

# Police Independence vs Military Discipline: Democratic Policing in the Canadian Forces

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J O N A T H A N   A V E Y \*

## ABSTRACT

Over the last 25 years, there has been a gradual acceptance within the Canadian Forces that Military Police need to be able to function independently when exercising their duties as police officers. This acceptance has led to organizational and administrative changes to provide such independence to MP members; however, despite these changes, there remains the risk that MP independence may be eroded in the course of criminal or disciplinary investigations. This article presents two recent matters to illustrate that the independence currently afforded to MP investigators is still very much in doubt. The first is the recent decision of the Court Martial Court of Appeal in *R v Wellwood*, which brought the dichotomy of MP independence and the need to maintain discipline and a rigid obedience to orders from a superior squarely before the court. The second is the recent controversy surrounding the MP investigation into allegations against Lieutenant Colonel Mason Stalker, which ultimately resulted in a stay of proceedings being directed on all charges and Stalker launching a lawsuit against the Department of National Defence and the Canadian Forces.

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This article argues the steps already taken by the CF to ensure MP independence are positive, but not sufficient. Specific sections of the *National Defence Act* inappropriately permit senior members of the CF to interfere in MP investigations. In the absence of a finding that police independence is a principle of fundamental justice under s. 7 of the *Charter*, it falls to Parliament to ensure that Military Police personnel are free to carry out police functions in an independent manner. The offending portions of the *NDA* should be immediately repealed and further amendments should be enacted that prohibit any interference in MP investigations.

**Keywords:** police independence; principle of fundamental justice; military police; *National Defence Act*; Deschamps Report; democratic policing; military law; military discipline; Canadian Force

## I. INTRODUCTION

The principle of police independence is deeply entrenched in Canadian law. The reason is simple: we do not live in a totalitarian state where the police act as enforcers of those in political power. Police officers are imbued with an enormous amount of authority – both legal and moral. With that authority, however, comes both legal responsibility and the expectation of a high moral standard. In order to maintain public confidence in the police, officers cannot act – or be perceived as acting – to protect or defend a political or private interest. Rather, the police must independently and fairly enforce the law without the interference of political leaders or those they have put in authority. Officers must also be free to perform their duties without fear of reprisals against them for doing so.

It is well established in Canadian law that the nature and unique concerns of the military necessitate a separate and parallel system of military justice.<sup>1</sup> This is not manifested by a system identical to that of civilian law save that it wears a uniform, but one that addresses the unique requirements of service life. One of the requirements of this separate system is that the Canadian Forces (CF) have a professional police force trained to conduct

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<sup>1</sup> See *R v Généreux*, [1992] 1 SCR 259 at para 60, 70 CCC (3d) 1 [*Généreux*]; see also *MacKay v The Queen*, [1980] 2 SCR 370 at 400, 403-04, 114 DLR (3d) 393; *MacKay v Rippon*, [1978] 1 FC 233 at paras 6-8, 36 CCC (2d) 522.

criminal and disciplinary investigations in the unique environments encountered in the course of military employment. The result is the Military Police (MP), whose duties encompass both the more traditional police duties performed by civilian police officers as well as those required in order to fulfill their role as soldiers in support of military operations.

Like all members of the Canadian Forces, Military Police members (MPs) take on legal obligations under military law in addition to those imposed on all members of Canadian society.<sup>2</sup> They fall under the authority of the *National Defence Act (NDA)*,<sup>3</sup> and must comply with the *Queen's Regulations and Orders (QR&O)*, which are enacted pursuant to the *NDA* in order to provide an authoritative manual of military law.<sup>4</sup> Finally, in addition to these statutes, MPs are also governed by the *Military Police Professional Code of Conduct*.<sup>5</sup>

One of the most basic functions of military law is to ensure a rigid adherence to discipline. One only needs to look so far as s. 83 of the *NDA* to see how seriously disobedience to orders may be treated: "Every person who disobeys a lawful command of a superior officer is guilty of an offence and on conviction is liable to imprisonment for life or to less punishment."<sup>6</sup> This article will examine the tension between the need to maintain military discipline – including a rigid adherence to obedience of lawful orders – and the democratic requirement that Military Police members be independent from external or political influences in the execution of their duties. I will also examine other ways in which the principle of democratic policing is at risk of being eroded as a result of the current organizational and administrative structure of the Canadian Forces. In doing so, I will examine the recent decision of the Court Martial Appeal Court (CMAC) in *R v Wellwood*, a matter that brought this dichotomy squarely before the courts.<sup>7</sup> I will also be examining portions of the *NDA* that affect MP independence,

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<sup>2</sup> Canada, Department of National Defence, *Military Justice at the Summary Trial Level*, vol 2.2 (Ottawa: DND, 2011) at 1-1-1-6.

<sup>3</sup> *National Defence Act*, RSC 1985, c N-5 [NDA].

<sup>4</sup> Canada, Department of National Defence, *Queen's Regulations and Orders for the Canadian Forces*, online: <<http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders/index.page>> [QR&O].

<sup>5</sup> *Military Police Professional Code of Conduct*, SOR/2000-14.

<sup>6</sup> *NDA*, *supra* note 3, s 83.

<sup>7</sup> *R v Wellwood*, 2017 CMAC 4, 140 WCB (2d) 660 [Wellwood].

as well as the question of whether police independence should receive constitutional protection.

This is by no means the first consideration of MP independence in recent years. Both Andrew Halpenny and Kent Roach have confronted the issue.<sup>8</sup> Halpenny advocated for a restructuring of the MP chain of command that would result in the CF Provost Marshal (CFPM), the CF's senior MP officer, consolidating all MPs under his or her command, with the Provost Marshal answering to a Military Police Services Board, which in turn would report to the Chief of the Defence Staff.<sup>9</sup> The CF subsequently adopted this position in April 2011.<sup>10</sup> Roach would go further, positing that MP independence should be recognized as a constitutional principle associated with the rule of law and under s. 7 of the *Charter* as a principle of fundamental justice.<sup>11</sup> While I agree wholeheartedly with Roach's position, this article will focus on what I refer to as *institutional independence*, that is, independence of the Military Police as a branch within the confines of the Forces as an institution, including its governing legislation.

In this article, I will do the following: first, I will outline the organizational structure of the Canadian Forces, generally, with emphasis on how MPs fit within that structure. I will also provide some background to show how the notion of MP independence has evolved over time. Second, I will review the facts of the *Wellwood* case to illustrate how MPs can be placed in the position of being forced to choose between competing authorities. As part of this section, I will review the conduct requirements that apply to CF members under the *NDA* and the penalties a member may be liable to for violating those standards. Third, I will consider the question of what impacts a perception of command influence may have on the military justice system and why such perceptions must be fought. Finally, I will argue that further steps need to be taken to ensure an independent and

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<sup>8</sup> Andrew Halpenny, "The Governance of Military Police in Canada" (2010) 48:1 *Osgoode Hall LJ* 1; Kent Roach, "Police Independence and the Military Police" (2011) 49:1 *Osgoode Hall LJ* 117.

<sup>9</sup> Halpenny, *supra* note 8 at 52–53.

<sup>10</sup> See Canada, Department of National Defence, "The Canadian Forces Military Police Group," Backgrounders CFPM BG 11-01, online: <<http://www.forces.gc.ca/en/news/article.page?doc=the-canadian-forces-military-police-group/hnps1vb3>>.

<sup>11</sup> Roach, *supra* note 8 at 127–31; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11, s 7 [*Charter*].

impartial Military Police. Specifically, I will argue that the *NDA* should be amended to remove sections that specifically permit command interference with MP investigations. I will also argue that Parliament should enact specific provisions that explicitly prohibit such interference by senior commanders. This will have the dual effects of protecting against interference and promoting the perception of an impartial Military Police branch, thus preserving the public confidence in the administration of military justice.

## II. THE STRUCTURE OF THE CANADIAN FORCES

In this section, I will summarize the general organizational structure of the CF, and will show how this structure directly impacts each individual member. This is not intended as a thorough or in-depth guide to the intricacies of military administration, but rather to provide a foundation of context to understand the myriad of ways that MP independence may be infringed upon. I will also discuss how the structure of the CF has changed regarding the MP, and discuss specific provisions of the *NDA* that impact on the independence of MP.

### A. The Overall Structure

The term “Canadian Forces” refers to the unified armed services of Canada, encompassing the Canadian Army, the Royal Canadian Navy and the Royal Canadian Air Force. Unlike some nations’ armed forces, whose branches are independent of one another,<sup>12</sup> the CF all falls into one organizational structure, commanded by the Chief of the Defence Staff (CDS), who is the senior commissioned officer of the Canadian Forces.<sup>13</sup> While each service (land, sea, or air) generally has its own established chain of command and areas of responsibility, there is overlap. For example, a Military Police officer or a Cook may be enrolled in the Air Force, because the nature of the position is not specific to the air service, they may be assigned to duties on an Army base. This would be different than a member

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<sup>12</sup> For example, the United States has divided its armed services into separate departments, with each answering to its own chain of command, and ultimately to a civilian appointed by the President.

<sup>13</sup> *NDA*, *supra* note 3, s 14.

who is a pilot, for example, who would likely be most out of place at a naval facility.

The CF can be simply described as a hierarchical structure similar to a pyramid; in many ways similar to the organization of a civilian police department. Each individual soldier is assigned a position within the structure, and answers to a direct chain of command. In terms of units and not individuals, the structure is similar: each unit falls within a larger organization within the structure, which is ultimately commanded by the CDS. While at first glance this structure appears to be straightforward, it can very quickly become complex. As will be discussed in greater detail when considering the issues in *Wellwood*, there can be a disconnect between rank and authority, even though the former is always, to some extent, imbued with the latter.

For the individual member, their position in the chain of command determines how their career progresses: personnel evaluations are typically performed by a member's immediate supervisor and opportunities for advanced training are often intended for specific units or positions. In turn, how a member is evaluated and the training they have received will strongly influence their future career assignments, opportunities for promotions, and postings. Prior to 2011, this structure presented a much higher risk of interference with MPs. As Halpenny noted, MPs are typically posted in detachments of 10-20 members, commanded by a junior officer holding the rank of captain. These detachments, though, answered to base or wing commanders, who are frequently colonels – a difference of three rank levels (and a vast difference in terms of tenure: a colonel is typically an officer with 15-20 years of experience, where as a captain may have as little as 3 or 4). Halpenny described the result thusly:

This can cause the local Detachment Commander, who depends upon being perceived by his commander as cooperative and productive and who has otherwise no policing priority guidelines, to be agreeable to those priorities that the commander sees as important. MP are then liable to be employed in a manner that does not optimally use their policing training and skills, and may result in poor policing.<sup>14</sup>

As mentioned previously, in April 2011 the CF implemented one of Halpenny's recommendations by consolidating all MPs under the authority of the Provost Marshal when they are exercising military police functions. This removed MPs from the command authority of their environmental or

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<sup>14</sup> Halpenny, *supra* note 8 at 46-47.

operational chains of command during the time when independence is most necessary.<sup>15</sup> The result is that MPs are ostensibly insulated from local pressures or considerations in exercising their police-specific functions.

## **B. The Evolution of MP Independence within the CF**

Military Police members are in a unique position within the CF, in that they are both CF soldiers and police officers, and thereby fall under two distinct classes of actors. It follows that they have two distinct types of duties: “field and garrison duties” which are “essentially of a military nature” and their “investigative responsibilities, ‘which are almost wholly of a policing nature.’”<sup>16</sup> Regarding their investigative responsibilities, over the last 25 years the principle of police independence has incrementally been recognized within the CF.<sup>17</sup>

In his article, “Police Independence and the Military Police” Kent Roach provides a valuable overview of the way independence has developed in the military police.<sup>18</sup> Roach traces its beginning with the role of the military police generally, and following the increase of police independence from the Somalia Inquiry through the Dickson Reports, the 1998 Accountability Framework, subsequent amendments to the *NDA*, and the 2011 increased command authority of the CF Provost Marshal.<sup>19</sup> I do not propose to duplicate this overview. For this article, it suffices to say that the Somalia Inquiry brought to light the real-life consequences of a military police lacking independence, including serious criminal allegations that went uninvestigated and the ways that investigations could be, and indeed were, tainted by conflicts of interest. Former Chief Justice Dickson shed further light when tasked with examining the military police and military justice. He approved of a 1998 Accountability Framework, which was “meant to ensure that the reporting relationship of the [Provost Marshal] to the [Vice Chief of the Defence Staff] does not in any way compromise the independence of the CFPM in relation to the investigatory role of the

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<sup>15</sup> Roach, *supra* note 8 at 139.

<sup>16</sup> Roach, *supra* note 8 at 136, citing Canada, Department of National Defence, *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services* (Ottawa: DND, 14 March 1997) at ii.

<sup>17</sup> Roach, *supra* note 8 at 132; see also Halpenny, *supra* note 8.

<sup>18</sup> Roach, *supra* note 8.

<sup>19</sup> *Ibid* at 132-40.

military police.”<sup>20</sup> Finally, in 2011, changes in the organizational and command structure regarding military police resulted in the consolidation of all MPs under the authority of the Provost Marshal while they are carrying out investigatory duties.

The above summary clearly demonstrates that there has been, as Roach describes, a “growing acceptance” of the necessity for military police independence.<sup>21</sup> In addition to their newfound structural independence, MPs now possess the statutory ability to file a complaint of improper interference with an investigation with the Military Police Complaints Commission (MPCC).<sup>22</sup> As Roach notes, this 2009 addition to the *NDA* will allow the MPCC to develop the jurisprudence on the scope of police independence. It is not impregnable, however, as its authority to examine such complaints can be limited through legislation that authorizes command direction and interference.<sup>23</sup> Thus, in the absence of constitutional protection for police independence, it provides only the security given by any enacted statute and is subject to legislative change.

Illustrating this state of affairs is the manner by which the *Strengthening Military Justice in the Defence of Canada Act* amended the *NDA* in 2013.<sup>24</sup> The Act altered the oversight relationship between the Vice Chief of the Defence Staff (VCDS) and the Provost Marshal. As Roach stated:

[T]he [1998] Accountability Framework contemplated that while the VCDS would establish “general priorities and objectives for military police services” and be responsible for “general administrative and financial control,” the VCDS would “have no direct involvement in individual ongoing investigations but will receive information from the CFPM to allow necessary management decision making.”<sup>25</sup>

However, when the *NDA* was amended, s. 18.5 was enacted. It reads:

18.5(1) The Provost Marshal acts under the general supervision of the Vice Chief of the Defence Staff in respect of the responsibilities described in paragraphs 18.4(a) to (d).  
 (2) The Vice Chief of the Defence Staff may issue general instructions or guidelines

<sup>20</sup> *Ibid* at 137, citing Canada, Department of National Defence, *Report of the Military Police Services Review Group* (Ottawa: DND, 1998) at 14 [Dickson Committee Report].

<sup>21</sup> Roach, *supra* note 8 at 139.

<sup>22</sup> *NDA*, *supra* note 3, s 250.19.

<sup>23</sup> Roach, *supra* note 8 at 138–39.

<sup>24</sup> *Strengthening Military Justice in the Defence of Canada Act*, SC 2013, c 24.

<sup>25</sup> Roach, *supra* note 8 at 137–138, citing *Dickson Committee Report*, *supra* note 20 at 15 [emphasis in original].



in writing in respect of the responsibilities described in paragraphs 18.4(a) to (d). The Provost Marshal shall ensure that they are available to the public.

(3) The Vice Chief of the Defence Staff may issue instructions or guidelines in writing in respect of a particular investigation.

(4) The Provost Marshal shall ensure that instructions and guidelines issued under subsection (3) are available to the public.

(5) Subsection (4) does not apply in respect of an instruction or guideline, or of a part of one, if the Provost Marshal considers that it would not be in the best interests of the administration of justice for the instruction or guideline, or that part of it, to be available to the public.<sup>26</sup>

In plain language, this amendment permits the VCDS to exercise command authority to interfere with an ongoing MP investigation pursuant to s. 18.5(3). Furthermore, s. 18.5(5) provides that any instructions issued by the VCDS to the Provost Marshal may not be released to the public. This legislation expressly negates MP independence. As I will discuss in detail below, the inclusion of subsections (3)-(5) in the *NDA* represents a regression in the law governing MP; in my view, there is no justification for these provisions to remain in force and they ought to be immediately repealed.

### III. *WELLWOOD*: AN ILLUSTRATION OF COMPETING AUTHORITIES

Having provided an overview of the organizational structure of the CF, I will now turn to the circumstances that resulted in the court martial of Major Wellwood. Major Wellwood was charged with obstructing a peace officer in the execution of his duties under s. 129 of the *Criminal Code*, and two counts of conduct to the prejudice of good order and discipline under s. 129 of the *NDA*.<sup>27</sup> The charges arose from an acrimonious encounter between Major Wellwood and Corporal Plourde, a military police officer.

On February 5, 2012, the spouse of a CF member involved in a training exercise in the Beauce region of Quebec contacted police to advise that the member had contacted her and confided he had suicidal thoughts involving the use of a firearm. This was brought to the attention of the military police, and Corporal Plourde, as the MP assigned to the exercise as the police

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<sup>26</sup> *NDA*, *supra* note 3, s 18.5.

<sup>27</sup> See *NDA*, *supra* note 3, s 130 (providing that an act or omission constituting an offence under any Act of Parliament is an offence under the Code of Service Discipline and falls within the jurisdiction of military law).

officer responsible for law enforcement, was tasked to investigate and ensure the member was not in danger. Attempting to confirm the location of the member, Corporal Plourde proceeded to Command Post 8 (CP-8), commanded by Major Wellwood.<sup>28</sup>

When approaching CP-8, Corporal Plourde and his driver, Private Simard-Bolduc, had to pass through a gatehouse that controlled access to the area. Instead of stopping, Private Simard-Bolduc activated the emergency lights and was permitted access. This was reported to the Command Post. Major Wellwood determined to intercept the MPs and demand an explanation for why they did not stop at the gatehouse.<sup>29</sup>

When confronted, Corporal Plourde indicated to Major Wellwood that he was there looking for a suicidal member, and invoked his authority to act under a provincial statute.<sup>30</sup> Major Wellwood told him that the military chain of command was already aware of the situation and handling it, and further that the matter was not under military police jurisdiction. Corporal Plourde replied that it was a police matter, not that of the chain of command, and that she “should not confuse her rank with his police authority.”<sup>31</sup>

It was at this time that the confrontation progressed past a mere exchange of words about who should act. Major Wellwood ordered Corporal Plourde – in colourful language, reflecting the antagonistic nature of the conversation – to leave the premises, forbade him from speaking with anyone else and blocked him from entering the CP.<sup>32</sup> Corporal Plourde, who fully intended to enter the CP to talk with others, was required to use force to remove Major Wellwood from his path.<sup>33</sup>

While Corporal Plourde’s investigation, and that of the military chain of command, continued past this interaction, it was the incident recounted above that resulted in the charges against Major Wellwood. In summary, it was an incident where both actors felt they had the legal authority and responsibility to act, which the other was infringing upon. What should be

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<sup>28</sup> Wellwood, *supra* note 7 at paras 28–31, 227.

<sup>29</sup> *Ibid* at para 229.

<sup>30</sup> Specifically, *An Act Respecting the Protection of Persons Whose Mental State Presents a Danger to Themselves or to Others*, CQLR c P-38.001; see Wellwood, *supra* note 7 at para 42.

<sup>31</sup> Wellwood, *supra* note 7 at paras 41–45.

<sup>32</sup> *Ibid* at paras 230–32.

<sup>33</sup> *Ibid* at paras 47–48, 50.

recognized is that the former is correct, as both Major Wellwood and Corporal Plourde were justified in taking action – and indeed, required to – but it does not follow that the latter is equally accurate. There was nothing to be gained for either party in impeding the efforts of the other; conversely, there was a realistic possibility of danger if time was wasted and a potentially suicidal member was not located.

One factor that may have contributed to the parties' actions during this incident is the suicide of Corporal Stuart Langridge. The suicide itself occurred in 2008; there was an immediate "sudden death" investigation, and subsequently two further investigations in 2009 and 2010. While the details of the investigations were not publicly available at the time, the fact of their existence and the allegations leveled by Corporal Langridge's parents against members of the CF were well-publicized. On April 29, 2011, Glenn Stannard, the Chair of the Military Police Complaints Commission, gave notice of his intention to convene a public interest hearing into complaints about the investigations.<sup>34</sup>

The MPCC hearing was extensive, hearing from approximately 90 witnesses and entering some 22,000 documents into evidence.<sup>35</sup> The Final Report (the "Langridge Report") criticized the initial investigation,<sup>36</sup> the handling of Corporal Langridge's suicide note to his family,<sup>37</sup> the 2009 investigation surrounding who was Corporal Langridge's Next of Kin,<sup>38</sup> and the decision to close the 2010 investigation file without performing any

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<sup>34</sup> Canada, Military Police Complaints Commission, "The Notice of Decision to Conduct a Public Interest Investigation into the Military Police Investigations Relating to the Death of Corporal Stuart Langridge," by Glenn Stannard (Ottawa: MPCC, 29 April 2011), online: <<http://www.mpcc-cppm.gc.ca/info/pubs/329-eng.aspx>>.

<sup>35</sup> Canada, Military Police Complaints Commission, *Final Report Following a Public Interest Hearing Pursuant to Subsection 250.38(1) of the National Defence Act with Respect to a Complaint Concerning the Conduct of Sergeant David Mitchell; Petty Officer 2<sup>nd</sup> Class Eric McLaughlin; Sergeant Matthew Ritco; Sergeant Scott Shannon; Warrant Officer Jon Bigelow; Warrant Officer (Retired) Sean Bonneteau; Warrant Officer Blair Hart; Master Warrant Officer Ross Tourout; Chief Warrant Officer (Retired) Barry Watson; Major Daniel Dandurand; Lieutenant-Colonel Brian Frei; Lieutenant-Colonel (Retired) Bud Garrick; and Lieutenant-Colonel Gilles Sansterre*, by Glenn Stannard, Chairperson (Ottawa: MPCC, 10 March 2015) at 4.

<sup>36</sup> *Ibid* at 10–11, 166–432.

<sup>37</sup> *Ibid* at 12–15, 433–511.

<sup>38</sup> *Ibid* at 16–18, 545–634.

actual investigation.<sup>39</sup> The final report is in excess of 1000 pages. There is no question that the public interest hearing was appropriate under the circumstances – at a minimum, the transparency provided by the public hearing and report serves to promote accountability within the CF.

For those in the CF who were not involved in the Langridge investigations, however, it would be easy to view the hearing (and later, the Langridge Report) as a warning that any actions surrounding a suicidal or potentially suicidal member could be extensively analyzed later on. At the time of the events in *Wellwood*, the MPCC's hearing was still ongoing – it takes little imagination to conceive that Corporal Plourde was determined not to be the subject of any future hearing by walking away from the situation. Similarly, Major Wellwood can easily be envisioned as being determined not to be perceived as behaving negligently towards the well-being of a soldier (which was one of the allegations leveled by Corporal Langridge's parents against his chain of command).

Given such a backdrop, one can sympathize with both parties' desire to remain involved. Notwithstanding that, decisions under such circumstances must be based on training and adherence to law. Unfortunately, the spectre of suicide and other mental health incidents are not unheard of in the modern CF. It is entirely foreseeable that similar interactions may occur in future. At a minimum, this should serve as a warning to the CF that all members should be informed about their duties and obligations, not only regarding their own chain of command, but also how it may affect dealing with Military Police members.

### A. High Stakes: Disciplinary Charges under the *National Defence Act*

For Major Wellwood, the potential jeopardy in impeding Corporal Plourde is readily apparent, as doing so may constitute a criminal offence. Similarly, even if criminal charges are not pursued, such an incident could easily form the basis of internal disciplinary or even administrative actions. What may not be so clear is the potential jeopardy for Corporal Plourde.

For civilians who have never served in a professional armed force, it may be difficult to grasp the seriousness with which orders are viewed. This is understandable, as the only reference that most people have is that of directions from a civilian boss; however, the situations are not analogous.

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<sup>39</sup> *Ibid* at 18-23, 635-682.

Civilian perception of the armed forces is strongly influenced by popular culture, and as Amar Khoday notes, “[p]roducers and mediums of popular culture play a significant role in transmitting ideas and information about law and justice.”<sup>40</sup> Khoday aptly demonstrates how popular culture routinely focuses on a hero who flouts military discipline, often for moral reasons.<sup>41</sup> What is typically lost in these cinematic portrayals, though, is just how seriously such breakdowns in discipline are taken by the military.

Discipline is the cornerstone upon which a military force is built. Field Marshal de Saxe stated its importance as follows:

Next to the forming of troops, military discipline is the first object that presents itself to our notice; it is the soul of all armies; and unless it be established amongst them with great prudence, and supported with unshaken resolution, they are no better than contemptible heaps of rabble, which are more dangerous to the very state that maintains them than even its declared enemies.<sup>42</sup>

The necessity to maintain military discipline has been written on more recently. The Supreme Court of Canada termed the requirement that military members obey orders as an “absolute necessity”<sup>43</sup> and ultimately, as Major C. E. Thomas notes, this necessity is the basis for the offence of disobeying a lawful command under s. 83 of the *NDA*.<sup>44</sup>

A conviction under s. 83 carries significant jeopardy. As previously mentioned, the offender is liable to imprisonment for life. However, even if a member receives a non-custodial sentence, the mere fact of a conviction represents a significant impediment for the member in terms of career progression, in addition to whatever sentence is ultimately imposed.<sup>45</sup>

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<sup>40</sup> Amar Khoday, “Valorizing Disobedience Within the Ranks: Law and Resistance in American Military Films” (2018) 36:2 *Cardozo Arts & Ent LJ* [forthcoming in 2018].

<sup>41</sup> *Khoday*, *supra* note 40.

<sup>42</sup> Field-Marshal Count Saxe, *The Art of War: Reveries and Memoirs* (London, UK: J Davis, 1811) at 48.

<sup>43</sup> *R v Finta*, [1994] 1 SCR 701 at para 123, 28 CR (4th) 265.

<sup>44</sup> Major CE Thomas, “*R v Liwyj*: Can a Soldier Be Punished for Disobeying an Unlawful Command?” (2012), 88 CR (6th) 352.

<sup>45</sup> See *NDA*, *supra* note 3, s 139 (available sentences include imprisonment, dismissal from the CF, reduction in rank, a severe reprimand or reprimand, a fine, and what is termed “minor punishments” such as stoppage of leave or confinement to barracks. A combination of the aforementioned punishments may also be imposed—i.e., imprisonment and reduction in rank, or a reprimand and a fine).

## B. To Obey or Not to Obey

Turning to the facts in *Wellwood*, Corporal Plourde was given a direct order by Major Wellwood: to leave the camp and not speak to anyone else present. This was after Major Wellwood indicated that the matter fell outside military police jurisdiction. Thus, Corporal Plourde was presented with a significant question: how certain was he that the matter he was dealing with fell within his jurisdiction as a peace officer? It was on this point that the potential jeopardy, if any, that the corporal could face turned: if his initial assessment that it was a military police matter was correct, the order given by Major Wellwood was unlawful. As Major C. E. Thomas indicates, in the context of a charge under *NDA* s. 83, “legality of the order... remains an essential element of the charge.”<sup>46</sup> This is consistent with *QR&O* article 19.015, which provides that “[e]very officer and non-commissioned member shall obey lawful commands and orders of a superior officer.”<sup>47</sup> An unlawful order is thus no order at all, and there is no obligation to follow it – or conversely, no punishment for disobeying it.

As mentioned previously, Corporal Plourde was confronted with a different perspective, as Major Wellwood asserted that the chain of command was dealing with the situation – and that the military police had no authority to act. The major’s assertion that it was a chain of command responsibility is not without merit: every officer in the CF has a duty to promote the welfare of her subordinates.<sup>48</sup> If the major was correct in asserting the matter fell under her exclusive authority, she would have every right to give orders in furtherance of that objective.

In sum, Corporal Plourde had to determine whether he was confident enough that he was acting within his jurisdiction and authority as a peace officer that he was prepared to disregard what would otherwise be a lawful command from an officer ten ranks his superior, and risk the punishment for doing so.

While the Court Martial Appeal Court was not unanimous in its ultimate disposition of the appeal, on the question of whether Corporal Plourde should have obeyed Major Wellwood’s order (one of the grounds

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<sup>46</sup> Thomas, *supra* note 44.

<sup>47</sup> *QR&O*, *supra* note 4, art 19.015 [emphasis added].

<sup>48</sup> *Ibid*, art 4.02(1)(c); see also *Wellwood*, *supra* note 7 at paras 119, 239.

of appeal from conviction) the panel agreed: “[Major Wellwood’s] position does not hold water.”<sup>49</sup>

Cournoyer JA., writing for the majority, reviewed the principle of police independence as it has been interpreted by previous courts, citing Binnie J. in *R v Campbell* for the proposition that, “[a] police officer investigating a crime is not acting as a government functionary or as an agent of anybody... the police are independent of the control of the executive government.”<sup>50</sup> He also adopts expressly Roach’s assertion that the principle of police independence applies to the military police vis-à-vis the chain of command when they are performing activities related to law enforcement.<sup>51</sup>

Cournoyer JA. concludes his analysis by indicating:

The independence of the military police with respect to the chain of command in the course of law enforcement activities is indisputable. Moreover, contrary to another of the appellant’s arguments, law enforcement activities also include the duty and powers of police officers under the common law and not restricted to investigations regarding service offences.<sup>52</sup>

Thus, the CMAC validated Corporal Plourde’s actions insofar as his refusal to obey Major Wellwood’s order in a resounding fashion. However, as I will address later on, I respectfully disagree with Cournoyer JA.’s conclusion that military police independence with respect to the chain of command is indisputable. While Corporal Plourde was justified in not following the order he was given, the reality is that no military police officer should ever be in the position where they are faced with such an evaluation. In this case, Corporal Plourde acted properly; however, as Cournoyer JA. recognized, it is impossible to predict the multitude of situations where the aims and authority of MPs may come into conflict with those of the chain of command, or how those situations may be handled.<sup>53</sup>

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<sup>49</sup> *Wellwood*, *supra* note 7 at paras 91, 238.

<sup>50</sup> *R v Campbell*, [1999] 1 SCR 565 at paras 27–29, 171 DLR (4th) 193 [*Campbell*], cited by *Wellwood*, *supra* note 7 at para 94.

<sup>51</sup> See Roach, *supra* note 8 at 132, 139–40, cited by *Wellwood*, *supra* note 7 at para 95.

<sup>52</sup> *Wellwood*, *supra* note 7 at para 100. Regarding the instant case, Cournoyer JA observed that a police officer responding to a 911 call is acting within their authority, per *Dedman v The Queen*, [1985] 2 SCR 2 at 28, 20 DLR (4th) 321; *R v Godoy*, [1999] 1 SCR 311 at paras 15–16, 168 DLR (4th) 257; *R v Clayton*, 2007 SCC 32 at paras 21–25, 2 SCR 725.

<sup>53</sup> See *Wellwood*, *supra* note 7 at para 104, where Cournoyer JA declined to expand on his conclusion that police independence applied to the MP and how it might apply in other circumstances, indicating it would be “unwise and inappropriate” to do so.

As I will address below, there are legislative steps to ensure MP are granted institutional independence, and in addition, further protection would be granted if police independence is recognized as a principle of fundamental justice. Outside the formal legal system, however, there are still actions that may be taken within the Canadian Forces, itself. Such actions could include specific training for officers on their obligations with respect to MP investigations, and how the authority vested in them by virtue of their rank and/or position may overlap those of a military police investigator, who is a subordinate by rank but who is nonetheless cloaked in the authority of a police officer.

#### IV. THE DANGERS OF COMMAND INTERFERENCE

Command interference in the exercise of police duties can take many different forms, and have various impacts. Interference may be specific to a particular investigation, and so are limited in the sense that its impacts may not have a direct effect on any other investigation; however, interference can also take forms that are more systemic in nature. Regardless of the particular nature of the interference, though, command interference can have serious effects on society's – including CF members' – confidence in the administration of military justice.

To see a real-life example of the dangerous effects command interference may have, we need only look back to the turning point that has ultimately brought about the level of MP independence currently enjoyed: the Somalia Inquiry. The numerous instances of command interference that either hampered or outright prevented MP investigations were recognized, as were numerous systemic issues that resulted.<sup>54</sup> In terms of life, liberty, and security of the person, these interests, of any number of individuals, were threatened. The torture and murder of Shidane Arone is the most well-known consequence, but the misconduct was by no means limited to that infamous event, but rather was rampant leading up to it. Had MPs enjoyed the independence they should, and been permitted to carry out their duties properly, it is possible what was later dubbed “Canada's National Shame” would never have occurred.<sup>55</sup>

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<sup>54</sup> Roach, *supra* note 8 at 132–40.

<sup>55</sup> Donna Winslow, *The Parliamentary Inquiry into the Canadian Peace Mission in Somalia* (Brussels: Geneva Centre for the Democratic Control of Armed Forces, 2002) at 7.



The Somalia affair provides an illustration of what may occur from Military Police being restricted from pursuing investigations. It led to blatant misconduct, criminal charges, loss of life under atrocious circumstances, the disbanding of the entire Canadian Airborne Regiment, and a serious blow to the reputation of the Canadian Forces as a whole. Since that time, the CF has strived to gain back a reputation for professionalism. This was aptly expressed by Colonel (Ret'd) Michel Drapeau, who stated:

Over the past decade I have watched our army transform itself into a world-class organization whose performance in Afghanistan has gained the unrestricted admiration and respect of both our allies and Canadians. This is due, in my estimation, to two interconnected factors: a second-to-none field leadership and the unremitting performance by the rank and file who serve above and beyond the call of duty.<sup>56</sup>

The CF's foreign involvement since Somalia was not limited to the mission in Afghanistan, although that was certainly its most visible, spanning from 2001-2014. Other operations included involvement with the United Nations in Bosnia from 1992-2007, the UN observer mission in Ethiopia and Eritrea from 2000-2003, UN airlift support in the Democratic Republic of the Congo in 2003, assisting at the Cambodia Mine Action Centre from 1993-2000, and many others.<sup>57</sup>

Throughout this time, the Military Police has carried out its functions, both domestically and abroad, without interference from the chain of command. They are part of the team described by Colonel Drapeau that has displayed exemplary leadership and unremitting performance by front-line soldiers. In short, the Military Police has demonstrated that it is fully capable of carrying out its mandate without the assistance of senior CF leadership, or the direction or involvement of those falling outside the MP branch.

## **A. Avoiding the Perception of Command Interference**

The justice system is no stranger to evaluating not only an actual problem, but also the perception of a problem. Lord Chief Justice Hewart

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<sup>56</sup> *Standing Committee on National Defence*, 41st Parl, 1st Sess, No 065 (11 February 2013) at 1530 (Michel Drapeau).

<sup>57</sup> Canada, Centre for Operational Research and Analysis, "Canadian Armed Forces Operations from 1990-2015," prepared by Michael A Stevens (Ottawa: Valcom Consulting Group Inc, November 2015).

expressed the oft-quoted maxim nearly a century ago: “Justice should not only be done, but should manifestly and undoubtedly be seen to be done.”<sup>58</sup> Our more modern courts have recognized as legitimate questions surrounding whether a judge’s decision was influenced by bias, or the reasonable apprehension of bias,<sup>59</sup> whether an accused was deprived of a fair trial or the appearance of one,<sup>60</sup> and what requirements must be met for an independent judiciary.<sup>61</sup> On a more general level, though, the justice system must have the confidence of society if it is to function properly. As actors in the system, this applies equally to police, and is no less applicable in the military context.

The perception of fairness was commented on by Senator (and retired Lieutenant-General) Roméo Dallaire, who referred to the effects of command interference found in the aftermath of the Somalia Inquiry and commented that such interference “put the entire military justice system at risk by undermining the confidence of the troops, who began to question whether the system would be able to respond to their needs.”<sup>62</sup>

A Canadian who joins the CF has not simply accepted a job, but rather adopted an entirely different lifestyle – one that requires them to place themselves under the authority of a separate legal system with which few are familiar. They are subject to strict rules and regulations – actions such as showing up late for work, which may or may not even merit comment in a civilian workplace, can result in disciplinary charges, and punishments. The system that administers these rules and regulations must be fair – and it must be perceived as fair. That system does not begin when a person is charged and brought before a court, but when conduct is investigated. Confidence in the justice system – military or civilian – requires that police have the support of the public. In the case of the Military Police, they require the support of the CF membership. Even the appearance of unfairness will erode that support, and MPs will find it increasingly more difficult to effectively discharge their duties.

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<sup>58</sup> *R v Sussex Justices; Ex parte McCarthy*, [1924] 1 KB 256 at 259.

<sup>59</sup> *R v RDS*, [1997] 3 SCR 484, 10 CR (5th) 1.

<sup>60</sup> *R v Schmidt*, [1945] SCR 438, 2 DLR 598; *R v Schmaltz*, 2015 ABCA 4 at paras 13–14, 320 CCC (3d) 159.

<sup>61</sup> *R v Valente*, [1985] 2 SCR 673, [1986] 19 CRR 354; *Généreux*, *supra* note 1.

<sup>62</sup> *Debates of the Senate*, 41st Parl, 1st Sess, Vol 150, Issue 163 (21 May 2013) at 1950 (Hon Roméo Dallaire).

All Canadians have the right to expect independent and impartial policing. It must also appear fair and impartial. Public confidence in the police depends on it. A system that appears to be acting on the direction of either a political authority, or one wholly removed from the police, risks being perceived as akin to a police state. For CF soldiers, who experience an extreme power imbalance when faced with someone even a single rank higher than themselves, it is imperative that those who are tasked with police duties be perceived as being free to carry them out independently.

It bears emphasizing that Canadians who join the CF do not give up their rights as Canadian citizens simply by volunteering to take on responsibility for the safety of the nation. As Justice Létourneau stated, “We as a society have forgotten, with harsh consequences for the members of the armed forces, that a soldier is before all a Canadian citizen, a Canadian citizen in uniform.”<sup>63</sup>

## **B. The Investigation and Charges against Lieutenant Colonel Stalker**

An illustration of the need for a strong perception of MP institutional independence is the recent investigation surrounding Lieutenant-Colonel Mason Stalker, who was charged with several offences, including sexual assault and sexual exploitation. To understand the concern about the potential appearance of command interference in the investigation, and how it could negatively impact the military justice system, some background is required.

On March 27, 2015, former Supreme Court Justice Marie Deschamps released her report on the external review conducted into sexual misconduct and sexual harassment in the Canadian Armed Forces.<sup>64</sup> This review was conducted in response to numerous media articles on the topic of sexual assault in the military, as well as several internal surveys within the CF.

Justice Deschamps’s report was devastatingly blunt. In it she reports candid accounts from serving members, including comments stating that sexual harassment at military colleges is a “passage oblige” and “[members]

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<sup>63</sup> *Standing Committee on National Defence*, 41st Parl, 1st Sess, No 065 (11 February 2013) at 1655 (Gilles Létourneau).

<sup>64</sup> Marie Deschamps, *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces* (Ottawa: Government of Canada, 27 March 2015) [Deschamps Report].

do not report sexual harassment because it happens all the time.”<sup>65</sup> In the CF, generally, a “sexualized culture creates a climate conducive to more serious incidents of sexual misconduct... The use of the word ‘cunt’, for example, is commonplace, and rape jokes are tolerated”<sup>66</sup> While the misconduct described was primarily reported by female members, it was acknowledged that LGBTQ members reported a similarly degrading environment.<sup>67</sup> In short, she determined that the CAF possessed a culture that was sexualized and misogynistic, allowing harassment and abuse to be overlooked, under-reported, and poorly understood.<sup>68</sup> The Deschamps Report made ten specific recommendations, with the intention of addressing the serious problem of sexual misconduct within the CF.<sup>69</sup>

While the CF did not implement all of Justice Deschamps’s recommendations, in one regard the Report was spectacularly successful: it brought to the forefront a very real issue facing the Forces that sparked immediate action. Shortly after release of the Report, General Jonathan Vance was appointed as Chief of the Defence Staff. He made no secret of his intention to address the problem, stating upon assuming his new role, “As my first order to the Canadian Armed Forces, everybody must continue to work together to eliminate this harmful behaviour. It must stop now.”<sup>70</sup>

He wasted no time in issuing his first operational order setting in motion Operation HONOUR (Op HONOUR). In doing so, he formally recognized that the behaviour described and the existence of the sexualized culture in the CF “runs contrary to the values of the profession of arms and

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<sup>65</sup> *Ibid* at 14.

<sup>66</sup> *Ibid* at 15.

<sup>67</sup> *Ibid* at 16.

<sup>68</sup> James Cudmore, “Military’s Response to Sexual Misconduct Report Curtailed by General’s Orders,” *CBC News* (13 May 2015), online: <<http://www.cbc.ca/news/politics/military-s-response-to-sexual-misconduct-report-curtailed-by-general-s-orders-1.3071386>>.

<sup>69</sup> *Deschamps Report*, *supra* note 64 at ix-x.

<sup>70</sup> Postmedia News, “Operation Honour Dubbed ‘Hop on Her’ by Soldiers Mocking Military’s Plan to Crack Down on Sexual Misconduct,” *National Post* (26 October 2015), online: <<http://nationalpost.com/news/canada/operation-honour-dubbed-hop-on-her-by-soldiers-mocking-militarys-plan-to-crack-down-on-sexual-misconduct>>; see also, “Gen. Jonathan Vance Says Sexual Harassment ‘Stops Now,’” *CBC News* (23 July 2015), online: <<http://www.cbc.ca/news/politics/gen-jonathan-vance-says-sexual-harassment-stops-now-1.3165065>>.

ethical principles of the DND/CAF.” He went on to state that, “[h]armful and inappropriate sexual behaviour is a real and serious problem for the CAF which requires the direct, deliberate and sustained engagement by the leadership of the CAF and the entire chain of command to address.”<sup>71</sup>

General Vance has continued to make Op HONOUR a priority, instituting a policy that sexual misconduct convictions will result in administrative review with a view to release the member from the CF.<sup>72</sup> An administrative release (akin to firing an employee) is not limited to circumstances where the individual has been convicted of wrongdoing, however. As Rear Admiral Jennifer Bennett, director general of the military’s strategic response team on sexual misconduct, notes, even where the evidence is insufficient for a criminal conviction the military can take action. This is also possible where no trial was conducted, but the conduct is still deemed to be inappropriate.<sup>73</sup>

Against this background one can consider the matter surrounding Lieutenant Colonel Stalker. In July 2015, Lieutenant Colonel Stalker was charged with three counts of sexual assault, four counts of sexual exploitation, one count of sexual interference, one count of invitation to sexual touching, and one count of breach of trust by a public officer. The charges were laid after an investigation performed by the CF National Investigation Service, a division of the Military Police. As an immediate result of the charges, he was removed from his position as Commanding Officer of the 1<sup>st</sup> Battalion, Princess Patricia’s Canadian Light Infantry.<sup>74</sup>

Sixteen months later, all charges against the highly-decorated officer were withdrawn.<sup>75</sup> In May 2017, Lieutenant Colonel Stalker launched a suit

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<sup>71</sup> Canada, Department of National Defence, *CDS OP Order – OP Honour* (14 August 2015) at paras 1, 3, online: <[http://www.forces.gc.ca/assets/FORCES\\_Internet/docs/en/caf-community-support-services-harassment/cds-op-order-op-honour.pdf](http://www.forces.gc.ca/assets/FORCES_Internet/docs/en/caf-community-support-services-harassment/cds-op-order-op-honour.pdf)>.

<sup>72</sup> Bruce Champion-Smith, “Top General Issues Orders to Drum Out Sexual Offenders,” *The Star* (13 January 2017), online: <<https://www.thestar.com/news/canada/2017/01/13/top-general-issues-orders-to-drum-out-sexual-offenders.html>>.

<sup>73</sup> *Ibid.*

<sup>74</sup> Trisha Estabrooks, “Lt.-Col. Mason Stalker, Based in Edmonton, Faces Sex Charges,” *CBC News* (28 July 2015), online: <<http://www.cbc.ca/news/canada/edmonton/lt-col-mason-stalker-based-in-edmonton-faces-sex-charges-1.3171086>>.

<sup>75</sup> Clare Clancy, “‘I Have Always Maintained My Innocence’: Sexual Assault Charges Dropped Against Military Commander,” *Edmonton Journal* (4 November 2016), online: <<http://edmontonjournal.com/news/crime/sexual-assault-and-exploitation-charges-dropped-against-decorated-military-commander>>.

against the Department of National Defence and the CF, alleging that the MP investigation was negligent, electing to lay charges after interviewing a small number of witnesses who failed to corroborate the complainant's allegations. He alleges that the allegations against him were incongruent with the established timeline of his CF service, and that a "proper, professional and competent investigation prior to (Stalker's) arrest would have clearly indicated that the allegations made against the Plaintiff could not have possibly been true."<sup>76</sup> Interestingly, he also alleges that even though the charges against him have been withdrawn, the MP investigation into his conduct continues.<sup>77</sup> Most relevant to this article, though, is the following excerpt from Lieutenant Colonel Stalker's statement of claim:

The very few witnesses interviewed pre-arrest saw nothing unusual and provided no corroboration to the Complainant's false and malicious allegations, (...) This demonstrates a campaign by the Defendant to showcase the Plaintiff's arrest to the public - which we allege likely occurred in order to diminish negative headlines that followed the 'Deschamps Report.'<sup>78</sup>

Lieutenant Colonel Stalker's assertions have not yet been proven. They may be entirely without merit. However, they do raise the question, if the allegations against him could have been disproven by such simple investigatory measures as an examination of his service record, why did the matter proceed? The statement of claim provides one argument: the charges provided the CF the opportunity to show just how seriously sexual misconduct allegations were being handled. But this raises another concern: if one accepts the possibility that the CF used the allegations against Lieutenant Colonel Stalker as a tool to influence public perception, is there a possibility that the investigation itself was the subject of command influence? Put more specifically, could the VCDS, in full awareness of the public perception regarding the CF in the wake of the Deschamps Report, have influenced an investigation that resulted in criminal charges against a

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<sup>76</sup> See "Military Officer Taking Legal Action Against DND Over Sex Assault Investigation," *CTV News* (5 May 2017), online: <<https://www.ctvnews.ca/canada/military-officer-taking-legal-action-against-dnd-over-sex-assault-investigation-1.3400629>>.

<sup>77</sup> *Ibid.*

<sup>78</sup> Julia Wong, "Federal Government Claims No Wrongdoing After Edmonton Military Officer Files \$8M Lawsuit," *Global News* (13 December 2017), online: <<https://globalnews.ca/news/3915584/federal-government-claims-no-wrongdoing-after-edmonton-military-officer-files-8m-lawsuit/>>.

CF member to bolster public perception in the wake of damning allegations against the CF as an institution?

Whether or not Lieutenant Colonel Stalker's assertions are ultimately proven, the fact remains that the VCDS has the statutory authority to issue instructions or guidelines in respect of a MP investigation. The circumstances surrounding the investigation into Lieutenant Colonel Stalker provide a concrete example of a circumstance where it could reasonably be questioned whether such interference occurred. What effect does that have on CF members' confidence in the Military Police, and the administration of military justice? Even if no such instructions or guidelines were issued in this case, when one considers that a military police investigation featuring interference by the second-highest ranking member of the CF may result in criminal or disciplinary charges, it is difficult to argue that the Military Police currently operate with the independence required to maintain the perception of impartiality.

## V. ENSURING MILITARY POLICE INDEPENDENCE

While I agree that the organizational changes Halpenny advocated for were required to move MPs away from a traditional military chain of command and towards a model comparable to that of a civilian police department, in my view the changes made were nothing more than necessary first steps in protecting MP independence. In my view, they are insufficient to ensure the required level of independence that the military justice system requires. This is especially true given certain amendments made to the *NDA* by the *Strengthening Military Justice in the Defence of Canada Act* that impact on MP independence.<sup>79</sup>

The position of Military Police members as soldiers with military duties necessitates that they answer to a military chain of command; however, their unique role when tasked as police officers requires that they are independent from the standard CF structure in order to carry out police duties. Just as important, however, is that, along with actual independence, MP investigators be perceived as being independent. In this section, I will propose changes to the *NDA* that in my view are necessary for the MP branch to have true institutional independence, including both repealing and enacting legislation.

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<sup>79</sup> *Strengthening Military Justice in the Defence of Canada Act*, *supra* note 24.

## A. Amending the National Defence Act

As stated above, I agree with Roach in his assessment that police independence warrants constitutional protection, not merely that provided for in a statute that Parliament may revoke at its pleasure. At this time, however, police independence is not recognized as a constitutional principle, despite it being clearly and inextricably linked to the rule of law, which the Supreme Court has twice described as “one of the ‘fundamental and organizing principles of the Constitution.’”<sup>80</sup> Even with that constitutional proximity, however, it is unlikely that current legislation would be invalidated based solely on this connection. Put simply, the published decision invalidating democratically enacted legislation on the basis of an unwritten constitutional principle has yet to be penned.<sup>81</sup> Thus, until such time as such a principle is recognized, the focus squarely falls on ensuring that the legislative provisions governing the Canadian Forces not only provide for MP independence, but ensure it is protected.

In its current form, the *National Defence Act* does not do so. Section 18.5, governing the supervisory relationship between the Vice Chief of the Defence Staff and the Provost Marshal, explicitly permits interference in investigations. It is worth restating the section:

18.5(1) The Provost Marshal acts under the general supervision of the Vice Chief of the Defence Staff in respect of the responsibilities described in paragraphs 18.4(a) to (d).

(2) The Vice Chief of the Defence Staff may issue general instructions or guidelines in writing in respect of the responsibilities described in paragraphs 18.4(a) to (d). The Provost Marshal shall ensure that they are available to the public.

(3) The Vice Chief of the Defence Staff may issue instructions or guidelines in writing in respect of a particular investigation.

(4) The Provost Marshal shall ensure that instructions and guidelines issued under subsection (3) are available to the public.

(5) Subsection (4) does not apply in respect of an instruction or guideline, or of a part of one, if the Provost Marshal considers that it would not be in the best interests of the administration of justice for the instruction or guideline, or that part of it, to be available to the public.<sup>82</sup>

The section can be bifurcated cleanly: subsections (1)-(2) pertain to the Provost Marshal’s general responsibilities; whereas subsections (3)-(5)

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<sup>80</sup> *Campbell*, *supra* note 50 at para 18, citing *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at 240, 161 DLR (4th) 385.

<sup>81</sup> Roach, *supra* note 8 at 131.

<sup>82</sup> NDA, *supra* note 3, s 18.5.



pertain to specific investigations.<sup>83</sup> It is noteworthy that, while the VCDS may issue instructions or guidelines pertaining to both the Provost Marshal's general responsibilities and regarding a particular investigation, instructions pertaining to the former are required to be available to the public. Instructions or guidelines relating to the latter, however, may be withheld. In a report prepared on police independence and the Military Police, Roach acknowledged that subsections (1)-(2) are "consistent with the balance that must be struck between military police independence and accountability, policy guidance and the management responsibilities of the general command."<sup>84</sup> I agree – the Provost Marshal, like all CF members, has to be accountable for their general duties; with that comes the necessity that some direction be permitted in carrying out his or her duties. It is the latter provisions that directly infringe on the independence of the Military Police, and ought to be immediately repealed.

When Parliament was considering the *Strengthening Military Justice in the Defence of Canada Act*, the issue of police independence was raised on several occasions, both in the House of Commons during debates and while the bill was in committee. In fact, in one of the bill's first committee meetings Peter Tinsley, a former Military Police officer and lawyer, and former Chair of the Military Police Complaints Commission, expressed strong concern about the new s. 18.5. He pointed out that the Somalia commission was quite critical of the position of the Military Police within the structure of the Forces, "which vitiated any notion of independence and gave rise to the potential for the perception of improper influence being exercised."<sup>85</sup>

Tinsley proceeded to review the recommendations made by the special advisory group (SAG) chaired by Brian Dickson, as well as the mandated review of the *NDA* headed by Antonio Lamer in 2003. He concluded:

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<sup>83</sup> *Ibid*, s 18.4 ("The Provost Marshal's responsibilities include (a) investigations conducted by any unit or other element under his or her command; (b) the establishment of selection and training standards applicable to candidates for the military police and the ensuring of compliance with those standards; (c) the establishment of training and professional standards applicable to the military police and the ensuring of compliance with those standards; and (d) investigations in respect of conduct that is inconsistent with the professional standards applicable to the military police or the *Military Police Professional Code of Conduct*").

<sup>84</sup> *House of Commons Debates*, 41st Parl, 1st Sess, No 102 (29 March 2012) at 1550-1555 (Hon Wayne Easter).

<sup>85</sup> *Standing Committee on National Defence*, 41st Parl, 1st Sess, No 066 (13 February 2013) at 1535-1540 (Peter Tinsley).

[N]otwithstanding the consistent recommendations of the Somalia commission, the Dickson report, and Lamer in respect of the necessary independence of the military police from the chain of command in respect of police operational decisions and investigations—as well, it is in stark contrast to the accountability framework—[Bill C-15] includes a provision that specifically authorizes the VCDS to “issue instructions or guidelines in writing in respect of a particular investigation.”<sup>86</sup>

Tinsley was not the only person to refer to the Somalia Inquiry. Senator Roméo Dallaire expressed concern over this section, describing it as “counter to everything that was recommended in the aftermath of Somalia.”<sup>87</sup> Similar concerns were expressed in the House of Commons by several opposition members who questioned the need for such a power.<sup>88</sup> In response, Chris Alexander provided the following justification for the provision:

The intent of proposed subsection 18.5(3) is to recognize the unique circumstances of the military police, who often operate in zones of armed conflict. [...]

Military police may be going to investigate a situation, here or there on the battlefield, but they do not have knowledge of the operational next steps of the mission. They do not know if there is going to be direct fire called in at that location. They do not know if there is going to be a live fire training exercise at that location. They do not know if there is going to be an air strike at that location. That is what this provision in the bill, as unamended, seeks to allow the VCDS to inform the Provost Marshal of, and absolutely the Provost Marshal could make public the rationale. [...]

However, in those rare cases when, for reasons of operational secrecy, the protection of Canadian lives or, if there is personal information involved in the investigation, privacy, the Provost Marshal may not make the instructions fully public or may not make them public at all.

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<sup>86</sup> *Ibid* at 1540.

<sup>87</sup> *Debates of the Senate*, 41st Parl, 1st Sess, Vol 150, Issue 163 (21 May 2013) at 1950 (Hon Roméo Dallaire).

<sup>88</sup> *House of Commons Debates*, 41st Parl, 1st Sess, No 44 (4 November 2011) at 1325 (John McKay); *House of Commons Debates*, 41st Parl, 1st Sess, No 102 (29 March 2012) at 1550–1555 (Hon Wayne Easter); *House of Commons Debates*, 41st Parl, 1st Sess, No 226 (21 March 2013) at 1020 (Elizabeth May); *House of Commons Debates*, 41st Parl, 1st Sess, No 226 (21 March 2013) at 1050 (John McKay); *House of Commons Debates*, 41st Parl, 1st Sess, No 242 (29 April 2013) at 1815 (Marc Garneau).

In other words, the intent of proposed section 18.5 is to strengthen the independence of the military police, as the default position is that the instructions must be made public.<sup>89</sup>

With the greatest of respect to Mr. Alexander, it is difficult to see how a statutory provision that allows a senior officer to issue instructions regarding a particular investigation could strengthen the independence of the MP simply because the instructions *may* be publicly released. It should be remembered that the VCDS is subject to military law, has a vested interest in the perception of the CF as a whole, is not a police officer – and so may not fully appreciate the impact of any instructions given on an investigation – and is not subject to the processes of the Military Police Complaints Commission.

However, turning to the circumstantial examples provided, they are best described as specious. There will, no doubt, be times when the MP are required to conduct investigations in combat zones. Stating that they may not be aware of what may be occurring in those areas, though, ignores that MPs are not only police officers – they are also professional soldiers, with all the training, knowledge, and resources that come with that status. MPs – like all CF members – do not operate in a vacuum. They know the organizational structure of the CF and operational commands. They know who the key contact people are while deployed. They know who to inquire of to ensure they will not be walking into a hot combat zone. They know who to contact to inquire about live-fire exercises or air-strikes. Even in the worst-case scenario, which is that MPs find themselves in a situation when conducting an investigation is not feasible for operational reasons, they are specifically trained in how to react and deal with the situation. In short, it is entirely unnecessary to truncate police independence for the reasons given.

When pressed on the reason why the authority of the VCDS is not limited in the nature of the instructions that he or she may give, the government response was that the limitations are in the accountability and transparency provisions themselves. Peter MacKay, then Minister of National Defence, testifying before the Senate Standing Committee on Legal and Constitutional Affairs, stated, “I would respectfully suggest that the limitations are in the transparency and the accountability. That is to say,

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<sup>89</sup> *House of Commons Debates*, 41st Parl, 1st Sess, No 226 (21 March 2013) at 1040 (Chris Alexander).

the behaviour of the Vice Chief of the Defence Staff in injecting himself into an investigation must be completely transparent.”<sup>90</sup>

It is unfortunate that the government seemed to miss the point: interference with police independence is not a problem solely when the interference is surreptitious. Section 18.5 imposes no limits whatsoever on the VCDS’s discretion to issue instructions – whether publicly available or otherwise, such direction directly impacts police independence and may adversely affect public confidence in the administration of military justice. The fact remains that when the VCDS issues orders in respect of a particular investigation, the Provost Marshal is obliged to follow those orders. He or she has no recourse. Thus, the section presents a simple cost-benefit weighing for the VCDS: is he or she prepared for the response that may result, in the event their order is publicly released?

While this is not a constitutional question, to borrow from the language often used in constitutional assessments, the legislation is disproportional: it permits absolute interference with police investigations, but for a completely unnecessary stated purpose.

In addition to repealing s. 18.5(3)-(5), I am of the view that sections should be enacted specifically prohibiting any interference with a police investigation. This could be done through several different means. Attempting to do so could be listed as a service offence under the Code of Service Discipline.<sup>91</sup> Alternatively, a clarifying subsection could be added to s. 83 indicating that, without restricting s. 83, any order purporting to interfere or that would result in interference with a Military Police investigation is not a lawful command. Such provisions would clearly send the message that MPs are to carry out their police duties independently without any interference from senior service members.

Police independence is not yet recognized as a principle of fundamental justice; nonetheless it is strongly linked to the unwritten constitutional principle of the rule of law. It is worthy of, and indeed requires strong protection. The CF has already taken steps to remove command influence from MPs as they carry out police duties by placing them under the command of the CF Provost Marshal when they are so employed. This is not sufficient, however, to ensure they enjoy true independence. Contrary

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<sup>90</sup> *Standing Senate Committee on Legal and Constitutional Affairs*, 41st Parl, 1st Sess, Issue 37 (23 May 2013) at 1030 (Hon Peter MacKay).

<sup>91</sup> Being Part III of the NDA, *supra* note 3.

to Cournoyer JA.'s pronouncement in *Wellwood* that the independence of military police from the chain of command is indisputable, the fact remains that interference can be – and currently is – permitted by democratically enacted legislation.<sup>92</sup> In order to achieve true Military Police independence, s. 18.5(3)-(5) must be repealed.

## VI. CONCLUSION

Military law occupies a unique position within the Canadian legal system. It is neither criminal nor administrative, nonetheless it reflects principles of both. Regardless of how much it interacts with principles of civilian law, however, it will continue to function in a unique manner to meet the distinct requirements of the Canadian Forces. This includes those tasked with carrying out police investigative duties while still acting within their responsibilities as soldiers.

The need for military police independence has been gradually accepted. Changes have been made in furtherance of this, including the administrative reassignment of military police officers to fall under the command authority of the CF Provost Marshal when carrying out police functions. This step, while certainly necessary and welcome, represents merely one step on the path to military police independence. As the recent case of *R v Wellwood* illustrates, there are still uncertainties within the CF surrounding the intersection of military police duties as police officers and their responsibilities as Canadian Forces soldiers. These uncertainties can, and should, be addressed by ensuring that there is clear legislation providing for the independence of the Military Police when carrying out police functions.

At this time, the *National Defence Act* expressly permits interference in military police investigations by the Vice Chief of the Defence Staff, the second-highest ranking member of the CF and who has a vested interest in how the CF is perceived by the public, and who therefore may be perceived to act in a way that will prevent incidents that may embarrass the CF from being brought into the public eye. Further, that interference itself may not be made public. The existence of this legislation has the potential to strongly impact the perception of fairness surrounding military police investigations,

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<sup>92</sup> *Wellwood*, *supra* note 7 at para 100.

as is aptly demonstrated by the recent controversy surrounding Lieutenant Colonel Mason Stalker and his subsequent lawsuit.

This current state of the law should not stand. The rule of law demands that police act independently – and public confidence in the administration of military justice just as strongly demands that they be perceived as acting independently. It is hoped that the judiciary will recognize the principle of police independence as a principle of fundamental justice under s. 7 of the *Charter* at its first opportunity; however, until the courts make such a determination, the immediate obligation remains that s. 18.5(3)-(5) should be removed from the *NDA*. Permitting it to remain in force is to allow the law governing military justice to regress back to a time that resulted in disastrous consequences for the CF, and to invite interference from biased actors and risk the public perception – including the perception within the Canadian Forces membership – that the military is free to place its own interests above those of justice.