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Canada

Royal Canadian Mounted Police
External Review Committee

ANNUAL REPORT 2003-2004

ERC RCMP
CEE GRC

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External Review Committee

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Royal Canadian Mounted Police
External Review Committee

Comité externe d'examen
de la Gendarmerie royale du Canada

Chair/Président

June 2004

The Honourable Anne McLellan, P.C., M.P.
Minister, Public Safety and Emergency Preparedness Canada
Sir Wilfrid Laurier Building
340 Laurier Avenue West
Ottawa, Ontario
K1A 0P8

Dear Minister:

In accordance with Section 30 of the *Royal Canadian Mounted Police Act*, I am pleased to submit to you the annual report of the RCMP External Review Committee for fiscal year 2003-2004, so that it may be tabled in the House of Commons and in the Senate.

Yours very truly,

Philippe Rabot,
Chair

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MESSAGE FROM THE CHAIR

The RCMP External Review Committee (the "Committee") is a small and vital independent agency within the federal government. It came into operation 16 years ago and has the mandate to independently and impartially review specific issues that arise in the course of grievance, disciplinary and discharge and demotion proceedings within the Royal Canadian Mounted Police.

The RCMP provides federal policing services and policing services under contract to eight provinces and all three territories as well as hundreds of municipalities and First Nations communities across Canada. The total complement of the Force as of January 1, 2004, is 22,239, which includes 2,585 civilian members, 15,653 regular members, and 4,001 public servants. The RCMP regular and civilian members are not unionized and do not negotiate their conditions of employment. Nonetheless, the Committee fulfills the role of providing an oversight mechanism with regard to labour relations issues so that RCMP members have access to redress mechanisms that are somewhat comparable to those available to unionized public servants.

The Committee is authorized to review certain categories of RCMP grievances, particularly those which pertain to the application of Treasury Board directives. It also hears appeals of decisions made by RCMP adjudication boards concerning alleged transgressions of the *Code of Conduct* by RCMP members. Many of these appeals pertain to cases where a member's continued employment with the Force is at stake. As well, the Committee can be called upon to hear appeals of RCMP discharge and demotion boards. These are cases where the competency or capacity of a member to perform assigned duties is called into question. The Committee's findings on each case referred to it are not binding. The Commissioner of the RCMP has the final word; however, if he disagrees with the Committee's recommendations, he is required by the *RCMP Act* to provide written reasons. The sufficiency of such reasons is one of the issues that may be addressed in an application to review the Commissioner's decision to the Federal Court of Canada. There have been two instances in recent years where the Court has referred to the quality of the reasons given as the basis for overturning the Commissioner's decision. On other occasions, the Court concluded that the reasons were sufficient and therefore declined to set aside the decision.

Since the time of my initial appointment to the Committee in 1998, it has been most apparent that a growing proportion of the caseload pertains to disciplinary and discharge matters. As well, grievances continue to be a significant element in the Committee's work. It has proven to be more of a challenge that I would have liked to complete the review of cases within a reasonable time frame. Nonetheless, I am determined to continue to make improvements in that regard.

The role of the Committee itself is evolving as well. The Committee's staff is increasingly being called upon to provide to Force management and its members training and guidance on such issues as the implementation of a new grievance process, information as to how specific issues have been addressed by the Committee and explanations of applicable legal principles regarding specific labour relations issues.

This Annual Report for the year 2003-2004 highlights some of the more significant issues that the Committee has recently addressed as well as Federal Court decisions handed down during the year on matters that were once before the Committee. It complements the extensive information that is available on our website at **www.erc-cee.gc.ca** and in our quarterly publication entitled "*Communiqué*" which is also available on our web site.

PART I – INTRODUCTION

The Committee is guided by two strategic objectives. Firstly, the Committee ensures that the review which it conducts of every grievance, disciplinary appeal and appeal of a decision from a discharge and demotion board is thorough, well-reasoned and susceptible of withstanding challenge upon judicial review. The second strategic objective is that the Committee aims to positively influence the manner in which labour relations issues are addressed within the RCMP. Fulfilling the first objective is the primary and more time-consuming commitment.

The *Communiqué* is the Committee's window on the world. It provides timely information about recent findings and recommendations from the Committee, recent decisions from the Commissioner on cases which were the subject of Committee findings and recommendations, recent court decisions that pertain to RCMP labour relation issues and articles written by the Committee's legal counsel on various topics that will be of interest to RCMP members and managers who require information regarding their rights and responsibilities insofar as concerns the management of employee-employer relations. The *Communiqué* is distributed free of charge to the RCMP detachments across Canada and is also posted on our web site.

PART II – THE COMMITTEE'S JURISDICTION

The Committee is a quasi-judicial tribunal established by the *RCMP Act*, whose members are appointed by the Governor in Council for a term not exceeding five years. At present, the Committee has only one member, Philippe Rabot, who is also its Chair and Chief Executive Officer. The Committee is a recommendation-making body only. Decisions on all matters referred to the Committee remain within the exclusive purview of the Commissioner of the RCMP. However, those decisions are themselves subject to review by the Federal Court of Canada.

Disciplinary appeals

Part IV of the *RCMP Act* indicates that RCMP members are subject to a *Code of Conduct* and will be held accountable for not adhering to it. Violations of the *Code* can be addressed through informal measures imposed by their immediate supervisor. In the case of more serious transgressions, the commanding officer of the division where the member is posted may refer the matter to an adjudication board (the "Board"), consisting of three officers of the RCMP, who will determine if the member has indeed violated the *Code of Conduct*. The commanding officer is required to describe the allegation(s) against the member in a Notice of Hearing that will contain sufficient detail to permit the member to adequately prepare a defence. The Board will initially conduct a hearing to determine if any allegation is established on a balance of probabilities. If an allegation is found to have been established, the Board will also conduct a hearing to determine what sanction is appropriate, bearing in mind all of the relevant circumstances, such as past disciplinary misconduct by the member or any other mitigating or aggravating factors.

The Board's decision can be appealed to the Commissioner of the RCMP. The majority of appeals to date have concerned cases where the Board ordered the member to resign from the Force. The member who was the subject of the proceedings can appeal both a finding that the *Code of Conduct* was violated and a decision with respect to the sanction imposed for that violation. The commanding officer can appeal a finding that the member did not violate the *Code of Conduct*. However, the commanding officer cannot lodge an appeal against a sanction imposed by the Board. Both parties must

make their appeal submissions in writing. The appeal is then referred to the Committee, unless the member requests that the matter proceed directly to the Commissioner (which has never happened to date). The Committee reviews the appeal submissions, the transcript of the Board's hearing and the exhibits that the parties filed with the Board. At its discretion, the Committee is also entitled to hold an oral hearing. However, it is rare that this prerogative will be exercised. Over the past decade, the Committee has only found it necessary to hold hearings in two cases. The Committee provides its findings and recommendation to the Commissioner in writing. It aims to complete the review of each disciplinary appeal within a period of six months.

Appeals of discharge and demotion boards

Part V of the *RCMP Act* sets out a process whereby RCMP members may be discharged or demoted for failing to perform their duties in a satisfactory manner after having been given *"reasonable assistance, guidance and supervision in an attempt to improve the performance of those duties"*. The process begins with the commanding officer serving the member with a Notice of Intention to discharge or demote that member, which includes an explanation of the grounds for taking such action. The member has the right to examine the supporting material and can thereafter request that a discharge and demotion board (the "Board"), consisting of three officers of the Force, be convened to review the matter.

Both parties may appeal the Board's decision to the Commissioner of the RCMP. They must make their appeal submissions in writing. The appeal is then referred to the Committee, which reviews the appeal submissions, the transcript of the Board's hearing and the exhibits that the parties filed with the Board. At its discretion, the Committee is also entitled to hold an oral hearing. The Committee provides its findings and recommendation to the Commissioner in writing. There have been only three appeals to date where the Committee has been called upon to review a decision of a discharge and demotion board.

Level II grievances

Part III of the *RCMP Act* provides members with the right to submit grievances against decisions made in the administration of the affairs of the Force which affect them directly. At the initial level, these grievances are reviewed by an RCMP officer who is designated as an adjudicator. The decision is based on written submissions alone and there is no hearing.

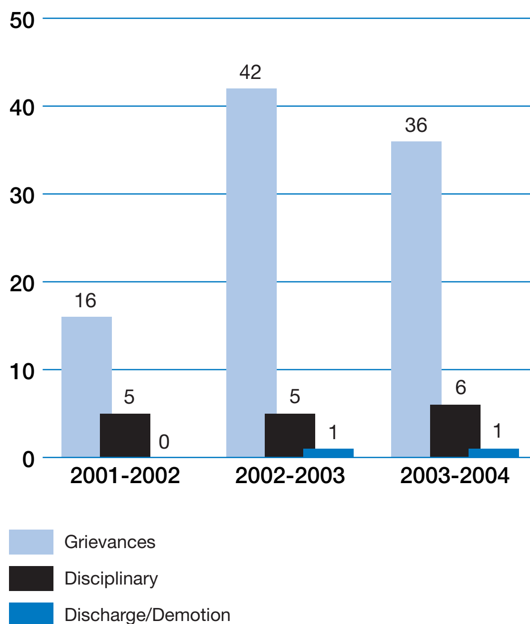
An RCMP member who is dissatisfied with a decision at the initial level also has the right to present the grievance at Level II. Specific categories of Level II grievances can be referred to the Committee prior to being adjudicated by the Commissioner of the RCMP. Section 36 of the *RCMP Regulations* sets out those categories. They consist of:
a) the Force's interpretation and application of government policies that apply to government departments and that have been made

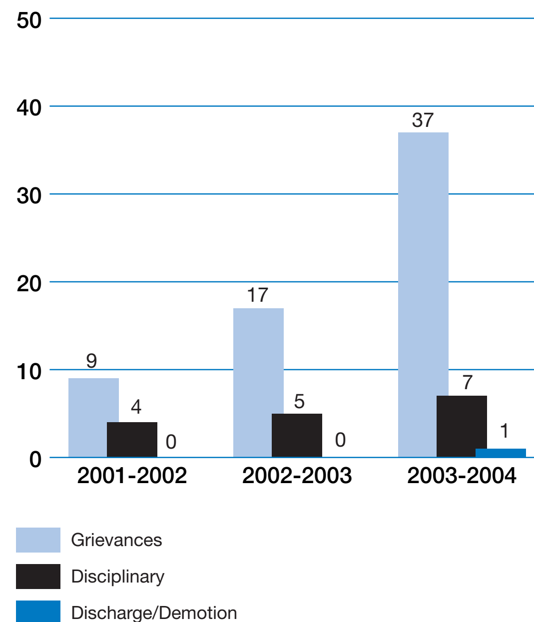
to apply to members; b) the stoppage of pay and allowances; c) the Force's interpretation and application of the *Isolated Posts Directive*; d) the Force's interpretation and application of the RCMP *Relocation Directive*; e) administrative discharge on the grounds of physical or mental disability, abandonment of post, or irregular appointment.

The Committee reviews the material in the grievance record but also has the prerogative to hold a hearing. However, there has not been a single hearing for a grievance in more than a decade. The Committee provides its findings and recommendation to the Commissioner in writing. It aims to complete the review of each grievance within a period of three months. In many cases, however, important information may be missing from the grievance record and delays are encountered as a result.

PART III – THE PAST YEAR IN REVIEW

The number of cases referred to the Committee has remained relatively constant over the past two years. However, what is significant to note is that six appeals of disciplinary decisions were referred to the Committee during 2003-2004 and that, during the same period, the Committee issued seven decisions on disciplinary appeals. Previously, the Committee received an average of three to four disciplinary appeals each year. As well, for the first time in eight years, the Committee issued findings and recommendations on an appeal of a decision from an RCMP discharge and demotion board and received a second appeal against another decision of a discharge and demotion board. A total of 43 cases were referred to the Committee during the year and it issued findings and recommendations in 45 cases, including several outstanding cases from previous years. At year end, 40 active cases remained before the Committee, including 35 grievances.





The Committee continues to strive to meet its objective of completing the review of grievances within an average of three months and that of disciplinary and discharge and demotion appeals within six months. Regrettably, it has taken an average of eight months during the past year to review each case. Part of the explanation for the delay lies in the fact that one particular disciplinary appeal involving the defence of whistle blowing required extensive analysis by the Committee. This voluminous file is the single most important explanation for the backlog that accumulated but which is now being addressed. The next year is expected to yield far more encouraging results.

The Committee is an active participant in the Government of Canada's Modern Comptrollership Initiative. During the year, it developed an action plan which will serve to enhance management practices and better define priorities. Implementation is scheduled to proceed throughout the next two years.

Of the seven appeals on disciplinary matters that were the subject of findings and recommendations by the Committee during 2003-2004, the most noteworthy included one case where the defence of whistle blowing was accepted by the Committee, one case that raises a significant issue regarding the time frame during which a commanding officer is entitled to initiate disciplinary proceedings, one case where the Committee recommended overturning an adjudication board's decision that had exonerated a member of an allegation of excessive use of force on a prisoner and two cases that concern appeals by a commanding officer against decisions that rejected agreements reached by the parties. Other cases of particular interest include an appeal of a decision of a discharge board, two cases of harassment grievances, seven grievances regarding meal allowance entitlements, a grievance regarding the provisions of legal fees at public expense, and three cases dealing with stoppage of pay.

D-081: When is an unauthorized disclosure of a matter of legitimate public concern considered to be a lawful form of expression even if it violates a RCMP member's oath of secrecy?

An RCMP member became the subject of disciplinary proceedings for having granted numerous media interviews, over a ten-month period, in which he denounced the Force's handling of an investigation into corruption in the immigration application process at the Commission for Canada in Hong Kong (the "Mission") during the late 1980s and early 1990s. He also provided several journalists with copies of documents from the investigation file, including a report by a security analyst from the *Department of Foreign Affairs and International Trade* (DFAIT). The analyst had concluded in 1992 that the application process was open to widespread abuse because the Mission had failed to take the appropriate safeguards to prevent immigration fraud by corrupt employees. The Force had initially been called upon to investigate activities at the Mission in 1991-92 as the result of receiving a complaint from two Hong Kong residents. They indicated that they had received an offer to expedite the processing of their visa application from two women who identified themselves as employees of the Mission if they were prepared to make a payment of $10,000 through the intermediary of a local immigration consultant. They declined the offer and complained about it in writing to the Mission but received no response and

therefore decided to subsequently complain to the RCMP. Reports of other unusual occurrences surfaced, which led to an RCMP investigator travelling to Hong Kong to interview selected employees. Two locally engaged staff (LES) who were suspected of involvement in immigration fraud were not interviewed and a determination was made that there was insufficient evidence to implicate them in any wrongdoing because there were no signs of untold wealth on their part. Information was received from the Mission's immigration control officer that organized crime groups may have infiltrated the Mission's computer system and that fake immigration visa stamps had been found in the desk of a former employee. The investigation was concluded due to lack of evidence. A new investigation was initiated in 1993 to consider evidence that Canada-based officers (CBOs) had accepted expensive gifts and money from a family of Hong Kong industrialists, who made efforts to ingratiate itself to staff of the Mission's immigration section. The Force declined a request to send two investigators to Hong Kong to interview witnesses and the investigation was concluded in April 1994 due to lack of evidence. A third investigation was initiated in May 1995 as the result of a complaint from the immigration control officer that reiterated some of the issues raised in the first and second investigations. In September 1996, the member was tasked with reviewing the allegations and recommending a course of action to be pursued for the investigation. The member took numerous statements from the complainant and submitted periodic investigation reports in which he indicated that he was convinced that Mission staff had been corrupted and that immigration fraud had been widespread. Concerns began to arise about the member's lack of objectivity after he shared the 1992 security analysis with the complainant, met with the security analyst and asked him to redraft his report so that it would be less dense with jargon, and told one former CBO that he interviewed that he was convinced that criminal charges would be laid as a result of the investigation. Accordingly, in March 1997, he was instructed to cease interviewing witnesses and a decision was made to assign the investigation to another member. The new investigator eventually conducted interviews with many of the former CBOs who had been at the Mission in 1991-92 but concluded that there was no evidence of criminal wrongdoing. In the meantime, the member wrote to his commanding officer to complain that he had obstructed his investigation. After his complaint was dismissed, the Appellant submitted it to the *Commission for Public Complaints against the RCMP* (CPC). This led to an investigation by the Internal Affairs Branch of the RCMP which concluded that the complaint was without merit. The CPC itself informed the member in January 1999 that it had concluded that it did not have jurisdiction to address the complaint. The member then contacted the *Office of the Auditor General* which agreed to initiate an investigation. Within the next several months, the member was approached on several occasions by the investigator and his manager who indicated that they were seeking information about missing documents from the investigation. The member began to sense that the Force was attempting to build a case for disciplinary action to be taken against him. It was then that he decided to contact several journalists and reveal his concerns about the investigation.

The RCMP adjudication board (the "Board") that conducted a hearing into the allegations of misconduct against the member concluded that his actions were disgraceful because they violated the oath of secrecy that he had taken upon joining the Force. It also found that he had provided false information to the media, in that there was *"not a shred of evidence of cover-up, wrongdoing or of illegal conduct that required public scrutiny"*. The fact that he had disclosed confidential information concerning an ongoing criminal investigation, including the names of suspects in that investigation, was described by the Board as potentially having compromised the investigation and damaged the reputation of the persons named as suspects, which included Canadian diplomats occupying high ranking positions. The Board rejected the member's contention that he had acted out of concern for the public interest, finding instead that he had been merely attempting to prevent the Force from investigating his own conduct regarding the missing documents. Addressing the implications of the *Charter of Rights and Freedoms'* protection of the right to free speech, the Board stated that because that guarantee was subject to *"such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"* (s. 1), the Force was still entitled to discipline members for violating their oath of secrecy and that the only circumstances where it might be otherwise was for the purpose of denouncing *"serious illegal acts or policies that put at risk the life, health or safety of the public"*. As a result, the Board ordered the member to resign from the Force, failing which he would be dismissed. It found that the member had *"a character flaw which impairs his usefulness as a peace officer and member of the RCMP"*. The appeal against the decision pertained to both the finding that the member's conduct was disgraceful and to the sanction that was imposed.

The Committee recognized that an RCMP member's intentional violation of the oath of secrecy is, *prima facie*, disgraceful conduct that could bring discredit upon the Force. Therefore, it is something for which it is appropriate that the member be disciplined, unless the member acted to disclose a matter of legitimate public concern requiring a public debate. The fact that the member honestly believed that the Force had engaged in serious wrongdoing is not a particularly relevant consideration. He had the onus of presenting evidence before the Board which would establish that there was at least a reasonable basis to his assertions. While there was no evidence of a cover-up on the part of the Force, there were important shortcomings in the investigative process followed by the Force since 1991, with the result that it remained possible that employees of the Mission were able to engage in immigration fraud on a widespread basis and that such activities have remained undetected to date. The record disclosed a series of suspicious and disconcerting events that the Force failed to investigate in a timely and thorough manner. The RCMP oath of secrecy could undoubtedly be considered a reasonable limit to an RCMP member's right of free speech if it was enforced in a manner that is designed to protect legitimate interests but it could not serve to prevent public scrutiny of wrongdoing on the part of the Force. The Force had consistently demonstrated a reluctance to investigate the activities of LES at the Mission. The last investigation did not succeed in making up for the shortcomings in previous investigations. It constituted an exhaustive review of the interaction between CBOs and the Hong Kong residents and did reveal that the extent to which gifts, money and other benefits had traded hands was far more

widespread than the Force had previously been led to believe. However, there were several important issues that had first surfaced during the initial investigation which were not subsequently investigated in a meaningful fashion, such as the activities of LES. Although it was clear that the member was prompted to turn to the media in response to his impression that his handling of missing documents was being investigated, his primary motivation was to ensure that the Force conducted a thorough investigation into activities at the Mission. His disclosure was a matter of legitimate public concern because it exposed the fact that the Force had, for seven years, failed to take appropriate action to determine if employees of the Mission had engaged in immigration fraud.

The Commissioner declined to hear the appeal himself out of concern that a perception of bias might arise given that in his previous role as Deputy Commissioner, he had some involvement in the administrative review of RCMP investigations into activities at the Mission. Accordingly, the appeal was decided by an Assistant Commissioner who was acting Commissioner at the time. He dismissed the appeal. His decision has become the subject of an application for judicial review to the Federal Court of Canada which is expected to be heard in 2005.

This case is significant for several reasons. Not only does it represent the first time that the Committee has accepted the defence of whistle blowing, it has defined the circumstances where whistle blowing is appropriate as including matters of legitimate public concern, whether or not they involve an immediate risk to health or safety. Furthermore, the Commissioner's decision to recuse himself from hearing the appeal raises interesting legal issues. To begin with, the authority to hear appeals is one that the *RCMP Act* has reserved exclusively for the Commissioner and he is precluded from delegating that authority. The Commissioner has relied on the fact that s. 15 of the *RCMP Act* provides for another senior officer to act in his stead when he is *"unable to act"*. It is debatable whether the reliance placed on these three words constitutes a correct legal interpretation. There may well be other cases in the future where the Commissioner's involvement in one aspect of the matter under appeal may give rise to a request by one of the parties that he recuse himself. It is also not hard to predict that situations may arise where other senior officers who may be called upon to act in the Commissioner's stead would also be perceived as biased.

D-082: Calculating the one-year period to initiate disciplinary action when the commanding officer was temporarily replaced by another officer who had earlier knowledge of the allegations

The City of Montreal police learned that an RCMP member was the manager of a bar/restaurant that was frequented by criminal motor cycle gangs and that he had assisted a patron in purchasing illegal drugs at that location. These events occurred in February and March 1999 and were immediately reported to the RCMP. The Officer in charge, Criminal Operations (the "CROPS officer") was informed of the allegations but did not discuss them with the commanding officer of the division. He later went on to serve as acting commanding officer on several occasions between May and September 1999 for several days at a time while the commanding officer was away

on business or vacation. The commanding officer himself was not informed of the allegations until November 1999. He initiated formal disciplinary proceedings against the Appellant in October 2000. However, at the hearing before an RCMP adjudication board (the" Board"), the Board's jurisdiction was challenged by the member on the grounds that the proceedings had not been initiated within the time permitted by s. 43(8) of the *RCMP Act*, which is *"one year from the time the [alleged] contravention [*of the *Code of Conduct] ... became known to the appropriate officer"*. The basis for that argument was that the CROPS officer had been aware of the allegations when acting as commanding officer in May 1999. Therefore, that is the date upon which the appropriate officer (*i.e. the commanding officer*) should be considered to have become aware of the allegation, some 17 months before disciplinary proceedings were initiated. The Board did not accept that argument. It stated that the information provided to the CROPS officer in March 1999 would only have been relevant to consider if he had been acting commanding officer at the time and that it had been by reason of that function that the information was shared with him. The Board's finding that it had jurisdiction to hear the matter was the only ground of appeal raised by the member.

The Committee recommended that the appeal be dismissed because there was no indication that the CROPS officer or any one else for that matter had shared information with the commanding officer prior to November 1999 about the matter that would eventually lead to disciplinary proceedings. The Committee rejected the notion that the information previously known to the CROPS officer ought to be considered to have been imparted to the commanding officer when the CROPS officer was called upon to temporarily replace him in May 1999. The Committee emphasized that it would have viewed matters differently if the commanding officer's position had become vacant when the CROPS officer acted in the position. However, it concluded that the position advocated by the member did not reflect the intent of the *RCMP Act*. The Commissioner also concluded that the appeal should be dismissed and his decision became the subject of an application for judicial review to the Federal Court of Canada.

This case is significant because there may be many instances where information that an RCMP member is alleged to have violated the *Code of Conduct* is known to superior officers within the divisions but, for a variety of reasons, has not been communicated to the commanding officer. Those same senior officers will routinely be called upon to act in the commanding officer's stead when the commanding officer is on vacation or must travel outside the division on Force business. As well, on occasion, promotions within the organization will result in a senior officer of the division acceding to the position of commanding officer. Previous cases have emphasized that information about alleged misconduct that was known to a commanding officer shall be considered knowledge imparted to the commanding officer's successor, so that the one-year time frame to initiate disciplinary proceedings does not start anew simply because there is a change in command. Many disciplinary proceedings are not initiated until the very end of the one-year period as commanding officers prefer to await the results of an internal

investigation into the matter before taking action. Over the past few years, there has been a significant increase in challenges to an adjudication board's jurisdiction on the grounds that the statutory time frame was not complied with. In at least three instances, the Committee recognized that the evidence failed to establish that proceedings were initiated within the time permitted and the Commissioner agreed with the Committee's conclusion.

D-084: Force used to subdue an obstreperous and intoxicated prisoner whose behaviour was perceived as threatening

A disciplinary hearing was initiated against an RCMP member for having hit a prisoner in the head six times while he was attempting to search him. The member's defence before the RCMP adjudication board that heard the matter (the "Board") was that he had been concerned that the prisoner, who was intoxicated, was on the verge of becoming violent. He had therefore taken what he considered to be necessary measures to subdue him. This included pushing the prisoner into a small room, attempting unsuccessfully to search him, kicking him in the knee and finally striking him four times in the head with a closed fist and twice with an elbow. A videotape of the incident was presented to the Board. In it, the member is heard to utter *"I don't think that you quite understand"* as he is striking the prisoner. Two witnesses who were recognized as experts in police use of force and control tactics testified that, in their opinion, the member's actions were appropriate given the fact that he perceived the prisoner's behaviour as threatening. They both stated that it was apparent from the videotape that the prisoner had displayed threat cues suggesting imminent resort to violence. That position was endorsed by two of the three Board members who therefore concluded that the member's use of force did not amount to disgraceful conduct. While they stated that they recognized that there might be circumstances in which an application of force that is consistent with policing models might still amount to disgraceful conduct, they emphasized that *"the public interest must be balanced against the right of a member not to be held liable for performing duties in a manner consistent with proper police procedures"*. In a dissenting opinion, the Board's Chair indicated that while he agreed that the member's use of force fell within the parameters of policing models, his conduct was disgraceful nonetheless because *"members of the public expect more from police officers in terms of their ability to deal with the attitudes of intoxicated persons who may not be thinking clearly and may have difficulty following directions."* He criticized the member for failing to provide the prisoner with clear verbal instructions and engaging in provocative behaviour prior to striking him. The majority decision was appealed by the commanding officer.

In its report on the appeal, the Committee agreed with the analysis of the issues that had been conducted by the Board's Chair. The Committee commented that the member's actions in the moments preceding the altercation had contributed to an escalation of tension, citing as examples several threats that the member had made to the prisoner who had not himself been engaging in threatening behaviour at that point but had merely been argumentative. The Committee stated that when considering if certain conduct is disgraceful, an adjudication board must consider the matter from the perspective

of a neutral observer. This meant that a Board had to go beyond the question of whether a member's actions had fallen within the parameters of use of force models. Factors that a neutral observer would likely have considered included the member's motivation for using force, whether frustration contributed to his actions and the efforts made by the member to communicate with the prisoner. The difficulty that the Committee found with the opinions expressed by the two expert witnesses is that these opinions were based largely on the member's perception of a threat, with little consideration being given to the issue of whether that perception was reasonable and whether the member himself was responsible for the prisoner becoming aggressive. As a result, the Committee recommended that the appeal of the Board's findings on the allegations of misconduct be allowed and that the Board be directed to conduct a new hearing into the allegation. The appeal was still before the Commissioner at year-end.

Aside from the fact that this case represents a rare example of an adjudication board being divided on the outcome and the appeal coming from the commanding officer, rather than the member, the case also raises significant issues about use of force by RCMP members and the test that they will be expected to meet in order to avoid being disciplined. The Committee recognized the important principle that even if an RCMP member may be found to have been wrong in assessing a perceived threat and determining how to respond to it, this would not necessarily entail disciplinary action, in that a member's use of force *"ought not be 'measured to a nicety'"*. When excessive use of force is the basis for an allegation of disgraceful conduct, use of force models implemented by the policing community will be relevant to consider but other considerations will also have to be taken into account if the public is to have the assurance that RCMP members will always endeavor to use appropriate measures when interacting with citizens who have been detained.

D-085 & D-086: The authority of an adjudication board to reject a member's admission to an allegation

Two other appeals from a commanding officer raised important issues about how adjudication boards act when they have misgivings about a finding that an allegation of misconduct has been established strictly on the strength of the member admitting the allegation. In D-085, the commanding officer had withdrawn the original ten allegations, all of which pertained to acts of domestic violence, and "blended" them into a single allegation. This covered an incident in which the member had swiped items off of a bedroom dresser, including a televison remote control that flew in the direction of his spouse, hitting her on the face and causing a slight bruise. The member told the Board that he acknowledged these facts to be correct but maintained that he had not intended for the television remote control to hit his spouse in the face. The Board found that the accidental nature of the member's actions meant that his conduct could not be considered disgraceful. In D-086, four of the original six allegations were withdrawn. The two remaining allegations concerned the member's attendance at a party during the time that he was supposed to be either on duty or on standby. While the member

admitted that he had been absent from duty without permission, the Board found that the allegations had not been established because the location of the party was within the member's patrol area and he was available for duty during the entire time.

The Committee recommended that both appeals be allowed. The commanding officer should have been put on notice by the Board that it was not prepared to rely solely on the member's admission and then given an opportunity to either introduce evidence in support of the allegation or enter into an agreed statement of facts with the member that would have addressed whatever concerns the Board may have had. This was seen as a matter of basic fairness. It is not reasonable to expect the parties to prepare for a full evidentiary hearing regarding an allegation which they both acknowledge to be valid. The Committee observed that the *Commissioner's Standing Orders (Practice and Procedure)*, SOR/88-367 contemplate the possibility of an adjudication board rejecting a member's admission but this is to be done *"during the proceedings"* and not at the time of issuing its findings. The Committee also voiced concern about the Board allowing the commanding officer in D-085, to blend the ten allegations into a single one, since the only amendments to an allegation which are permitted by the *RCMP Act* are those whose purpose is to correct *"a technical defect"* that *"does not affect the substance of the notice".* As well, the Board may have erred in stating that the member's conduct could not be disgraceful because it was accidental. Conduct that is reckless can be considered disgraceful, whether or not it is accidental. Both appeals were still before the Commissioner at year-end.

In previous years, the Committee had addressed the requirement for an adjudication board to place the parties on notice and adjourn the proceedings whenever it is unwilling to accept a joint submission on sanction, either because it considers the agreed upon sanction to be harsh or too lenient. The same principle has now been stated to be applicable in the case where an adjudication board is concerned about an agreement concerning the validity of an allegation. The Committee recognizes that it is important to encourage parties to disciplinary proceedings to settle issues whenever possible. It appreciates that an agreement by a member to admit to an allegation may in some instances be tied to an agreement by the commanding officer to ask for a more lenient sanction than might otherwise have been the case. There is an inherent risk that members facing disciplinary proceedings may be less inclined to admit to allegations in the future if they have to be concerned that their admission may not be sufficient to satisfy the Board that the allegation is established. The commanding officer will then be given an opportunity to introduce evidence which neither party had contemplated would be placed before the Board. However, it is not fair to expect that adjudication boards will blindly sign off on agreements that are placed before them. Accordingly, the onus rests with the parties to ensure that for every allegation admitted to by the member, there exists an agreed statement of facts that contains sufficient details to satisfy the Board that the facts truly do demonstrate that the allegation is established.

R-003: Discharge of a member with a history of performance shortcomings which had followed on the heels of a personal tragedy

The member had joined the Force in 1992 and remained posted at the same location for the next seven years. An initial performance appraisal in 1993 indicated that he was having difficulty adjusting to the workload but his supervisor's overall impression of him was favourable. At that time, the member's spouse was suffering from chronic depression and was often prone to bouts of violence. She committed suicide in January 1994. For compassionate reasons, the member was assigned to lighter duties until July 1995. Following his return to regular duties, his performance was assessed in February 1996. It was noted that he was continuing to experience difficulty in setting priorities. He acquired a new supervisor later that year and, as a result, his work was more closely monitored. The new supervisor completed a performance appraisal in April 1997 which stated that the member was not meeting expectations and would have to make major improvements, particularly with respect to time management and conducting criminal investigations. Extensive direction was provided to him over the course of the next two years but the supervisor remained dissatisfied with his performance. As a result, in January 1999, the member received a *"Notice of Shortcomings"* which provided him with some specific instructions on improvements that he would have to make. Apparently, he failed to do so. As a result, he was removed from duty and discharge proceedings were initiated.

At the hearing before the discharge board (the "Board"), the member introduced expert evidence from two psychologists who attributed his performance shortcomings to a mild depression, from which he had been suffering since the time of his spouse's death. They maintained that treatment could enable him to once again meet performance expectations but indicated that he should also be transferred to another detachment. Other witnesses in support of the member testified that he had been profoundly affected by his spouse's death and that the Force had not given him sufficient aid to cope with this incident. It was also alleged that the member's workload was greater than that of other members. The Board concluded that the member's supervisor had made a sincere and ongoing effort to assist him in improving his performance. While acknowledging the diagnosis of depression, the Board determined that this illness was not a major factor in explaining why the member's performance had continued to be unsatisfactory. It stated that a transfer was not a viable option because the nature of the member's shortcomings was such that he would not be able to meet performance expectations at other detachments either.

The Committee recommended that the appeal be dismissed. The Board did not appear to have made any factual or legal errors in its analysis. Furthermore, the evidence established that the member supervisor acted in good faith in providing him with extensive direction, although he was often openly critical of him. The Committee also found that it was not unreasonable for the Board to conclude that treating the member's depression would not likely enable him to overcome his performance shortcomings, which appeared principally attributable to a lack of basic skills to do the job. The Committee acknowledged that there may

be instances where the Force should consider placing a member in a different work environment and under a different supervisor if it had reason to believe that either the environment or the relationship with the supervisor are significant factors that account for the member's poor performance. That did not seem to be the case in this particular instance. The appeal was still before the Commissioner at year-end.

G-293 & G-294: Unfounded findings of harassment against a civilian member

Two harassment complaints were filed against a civilian member of the Force by two employees who reported to her. The same investigator conducted the investigations into both complaints. He concluded that these complaints were founded. The commanding officer supported this conclusion and therefore imposed informal disciplinary measures on the member. These disciplinary measures were however revoked as a result of an appeal by the member. The adjudicator who heard that appeal stated that the investigation had not been properly conducted. The member also grieved the finding that she had harassed the two employees but the Level I adjudicator determined that the decision on the appeal had remedied whatever wrong may have been caused.

The Committee disagreed with that conclusion because the earlier appeal decision setting aside the disciplinary action had not also set aside the determination that the member had harassed her subordinates. The Committee concluded that, as it was apparent that there were shortcomings to the harassment investigation, the decision that the member had harassed her subordinates should be set aside. The Commissioner agreed with the Committee's recommendation that the grievance should be allowed.

This case serves to highlight the fact that a finding that a member engaged in harassing behaviour can be aggrieved by the member whether or not it leads to disciplinary measures. It also serves to illustrate that it is important that harassment investigations conducted by the Force be fair to all parties concerned and that the quality of an investigation be subject to review through the grievance process. It is noted as well that this process can be initiated not only by the complainant but also by the member who was the subject of that complaint.

G-303 to G-310: Different entitlements for members assigned to the Summit of the Americas in Quebec City, April 2001

Eight members of the RCMP who were temporarily assigned to Quebec City for periods of several months leading up to the Summit of the Americas in April 2001 challenged the Force's refusal to provide them with a daily meal allowance for this period. Before their assignments, the members were posted to detachments outside of Quebec City but located within commuting distance. For the duration of their assignments, their workplace was formally changed by the RCMP and it became Quebec City. They had all become aware at a meeting in January 2001 that they would not be receiving a meal allowance given that they were not considered to be on travel status whereas other members who were posted further away from Quebec City were to receive a meal allowance during their assignment to the Summit of the Americas. They decided to wait until after the Summit of the Americas before submitting

requests for payments of a meal allowance. When those requests were refused, they grieved. The Level I Adjudicator concluded that they had missed the deadline for filing a grievance, given that they had been aware since January 2001 that they would not be receiving a meal allowance and given that the *RCMP Act* only allows a grievance to be submitted within 30 days of the date that the aggrieved member learned of the impugned decision. At Level II, the members explained that the reason they decided to postpone taking any action with respect to this matter until after the Summit had ended was that they wanted to avoid creating any dissension during this important event.

The Committee was unable to find that the members had a sufficiently valid reason for waiting as long as they did to grieve a decision which they had known about for many months. The mere fact of putting in a claim for a meal allowance did not have the effect of creating a new grievance right once a response was received to that claim as the members already knew what that response was going to be. The deadline established by the *RCMP Act* would become meaningless if it were to be otherwise. Although the Committee accepted that the members were being sincere in maintaining that their delay in addressing the matter was designed not to ruffle feathers at what was a delicate time for the RCMP, this reason cannot impact on the determination of whether they met a deadline established by statute, nor does it represent an example of exceptional circumstances where the RCMP Commissioner would have been justified in extending the deadline, as he is permitted to do under the *RCMP Act*. In any event, the Committee was also of the view that the decision not to pay a meal allowance to these members was correct. The Force did not act unreasonably in changing their worksite for the duration of their assignment to the Summit of the Americas, given that they all lived within commuting distance. As a result of that decision, the members could not be considered to have been on travel status as defined by the applicable Treasury Board *Travel Directive*, and therefore were not entitled to a meal allowance. It was not discriminatory for the Force to treat other members differently given that they had to stay at a hotel while on assignment to the Summit of Americas. At year-end, the Commissioner had not yet adjudicated the Level II grievances.

These grievances represent but one of many examples in which the Committee has had to address the issue of whether the grievance was submitted within the time permitted by the *RCMP Act*. RCMP members are often unaware that time is of the essence or they appear to be under the impression that it is not until they actually submit a claim for compensation that they may be considered aggrieved by a decision which had been communicated to them beforehand. As well, the Committee is frequently called upon to address instances where RCMP members faced with the same circumstances appear to have been treated differently when it comes to establishing their travel, meal or relocation entitlements.

G-313: An RCMP member seeks legal representation at public expense to defend himself against criminal charges arising from a duty-related occurrence: Did he meet reasonable expectations of the Force?

An RCMP member grieved the Force's decision to deny his request for legal representation at public expense so that he could defend himself against a criminal accusation of dangerous driving. The circumstances that gave rise to that accusation were that the member had taken three 12-year old students from an elementary school as passengers while he went out on highway patrol duties. On at least one occasion during the time that the member had the students in his vehicle, he travelled at a speed of up to 200 Km/h as he pursued speeding vehicles. That information was subsequently relayed by the students to their parents who laid the complaint that led to the member being charged. The member maintained that he had simply been carrying out his duties as he had been instructed to do by his superiors when he decided to pursue speeding vehicles with the objective of ticketing their drivers. He maintained that he had not placed the safety of the students at risk because there were no other vehicles on the road, he was on a straight stretch of road, there was no weaving in and out and he did not travel at excessive speeds for more than a few seconds at a time. The grievance was denied at Level I.

The Committee noted that in disciplinary proceedings arising out of the same matter, the member had admitted that his conduct was disgraceful. It therefore seemed paradoxical that he would continue to maintain in the grievance proceeding that he had done nothing wrong. In any event, it could not be considered that the member was entitled to legal representation at public expense for his criminal trial because one of the conditions stipulated by the applicable Treasury Board directive was that the member had to have met *"reasonable expectations"* of the Force when he carried out his duties. It was unreasonable for the member to travel as fast as he did knowing that there were children in his vehicle. He was not as sensitive as he ought to have been to the impressions that his actions might convey to others and, in particular, to the parents of the children. That factor was seen by the Committee as more important than the fact that the member had been instructed to continue performing his duties as he would normally. At year-end, the Commissioner had not yet issued his decision on the Level II grievance.

The issue of whether RCMP members are entitled to legal representation at public expense has frequently come before the Committee in recent years and it is the specific question of whether members were meeting reasonable expectations of the Force which has proven particularly difficult to address. It is recognized by the Committee that RCMP members may yet meet reasonable expectations even if they exercised questionable judgment in handling a particular situation. However, it is also clear from the Treasury Board directive that it is not sufficient for members to establish that they were on duty at the time of the incident that led to criminal or civil proceedings being initiated against them. In each instance, an evaluation must be made of the manner in which they conducted themselves in order to determine whether it appears to have been reasonable based on the circumstances.

G-318 to G-320: Stoppage of Pay and Allowances for suspended members: The absence of clear and lawful criteria

Three grievances came before the Committee during the year pertaining to decisions to stop the pay and allowances of members who had been suspended from duty. There had been relatively few prior instances where grievances from this category had been referred to the Committee. In the most recent grievances, the Committee addressed the question of Treasury Board's failure to spell out by regulation the criteria that must be applied to determine when it is appropriate to stop the pay and allowances of a suspended member. It also considered whether the conduct of the member fell into the category of *"extreme circumstances"* which the Force's policy identifies as a requirement to stop a member's pay and allowances, and whether the decision to stop pay and allowances was made in a timely fashion. The Committee recommended that all three grievances be allowed. At year-end, the grievances were awaiting a decision from the Commissioner.

The Committee's concern was that the Treasury Board's regulation merely indicates who within the Force is authorized to make a decision with respect to stoppage of pay and allowances. This was considered not to fully satisfy the requirement under the *RCMP Act* that the Treasury Board establish regulations regarding stoppage of pay and allowances. The Committee was critical of the fact that the RCMP was allowed to develop its own internal policy governing the matter without such appearing in a regulation. This was regarded as an illegal sub-delegation of delegated authority.

The Committee also called into question whether the facts in each of the three cases represented examples of *"extreme circumstances when it would be inappropriate to pay a member"* which is the primary consideration indicated by Force policy. The policy also states that stoppage of pay and allowances will not apply to summary convictions, provincial statutes or minor Criminal Code offences which led the Committee to conclude that stoppage of pay and allowances would not be appropriate where the member has not been charged with a criminal offence. At year-end, the Commissioner had not adjudicated the Level II grievances.

G-318 concerns a member who had been observed having sexual intercourse with his spouse in a vehicle parked in a public area in 1993. He was neither charged, nor disciplined as a result of those incidents. Two years later, he was reprimanded for having had sexual intercourse with his spouse in a vehicle that was stopped at a red light. At about that time the member started to see a psychologist to deal with a sexual disorder and the course of treatment continued over several years. In 1999, the member was alleged to have engaged in an indecent act in a public place, an allegation that he flatly denied. In May 2001, he was once again the subject of a complaint regarding an indecent act. In this case, he was charged with willfully committing an indecent act in a public place in the presence of other persons, an offence punishable on summary conviction. He shared this information with his commanding officer and consequently, was subject to a investigation for a breach of the RCMP's *Code of Conduct*. The member was suspended from duty with pay pending the outcome of the investigation and three weeks later

the commanding officer recommended that his pay and allowances be stopped. The recommendation was accepted on the grounds that the member *"committed an act that is unacceptable in our society and is against the law."* It was also noted that *"the accumulation of several incidents of a similar nature [was] a contributing factor in making a determination in this matter."* In his grievance presentation, the member commented that he had been diagnosed as suffering from a sexual disorder for which he was continuing to receive treatment from a psychologist. He therefore considered that he was being punished for an illness. Shortly after the grievance was referred to the Committee, medical discharge proceedings were initiated and the member decided not to contest his discharge. The Committee agreed with the member that it was inappropriate that his pay and allowances should have been stopped given that the events that formed the basis of that decision arose from what was accepted as being a medical condition.

G-319 concerns a member who was visited at his home by a woman who had previously consulted him at the detachment about the possibility of filing a complaint over a sexual assault that had occurred many years earlier when she was a teenager. They had sexual relations on that occasion. These events occurred in May 1997. Several weeks later, she told the member's detachment commander that the member had taken advantage of her distraught condition to persuade her to have sexual relations. As a result of that accusation, the member was suspended from duty with pay and became the subject of a disciplinary investigation. The commanding officer recommended stoppage of the member's pay and allowances. The recommendation was rejected on the grounds that there was insufficient evidence that the member had been clearly involved in serious wrongdoing. Two years later, following an RCMP adjudication board's decision that the member had *"forced himself upon"* his victim and *"coerced [her] into having sexual intercourse"* with him, a new recommendation was made to stop his pay and allowances, even though he had appealed the decision. This time, the recommendation was accepted. The appeal would later be dismissed by the Commissioner of the RCMP but he specifically indicated in his appeal decision that he did not agree with the finding that the victim had been coerced into having sex with the member. In its review of the decision to stop the member's pay and allowances, the Committee stated that the lack of clear evidence that the nature of the sexual relationship had been anything other than consensual and the fact that the member was not criminally charged as a result of this incident were the principal reasons why this case did not involve extreme circumstances. Furthermore, the commanding officer failed to establish that he acted at the first available opportunity by waiting until after the adjudication board had issued its decision before renewing his attempt to have the member's pay and allowances stopped. It was noted that the evidence upon which the decision was based had been known to the commanding officer for quite some time.

G-320 concerns a member who had been assisting his spouse at a bar that she owned when he encountered an acquaintance who was engaging in suspicious behaviour involving a large amount of cash. The individual told the member that he was using the money to purchase drugs and left the bar several minutes later. Several RCMP members who were investigating an armed robbery at a nearby

location attended at the bar and told the member that they had reason to believe that the suspect in the robbery may have entered the bar. They provided him with a description of the suspect that corresponded somewhat to that of the individual whom the member had encountered in the washroom. However, the member told them that no one matching that description had been at the bar. Some 20 minutes later, after the members had left, the member sought them out and identified the individual as a possible suspect. The individual was arrested later that evening and was subsequently convicted of the robbery. This incident led to the member becoming the subject of a disciplinary investigation and being suspended from duty. The recommendation that he should cease receiving pay and allowances was accepted on the grounds that the evidence established that the member had intentionally lied to his colleagues when he stated that no one matching the description of the suspect had been at the bar. An RCMP adjudication board reviewed the allegations of misconduct against the member and concluded that they had not been established. It attributed his actions to lack of sleep and consumption of alcohol. The member's pay and allowances were reinstated but only from the date of the Board's decision, not retroactively to the time that his pay was stopped almost one year earlier. The Committee concluded that the *RCMP Act* required that the member's pay and allowances be fully reinstated since the Board's decision had the effect of cancelling his suspension. Furthermore, the evidence upon which the decision had originally been made did not clearly establish that the member had intentionally withheld information about the suspect in the armed robbery.

PART IV – CASES BEFORE THE FEDERAL COURT OF CANADA

Three decisions were issued during the year by the Federal Court on applications for judicial review that had been presented against decisions of the RCMP Commissioner on matters which had also been reviewed by the Committee. Three other applications were filed during the year against decisions from the Commissioner concerning grievances and disciplinary appeals for which the Committee issued findings and recommendations as well. Those applications have not yet been heard.

Gordon v. Canada (Solicitor General), 2003 FC 1250 (ERC 2600-99-002, D-068)

An RCMP adjudication board (the "Board") found that a member had engaged in disgraceful conduct by having coerced a member of the community into having sex with him at his home. As a result, the Board ordered the member to resign from the Force. The member appealed both the finding of misconduct and the decision on sanction. The Committee recommended that the appeal against the finding of misconduct be allowed because the Board's conclusion that the sexual relationship was not consensual was not supported by the evidence. The Committee also recommended that a more lenient sanction be imposed should the Commissioner be inclined to support the Board's findings on the allegation of misconduct. The Commissioner agreed with the Committee that the Board had misinterpreted the evidence and that it was not reasonable to conclude that the sexual relationship was the result of coercion on the member's part. However, he concluded that the member's conduct was disgraceful nonetheless since the individual whom he had sex with had earlier met with him at the detachment to discuss the possibility of filing a complaint over a sexual assault which had occurred in her youth. The Commissioner also concluded that the sanction imposed by the Board was appropriate because alcohol consumption appeared to have influenced the member's actions and he had previously been disciplined for incidents brought about by excessive consumption of alcohol. The member applied for judicial review from that decision.

The Court (*per* Campbell J.) dismissed the application for judicial review, in part concluding that disciplinary decisions by the Commissioner should only be overturned where they were shown to be "*patently*

unreasonable". The Court noted that although the sanction which was imposed might appear unduly harsh, it was not *"clearly irrational"*. The Court also indicated that the Commissioner's decision balanced the interests of the member with the interests of the RCMP as an institution.

Stenhouse v. Canada (Attorney General), 2004 FC 375 (ERC 2900-01-001, D-076)

An RCMP adjudication board (the "Board") ordered a member to resign from the Force after it found that he had engaged in disgraceful conduct by sharing confidential documents with a journalist about police strategies to investigate outlaw motorcycle gangs, documents which were later reproduced in a book. The member appealed both the finding that his conduct was disgraceful and the sanction which was imposed. He sought leave from the Committee to introduce a voluminous amount of material that had been provided to him as a result of an application that he made to the Force under the *Access to Information Act* after the Board had issued its decision. The member maintained that this material established that various members of the Force had conspired to discredit him. The member also requested that the appeal not be heard by the Commissioner because he had been involved with various aspects of this case in his previous role as Deputy Commissioner, Organized Crime. The member's principal argument as to why he considered the Board's assessment of his actions to be unfair was that the information which he had disclosed was a matter of legitimate public concern, as it exposed the fact that the senior echelons of the policing community in Canada were placing public safety at risk in order to put pressure on governments to provide them with additional funding to investigate the activities of outlaw motorcycle gangs. The Committee concluded that there was no evidence to that effect and that there had not been any abuse of process on the part of the Force in its handling of this case. It rejected the member's application to add material to the record, concluding that he had not demonstrated that such material was susceptible of influencing the outcome of the appeal. Finally, the Committee concluded that the appeal had to be heard by the Commissioner because the *RCMP Act* did not allow him to delegate the authority to hear appeals. The Commissioner heard the appeal and stated that he agreed with the Committee's recommendation that the appeal should be dismissed. The member applied for judicial review from that decision.

The Court (*per* Kelen J.) set aside the Commissioner's decision and ordered both that a new hearing be held before the Committee and that the appeal then be the subject of a new decision by *"the most senior RCMP officer not involved in the case ... after allowing the parties to make representations"*. The Court indicated that the Commissioner's prior involvement in preparing briefing notes on this case created an appearance of bias and he therefore was precluded from hearing the appeal. The Court also concluded that, within the material that the member had sought leave to introduce before the Committee, there was one document that was susceptible of affecting the decision on sanction because it consisted

of correspondence from a senior officer in which he expressed concern that the Force had not provided adequate support to the member in his efforts to investigate outlaw motorcycle gangs. However, the Court concluded as follows (at para. 39):

> *While the freedom of public servants and, in the present case, members of the RCMP, to speak out is protected in common law and by the Charter, the "whistle-blowing" defence must be used responsibly. It is not a license for disgruntled employees to breach their common law duty of loyalty or their oath of secrecy. In this case, the confidential documents disclosed by the applicant reflected his disagreement with confidential RCMP policy on the allocation of resources to fight crime. The documents do not disclose either an illegal act by the RCMP or a practice or policy which endangers the life, health or safety of the public. The RCMP policy at issue involves the allocation of RCMP resources to fighting different types of crime — — a policy with which the applicant disagreed, but a confidential policy properly decided by senior RCMP management who know and understand the "big picture" of crime in Canada. Accordingly, while the court recognizes the important objectives served by the availability of the "whistle-blowing" defence, the court agrees that it does not apply in the present circumstances.*

Muldoon v. Canada (Attorney General), 2004 FC 380 (ERC 2900-01-002, G-267)

A member grieved the decision to discharge him on the grounds of medical disability. He acknowledged that he had physical limitations arising from a back injury but maintained that it would have been possible for the Force to find a position whose duties he would be able to carry out despite his limitations. However, the Force took the view that since the member did not meet the medical standard set for general duty constables, he should no longer be retained in that capacity. His grievance was denied at Level I. The Level II grievance was referred to the Committee, which concluded that recent case law from the Supreme Court of Canada imposed an obligation upon all employers, including the RCMP, to make reasonable efforts to accommodate disabled employees. It recommended that the grievance be allowed because it considered that the Force had not made reasonable efforts to determine whether it could accommodate the member. The Commissioner acknowledged that the Force had a reasonable duty of accommodation towards disabled members but concluded that this obligation had been met in this case. Accordingly, he dismissed the grievance. The member applied for judicial review from that decision.

The Court (*per* Rouleau J.) allowed the application and indicated that it agreed with the Committee's conclusions. The Court stated (at para. 20):

> *The current RCMP policy seems to only provide for disabled members to be considered for positions for which they are regarded as fully qualified for. It does not follow from this that appointing a member to a position for which the member lacks some of the essential qualifications would create an undue hardship for the RCMP. The RCMP has an obligation to do more than simply compare the Applicant's qualifications to the requirements of existing positions.*

Matters pending before the Court

Two of the three new applications for judicial review filed during the year pertain to disciplinary appeals that are included in the summary of leading cases that came before the Committee. These are D-081 and D-082. The other application concerns grievances (G-287, G-289, G-290, G-291, G-292) that were presented by a member against the results of a harassment investigation that considered his actions towards one of his subordinates. Both the Committee and the Commissioner concluded that the matter was not grievable as there had yet to be a decision made which could be considered to have aggrieved the member, the investigation report having merely been presented to the member's line officer for his consideration.

PART V – APPENDICES

APPENDIX 1: ABOUT THE COMMITTEE

Established in early 1987, the Committee was one of two entities created as civilian oversight agencies for the RCMP, the other being the Commission for Public Complaints Against the RCMP. The first Chair of the Committee was the Honourable Mr. Justice René Marin, who from 1974 to 1976 had chaired the *Commission of Inquiry relating to Public Complaints, Internal Discipline and Grievance Procedure within the Royal Canadian Mounted Police*. In 1992, the Vice-Chair, F. Jennifer Lynch, Q.C., became Acting Chair of the Committee, a position which she held until 1998. Philippe Rabot then assumed the position on an acting basis and, on July 16, 2001, he was appointed Chair of the Committee for a five-year term.

Mr. Rabot joined the federal public service in 1983 as an appeals adjudicator with the Public Service Commission of Canada, where he later served as Assistant Director General of the Appeals Directorate. In 1990, he was appointed Secretary of the Copyright Board of Canada. From 1993 to 1997, Mr. Rabot was Vice-Chair of the Assessment Review Board of Ontario.

APPENDIX 2: THE COMMITTEE AND ITS STAFF IN 2003-2004

Virginia Adamson, *Counsel*

Catherine Ebbs, *Executive Director and Senior Counsel (Acting)*

Lorraine Grandmaitre, *Manager, Administrative Services and Systems*

Martin Griffin, *Counsel*

Philippe Rabot, *Chair*

Claudia Veas, *Administrative Assistant*

Employees who left the Committee during the year

Thomas Druyan, *Counsel*

Madeleine Riou, *Counsel*

Norman Sabourin, *Executive Director and Senior Counsel*

Address

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APPENDIX 3: LEGISLATIVE PROVISIONS

PART II of the *Royal Canadian Mounted Police Act*

ROYAL CANADIAN MOUNTED POLICE EXTERNAL REVIEW COMMITTEE

Establishment and Organization of Committee

25. (1) There is hereby established a committee, to be known as the Royal Canadian Mounted Police External Review Committee, consisting of a Chairman, a Vice-Chairman and not more than three other members, to be appointed by order of the Governor in Council.

(2) The Committee Chairman is a full-time member of the Committee and the other members may be appointed as full-time or part-time members of the Committee.

(3) Each member of the Committee shall be appointed to hold office during good behaviour for a term not exceeding five years but may be removed for cause at any time by order of the Governor in Council.

(4) A member of the Committee is eligible for re-appointment on the expiration of the member' s term of office.

(5) No member of the Force is eligible to be appointed or to continue as a member of the Committee.

(6) Each full-time member of the Committee is entitled to be paid such salary in connection with the work of the Committee as may be approved by order of the Governor in Council.

(7) Each part-time member of the Committee is entitled to be paid such fees in connection with the work of the Committee as may be approved by order of the Governor in Council.

(8) Each member of the Committee is entitled to be paid reasonable travel and living expenses incurred by the member while absent from the member' s ordinary place of residence in connection with the work of the Committee.

(9) The full-time members of the Committee are deemed to be employed in the Public Service for the purposes of the *Public Service Superannuation Act* and to be employed in the public service of Canada for the purposes of the *Government Employees Compensation Act* and any regulations made under section 9 of the Aeronautics Act.

R.S., 1985, c. R-10, s. 25; R.S., 1985, c. 8 (2nd Supp.), s. 16.

26. (1) The Committee Chairman is the chief executive officer of the Committee and has supervision over and direction of the work and staff of the Committee.

(2) In the event of the absence or incapacity of the Committee Chairman or if the office of Committee Chairman is vacant, the Minister may authorize the Vice-Chairman to exercise the powers and perform the duties and functions of the Committee Chairman.

(3) The Committee Chairman may delegate to the Vice-Chairman any of the Committee Chairman' s powers, duties or functions under this Act, except the power to delegate under this subsection and the duty under section 30.

R.S., 1985, c. R-10, s. 26; R.S., 1985, c. 8 (2nd Supp.), s. 16.

27. (1) The head office of the Committee shall be at such place in Canada as the Governor in Council may, by order, designate.

(2) Such officers and employees as are necessary for the proper conduct of the work of the Committee shall be appointed in accordance with the *Public Service Employment Act.*

(3) The Committee may, with the approval of the Treasury Board,

(a) engage on a temporary basis the services of persons having technical or specialized knowledge of any matter relating to the work of the Committee to advise and assist the Committee in the exercise or performance of its powers, duties and functions under this Act; and

(b) fix and pay the remuneration and expenses of persons engaged pursuant to paragraph (a).

R.S., 1985, c. R-10, s. 27; R.S., 1985, c. 8 (2nd Supp.), s. 16.

Duties

28. (1) The Committee shall carry out such functions and duties as are assigned to it by this Act.

(2) The Committee Chairman shall carry out such functions and duties as are assigned to the Committee Chairman by this Act.

R.S., 1985, c. R-10, s. 28; R.S., 1985, c. 8 (2nd Supp.), s. 16.

Rules

29. Subject to this Act, the Committee may make rules respecting

(a) the sittings of the Committee;

(b) the manner of dealing with matters and business before the Committee generally, including the practice and procedure before the Committee;

(c) the apportionment of the work of the Committee among its members and the assignment of members to review grievances or cases referred to the Committee; and

(d) the performance of the duties and functions of the Committee under this Act generally.

R.S., 1985, c. R-10, s. 29; R.S., 1985, c. 8 (2nd Supp.), s. 16.

Annual Report

30. The Committee Chairman shall, within three months after the end of each fiscal year, submit to the Minister a report of the activities of the Committee during that year and its recommendations, if any, and the Minister shall cause a copy of the report to be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the day the Minister receives it.

R.S., 1985, c. R-10, s. 30; R.S., 1985, c. 8 (2nd Supp.), s. 16.

PART III of the *Royal Canadian Mounted Police Act*

Grievances

Presentation of Grievances

31. (1) Subject to subsections (2) and (3), where any member is aggrieved by any decision, act or omission in the administration of the affairs of the Force in respect of which no other process for redress is provided by this Act, the regulations or the Commissioner' s standing orders, the member is entitled to present the grievance in writing at each of the levels, up to and including the final level, in the grievance process provided for by this Part.

…

32. (1) The Commissioner constitutes the final level in the grievance process and the Commissioner' s decision in respect of any grievance is final and binding and, except for judicial review under the *Federal Court Act*, is not subject to appeal to or review by any court.

(2) The Commissioner is not bound to act on any findings or recommendations set out in a report with respect to a grievance referred to the Committee under section 33, but if the Commissioner does not so act, the Commissioner shall include in the decision on the disposition of the grievance the reasons for not so acting.

(3) Notwithstanding subsection (1), the Commissioner may rescind or amend the Commissioner' s decision in respect of a grievance under this Part on the presentation to the Commissioner of new facts or where, with respect to the finding of any fact or the interpretation of any law, the Commissioner determines that an error was made in reaching the decision.

R.S., 1985, c. R-10, s. 32; R.S., 1985, c. 8 (2nd Supp.), s. 16; 1990, c. 8, s. 65.

Reference to the Committee

33. (1) Before the Commissioner considers a grievance of a type prescribed pursuant to subsection (4), the Commissioner shall refer the grievance to the Committee.

(2) Notwithstanding subsection (1), a member presenting a grievance to the Commissioner may request the Commissioner not to refer the grievance to the Committee and, on such a request, the Commissioner may either not refer the grievance to the Committee or, if the Commissioner considers that a reference to the Committee is appropriate notwithstanding the request, refer the grievance to the Committee.

(3) Where the Commissioner refers a grievance to the Committee pursuant to this section, the Commissioner shall furnish the Committee Chairman with a copy of

(a) the written submissions made at each level in the grievance process by the member presenting the grievance;

(b) the decisions rendered at each level in the grievance process in respect of the grievance; and

(c) the written or documentary information under the control of the Force and relevant to the grievance.

(4) The Governor in Council may make regulations prescribing for the purposes of subsection (1) the types of grievances that are to be referred to the Committee.

R.S., 1985, c. R-10, s. 33; R.S., 1985, c. 8 (2nd Supp.), s. 16.

34. (1) The Committee Chairman shall review every grievance referred to the Committee pursuant to section 33.

(2) Where, after reviewing a grievance, the Committee Chairman is satisfied with the disposition of the grievance by the Force, the Committee Chairman shall prepare and send a report in writing to that effect to the Commissioner and the member presenting the grievance.

(3) Where, after reviewing a grievance, the Committee Chairman is not satisfied with the disposition of the grievance by the Force or considers that further inquiry is warranted, the Committee Chairman may

(a) prepare and send to the Commissioner and the member presenting the grievance a report in writing setting out such findings and recommendations with respect to the grievance as the Committee Chairman sees fit; or

(b) institute a hearing to inquire into the grievance.

(4) Where the Committee Chairman decides to institute a hearing to inquire into a grievance, the Committee Chairman shall assign the member or members of the Committee to conduct the hearing and shall send a notice in writing of the decision to the Commissioner and the member presenting the grievance.

R.S., 1985, c. R-10, s. 34; R.S., 1985, c. 8 (2nd Supp.), s. 16.

PART IV of the *Royal Canadian Mounted Police Act*

Discipline

Appeal

45.14 (1) Subject to this section, a party to a hearing before an adjudication board may appeal the decision of the board to the Commissioner in respect of

(a) any finding by the board that an allegation of contravention of the *Code of Conduct* by the member is established or not established; or

(b) any sanction imposed or action taken by the board in consequence of a finding by the board that an allegation referred to in paragraph (a) is established.

(2) For the purposes of this section, any dismissal of an allegation by an adjudication board pursuant to subsection 45.1(6) or on any other ground without a finding by the board that the allegation is established or not established is deemed to be a finding by the board that the allegation is not established.

(3) An appeal lies to the Commissioner on any ground of appeal, except that an appeal lies to the Commissioner by an appropriate officer in respect of a sanction or an action referred to in paragraph (1)(b) only on the ground of appeal that the sanction or action is not one provided for by this Act.

...

45.15 (1) Before the Commissioner considers an appeal under section 45.14, the Commissioner shall refer the case to the Committee.

(2) Subsection (1) does not apply in respect of an appeal if each allegation that is subject of the appeal was found by the adjudication board to have been established and only one or more of the informal disciplinary actions referred to in paragraphs 41(1)(a) to (g) have been taken by the board in consequence of the finding.

(3) Notwithstanding subsection (1), the member whose case is appealed to the Commissioner may request the Commissioner not to refer the case to the Committee and, on such a request, the Commissioner may either not refer the case to the Committee or, if the Commissioner considers that a reference to the Committee is appropriate notwithstanding the request, refer the case to the Committee.

(4) Where the Commissioner refers a case to the Committee pursuant to this section, the Commissioner shall furnish the Committee Chairman with the materials referred to in paragraphs 45.16(1)(a) to (c).

(5) Sections 34 and 35 apply, with such modifications as the circumstances require, with respect to a case referred to the Committee pursuant to this section as though the case were a grievance referred to the Committee pursuant to section 33.

R.S., 1985, c. 8 (2nd Supp.), s.16

45.16 (1) The Commissioner shall consider an appeal under section 45.14 on the basis of

(a) the record of the hearing before the adjudication board whose decision is being appealed,

(b) the statement of appeal, and

(c) any written submissions made to the Commissioner,

and the Commissioner shall also take into consideration the findings or recommendations set out in the report, if any, of the Committee or the Committee Chairman in respect of the case.

…

(6) The Commissioner is not bound to act on any findings or recommendations set out in a report with respect to a case referred to the Committee under section 45.15, but if the Commissioner does not so act, the Commissioner shall include in the decision on the appeal the reasons for not so acting.

…

PART V of the *Royal Canadian Mounted Police Act*

Discharge and Demotion

45.24 (1) A party to a review by a discharge and demotion board may appeal the decision of the board to the Commissioner, but no appeal may be instituted under this section after the expiration of fourteen days from the later of

(a) the day the decision is served on that party, and

(b) if that party requested a transcript pursuant to subsection 45.23(6), the day that party receives the transcript.

(2) An appeal lies to the Commissioner on any ground of appeal.

…

Reference to the Committee

45.25 (1) Before the Commissioner considers an appeal under section 45.24, the Commissioner shall refer the case to the Committee.

(2) Notwithstanding subsection (1), the officer or other member whose case is appealed to the Commissioner may request the Commissioner not to refer the case to the Committee and, on such a request, the Commissioner may either not refer the case to the Committee or, if the Commissioner considers that a reference to the Committee is appropriate notwithstanding the request, refer the case to the Committee.

(3) Where the Commissioner refers a case to the Committee pursuant to this section, the Commissioner shall furnish the Committee Chairman with the materials referred to in paragraphs 45.26(1)(a) to (e).

(4) Sections 34 and 35 apply, with such modifications as the circumstances require, with respect to a case referred to the Committee pursuant to this section as though the case were a grievance referred to the Committee pursuant to section 33.

45.26 (1) The Commissioner shall consider an appeal under section 45.24 on the basis of

(a) the material that the officer or other member was given an opportunity to examine pursuant to subsection 45.19(3),

(b) the transcript of any hearing before the discharge and demotion board whose decision is being appealed,

(c) the statement of appeal,

(d) any written submissions made to the Commissioner, and

(e) the decision of the discharge and demotion board being appealed,

and the Commissioner shall also take into consideration the findings or recommendations set out in the report, if any, of the Committee or the Committee Chairman in respect of the case.

...

(4) The Commissioner shall as soon as possible render a decision in writing on an appeal, including reasons for the decision, and serve each of the parties to the review by the discharge and demotion board and, if the case has been referred to the Committee pursuant to section 45.25, the Committee Chairman with a copy of the decision.

(5) The Commissioner is not bound to act on any findings or recommendations set out in a report with respect to a case referred to the Committee under section 45.25, but if the Commissioner does not so act, the Commissioner shall include in the decision on the appeal the reasons for not so acting.

...

EXCERPT FROM THE RCMP REGULATIONS (1988)

(Section 36: grievances that can be referred to the Committee)

36. For the purposes of subsection 33(4) of the Act, the types of grievances that are to be referred to the External Review Committee of the Force are the following, namely,

(a) the Force' s interpretation and application of government policies that apply to government departments and that have been made to apply to members;

(b) the stoppage of the pay and allowances of members made pursuant to subsection 22(3) of the Act;

(c) the Force' s interpretation and application of the *Isolated Posts Directive*;

(d) the Force' s interpretation and application of the *R.C.M.P. Relocation Directive*; and

(e) administrative discharge for grounds specified in paragraph 19(a), (f) or (I).