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## GOVERNANCE OF THE CANADIAN FORCES MILITARY POLICE



*There is nothing more powerful than an idea whose time has come.*

*- Unknown*

By/par  
**A.N. Gale**  
**Lieutenant Commander**  
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## Abstract

*This paper examines the governance of the Canadian Forces Military Police demonstrating that the preferred governance of military police is vested in the Canadian Forces Provost Marshal and not the established chain of command. Indeed, this change in governance is required for the military police to evolve into a professional policing service necessary to support a Constitutionally compliant and modern military force. Reviewing the concept of police independence in Canadian society furthers this position. The significance of this concept is pertinent to the evolution of policing in Canada and is a benchmark for future discussion on military police governance. Following a brief review of the evolution of military policing, the paper presents recent developments in Canadian military justice, military police powers, and core military police functions. Finally, the paper concludes with recommendations to strengthen military police service to the Canadian Forces under the new governance relationship.*

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## I. INTRODUCTION

I have attempted to make it quite clear that the policy of the Government and, I believe, the previous governments in this country, has been that they, indeed, - the politicians who happen to form the Government – should be kept in ignorance of the day-to-day operations of the police force and even of the security force ... that is our position. It is one of keeping the Government's nose out of the operations of the police force, at whatever level of government.

*Prime Minister Trudeau, 1977<sup>1</sup>*

It is recognized that friction between police officers and the public can occur, particularly when there is some doubt as to the actions taken by the police to enforce the law and maintain public safety. Citizens, therefore, have an interest in ensuring that the police are accountable for their actions. They also want to insulate the police from partisan politics or inappropriate influences from public officials. The historical development of the police can be characterized by society's attempt to find a balance at controlling the police while ensuring police independence to enforce the law without interference. The military police (MP) are no strangers to similar issues within the Department of National Defence (DND) and the Canadian Forces (CF). Indeed, the issue of who should control military police has been the subject of a number of reviews. These reviews have become fixated on two perspectives on military police governance. The first view suggests that military police governance should come under the direct control of the military police, distinct and separate from the military's traditional chain of command. The other view prefers military police governance to remain with the local military commander as an integral part of the chain of command. The latter reflects the prevailing governance relationship

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<sup>1</sup> *Globe and Mail* 1977, recited in Philip C. Stenning, "Police and Politics: There and Back and There Again?" in *Police Powers in Canada: The Evolution and Practice of Authority*. Eds., R.C. Macleod and D. Schneiderman, (Toronto: University of Toronto Press Incorporated, 1994), pp. 178-179.

between the military police and military commanders, a relationship that has military police performing innumerable functions in support of the military mission.<sup>2</sup> However, beginning in 1997, the Canadian Forces Provost Marshal (CFPM) began to question this prevailing view.<sup>3</sup> The CFPM asserted that without direct control of military police it was exceedingly difficult to apply her responsibilities and accountabilities in maintaining a professional police service.<sup>4</sup> Essentially, the CFPM saw herself in a tenuous situation by being accountable for the professional conduct and policies of a police force neither under her leadership nor her direct control.

Currently, the military police occupation within the CF consists of approximately 1300 persons, the majority of whom are employed at CF bases throughout the country. Some are involved in UN and NATO missions abroad; others are stationed within a variety of units at National Defence Headquarters (NDHQ), the National Counter-Intelligence Unit (NCIU), and at Canadian embassies around the world. Only approximately 163 persons are directly under the command and control of the CFPM.<sup>5</sup> This arrangement of controlling military police stems from the desire to ensure that, as far as possible, the supported military commander retains command and control of all CF forces assigned to a specific mission. Ultimately, the ability to co-ordinate and plan the employment of military forces by the appointed commander could also directly impact upon victory or defeat on the battlefield. Moreover, the CFPM is not responsible for the conduct of military operations and since military police are often an integral element of those

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<sup>2</sup> Lieutenant-General (Retired) C.H. Belzile, et al., Report of the Military Police Services Review Group. (December 11, 1998), p. 7.

<sup>3</sup> The term Provost Marshal historically denotes the head of the military police (The Concise Oxford Dictionary) and in the Canadian Forces is both a senior police advisor and a commanding officer.

<sup>4</sup> Belzile. Report of the Military Police Services Review Group, p. 7.

<sup>5</sup> LCol Tim Grubb, Deputy Provost Marshall Resource Management, 18 Mar 02. The military police occupation consists of 134 officers and 1085 non-commissioned members. The NIS employs 109 persons and the office of the CFPM employs 54 persons.

operations, the argument is that their employment should be exclusively directed by those who would be most affected.<sup>6</sup> The governance of the military police is, therefore, presently dispersed among a number of authorities within the CF.

The debate, despite recent significant changes to the *National Defence Act* (NDA), is that military police should be subject to special rules designed to enhance the effectiveness of their law enforcement role.<sup>7</sup> The principle issue centers on the extent of independence military police require in addressing implications of internal as well as external influences in their governance. So what is meant by independence? To cite the dictionary, it means “not depending on authority or control.”<sup>8</sup> Conceivably, this definition would lead to trepidation among many, civilian and military alike. Without some form of control, the police would be void of accountability to the public it serves. However, independence does not void the obligation to give an account or to obey. Numerous public officials are independent, but this concept is in reality relative rather than absolute. The amount of independence required will vary “with every office, scaling down from the Chief Justice of the most exalted court to the lowliest door-keeper at the House of Parliament.”<sup>9</sup> Therefore, the independence of any official may be measured in terms of the extent to which, in carrying out the functions of their office, he or she is free from control. Likewise, the office held by the official will determine the extent of independence required.

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<sup>6</sup> Dickson. Report of the Special Advisory Group on Military Justice and Military Police Investigative Services, p. 28.

<sup>7</sup> Bill C-25 primarily dealt with amendments to military justice within the NDA. Those amendments were also complemented by necessary changes to Queen’s Regulations and Orders (QR&O) that also took effect on 1 September 1999. When Bill C-25 received royal assent, it became S.C. 1998, Chapter 35. Concerning military police, amendments to the NDA would establish an independent civilian Military Police Complaints Commission and the establishment of a Military Police Professional Code of Conduct to govern the conduct of military police. Amendments to QR&O for the Canadian Forces established a National Investigation Service (NIS), a specialized military police unit outside of the operational chain of command and reporting directly to the Vice Chief of the Defence Staff.

<sup>8</sup> The Concise Oxford Dictionary of Current English, (Oxford: Oxford University Press., 1982), p. 509.

<sup>9</sup> R.M. Dawson. The Principles of Official Independence, (Toronto: S.B. Gundy, 1922), p.10.

Independence is not a new concept. Reasons for independence are based on the belief that “the wise use of independence provides certain advantages which are not easily procurable by any other expedient.”<sup>10</sup> Foremost, however, is the advantage that independence provides in promoting trust in officials:

Political bodies are generally regarded with suspicion and often with hostility, for their motives are not always altruistic and almost one half of the people dislike intensely the government of the day or anything connected with it. But if these bodies are purged of their political element and dissociated from any political party, the people will trust them to a far greater extent.<sup>11</sup>

The general thinking behind the justification for independence, therefore, is the ability of the professional to provide an unbiased service to his community, void of inappropriate influence or direction, and with the latitude to determine the best course of action in the execution of his or her work.<sup>12</sup> Similarly, society has determined that to be effective civilian police officers and police forces require a level of autonomy to carry out their vocation. Over time, this notion has become known as the concept of police independence. Against this standard, the current arrangement of military police governance is not consistent with the concept of police independence. In turn, the ability of the CFPM to manage a professional policing service, in adherence to Canadian values and policing standards, in support of the DND and the CF is undermined by her lack of control.

It is the intention of this paper to demonstrate that the preferred governance of the military police in the Department of National Defence and Canadian Forces should be vested in the Canadian Forces Provost Marshal. This method of governance will allow the military police to develop into a professional policing service required to support a constitutionally compliant

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<sup>10</sup> *Ibid.* p. 10.

<sup>11</sup> *Ibid.* pp. 10-11.

<sup>12</sup> *Ibid.* p. 10.

and modern CF. In support of this position, it is observed that the military police, as part of the policing profession, have not evolved in unison with their civilian police compatriots in meeting the standard of police autonomy in Canada. Specifically, the development of the concept of police independence has not been applied in an equitable manner toward military police governance. Furthermore, recent NDA amendments to the military justice system did not consider the importance of this concept toward improving the professionalism of military police. Before examining military police governance, including developments within the military justice system that have resulted from recent constitutional and procedural concerns, our point of reference begins with the concept of police independence.

## II. THE CONCEPT OF POLICE INDEPENDENCE

From the time the human race was young, people have looked to constitutions and systems of law to provide fairness and justice. Moreover, people place their trust in the police to enforce the law in a fair and unbiased manner. The notion of Canadian policing has evolved from the English experience, which in turn developed from centuries of conflict and the need for peace and order in society.<sup>13</sup> Policing “is not the creation of any theorist nor the product of any speculative school; it is the child of centuries of conflict and experiment.”<sup>14</sup> Therefore, before examining the question of military police governance, it is necessary to understand the origins of the concept of police independence in the larger Canadian mosaic. The reason for this examination is two fold. First, the issues of independence and control influence the governance of all police officers. Second, the members of the CF are recruited from this mosaic and they bring the perceptions and expectations of the larger society. It is, therefore, a concept that provides a basis for military police governance in a society that lives by the rule of law.

The concept of police independence parallels the development of the civilian police constable. Between the seventh and tenth centuries, every citizen was responsible for aiding neighbors against criminals. The early ‘police’ were local individuals who represented the interests of the community that chose them. The original authority of the police ‘constable’ came from the community and its members:

The police organization which we are considering is generally spoken of as the “Frankpledge system,” frankpledge signifying the guarantee for peace maintenance

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<sup>13</sup> Adam Wilson, The Constable’s Guide: A Sketch of the Office of Constable, (Toronto: Maclear & Co., 1859), p. 16.

<sup>14</sup> Melville W.L. Lee, A History of Police in England, (Montclair, N.J.: Patterson Smith, 1971), p. xxxi.

demanded by the king from all free Englishmen, the essential properties of this responsibility being, that it should be local, and that it should be mutual.<sup>15</sup>

Subsequently, early policing was far from independent. Local citizens arranged themselves into groups called 'tithings' and a 'hue and cry' was sounded to warn everyone of trouble and solicit aid in capturing outlaw citizens.<sup>16</sup> Supervision of the 'tithings' was vested in a constable, who in turn was supervised by a shire-reeve appointed by the King to enforce the royal laws and collect taxes.<sup>17</sup> This form of citizen policing, however, would prove insufficient as citizens converged and began living in dense communities with the rise of the market economy.

Toward the end of the eighteenth century, the industrial revolution gained momentum and a massive influx of people moved to the cities to work in factories. Crime became rampant as people struggled to survive. With no organized police force, gang activity increased, counterfeiting flourished, and highwaymen victimized travelers. The policing and judicial system reflected the social-economic structure of society of the time. Punishment of criminals became severe, in which the act of stealing a loaf of bread was considered a hanging offence; however, harsh punishments did not reduce the crime problem.<sup>18</sup> It was only through the innovation of individuals, such as Henry Fielding, that policing and public safety in England was improved. After Fielding was appointed magistrate in Westminster, near London in 1748, he conceived a strategy of preventing crime through police action. He formed the famous Bow Street Runners who quickly traveled to crime scenes to catch criminals. This strategy was the first step in establishing a separate organization dedicated to crime control and public security.

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<sup>15</sup> *Ibid.*, p. 4.

<sup>16</sup> J.D. Devlin, *Police Procedure, Administration and Organization*, (London: Butterworths, 1966), p. 4.

<sup>17</sup> A.C. Germain, et al., *Introduction to Law Enforcement and Criminal Justice*, (Springfield, IL: Charles C. Thomas Pub., 1974), pp. 47- 48.

<sup>18</sup> *Ibid.*, p. 60.

The next step would involve the police function being taken from the local authorities through the establishment of a professional organization under centralized government control.

When Sir Robert Peel became Home Secretary in 1822, he supported the need for a professional police force. Although originally rebuffed, he gained support by stressing the importance of preventive patrols by well-trained professional police. It took him several years to generate enough political support to gain acceptance for his proposal to establish a professional police force. In 1829, the *Metropolitan Police Act* created the London Metropolitan Police; however, acceptance of this public police force was not universal. Disagreement, before and after the creation of the police force, continued between those who wished to bolster the status quo of justices, magistrates and their assorted constables, and watchmen, and those who wished to see a unified police force established. Since the bulk of the justices and magistrates were members of the gentry and aristocracy, this privileged class was not moved by calls for a new ‘independent’ police force. In contrast, the emerging industrial middle class could not afford the private protection of the aristocracy and was seeking reform and fairness in the prosecution and enforcement of laws.<sup>19</sup> To pacify any resentment, the ‘new police’ were not to be involved in political expression and would identify themselves as “agents of the legal system who derived both their strength and their restraint from the powers and limitations of the laws of England.”<sup>20</sup> The creation of the London Metropolitan Police marked the beginning of a modern police force and a new notion of police governance. The public now demanded a level of autonomy for the police, who would be subordinate to the law and not local authorities.<sup>21</sup> Hence, the notion of

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<sup>19</sup> Andrew J. Goldsmith, *The Politics of Police Independence: A Comparative Analysis of Police Autonomy in the State*, (University of Toronto: Centre of Criminology, 1982), pp. 21-22.

<sup>20</sup> W.R. Miller, *Cops and Bobbies: Police Authority in New York and London 1830-70*, (Chicago: University of Chicago Press, 1977), pp. 14-15.

<sup>21</sup> Germain and Lee.

police independence is relatively new; however, Peel perhaps laid the foundation with the argument that the police had to be impartial in any dealings with the public, albeit under the control of the government through the Home Secretary.<sup>22</sup> Likewise, this notion would influence Canadian thought on police governance.

Policing in Canada can trace its roots back to the developing colonies of British North America. Each colony would emulate the English system of establishing local officials to perform the function of constable within their cities. In 1729, constables were appointed in Newfoundland to administer the common law of England.<sup>23</sup> In 1749, at Halifax, Nova Scotia, constables were chosen to carry out the duties detailed to them by the local justices of the peace.<sup>24</sup> Similarly, five years after the conquest of New France by the British in 1759 English-style justices of the peace were introduced to the Quebec colony.<sup>25</sup> The common theme throughout the British colonies was that the local constable was generally subordinate to the local justice for the performance of his duty. However, Confederation in 1867 would also lead to a departure of police governance by the Canadian Parliament from the traditional British model.<sup>26</sup> In 1868, the *Police of Canada Act*, established the Dominion Police Force. Three significant developments arose from this *Act*, influenced by the reforms of police governance in the Great Britain: first, the police force was to be controlled by the central government; second, constables within the new force were to be appointed; and third, a Commissioner of Police would

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<sup>22</sup> T.A. Critchley, *A History of Police in England and Wales*, (London: Constable, 1978), pp. 133-139.

<sup>23</sup> D.W. Prowse, *A History of Newfoundland*, (New York: Macmillan & Co., 1895), p. 287.

<sup>24</sup> V.W. Mitchel, "Halifax Police Department," *R.C.M.P. Quarterly*, (April 1965), p. 3.

<sup>25</sup> W.P.M. Kennedy, *Documents of the Canadian Constitution 1759-1915*, (Toronto: Oxford University Press, 1918), p. 37.

<sup>26</sup> U.K., *The British North America Act*, 1867 (Vict., c. 3), pp. 30-31.

be appointed to manage the force.<sup>27</sup> The result was to fashion a new method of police governance. In fact, elements of this plan still exist to this day and continue to influence the perceptions and realities of police independence and control in Canada. However, an English court decision on the constitutional status of the Commissioner of the Metropolitan Police would strongly influence Canadian perceptions of police independence.

The most cited statement to this day was to come from England, in *R. v. Metropolitan Police Commissioner, Ex Parte Blackburn* [1968] 1 All E.R. 763 (C.A.), in which Lord M.R. Denning expressed a broad concept of police independence. Hereafter, the notion of police being independent from political control was not brought forth in law, but derived through political statements and judicial announcements.<sup>28</sup> His opinion succinctly described the Commissioner of Police and police constables to be independent from the executive who appoint them to that office. The Commissioner of Police should be free to determine the course of police investigation, arrest, and prosecution:

...in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.<sup>29</sup>

Lord Denning's statement had a significant impact in defining the appropriate relationship between the police and their political superiors. His determination that the Commissioner of Police and his constables were solely responsible for law enforcement, independent of public

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<sup>27</sup> Philip C. Stenning, *Legal Status of the Police*, (Ottawa: Law Reform Commission of Canada, Minister of Supply and Services Canada, July 1981), pp. 40-41 and Philip C. Stenning, *Trusting the Chief: Legal Aspects of the Status and Political Accountability of the Police in Canada*, (Toronto: University of Toronto Faculty of Law, 1983), pp. 187-190.

<sup>28</sup> Andrew J. Goldsmith, *The Politics of Police Independence: A comparative Analysis of Police Autonomy in the State*, (University of Toronto: Centre of Criminology, 1982).

<sup>29</sup> *R. v. Commissioner of Police for the Metropolis, ex parte Blackburn* [1968] 2 Q.B. 118, pp. 135-136.

direction, would provide a yardstick for future police governance by public officials.

In particular, Lord Denning's decision influenced Canadian perceptions of police independence in the McDonald Commission's report on the Royal Canadian Mounted Police (RCMP) in the 1970s, known by its official title as the *Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police*.<sup>30</sup> This report was the result of a Commission of Inquiry established in 1976 to investigate allegations of impropriety by the RCMP Security Service.<sup>31</sup> Headed by Justice David McDonald, the Commission of Inquiry had a broad mandate to review RCMP operations and policies throughout the country.<sup>32</sup> In the context of policing, the report was to "advise as to any further action that the Commissioners may deem necessary and desirable in the public interest..."<sup>33</sup> The Commission's subsidiary treatment of the policing function within the report provides evidence on the evolution of the concept of police independence and methodology toward police governance in Canada. The Commission, which strongly advocated throughout their report that the rule of law was "fundamental to the health of our democratic society," insisted that police conduct "must be above reproach, and set an example of obedience to the law."<sup>34</sup> The Commission subsequently warned:

If governments and police forces do not strictly apply the rule of law to themselves it will become increasingly difficult for them to persuade private organizations and individuals in our society to respect the law.<sup>35</sup>

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<sup>30</sup> Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, Second Report: Freedom and Security under the Law, (Ottawa: Canadian Government Publishing Centre, 1981), referred to as the McDonald Commission.

<sup>31</sup> In 1976, allegations were made by a former RCMP constable implicating himself and other members of his police force of illegally breaking into a press agency in Montreal in 1972. The illegal break-in occurred in the wake of the 1970 October Crisis. The RCMP, embarrassed by their failure of intelligence and the assassination of Pierre Laporte by Quebec separatists, became very aggressive in their pursuit of potential terrorist and subversive threats. See: Richard French and André Béliveau, The RCMP and the Management of National Security. (Toronto: Butterworth and Co., Ltd., 1979), pp. 19-20.

<sup>32</sup> Freedom and Security under the Law, pp. 9-11.

<sup>33</sup> Ibid, p.14.

<sup>34</sup> Ibid, p. 43 and p. 45.

<sup>35</sup> Ibid, p. 409.

To retain trust and co-operation from society, the Commission was concerned that the police not develop into an organization distant and out of control from the very society it was sworn to serve. The Commission went on to explore issues involving police independence and police obligation to account for their actions in a modern society.

The McDonald Commission found evidence of willingness among RCMP members to deceive persons with jurisdiction over them or their activities. More disconcerting was “a widespread attitude by the Force that it need not be responsible to civilian authority.”<sup>36</sup> The Commission did not believe the RCMP should escape their obligations toward the civil authority by claiming obedience to the rule of law. Indeed, the Commission stated:

In addition to recognizing unreservedly the significance of the rule of law in its application to the RCMP, it is imperative that in word and deed all police forces accept the primacy of the civil government. Yet we have detected, in subtle references, that there is an impression in some quarters in the RCMP that the Commissioner of the RCMP is answerable to the law and not to the government.<sup>37</sup>

Led by this line of inquiry, the Commission focused on the nature and degree of control asserted by government over the law enforcement functions performed by the RCMP.<sup>38</sup> The Commission believed that the notion of police independence in relationship to the government should “qualify, but not dictate, the essential nature of those relationships”; but in the end, it is the democratically elected government that remains in control and accountable of the police.<sup>39</sup>

Notwithstanding McDonald’s belief that ultimate control of the police should rest with government, the Commission also took into consideration the following position taken by the

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<sup>36</sup> *Ibid.*, p. 102.

<sup>37</sup> *Ibid.*, p. 963.

<sup>38</sup> *Ibid.*, p. 1005.

<sup>39</sup> *Ibid.*, p. 1006.

British Royal Commission on the Police in 1962:

...it is clearly in the public interest that a police officer should be answerable only to his superiors in the force and, to the extent that a matter may come before them, to the courts. His impartiality would be jeopardized and public confidence in it shaken, if in this field he were to be made the servant of too local a body.<sup>40</sup>

The British Royal Commission reaffirmed the special constitutional status of the police in Great Britain and their relationship to local police authorities, and accepted the position that the chief constable should be independent of local influence.<sup>41</sup> The McDonald Commission held that this statement remained pertinent to Canadian police and observed Canadian courts often-cited Lord Denning's comments:

...there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State which he is said to serve. The constable falls within the latter category. His authority is original, not delegated, and is exercised as his own discretion by virtue of his office; he is a ministerial officer exercising statutory rights independently of contract.<sup>42</sup>

The British position, however, must be tempered by the different statutory arrangements in Canada. Specifically, as noted in the McDonald Commission report, the statutory power contained in the *RCMP Act* granted the Minister power to direct the Commissioner of the RCMP with respect to management of the police force.<sup>43</sup> In regard to Canadian policing, police governance and accountability was to be firmly seated in a very senior elected public official within government.<sup>44</sup>

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<sup>40</sup> *Ibid.*, p. 1010.

<sup>41</sup> *Ibid.*, p. 1008.

<sup>42</sup> *Ibid.*, p. 1011, refers to Lord Denning's reference to the Privy Council case of *A.G. of N.S.W. v. Perpetual Trustee Co. (Ltd.)* (1955)

<sup>43</sup> *R.C.M.P. Act*, ( R.S. 1985, c. R-10 ), Section 5, at: <http://laws.justice.gc.ca/en/R-10/index.html>

<sup>44</sup> *Freedom and Security under the Law*, p. 1006.

Notwithstanding, civilian control of the police must not be overshadowed by a concept of police independence in Canada that serves to obstruct attempts to interfere in police decision-making. In the case of the RCMP, the Commission stated:

... the Solicitor General [has] full power of direction over the activities of the RCMP, except over the ‘quasi-judicial’ police powers of investigation, arrest and prosecution in individual cases.<sup>45</sup>

The Commission qualified its remarks by stating that the Commissioner of the RCMP should advise the Minister on any operational police matter, if the case raises an important question of public policy. This qualification, however, did not mean authority to direct the Commissioner of the RCMP in his policing duties.<sup>46</sup> Generally, the Commission’s work provided the framework toward a better appreciation of police governance in society and attempted to balance the concept of independence and the need for control.

Any ambiguity of the premise would be cleared up by the Supreme Court of Canada, which confirmed police status in *R. v. Campbell*, [1999] 1 S.C.R. 565. In this case, the court gave their approval of the passage quoted from *Ex. parte Blackburn* previously. Speaking for a unanimous court, Justice Binnie stated: “a police officer investigating a crime is not acting as a government functionary or as an agent of anybody;” however, “officers perform a myriad of functions apart from the investigation of crimes” which bring officers toward a closer relationship with the other authorities.<sup>47</sup> With respect to the RCMP, the court referred to section 5 of the *RCMP Act*, which provided for governance of the RCMP:

While for certain purposes the Commissioner of the RCMP reports to the Solicitor General, the Commissioner is not to be considered a servant or agent of the government while engaged in a criminal investigation. The Commissioner is not subject to political

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<sup>45</sup> *Ibid.*, p. 1014.

<sup>46</sup> *Ibid.*, p. 1013.

<sup>47</sup> *R. v. Campbell*, [1999] 1 S.C.R. 565 13 & 14. at <http://www.canlii.org/ca/cas/scc/1999/1999sec18.html>

direction. Like every other police officer similarly engaged, he is answerable to the law and, no doubt, to his conscience.<sup>48</sup>

The opinion of the Supreme Court lends strong support to the concept of police independence, confirming all police officers are autonomous from government control when conducting criminal investigations.

The concept of police independence would again be reviewed as a corollary to events that took place in connection with demonstrations on 19-25 November 1997 as Canada hosted the Asia Pacific Economic Cooperation (APEC) Conference in Vancouver. The RCMP, who were responsible for security, clashed with students and other demonstrators protesting against regimes of some of the APEC member states. These clashes and the actions of the RCMP resulted in 52 formal complaints and the initiation of hearings into those complaints by Commissioner Ted Hughes.<sup>49</sup> The Commission's objective was to review the appropriateness of the conduct and actions taken by the RCMP during the APEC conference in dealing with demonstrators. During the course of the inquiry, complaints of "inappropriate and direct government interference with the RCMP" were made.<sup>50</sup> In effect, it was asserted that the RCMP were inappropriately influenced in their policing functions of monitoring public peace and security by the Government of the day.<sup>51</sup> Commissioner Hughes concluded that the Government did not improperly suggest to the RCMP how they ought to perform; however, the Commissioner briefly analyzed the proper relationship between government and the RCMP.<sup>52</sup>

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<sup>48</sup> Ibid, paragraph 33.

<sup>49</sup> Canada, Commission of Public Complaints Against the RCMP, Commission Interim Report, (File No.: PC 6910-199801, July 31, 2001), p. 2.

<sup>50</sup> Ibid, p. 54

<sup>51</sup> The RCMP were responsible for security arrangements; however, those arrangements concerned a public venue requiring the authority of police powers should any violation of law be detected.

<sup>52</sup> Ibid, pp. 80-81.

Overall, Commissioner Hughes felt that it was clearly unacceptable for government officials to direct the RCMP's law enforcement activities. However, "it is equally unacceptable for the RCMP to be completely independent and unaccountable, to become a law unto themselves."<sup>53</sup> Taking into consideration the position held by the McDonald Commission and the Supreme Court decision in *R. v. Campbell*, Commissioner Hughes formulated principles to regulate police governance in specific situations: when performing law enforcement functions, the police are entirely independent and answerable only to the law; when performing their other functions, the police are not entirely independent but are accountable to a government official, but must remain accountable to the law and the courts; when responsible for security, the police must give adequate weight to the Constitutional rights of citizens and political direction can not be used as a defence; and, a police officer must not submit to government direction that is clearly unlawful.<sup>54</sup> Consequently, Commissioner Hughes presented a road map toward the improved practice of police governance in Canadian society, balancing the concept of police independence with government control.

Adoption of the concept of police independence, which assumes a particular role for the police in investigation, arrest, and prosecution, means in a very real sense that the police are independent from those who appoint them in this function. On the other hand, the police are not independent in all other activities that they perform and are subject to the appropriate level of governance through their senior police officer, such as a commissioner, a chief constable, or a chief of police. The courts have not previously articulated the question of adopting this theory with respect of the military police; however, such a debate is not impossible. The first

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<sup>53</sup> *Ibid.*, pp. 83-84.

<sup>54</sup> *Ibid.*, pp. 85-86.

expression of concern surrounding military police independence came from a 1994 Audit of the military police role in counter-intelligence by retired provincial court judge René J. Marin. In his report, Marin wrote:

It is perhaps time to examine the total Military Police role...the Military Police are becoming, *de facto*, a civil police force. In fact, increasingly, the Military Police are taking their prosecutions to the civil courts of criminal jurisdiction for resolution. I welcome this, as it subjects some of the Military Police enforcement operations, methods and investigational standards to the scrutiny of the judicial system. I believe this to be particularly important, considering the increased emphasis being placed on individual rights and freedom by the Courts.

Nonetheless, I remain unconvinced that a serious problem of accountability will not develop in the future. Military Police personnel are, after all, soldiers by trade and police officers by selection. The existence of a rigid military culture which demands, first and foremost, total loyalty to its own beliefs and institutions may not always be compatible with the dynamics of the law in its reflection of public values and attitudes. For example, while the civil police are held accountable to the public they serve, not only by the Courts, but by various external oversight committees, boards and commissions, the Military Police respond primarily to their own internal command structure...the lack of external controls must bring into question the objectivity of Military Police conducting investigations into the activities of military personnel and others who fall under their jurisdiction...all of whom are entitled to the same freedoms and safeguards as other citizens...

I should add that there is some question in my mind as to the Military Police officer's individuality, or independence of action and ability to exercise the discretionary powers of a peace officer in view of the 'tasking' philosophy prevalent in organizations that place great emphasis on 'chain of command'. The fact that a Commanding Officer (CO), who may have little knowledge of the law or criminal procedures, is in a position to influence the course of a police investigation certainly bears further scrutiny.<sup>55</sup>

Without question, Judge Marin reflected on the governance of military police in relation to the concept of police independence and the ability to perform independently their 'quasi-judicial'

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<sup>55</sup> R.J. Marin, Audit of the Canadian Forces Special Investigation Unit, Report to the Chief of the Defence Staff, Ottawa, July 1994, (Ottawa: Canada Communication Group, 1994), pp. 6-8.

functions of investigation, arrest, and prosecution. Canadian courts and Commissions have now up-held the concept that police officers are independent in discharging their duties and are not servants or agents of the appointing authority. The exception is when police forces perform non-quasi-judicial functions and receive advice and direction from an appropriate authority.<sup>56</sup> The remaining challenge is to address the type of influence appropriate in operations of the military police as broached in Judge Marin's statement. An answer to this question requires an awareness of the evolution of military policing in general and in Canada specifically.

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<sup>56</sup> Anne W. McChesney, K.R. Turriff, Ministerial Control and the Ontario Provincial Police: A Discussion Paper. (Toronto: Ministry of the Solicitor General, 1991), p. 17.

### III. CANADIAN MILITARY POLICE

The Provost must have a horse allowed him and some soldiers to attend him, and all the rest commanded to obey and assist him, otherwise the service will suffer, for he is but one man and must correct many and cannot therefore be beloved.

And he must be riding from one Garrison to another, to see that the soldiers do no outrage, nor scathe about the country.

*Charles I, Articles of War of 1625*<sup>57</sup>

Little information is known about the historical development of military police in Canada. Notwithstanding, military police have historically been an integral part of military organizations. Prior to civil policing, the earliest presence of military police was recorded as far back as the Roman army of Augustus Caesar in 27 B.C. - 14 A.D. Emperor Augustus decided a large body of troops was too unwieldy to be effective for his personal protection and formed a smaller loyal group that he named 'Speculatore'.<sup>58</sup> Not surprisingly, military law and its civilian counterpart can trace their roots to Roman law, which permeated Western Europe during the first millennium A.D.<sup>59</sup> Roman Law made no distinction between civilian and military systems of justice since it was predicated upon a military society. However, after William the Conqueror brought the Roman law to England in 1066, a separate legal system applying to members of the Army and Navy began to manifest itself.<sup>60</sup> From the fourteenth century onward, the word 'provost' came into general use in the British and French armies, designating a person who was responsible for maintaining discipline among soldiers on behalf of the commander in the field.<sup>61</sup>

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<sup>57</sup> R.A.J. Tyler, Bloody Provost, (London: Phillimore & Co. Ltd., 1980), p. 82.

<sup>58</sup> Michael Grant, The Army of the Caesars, pp. 90&91 in Ritchie, Andrew R. Watchdog: A History of the Canadian Provost Corps, (Burlington: The Canadian Provost Corps Association, 1995), p. 1.

<sup>59</sup> ROTC Manual No. 145-85, Fundamental of Military Law, (Washington, D.C.: Headquarters, Department of the Army, 30 October 1980), p. 1.

<sup>60</sup> Fundamental of Military Law, p. 1.

<sup>61</sup> Ibid, p.6.

The inference derived from the study of early military police in early European armies is that there was the uncertainty that discipline could be maintain among large numbers of troops, consisting primarily of neglected peasant soldiers. Therefore, the requirement for a well-trained and disciplined police corps to apply law and order was established; this force often possessed power to arrest, judge, and to pronounce and carry out the sentence.<sup>62</sup> Indeed, the Grand Emperor Napoleon is quoted as saying in 1812: “Two or three hundred cavalymen more or less, do not mean much. Two hundred more policemen ensures serenity in the army and good order.”<sup>63</sup> The function of policing the military continues to this day, along with numerous other sundry duties. However, the method of governance over the policing function has come under increased examination over many years. The principal focus of criticism has been the ability of the military police to exercise their quasi-judicial functions without interference within a military institution with strong cultural values and beliefs. Likewise, the maturing of constitutional rights and Canadian policing standards have resulted in internal and external reflection on the methodology of policing within the CF.

The history of military police in Canada appears to have begun late in the First World War. In the early years of the war, small Regimental Police forces drawn from infantry made up the police element in the army. Selected on the basis of good conduct and reliability, their tasks were to police their regiment, supervise defaulters and guard soldiers under arrest. This situation prevailed until the Minister of Militia and Defence authorized the stand-up of the Canadian Military Police Corps (CMPC) on October 1917. This action, mainly in response to problems of discipline and desertion, was instrumental in coordinating military police activity and was

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<sup>62</sup> *Ibid.*, p. 5, 6.

<sup>63</sup> National Defence, Project Charter C-18 Security and Military Police 31 July 1995 in 1000-5(SSAT) 4 August 1995

credited with the marked improvement in the dress, deportment, and general discipline of Canadian military troops.<sup>64</sup> The CMPC was disbanded on 30 June 1920 and the military police function would not exist until it was needed again during the Second World War.<sup>65</sup> In 1939, RCMP Commissioner S.T. Wood, citing the tradition of military service by the members of the police force, recommended establishment of a provost company from RCMP volunteers. On 20 September 1939, these volunteers stood-up 1 Provost Company, a unit within the 1<sup>st</sup> Canadian Infantry Division, thus paving the way for establishment of a new Corps of military police.<sup>66</sup>

In June 1940, the Canadian Provost Corps (C Pro C) came into existence, quickly integrating the original members from the RCMP as it grew to meet the home and oversea demands of the Canadian Army. The C Pro C would be involved in most operations of the Canadian Army, conducting the duties of traffic control, security, and maintenance of good order behind the front lines. After the end of the world, the C Pro C provided integral support to units in Korea in 1950, NATO detachments in Germany in 1951, and it served with the United Nations in Cyprus in 1964.<sup>67</sup>

During the Second World War, the Royal Canadian Air Force (RCAF) also realized that as it was rapidly expanding it too needed to establish a policing service at its bases. The debut of the RCAF Police commenced in 1940 with appointment of the first Provost Marshal of the RCAF and establishment of a new Directorate of Provost and Security Services. Security at the newly established Commonwealth training bases would receive priority from the RCAF Police

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<sup>64</sup> Ritchie. *Watchdog: A History of the Canadian Provost Corps*, pp. 6-7.

<sup>65</sup> *Ibid.*, p. 11.

<sup>66</sup> *Ibid.*, pp. 11-14.

<sup>67</sup> Col (Ret'd) A.R. Ritchie, "A Brief History of the Canadian Provost Corps", D.R. Johnson, ed., *On Guard For Thee: The Silver Anniversary of the Security Branch*, (Winnipeg: Jostens Canada Limited, 1993), pp. 9-25.

during the war years; however, the service included provision of policing and counter-intelligence, and later during the Cold War years, the RCAF Police were assigned nuclear security responsibilities in Canada and abroad.<sup>68</sup> The RCAF Police emphasis on physical security, in addition to its policing responsibilities, continues to be an important function in today's military police service.

Unlike the C Pro C and the RCAF Police, the Royal Canadian Navy (RCN) at its inception in 1910 recognized the need for a military police service to ensure the proper functioning of a military body. The RCN would rely on a Shore Patrol concept of using sailors to maintain discipline in the Navy. Security of the dockyards in Halifax was left to the RCMP and those in Esquimalt to the local civilian police. At the beginning of the Second World War, the Army and Air Force were better prepared organizationally to provide military policing services and this fact influenced the Navy's approach to policing in the years ahead. The intermingling of the three services and subsequent altercations between rival services during the war years led the navy to establish a permanent Naval Shore Patrol responsible for policing the RCN. This service would be disbanded shortly after the war and the old Shore Patrol system re-established to maintain discipline.<sup>69</sup> However, in 1952, a permanent Naval Shore Patrol would be re-established, headed by a Naval Provost Marshal.<sup>70</sup>

The three services continued to have their own military policing service until Paul Hellyer's White Paper on Defence, tabled in March 1964, raised the issue of duplication within

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<sup>68</sup> Squadron Leader (Ret'd) G.F.. Stubinski, "History of the RCAF Police and Security Services", D.R. Johnson, ed., On Guard For Thee: The Silver Anniversary of the Security Branch, (Winnipeg: Jostens Canada Limited, 1993), pp. 26-32.

<sup>69</sup> The shore patrol system and the Navy were criticized for faulty direction and reaction during the Halifax Riots in May 1945. In hindsight, the lack of professional service police and command interference may have contributed this criticism. See: Stanley R. Redman, Open Gangway: The (Real) Story of the Halifax Navy Riot. (Hantsport: Lancelot Press, 1981).

<sup>70</sup> Lieutenant (N) M. Baker, "Policing the RCN", D.R. Johnson, ed., On Guard For Thee: The Silver Anniversary of the Security Branch, (Winnipeg: Jostens Canada Limited, 1993), pp. 1-8.

DND. The result was amalgamation of police and security functions into a single Directorate of Security within the new National Defence Headquarters in Ottawa. In 1967, the Security Branch was formed with the amalgamation of the police and intelligence occupations of the CF.<sup>71</sup> When it became apparent that the job performed by Security Branch ‘intelligence’ officers was dissimilar to the job performed by Security Branch ‘military police’ officers, the two occupations were separated in 1982. This separation inaugurated a new Intelligence Branch to deal with military intelligence matters, while the military police were re-dedicated to police and security functions throughout the CF retaining the name Security Branch.<sup>72</sup> Despite these many changes, however, military police were not masters of their own occupation. Specifically, the chain of command and other authorities continued to control the recruitment, selection, and training of military police in the CF, which in time led to questions of accountability and policing standards. Moreover, critics were skeptical of military police capability to act independently when conducting their law enforcement functions.

In April 1995, a Management Command and Control Reengineering Team (MCCRT) was set up in NDHQ to reassess, prioritize, and rationalize the resources assigned to the various headquarters throughout DND and the CF. However, the real impetus behind MCCRT was the reduction of CF personnel to meet predicted government budget cuts to defence. Concurrently, this rationalization and eventual downsizing of the CF would affect military police services. Under the auspices of MCCRT, a sub-team referred to as Operation Thunderbird, was established to study CF military police. The team’s objective was to determine the capability of

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<sup>71</sup> Colonel (Ret’d) R.T.Grogan, “Identification and Unification”, On Guard For Thee: The Silver Anniversary of the Security Branch, (Winnipeg: Jostens Canada Limited, 1993), pp. 43-49 and Canadian Forces Reorganization Act, Stat. Can. 1966-67, c-96.

<sup>72</sup> Grogan, “Identification and Unification”, pp. 50-51. In 2001, the Security Branch would be renamed Military Police Branch as a better reflection of the occupation’s function.

the military police to meet the demands of future operational requirements, to find better methods of selection and training and, to improve police accountability in a downsized CF.<sup>73</sup> Moreover, a key issue added to the team's mandate was to address the "perception that some sensitive investigations have been, or appeared to have been, subject to inappropriate influences."<sup>74</sup> This study was the first time DND and CF asked an important question. Were military police controlled in a manner free from command influence?

Before and during this time period, the control of all police resources resided with local base commanders. These commanders possessed almost unqualified authority over their military police with limited police technical control from the CFPM to direct policing requirements.<sup>75</sup> This lack of the ability of police oversight by the CFPM often meant, in some cases, a delay to investigate serious incidents of major public concern.<sup>76</sup> Attempts at police technical control by the CFPM were seriously watered down by the filtering and resistance encountered by the various layers of command. To resolve this contentious issue, Operation Thunderbird proposed various options of military police governance to the Commanders of the Army, Navy, and Air Force.

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<sup>73</sup> Management, Command and Control Re-engineering Team (MCCRT) C-18, *Operation Thunderbird: Commanders Briefing Package* (1995) in Vice Admiral L.G. Mason, DCDS Study Directive-Security and Military Police Services. (Deputy Chief of Defence Staff 1000-5 (DCDS) 31 May 1995).

<sup>74</sup> Lieutenant General J.A. Roy, Project Charter C-18 Security and Military Police, DCDS, 31 July 95, p. 1.

<sup>75</sup> The Canadian Forces Provost Marshal (CFPM) was called the Director General Security and Military Police during this time. The name of the office would change later; however, for consistency, CFPM will be used. Technical control is defined in CF Joint Doctrine as: "The control applied largely to administrative or technical procedures and exercised by virtue of professional or technical jurisdiction. It parallels command channels but is restricted to control within certain specialized areas such as legal, medical or communications. Operational commanders may override this type of control anytime its application is seen to jeopardize the mission or the military force." Canada, National Defence, Canadian Forces Operations B-GG-005-004/AF-000. (J7 DLLS 2 2000-10-02), p. GL-E-8.

<sup>76</sup> J.W. O'Reilly, and P. Healy, Independence in the Prosecution of Offences in the Canadian Forces: Military Policing and Prosecutorial Discretion. (Ottawa: Minister of Public Works and Government Services Canada, 1997), p.11.

The commanders were provided twelve different options, ranging from contracting a civilian policing group to allowing an independent military police force. Each option was presented with its ramifications on support to their environmental operations, police independence, and military justice system. Eventually, two options would emerge: total Force Regionalization of Military Police in four regional MP Headquarters responsible for regional service delivery under the command of the CFPM, or Investigative Regionalization in which criminal investigators would be extracted from each base and organized into a regional criminal investigative structure under the CFPM. However, governance issues were to remain contentious as the commanders of the Navy and Air Force agreed with a limited form of military police regionalization, while the Army, would not endorse any of the options. The Army instead advocated that the military police should be regionally organized and assigned to the Army to manage.<sup>77</sup> It is unclear why the Army adopted this parochial position, but speculation suggests the values and customs of the Army reflected the historical control that existed over the C Pro C and disdain toward further military centralization in NDHQ. These differences resulted in the Operation Thunderbird team leader expressing to the Deputy Chief of Defence Staff that progress was effectively stalled.<sup>78</sup> On 26 March 1996, the impasse was broken when the governance options for military police were presented to the senior military leadership. The senior leadership directed that Investigative Regionalization be reviewed in detail, in which all military police resources would remain with their respective commanders, but criminal investigators would be assigned to the CFPM.<sup>79</sup> Nevertheless, events soon overtook the preliminary work of Operation Thunderbird.

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<sup>77</sup> Operation Thunderbird MCCRT C-18, Decision Brief to Armed Forces Council, 8 Mar 96. p.2.

<sup>78</sup> BGen (ret'd) D.I.F. Mackay, OP THUNDERBIRD (MCCRT C-18) STATUS REPORT. (1000-5-6 (DG SAMP/SSAT) 12 Jan 96), p. 1.

<sup>79</sup> LGen A. Roy, SAMP COMMAND AND CONTROL. (2100 DCDS (DG SAMP/SSAT) 7 Aug 96).

The shooting of several Somalis and the beating death of a Somali teenager at the hands of Canadian soldiers, called into question the ability of the military to investigate allegations of impropriety in an objective manner. The fallout from Canada's participation in the UN peacekeeping mission to Somalia in 1992-93 emphasized the need to re-examine the effectiveness of military law, discipline, and the traditional system of command and control. The Government determined that a study of the military justice system would be an important step toward renewing confidence both within and without Canada's military. On Ministerial Direction issued on 17 January 1997, a Special Advisory Group (SAG), chaired by The Right Honorable Brian Dickson, was appointed to examine military justice and military police investigation services. The SAG received specific direction:

... assess the roles and functions of the military police, including the independence and integrity of the investigative process, against the delivery of effective police services to the Canadian Forces and the Department. The Special Advisory Group should consider and make recommendations that are responsive to the requirements of operational commanders.<sup>80</sup>

Undeniably, this broad mandate had the potential to alter military police governance within DND. Indeed, a final report, submitted to the Minister on 25 March 1997, made recommendations that would usher in a new era of military policing while attempting to balance the needs of the operational commanders and independent investigative services.<sup>81</sup> The SAG had concluded there was valid need to address previous observations and perceptions of command influence over police investigations. Furthermore, after being heavily criticized by members of Parliament, the government wanted to ensure any future improprieties by members of the CF would be addressed quickly and decisively.

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<sup>80</sup> Young, Douglas, Minister of National Defence. Ministerial Direction. (Ottawa, Ontario, 17 January 1997), p. 2.

<sup>81</sup> Bill C-25, an act to amend the *National Defence Act* was part of the governments response introduced into the House of Commons 4 December, 1997 and passed on 10 December, 1998.

In the judgment of the SAG, military police were seen in two roles: a traditional force of military police supporting military functions under the established chain of command, and a distinctive investigative policing service reporting independently of the chain of command. These two distinct roles were frequently in conflict and resulted in differing requirements for military police governance. Likewise, control of military police by the local commander added to the perception of interference with police decision-making.<sup>82</sup> The SAG recommended a compromise in military police governance as a method of addressing this conflict.

Based upon the SAG report, military police governance would be fine-tuned within DND in three primary areas. First, the need to address the issue of limited police technical control and accountability by NDHQ resulted in establishment of the position and office of CFPM directly under the Vice Chief of Defence Staff (VCDS). Nound18 .55981 T780141

primacy of operations. In other words, unless an investigation was clearly serious, sensitive, or complex, it should be addressed by the local military police. It was assumed that the commanding officer should retain, as much as possible, control of military police resources.<sup>83</sup> This reasoning was based on the notion that the local commander must ultimately be in control of military operations, which includes directing the support of local military police.

Concurrent with the SAG inquiry, a separate public Commission of Inquiry, chaired by the Honorable Justice Gilles Létourneau, was established to examine the chain of command, leadership, discipline, operations, actions, and decisions in respect of the CF deployment to Somalia. Within this mandate, as interpreted by Létourneau and fellow commissioners, the inquiry made recommendations on military police investigations and the military justice system within the CF. The Commission of Inquiry submitted a report to the Government on 30 June 1997.<sup>84</sup> The report added to the impetus for comprehensive change touching on all aspects of military justice and military police services. Indeed, much of the preliminary background and research by the Commission of Inquiry aided the SAG in quickly reaching their recommendations before Létourneau finished his work. Although more critical in tone than the SAG Report, the need for change recognized by the Commission substantially tracks those of the SAG in most areas related to military police. The Commission's concept of governance for military police, nevertheless, saw the CFPM being "responsible and accountable to the Chief of Defence Staff for all military police purposes," removing control away from local commanders.<sup>85</sup> In response to recommendations from the SAG and the Somalia Commission of Inquiry, the

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<sup>83</sup> Dickson. Report of the Special Advisory Group on Military Justice and Military Police Investigative Services, pp. 29-30, 38.

<sup>84</sup> Justice Gilles Létourneau, et al., Dishonoured Legacy: The Lessons of the Somalia Affair. (Canada: Minister of Public Works and Government Services, 1997).

<sup>85</sup> Ibid., Recommendation 40.11, p. ES-76.

government introduced amendments to the *National Defence Act* that aimed at modernizing and strengthening the military justice system.<sup>86</sup>

As previously mentioned, military police were required to function under a compromise arrangement in their governance; providing support to the military justice system, while maintaining in large measure the status quo of police control by local commanders. This decision did not recognize the reality of policing, which acknowledges all police officers may be engaged in investigations; however, not all are assigned as police investigators. Investigators with the NIS have no additional authority as peace officers that are not conferred upon all military police. Therefore, to address only the independence of the investigative process within the military justice system and not the concept of police independence, whereby a peace officer is a peace officer irrespective of his/her employment, may erode and not strengthen police professionalism. Such a two-tiered policing system will only exacerbate equal access to training and resources for individual military police since budgets are devolved to local commanders. Furthermore, the CFPM will continue to be limited in providing the strategic outlook for military policing when not all military police are colloquial. In fact, the authority of the military police would suggest a two-tiered police system is inappropriate. At present, the legal powers of the military police are similar to those of the civilian police in Canada. In brief, military police are appointed under section 156 of the *National Defence Act* and have the power to arrest and use force in certain circumstances.<sup>87</sup> Officers and non-commissioned members who are appointed as

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<sup>86</sup> Canada, House of Commons, Bill C-25; An Act to amend the National Defence Act and to make consequential amendments to other Acts, December 4, 1997.

<sup>87</sup> Section 156 of the *National Defence Act*, R.S. 1985, c. N-4, provides power of arrest, in addition, QR&O 22.01(2) clarifies the lawful duties for the purposes of the definition of “peace officer” in section 2 of the *Criminal Code*.

military police are also peace officers within the meaning of section 2 of the *Criminal Code of Canada*, which states that a peace officer includes:

Officers and non-commissioned members of the Canadian Forces who are (i) appointed for the purposes of section 156 of the *National Defence Act*, or (ii) employed on duties that the Governor in Council, in regulations made under the *National Defence Act* for the purposes of this paragraph, has prescribed to be of such a kind as to necessitate that the officers and non-commissioned members performing them have the powers of peace officers.<sup>88</sup>

No provision is made to have a two-tiered policing system in the CF. All military police are endorsed with the same authority, whether employed at local units or in the NIS. Section 2(i) refers to the authority of military police to exercise police jurisdiction over persons who are subject to the military *Code of Service Discipline*; nevertheless, it does not confer jurisdiction over civilians. Military police must rely on section 2(ii) to exercise police jurisdiction with respect to civilians. In this latter case, the Queen's Regulations and Orders specifically provides for this purposes by stating:

...any lawful duties performed as a result of specific order or established military custom or practice, that are related to any of the following matters are of such a kind as to necessitate that the officers and non-commissioned members performing them have the powers of peace officers: (a) the maintenance or restoration of law and order; (b) the protection of property; (c) the protection of persons; (d) the arrest or custody of persons; or (e) the apprehension of persons who have escaped from lawful custody or confinement.<sup>89</sup>

Consequently, the military police exercise jurisdiction over all persons who are subject to the *Code of Service Discipline* inside or outside Canada, including civilians who accompany the

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<sup>88</sup> QR&O 22.01 reiterates the definition of peace officer from S. 2 in the *Criminal Code of Canada*.

<sup>89</sup> QR&O 22.01 (2).

Canadian Forces outside Canada. As peace officers, military police can arrest for *Criminal Code* offences under section 495 of the *Code* and may also lay charges in civil courts.<sup>90</sup> In certain circumstances, military police have jurisdiction over a person not subject to the *Code of Service Discipline* or a civilian.<sup>91</sup> These guidelines are further amplified in the *Military Police Policies and Technical Procedures* that depicts an overview of military police responsibilities to “enforcing the laws of Canada, including all CF laws and regulations, on or with respect to DND establishments.”<sup>92</sup>

Such peace officer powers, not dissimilar to the RCMP or other civilian police, suggests that military police should merit neither more nor less autonomy than their civilian counterpart.

For example, in 1985, the Commissioner of the RCMP proclaimed in a report that:

I accept that the Minister has broad powers of direction over the commissioner with respect to control and management of the Force, and all matters connected with that control and management. However, I do not accept that the Minister’s powers of direction over-ride the inherent responsibilities, authorities and powers that are given to every member upon appointment to the office of “Peace Officer.”<sup>93</sup>

Thus far, the CFPM has not proclaimed a similar statement on behalf of all military police.

Moreover, to make such a statement could be tantamount to insubordination, an offence under

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<sup>90</sup> When concurrent jurisdiction exists such as when an individual subject to the *Code of Service Discipline* commits an offence in Canada that is also punishable under other Acts of Parliament, military police may also lay charges in the civilian courts. Office of the Judge Advocate General, JAG Annual Report (A Review from 1 April 2000 to 31 March 2001), pp. 16 & 44, at [http://www.dnd.ca/jag/hl\\_annualreport\\_e.html](http://www.dnd.ca/jag/hl_annualreport_e.html)

<sup>91</sup> See *R. v. Hayes* (1994), 4 M.V.R. (3d) 317 (N.S. C.A.); *R. v. Courchene* (1989), 52 C.C.C. (3d) 375 (Ont. C.A.); and *R. v. Nolan* (1987), 58 C.R. (3d) 335, 34 C.C.C., (3d) 289 (S.C.C.) in which the Supreme Court of Canada stated that military police are not peace officers for all purposes of the *Code*, but in the case cited the arresting military police officer was a peace officer and had authority to demand a breath sample of a civilian after following the civilian off a military base to a public highway. In conclusion, the Nolan case cannot be said to support the view that the military police may freely conduct investigations off Defence property, specifically with respect to civilians. The circumstances in which the military police have peace officer status off a Defence establishment with respect to civilian offenders are extremely limited by this case.

<sup>92</sup> Canada, Security Orders for the Department of National Defence, Vol 4. Military Police Policies and Technical Procedures, (February 2000), p. 1C-9/25.

<sup>93</sup> R. Simmonds, Internal Review of the Royal Canadian Mounted Police Investigation of the Hatfield Case (Ottawa: RCMP, 1985), Addendum, p. 6.

the *Code of Service Discipline*. Consequently, the inability to add clarity to the office of peace officer by the CFPM only hinders strong police leadership within DND. Therefore, the dilemma is to advocate the concept of police independence while subordinating oneself to the demands of the CF. Today, the majority of military police must face this dilemma when exercising their vocation.

Furthermore, today, the governance of the military police remains within the chain of command. This restriction is made abundantly clear in various instructions. The *Military Police Policies and Technical Procedures* manual, for example, underscores the authority of the commanding officer:

Approved CF doctrine remains the established policy regarding Command and Control. CF Commanders may assign missions, allocate resources, and establish enforcement priorities for their MP organizations.<sup>94</sup>

Thus, CF doctrine, including years of established custom and tradition, have become a qualifying influence in how the governance of military police is perceived. In addition, the military police have been subordinated to their commander's requirements of crime prevention, investigation, and assistance in the maintenance of good order and discipline.<sup>95</sup> Doctrine should not, however, be considered tantamount to a legal relationship between military police and the local commander. While doctrine is important, it should serve only to guide the relationship and service requirements between the commander and military police, and not undermine the concept of police independence. Furthermore, the CFPM's responsibilities for professional oversight and review of police functions within DND remain complicated by arrangements where military

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<sup>94</sup> Military Police Policies and Technical Procedures, p. 1-7/15.

<sup>95</sup> Ibid, p. 1-2/15.

police report directly to a local commander. Nevertheless, military police retain a method to circumvent their commander with respect to police information.

To mitigate the lack of direct control of military police by the CFPM, there exists a method of communication commonly termed the ‘MP Technical Chain’ that authorizes communication among military police regardless of where they serve.<sup>96</sup> In addition, the CFPM is responsible for the professional audit of police functions that permit a level of professional oversight on behalf of DND.<sup>97</sup> Moreover, important linkages and legislation in place are designed to give the military police a measure of autonomy or at least the perception of autonomy from command influence. Specifically, establishment of an independent body modeled after the RCMP Public Complaints Commission, which provides oversight of RCMP members’ conduct in performing their policing duties was approved for the military police.<sup>98</sup>

Establishment of the civilian Military Police Complaints Commission in 1998, a body independent of DND, was mandated to review, investigate, and report on complaints about the conduct of military police. Additionally, in striking a compromise between police independence and the traditional authority of the military chain of command, the commission is authorized to review complaints about improper interference by military authorities or senior officials of DND with a member of the military police conducting an investigation. Section 250.19 states:

- (1) Any member of the military police who conducts or supervises a military police investigation, or who has done so, and who believes on reasonable grounds that any officer or non-commissioned member or any senior official of the Department has improperly interfered with the investigation may make a complaint about that person under this Division.<sup>99</sup>

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<sup>96</sup> *Ibid.*, p. 1-8/15.

<sup>97</sup> *Ibid.*, p. Annex C.

<sup>98</sup> *RCMP Act*, Part VI (RSC 1985 c.R-10) at: <http://laws.justice.gc.ca/en/R-10/index.html> and P.C. 1999-2065 18 November 1999

<sup>99</sup> The Governor in Council, 16 December 1999, pursuant to Section 13.1a of the National Defence Act added a regulation to be known as the *Military Police Professional Code of Conduct* to govern the conduct of members of the military police.

(2) For the purpose of this section, improper interference with an investigation includes intimidation and abuse of authority.<sup>100</sup>

This clause endeavors at legitimizing the placing of military police within the chain of command and at the same time protecting the police officer's 'quasi-judicial' functions. The requirement for such a clause, however, may be inconsequential. Certainly, any willful obstruction of a police investigation or policing duties by anyone, regardless of rank or position, would become the subject of a *Criminal Code* offence of resisting or obstructing a peace officer in execution of his/her duty.<sup>101</sup> It remains to be seen, of course, how this provision would be interpreted in practice. The legitimacy of the current governance relationship, nevertheless, would be the subject of an additional review.

In the subsequent follow-up review of military police activities commissioned by the Vice Chief of Defence Staff, the Military Police Services Review Group (MPSRG) was asked specifically to determine "whether the military police command and control structure is reflective of the recommendations in the report of the Special Advisory Group on Military Justice and Military Police Investigation Services."<sup>102</sup> The review reaffirmed that all military police, less those who work for the CFPM, would remain within the normal chain of command. Fundamentally, the commanding officer was to retain, as much as possible, control of military police resources. Control of military police would only be transferred outside the chain of

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<sup>100</sup> R.S. 1985, c.N-5. National Defence Act, Part IV, Section 250.19 "Complaints about or by Military Police." Additional information can be found at: <http://www.opcc.bc.ca/canadian.htm>

<sup>101</sup> R.S., c. C-34, s.118; 1972, c.13, s.7 *Criminal Code of Canada*, Section 129 "Offences relating to public or peace officer", the gravamen of these offences is the unlawful interference with peace officers in the execution of their duties. The external circumstances of the offences of s.129(a) and (c) involve in resistance or obstruction. Under s. 129(a), the person resisted or obstructed must be a peace or public officer in the execution of his/her duty or anyone lawfully action in aid of the officer. The offence under s. 129(d) is one of omission, in which a person(s) without reasonable excuse, omits to assist a peace officer in the execution of his/her duty in arresting someone or preserving the peace.

<sup>102</sup> Belzile. Report of the Military Police Services Review Group, p. 3.

command when warranted by the seriousness, sensitivity, or complexity of the investigation.<sup>103</sup> By not recommending radical change, the MPSRG essentially endorsed the status quo relationship that has not changed since the inception of military policing. This reaction is not dissimilar to the resentment toward Sir Robert Peel's efforts in establishing the Metropolitan Police in which he too faced disagreement between senior officials who wished to bolster the status quo. In essence, the primary focus of NDA reform was not the military police. It was instead the effective and constitutional functioning of the military justice system. To understand this reasoning, the role of the military justice system in the CF must be clearly understood. The existing military justice system supports acceptable change centered on the independence of the police investigative process and not the 'quasi-judicial' functions of the police.

Canada, along with other countries that developed a legal and justice system on the British model, maintains a separate justice system for its military forces.<sup>104</sup> The historical explanation for a military justice system can be traced to the crucial struggle for power between the Crown and Parliament during the 17<sup>th</sup> century English Civil War:

In attempting to control the power of the King, Parliament had made the country vulnerable to invasion. The solution was essentially a pragmatic one. A standing Army was established by Parliament, but its existence would be limited to a fixed period. The Mutiny Act 1689 not only recited the terms of the Bill of Rights but it also provided a basic disciplinary code for its members...Parliament had therefore stamped its authority over the very existence of the Army, but it had also given the right to the military authorities to try a limited number of offences, and if need be, to exact the death penalty. Moreover, the Act made it very clear that soldiers were liable also to the ordinary laws of the land.<sup>105</sup>

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<sup>103</sup> Ibid., p. 6.

<sup>104</sup> Re Grimley Supreme Court of the United States, 1890 137 U.S. 147, 11 S.Ct. 54, L.Ed. 636, United States Law and the Armed Forces: Cases and Materials on Constitutional Law, Courts-Martial, and the Rights of Servicemen, Willis E. Schug, Ed., (New York: Praeger Publishers, 1972), p. 123.

<sup>105</sup> Peter Rowe, Defence: The Legal Implications of Military Law and the Laws of War, (London: Brassey's Defence Publications, 1987), p. 1.

Consequently, from the beginning, several principles underlay military justice. Soldiers were afforded the same basic rights as all citizens and were liable to the same ordinary laws, but in addition, soldiers were to be subject to a disciplinary code that was to be administered and adjudicated by and for the military.

This addition to the ordinary law was predicated on Parliament's fear of a powerful-armed force becoming a danger to the society that it was established to serve. This fear established the desire to control that armed force through special disciplinary provisions. As outlined in the original *Mutiny Act*:

...it being requisite for retaining such Forces as are or shall be raised during this Exigence of Affaires in their Duty an exact Discipline be observed. And that soldiers who shall mutiny or stir up Sedition, or shall desert Their Majestyes Service be brought to a more Exemplary and speedy Punishment than the usuall Forms of Law will allow...<sup>106</sup>

This special requirement for discipline continues to be the central argument for retaining a separate military justice system in Canada. The emphasis, however, is not a modification of the corresponding civil or criminal justice system, but a separate and distinct military system “developed to meet the particular requirements of a particular part of our polity.”<sup>107</sup> Indeed, the very nature of military law is such that it is “...usually taking the form of a curtailment or abolition of such rights as the soldier would have had as a citizen.”<sup>108</sup> In a democratic society, a soldier's duty to obey must be balanced with the soldier's rights as a citizen. The resulting dichotomy continues to evolve today, between the requirement of the military to retain a military justice system and the requirement of all institutions of the state, including the military, to

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<sup>106</sup> Joseph W. Bishop, Jr., *Justice Under Fire: A Study of Military Law*, (New York: Charterhouse, 1974), p. 7.

<sup>107</sup> *Ibid.*, p. xiv.

<sup>108</sup> *Ibid.*, p. 3.

respect the fundamental rights of its citizens, including members of its armed forces.<sup>109</sup>

Notwithstanding, the continued validity of maintaining a separate military justice system in Canada has been scrutinized. Indeed, Justice Létourneau questioned the requirement to maintain a separate justice system. He asked if military discipline could be administered and enforced by the civilian judicial system?<sup>110</sup> Perhaps, however, the two systems are different because each serves the needs of different communities in Canadian society and government. Four reasons, cited in Joseph Bishop's paper, offer an explanation for maintaining a military justice system. Firstly, the civilian justice system is inefficient and slow because the accused individual's rights in the civilian system are paramount. Thus, civilian justice would not consider the essential military requirements of maintaining efficiency and obedience through a disciplined command structure. Secondly, certain military offences are not found in the civilian realm and are essential in maintaining obedience within the Armed Forces, such as disobedience of a lawful command, desertions, absence without leave, or striking a superior. Thirdly, discipline, if it is to be maintained, must be the responsibility of the commander recognized by the summary trial system within the CF for minor infractions. Therefore, the commander plays a major part in the process of adjudicating and awarding punishment for behavior that could threaten discipline and obedience within the service. Finally, a system designed to dispense military justice must be deployable to the locations where the Armed Forces are serving.<sup>111</sup> Indeed, the validity of the military justice system was recognized in Section II (f) of the *Canadian Charter of Rights and Freedoms* which states that any person charged with an offence has the right to trial by jury "except in the case of an offence under military law tried before a

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<sup>109</sup> William T. Generous, Jr. *Swords and Scales: The Development of the Uniform Code of Military Justice*, (New York: Kennikat Press, 1973), p. 4.

<sup>110</sup> Létourneau, *Dishonoured Legacy: The Lessons of the Somalia Affair*, Vol 5, p.1289-1290.

<sup>111</sup> Bishop, *Justice Under Fire: A Study of Military Law*, pp. 19-25.

military tribunal.”<sup>112</sup> To be sure, the clause amplifies Canada’s recognition of a separate system of military tribunals in Canadian law.

Further amplification of Section II (f) came from the Supreme Court of Canada in 1992, when the court upheld the requirements for a separate military justice system. The court recognized the requirement of Canada to enforce special disciplinary standards in the military in order to maintain the military in a state of readiness.<sup>113</sup> Furthermore, both the Commission of Inquiry into the Deployment of Canadian Forces to Somalia and the SAG re-examined this requirement. In each, the requirement of a military justice system was re-affirmed.<sup>114</sup> While the “need for a separate and distinct military justice system is inescapable,” the system could not be separated from the *Canadian Charter of Rights and Freedoms* that apply to all citizens.<sup>115</sup> Consequently, the *National Defence Act*, which is comprised of approximately 50 percent of the *Code of Service Discipline*, is subject to the *Charter* and must meet its standards. Therefore, while separate, the military justice system must conform to the *Canadian Charter* and deal promptly and reasonably with breaches of military law.<sup>116</sup> Likewise, within society, armed forces must be reflective of standards of fair play and justice if it hopes to attract volunteers to serve in its ranks. The need to promote strict discipline, efficiency, and high morale will remain a cornerstone of military justice; however, the process of military justice must meet concurrently the Constitutional guarantees of procedural fairness and individual rights.

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<sup>112</sup> *Canadian Charter of Rights and Freedoms*, 1982, Section II(f).

<sup>113</sup> *R. v. Généreux* [1992] 1 S.C.R. 259, pp. 293-4.

<sup>114</sup> Office of the Judge Advocate General, *Rationale for the Military Justice System*, Menu Highlights, at [http://www.dnd.ca/jag/hl\\_ip\\_rationale\\_e.html](http://www.dnd.ca/jag/hl_ip_rationale_e.html)

<sup>115</sup> Dickson. *Report of the Special Advisory Group on Military Justice and Military Police Investigative Services*, p. 7. Also see Section 2 NDA, the Code of Service Discipline consists of Part III of the NDA.

<sup>116</sup> Office of the Judge Advocate General, *Rationale for the Military Justice System*, Menu Highlights, at: [http://www.dnd.ca/jag/hl\\_ip\\_rationale\\_e.html](http://www.dnd.ca/jag/hl_ip_rationale_e.html)

Among the most contentious issues concerning a separate military justice system has been the question of 'command influence' affecting the independence of military tribunals. Naturally, "independent and impartial adjudication is essential to a free and democratic society."<sup>117</sup> Prior to the reforms of the military justice system in 1997, a common view persisted, which may continue today:

...courts-martial are not convened unless the commanding officer believes the defendant is guilty; and since the officers who make up the trial panel know that the commandant is of this persuasion - and because they must often look to the commandant for promotion - they will often come through with the verdict he wants. It is in fact, that simple.<sup>118</sup>

Deficiencies in the military justice system resulted in the passage of Bill C-25, which provided significant reforms to the *National Defence Act*.

little, if any regard to the concept of police independence was made. Such oversight may not be surprising due to the suggestion that the desire to maintain an independent military justice system, with a large establishment of military lawyers and creation of independent military judges, was more important to the Judge Advocate General than other considerations, such as the appropriate governance of military police.<sup>120</sup> Furthermore, without integral legal support, the CFPM was essentially captive to the legal opinion drawn from departmental lawyers who were the same individuals that advocated the changes in Bill C-25.

The evolution of military police independence in Canada, albeit at a slower pace, has paralleled that of the civilian police. Concerns have centered on amendments to the *National Defence Act* and other regulations that have resulted in modernizing the military justice system. Creation of the NIS and the office of the CFPM was a small step in coming to terms with the issue of the ‘quasi-judicial’ functions of investigation, arrest, and prosecution. In contrast with their civilian counterparts, the military police remain predominantly split between governance by the CFPM and various commanders. In a very real sense, the military police remain in a governance system of the 18<sup>th</sup> Century. They face the same hurdles for an independent police force as did Sir Robert Peel, while at the same time having to support a 21<sup>st</sup> Century military and civilian justice system. The governance of the military police remains out-of-step with modern practice. It now requires reform.

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<sup>120</sup> Chris Madsen, *Another Kind of Justice: Canadian Military Law from Confederation to Somalia*, (Vancouver: UBC Press, 1999), pp. 135-136.

#### IV. GOVERNANCE OF CANADIAN MILITARY POLICE

The military police were worth their weight in gold. Early on in the intervention we found that a major weakness in the initial troop lists was a shortage of MP...we soon had to give them a priority on a par with combat units.

- General Bruce Palmer<sup>121</sup>

Derived from obvious wartime necessity, military police functions in the CF have evolved over several decades into a myriad of peacetime and wartime activities, together with a rather complex organization. Whether in garrison or deployed in an operational theatre, military police leverage their specialist skills to support a variety of tasks. Essentially, the functions of the military police today can be conceived as a trinity, or the idea of three-in-one.<sup>122</sup> The unity or oneness of the trinity is provided by the idea of military service where the mission of the Canadian Forces Military Police is to “contribute to the effectiveness and readiness of the Canadian Forces and the Department of National Defence through the provision of professional police, security, and operational support services worldwide.”<sup>123</sup> This consideration underlies the whole business of military policing within the CF and was articulated in the SAG report: “contrary to many public perceptions, the investigation of service offences is not the main role of the military police.”<sup>124</sup> The character of the trinity is then defined by the three characteristic or core functions by which military police carry out their purposes. The police function aptly forms the base of the trinity. It is the police function, derived from historical necessity to the present

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<sup>121</sup> Bruce Palmer, Jr., *Intervention in the Caribbean: The Dominican Crises of 1965*, (Lexington: University Press of Kentucky, 1989), pp. 151-152.

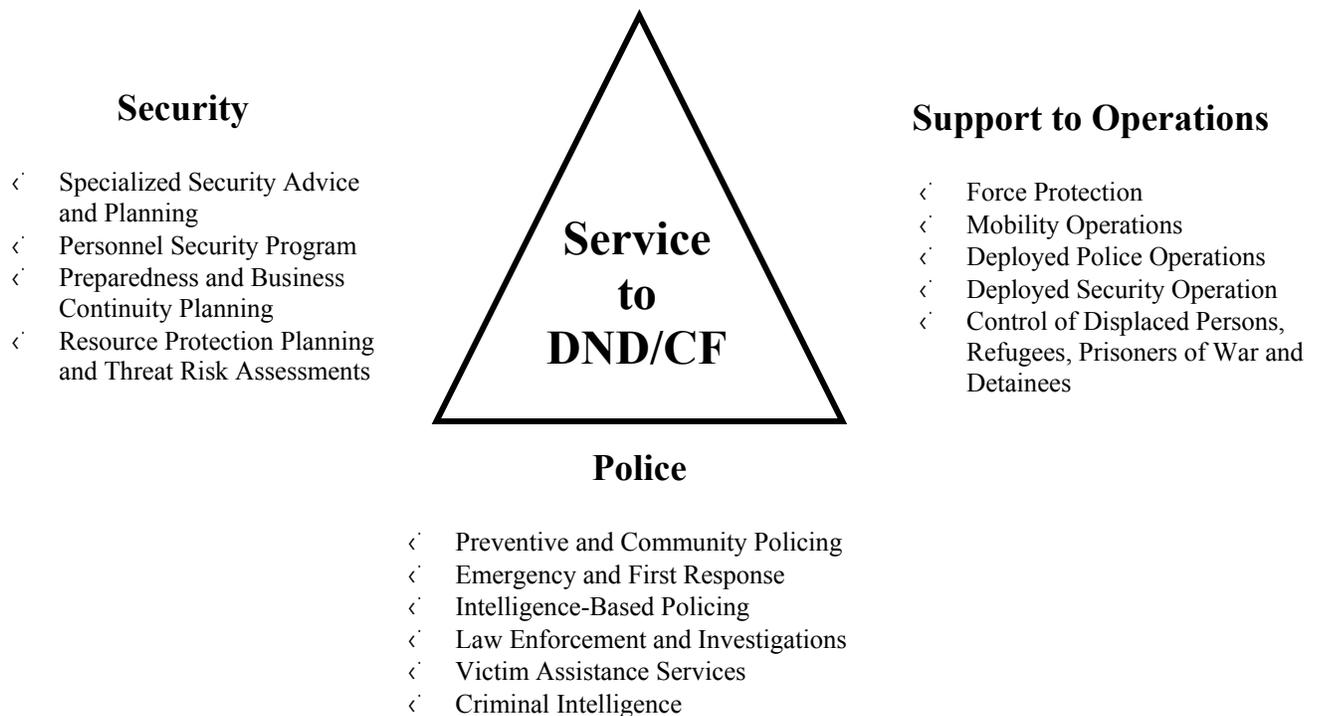
<sup>122</sup> This idea has been adapted from: Canada, *Leadmark: The Navy’s Strategy for 2020*, (Ottawa: Directorate of Maritime Strategy, 18 Jun 2001), pp. 30-31.

<sup>123</sup> “Military Police Strategic Plan 2002-2006” 25 Feb 02 provided by Capt B.C. Hudson, Staff Officer to the CFPM 1 Mar 02.

<sup>124</sup> Dickson. *Report of the Special Advisory Group on Military Justice and Military Police Investigative Services*, p. 13.

day, which is embedded within the *National Defence Act*. The security function of military police is not dissimilar to the security function performed by civil police and security agencies, although it must be performed in a military as well as a civil-domestic setting. The support to operations function is concerned with combining the functions of policing and security to support CF missions, and transcends the traditional policing role and establishes the military police as a combat support occupation. This function also requires a stronger relationship between military police and commanders to achieve mission success. It is also a relationship neither found in civilian policing nor easy for civilian police to emulate. Noticeably, all these functions serve a variety of subordinate functions that can be expressed diagrammatically as shown in Figure 1.

### **Military Police Core Functions**



**Figure 1**

These three core functions are the common denominator linking military police roles in support of the current service as well as other governmental requirements. Generally speaking, military police in support of land operations focus their attention on police and custodial functions such as traffic control, law enforcement, prisoners of war, and refugee control. Those employed in maritime and air operations, while tasked to provide police and custodial support, are much more heavily involved in the security and force protection of operational assets. Military police in support of a Joint Force operation, the employment of two or more elements, provide the full range ofent

other units. Ultimately, the objective was to increase the focus on police support to operations and enhance the operational resources in a time of downsizing that would be necessary to support CF operations.

While Operation Thunderbird received general consensus in the majority of areas discussed with Commanders and their staff, it was not entirely unexpected that differences of opinion existed. Suffice to say, parochial arguments to protect certain traditional ways of doing business remained. Protecting and controlling assigned military resources remained very much the focal point of business, rather than focusing on the non-traditional requirements and capabilities needed for the future.<sup>126</sup> Today, there is little evidence to suggest anyone has relinquished control over his or her resources. Arguably, the control of military police by numerous commanders will continue to be a hindrance to the CFPM's ability in establishing a common vision of employment for the occupation.

Instead of providing the CFPM control of all military police, a methodology was devised to enhance the technical control of police functions from a corporate or strategic perspective. Specifically, establishment of the 'Accountability Framework' between the CFPM and the VCDS was determined to be the solution. At the core of this Accountability Framework is delineation of the relationship between the VCDS and the CFPM, to ensure provision of a professional and effective military police service.<sup>127</sup> Essentially, the VCDS agrees not to direct the CFPM with respect to specific military police operational decisions and to raise military police concerns only with the senior leadership in DND. In turn, the CFPM is accountable for

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<sup>126</sup> Management, Command and Control Re-engineering Team (MCCRT) C-18, *Operation Thunderbird: Commanders Briefing Package* (1995).

<sup>127</sup> Belzile, Report of the Military Police Services Review Group, p. 9 and Annex B.

developing and maintaining professional and responsive policing standards within DND, albeit without any command authority.

The Accountability Framework, however, provides an illusion of accountability to justify the commander's retention of control over local military police personnel and resources. Two issues need to be considered with respect to the merit of this agreement. First, the Accountability Framework is not entrenched in any military regulation such as the NDA or other statute. The relationship, which reflects the notion of police independence between the CFPM and her supervisor, should be more substantive than just a promise. Ideally, establishment of this relationship should be between DND and the CFPM and entrenched in regulations. Second, military police serving in the environments do not have a similar Accountability Framework with their commanders. Circumstance could dictate that military police may rely on the technical chain in the hopes that concerns could be passed to the VCDS and action directed to their commanders. Indeed, use of the technical chain seems to be the preferred method of approach by military police. Regrettably, it also has the ability to remove control from the CFPM and place it in the discretionary hands of the VCDS:

We believe that the Accountability Framework between the VCDS and the CFPM provides all the executive authority required by the CFPM in order to ensure respect for military police policies and procedures. As we understand it, the chain of command has effectively been ordered by the VCDS to implement military police policies and procedures as they may be issued from time to time by the CFPM.<sup>128</sup>

Hence, the CFPM is reliant on a supervisor, who is not a police officer to issue directions to his equals within the CF, in order to obtain compliance with Canadian policing standards. This

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<sup>128</sup> Ibid. p. 7.

situation continues to demonstrate the inability of the CF to come to grips with either modern police governance or perceptions of command bias and interference in the quasi-judicial functions of the police.

It is not, however, easy to address the issue of the appropriate relationship between the CFPM and departmental authorities. As part of the CF, military police are subject to the same regulations as other members. In accordance with the NDA, the responsibilities and powers of military police are not prescribed by the senior departmental police officer, the CFPM, but are prescribed by the Chief of Defence Staff (CDS).<sup>129</sup> The CFPM is authorized, on behalf of the CDS, to issue military police policies and procedures.<sup>130</sup> This relationship is similar to the authority of the Solicitor General of Canada to direct the Commissioner of the RCMP, or the Ontario Minister of Public Safety and Security to direct the Commissioner of the Ontario Provincial Police, in respect of the control and management of their respective police forces. The exception, however, is that the CDS is not an elected member of the federal Cabinet, although he is responsible through the Minister of National Defence to Parliament and the Cabinet. Nonetheless, this method of control and accountability ensures military police services are focused on serving CF interests.

Control and accountability also underscored the recommendations of the McDonald Commission on the governance of the RCMP discussed in Chapter One. In the civilian setting, the theory pertains that the minister is responsible for the activities carried out under his or her authority and must answer to Parliament for the actions of his subordinates. However, reality suggests that a minister may not be aware of all actions taken in his or her name. A minister, therefore, must delegate management authority to senior officials. Within a civilian

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<sup>129</sup> QR&O Chapter 22.03

<sup>130</sup> Military Police Policies and Technical Procedures, p. 1-3/15.

Accountability Framework, the minister or police board deals directly with the senior police officer of the force. Accordingly, ministerial liability will only extend to flaws in policy or major administrative errors in which the minister is personally identified.<sup>131</sup> It is generally agreed that the minister should not intervene in police decisions made by civilian police when exercising their powers as peace officers. The rationale for this restriction is that statute and case law guide police; for example, the *Criminal Code* specifies circumstances in which an officer may arrest. Similar provision exists for military police within the NDA concerning persons subject to the *Code of Service Discipline* and the *Criminal Code* when dealing with civilians. The current method of decentralized military police governance works to curb the ability of the CFPM to be accountable for policing services on behalf of the CDS. This method is, thus, inefficient at managing a professional police force that must cater to numerous demands for its service both domestically and on military operations.

Centralized police management, either civilian or military, does not remove the flexibility of the police to meet the immediate demands for service. As noted previously, accountability for police matters may be to require information on what has or will be done rather than, as in the policy area, to control or direct the actions of police. The military police investigation policy reflects this requirement:

Commanders have the operational need to know who in their command is under investigation...commanders must at the same time exercise caution to avoid both the reality and the appearance of inappropriate involvement in an ongoing investigation that could endanger the proper conduct of the investigation and/or the reputation of the Commander.<sup>132</sup>

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<sup>131</sup> R.F. Adie and P.G. Thomas, Canadian Public Administration: Problematical Perspectives. (Scarborough: Prentice-Hall, 1987), pp. 152-153.

<sup>132</sup> NDHQ Policy Directive Revised Military Police Investigation Policy, (2120-4-0 (CFPM) 7 May 1999), p. 5.

If the minister of a province or the Solicitor General of Canada should not be able to intervene in police matters that are quasi-judicial, what right does any commander have to intervene in military police operations? The commander, having a similar relationship with the military police, as does the minister with the civil police, is not in a position to direct the police in their day-to-day functions. Such functions would include specific police matters requiring the exercise of professional police judgment. For example, crowd control at demonstrations, hostage/barricaded person incident, or response to accidents are matters that require police presence and direction. The rationale is that the military police are in the best position to assess the correct legal action and the method of operation required, which could include the use of lethal force.

Restricting the control ability of police governing authorities has already been established among provincially administered police forces. For example, Section 31(4) of the *Police Services Act* in Ontario contains the first unequivocal inclusion of the concept of police independence in Canada. The statute specifically prohibits the police management board from directing the chief of police “with respect to specific operational decisions or with respect to the day-to-day operation of the police force.”<sup>133</sup> Similar provisions, respecting the concept of police independence, have not been adopted within DND. Nevertheless, the CF does not operate in a vacuum and must determine, as have the civilian authorities in Ontario, the impact of the concept of police independence in future military police governance.

Observance of the concept of police independence could begin with the wise adoption of some of the principles mapped out by Commissioner Hughes, thereby codifying them in the NDA, or a least QR&O. First, when the CF military police are performing their law enforcement

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<sup>133</sup> Ontario, *Police Services Act* R.S.O. 1990, c. P-15, s.31(4), at [http://192.75.156.68/DBLaws/Statutes/English/90p15\\_e.htm](http://192.75.156.68/DBLaws/Statutes/English/90p15_e.htm)

functions, such as investigation, arrest and prosecution, they are entirely independent of the CF and answerable only to the law. This principle acknowledges the concept of police independence within DND and removes the perception of command interference in the quasi-judicial functions of the military police. Second, when military police perform their other functions, they are not entirely independent, but are accountable to the Minister of National Defence through the CDS or such branch of government as Parliament may authorize. This principle recognizes that the military police provide other sundry duties in support of the government, DND, and CF. Furthermore, the core functions of support to operations and security require military police to remain responsive to the military commander and his mission. Finally, in all situations, the CF military police are accountable to the law, the courts, and the Military Police Code of Conduct. This principle recognizes, despite any command and control relationship established on military operations, that military police must primarily abide in and enforce the laws of Canada.

Surely, it will be argued, the commander responsible for military operations must be able to command those resources assigned to him. Consequently, the question of military police governance is very controversial. Past issues, but more to the point, society's perceptions and expectations of police governance have questioned the ability of military police to conduct law enforcement activities within the CF.<sup>134</sup> From a critic's standpoint, the rule of law and the *Canadian Charter* are the cornerstones of our legal system. Whether working within the framework of either the military or the civilian legal system, the rule of law must be applied

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<sup>134</sup> Dishonoured Legacy: The Lessons of the Somalia Affair, p. ES-38.

equably, in spite of personal feeling or empathy.<sup>135</sup> Despite historical and legal authenticity, the military justice system appears not willing to address the concept of police independence in favor of its own self-preservation and control of the investigative process. For example, reasonable grounds remain a crucial element in any criminal procedure, most notably in arrests, searches, and laying of charges. The investigating military police officer must form the belief, beyond mere suspicion, that an offence has been committed.<sup>136</sup> In the civilian justice system reasonable grounds cannot be transferred; however, the military justice system expects local military police to transfer this responsibility to the local commander. It is then the responsibility of the commander to receive information from the local military police and determine if a charge for the offence is warranted or not.

The commander remains central to the conduct of the disciplinary system in the CF and must have a means to deal quickly and decisively with any breach of the *Code of Service Discipline*. The ability of the commander to prosecute minor offences at summary trial, however, should not be confused with the function of policing. The importance of such a distinction was pointed out by the Royal Commission on the Donald Marshall, Jr., Prosecution:

We recognize that cooperative and effective consultation between the police and the Crown is essential to the proper administration of justice. But under our system, the policing function – that of investigation and law enforcement – is distinct from the prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice.<sup>137</sup>

This observation is equally pertinent to the administration of military justice. Both the commander and military police must co-operate and consult, keeping the interests of the service

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<sup>135</sup> Gerald E. Rosen. “Judicial Independence: Political and Media Scrutiny”, in *Vital Speeches of the Day*. (Volume LXII, No. 7, January 1997).

<sup>136</sup> Gino Arcaro, *Criminal Investigation: Forming Reasonable Grounds*. (Toronto: McGraw-Hill Ryerson, Ltd., 1997), pp. 8-9.

<sup>137</sup> *The Royal Commission on the Donald Marshall, Jr., Prosecution*, (Volume 1, Findings and Recommendations, Nova Scotia, December 1989), Recommendation 35 at page 232.

and mission foremost in mind. However, the military police functions of investigation and law enforcement should be separate from the commander's prosecutorial responsibilities to ensure fairness and impartiality.

The importance of being able to lay a charge, however, was recognized to be important enough for the independence of the NIS in dealing with offences under the *Code of Service Discipline*.<sup>138</sup> The granting of this authority echoes the opinion "that the right of the police to lay a charge ensures protection of the common law position of police independence and acts as an essential check on the power of the Crown."<sup>139</sup> Military police, who come under the control of the local commander, do not have the authority to lay charges. Accordingly, local military police may be regarded as less independent in their law enforcement functions under the *Code of Service Discipline*. In spite of this situation, as peace officers, local military police can lay a charge in civilian court for hybrid offences, in other words similar offences contained in the *Criminal Code* and the *Code of Service Discipline*. The use of civilian courts by the military police should occur by exception, since indiscriminate use would surely undermine the effectiveness of the military justice system. It is incumbent upon DND, therefore, to ensure a distinct line is established between the policing function and prosecuting function if it is to maintain the confidence of CF members.

Likewise, control of military police personnel and resources at the base or command level, while expecting technical direction from the CFPM, does not facilitate responsiveness necessary in today's policing environment. Specifically, the CFPM does not have the ability to allocate police resources independently of the local commanders to meet CF commitments. A clear command and control framework, which provides for military police governance, to be

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<sup>138</sup> QR&O, 107.02 (c).

<sup>139</sup> The Royal Commission on the Donald Marshal, Jr., Prosecution, Recommendation 36 at page 232

vested with the CFPM, would focus the delivery of military police services to the CF and DND. This approach is not unlike members of the medical and legal branches who report directly to the Surgeon General and JAG respectively.

Holding fast to the doctrine of police independence, military police could already be considered independent of the local commander with respect to their policing functions. However, friction will continue to exist as long as control is vested in commanders at the same time police standards and direction are issued from the CFPM. Change is necessary, not only in the pursuit of investigative integrity, but also in development of overall excellence in program delivery and service. To achieve this objective requires a single champion of military police services who can articulate the direction of police support within the entire CF. Similarly, the question as to how best military police can support operations must not become secondary to command and control. Support to military operations, including application of the principle of primacy of operations, does not mean commanders must own military police. It does mean, however, commanders must be able to employ or receive the services of military police when and where required. For example, the Navy does not own the resources assigned to the Air Force, but it must rely on Air Force support to conduct maritime air operations. Likewise, CF military police who provide support to the majority of CF operations abroad today come from different CF bases and are not integral to the deploying units. Therefore, attention must focus on the provision of services, not on who controls the resources. The best method of achieving this focus is to go the next step, by severing policing resources from the chain of command and placing them under the direction of the CFPM.

The severance of control from local commanders would obviously meet with resistance. Commanders will argue that operational control is paramount to the assignment of tasks, objectives, and mission success. Likewise, the operational requirements of the Army, Navy, and Air Force are different, placing specific operational demands upon their military police. Naturally, these opinions are instinctive in three environments that have proud histories, customs, and traditions. Today, there are no Army, Navy, or Air Force military police, only CF military police that are selected and trained to a common standard by the CFPM to meet CF commitments. The standard, articulated by the CFPM and joint operational doctrine, provides the direction for military police to support operations in Canada and abroad, and is not reliant on control by the environmental commanders.

Moreover, the concept of police independence represents the zenith of the evolution of police governance. It equates police governance to be analogous with the constitutional independence of the judiciary and their immunity from control.<sup>140</sup> The concept has evolved over time, observable in police doctrine and legal opinion; however, the concept has not matured to the same extent within the military justice system. The concept of police independence will persist in influencing the governance of police forces in Canada, and the military police should be no exception.<sup>141</sup> The next step is for the CF to recognize the need for change before the courts or a future enquiry imposes it upon DND. To anticipate inevitable change, the CF should examine four proposals to enhance CF military police services.

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<sup>140</sup> P.H. Stenning, "Police and Politics: There and Back and There Again" in Police Powers in Canada: The Evolution and Practice of Authority, (Toronto: University of Toronto Press, 1994), p. 215.

<sup>141</sup> The minimum educational entrance requirement into the military police is a college certificate (grade 12 for the RCMP) in security and law enforcement. It is quite possible that new entrants will be taught the concept of police independence in some form or another resulting in its practise within DND. For more information see: <http://www.dnd.ca/eng/index.html> under recruiting: [http://209.82.43.54/flash/careers/career\\_profiles/mili\\_poli.html](http://209.82.43.54/flash/careers/career_profiles/mili_poli.html).

Firstly, the core functions of military police, outlined in the trinity as police, security, and support to operations, should define the basis of military police services in the CF and DND. Commanders require a complete understanding of the level of support that military police provide and the military police need to be trained and organized to achieve that support. Focusing on the core functions will ensure military police services and expectations are clearly understood by commanders of the three service environments. Any deviation or exception will need to be negotiated with the CFPM and funded accordingly by the requesting commander, similar to the method of agreement with DFAIT to provide military police support.

Secondly, the concept of independence, acknowledged in an opinion from the Supreme Court of Canada, should receive scrutiny of its applicability within the military justice system. As peace officers, military police must be seen to be impartial and beyond inappropriate influence, regardless of where they are employed. This being so, the functions of investigation, arrest, and prosecution should not be separated structurally by having a two-tiered governance methodology for the police force.

Thirdly, the military police must be organized in a simple, yet effective manner that will be responsive to the trinity of core functions. The current decentralized method of governance continues to perpetuate the difficulties identified by Operation Thunderbird to extract and generate military police in an equitably manner for CF operations. Centralized governance by the CFPM should ensure military police forces are assigned to where they are needed to support current priorities and contingencies. Since the number of CF military police is limited, the ability to extract and employ military police quickly to trouble spots becomes increasingly advantageous as either integral or stand-alone units.

Finally, administration of all CF military police should be under the control and accountability of the CFPM. It is difficult for the CFPM and senior military police officers to provide effective leadership and accountability of a specialist occupation that is decentralized only through technical audits, policy direction, and reports. Furthermore, despite changes with respect to investigating sensitive or serious investigations by the NIS, the parochial method of doing business within the three service environments has not changed. Consequently, control of military police should be revisited not technically, but operationally by having all CF military police under the command and control of the CFPM. In turn, the CFPM should report to the highest level possible within the CF – the CDS. The advantage of this reporting relationship would underscore the importance of military police functions in support of the CF, as both a police force and combat support occupation. It is envisioned that the CFPM would then enter into a Service Level Agreement (SLA) for the provision of military police services to support requesting commanders. The SLA would achieve two objectives: first, it would establish a collaborative business planning process to determine the levels of service to support force generation, routine operations, and sustainment with the requesting commander. Second, it would establish a command and control framework to ensure effective and efficient employment of military police resources in support of the commander's operations. Such an arrangement would see the CFPM retaining full command of military police, but would assign operational control to the respective commander of assigned military police personnel or units.<sup>142</sup> Thus the

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<sup>142</sup> Command is the authority vested in an individual for the direction, coordination, and control of military forces. Control is that authority exercised by a commander over part of the activities of subordinate organizations, or other organizations not normally under his command, which encompasses the responsibility for implementing orders or directions. Operational Control is the authority delegated to a commander to direct assigned forces to accomplish specific missions or tasks which are usually limited by function, time, or location. It does not include the authority to employ a unit, or any part of it, for tasks other than the assigned task, or to disrupt its basic organization so that it cannot readily be given a new task or be redeployed. Canada, Canadian Forces Operations, pp. 2-1& 2-2.

CFPM would be accountable for the delivery of military police services to the CF and DND through a military police chain of command.

Adoption of the concept of police independence by civilian police forces has set the benchmark. In the words of the CFPM, “it is imperative that all military police operations are consistent with...accepted Canadian policing standards.”<sup>143</sup> It is now time for DND and the CF to follow the path of its civilian counterparts.

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<sup>143</sup> Canadian Forces Provost Marshal, Annual Report 2000, pp.13-14.

## V. CONCLUSION

Canadian citizens have an interest in ensuring police officers are accountable for their actions, but also want the police to be independent from inappropriate influence. This balancing act of accountability and independence of the police has evolved over many years of police-public relations. In general, the concept of police independence within public policing has been derived from common law practice, popular political statements, and judicial pronouncements. The cumulative effect, articulated by the Supreme Court of Canada, is that police officers investigating a crime are not acting on behalf of the government or government official. However, independence is not absolute and police officers not engaged in a quasi-judicial function can receive advice and direction from an appropriate authority.

Despite the history of the military police preceding that of the civilian police, developm9v198.61 Tf-0.d

Conventional wisdom behind the concept of police independence, and its evolution in our society, suggests it has equal applicability to the military police. The current method of decentralized military police governance, with strong police technical direction and oversight from the CFPM, is inadequate in meeting the many challenges of leadership and police management in a modern society. The organizational obligations of the military police must reflect Canadian values and remain relevant to society, in and out of uniform, while retaining the necessary professional characteristics of the CF. Moreover, it must not continue to perpetuate the myth that the present control of military police is preventing inappropriate influence by the chain of command. The difficulty, undoubtedly, is finding the correct balance of police independence and control by the right level of authority. In a military setting, the control of military forces becomes essential in establishing mission success by the commander; however, to achieve success does not mean that the commander is required to own those resources which he is assigned; only that he can employ them appropriately when and where needed. Likewise, military police can operate as independent units and still be required to support the commander without jeopardizing mission success.

Canadians, in and out of uniform, expect the police and military justice system to be, and to be seen to be, outside of the operational control of those who may have an interest in the case, investigation, and/or outcome. The leadership of DND and the CF must recognize this expectation, not just in dealing with serious or sensitive cases, but all investigations commencing at the unit policing level. Furthermore, the current command and control structure of CF military police is inadequate; it does not provide for the concept of police independence articulated by various reports and judicial pronouncements, and it has not improved on the capability or

flexibility of military police to support departmental and CF operational objectives. To rectify these deficiencies, first, the governance of all CF military police should be vested in the CFPM. Additionally, an Accountability Framework must be entrenched in legislation that would define the concept of police independence with respect to the provision of military police services and define the relationship of military police when they are not performing quasi-judicial functions.

The concept of police independence, contentious as it is, will continue to have a profound effect on military police governance. It is a concept, which now outlines a methodology of police governance, facilitates the avoidance of inappropriate influence, and which promotes professional policing in Canada. This concept must now evolve in applicability and practice within the CF, and thus ensure professional military policing services within the profession of arms continues to be aligned with the rest of Canadian society. The first step in this evolution is to have the governance of all military police come directly under the CFPM.

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