MILITARY POLICE COMPLAINTS COMMISSION

SPECIAL REPORT ON INTERFERENCE

AUGUST 12, 2014

DP4-2/2014E-PDF
978-1-100-25000-7

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A WORD FROM THE CHAIRPERSON

As the Military Police Complaints Commission (MPCC) enters the 15th year of its operation, I believe it is appropriate to reflect back on its work during that time concerning one of the two pillars of the MPCC's mandate: interference complaints. While the other mandate pillar of conduct complaints also deserves attention, those are quite similar to public complaints against civilian police, and are therefore perhaps more familiar to Canadians.

The interference complaint mechanism, on the other hand, is unique to the military policing context. It was created by an Act of Parliament in 1998 to deal with the special challenge of supporting military police (MP) investigative independence within the particular context of the Canadian Forces (CF), an institution which is necessarily focused on the conduct of, and preparation for, military operations.

In 2002, the MPCC released its first Special Report on interference complaints: *Special Report – Interference with Military Police Investigations: What is it About?*, the purpose of which was to inform members of the CF – especially MP members – about the availability of recourse to the MPCC for interference complaints. As the then Chair of the MPCC, Ms. Louise Cobetto, noted: "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."

By contrast, this second Special Report issued almost 12 years later comes at a time when the existence of the interference complaint mechanism is well known within the CF, and certainly among the MPs. So this Special Report has a somewhat different goal, which is to provide the public, the CF, and especially MPs with more

of a picture of what we think improper interference in MP investigations looks like, based on the MPCC's interference complaint decisions over the years. Of course, this picture is necessarily a 'snap-shot', as the MPCC's understanding of interference can evolve over time in response to new factual scenarios presented in future cases.

I cannot stress enough that civilian oversight of policing is not a sign that there is a problem, but rather demonstrates members of the Military Police are held to the same standards as their civilian counterparts. It is a question of accountability, transparency and ensuring public confidence at all times. The MPCC is dedicated to assisting the Military Police in being the best police service it can be.

Ottawa, August 12, 2014

Glenn M. Stannard, O.O.M.
Chairperson
Military Police Complaints Commission

INTRODUCTION

The interference complaint remedy for MP members, created by Parliament in Part IV of the *National Defence Act* (NDA) in 1998, was a response to concerns which arose as a result of events during the CF mission in Somalia in the early 1990s and the ensuing investigations and public inquiry. These concerns related to the need to safeguard the independence and integrity of MP investigations from actual or potential interference by the military chain of command. It was recognized that MPs are called upon, among other duties, to investigate possible offences under both military and civil laws, and when doing so they should, like their civilian police counterparts, be free from direction or improper influence from persons outside of law enforcement. In the case of MPs, it was felt that there was a special vulnerability to improper interference because, as CF members, they are part of a larger, non-policing organization.

Almost 12 years ago, the MPCC issued its first Special Report, entitled, *Interference with Military Police Investigations: What is it About?* (December 2002). Then, as now, the MPCC was the only police oversight body with an explicit mandate to look at police complaints of improper interference in their investigations. Moreover, while NDA subsection 250.19(2) stipulates that "improper interference" can come in the form of "abuse of authority" or "intimidation", the concept of "improper interference" itself is not defined in NDA Part IV, nor is it a concept otherwise known to law.

So, with a unique mandate regarding a unique subject, it has fallen exclusively to the MPCC to give meaning to the concept of "improper interference" under NDA section 250.19, on a case-by-case basis. At the time of publication of the 2002 Special Report, the MPCC – then just completing its third year of operation – had received but four interference complaints,[1] and only one of these had gone to a decision on the merits.

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[1] By contrast, there had been approximately 200 conduct complaints filed over the same time period.

Since the 2002 Special Report, the MPCC has received a further 22 interference complaints, for total of 26. Fourteen of these cases have been decided on the merits in final reports by the MPCC; one was informally resolved; two were withdrawn by the complainants; two were found to be outside the MPCC's jurisdiction; and seven are currently pending before the MPCC. While this is still not a large number of cases when compared to the number of conduct complaints received over the same period, the MPCC has had occasion to develop further its understanding of interference in some key areas.

The intervening years have also brought a number of key events and experiences in the evolution of military policing, as well as the broader Canadian Forces (CF).

Since the 2002 Special Report, Canada was involved in a 12-year-long conflict in Afghanistan, which represented the single largest commitment of Canadian military personnel to combat operations in five decades. The operational requirements of a long-term and large-scale combat commitment stretched the resources of the CF, and placed particular demands on MPs, who were at times required to perform both their policing and military duties in challenging combat environments, and all the while those back home were having to make do with less manpower for their ongoing policing and security obligations in Canada.

On the organizational side, the 2011 reforms to command and control of the MPs have resulted in all MPs, for the first time, being placed under the command of the CF Provost Marshal (CFPM) in respect of their policing duties. This restructuring of the MP branch represents the most significant step toward greater protection of the independence of MP investigations since the creation of the Canadian Forces National Investigation Service (CFNIS) and the other post-Somalia reforms of the late 1990s.

Also, in 2013, Parliament adopted Bill C-15, the *Strengthening Military Justice in the Defence of Canada Act* (*Statutes of Canada, 2013*, chapter 24), enacting the first significant amendments to NDA Part IV ("Complaints About or By Military Police"). These legislative reforms were at once welcome and a source of some concern from

the perspective of MP investigative independence (as will be discussed further below).

In light of all the foregoing developments, it seems an opportune time to provide an updated perspective on interference for the benefit of the CF MP community and other key stakeholders in military policing.

In this report, we will start by revisiting the origins of the interference complaint provisions in NDA Part IV, and then turn to subsequent developments in the MPCC's understanding of that unique mechanism for supporting the independence of military policing. Finally, the report will discuss some of the principles about the nature of interference that have been recognized in the MPCC's decisions.

ORIGINS OF THE MPCC'S INTERFERENCE MANDATE AND THE EVOLUTION OF MP INVESTIGATIVE INDEPENDENCE

Issues Arising from the CF Deployment to Somalia and its Aftermath, 1992-97

Although the establishment of the MPCC and its mandate to deal with interference complaints was influenced by a number of studies and initiatives, the most high-profile impetus was the 1997 *Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia,* which made the following observations:

> The reluctance of commanding officers to call in Military Police for serious criminal investigations was symptomatic of the dismissive attitude of both senior officers and non-commissioned officers toward the Military Police. In three incidents in 2 Commando in the autumn of 1992, non-commissioned officers counseled soldiers to not co-operate with their own senior officers and MP investigators. In several investigations within the CAR [Canadian Airborne Regiment] during the pre-deployment period, Military Police met a wall of silence that seriously hindered their investigations. Military police investigating the March 4th incident[2] also noted this as a problem in their investigation. Their report states:

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[2] This refers to a controversial shooting by Canadian soldiers of two unarmed Somali civilians (one fatally) while the latter were fleeing after an alleged attempt to penetrate the perimeter of the Canadian base in Belet Huen, Somalia, on March 4, 1993.

> Throughout the conduct of this investigation, there was an evident lack of cooperation and a reluctance on the part of most personnel to come forward, to provide information or to get involved in the inquiries. Regardless of the perceived status (suspect or source) of the personnel contacted by investigators, information had to be slowly and laboriously acquired from those personnel.
>
> At least one MP investigating the March 4th incident felt that superior commanders went beyond simple lack of co-operation and actually interfered with the investigation.[3]

Indeed, the resulting August 23, 1993 MP investigation report into certain incidents in Somalia noted the MP investigation had been "inexplicably delayed for five weeks causing the irretrievable loss of physical evidence, faded recollections, increased opportunities for collusion and command influence".[4]

The Somalia Inquiry further noted the systemic challenges which confronted the MPs in upholding the integrity and independence of their investigations:

> Military Police can undertake investigations of their own accord – at least in theory. However, commanding officers can exert tremendous influence over investigations because Military Police fall within the chain of command. That influence can be intentional or unintentional, but it can affect the scope of an investigation and the resources available to carry it out.[5]

To place these observations in their historical context, it should be recalled that, at the time of the incidents in Somalia, MPs were under the sole command of the units and formations whose members they were expected to investigate. Moreover, there was no CFNIS (whose creation was also a direct result of the events in Somalia) reporting directly to the CFPM with independent authority to lay charges under the Code of Service Discipline – the power was then the exclusive preserve of the suspect's chain of command, regardless of the nature of the service offence.

As a result of these and other findings, the Government and Parliament of the day decided that such interference in MP investigations was unacceptable, and a body

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[3] *Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia – Dishonoured Legacy: the Lessons of the Somalia Affairs* (Ottawa: Minister of Public Works and Government Services Canada, 1997)[hereafter, Somalia Inquiry Report], Volume 5, at p. 1271 (endnotes omitted).

[4] Somalia Inquiry Report, Volume 5, at p. 1135 (endnotes omitted).

[5] Somalia Inquiry Report, Volume 5, at p. 1272.

like the MPCC was required to independently address future complaints of interference that hampered MP investigations.

Bill C-25 NDA Amendments, 1998

In 1998, the Parliament of Canada enacted an *Act to amend the National Defence Act* (*Statutes of Canada 1998*, chapter 35) which represented the most significant overhaul of the *National Defence Act* (NDA) since 1950. This Act (which had been known as Bill C-25 as it made its way through the 1st Session of the 36th Parliament), which made a number of changes to the NDA, was focused especially on reforming the military justice system. This included significant legislative changes related to military policing, although a number of important reforms affecting the military police took place outside of Parliament.

The general thrust of Bill C-25 was to make the administration of military criminal justice under the Code of Service Discipline more similar to the civilian criminal justice system by, amongst other things, reducing the role of the chain of command in the administration of justice within the CF.

A similar theme was prevalent in the reforms to military policing, which were manifested both within and beyond the adoption of NDA Part IV ("Complaints About or By Military Police") in Bill C-25.

The twin and intertwined goals that animated the historic reforms to military policing in the late 1990s were enhanced professionalism and enhanced independence. Both of these goals are reflected in NDA Part IV, which created two distinct complaints processes related to military policing: the conduct complaint (NDA section 250.18), to promote MP professionalism; and the interference complaint (section 250.19), to promote MP independence. Linking the two complaints regimes was the MPCC: a civilian agency separate from the Department of National Defence (DND) and the CF (though reporting to Parliament through the Minister of National Defence).

Other Reforms to Military Policing in the late 1990s

Reforms to military policing which occurred outside of NDA Part IV were also significant.

On the professionalism side of the equation, the most notable change was the adoption by regulation of the *Military Police Professional Code of Conduct*, and the related enforcement authorities granted to the CFPM.

On the independence side – which is the focus of this Special Report – the most significant non-statutory reform was the creation of a specialized MP unit, the CFNIS, with the unique mandate to investigate serious and sensitive offences (including any offence by a senior officer). The key significance of the CFNIS was the ways in which it was authorized to bypass the regular military chain of command:

1) CFNIS was given independent authority to lay charges under the Code of Service Discipline;[6] and

2) CFNIS was placed under the command of the CFPM (the CFPM had previously been essentially a command staff advisor position).

The CFPM also retained certain authorities over all MPs (i.e., including those outside of the CFNIS) in respect of their policing duties. A separate MP 'technical chain' was authorized, which allowed senior MPs, up to and including the CFPM, to bypass regular channels of communication based on the chain of command and provide technical and professional guidance on policing matters directly to MPs. Ultimately, the CFPM could enforce technical direction to MPs through his or her control over each MP member's MP credentials, which, in turn, are necessary conditions for MPs' particular law enforcement authorities, as reflected in NDA section 156 ("Powers of military police") and in their automatic status as "peace officers" under the *Criminal Code*.

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[6] See *Queen's Orders and Regulations for the Canadian Forces* (QR&O), article 107.02.

This new MP governance arrangement, and particularly the special mandate and authorities of the CFNIS, and the command role of the CFPM therein, in turn necessitated a special approach to how the CFPM would fit into the CF chain of command. This was done in two notable ways.

First, the CFPM was placed under the direct command of the Vice Chief of the Defence Staff (VCDS) – the second most senior officer in the CF. The intention was to ensure that any non-MP direction that could affect CFNIS operations would come only from the highest levels within the CF.

Second, in an attempt to further shield investigations from potential command influence, the actual command relationship itself between the VCDS and the CFPM was adjusted through an *Accountability Framework*. This *Accountability Framework*, while authorizing the VCDS to "give orders and general direction to the CFPM to ensure professional and effective delivery of policing services...," significantly constrained the VCDS's role in respect of individual ongoing MP investigations. In this regard, the Framework stipulated that:

> The VCDS shall not direct the CFPM with respect to specific military police operational decisions of an investigative nature. (...);
>
> The VCDS will have no direct involvement in individual ongoing investigations but will receive information from the CFPM to allow necessary management decision making.
>
> (...)
>
> The CFPM has a duty to advise the VCDS on emerging and pressing issues where management decisions are required. However, the degree of detail provided on the day to day investigations rests within the discretion of the CFPM.

Restructuring of MP Command and Control, 2011

MP independence was further enhanced when, by order of the Chief of the Defence Staff, effective April 1st, 2011, the CF Military Police Group was created as a new CF formation under the command of the CFPM. Under this new arrangement, all MP members are under the command of the CFPM in respect of their policing duties, and all those not specially assigned to military operational taskings (i.e., CF duties of

a non-policing nature) are under the full command of the CFPM. In effect, the unique command relationship with the CFPM previously developed for the CFNIS has been extended to all MPs when they are engaged in policing duties.

Bill C-15 NDA Amendments, 2013

These latest amendments to the NDA were passed by Parliament and given Royal assent in 2013.

From the perspective of MP independence, the most important new provisions were those which enshrined the position of CFPM in statute for the first time and which set out his or her roles and responsibilities (new NDA sections 18.3 – 18.5). The amendments to the NDA entrenched in law the CFPM's reporting relationship with the VCDS and set out a formal and transparent procedure for removing the CFPM from office prior to the end of his or her term.

Another welcome addition to the NDA were new provisions expressly prohibiting reprisals against those who make conduct or interference complaints in good faith (new subsections 250.18(3) and 250.19(3)).

However, of concern is the new provision (new subsection 18.5(3)) giving the VCDS the express authority to issue directions to the CFPM on the conduct of individual MP investigations. This provision effectively abrogates the 1998 *VCDS-CFPM Accountability Framework*. As noted above, the *Accountability Framework* was specifically designed to preclude such intervention on the part of the VCDS, and had formed an important cornerstone of the post-Somalia initiatives to safeguard MP investigative independence. The MPCC is unaware of any incident, study or consultation which preceded or precipitated this departure from the general trend toward greater support of MP investigative independence. [7]

[7] The MPCC unsuccessfully made submissions to Parliament recommending the deletion of subsection 18.5(3) from the Bill.

The MPCC does not expect this new authority of the VCDS to be used with any frequency. The MPCC's concern is more for the conceptual implications of this new limitation on MP investigative independence, and on how MP independence is to be defined and understood going forward by the relevant stakeholders.

WHY IS MP INVESTIGATIVE INDEPENDENCE IMPORTANT?

At this point, it is useful to remind the reader of the basic principles which underlie and animate the concerns and efforts, discussed above, regarding the independence of MP investigations.

In its 1999 decision in *R. v. Campbell*,[8] a unanimous Supreme Court of Canada affirmed that when engaged in the investigation of offences, police officers – in that case, members of the Royal Canadian Mounted Police (RCMP) – are answerable only to the law and are not subject to direction from the broader government. In expressing its view on the matter, the Supreme Court adopted the words of the great English jurist, Lord Denning, in one of his decisions from the English Court of Appeal. At paragraph 33 of the Supreme Court's decision in the *Campbell* case, Justice Binnie wrote for the Court that:

> While for certain purposes the Commissioner of the RCMP reports to the Solicitor General, the Commissioner is not to be considered a servant or agent of the government while engaged in a criminal investigation. The Commissioner is not subject to political direction. Like every other police officer similarly engaged, he is answerable to the law and, no doubt, to his conscience. As Lord Denning put it in relation to the Commissioner of Police in *R. v. Metropolitan Police Comr., Ex parte Blackburn*, [1968] 1 All E.R. 763 (C.A.), at p. 769:
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> > I have no hesitation, however, in holding that, like every constable in the land, he [the Commissioner of Police] should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act 1964 the Secretary of State can call on him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police, 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

[8] 1999 CanLII 676 (S.C.C.), [1999] 1 S.C.R. 565.

> 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.

The Court's statement that the principle of police independence in the conduct of investigations "underpins the rule of law", while significant in itself, is even more so in light of its decision a few months earlier in the *Quebec Secession Reference* case,[9] wherein the same Court indicated that "the rule of law" was itself a binding unwritten constitutional principle.

Thus the requirement for police to personally exercise independent judgment in certain matters, and to generally make investigative decisions without external interference or influence, is clearly established in the common law, and perhaps even the constitutional law, of Canada.

INTERFERENCE: WHAT IT IS AND WHAT IT IS NOT – SOME GUIDANCE FROM MPCC COMPLAINTS DECISIONS

Introduction

As noted earlier, the MPCC's understanding of what constitutes improper interference, as outlined in this report, will continue to evolve and develop on the basis of the specific facts of future cases.

Nonetheless, it can still be beneficial to military policing stakeholders to consider some of the MPCC's previous interference complaint "jurisprudence". Looking back on the MPCC's 14 years of experience with the concept of interference, there do appear to be some consistent themes and principles reflected in the MPCC's approach to such cases.

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[9] [1998] 2 S.C.R. 217.

Interference and Intent

As the MPCC observed in its 2002 Special Report on interference, there are both important similarities and distinctions between improper interference in NDA section 250.19 and the criminal offence of obstruction of a peace officer in section 129 of the *Criminal Code.*[10] There is certainly a partial overlap between the two concepts. Any conduct by a person which amounted to criminal obstruction, would almost certainly constitute improper interference, provided the person in question was in the category of those liable to be the subject of an interference complaint (i.e., members of the CF and senior DND officials). At the same time, not all that might be considered interference would necessarily amount to criminal obstruction.

The key distinction between criminal obstruction and interference, respectively, is that the former only applies where a person "*willfully* obstructs a public officer or peace officer in the execution of his duty..." [emphasis added].[11] This means that obstruction entails that the accused have knowledge of the fact that a public or peace officer is engaged in the execution of his or her duty, and intentionally acts so as to obstruct the officer's performance of the duty. The MPCC, however, has long recognized that the concept of "improper interference" in NDA section 250.19 does not require the same degree of intent.[12]

This is not to say improper interference can be found where the person did not know, and could not be expected to know, of an ongoing or impending MP investigation or investigative interest. There should be some basis for inferring the person knew or ought to have known of an ongoing or imminent MP investigation or investigative interest, or there should at least be facts which should have caused the person to inform himself or herself on the issue.

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[10] Military Police Complaints Commission, *Special Report – Interference with Military Police Investigations: What is it About?*, Ottawa, December 2002, at pages 14-15.

[11] *Criminal Code*, R.S.C. 1985, c. C-46, s. 129.

[12] MPCC Special Report, 2002, at pages 14-15.

Another distinction with obstruction is that, where there is awareness of an MP investigative interest on the part of a subject of a complaint, a finding of interference would not necessarily require that the subject had specific foresight as to *how* his or her actions would adversely affect the actual or impending MP investigation. Obviously, there are situations where a commander, for example, would be expected to consult with the MPs about a proposed course of action which could have an impact on an investigation.

CASE EXAMPLE #1

MPCC 2002-042 – Lack Of Knowledge of Existence of Investigation Allegedly Interfered With (Interference Not Found)

An MP corporal was the subject of an RCMP investigation regarding an alleged sexual assault. The CFNIS opened a "shadow file" on the investigation, as is CF practice in such situations.

During the course of the investigation, the RCMP investigator received an anonymous note alleging sexual harassment on the part of the subject of the investigation. At the CFNIS investigator's request, the RCMP investigator provided a copy of the note to the CFNIS investigator responsible for the "shadow file". The CFNIS investigator subsequently briefed the MP Detachment Commander of the subject of the sexual assault investigation about the existence of the note. However, the CFNIS investigator did not advise the Detachment Commander that he had now broadened his "shadow file" investigation to an active investigation into public mischief on the part of the letter writer, whom the investigator considered to have provided false information to police.

The MP Detachment Commander deduced the anonymous letter had been sent by another member of his unit, and circulated an "all-staff" email to the MPs under his command requesting the author of the letter to come forward. An interference complaint was then brought by the CFNIS investigator against the MP Detachment Commander for circulating the all-staff email.

Commanders are usually entitled to know if any of their personnel are under MP investigation. It would indeed be irresponsible for a commander so briefed to reveal to the subject and prospective witnesses information provided during such a briefing; this could well amount to interference. In this case it was determined by the MPCC that the MP Detachment Commander was never informed by the CFNIS investigator that the anonymous letter had become the subject of a separate investigation of the letter's author. Thus the MPCC concluded that, as the Detachment Commander lacked awareness of the investigation allegedly interfered with, he had not improperly interfered in the CFNIS investigation.

CASE EXAMPLE #2

MPCC-2006-013 –Interference by CO through Returning Deceased Soldier's Personal Effects to Family Prior to Conclusion of MP Investigation into Death (Interference Found)

In this case, a Commanding Officer (CO) gave the order to a junior officer to retrieve a deceased soldier's personal effects. In doing so, the junior officer ended up cutting through police tape and removing the padlock with which the MPs had sealed off the soldier's living space and possessions. The CO was motivated by compassion for the soldier's family, who had travelled to the base to be with their son as he was dying, and wished to take his effects back home with them.

CF policy at the relevant time required all such deaths on military property to be investigated to the same standards as a homicide until such time as the possibility of foul play is eliminated. Here a young solider had experienced a sudden and unexplained medical crisis. Local MPs had launched an investigation into the possible involvement of illegal drugs. When the soldier died, the CFNIS mandate to investigate suspicious deaths on DND property was triggered.

The CO was aware of the first investigation by the local MPs. Arguably, he also should have been aware of the second investigation by CFNIS, due to a previous sudden death which had occurred earlier in his tenure as the CO of the base in

question. The MPCC determined that information available to the CO should have caused him to seek out, and defer to, the technical expertise of the MPs conducting the investigations, rather than unilaterally overriding their judgment concerning the needs of the investigation. Thus the MPCC concluded that this CO had improperly interfered with an MP investigation.

The Role of MP Supervisors

It is safe to assume that, when Parliament created the interference complaint mechanism in 1998, it did not do so for the purpose of creating a forum for settling disputes between MPs and their own MP supervisory chain of command. Yet it has turned out that interference complaints by MPs against their own supervisors have accounted for fully half of all the interference complaints received to date (13 out of 26).

The foregoing data does not necessarily mean there has been an unusually high rate of interference complaints against MP supervisors. It may also mean there has been an unusually low rate of interference complaints as a whole. Or it could be some combination of both of these hypothetical trends. However, it is difficult to discern meaning in these statistics in the absence of any data on possible interference cases which have gone unreported.

What may be more useful is to compare the two categories of interference complaints – those against MP supervisors and those against others – on the basis of the rate at which the two types of complaints have been found to be substantiated by the MPCC.

Of the 13 interference complaints against persons who did not have an MP supervisory relationship with the complainant, five have gone to a final decision on the merits. Of these five cases, three were found to be substantiated by the MPCC. By contrast, of the nine decided interference complaints against MP supervisors, none has been substantiated to date.

These trends may suggest the need for education of the MP community on the limits of MP investigative independence, and specifically, on the legitimate authorities and prerogatives of the MP supervisory chain. The MPCC has consistently recognized throughout its existence that legitimate interventions by MP supervisors in their subordinate MPs investigations are not interference. This point was expressly made in the 2002 Special Report[13] and has been reiterated in several complaint decisions since that time. Just as the principle of the independent exercise of discretion by police investigators free from outside (i.e. non-police) direction and influence has been upheld by the courts in cases like *Campbell*,[14] so too has the authority and the duty of police superiors to guide and control their investigators' handling of investigations.[15]

In its 2006 decision on the first interference complaint by an MP against his supervisor, the MPCC laid out some key principles which have informed its subsequent decisions in such cases. In its Final Report in MPCC 2006-008 (the facts are summarized in Case Example #3, below), the MPCC noted:

> Any discussion of military police supervisory authority must start with the fundamental premise that, as peace officers, all military police members are imbued with a certain amount of discretion in the exercise of their policing duties, particularly with respect to the investigation of offences and the laying of charges to the extent that they are authorized to do so. The common law has long recognized the requirement for peace officers to exercise individual judgment regarding the formation of the requisite grounds for actions such as conducting a search, making an arrest or laying a charge. Peace officers, whether civilian or military, may not be ordered to take any of these actions on their own authority absent their personal belief in the requisite grounds. Indeed, such an order would be illegal and the peace officer would be entitled to disregard it.
>
> However, peace officers are not given "carte blanche" in that they may be ordered to refrain from exercising their discretionary authority in certain instances. In addition to independently forming the requisite legal grounds to, for example, lay a charge, a peace officer is also expected to exercise policing discretion. While this discretion is normally exercised by the individual officer on the scene or with carriage of the investigation, as the case may be, such exercise of discretion may be made the subject of enforcement policy or be individually reviewed, questioned and even overruled by a police superior.

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[13] MPCC Special Report, 2002, at pages 11-12.
[14] 1999 CanLII 676 (S.C.C.), [1999] 1 S.C.R. 565.
[15] *Wool v. The Queen* (1981), 28 Crim. L.Q. 162 (Fed. T.D.); *R. v. Metropolitan Police Commissioner; Ex parte Blackburn*, [1968] 1 All E.R. 763 (C.A.); and *R. v. McAulay; Ex parte Fardell*, [1979] 2 N.T.R. 22 (S.C.).

The MPCC summarized its understanding of the law thus: "while peace officers are not subject to superior direction as to forming the requisite belief about the presence of the legal grounds to support a charge, they are subject to direction in the exercise of their discretion as to whether a charge should be laid." It may be added that police investigators are also subject to superior direction as to whether or not to continue or pursue an investigation.[16]

In this same case (MPCC 2006-008), the MPCC also recognized that the legitimacy of such interventions by police supervisors, whether military or civilian, is subject to certain conditions: namely, the supervisor must be acting in good faith and not for an improper purpose (e.g. for his or her own self-interest, to improperly discriminate against, or show favouritism toward, a person or category of persons, etc.).

In some of the cases summarized below, it became readily apparent that bad faith or other improper motivation were not present, in others, this possibility could only be eliminated through an investigation.

In short, MP investigators need to be mindful of the authority of their MP supervisors to intervene in their cases in ways which would be improper if done by a non-MP, at the same time, interference complaints against MP supervisors cannot be dismissed out of hand as a category, but must be examined on a case-by-case basis.

CASE EXAMPLE #3

MPCC 2006-008 – Legitimacy of MP Superior Intervention in Exercise of Charging Discretion (Interference Not Found)

An MP had decided to lay a criminal charge of uttering threats against a person, after responding to a disturbance call on a CF base, but elected not to complete the paperwork until his next shift. During the time while he was off duty, the MP's

[16] See note 14.

supervisor explored the possibility of resolving the matter through a peace bond and sent an email to the investigating MP to inform him of the steps taken during his time off duty. The investigating MP perceived that his supervisor had unilaterally overruled his charging decision, and filed an interference complaint with the MPCC.

The MPCC found no evidence to indicate the supervisor was seeking to overrule the MP's decision to lay a charge, and found the interference allegation to be unsubstantiated. However, the MPCC took the opportunity to clarify the legitimacy of MP superior intervention in the exercise of police discretion. It found such intervention must:

- be informed of all the facts of the case and be reasonable in the circumstances;
- be made in good faith and for a proper purpose;
- not be based on improper considerations like personal malice, favouritism or prejudice; and
- avoid any appearance of a conflict of interest or bias on the part of the MP superior giving direction.

CASE EXAMPLE #4

MPCC-2009-033 – Legitimacy of MP Superior Intervention in Assignment of Investigator and Election to Lay Charges (Interference Not Found)

The CF Base Chief's spouse was involved in a minor motor vehicle collision on the base, where she was at fault. The Base Provost Marshal (Base PM) elected to transfer the file to a more junior MP from the MP who had initially made inquiries concerning the case, and allegedly directed that no charges would be laid. The MP initially tasked with the file brought a complaint of interference before the MPCC.

The MPCC found the Base PM had proper motives in transferring the file, as the complainant was due to leave on a five day course, and the Base PM believed the

minor file would present a useful learning exercise for the junior MP. The MPCC further found there was conflicting evidence over what the Base PM said concerning the laying of charges, and likely had expressed a personal assumption rather than a direction concerning charging. Although the MPCC found the complaint to be unsubstantiated, the possibility that the Base PM's actions were motivated by favouritism or conflict of interest did require examination.

CASE EXAMPLE #5

MPCC-2011-011/MPCC-2011-013/MPCC-2011-018/MPCC-2011-021 – Legitimacy of MP Superior Intervention in Various Investigations (Interference Not Found)

The complainant alleged that various members of his MP chain of command improperly interfered in four of his investigations (two on-base domestic violence incidents and two off-base impaired driving incidents). MP supervisors had challenged the judgment of the complainant in his conduct of the investigations, accusing him of violating the suspects' rights by exceeding MP territorial jurisdiction, and other irregularities.

In the two impaired driving cases, the cars involved were outside the CF base and the supervisors felt the complainant should have contacted local civilian law enforcement. There was also some concern regarding changes to the initial MP report, which sought to strengthen, after the fact, the complainant's legal grounds for stopping the vehicle, with reference to CF security regulations. With the two domestic assault cases, the supervisors' concerns were focused on issues related to the grounds for making an arrest.

The MPCC found that, absent bad faith or an improper purpose, MP supervisory intervention does not constitute interference. A standard of reasonableness rather than correctness is applicable to supervisory decisions. Even if the complainant was correct that his MP supervisors' understanding of applicable law and policies was flawed in some way, this would not be sufficient to constitute interference. The

complainant's MP supervisors were within their rights to provide good faith direction on the exercise of his policing authorities. The MPCC concluded the relevant MP superiors of the complainant were not acting in bad faith or for an improper purpose, and therefore concluded there was no interference in these cases.

CASE EXAMPLE #6

MPCC 2011-033 – MP Supervisor Allegedly Interfering with Filing of Charge (Interference Not Found)

This complaint involved questions over the appropriate disposition of a provincial offence notice issued by an MP complainant against a dump-truck driver for failing to cover his load. After the MP Patrol Section Commander was visited by the dump-truck company's foreman, the supervisor agreed to discuss the facts surrounding the offence notice with the complainant, and instructed the Court Liaison Officer to hold the offence notice in abeyance until she was able to verify the facts surrounding the alleged incident with the complainant.

The complainant advised his supervisor he wished to proceed with the charge; however, the Court Liaison Officer subsequently advised that the offence notice was missing from his office and had not been received by the provincial offences court administration. When the complainant sought to re-serve the offence notice, the truck driver told him the MP Patrol Section Commander had the ticket and the complainant need not worry about it. The complainant concluded that his section commander had pulled the ticket and made an interference complaint on that basis.

The MPCC's investigation revealed the complainant's assumption was erroneous and the ticket had in fact been filed with the court after all. Moreover, the MPCC determined that while the subject of the complaint had questioned the laying of the charge, she ultimately supported the complainant in the exercise of his discretion. The MPCC found the complaint to be the result of a lack of awareness on the part of the complainant of the scope of MP supervisory authority, as well as a breakdown in

the trust and communication between the complainant and the subject of the complaint.

CASE EXAMPLE #7

MPCC-2011-038 – MP Supervisor Intervention in Break-in Investigation (Interference Not Found)

The complainant alleged his supervisor had interfered in his investigation of a break and enter crime scene. The complainant was dispatched to an on-base residence after cleaning staff had detected a break-in had occurred. The complainant and his partner began to conduct their investigation. The complainant enlisted the assistance of the cleaners who had discovered the break-in to identify items in the residence which appeared to be missing or otherwise out of place.

When the subject of the complaint arrived on the scene to check on the investigators' progress, she noted the cleaners were still inside the residence. She questioned the complainant on this. A heated exchange took place between them as to the appropriateness of keeping the cleaners at the crime scene. The subject asked the cleaners to wait outside and ultimately directed the complainant to get their names and then send them away.

The complainant filed an interference complaint with the MPCC about the subject's actions in: 1) impeding his investigation by sending the cleaners away, thus curtailing his attempt to identify missing or out of place items; and 2) allegedly berating him in front of the civilian workers.

Following an investigation, the MPCC concluded the complaint was unsubstantiated. There was no evidence of bad faith or improper purpose on the part of the supervisor, and in fact, her views were more consistent with proper police practices regarding crime scene management.

With regard to the alleged berating of the complainant, the MPCC's investigation revealed that, while a fairly loud and heated exchange did occur between the subject

and the complainant – something which police professionals ought to avoid when within earshot of members of the public – there was some evidence both parties were fairly assertive in their positions. Moreover, in the MPCC's view, such behaviour is an issue of interpersonal conduct and not one of interference in an investigation.

CASE EXAMPLE #8

MPCC-2011-047 – MP Tasked with Investigation Involving his own MP Unit Chain of Command (Interference Not Found)

A vehicle being driven on base by a CF member which struck members of an MP unit on a training march, injuring three MPs, led to two MPs being assigned to investigate the incident. Those MPs found the driver was at fault and he was charged under the applicable traffic laws. However, they also found that no members of the march were wearing reflective safety vests and no members had been designated to act as pointers to alert approaching vehicles, contrary to base standing orders.

While the MPCC found the interference complaint was unsubstantiated, it did find the complainant's concerns were understandable, as he had been put in the awkward position of having to investigate a case which implicated his detachment leadership in a breach of base orders. The situation was aggravated by poor communication flow from the complainant's chain of command. The MPCC recommended that MPs have the discretion to open more than one investigation file. In this case, this would have allowed the local MP unit to deal with the driver's infractions while the CFNIS could have taken on the issue of the violation of the base orders.

Other Case Examples of Note

CASE EXAMPLE #9

MPCC-2000-11 – Authority of Commander to Search Administratively Notwithstanding Ongoing MP Investigation (Informally Resolved)

The complainant alleged that a superior officer interfered with the conduct of his investigation into the presence of narcotics in the room of a CF member. Evidence was discovered during a health inspection. Specifically, the MP alleged that the superior officer may have compromised the investigation by ordering members of his unit to search the room without a warrant, rather than wait for the MP to obtain a search warrant. The MPs had advised the commander that his proceeding administratively could compromise an ongoing investigation.

The case was ultimately resolved through a conciliation process and informal settlement between the parties, and thus the MPCC elected to make no finding on the substance of the complaint, but did offer a number of observations that would hopefully be of use to minimize the potential for future misunderstandings in similar situations. The MPCC observed generally that it is not in the best interests of unit commanders to intervene in a police investigation. The MPCC also noted that while a commander has great discretion over when to call upon the services of the MP, a commander is exercising good caution and judgment in making use of police services in doubtful situations.

CASE EXAMPLE #10

MPCC 2001-061 – Superior Officer Interferes with Traffic Investigation through Questioning Actions and Calling Investigating MPs Insubordinate (Interference Found)

During an MP traffic stop, a superior non-MP officer ordered the investigating MPs into his office in order to question them about their actions. He accused one MP of insubordination when he would not sufficiently explain his actions, and the other

MP who remained with the MP patrol vehicle needed to telephone his supervisor to report the incident.

The MPCC found that non-MP superiors do not have discretionary authority to intervene with MP members when they are conducting policing duties. If an MP member informs another member of the CF (or senior DND official) that he or she cannot obey an order because he or she is engaged in policing duties, this decision must be respected in light of the need for MP members to be able to operate independently and without undue influence from the chain of command. Outside of their policing duties, MP members are available to respond to the obligations imposed on them as soldiers within the CF.

CASE EXAMPLE #11

MPCC 2004-042 – Superior Officer Conducting his Own Investigation into Culpability of Soldiers, Despite Parallel CFNIS Investigation (Interference Found)

Three CF members were stopped at the Canada-U.S. border and found to be in possession of a small quantity of marijuana. The RCMP elected not to lay charges given the quantity and type of drug, and instead referred the matter to the MP. The CFNIS became involved in making additional inquiries into the members' involvement with drugs. At the same time, as the members were imminently due to be deployed on a foreign mission, their unit adjutant commenced a parallel administrative investigation in order to quickly determine which of them was responsible for the drugs, so the others could proceed on the deployment.

A CFNIS MP member filed a complaint to the MPCC after learning the adjutant had independently taken certain investigative steps, including contacting an outside law enforcement agency to obtain further information, while CFNIS inquiries were ongoing. The MPCC found that, generally, criminal/service offence investigations by MP should take precedence over administrative investigations, with the administrative investigation being held in abeyance until completion of the criminal

investigation. However, the MPCC also recognized that certain urgent, operational situations might require an alternate response.

The MPCC concluded that, generally, contact with outside law enforcement agencies should be left to the MP. In addition, in this case, the adjutant went so far as to declare two of the members "innocent" as a result of his investigation, which the MPCC found could have impeded the CFNIS in arriving at its own objective conclusions. As a result, the MPCC found that interference had occurred in this case.

CASE EXAMPLE #12

MPCC 2005-035 – Conflict Between CFNIS Directly Contacting MP Witnesses and MPs Requiring Contact Through Chain of Command (Interference Not Found)

A CFNIS investigator brought a complaint to the MPCC alleging interference in his investigation on the part of an MP sergeant. The CFNIS member was conducting an investigation in which he needed to interview members of the sergeant's unit. The investigator complained the sergeant had advised prospective witnesses not to agree to interviews on a day they were supposed to be off-duty – the sergeant objected to the CFNIS investigator trying to arrange the interviews directly with the witnesses, rather than through the unit chain of command. The MPCC found the actions by the subject of the complaint did not alter the course of the CFNIS investigation, nor did the subject attempt to influence the evidence of the witnesses or dissuade them from speaking to the CFNIS. He only contacted them in respect to the timing of their interviews. The MPCC found the allegations of inference to be unsubstantiated, and noted "cultural" differences between MPs who were strongly focused on the chain of command, and the CFNIS who were more inclined to work outside the chain of command in the conduct of their investigations. The MPCC concluded this did not amount to interference in the circumstances.

SOME CONCLUDING OBSERVATIONS

In the almost 12 years since the last Special Report on interference, the MPCC has gained some important experience in grappling with the concept of improper interference. Much of this experience has, of course, come through investigating and deciding interference complaints.

However, the MPCC also has had frequent opportunities to discuss the issue of interference during its regular outreach visits to the various military bases in Canada. These discussions have primarily taken place with MPs, but the MPCC also tries to meet and speak with representatives of the operational chain of command on each base. The MPCC also sometimes informally discusses specific situations of concern with MPs, either in person during a base visit, or by telephone. Some of these informal discussions result in actual interference complaints being submitted, which are then investigated and reported on by the MPCC and subsequently reflected in our growing body of "jurisprudence". In other cases, the MP decides against pursuing a complaint (and the MPCC is always open to these types of informal discussions with MPs, or other military or senior departmental personnel, regarding concerns about potential interference).

In this manner, the MPCC has gained some insights into aspects of interference which are not always reflected in our complaint reports. The MPCC thinks it would be useful to share some of these observations in this Special Report, particularly with the MP community.

The first observation is that the MPCC well appreciates the courage it takes to make an interference complaint. The MPCC appreciates that it is contrary to the military culture to bring internal problems directly to the attention of external bodies. While the MPCC has no desire to foster a culture of complaint within the CF, the importance of supporting MP investigative independence and, by extension, the rule of law and fairness within the military justice system is understood. As such, the MPCC takes every interference complaint very seriously.

Secondly, it is appropriate to acknowledge the progress which has been made in the area of MP investigative independence since Somalia. In addition to the institutional reforms discussed earlier in the report, the MPCC has noted a broad awareness, certainly among MPs, but also throughout the operational chain of command, of the issue of MP independence and the problem of interference.

This progress is especially notable when one compares the current situation regarding MP support of operations with that in place at the time of the Somalia deployment of 1992-93. In Somalia, there were a tiny number of MPs deployed and they were all under the full command of the battle group commander. By contrast, during Canada's twelve-year contribution to the International Security Assistance Force mission in Afghanistan, CF battle groups and joint task forces, in addition to those MPs assigned to them, have deployed with members of the CFNIS reporting directly to the MP Group chain of command in Ottawa, rather than to the commander in-theatre.

Despite this progress, the MPCC also appreciates the ongoing challenges faced by MPs as they seek to balance the operational needs of the broader CF with the imperatives of law enforcement and the rule of law. This is a balancing which must occur. While military police have special law enforcement duties and obligations, the military police exist to support military operations.

This does not mean, of course, that law enforcement imperatives should necessarily yield to operational priorities. In fact, this should be the exception, rather than the rule. It does mean, however, that military police must be sensitive to the legitimate needs and priorities of the operational chain of command. Sometimes, it will be appropriate to expect MPs to accommodate legitimate operational needs by doing policing differently than their civilian counterparts. A perfect example of this is the requirement of MPs to advise commanders when their personnel are under investigation. On other law enforcement issues, or in particular factual contexts, it may not be appropriate to deviate from general policing norms and practices.

Part of the legitimate adaptation of policing in the military context, is the need for MPs to be able to effectively communicate law enforcement and MP investigative independence requirements to the operational chain of command. While, as noted earlier, the issues of MP independence and interference are now widely known about in the CF, operational commanders generally will not have – and cannot be expected to have – the same expert knowledge as MPs as to what MP investigative independence requires in specific situations.

In our view, this ability to communicate with operational commanders on policing and MP independence issues includes knowing when to respectfully and appropriately challenge operational direction that may be inconsistent with law enforcement imperatives. An MP in this situation would of course, where circumstances permit, be well-advised to first consult with his or her superiors in the MP chain of command. In most situations, these informal recourses in the face of a questionable instruction to MPs should be attempted before consideration is given to filing an interference complaint.

After all, the true objective of the interference complaint mechanism should be to prevent interference before it can occur, rather than simply investigating it after the fact. In this worthy goal, the military police themselves have an important role to play.