or in the possession, of the Royal Canadian Mounted Police.

Unlike the Public Complaints and Review Commission, the Military Police Complaints Commission is not a designated entity in the Schedule to the *Canada Evidence Act*. If it were a designated entity, the practical impact would be that it could receive potentially relevant documents much more expeditiously and it would be spared the time and expense involved when the matter of disclosure must go before the Federal Court.

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[57] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Public Works and Government Services Canada, 2006) at 534.

If it received unredacted documents, it would then be in a position to determine which of them are truly relevant to its proceedings. The only impact of an entity being listed in the Schedule is to authorize it to receive certain information without immediately triggering the section 38 process. The entity must still treat the information in accordance with its security classification.

Access to Information: Access to Solicitor-Client Privileged Information

Aside from section 38 of the *Canada Evidence Act* privilege claims, the Commission also has to contend with claims of solicitor-client privilege. In many investigations, a member of the Military Police has sought legal advice, either from within the military or from civilian Crown attorneys, often on how to proceed with the evidence that has been gathered. The content of the legal advice sought and provided to a Military Police member is certainly relevant to assessing the reasonableness of a decision to, for example, lay charges. Acting reasonably rather than correctly is the legal standard applied by the Commission.

There is one mention of privilege in general in the Commission's governing legislation. In setting out the conduct of a public interest hearing, paragraph 250.41(2)(a) of the *National Defence Act* states that the Commission may not receive or accept "any evidence or other information that would be inadmissible in a court of law by reason of any privilege under the law of evidence."[58] There is no other legal bar to the Commission getting access to solicitor-client privileged information. In practice, however, the legal position taken by the Canadian Armed Forces is that any privilege in legal advice provided to Military Police members in the course of their policing duties belongs to the Minister of National Defence. Access to this advice is dependent upon the consent of the Minister and that consent is determined on an *ad hoc* basis.

As with the restricted access to documents and witnesses, the lack of full access to solicitor-client privileged information denies the Commission important evidence. For example, the inability for the MPCC to have access to legal advice does not permit it to confirm that a member of the Military Police provided an accurate description of the evidence to a prosecutor, or that the ensuing legal advice was properly considered. It can also be unfair to the Military Police member who is the subject of the complaint. They may have been encouraged to seek out expert legal advice and naturally relied upon it in acting as they did. It is not their role to go behind that advice and question it. Yet when their actions are

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58 *National Defence Act*, *supra* note 2, s 250.41(2)(a).

questioned in the course of a complaint, they are effectively denied the ability to justify their conduct by reasonable reliance on legal advice if the Commission is not allowed to see it.

It is important to unpack the term "solicitor-client privilege" as it can be taken to mean that any communication between a lawyer and client can never be communicated in any circumstances. This, however, is simply not the case. Just as no right is absolute, so too is solicitor-client privilege subject to clearly defined exceptions. For example, it has long been the case that communications between a lawyer and client are not privileged when the client attempts to obtain legal advice that would facilitate a crime.[59] Solicitor-client privilege must also yield to the right of accused persons to provide full answer and defence as well as to instances when the safety of the public is at risk if the privilege is maintained.[60] The Supreme Court has even said that the exceptions to the privilege are not foreclosed and may be expanded to, for example, protect national security.[61] So the very important interest in protecting solicitor-client privilege must be balanced against other compelling public interests.

It can also be argued that the rationale underlying the privilege afforded the giving of legal advice does not apply in the context of investigations undertaken by the Commission. That rationale is to encourage anyone to seek legal advice by assuring them that whatever is communicated between them and their lawyer will be kept secret. The only person that can waive this protection is the client who has received the advice. Almost 200 years ago, the reason behind solicitor-client privilege was put in these terms: "If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case."[62]

The legal advice being sought in the context of an investigation conducted by members of the Military Police, though, is not private legal advice regarding personal affairs. This is not a case of a Military Police member being charged with an offence and needing to confide in legal counsel. This, rather, is a case of legal advice being provided to a member

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59 *R v Cox and Railton*, [1884] 14 QBD 153.

60 *Smith v Jones*, [1999] 1 SCR 455 at paras 52, 57 [*Smith*]. The doctor-patient privilege may also be overridden by concerns over public safety. For example, section 125 of the *Child, Youth and Family Services Act, 2017*, SO 2017, c 14, Schedule 1 obliges every person who performs professional or official duties with respect to children, including physicians, to report suspicions that a child is in need of protection immediately to a children's aid society. This obligation overrides any doctor-patient confidentiality.

61 *Smith*, *supra* note 60 at para 53.

62 *Greenough v Gaskell*, [1833] 39 ER 618 at 620, per Brougham LC.

of the Military Police as part of their official duties, and it is available to the Provost Marshal. The desire to dispel people's fears in consulting a lawyer does not apply here. In this instance, it seems more likely that Military Police members would want that advice revealed as it should tend to support the course of action they took.

In the Arar Commission Report, Justice O'Connor stated that an oversight body for RCMP national security activities should have access to information covered by solicitor-client privilege if it concerns the decision-making process or series of events being investigated or reviewed. That would clearly be the case in a Commission investigation where the goal is to determine how the Military Police members arrived at the decisions they made. Accessing solicitor-client advice will help the Commission make a thorough and accurate assessment of Military Police activities. The other important point Justice O'Connor makes is that access to legal advice is sought not to second-guess or evaluate it, but to determine the propriety of the actions taken in trying to comply with it.[63] If the Commission cannot examine the legal advice received, it will have only a partial and, perhaps, inaccurate view of the activities of members of the Military Police.

Parliament seems to agree with the arguments for giving access to privileged communications as it has already created an exception to the solicitor-client rule for a police oversight body. The Public Complaints and Review Commission has been given wide powers of access to information in order to carry out its oversight role. This includes access to solicitor-client privileged information, as its governing legislation states: "Despite any privilege or confidentiality that exists and may be claimed in relation to any information, the Commission is entitled to have access to privileged information, including information subject to solicitor-client privilege … under the control, or in the possession, of the RCMP … if that information is relevant and necessary to the matter before the Commission."[64] The Commissioner of the RCMP may refuse access to privileged information and there are a number of other caveats, but the principle of access to privileged information in the cause of a proper investigation of police conduct has been established.

Still, there may be a concern that setting aside solicitor-client privilege may place limits on the free exchange of information and opinion between a legal advisor and a member of the Military Police. This is where the concept of a limited waiver comes in. A limited waiver means that not

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63 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *supra* note 57 at 538.

64 *Public Complaints and Review Commission Act*, *supra* note 12, s 17(2)(a).

everything passing between a lawyer and his or her client is revealed. Instead, only certain communications or documents are revealed and then only for a defined purpose.

The purpose of a limited waiver of solicitor-client privilege can be defined in two ways. One of these is by statute. A number of statutes require that information must be disclosed for a certain narrow purpose prescribed by the statute. When such information is provided, the statute can explicitly provide that this does not constitute a general waiver of solicitor-client privilege. One example is found in subsection 36(2.2) of the *Access to Information Act*.[65] Under the Act, the head of a government institution may be obliged to disclose to the Information Commissioner a record that contains information subject to solicitor-client privilege. Subsection 36(2.2) states that this disclosure does not constitute a waiver of that privilege. Similarly, the Ontario *Legal Aid Services Act, 1998*[66] can compel the disclosure of privileged information to Legal Aid Ontario. Subsection 89(3) of the Act makes it clear that "[d]isclosure of privileged information to the Corporation [Legal Aid Ontario] that is required under this Act does not negate or constitute a waiver of privilege."[67]

A limited waiver of solicitor-client privilege may also be defined by a formal agreement. The *Public Complaints and Review Commission Act* provides for a memorandum of understanding to set out principles and procedures respecting access to privileged information.[68] In the case of the Commission, a memorandum of understanding could be agreed upon with the Minister of National Defence to specify that the only privileged information being sought was that deemed necessary to determine the reasonableness of the actions of a member of the Military Police. The Commission's interest is in examining the actions of a Military Police member, not assessing the quality of the legal advice he or she received.

Independence of the Military Police Complaints Commission

As already mentioned, there are two pillars to the common law duty to act with procedural fairness, namely the right to be heard and the right to an independent adjudicator. As for the second pillar, the degree of independence will depend upon an administrative tribunal's enabling statute, but it will never be on the same level as that of a court. Courts are constitutionally required to possess objective guarantees of both

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65 RSC 1985, c A-1.

66 SO 1998, c 26.

67 *Ibid*, s 89(3).

68 *Public Complaints and Review Commission Act*, *supra* note 12, s 17(7).

individual and institutional independence.[69] This refers to judges having security of tenure and financial security, while courts enjoy administrative independence.[70] This preserves the impartiality of judges—both in fact and perception—by insulating them from external influences, including the preferences of the government of the day. Administrative tribunals, though, lack this constitutional distinction from the government. In fact, they are "created precisely for the purpose of implementing government policy."[71] Complete independence from government, therefore, is not part of the Commission's DNA.

When it comes to independence, perception is as or more important than the reality. Even if there is no actual interference by the military with Commission investigations, the old saying holds true that "[j]ustice should not only be done, but should manifestly and undoubtedly be seen to be done."[72] Applied to administrative tribunals like the Commission, this saying takes the form of the reasonable apprehension of bias test. According to this test, there need only be a reasonable perception of a lack of independence for there to be a breach of procedural fairness.[73] The test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude."[74] The question is whether it would be more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly.[75]

The Commission, therefore, is keen to emphasize that while it reports through the Minister of National Defence, it is not beholden to that Minister; it is both administratively and legally independent of the Department of National Defence and the Canadian Armed Forces.

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69 *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 SCR 3.

70 Security of tenure holds that a judge should be removable only for cause and that such cause should be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. Financial security refers to the security of a judge's salary and pension that are not subject to interference by government. Institutional or administrative independence refers to judicial control over such matters as the assignment of judges, sittings of the court and court lists (see *Valente v R*, [1985] 2 SCR 673).

71 *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at para 24.

72 *R v Sussex Justices; Ex parte McCarthy*, [1924] 1 KB 256 at 259, per Lord Chief Justice Hewart.

73 *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at 394–95.

74 *Ibid* at 386.

75 In *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3, Chief Justice Lamer stated: "it is a principle of natural justice that a party should receive a hearing before a tribunal which is not only independent, but also appears independent" at para 80.

This means that the Commission is an independent federal government institution as defined under Schedule I.1 of the *Financial Administration Act*.[76] As an independent oversight agency, the Commission must operate at "arm's length" and with a degree of autonomy from government. All legal counsel at the Commission are staffed independently from the Department of Justice and all members appointed to the Commission are civilians. They hold office during good behaviour but may be removed by the Governor in Council for cause.[77]

The Commission can also argue that its mandate is far removed from, for example, a licensing board which is directed to issue licences in accordance with certain legislated policies. The Commission is left free to exercise its discretion as to how to investigate matters brought before it. Of course, as Justice Rand noted in *Roncarelli v Duplessis*,[78] "there is no such thing as absolute and untrammeled 'discretion'";[79] any exercise of discretion must accord with the purposes for which it was given. In the case of the Commission, the only clear legislative admonition is found in section 250.14 of the *National Defence Act* which states that the Commission shall deal with all matters before it as informally and expeditiously as the circumstances and the considerations of fairness permit. In accordance with *Vavilov*, therefore, the lack of legislative constraints means that the Commission can exercise a broad range of discretion concerning what it chooses to investigate, and this will be considered to be reasonable in the circumstances.

Direction from the Vice Chief of the Defence Staff

There is one glaring exception to the lack of legislative constraints on the Commission and that is found in subsection 18.5(3) of the *National Defence Act.* As is to be expected in a hierarchical organization like the military that functions via a chain of command, the Provost Marshal acts under the general supervision of the Vice Chief of the Defence Staff in respect of investigations within their purview. But this general supervision is transformed into specific direction by the Vice Chief in subsection 18.5(3) of the Act which states: "The Vice Chief of the Defence Staff may issue instructions or guidelines in writing in respect of a particular investigation."[80] While the Provost Marshal is enjoined to make these instructions or guidelines public, under subsection 18.5(5) they can keep

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76 RSC 1985, c F-11.

77 *National Defence Act*, *supra* note 2, s 250.1(3).

78 [1959] SCR 121.

79 *Ibid* at 140.

80 *National Defence Act*, *supra* note 2, s 18.5(3).

them secret if they consider that making them public would not be in the best interests of the administration of justice.

The provision for the Vice Chief to give specific direction on an investigation is an anomalous one, as neither the Chief of the Defence Staff nor the Vice Chief of the Defence Staff is authorized to direct the Judge Advocate General, the Director of Military Prosecutions or the Court Martial Administrator in the performance of their legal duties. In addition, the Vice Chief is not a police officer, so instructions are unlikely to be police-related and the implications of giving instructions on the progress of a police investigation may not be known. More importantly, it is anomalous because the effort to insulate the police from political or other influences has been going on for quite some time:

> Since the mid-19th century, police governance institutions at the regional and municipal level (known originally as boards of commissioners of police or police commissions, and more recently in some jurisdictions as police services boards) were established with the specific intention of insulating the police from direct governance by elected municipal politicians, and guaranteeing a measure of political independence for police services in the performance of their duties. The idea has been to further remove the police from direct political control by ensuring that these independent bodies, rather than elected politicians, provide policy direction and approve police budgets.[81]

The provision giving the Vice Chief of the Defence Staff the ability to direct a specific Military Police investigation also runs counter to the jurisprudence concerning police independence. There is no argument against the Vice Chief having a general supervisory role and providing policy direction, just as Ministers of the Crown do with civilian police services. Police acting without any political control can lead to a police state, just as the military acting without any civilian political control can lead to a state of martial law. The authority conferred upon the Vice Chief, though, is different in kind in that it is specifically and exclusively aimed at the heart of military policing duties, i.e., the investigation of offences. The fact that Military Police members have a dual role as police officers and as soldiers does not diminish the applicability of the legal principle of police independence to the Military Police when conducting law enforcement investigations.[82] That principle of police independence was famously

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81 Law Commission of Canada, *supra* note 25 at 85.

82 Morris Fish, *Report of the Third Independent Review Authority to the Minister of National Defence Pursuant to subsection 273.601(1) of the National Defence Act, RSC 1985, c N-5* (Ottawa: Department of National Defence, 2021) at para 188. In this paragraph, Justice Fish adopts the submission of the Commission, which argued that subsection 18.5(3) should be repealed.

articulated by Lord Denning in *R v Metropolitan Police Commissioner, Ex parte Blackburn*,[83] where he wrote:

> [L]ike every constable in the land, he [the Commissioner of Police] should be, and is, independent of the executive … I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.[84]

Lord Denning's views on the independence of police investigations have been adopted by Canada's Supreme Court. In its 1999 decision in *R v Campbell*,[85] the Court affirmed that a "police officer investigating a crime is not acting as a government functionary or as an agent of anybody."[86] Just as the *National Defence Act* in subsection 18.5(1) states that the Provost Marshal acts under the general supervision of the Vice Chief of the Defence Staff, so section 5 of the *RCMP Act* states that the Commissioner of the Royal Canadian Mounted Police, under the direction of the Minister of Public Safety and Emergency Preparedness, has the control and management of the Force. The key difference, though, is that despite this overall "direction," the Supreme Court held that when an RCMP officer is in the course of a criminal investigation, they are independent of the control of the executive government. The Court also held that this important principle underpins the rule of law.[87] While for certain purposes the Commissioner of the RCMP reports to the Minister, the Commissioner is not to be considered a servant or agent of the government while engaged in a criminal investigation.[88]

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83 [1968] 1 All ER 763 [cited to].

84 *Ibid* at 769.

85 [1999] 1 SCR 565 [*Campbell*].

86 *Ibid* at para 27.

87 *Ibid* at para 29.

88 The legal status of RCMP members is addressed in section 36 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, which states: "For the purposes of determining liability in any proceedings by or against the Crown, a person who was at any time a member of the Canadian Forces or of the Royal Canadian Mounted Police shall be deemed to have been at that time a servant of the Crown." See *Campbell*, *supra* note 85 at para 36, the Supreme Court points out such a deeming provision would not be necessary if members of the RCMP were always clearly thought to be agents of the Crown.

The Supreme Court's statement that the principle of police independence in the conduct of investigations "underpins the rule of law," is significant because in the *Reference Re Secession of Quebec*,[89] the Supreme Court held that the "principles of constitutionalism and the rule of law lie at the root of our system of government."[90] As Professor Kent Roach has stated, "[t]he Somalia Inquiry revealed how the rule of law—the principle that the law applies equally to all, including those in the military—can suffer when the military obligation to respect the chain of command overwhelms the military police's law enforcement duty to investigate fully and impartially misconduct within the military."[91] Raising police independence in investigations to a quasi-constitutional principle is an indicator of how serious the implications of subsection 18.5(3) of the *National Defence Act* should be taken.

The independence and integrity of military policing have been further supported through changes to the Military Police command structure. Effective 1 April 2011, all Military Police members when performing their policing duties came under the command of the Provost Marshal, and so were removed from the control of a unit's commanding officer. The authority given to the Vice Chief is inconsistent with existing arrangements in place since the period following the troubled Somalia deployment, which specifically sought to safeguard Military Police investigations from interference by the chain of command.

Extending the Right of Review to Subjects of Conduct Complaints

It is of vital importance for the Commission to be seen as independent of the Canadian Armed Forces in general and the Military Police command in particular. This has to do with the respect for and acceptance of Commission decisions. While one side of a complaint is likely to be disappointed by the Commission's decision, the goal of the Commission is to ensure that both sides agree that the process leading to the result was a fair one. The perception of fairness will be enhanced if the tribunal is not only seen as independent, but also impartial. Impartiality refers to the state of mind of the decision-maker in relation to the issues and the parties before him or her. A willingness to hear all sides and be fair (the *audi alteram partem* principle) is aided by a lack of partiality (the *nemo judex in sua causa* principle).[92]

89 [1998] 2 SCR 217.

90 *Ibid* at para 70.

91 Kent Roach, "Police Independence and the Military Police" (2011) 49:1 Osgoode Hall LJ 117 at 119.

92 Laverne Jacobs, "Tribunal Independence and Impartiality: Rethinking the Theory after *Bell* and *Ocean Port Hotel*—A Call for Empirical Analysis" in Laverne Jacobs

Acceptance of its decisions is enhanced if the Commission can demonstrate that it is open to all and does not favour one party over another. Under the current system, however, there may be a reasonable apprehension that the complaints system is biased in favour of complainants. This apprehension may flow from the fact that only a dissatisfied complainant may request a review of a complaint by the Commission following the initial decision on that complaint by the Provost Marshal.[93] The rationale behind this seems to be that, if any negative consequences result from a Provost Marshal review, a member of the Military Police has available to him or her internal means of challenging those consequences, such as the Canadian Forces grievance process. Without the provision allowing a complainant to request a review, he or she would have no way to challenge the Provost Marshal's disposition of a complaint.

Nevertheless, only giving the complainant the right to request a review can be seen as a fairness issue by members of the Military Police. If a finding by the Provost Marshal reflects adversely on the conduct of a member, but does not lead to any further action, internal mechanisms for members to challenge sanctions imposed on them are of no value. A right of review for subject Military Police members would give them the opportunity to challenge negative findings about their conduct, regardless of whether remedial measures were taken against them.

If subjects of complaints were provided with a right to request a review by the Commission, it would serve to promote balance in the complaints process. The process would appear to be more impartial if every party were able to gain access to the investigative talents of the Commission's experienced corps of retired civilian police officers. A right to request a review for subjects of complaints would also enhance morale among Military Police members. In a system where the Commission cannot compel people to furnish evidence, there is no incentive for Military Police members to do so if they are not allowed to bring matters to the Commission themselves. If the Commission gives them no recourse, there is no reason they should help it potentially make negative findings about them.[94] Those findings do not take the form of legal sanctions, but they can have important consequences if they reflect negatively on a Military Police member's reputation. The stress of waiting for a decision on the performance of their duties can also weigh on subject members. Any

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& Anne Mactavish, eds, *Dialogue between Courts and tribunals: Essays in Administrative Law and Justice (2001-2007)* (Montreal: Les Editions Themis, 2008) 43 at 47–48.

93 *National Defence Act*, *supra* note 2, s 250.31(1).

94 *Military Code*, *supra* note 49, s 8 imposes a duty on Military Police members to respond to any question relating to an investigation into a breach of the Code, but this duty to cooperate does not apply to the subject of the investigation.

feeling that the Commission, or at least its legislative mandate, is biased in favour of complainants can only add to that stress.

Commission-initiated Complaints

One way for a tribunal to be seen as independent is for it to be proactive in its oversight rather than be solely reactive. Instead of simply waiting for complaints to come through the door, a tribunal can go out to find misconduct and try to deal with it. This could be done on a systemic rather than a strictly individual scale. However, the scope of the Commission Chairperson's ability to call for a public interest investigation is not as clear as it is for some other tribunals. Subsection 250.38(1) of the *National Defence Act* can be read as requiring there to be an existing complaint before the Chairperson can call for a public interest investigation. This impression is reinforced by subsection 250.38(3) of the Act which requires the Chairperson to notify the complainant and the subject of the complaint if there is to be a public interest investigation. So, it appears there must be a pre-existing complaint before the Commission Chairperson can step in and make the matter into one of public interest. However, since "any person" may make a conduct complaint under section 250.18 of the Act, it is not clear that Chairperson-initiated complaints are prohibited (since the Chairperson may be the "any person").[95]

This uncertain situation can be contrasted with the clear ability of other tribunals to investigate matters on their own initiative, in the absence of an existing complaint. Under subsection 36(1) of the *Public Complaints and Review Commission Act*, the Chairperson of the Commission may initiate a complaint into the conduct, in the performance of any duty or function under the *Royal Canadian Mounted Police Act*, of any person who was an

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95 The Commission has, in fact, brought forward one conduct complaint on its own initiative. The *Registrar Public Interest Investigation into Military Police Investigations into Incidents at the Royal Military College of Canada (MPCC2020013)* was a Public Interest Investigation into Military Police investigations into incidents that occurred at the Royal Military College of Canada during 2019. This is an example of the importance of clarifying the Chairperson's power to initiate conduct complaints. One potential complainant in the matter was medically incapable of launching a complaint while the other potential complainant had been left vulnerable by events, such that it would have been highly unlikely that this person would have brought the matter forward. The result was that the Commission had knowledge of potential misconduct by members of the Military Police but no complaint from those most affected. In order to carry out its mandate to investigate the conduct of the Military Police in carrying out policing duties or functions, the Commission for the first time, decided to launch its own conduct complaint (see Military Police Complaints Commission of Canada, "Registrar Public Interest Investigation into Military Police Investigations into Incidents at the Royal Military College of Canada (MPCC-2020-013)" (31 May 2022), online: <https://tinyurl.com/2rcvjs65>.

RCMP employee at the relevant time. The power to initiate complaints is common to the office of an ombudsperson and was recommended as a feature of independent RCMP oversight in order to avoid having to create a separate ombudsperson service.[96] In British Columbia, the police complaint commissioner can order an investigation if information comes to its attention concerning conduct that, if substantiated, would constitute misconduct.[97] Other non-policing oversight bodies also have a clear self-initiating complaint power.[98]

These statutory provisions support the conclusion that in order to have effective oversight, a tribunal cannot rely entirely on receiving complaints from individuals. There are at least five possible reasons for this conclusion:

- Proceeding solely by means of individual complaints is too haphazard; this type of system is too reliant on having careful and observant complainants scattered throughout what may be a large organization. It is inevitable that conduct that should be scrutinized will escape notice;

- An entirely complainant-driven system depends on those complainants being willing to come forward and put their name on a complaint. This may be asking too much if it is a question of a subordinate complaining about their boss;

- The initial investigation of a complaint may reveal potential misconduct other than that raised by the complaint itself;[99]

- A system with the possibility of a tribunal-initiated complaint is one that can look at every aspect of an organization; the individual complainant can see a snapshot but not the entire moving picture; and

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96 Task Force on Governance and Cultural Change in the RCMP, *Rebuilding the Trust* (Ottawa: Public Safety Canada, 2007) at 15. This report was prepared for the Minister of Public Safety and President of the Treasury Board to address the issue of rebuilding trust in the management of the RCMP.

97 *Police Act*, *supra* note 40, s 93.

98 Under the *Access to Information Act*, *supra* note 65, s 30(3) where the Information Commissioner is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records, the Commissioner may initiate a complaint in respect thereof. Under the *Canadian Human Rights Act*, RSC 1985, c H-6, s 40(3) where the Human Rights Commission has reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice, it may initiate a complaint.

99 Tulloch, *supra* note 28, Recommendation 7.11.

- An oversight body has a greater capacity to discern systemic problems than does an individual complainant. An individual complainant may perceive a problem in one event but the tribunal may determine that this problem is common to numerous events. It is by means of a tribunal-initiated complaint that a wider policy issue could be examined.[100]

Chairperson-initiated complaints would be consistent with the wide ambit of the jurisdictional powers granted to the Commission by Parliament. Subsection 250.18(1) of the *National Defence Act* states that "any person" may make a conduct complaint while subsection 250.18(2) of the Act states that a conduct complaint may be made whether or not the complainant is affected by the subject-matter of the complaint. By contrast, the Public Complaints and Review Commission may refuse to deal with a complaint if it is from a third party that is not directly concerned by the subject matter of the complaint.[101]

When the Commission receives a conduct complaint, subsection 250.32(2) of the *National Defence Act* empowers the Chairperson to investigate any matter relating to the complaint. At any time, the Chairperson may declare a complaint to be a matter of public interest and can even continue a public interest investigation if the complaint has been withdrawn.[102] So, Parliament has already granted to the Commission the power to act in the public interest, in some cases contrary to the wishes of an individual complainant. It would be consistent with this power for Parliament to grant the Chairperson the express power to self-initiate complaints, as it has done for the Public Complaints and Review Commission, and thereby avoid potential future litigation on this jurisdictional question.

Conclusion

Hearkening back to Sir Robert Peel's Principles, the work of the police is enhanced, not hindered, by oversight in that it is one way to earn the respect of the public. There will not be willing cooperation of the public to follow the law if that law is perceived to apply differently to police suspected of misconduct than it does to civilians. This is captured in the rule of law precept that all must be equal, and be seen to be equal, under the law. As the Commission itself has put it, "the arrival of independent civilian

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100 Task Force on Governance and Cultural Change in the RCMP, *supra* note 96. This report found that ("an oversight role of a body independent from the RCMP would provide valuable consideration of matters in a broader policy context" at 11).

101 *Public Complaints and Review Commission Act*, *supra* note 12, s 38(1)(b)(i).

102 *National Defence Act*, *supra* note 2, s 250.38(2).

oversight of the [M]ilitary [P]olice was a key part of their recognition as a modern professional police force."[103] The Military Police need and deserve an oversight body that has the capacity to independently and credibly address Military Police conduct complaints, identify problems and possible solutions, and dispel unfounded allegations and suspicions.

It is, though, perhaps too easy to opine about the importance of civilian oversight of the police if one is that oversight body. It can appear to be special pleading to seek more powers to do more extensive investigations, all in the name of holding the police 'accountable.' There are two responses to this critique. One is that the police have conferred on them a monopoly on the use of force in carrying out their mission and they must be held to account in how they use their power. Oversight is not in place because we suspect the police are always acting badly, but, rather, because it is the right thing to do. It provides a structure that senior police officers, at least, have come to realize helps them improve their work. It is important to the individual citizen, but the even greater value to the community as a whole is in seeing the concerns of their fellow citizens being addressed. Individuals who advocate for external review are defending something that is inherently social: a desire for common security and reinforcement of democratic principles.[104]

Furthermore, the police are given the power to restrict the freedom of action of citizens and need to do so with the consent of that citizenry.[105] Oversight is one means of building that consent. That oversight needs to be robust in response to the concerns of some police officers about being overseen by civilians with non-policing backgrounds and who lack lived police experience. The belief among these officers is that such civilian oversight members do not understand the types of scenarios, risks, and split-second decisions required in the field.[106]

The second response to the special pleading critique is that the specific issues addressed in terms of the Commission should be read in the context of all oversight bodies. This article has made frequent comparisons between the powers of the Commission and the greater powers given to

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[103] Military Police Complaints Commission of 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* (Ottawa: Department of National Defence, 2006) at 13.

[104] Danielle Hryniewicz, "Civilian oversight as a public good: democratic policing, civilian oversight, and the social" (2011) 14:1 *Contemporary Justice Rev* 77 at 80.

[105] Michael Rowe, *Policing the Police: Challenges of Democracy and Accountability* (Bristol: Policy Press, 2020) at 12.

[106] Krista Stelkia, "An Exploratory Study on Police Oversight in British Columbia: The Dynamics of Accountability for Royal Canadian Mounted Police and Municipal Police" (2020) 10:1 SAGE Open 1.

the Public Complaints and Review Commission. When it introduced Bill C-42, which created the RCMP Commission, the Government of Canada said: "The enhanced powers and authorities of the [RCMP Commission] will increase the RCMP's accountability to Canadians and will be similar to those of other modern international, federal and provincial review bodies."[107] The theme running through this article has been that, in order to properly fulfill its mandate and see that complaints are dealt with in a timely and fair manner, the Commission needs better legal tools. Providing those tools through updates to Part IV of the *National Defence Act* will see to it that the Commission will be as 'modern' as its fellow oversight bodies.

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107 Public Safety Canada, "Increasing RCMP Accountability through a new Civilian Review and Complaints Commission", *Government of Canada* (20 November 2015), online: <https://tinyurl.com/yckcrdar>.