

## **THE CANADIAN EXPERIENCE IN OVERSIGHT**

(A presentation for the UNDP sponsored Basra Justice Workshop, August 8 – 9, 2009, by Peter A. Tinsley, Chairperson of the Military Complaints Commission of Canada and President of the Canadian Association of Civilian Oversight of Law Enforcement)

### **INTRODUCTORY REMARKS**

#### **THE LAST 30 YEARS – A THUMBNAIL SKETCH**

The last 30 years in Canada has seen the independent civilian oversight of law enforcement advance from a relatively theoretical concept populated by a scattering of newly coined and inexperienced agencies to a situation where there is now at least one fully developed agency in each of the ten provincial jurisdictions and at the federal level. The speed of this development has increased with time. In the last two years alone three new more robust agencies have been put into place and two other existing agencies have been scheduled for revitalization and greater empowerment by their respective governments.

As indicated in the last statement, the changes or developments that have taken place have not been restricted to the number of oversight agencies. In a far more substantive regard, there has been experienced a developing trend for changes to the role performed by, and processes available to, oversight agencies. Two such types of change of particular note are:

- Traditionally the Canadian models of oversight agencies performed a review, appeal or audit function in respect of complaints, following internal police action on the complaint under the authority of the chief of police. This historical norm is, in many new and revitalized agencies, giving way to a shift or, at least, a sharing of “first instance” jurisdiction over conduct complaints to the oversight bodies; and
- In two provincial jurisdictions the jurisdiction for criminal investigations involving police officers and the performance of their duties has passed to independent civilian bodies. This same change of regime in the criminal context will soon be implemented in a third province and is being called for elsewhere.

A third, perhaps surprising evolution, coincidental with the changes already noted, has been the attitude of the police towards independent oversight. It is fair to say that historically the attitude towards the reception of oversight was one of resentment and even active resistance by both police leaders and front line officers. With some that continues to be the case, but, overall it is also fair to say that such oversight is now generally accepted with a far higher degree of cooperation and recognized as a necessary part of police professionalism and the maintenance of community confidence. At a recent annual conference of the Canadian Association of Oversight of Law Enforcement approximately a third of the delegates were from police services or associations representing front line officers. This increasing presence over the last several years has

been taken as an effort to understand and actively engage in the improvement of independent oversight in a fashion unknown just a few years ago.

These increases in the number of oversight agencies which have been spoken of, as well as their changing, more robust roles begs the question of - why has this occurred and/or been necessary in Canada? Does Canada have such flawed or deficient police services?

Flaws or patent deficiencies are clearly not the basic motivation for the changes. Canada enjoys a high standard of policing services, well funded and efficient. Polls would suggest that the majority of Canadians generally holds the police in high regard. The federal police service, the Royal Canadian Mounted Police, is, in fact, much revered as a historic national symbol.

I would suggest, however, that it is the very importance that Canadians attribute to the police and their role in our justice system and for our quality of life, as well as their unwillingness to allow inevitable instances of poor performance or misconduct of any degree to go unchallenged, that has been the primary impetus for change. This generalized sentiment is, I suggest, informed by contributing factors including:

- The singular significance attributed to the Rule of Law and the belief that all must be equal, and be seen to be equal, under the law;
- The demand that policing services be delivered in consonance with the spirit of Peel's Principles of Modern Policing, a prescient formulation of principles as applicable today as in 1829. As an aside it could be noted that, consistent with these principles, in the last 30 years our policing terminology has changed to the effect that police organizations once commonly known as police "forces" are now police "services";
- A general lessening of tolerance for breaches of individual rights by the government or any agent thereof; and,
- The reality of the electronic age wherein the availability of news, good or bad, is almost instantaneous and confidence in an institution can be affected at the very same speed.

## THE PURPOSE OF INDEPENDENT OVERSIGHT

It should be understood, as has been implied in the foregoing remarks, that the overarching purpose of independent oversight is the promotion and maintenance of community confidence in policing, police services and individual officers.

As an institution, oversight agencies are an independent, hopefully credible body, to which the individual citizen may make complaint if they feel that they have been offended by the acts of the police, who are agents of the state exercising extraordinary powers. This is certainly important to the individual citizen, but the even greater value to the community as a whole is in seeing the concerns of their fellow citizens being addressed.

Similarly, while the complaints of individuals are generally in respect of the police actions that they have witnessed or been directly affected by at the hands of one or more police officers, there are very often underlying causes for that conduct of which the citizen is complaining and of which the complainant is entirely unaware; underlying causes such as deficiencies in training, equipment and supervision. In order to achieve its full value and effectiveness oversight must look to more than the actions of the individual officer(s) complained of. It must be a review mechanism for systemic causative factors.

## OVERSIGHT MODELS

Reference has already been made to the increasing number of oversight agencies in Canada, as well as their differing and changing nature. That should make clear that we do not claim to have identified the best or perfect oversight model. In fact, experience has taught us that no one specific model of oversight agency fits the needs of all communities, which may vary widely in terms of size, demographic make-up and other environmental factors.

Noting again that oversight models in Canada differ and continue to evolve in response to the changing needs and demands of their constituent communities, it is only possible to say that there are presently four general groupings of models represented in Canada, as defined by their various processes or powers. These powers, ranging from the ability to self initiate a complaint, to investigate, to adjudicate or render a binding disposition are clearly very significant in defining the potential effect or impact of the particular oversight body.

However, notwithstanding the varying processes and powers found within different and equally legitimate models, the Canadian experience in oversight has also been that there are certain fundamental characteristics which are immutable, if there is to be any chance of the model successfully fulfilling its goal of community confidence. These essential common characteristics include:

- Independence – both real and perceived. Oversight agencies are clearly part of government in terms of their establishment, funding etc., but the performance of their mandate must be free of government direction;
- Appropriate empowerment by law, not by some lesser instrument of policy or governmental directive;
- Sufficient resources to properly and professionally perform their mandate. The creation of high expectations in the community without the provision of sufficient resources will destroy the credibility of the agency and its purpose;
- Transparency of process and fairness to all, including the police. Maintenance of the integrity of the inquiry/investigative process will require some confidentiality, but, at the conclusion, all possible information must be available

to all concerned, both complainant and the police officer(s) who was the subject of the complaint;

- The expertise and experience of all involved in the oversight process must be sufficient to equip them for their role of investigation or decision making, and credible in so doing; and,
- Communications or “outreach” must be done with both the broader community and the police in order to ensure knowledge of the agency and understanding of its purpose and processes. “If rights are not known, they do not exist.”

## THE MILITARY POLICE COMPLAINTS COMMISSION OF CANADA

### Creation, Structure and Composition

The Military Police Complaints Commission is an example of Canadian oversight agencies, unique only in the sense that its jurisdiction is in respect of the Military Police of the Canadian Forces, and it is the only such oversight body world wide for military police. The Commission is a federal independent quasi-judicial body established by the Parliament of Canada mandated to review matters of military police conduct and complaints from the military police concerning interference in the performance of their duties.

The Commission was created a result of amendments to the *National Defence Act* in 1998, after a major review of the military justice system following incidents of misconduct by Canadian troops in Somalia as part of a UN mission. It was established “in order to provide greater public accountability by the military police and the chain of command in relation to military police investigations” and it was modeled after the oversight body already in place for the Royal Canadian Mounted Police.

The *National Defence Act* amendments provide that: “There is established a commission, called the Military Police Complaints Commission, consisting of a Chairperson and not more than six other members to be appointed by Governor in Council.” These appointees are the decision makers in respect of the disposition of complaints received.

In order to meet the essential requirement of independence, the Commission is not responsible to or part of the Canadian Forces or the Department of National Defence. It is funded directly by Parliament and reports annually through the Minister of National Defence to Parliament.

In addition to a Chairperson and 3 members, the Commission currently employs 24 Commission personnel are structured in two divisions – those directly involved with complaints resolution or operations and those supporting the administration of the Commission as a whole.

In order to meet the essential requirements regarding expertise and experience, and in the interests of perceived credibility, the Commission's personnel include:

- Members (decision makers) with highly regarded analytical skills and sense of community standards, some with experience as former senior police leaders;
- Legal staff who are highly experienced in the fields of criminal and administrative law, as well as police oversight and discipline;
- Investigators who have an average of 34 years experience as expert police investigators; and
- Support staff who are well qualified in computer technology and records management, as well as a communications specialist.

Historically there has been some debate over the perceived propriety of involving former police officers in the work of independent civilian oversight. However, current practice holds that so long as they are carefully chosen for their skills and integrity, and any obvious conflicts of interest are avoided, it is acceptable. Above all, the most important matter is the correctness and credibility of the results of the investigation process.

#### Mandate and Mission

The mandate of the Military Police Complaints Commission is to deal with two types of complaints:

- Complaints from the public about the conduct of military police members; and,
- Complaints from the military police about interference in their work by senior government officials or the military chain of command.

The “interference” category of complaints is relatively unique to the Commission, but could be relevant to any police service operating in a hierarchical structure wherein they could be vulnerable to improper influence.

The “Mission Statement” of the Commission is:

To promote and ensure the highest standards of conduct of military police in the performance of policing duties and to discourage interference in any military police investigation.

#### Processes and Procedures

The Commission fulfills its mandate and mission by:

- Monitoring complaint investigations conducted by the staff of the Canadian Forces Provost Marshal in the exercise of “first instance” jurisdiction. The Commission will, as appropriate, intervene to provide advice concerning those investigations;
- Reviewing, including through further investigation as may be required, the Provost Marshal's disposition of a complaint, at the request of the complainant;
- Undertaking the investigation of complaints of interference received from the military police; and,
- Initiating and conducting public interest investigations and, as appropriate, holding hearings.

*Conduct Complaints* concerning the actions of a military police member may be filed by “any person”, whether or not the complainant is affected by the subject matter or actions complained of. This is a significant provision as it is possible that the person directly affected may not be willing or able to make the complaint. As previously indicated, conduct complaints are normally handled in the first instance by the Canadian Forces Provost Marshal, subject to the exception that the Chairperson of the Commission may at any time seize jurisdiction “in the public interest”.

*Interference Complaints*, on the other hand, can be filed by any member of the military police who conducts or supervises a military police investigation and believes that any member of the Canadian Forces or senior official of the Department of National Defence has improperly interfered with, or attempted to influence a police investigation. These complaints fall within the exclusive jurisdiction of the Complaints Commission.

*Public Interest Investigations and Hearings* are the ultimate and broadest power of the Commission Chairperson. There is wide discretion to take jurisdiction over complaints in the public interest, but the exercise of this discretion is used sparingly and must be explained in a formal decision. Once jurisdiction is taken over a complaint, in the public interest, the Chairperson or an assigned member of the Commission in the role of decision maker conducts an investigation or hearing. In the event of a hearing, but not an investigation, the Commission has the additional powers to summon and enforce the attendance of witnesses to testify under oath and/or produce documentary evidence.

#### The Provost Marshal’s Role

In the performance of his first instance jurisdiction over a conduct complaint, the Canadian Forces Provost Marshal, normally acting through his delegate the Deputy Provost Marshal – Professional Standards, may attempt to resolve certain types of complaints through a process of informal resolution or mediation between the complainant and the military police member(s) concerned with the complaint.

In all instances the Provost Marshal has the discretion to investigate the complaint to determine the facts and appropriate remedial action, if any, or, in the alternative, to refuse to investigate the complaint on grounds that the complaint is, for example, frivolous. Whether the matter is investigated to a conclusion or not, the Provost Marshal is required to inform the complainant of their right to request a review by the Commission.

Accordingly, the complaints process applicable to matters of military police conduct may, except in the cases when the Commission takes first instance jurisdiction, be understood to be of two parts, flowing from the Provost Marshal’s office to the Commission, at the request of the Complainant.

#### The Commission’s Role

Most “reviews” of conduct complaints undertaken by the Commission involve further investigation, including interviews of witnesses, requests for documentation etc. These reviews, including further investigation, are undertaken by the Commission’s

investigators, assisted by legal counsel, all under direction of the Chairperson or an assigned member.

After completion of the review, the Commission reports its findings concerning the complaint and any appropriate recommendations for remedial action to the Provost Marshal in an Interim Report. The findings and recommendations may relate to the specific incident complained of or be broader based in terms of systemic issues. The findings may, of course, be that the complaint is not substantiated and, in appropriate instances, the conduct of the military police member may be found to be justified, or even commended.

The Provost Marshal must respond to the Interim Report in what is referred to as a Notice of Action indicating what action will be taken in respect of the recommendations. If it is intended to take no action the Provost Marshal must provide reasons in writing.

After consideration of the Provost Marshal's Notice of Action, including any reasons for not following recommendations, the Commission issues a Final Report, which is distributed to the complainant, the military police member(s), involved and specified senior authorities in the Canadian Forces and Department of National Defence, including the Minister.

The Commission's findings and recommendations in respect of complaint files are also made publicly available, at least in summarized form, on its website and elsewhere. The findings, recommendations and responses of the Provost Marshal are also a central focus of the Commission's annual report to Parliament. This model of oversight is heavily dependent for effect through persuasion of police authorities knowing that their actions or inaction will be fully exposed to public scrutiny.

### Successes

As a simple fact of human nature, there will always be a certain degree of tension between independent civilian oversight agencies and the police services that they monitor. However, in the Canadian experience, with the proper approach on the part of all concerned, this need not be an adversarial relationship. It can be a collaborative one in the interests of professionalism and supportive of the ultimate goal of community confidence in policing services.

In the case of the Military Police Complaint's Commission we believe that we have achieved such a relationship with the leadership of the military police, in particular the Professional Standards unit with which we have great mutuality of interest. This working relationship is, in part, reflected by a record of 100 percent acceptance of the Commission's recommendations over the last three years, some of them requiring substantial changes to military police policies and procedures.

Never to be underestimated in this work is the importance of communications or "outreach". The Commission has worked hard at such outreach through visits to military police members and the broader community at bases across Canada. These contacts have

served to make the Commission known and to have its role and processes understood – “if rights are not known, they do not exist”.

### The Future

The nature and role of independent civilian oversight of the police has evolved greatly over the last 30 years and it will continue to evolve. In the specific instance of the Military Police Complaints Commission there are currently issues being examined before the Courts concerning the extent of the Commission’s jurisdiction regarding the conduct of the military police in military operations such as Afghanistan. More details may be found on the Commission’s website.

### More Information

The offices of the Military Police Complaints Commission are located at:

270 Albert Street, 10 Floor  
Ottawa, Ontario, Canada K1P 5G8

The Commission’s website may be found at:

[www.mpcc-cppm.gc.ca](http://www.mpcc-cppm.gc.ca)

And, the Commission’s electronic contact address is:

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