

Athabasca University  Master of Arts - Integrated Studies

THE CANADIAN FORCES MILITARY POLICE:  
EXPLORING THE NEED FOR COMPREHENSIVE PEACE OFFICER STATUS  
IN ACCORDANCE WITH FEDERAL AND PROVINCIAL STATUTE LAW

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## **Abstract:**

Military Police (MP) typically encounter two legal issues while attempting to conduct their law enforcement function within military jurisdictions. First, MP cannot provide competent law enforcement in accordance with provincial statute law because MP are not completely recognized as peace officers under the Criminal Code, and provincial statutes often refer to the Criminal Code definition of peace officer for law enforcement purposes. Second, MP are not adequately defined and there is much confusion in relation to a clear and concise definition of the MP and their organizational mandate and legal duties. MP possess a dual status as a soldier and a police officer, yet they operate under the command of senior non-policing military commanders and therefore have no independence while conducting the law enforcement or criminal investigative function. Further, the civilian collective considers that MP are expected to operate and conform with civilian police protocol in relation to the expectancies of civilian oversight, office of the crown attorney, public interest inquiries and the prospects of the criminal justice system, yet the current organizational design maintains organizational control based on the “soldier first” philosophy and the fact that MP are a trade within the CF.

# The Canadian Forces Military Police: Exploring the Need for Comprehensive Peace Officer Status in accordance with Federal and Provincial Statute Law

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## Introduction

*“To perform those duties of enforcing the criminal law against civilians on a military base, it was necessary, furthermore, to have the powers of a peace officer.”<sup>1</sup>*

*The late Chief Justice Brian Dickson*

The Military Police (MP) are the police service for the Canadian Forces (CF) with a dual professional status of soldier and police officer. MP conduct law enforcement, criminal and security investigations while operating interchangeably within two systems of justice, namely the Canadian and Military justice systems. As the MP are members of the CF, they receive common military training and in addition, they are schooled in police science and combine police education with civilian police services within Canada.<sup>2</sup> However the manner in which MP are legally defined continues to impair practical and competent policing standards and in addition, as MP are governed by non-policing military authorities, independence and autonomy during the policing and law enforcement function are drastically diminished.

The powers of MP can be found in section 156 of the National Defence Act which state:

### Powers of Military Police

156. Officers and non-commissioned members who are appointed as Military Police under regulations for the purposes of this section may

- (a) detain or arrest without a warrant any person who is subject to the Code of Service Discipline, regardless of the person's rank or status, who has committed, is found committing, is believed on reasonable grounds to be about to commit or to have committed a service offence or who is charged with having committed a service offence; and

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<sup>1</sup> Regina v Nolan, 1987 SCC

<sup>2</sup> All MP officers and non-commissioned members attend the Military Police Academy and are trained for six months in military and civilian law, rules of evidence, weapons handling, use of force, summary trial and court etiquette, and first aid in the same capacity as civilian police services. They sporadically return for additional training and specialized courses such as criminal investigator, close protection, and surveillance operatives.

- (b) exercise such other powers for carrying out the Code of Service Discipline as are prescribed in regulations made by the Governor in Council.<sup>3</sup>

In accordance with section 2(g) of the Criminal Code of Canada, “peace officer” includes:

- (g) officers and non-commissioned members of the CF 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>4</sup>

However, in section 2(g) “Annotations,” MP are described as follows:

A Military Police officer is not a peace officer within the meaning of para. (g)(i) when exercising authority over persons not subject to the Code of Service Discipline. He is, however, a peace officer within the meaning of para. (g)(ii) if the circumstances fall within s. 22.01 (2) of the Queen’s regulations which sets out duties of a kind as to necessitate the officers and members performing them to have the powers of peace officers, including duties performed as a result of established military action or practice related to the maintenance of law and order, protection of property and persons, and the arrest of an impaired driver and making of a Breathalyzer demand after the driver, a civilian, was stopped, albeit on a public highway, for breach of a traffic regulation on an armed forces base: *R v. Nolan*, [1987] 1 S.C.R. 1212, 34 C.C.C. (3d) 289, 58 C.R. (3<sup>rd</sup>) 335 &:0).

A Military Police officer, appointed pursuant to s.156 of the National Defence Act, R.S.C. 1985, c. N-5, is a peace officer within the meaning of this section when exercising authority over a person, such as a regular member of the armed forces, who is subject to the Code of Service Discipline even where the offence was committed by that person off a military establishment: *R v. Courchene* (1989), 52 C.C.C. (3d) 375, 22 M.V.R. (2nd) 1, 36 O.A.C. 29 (C.A.).<sup>5</sup>

As such, MP encounter two legal issues while attempting to conduct their law enforcement function within military jurisdictions. First, MP cannot provide competent law enforcement in accordance with provincial statute law because MP are not completely recognized as peace officers under the Criminal Code, and provincial statutes often refer to the Criminal Code definition of peace officer for law enforcement purposes. Second, MP are not adequately defined and there is much confusion in relation to a clear and concise definition of the

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<sup>3</sup> Powers of Military Police, NDA Section 156, online: [www.lawofcanada.net](http://www.lawofcanada.net)

<sup>4</sup> Peace Officer, Criminal Code of Canada, online: <http://laws-lois.justice.gc.ca/eng/acts/C-46/page-1.html#h-2>

<sup>5</sup> Martin’s Annual Criminal Code 2015, Section II, Annotations, pg. 21.

MP and their organizational mandate and legal duties. MP possess a dual status as a soldier and a police officer, yet they operate under the command of senior non-policing military commanders and therefore have no independence while conducting the law enforcement or criminal investigative function. Further, the civilian collective considers that MP are expected to operate and conform with civilian police protocol in relation to the expectancies of civilian oversight, office of the crown attorney, public interest inquiries and the prospects of the criminal justice system, yet the current organizational design maintains organizational control based on the “soldier first” philosophy and the fact that MP are a trade within the CF.

## **Thesis**

This paper will demonstrate that, despite current procedures, there exists a legal justification for greater independence from the direct military command structure and this can be done in a manner that continues to keep MP responsible and loyal to their military commanders, organizational customs and operational responsibilities.

This paper will do this through an examination and discussion of the ethical and legal issues currently affecting the policing competency of the MP, while exploring the requirements for complete and attested peace officer status within the Criminal Code of Canada; and finally, the creation of the first Military Police Services Act (MPSA).

## Military Police History

*“The Roman Speculatore, British Provost and French Gendarmerie all emerged to fill a similar need in their armies. Stated in broad terms, Military Police were developed because commanders required a trusted, loyal, and disciplined body to assist with the control and protection of military resources both at home and abroad. They were and continue to be an extension of the commanders’ long arm.”<sup>6</sup>*

*Colonel (Retired) Andrew Ritchie, OStJ, CD*

The history and tradition of the CF Military Police traces its origins to World War I whereby all three military services provided their unique environmental security force. Initially, the Naval Shore Patrol and the Army’s Canadian Provost Corp (C Pro C) worked in partnership with civilian police services in order to keep discipline and maintain the peace amongst the civilian population and the high concentration of military and naval personnel that gathered in metropolitan areas and coastal port cities. These security services of the time, continued to provide the policing and the security function throughout the war, but were subsequently reduced in size afterward as they were no longer required to police within civilian jurisdictions.

However at the onset of World War II, the C Pro C were again called upon to provide assistance to naval dockyard security and the protection of warships, yet as they were unaccustomed to navel tradition and custom, the Naval Shore Patrol primarily dealt with disruptive sailors and discipline issues while the C Pro C provided assistance with naval dockyard security and custodial issues with civilian police services that arrested servicemen for drunk or disorderly conduct offences.

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<sup>6</sup> Ritchie, Andrew “Watchdog: A History of the Canadian Provost Corps” (1995), pg. 287.

Simultaneously, as Canada accepted the responsibility to train pilots from all commonwealth nations, the Royal Canadian Air Force (RCAF) dramatically increased its complement of training bases, aircraft fleet, and training squadrons by constructing additional air bases for pilot training in support of the international war effort. As dozens of new air bases were created, the RCAF recognized their need to immediately establish a security and police service in order to provide policing and security services uniquely tailored for the needs of the Air Force establishments, aircraft, and the security of weapon and aircraft ammunitions, as civilian police were not accustomed to air force service requirements or military customs. The Air Force police provided 24 hour security of ammunitions and explosives, and perimeter security with police dogs which encompassed the entire defence establishment; a duty not normally provided by civilian police services.

In 1946, the Canadian Army introduced the concept of married life for servicemen with private married quarters (residential homes) within its twenty-one bases and military communities across Canada. Residential areas were constructed similar in fashion to municipalities with neighborhoods and domestic housing, schools, churches, retail stores, post offices, recreation and park facilities. It became readily apparent that nearby civilian municipalities were not prepared to administer the essential public services such as schools, fire, police, and medical services to this large volume of servicemen and their families, hence a military service police was deemed essential to carry out the same police functions as civilian communities for military establishments.<sup>7</sup>

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<sup>7</sup> Ritchie, Andrew "Watchdog: A History of the Canadian Provost Corps" (1995), pg. 203.



Leading into the Cold War and throughout the 1950s and 1960s, the “police soldiers” that joined the military were predominantly volunteers and former civilian police members originating from the Royal Canadian Mounted Police (RCMP), the Ontario Provincial Police, and various municipal police services from across Canada. In addition, the CF had a recruitment detachment in London England and as such, a large concentration of London Metropolitan Police joined the CF and migrated to Canada to serve as Canadian Military Police.<sup>8</sup> This conglomerate of civilian police officers turned “Service Police,” became the foundation of the Canadian Military Police, as they brought with them a tremendous amount of police knowledge and as such, they were posted to the first MP training school as instructors to teach police foundations, the rules of law (both military and civilian), evidence handling, hand-to-hand combat, arrest and restraint techniques and courtroom etiquette, while writing manuals and lesson plans in relation to proper police training and investigative theory.

Finally in 1968 the CF amalgamated all three policing services into the single trade and title as “Military Police,” designated as the security branch of the CF.<sup>9</sup> Their purpose was to provide a militarized and uniformed police and security service for all military environments, establishments and communities. Further, the MP training school was established in conjunction with the intelligence community in order to provide a standardized and acceptable level of police training designed exclusively for the interests and needs of the military and its operations in Canada and abroad.

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<sup>8</sup> Ritchie, Andrew “Watchdog: A History of the Canadian Provost Corps” (1995), pg. 211.

<sup>9</sup> In 1968 the Royal Canadian Navy, the Canadian Army and the Royal Canadian Air Force were unified into the Canadian Armed Forces, as the armed services for Her Majesty. As such, several trades were amalgamated to enhance organizational effectiveness by senior military leadership.

Throughout the 1980s and 1990s, MP policed their communities in the same capacity as civilian police services by serving the policing needs of the public, conducting community-based projects such as Block Parents and Neighborhood Watch/Crime Prevention programs, and patrolled with a problem-orientated policing philosophy in relation to property crime and youth vagrancy. MP operated and adhered to the same policies as civilian police services in relation to Human Rights legislation, Access to Information, the Privacy Act, and the Identification of Criminals Act. In addition, MP maintained their primary mandate of monitoring and advising military commanders on police operations, criminal investigations and security concerns in relation to military establishments and assets, and MP staff the CF Service Prison and Detention Barracks which is similar in fashion to a federal penitentiary for military personnel that have been sentenced for military related service offences.

The 21<sup>st</sup> century MP participates in civilian law enforcement, intelligence gathering and community policing programs alongside civilian police services. They conduct police investigations pertaining to drugs, acts of terrorism, threat assessments, and prepare prosecution files for civilians and military personnel charged with Criminal Code offences committed within Department of Nation Defence (DND) jurisdiction for both criminal and provincial offences within the civilian court process. The MP are recognized by the civilian courts, the police community and the general public as a recognized police service that conduct police investigations involving civilians and CF members within both military and civilian jurisdictions.

## The Policing Pendulum: Dual Status

*“Military Police, and police in general, have a duty to serve and protect,” the Chairperson believes that even though the MP is a specialized police force, its pivotal role is to serve and protect, the same as civilian police forces”<sup>10</sup>*

*Chairperson, Military Police Complaints Commission 2001*

The MP maintain the dual status of soldier and police person while providing police services to both military communities and civilians on military jurisdiction while operating interchangeably within two systems of justice. The role of civilian police has always been to prevent crimes and keep the peace amongst the civilian population to which they are ultimately responsible, yet contrary to some military scholars they believe that the primary role of MP is to assist military commanders while enforcing discipline of CF members.<sup>11</sup> Without prejudice, it is the author’s view that the duty to keep the peace and prevent crimes is also paramount if not equal within military jurisdictions, as the military community expects responsible and professional policing services in the same capacity as any civilian community. MP respond to residential break-ins, apprehend impaired drivers both military and civilian, attend calls for police service, medical emergencies and domestic assaults while making arrests under the Criminal Code rather than military law involving military and civilian persons. For the most part, the majority of law enforcement is provincial and criminal offences, as military law is strictly for soldiers subject to the Code of Service Discipline (CSD) and the majority of the military community residents are civilian, and therefore not subject to CDS provisions.

The MP continually and more predominantly utilize the local criminal courts for criminal and provincial offence matters because there is no other option as civilians are not subject to

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<sup>10</sup> Military Police Complaints Commission Case Precedents MPCC-2001-061 (2001).

<sup>11</sup> Halpenny, Andrew “The Governance of Military Police in Canada (2010), pg. 4.

military tribunals and discipline. As the civil courts have the support of provincial government funding and programs, there is greater access to social assistance programs for victims of crime, domestic/sexual abuse, and provincially-sponsored programs that are not available on military establishments. For those CF members that have been charged criminally, MP court officers monitor the matter as the member is treated through the criminal court process until the matter is concluded, at which time the MP court officer discusses probationary conditions with local crown attorneys in order that the subject remains capable of conducting their military duties.<sup>12</sup> For those sentenced and found guilty, the MP court officer caters for release of the military member if possible or if custodial sanctions are imposed, the matter and court disposition is promptly reported to military commanders in order to keep them apprised of the welfare of their troops in order to ensure situational awareness and operational effectiveness.

MP uphold their law enforcement obligations by the enforcement of provincial legislation such as the Provincial Highway Traffic Act, directly or indirectly assisted through federal statutes such as the Government Property Traffic Regulations, as MP are not completely recognized as natural peace officers within certain provinces based on parent legislation legal definition.<sup>13</sup> Therefore to simplify matters, certain provinces have entered into agreement and deemed MP with provincial constable status in order to enforce provincial laws on military and civilian

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<sup>12</sup> Occasionally probation orders that have firearm prohibitions can affect the military member as they are required to use a weapon during military duty and qualify on weapons ranges. MP court officers ensure the conditions do not affect the member's military readiness unless there is significant concern in which denying weapons is justified.

<sup>13</sup> The Contraventions Act contains the Government Property Traffic Regulations (GPTR) which MP use as the primary method to issue provincial offence notices in provinces that do not recognize MP as peace officers. In Ontario, the GPTR enables MP to enforce specific statutes such as the Ontario Highway Traffic Act, through the issuing of offence notices and fines to violators of provincial law. As with civilian police, the matter can be disputed in front of a local Justice of the Peace within the provincial court system and MP will testify and give evidence just as every other civilian police service. MP write Part I (Offence Notices), or Part III (Summons) under the Provincial Offences Act (POA). Fines generated are paid to the Ontario Provincial Offences office, just as all other notices issued by civilian police services. The revenue generated by the MP law enforcement function is collected by the province.

jurisdiction, thereby drastically improving police services to military communities in the exact fashion as municipal police services. As with civilian services, the MP are subject to the Military Police Code of Professional Conduct and a formal civilian oversight committee known as the Military Police Complaints Commission (MPCC). In addition, MP are members of the CF and therefore continually subject to administrative and disciplinary policies and procedures just as every other military member, just as civilian services are subject to their police services act which contains disciplinary provisions and administrative procedures.

However, the dual status as soldier and police officer has been problematic when operating as a police entity subject to non-policing authority within the CF, as non-policing commissioned officers continue to directly or indirectly influence MP based on their position of authority within the chain of command composition. As MP are not independent, the higher non-policing authority will always possess the power to influence the MP of lesser rank, especially for MP employed on a military base in which the MP Commanding Officer (a Captain), is subject to the control and influence of a Base Commander (a Colonel), who is the same person that controls the military resources and support required for the MP to conduct their military and policing duties on base.<sup>14</sup>

In addition, the Base Commander has considerable influence in relation to the MP Commanding Officer's annual performance appraisal whereby the military culture encourages loyalty and obedience in order to advance in rank through good soldiering practices and as a result, MP continually face risks in relation to their career progression if their dedication and cooperation does not meet the expectations of senior commanders. The organizational structure

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<sup>14</sup> Halpenny, Andrew "The Governance of Military Police in Canada" (2010), pg. 46.

places the MP commanding officer under the direction of senior non-policing officer, who ultimately answer to the Base Commander. In situations where senior officers have been arrested for impaired driving or domestic violence, MP at all ranks are vulnerable to indirect persuasion by senior officers in an effort to avoid criminal charges in favour of alternate courses of action.

As such, policing interests may not be as predominant as one would believe and MP commanding officers that defend the ethical policing activity of their subordinate MP, risk falling out of favour amongst the senior command staff at base level. Policing is not an independent function within military jurisdiction and MP are placed in challenging positions as they want a positive annual appraisal for promotion purposes, yet they are also susceptible to superior rank coercion. This lack of autonomy breeds two distinct MP mentalities from within the MP environment which are highly multifaceted; the soldier *or* the policing conviction.<sup>15</sup>

Soldier conviction leans towards military allegiance to non-policing authority whereby the MP individual focuses on career advancement by embracing the will of the senior leadership through the traditional master/servant relationship for personal benefit, and thereby sacrificing competent policing ethos in exchange for loyalty and reward from the non-policing chain of command.<sup>16</sup> For example, when an MP decides to let a senior officer off with a verbal warning for excessively speeding while on base or foregoes further investigative questioning during gate

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<sup>15</sup> It should be noted that all MP non-commissioned recruits must be police foundation graduates from a recognized college prior to any offer of MP employment. Commissioned members (officers) must hold a bachelor's degree in any discipline and many do not possess any police foundations or education relating to criminal justice prior to CF enrollment.

<sup>16</sup> In certain situations that have warranted criminal code charges involving a military member, the chain of command has influenced the investigating MP to refer to the matter under the National Defence Act (NDA) whereby a lesser penalty may be imposed and the member does not receive a criminal record, thereby keeping the matter "in house." An example would be an animal cruelty charge for wilfully killing an animal for entertainment in accordance with the criminal code, and favouring a military charge of "Prejudicing Good Order and Discipline" in accordance with section 129 of the NDA.

checks and alcohol has been detected on the breath of a senior officer, the MP feels compelled to provide “special treatment” based on the superior rank, as it is a known fact that by incarcerating a senior officer, the MP commanding officer will be summoned by the Base Commander in order to explain the situation in its entirety.

During the traffic enforcement function,<sup>17</sup> MP frequently encountered negative attitude and resentment from high ranking officers while executing their lawful duties. For instance, during traffic stops for speeding offences, senior ranking personnel have used use their rank in an attempt to influence preferential or special treatment. During traffic enforcement duties it is not uncommon that a remark is made in attempt to coerce the MP to issue a verbal warning rather than a provincial fine, or they may be in contact with the MP commanding officer in relation to the traffic stop and the conduct of the MP. Officers have also lodged complaints that the MP did not show proper respect by coming to attention and saluting before and after their encounter. Some officers have even attempted to verbally take control of the situation by demanding compliments be paid (saluting) immediately before the explanation for the traffic stop and that they [MP] should permanently stand at attention while speaking to them.

Due largely in part to the organizational design, there is a common credence amongst CF officers in which they are trained and expected to lead military personnel that are subordinate in rank, and their rank status will be respected at all times. Within the military culture, officers enjoy the company and brotherhood of other officers, as they are the future leaders of the organization and have higher education and leadership training in comparison to those of the non-commissioned rank. Therefore it is completely understandable that some antipathy is

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<sup>17</sup> As frequently experienced throughout the author’s career at several military bases.

generated towards MP when they conduct their law enforcement function and issue tickets to officers of senior rank, as they naturally believe they are expected to govern and lead subordinates, not to be incarcerated, questioned, or penalized by them through monetary fines.<sup>18</sup>

As such, for those MP that approach the enforcement matter discretely and provide extraordinary treatment to senior officers by overlooking the law enforcement matter or perhaps even driving a senior officer to their residence because they were drinking at a military mess function, this considerate course of action is usually preferred within the military culture and can later result in a “courteous call” to the MP commander the next day praising the MPs professionalism and appreciation, which would be acknowledged by the MP chain of command as a “Bravo Zulu”<sup>19</sup> and later included in the MPs next yearly assessment for promotion.

The Policing conviction focuses on the MP individual maintaining their beliefs on the philosophical principles of professional and competent policing which may clash with peer ideology during the race between peers for career advancement. MP that have focused strictly on law enforcement and issue too many tickets to senior military members, or their authoritative conduct was deemed as not respectful to a superior rank during a traffic stop, has sometimes resulted in complaints to the MP commander whereby the MP was removed from patrol duties and placed in a day staff position - in the capacity of a punishment in order to correct their overenthusiastic or overly excessive behaviour as deemed by senior military staff.

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<sup>18</sup> This is the opinion of the author based on 26 years of experience within the MP trade, when conducting the law enforcement function on military establishments.

<sup>19</sup> The term “Bravo Zulu” is a naval term used in the military meaning “Well Done” or “Good Work.”



This proportional ambiance can create an environment of animosity as peers evaluate peers as either a proficient police person or professional soldier, and some MP have been promoted to intermediate leaders based on good soldiering evaluations yet when required to make critical decisions as a police supervisor, they typically fail their subordinates based on a lack of police experience and little policing knowledge or proficiency which further perpetuates the lack of faith in relation to the chain of command's policing knowledge.<sup>20</sup> Aligning oneself to a specific conviction and failing to maintain an equal balance of perception can be at the expense of one's career progression, ethical principles, or image as a competent and trustworthy leader.

The lack of autonomy from the military hierarchy during the law enforcement function maintains this operational status quo where the MP continue to be controlled by commanders claiming this status as a bona fide military requirement. During times of war, the commander rationalization is absolutely justified during military operations involving MP for security issues and prisoner control, and as well during peacetime when commanders want to maintain the security of their military personnel or assets (weapons/ammunitions, and military vehicles/installations). Although aside from these bona fide military requirements, there is no other reason the MP should not follow the same procedural standards and safeguards of civilian oversight control in the same capacity as civilian police services.<sup>21</sup> This adverse predicament is not a new phenomenon within the military policing culture as numerous commonwealth militaries and their commanders share the same command hegemony and are not enthusiastic to

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<sup>20</sup> The military appraisal system promotes soldiers for their hard work, loyalty and dedication to the military command structure. The evaluation system is designed for rank progression based on allegiance to the next senior rank whereas policing and investigative skills are but one performance factor out of fifteen performance factors (Applying job knowledge and skills).

<sup>21</sup> Halpenny, Andrew "The Governance of Military Police in Canada" (2010), pg. 4, & The Military Police Complaints Commission Special Report (2005), pg. 3.

support the conception of an independent police entity operating within their military jurisdictions, as they themselves believe they may lose their capacity to influence, lose the power to police those of a lesser rank, or may even fall under the investigative scrutiny of a police investigation.<sup>22</sup>

Of greater importance gleaned from the 2001 MPCC report, was the opposite position a former CF Chief of Staff by contrast to the MPCC Chairperson, in which these two authorities took adversarial positions in relation to MP and interference by superior officers:

After reading the Notice of Action from the Chief of Defence Staff, the Report of the Somalia Inquiry, the Dickson and Belzile reports, as well as Parliamentary debates that preceded the creation of Part IV of the National Defence Act [NDA], the Chairperson disagreed with the Chief of the Defence Staff's interpretation of section 250.19 of the Act. The Chairperson believes that any interference or intervention by a non-Military Police member is improper and damages the military justice system.

The Chief of Defence Staff argued that sometimes interference with MP investigations by non-Military Police superiors is proper. He stated that there could be situations where intervention is necessary to ensure that commanders are able to carry out their responsibilities or where there is an obvious abuse or improper situation occurring. He further held that since the NDA refers to "improper" interference, "proper" interference could exist.<sup>23</sup>

As indicated, this former Chief of Staff advocated that non-policing superiors in the CF should have the ability to interfere with MP investigations in order to ensure that commanders are able to carry out *their* responsibilities regardless of the significance of MP responsibilities – thereby ratifying unconditional control of MP at all times. Further, he advocated that senior non-policing officers should have the justification and power to interfere with MP when engaged in law enforcement activities, as he believed that non-policing CF officers in general should have the ability to "properly" interfere based on a "could exist" probabilities.

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<sup>22</sup> Mitchell, Matthew "The Criminal and Investigative Agencies of the Armed Forces of the United States: A Brief description of their Organization and Mission" (2005), pg. 22.

<sup>23</sup> Military Police Complaints Commission Chairperson's reply following the Chief of Defence Staff Notice of Action (2001),MPCC-2001-061, online: <<http://www.mpcc-cppm.gc.ca/01/1400/3200/3202-eng.aspx>>

Furthermore, the former Chiefs of Staff did not support the ideology that MP are the same as civilian police even when the civilian justice system, Crown attorney, defense counsel, civilian oversight committees, and the Canadian public in general – all recognize that MP do the same duties as civilian police within their jurisdictions. The civilian collective perspective holds the position that the MP should be accountable to civilian oversight committees, the criminal courts and the criminal justice system in the exact manner as every other police service within Canada.

Yet CF senior leadership continue to resist this policing conception as they preserve the historic and cultural foundation and original purpose of the MP, forgoing the feature that policing in the military is just as important today as with civilian communities, and there is a public expectation from both the military and civilian perspective that MP will provide the same effective and professional police services within military jurisdictions. Furthermore, MP are also bound by the same military regulations as every CF member including the Code of Service Discipline and the annual evaluation process which thereby maintains the power relationship and influence of non-policing authorities over MP.

## **The Commander and Military Police Function**

*“The Commanding Officer is not a peace officer, is not subject to a peace officer’s oath of office or code of conduct, and has no overriding obligation to advance the administration of justice...*

*Thus, the commanding officer may decide not to investigate a matter, or may refuse to take action, not because it serves the goals of the CF, by because it serves the commanding officer’s more parochial interests.”<sup>24</sup>*

*The Somalia Inquiry 1993*

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<sup>24</sup> Halpenny, Andrew “The Governance of Military Police in Canada” (2010), pg. 40.

Base commanders are ultimately the mayors of military residential communities, yet during military hearings and summary trials they are also the judge, the jury, and the executioner all incorporated into one individual. Many military justice systems around the world are presently reforming their systems of military justice in favour of utilizing the civilian justice system in order to align themselves with the natural principles of justice and rules of fairness, thereby removing power from a single senior commander within the military justice system.<sup>25</sup> Yet the CF as with many militaries, are resistant to change and relinquishing hegemony, as independence from the command structure is a foreign object that conflicts with historical values and the military attitude amongst command authority.<sup>26</sup>

Without question, the MP support the lawful commands of commanders during military operations on base or deployed overseas, as that should always be the primary duty and bona fide military requirement of the MP since its creation. However when not engaged in military obligations, the MP secondary duty by default is law enforcement and police investigations while enforcing military and civilian law. MP are highly active in daily police duties within their communities while serving the interest of the general public that reside in military jurisdiction while practicing community-based policing methodology – servicing the needs of the public. Hence the creation of MP community relations offices within residential areas, drug and alcohol education within schools and participating in community-based youth programs to engage youth

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<sup>25</sup> Drapeau, Michel “Canadian Military Justice System: Marking Time?,” pg. 58. Online: <[www.athabascau.ca](http://www.athabascau.ca)>

<sup>26</sup> Roach, Kent (2011) In addition to the Somalia incident, Roach reiterated that the Somalia inquiry stressed the pertinent element that commanding officers can exert tremendous influence over the MP and that commanding officers are not peace officers, not subject to a peace officer’s oath of office or code of conduct, and they are not peace officers within the provisions set in section 156 of the National Defence Act. Commanding officers have “no overriding obligation to advance the administration of justice.” In addition, the inquiry also found the “soldier first” attitude amongst MP personnel in order to satisfy commanding officers rather than exercising a higher level of professionalism and ethics in relation to the natural course of justice.

interest in order to positively influence and condone mischievous behavior within military residential neighbourhoods.<sup>27</sup>

Terminologically speaking, the name “police” unconditionally invokes a social responsibility to ensure public safety, uphold the rule of law and democratic values, and to remain accountable to the state system while serving the general public.<sup>28</sup> In similar fashion, the MP police military communities comprised of military personnel and civilians and that are not subject to military law – and they are the majority.<sup>29</sup> Incidents in relation to property crimes and criminality occur within military jurisdictions that house retail stores, restaurants, recreation facilities and businesses within these military townships – in the exact same fashion as civilian municipalities. The MP are expected to deter, investigate, incarcerate, and follow the rule of law and justice - just as any police officer engaged in the criminal investigative process.

## The Role of the Provost Marshal

*“The Provost Marshal must have an especial care to the keeping of the peace, and to apprehend the least occasion which may tend to the breach of the same, he must prevent all Mutinies, Quarrels, and disorders, and that no uncivil discussion may have strength to out-face or withstand the power of his command: he shall ever have about him a guard of his under-Provosts and servants, who with short truncheons in their hands, according unto military form, shall enforce obedience to any lawful commandment with proceedeth from him...”*

*Francis Markham’s Five Decades of Epistles of Warre, 1622 C.E.*

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<sup>27</sup> MP assemble and participate in community-based town halls/meetings to deter youth from criminal activity. Many base MP have contributed to the development of youth centers, sports and recreation areas, skateboard parks, and outdoor hockey/basketball courts with policing models such as Crime Prevention Through Environmental Design (CPTED), in order to maintain low crime rates within military communities and residential areas – with the assistance and financial support of base commanders, thereby improving the standard of living within military communities.

<sup>28</sup> Soldatovic Igor “PR Impact on Public Confidence in Military and Police in Serbia” (2013), pg. 78.

<sup>29</sup> The families of each military member residing on base are not subject to military law except access regulations (to which many bases have an open base concept or the military location is housed in a metropolitan area in which no perimeter security exists). This also includes all public servants and locally employed staff that work on base (kitchen workers, cleaners, retail, secretaries, office staff, ground keepers, and essential service employees).

The role of the Provost Marshal is referenced to King Henry VIII's Article of War, believed to date back as far as 1513. The duties of the Provost Marshal included the enforcement of the code of military law. The King's "Military Police" of the time known as the "tip staves" were charged with keeping good order in the Army, prevent brawling and fighting, and to bring offenders to the Marshalsea for punishment at the Provost Marshal's direction.<sup>30</sup> The origins of the office of the Provost Marshal began in 1511 as an officer of the court and developed into the position of the Quartermaster General's branch of the Army. Thereafter, the Provost Marshal became interweaved within English history as a "Dispenser of Summary Justice" and a most efficient police officer until the conception of Sir Robert Peel's 19th century policing principles (The Peelian Principles), whereby policing was transformed and carried out by an alternate assembly rather than a military force. It was the consent of the public that empowered the police rather than the will of the state in order to build the public trust and respect from the citizens.<sup>31</sup>

Today's Military Police and the CFPM are of a different era and defined by civilian oversight as follows:

Military Police are in some way different from their civilian counterparts, but the similarities are far more numerous and fundamental. Military Police are peace officers. They possess the same extraordinary powers and the same authority to exercise these powers – as civilian police. They can arrest and detain people, not just members of the CF., but anyone. They can, when necessary to protect their own or others' lives, use lethal force against citizens. ... Military Police should be no less accountable to Canadians for their use of these powers than civilian police.<sup>32</sup>

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<sup>30</sup> Bullock H. "A History of the Provost Marshal and the Provost Services" (1929), p. 41.

<sup>31</sup> See also Eismann-Harpen, Sandra "Rambo Cop: Is he a soldier under the third amendment?" (2013). The Boston Massacre of 1770 exemplifies the public distrust and dislike using soldiers for law enforcement purposes after five colonists were killed by soldiers enforcing unpopular legislation that fuelled tension between civilians and soldiers. Colonists resented soldiers enforcing law with military weapons and at the time, soldiers were considered objects of hostility. The 21st century perspective has reversed the roles as police now act like soldiers treating people like combatants, following the mid-1980 Posse Comitatus Act amendment which facilitated military training and equipment for use by civilian police.

<sup>32</sup> Military Police Complaints Commission Special Report (2005), pg. 3.

In comparison, ever since the earliest role of the Provost Marshal was conceived, their primary duty was to keep the peace within both civilian and military jurisdictions in order that civilians were protected from vagrants and evil-doers. Lord Lieutenants appointed Provost Marshals that were charged with keeping the peace and preventing robberies and property offences against commoners and the civilian population – they were accountable to the people. Provost Marshals were special servants of her Majesty’s court and local Justices of the Peace were expected to assist and furnish horses and men to the Provost Marshal in their service while dispensing justice across the land. Provost Marshals apprehended soldiers, mariners, master-less men, and vagrants that wandered about the country, as commanded and made law through her Majesty’s proclamation of 13th November, 1589.<sup>33</sup>

Interestingly, the necessity for the Provost Marshal services has been a proven and required necessity for over 500 years in both military and civilian jurisdictions. The Provost Marshal was the policeman of the time, policing civilian communities as appointed by the court and as appointed within the military and armies of the day. They were expected to maintain the laws of the land and to be “lovers of justice,” while upholding high moral and ethical virtues, respecting and protect their prisoners, while carrying out their duties at the highest standard. They maintained peace in both jurisdictions while pursuing deserters from her Majesty’s services, or arresting civilians they encountered that were causing civil unrest and disorder.

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<sup>33</sup> A History of the Provost Marshal and the Provost Services, p.26.

## Civilian Police Service Parallels

*“The proposed authority of the VCDS to direct the CFPM regarding the conduct of particular Military Police investigations set out in subsection 18.5(3) represents an important departure from the status quo. This proposed authority would effectively abrogate key provisions of the Accountability Framework whose purpose was to adapt the command relationship of the VCDS and the CFPM, such that the latter would retain appropriate independence from the chain of command in the conduct of individual law enforcement investigations.”<sup>34</sup>*

*Elizabeth May, Member of Parliament*

Certain hypothetical parallels are drawn from the position associated to the CFPM and the position associated to that of the Commissioner of the RCMP in relation to their authoritative position as commanding officers, notwithstanding the actuality that the CFPM is subordinate to the VCDS and the CDS. The CDS reports directly to the Minister of National Defence whereas the RCMP Commissioner reports directly to the Minister of Public Safety.

The RCMP Act reads that the Governor in Council may appoint an officer to be the RCMP Commissioner under the direction of the Minister, and has the power and control of the force and all matters connected therewith. Further, the *McDonald Commission* stated the following in relation to allegations of wrongdoing by the RCMP Security Service:

19. ...[T]he Minister should have no right of direction with respect to the exercise by the RCMP of the powers of investigation, arrest and prosecution. To that extent, and that extent only should the English doctrine expounded in *Ex Parte Blackburn* be made applicable to the RCMP... [However], the Minister should have the right to be, and should insist on being, informed of any operational matter, even one involving an individual case, if it raises an important question of public policy. In such cases he may give guidance to the Commissioner and express to the Commissioner the government's view of the matter, but he should have no power to give direction to the Commissioner.<sup>35</sup>

In *Campbell & Shirose*, the court found that the Commissioner of the RCMP is not to be considered a servant or agent of the government while engaged in a criminal investigation.

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<sup>34</sup> House of Commons Debates (2012), online: <elizabethmaymp.ca>

<sup>35</sup> Halpenny, Andrew “The Governance of Military Police in Canada” (2010), pg. 27.



Further, Commissioner Hughes proposed the following recommendations after the 1997 APEC meeting<sup>36</sup> which stated:

- When the RCMP are performing law enforcement functions they are entirely independent of the federal government and answerable only to the law.
- When the RCMP are performing their other functions, they are not entirely independent but are accountable to the federal government through the Solicitor General of Canada or such other branch of government as Parliament may authorize.
- In all situations, the RCMP is accountable to the law and the courts. Even when performing functions that are subject to government discretion, officers are required by the RCMP act to respect and uphold the law at all times.
- The RCMP are solely responsible for weighing security requirements against the Charter rights of citizens.
- An RCMP member acts inappropriately if he or she submits to government direction that is contrary to law. Not even the Solicitor General may direct the RCMP to infringe Charter rights and such direction would be unlawful.<sup>37</sup>

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<sup>36</sup> Halpenny, Andrew “The Governance of Military Police in Canada” (2010), pg. 28.

<sup>37</sup> Ibid, pg. 30.

Drawing on this legal summation, the Somalian Inquiry produced much connotation in the fact that non-police commanders lacked general policing knowledge but worse, they could misuse their authority to thwart or direct MP engaged in criminal investigations. Furthermore and more concerning, is that any MP investigation pertaining to military law is prejudicial from the start as MP are not entirely independent when performing law enforcement or investigative functions and worse, they are not answerable “only to the law.” Military offences can be articulated as willful and deliberate acts through the articulation of the Base Commander because he *is* the lawmaker on his/her military base due largely in part to organizational design. He is the commander, mayor, judge, jury and executioner.

At the conclusion of the Somalian inquiry, several recommendations were made in support that MP operate independently from the chain of command just as the RCMP when engaged in law enforcement functions while investigating serious incidents. Although as an alternative to providing MP with complete investigative autonomy, the specialized Canadian Forces National Investigation Service (NIS) was created with the mandate to investigate senior officers and serious offences committed by all CF personnel, in comparison to a civilian police major crimes unit. Further, NIS investigators were conferred the power to lay charges under the Code of Service Discipline against senior officers rather than recommending charges as presently done today by MP at unit or base level. However, the NIS is a branch of the MP trade and therefore, they remain accountable under the chain of command which ultimately answers to the non-policing military authorities.

In conclusion, the Somalian Inquiry also recommended that the director of the MP be responsible and accountable directly to the Chief of Defence Staff for all MP matters or interests, yet none of the proposed changes were implemented and the commanders of today at all levels within the military hierarchy continue to maintain their hegemony and supremacy based on rank and command status within the organization.

## Civilian Oversight and Public Interest

*“Since the 19th century, ...police services boards were established with the specific intention to insulate the police from direct governance by elected municipal politicians and guaranteeing a measure of political independence for police services in the performance of their duties.”<sup>38</sup>*

*The Law Commission of Canada*

Formal police oversight structures exist in order to remove police from direct political control, provide direction, to ensure civil liberties are protected, and that police are answerable to the law.<sup>39</sup> Inversely, the CF operates in a dissimilar capacity as Base Commanders’ control the resources that MP require and provide direction for their security concerns and interests. The MP require housing, accommodation, vehicles, financial support, and other consumables in order to maintain unit operations. Base Commanders are responsible to provide for numerous military units under their command and maintain operations while annual budgets fluctuate based on financial constraints and operational need. The MP at base level are no different than every other unit requesting financial support and military necessities. The unit level MP commanding officer endeavors to maintain excellent relations with the base commander not only because it is their primary duty to support the commander in military interests, security and policing issues, but it is equally beneficial for the procurement or expansion of additional resources such as training

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<sup>38</sup> Halpenny, Andrew “The Governance of Military Police in Canada” (2010) pg. 23.

<sup>39</sup> Robertson, Neil “Policing: Fundamental principles in a Canadian context” (2012) pg. 349.

facilities, additional vehicle procurement and increased operational budgets. As a result, the relationship and dependence on senior command creates an association in which good performance and dedication to the commander's values will always be of benefit to MP interests.

In 1999, the MPCC commenced public hearings in relation to MP and interference complaints from non-policing commanders at base level and from within their own MP chain of command.<sup>40</sup> Even after a decade of internal investigations into these complaints, the MPCC continues to encounter resistance at every level of senior leadership during their investigative process, as senior leaders have not adequately surrendered information at their request for public examination, to the point in which the MPCC has made several complaints to the government asserting that the CF chain of command continually interferes, lacks cooperation and defers public confidence.<sup>41</sup>

During MPCC inquiries, many issues in relation to transparency and cooperation from the military were encountered. Through one suicide Board of Inquiry it was discovered that the MP chain of command had edited the police report of a MP investigator in order to make the deceased member's unit appear to have been more benevolent prior to the member's death.<sup>42</sup>

When the investigator expressed concern to his superiors about the editing of his report, he was

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<sup>40</sup> The MPCC was created following the accusations that military commanders covered up and interfered with MP during their investigation into the death of a Somali teenager at the hands of CF airborne troops in 1993.

<sup>41</sup> See O'Reilly & Healy (1997) for detailed study of the Somalia Incident where they address the issue of public confidence while serving military imperatives and they validate that the military justice system and National Defence Act lack arrangement and responsibility for proficient policing while subject to extraneous influences.

<sup>42</sup> As MP commanding officers are expected to support military commanders above all else, commanders expect that reports will be "massaged" or "polished" in order to promote the image of the military and the commander in a positive rather than a negative, noted by Retired Colonel Drapeau during the Langridge Inquiry.

advised “That’s the way we want it done. It was a direction that came down from higher.”<sup>43</sup> In another high profile case, the MPCC Chairperson illuminated their investigative findings which indicated that certain MP officers wrongly failed to investigate CF commanders for allegedly ordering the transfer of prisoners to Afghan security forces that were considered as a “known risk” for prisoner torture.<sup>44</sup> Soon afterward, due to the lack of cooperation from various levels of command the MPCC addressed parliament with concerns that it does not have the full authority it needs to discharge its oversight mandate despite the recent changes in law (Bill C-25), as there was “significant gaps” in its power to pry documents out of the federal government when conducting public hearings or investigations. In addition, when the MPCC was road-blocked by DND refusing to release documents related to the Langridge suicide,<sup>45</sup> the MPCC threatened court action in order to gain access to the said documents as the military did not wish them disclosed.

Regardless of these outcomes, police reports, command interference, and lack of cooperation continue to frustrate the MPCC as military superior’s claim they will cooperate with the requests of the MPCC, yet there continues to be a shroud of distrust towards the military leadership and its lack of genuine transparency. Frustration continues to build as MP members do not wish to cooperate with board of inquiries as there is a grounded certainty that testifying against the will of command authority or military leadership will be a significant threat to one’s

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<sup>43</sup> Cobb Chris “Langridge report wasn’t sanitized, inquiry hears” (2012), online:

<<http://www2.canada.com/calgaryherald/iphone/news/national/story.html?id=7311656>>

<sup>44</sup> Shaw, Erin “Bill C-15: Strengthening Military Justice in the Defence of Canada Act” (2013), online:

<<http://www.parl.gc.ca/Content/LOP/LegislativeSummaries/41/1/c15-e.pdf>>

<sup>45</sup> Brewster, Murray “Military Police Watchdog warns significant gaps remain in its authority” (2013), online:

<<http://www.macleans.ca/news/military-police-watchdog-warns-significant-gaps-remain-in-its-authority/>>

status and potential career advancement.<sup>46</sup> As such, the MPCC is aware that the individual MP may not wish to cooperate with MPCC inquiries in fear of indirect retribution for failing to align and defend the interests of the chain of command.

The MPCC may wish that MP have greater independence from the chain of command, although as military law continues to maintain a tight control of the MP and the MP commanding officer lacks independence from authoritative influence, the frustrations caused by the power divergence will not change. For instance, the National Defence Act Part II, “The CF Provost Marshal” states the following in relation to his responsibilities:

#### Tenure of office and removal

(3) The Provost Marshal holds office during good behaviour for a term not exceeding four years. The Chief of the Defence Staff may remove the Provost Marshal from office for cause on the recommendation of an inquiry committee established under regulations made by the Governor in Council.

#### General supervision

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

#### General instructions or guidelines

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

#### Specific instructions or guidelines

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

#### Availability to public

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

#### Exception

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<sup>46</sup> Robertson (2012) Explains that independent police commissions were created to provide both a buffer and a forum and conduit for necessary dialogue between police and politicians, however in the case of the military, the commanding officer is the politician that MP must continue to serve after the conclusion of Board of Inquiry, therefore there is significant reluctance to participate and testify during inquiries that may cause professional apprehension.

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

As the CFPM is subject to these NDA provisions, it is apparent that senior commanders maintain their control of the MP and that civilian oversight is not affectionately welcomed within the military culture. It is obviously beneficial to “maintain good behavior” to the chain of command at all times *or* risk being relieved of command. The technical rhetoric reinforces conformity and obedience towards higher military authority at all times or face penalty.

Yet in order for civilian oversight to legitimately achieve their objectives, the MP must be protected from its inherent organizational authorities and legislative governance or they will not embrace the values of the MPCC and cooperate to assist oversight objectives, nor facilitate complete transparency for the good of the general public. There is a public expectation that MP act in the same manner as civilian police services during oversight inquiry, yet senior leadership continues to be passive resistant to the concerns of the MPCC.

Furthermore, as the CFPM previews all complaints in relation to the conduct of MP members, he determines if the complaint is an “internal matter” or subject to independent review. In this capacity, his decisions can be of benefit to the senior command structure as a matter deemed internal prevents it from the preview of civilian oversight. The transparency process is clouded as files can be disposed of without knowledge of the MPCC or the Canadian public which causes the MP to be in a class that is beyond the reach of public accountability and areas of responsibility. The commission concluded that by claiming that “...continuing to exclude the conduct of Military Police during military operations for oversight, serious incidents such as the

alleged torture and harassment of prisoners of Abu Ghraib prison<sup>47</sup> operated by the U.S. military ... could be beyond the reach of the Canadian Oversight Committee.”<sup>48</sup>

## Public Expectation and Organizational Transparency

*“The rule of law embraces at least three principles. The first principle is that that “law is supreme over officials of government as well as private individuals, and thereby preclusive of the influence of arbitrary power” ... The second principle “requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order” .... The third principle requires that “the relationship between the state and the individual ... be regulated by law.”<sup>49</sup>*

*Supreme Court Judgments, British Columbia v. Christie*

Public interest peeks when one considers the embarrassing incidents within the CF over the last decade and the lack of faith in the judicial process when considering high interest incidents involving serious offences or senior leadership. In the Delisle matter (2013),<sup>50</sup> the military was advised of this investigation only after the crown attorney, RCMP civilian police, and the Canadian Security & intelligence Service (CSIS) had prepared to prosecute the matter within the civilian court system. The CSIS agent stated “The government likely chose the civilian prosecution route because it didn’t believe National Defence could carry out a competent investigation, amongst other things.”<sup>51</sup>

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<sup>47</sup> Hamm (2007) Abu Ghraib was operated by 300 military guards, mainly Military Police mentored by the Central Intelligence Agency to assist in torturing prisoners to extract information based President Bush’s unwritten policy to extract intelligence any means possible. In total over 19,000 Iraqis were rounded up by US forces for intelligence gathering by judging citizens strictly on their physical appearance and facial features, and who “looks” like a terrorist.

<sup>48</sup> Military Police Complaints Commission Special Report (2005), pg.12

<sup>49</sup> Roach, Kent “Police Independence, the Military Police and Bill C-41” (2011), pg. 9.

<sup>50</sup> On 22 September 2013, it was reported that the Canadian military was furious that it was not allowed to court-marshal Sub-Lt Jeffery Delisle for selling classified Western intelligence to Russia over a four year period. The military was advised of this investigation only after the crown attorney and RCMP civilian police and the Canadian Security & intelligence Service (CSIS) had prepared to prosecute the matter within the civilian court system.

<sup>51</sup> Brewster, Murray “Military was steamed about not being able to court martial navy spy” (2013), online: <<http://www.ctvnews.ca/politics/military-steamed-about-not-being-able-to-court-martial-jeffrey-delisle-documents-1.1465584>>



In addition, Retired Colonel and military lawyer Michel Drapeau responded in the opposite as he believed prosecuting under national security legislation was the right decision, as “Allowing the military to investigate, prosecute and sentence one of its own for such a grave offence would have put the Forces in a conflict position and fostered lingering doubts about whether the procedure was fair ... It is arrogant and improper for the military brass in general and the Judge Advocate General in particular to oppose this reality and resist the notion of ‘civilian control’ over all judicial affairs in this country.”<sup>52</sup>

Base Commanders are not always exemplary models of leadership that are immune from human immoralities. In 2013, Base Commander Major David Yurcyszyn was removed from duty and charged with offences relating to sexual assault, disgraceful conduct and drunkenness as a result of his actions against a female soldier, and he was found guilty and sentenced by a military judge with a reduction in rank from Major to Captain.<sup>53</sup> However, this same officer had faced a court martial in 2002 after being accused of conspiring to secretly videotape and making a porn video of a woman having sex without her knowledge. On the video, this junior officer was overheard inciting another officer saying “Get her while she’s drunk.” While charged for disgraceful conduct, the presiding military judge concluded there was not enough to support a conviction but did conclude by claiming that “the accused was arguably more than a common bystander ... may even been said to have assisted.”<sup>54</sup>

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<sup>52</sup> Ibid

<sup>53</sup> Maclean’s “Commanding officer of Canadian Forces Base in Alberta charged with sex assault” (2013), online: <http://www.macleans.ca/news/commanding-officer-of-canadian-forces-base-in-alberta-charged-with-sex-assault/>

<sup>54</sup> CBC News “CFB Wainwright commander loses job after sex charge” (2013), online: <http://www.cbc.ca/news/canada/edmonton/cfb-wainwright-commander-loses-job-after-sex-charge-1.1395633>

However in 2010, the most devastating incident to date in relation to military leadership was that of former Base Commander Colonel Russell Williams, who plead guilty to all 88 criminal charges including two counts of first degree murder, sexual assault, and break & enter. This highly decorated senior officer was considered as the “rising star” within the military as he was known as a gifted pilot and a natural leader who ferried the Queen and prime ministers before earning the top job as the Base Commander at the most important air force base; CFB Trenton.<sup>55</sup>

These incidents are not meant to discredit the strong leadership of the CF command structure, but rather exemplify that leadership in any organization has its unscrupulous elements that maintain their cloak of loyalty and dedication, and once in a position of higher authority, there is a real consequence that the authoritative position can be used to influence others based on positional power.<sup>56</sup> Compounding this dilemma is that fact that it is the non-policing commanding officers that have the authority to manage sexual harassment matters within their area of responsibility – their military bases. Yet as demonstrated, commanding officers are not impenetrable to human sexual desires, sexual deviance, and unethical moralities. Just because someone has attained a superior rank status and authoritative position, does not mean they are necessarily a good leader nor have they inherent and impregnably high morality standards – but

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<sup>55</sup> CBC News “Col Russell Williams pleads guilty to all 88 charges” (2010), online:

<<http://www.cbc.ca/news/canada/col-russell-williams-pleads-guilty-to-all-88-charges-1.872289>>

<sup>56</sup> Brewster (2014) In 2011, Brigadier-General Dan Menard was court-martialed for having sex with a subordinate and deliberately interfered with the investigation in a failed attempt to cover up the matter. In 2014, it was discovered that Retired Brigadier-General Menard was allowed to claim \$40,000 to move to the United Arab Emirates after he departed the military. Further, other senior officers have been taking advantage of these financial opportunities because they are “entitled” to these benefits, including the former Canadian Forces Chief of Staff Lieutenant-General Andrew Leslie that was allowed to claim more than \$72,000 for a move within Ottawa when he retired in 2011. Defence Minister Nicholson has ordered an investigation into these “grossly excessive” moving costs which to date, have only been justified as a perceived rightful entitlement to senior commanders in accordance with inadequate departmental moving policies and treasury board guidelines that were in place at the time.

they are given power and authority over others; a potentially hazardous situation through the preview of those affected.

It is abundantly clear that for the sake of competent policing capability, the MP must operate outside the immediate chain of command or at the very least operate outside the command hierarchy when conducting their policing and investigative duties, and there is a genuine need for a governing apparatus rather than an “Accountability Framework” that can maintain a natural and equal balance while upholding the image and credibility of the CF. Independence like justice must always be seen to be transparent, fair and unbiased.

Base commanders just as senior commanders should not be in a position to advise, instruct, or indirectly influence MP or the CFPM during policing and investigations, nor should the MP operate directly under non-policing commanders. MP should operate in the same capacity as civilian police services and answer to a civilian oversight committees in their host provinces for criminal and policing matters rather than a chain of command that know nothing about policing, although for the sake of military operations, MP need to be virtuous soldiers with their military skillsets capable to deploy on military operations while providing support to commanders, operations and mission objectives.

## Jurisdictional Deliberation

*“Military Police are in some way different from their civilian counterparts, but the similarities are far more numerous and fundamental. Military Police are peace officers. They possess the same extraordinary powers and the same authority to exercise these powers – as civilian police. They can arrest and detain people, not just members of the CF., but anyone. They can, when necessary to protect their own or others’ lives, use lethal force against citizens. ... Military Police should be no less accountable to Canadians for their use of these powers than civilian police.”<sup>57</sup>*

*Chairperson, Military Police Complaints Commission 2005*

Drawing from legal difficulties of extra-jurisdictional authority of provincially appointed police officers, Bilton and Stenning hypothesized that provincially appointed police officers lose their peace officer status when they travel outside their home jurisdiction which also includes the loss of authority to carry a firearm, arrest powers and more importantly, the loss of legal protection afforded by s. 25 of the Criminal Code.

MP are defined as peace officers in s.2 of the Criminal Code, yet further research into the Annotations section reveal that MP are only peace officers for the singular purpose of the military nexus and are not considered a genuine peace officer within the meaning of the text. In *Nolan vs The Queen* (1987), the Supreme Court recognized that the definition of peace officer is not designed to create a police force [or person], but rather provides that certain persons who derive their authority from other sources [legislation] will be treated as “peace officers,” thereby enabling them to enforce the Criminal Code within the scope of their pre-existing authority, and to benefit from certain protections granted only to “peace officers.”<sup>58</sup> Criminal law is the exclusive responsibility of the federal parliament. It is the provinces that possess the authority to

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<sup>57</sup> Military Police Complaints Commission Special Report 2005, MPCC Chairperson Henry Kostuck, pg. 3.

<sup>58</sup> Bilton & Stenning (2001) Extra-Judicial Authority of Provincially Appointed PO in Canada, pg. 15.

appoint provincial officers – therefore “peace officer” status flows from exclusive legislative authority under section 92(14) of the Constitution Act, 1867.

Drawing on parallels in relation to the administration of justice, their discussion focused on the difficulty civilian police officers encounter when travelling outside of their home jurisdiction and once outside their boundaries, as they no longer possess legal peace officer status, in the same capacity as MP during daily routines in which their duties require them to continually travel between civilian and military jurisdictions in marked police vehicles with complete police accoutrements. DND locations include military establishments, detachments, and federal government rental facilities, armories within metropolitan areas, ports and airports. When travelling to these locations between jurisdictions, any provincial offence or criminal incident they observe create a moral/legal dilemma as they are placed in a situation in which they are extremely proficient to handle the situation from a law enforcement perspective, and they have a social responsibility and public expectation to take lawful action within the public stare, yet MP are powerless and have no provincial authority.<sup>59</sup> There is no legal protection from the Criminal Code as a ‘peace officer’ for purposes outside the military nexus. Therefore, immediate police reaction from MP is balanced on the severity of the offence and the legal ramifications associated by either the province or the CF disciplinary system of justice.

As Bilton & Stenning identified, peace officers in Canada require extra-territorial jurisdictional protection in order to complete their duties, and this lack of protection in accordance with current law renders the police officer without legal status. Policing is the responsibility of provincial jurisdiction therefore the federal government cannot confer peace

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<sup>59</sup> In certain provinces MP are sworn/deemed peace officers for enforcement purposes by the host province.

officer status to a particular province through the Criminal Code, the Code only provides definition to who is considered a peace officer.<sup>60</sup> Furthermore, each jurisdiction enacts legislation such as their provincial police act which defines their definition of peace officer or for those that don't, they make direct reference to the Criminal Code for clear definition of peace officer, to which MP are not included as peace officers within the meaning of the Code when exercising authority over persons not subject to the Code of Service Discipline.

Depending on the province, MP have been deemed as provincial constables, special constables, or provincial constable status for a variety of reasoning and endorsed by the province. The courts of Canada have indicated that “a province is responsible for, and has control and supervision of law enforcement in the province within respect to provincial legislation and criminal law as defined by the federal Parliament.”<sup>61</sup>

Interestingly, the RCMP are regulated by the RCMP Act which appoints every member of the force as peace officers throughout Canada. They perform provincial or municipal duties under contract which means they are national peace officers with a clearly defined status. Further, in *Nolan*, the Supreme Court concluded that police officers may retain their status outside the jurisdiction in which they are appointed.<sup>62</sup> In addition, section 476 of the Criminal Code states:

Where an offence is committed on the boundary of two or more territorial jurisdictions within 500 meters of any such boundary or the offence was commenced within one territorial division and completed within another, the offence shall be deemed to have been committed in any other territorial divisions.<sup>63</sup>

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<sup>60</sup> Bilton, Johnathan & Stenning, Philip “Extra-Judicial Authority of Provincially Appointed PO in Canada” (2001), pg. 3.

<sup>61</sup> Ibid, pg. 14.

<sup>62</sup> Ibid, pg. 10.

<sup>63</sup> Ibid, pg. 41.

Stenning claims that the general rule of police jurisdiction in the United States (US) is the same in Canada, whereby the jurisdiction of a police officer “does not extend beyond the territorial limits of his or her municipality or jurisdiction,” yet the courts in the US have devised an exception to the rule as follows:

A police officer operating extra-jurisdictionally cannot hold him or herself out as a police officer in order to observe unlawful activity. In sum, a police officer operating out-of-state may act undercover as a private citizen to observe criminal activity and effectuate arrest, but must not use the authority of the office for criminal investigative purposes outside the jurisdiction of appointment; that is to say, a police officer acting outside jurisdiction must not openly assert his or her official position in order to observe unlawful activity or to seize evidence.<sup>64</sup>

This general rule is logical and reasonable yet in relation to MP, dozens of criminal incidents transpire annually in plain view of MP while travelling to their intended destination in which a proper police response was initiated within civilian jurisdiction (including gun point arrests). In this capacity the MP act as “a private citizen” and execute a citizen’s arrest under section 494 of the Criminal Code, rather than by peace officer under section 495 because they are not police officers. The legal concern to consider is that fact citizens don’t normally have the ability for a lethal force application on their body, they are not trained as police officers and use of force methodology, and they don’t wear police uniforms driving police vehicles. If the incident turned to a lethal force application, the MP member takes action without complete understanding of their legal protection and authority and worse, they are subjected to mental duress and emotional anguish wondering if they will be charged or abandoned by their immediate chain of command as they used initiative over authorization during a policing situation outside military jurisdiction, and perhaps organizational interests.

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<sup>64</sup> Ibid, pg. 50.

## United States Army Military Police

*“As policemen MPs are trained, experienced and have unique skills and mindsets not possessed by other military forces. This is the result of both the training received by MPs and of the conditions they routinely operate in. One result of this training and experience is the approach MPs learn to use when conducting their law and order (L&O) mission ... Another benefit of the conditions MPs routinely work in is that they become highly suited for interacting with both military and civilian populations. The bottom line is that through training and the execution of L&O operations MPs reinforce a unique mindset and again critical interpersonal and technical policing skills which give them a set of capabilities setting them apart from other Soldiers.”<sup>65</sup>*

*Colonel David Chase, United States Army*

Intriguingly, not all non-policing commanders are against the concept of MP possessing legal powers while operating outside military jurisdiction to the benefit of civilian communities. As indicated by Zink, the United States (US) Posse Comitatus Act (PCA) of 1878 prevented local sheriffs and US Marshals from drafting military members into service as a posse or a law enforcement service, as the War Department wasn't happy that soldiers were being drafted and pulled away from their military duties.<sup>66</sup> However in the 21st century, mutual aid is considered the cornerstone of public safety and as such, Zink advocates that MP are trained, certified, and capable of responding to requests of mutual aid from neighboring civilian police services and should participate in joint law enforcement matters outside military jurisdiction.

In accordance with the National Response Framework (NRF), first responder training is standardized and certified, as such both military and civilian police receive similar if not identical training (the same within Canada). Zink advocates from the law enforcement perspective, that mutual aid is a concept over 2000 years old that was derived from the historical

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<sup>65</sup> Chase, David “Military Police: Assisting in Securing the United States Southern Border” (2012), pg. 13.

<sup>66</sup> Zink, Dennis “Military Police Mutual Aid and the Posse Comitatus Act” (2011), pg. 3.



efforts of the Night Watch, Counts of the Stable (known as Constables), and Sheriffs and Posses, to which modern policing of today has widely adopted.<sup>67</sup>

MP have responded to requests for mutual aid even though the PCA precludes MP from responding to civilian enforcement agencies and hence, MP were found to have violated the PCA. Zinc argues that mutual aid requests do not include the entire military, only MP that:

...are already conducting active police operations – albeit on Federal Installations. MP are professionally trained, and in many cases certified, Law Enforcement officers on Federal installations. Their ability to conduct mutual aid is not in question. At issue is the prohibition that off-post jurisdictions have in requesting MPs to respond during mutual aid situations in a Law Enforcement capacity. MPs can go into an incident to provide advice and information, but cannot conduct any operations related to security, active law enforcement operations, or controlling the actions of the civilian populace within specific authorization by the President or SECDEF. When a military policeman conducts duties on the Federal Installation, he is appointed by the Army to provide security, conduct active law enforcement operations, and control the actions of the military and civilian populace on Federal Property. Responding off of a military installation in support of a local police official would be commensurate with their police duties and training. Notwithstanding the PCA prohibition, military police have the capacity to perform mutual aid duties in accordance with training and operational policies and procedures ... the training of military police when conducting law enforcement duties on installations mirrors that of civilian police officers ... it is a matter of defence policy that MPs enforce many of the state statutes on the installation for the state in which it is located.<sup>68</sup>

Zinc concludes that the PCA is an outdated concept and the benefits of allowing MP to respond to off-post requests for mutual aid including active police operations outweigh any historical concerns about local sheriff's drafting soldiers to be part of the posse, and that MP performing law and order duties off federal installations is consistent with military readiness and duty performance.<sup>69</sup> Mutual Aid benefits MP as they gain experience with other department procedures, techniques, and it builds synergy and cohesion. MP are a tremendous asset to the civilian population as they can enhance public safety and support local law enforcement, and the

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<sup>67</sup> Ibid, pgs. 6-7.

<sup>68</sup> Ibid, pgs. 10-11.

<sup>69</sup> Ibid, pg. 16.

veto authority by senior commanders or the senior MP would be retained so that military missions take precedence to any prior agreement supporting law enforcement.

Further in relation to border security and national security interests, Col Chase of the US Army does not support the idea that the military should be used to assist with border security but rather, he advocates that MP should be used outside direct military interests because he believes they are uniquely suited for such missions because of their police training and experience in law enforcement:

MP are soldiers who have proven proficiency in conducting various war fighting missions around the globe. However at the heart MPs are police, trained and experienced in executing law and order operations. In performing this function MPs routinely perform typical policing tasks such as community patrolling, responding to calls for assistance as well as perform traffic operations, criminal investigations and even providing support to customs operations while deployed overseas. MP have continuous experience performing these types of mission which they conduct primarily within Army communities ... As policemen MPs are trained, experienced and have unique skills and mindsets not possessed by other military forces. This is the result of both the training received by MPs and of the conditions they routinely operate in. One result of this training and experience is the approach MPs learn to use when conducting their law and order (L&O) mission ... Another benefit of the conditions MPs routinely work in is that they become highly suited for interacting with both military and civilian populations. The bottom line is that through training and the execution of L&O operations MPs reinforce a unique mindset and again critical interpersonal and technical policing skills which give them a set of capabilities setting them apart from other soldiers ... Another advantage MPs have is that they routinely work with other law enforcement agencies outside of the U.S. military....<sup>70</sup>

More than ever the United States has passed new law authorizing federal troops and employees of the Defence Department to enforce the law based on the 21st century terrorist threat to the civil order. In this capacity, federal troops can be called on to protect people from violence, protect key facilities, control people movement, provide services, augment civil organizations, and provide the legal authority to use federal troops to enforce the law.

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<sup>70</sup> Chase, David "Military Police: Assisting in Securing the United States Southern Board" (2012), pg. 13.

Law enforcement is not a traditional military skill, nevertheless it a primary skill that MP must maintain in both military and civilian systems of justice. There are many papers written in relation to the Posse Comitatus Act (1878) which outlines the principle that the military should not conduct policing or execute state laws against its own citizens, yet after the 911 terrorist attacks the new Anti-Terrorist and Patriot Acts which provides military assistance to civilian law enforcement, it is fast becoming a familiar trend. Aside from joint operations at command level, the frontline base-level MP are routinely managing their duties side by side with their civilian counterparts in criminal courts and civilian jurisdictions, as civilian and military law enforcement agencies actively promote interdepartmental cooperation that benefits both communities. Working and sharing valuable resources provides higher levels of service to both communities and serve both military and civil interests.

## **Global Governance: Military Police**

*“There is some question in my mind as to the MP 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 which 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>71</sup>*

*The 1994 Martin Report*

The border between the military and police are blurred to the point in which European nations are utilizing their militaries and more specifically their MP for domestic policing duties

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<sup>71</sup> O’Reilly, James & Healy, Patrick “Independence in the Prosecution of Offences in the CF” (1997) , pg. 7, online: <<http://www.lareau-legal.ca/SomaliaHealy-OReillyEng.pdf>>

in both military and civilian jurisdictions.<sup>72</sup> Police services are becoming militarized whereas Military Police are becoming civilianized and turning predominantly to the civilian court process, yet still utilizing the military justice system for strictly military offences.

The days of conscription into military service is for the most part, a fad of the past as citizens in Western and European nations join the military for employment security and the military mindset is geared towards higher motivation to be law abiding in order to maintain long term employment and career advancement. From the military perspective, the concept of victory has changed because we no longer fight against the will of the people, militaries fight for the support of the people.<sup>73</sup> Military forces contribute domestically to border security, anti-drug policies, search and rescue operations, and protection of national interests. Many countries are now focusing on external threats by utilizing military and policing services and creating hybrid police services that are referred as either para-military or gendarmerie forces.

For instance in the Czech Republic, the responsibility for civil protection was transferred from the Ministry of Defence to the Minister of the Interior. The MP constitutes a special force subordinated to the Ministry of Defence that disposes of all the necessary equipment and expertise to fulfill police tasks in a less secure environment.<sup>74</sup> The Czech MP have been used to mentor and train civilian police forces in Iraq and Afghanistan and they have moved closer to a police service despite the fact that police tasks are considered secondary by military leadership.<sup>75</sup>

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<sup>72</sup> Banton (1970) "In Britain many think of Military Police as unrepresentative kind of policeman, but in Italy most national policemen are enrolled as members of the armed forces. In some European countries the gendarmerie are both policemen and soldiers," pg. 368.

<sup>73</sup> Weiss, Tomas "Fighting Wars or Controlling Crowds? The Case of the Czech Military Forces and the Possible Blurring of Police and Military Functions" (2012), pg. 451.

<sup>74</sup> Ibid, pg. 458.

<sup>75</sup> Ibid, pg. 459.

Since 19th century France, Gendarmes were military personnel used primarily to maintain law and order amongst the civilian population to control civil disobedience. In wartime, the French Gendarmerie participated in all wars as either MP or as a fighting combat force. The Gendarmerie operated on a dual dependency on the Ministry of Defence and the Ministry of the Interior, while remaining as part of the French armed forces with official soldier status. They are responsible for maintaining law and order in rural areas whereas the National Police focuses on the policing of the cities. In the event of war, the Gendarmerie act as MP and serve in combat-related tasks.<sup>76</sup>

In a similar fashion, the Italian Carabinieri are an integral part of the Italian armed forces and constitute a forth branch of the military aside the army, air force, and navy. They align themselves closer to the military pendulum as they are controlled by the Minister of Defence yet they also report to the Ministry of the Interior, as their duties include combating organized crime, riot control when required, and they act as MP for military requirements.<sup>77</sup> As with France, Italy has the Guardia di Finanza; a national police service with military status that focuses on customs and cross-border economic crime while operating with dual affiliation to the Ministry of Defence and the Ministry of Finance.<sup>78</sup>

The Spanish Guardia Civil, similar to the French Gendarmerie operates on the same double ministerial dependency and are not part of the Spanish armed forces. They are controlled by a civilian director while retaining an official status of an “armed institution of military

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<sup>76</sup> Lutterbeck, Derek “Between Police & Military: The New Security Agenda and the Rise of Gendarmeries”(2004), pg. 48.

<sup>77</sup> Ibid, pg. 48.

<sup>78</sup> Ibid, pg. 48.

nature,” and automatically come under control of the Ministry of Defence to assume combat related tasks.<sup>79</sup>

The Austrian Federal Gendarmerie (Bundesgendarmerie) was modelled on the French Gendarmerie and held the same dual dependency until the late 19th century when they became under exclusive control of the Ministry of Interior, in the same capacity as the German Federal Border Police (Bundesgrenzschutz, BGS). Even though this service was considered as police rather than a military force, they were accorded the official status of combatants in order to provide them with prisoner of war status in the event they were drawn into military conflict.<sup>80</sup>

Here lies the recurring theme within these European nations. During peacetime, these forces provide the policing function to both military and civilian jurisdictions, however during wartime they immediately fall under the military command structure as designated MP or an active combat unit serving the military interest. Their dual dependency and double affiliation to both military and civilian command and ministries permit them to serve the law enforcement interests for both military and civilian populations and further, there is a growing popularity of police forces with military status to the point in which Switzerland initiated the creation of their own gendarmerie-type force which would be associated to the country’s armed forces, but answerable to the interior ministry and local civilian authorities while performing police duties until required for military service.<sup>81</sup>

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<sup>79</sup> Ibid, pg. 48.

<sup>80</sup> Ibid, pg. 50.

<sup>81</sup> Ibid, pg. 64.

Certain countries like Belgium have demilitarized their Gendarmerie in order for them to be associated to the concept of civilian police including decentralization in order to improve relations between the police and the community, as the chain of command is impervious to societal changes or civilian oversight. The structure of a militarized police organization facilitates human rights violations because military officers follow orders unquestionably and are granted very little initiative by their central command.<sup>82</sup> Although one hidden caveat to these organizations with dual dependency is that the Gendarmeries are placed under the control of various ministers that provide operational direction, yet the officers continue to remain members of the armed forces and therefore again, subject to military command influence.<sup>83</sup>

## Conclusion

*“The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation’s security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs.”<sup>84</sup>*

*Supreme Court Justice C.J. Lamer, R. v. Généreux*

The core responsibility of the MP is to directly support the military justice system both domestically and abroad in order to ensure that military commanders can maintain discipline and enforce military rules and regulation. Although conversely, MP are engaged in daily police activities in the same capacity as civilian police by continually providing police service to both

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<sup>82</sup> Gobinet, Pierre “The Gendarmerie Alternative: Is there a Case for the Existence of Police Organizations with Military Status in the twenty-first Century European Security Apparatus?” (2007), pg. 454.

<sup>83</sup> Ibid, pg. 455.

<sup>84</sup> Drapeau, Michel “Canadian Military Justice System: Marking Time?,” pg. 39. Online: <[www.athabascau.ca](http://www.athabascau.ca)>

service members and civilians within military and civil jurisdiction. As such, civilian oversight, crown attorney's, and the provincial courts of justice require the same level of support from MP as they provide to military commanders because of the dual status of soldier and policeman. As indicated by civilian oversight and the perspectives of the courts (Justices and Justices of the Peace), MP are perceived in the same capacity as civilian police/peace officers<sup>85</sup> because they arrest soldiers and civilians and therefore, they should follow the standard of police oversight and have the authority to investigate all matters and interference allegations.<sup>86</sup>

As demonstrated within this paper, commanding officers are also social creatures that are susceptible to malevolence just as the rest of society and therefore, should not be in a position to govern those conducting the law enforcement function, nor should they have the ability to interfere based on a superior conception that military officers unconditionally possess the wisdom of policing and should further possess the ability to 'rightfully' interfere with the lawful execution of one's duty. It is a court of law and the oversight committees that should determine the actions of MP as correct or incorrect during their policing function as they have the knowledge and legal dexterities to determine what manner of policing was appropriate, and provide constructive criticism to improve the policing competencies of the MP police service.

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<sup>85</sup> During Criminal court, MP and MP court officers assist local police and custody services as military service personnel are mixed with civilians that have been incarcerated and held in regional detention facilities. As such, all police services assist each other in partnership in order to process the court matters before the provincial courts.

<sup>86</sup> See also Viau (2001), Viau explains that the Poitras Commission indicated that control measures must exist in order to provide a remedy to the question "Who is policing the police?" The Assembly clearly indicated that civilian authorities must monitor the activities of police services. Quebec's new Police Act gives the government increased means of control over the entire province which further reassures the public that they have competent and professional police services. Citizens must remain vigilant and keep the police accountable to the people, and as such, citizens can lodge complaints with the MPCC in relation to their encounter with the MP.



Nonetheless, the organization continues to maintain its position that senior non-policing officers/commanders have the right to maintain complete control, while knowing full well that the organizational structure continually influences MP at every level within the military hierarchy.

Unlike ministers responsible for police in the federal or provincial governments, military commanders that exercise executive authority over the MP do so without specific statutory authority, except for that of command. The MP is the only police force without specific police legislation in Canada.<sup>87</sup> Federal and provincial statutes are designed to embrace the common law and to preserve police independence while insulating police from partisan influence and political control,<sup>88</sup> whereby the core functions of a police service are commonly described in police statutes which include crime prevention, law enforcement, emergency response, public order maintenance, and assistance to victims of crime.<sup>89</sup>

Complete autonomy from the chain of command may not be an absolute, but frequently it is justified during the law enforcement function and while outside any bona fide military requirement. In order to enhance the definition and understanding of the MP policing function during their interaction within both jurisdictions and dual professions, a statutory scheme would serve as the superior control mechanism to govern the MP and non-policing commanders within the CF organization, rather than military orders, policies and directives that are prone to erred human interpretation, biased influence, or lack of legal appreciation.

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<sup>87</sup> Halpenny, Andrew “The Governance of Military Police in Canada” (2010) pg. 46.

<sup>88</sup> Robertson, Neil “Policing: Fundamental Principles in a Canadian context” (2012), pg. 348.

<sup>89</sup> Robertson (2012) Police duties are described in statutes governing police services and in the prescribed oaths of office. The courts have recognized a police duty to keep the peace, investigate public offences and enforce law, in particular criminal offences (R v. McNeil 2009), policing: Fundamental Principles in a Canadian context, pg. 348.

MP need independence in order to investigate both Criminal Code and Code of Service Discipline offences which should be recognized as part of the unwritten constitutional principle associated with the rule of law, even when MP do not completely have the authority to lay charges under the Code of Service Discipline.<sup>90</sup> In accordance with Bill C-41, the Vice Chief of Defence Staff and his personnel are the supervising governing authority and provide instruction to the CFPM in relation to the policing services and activities associated to MP. A balance must be discovered that equalizes MP independence, accountability and governance. By allowing one senior commander such as the VCDS to issue instructions and guidelines that interferes with MP investigations, infringes on the core concepts of police independence as recognized in *Campbell and Shirose*.<sup>91</sup>

It is evident that the creation of the first *Military Police Services Act* is required for the benefit of the DND and the CF whereby MP can conduct their duties in order to satisfy both military and civilian interests while intermingling between two distinct systems of justice. As the MPCC oversight committee has already been established, the next logical step would be to introduce a tailored MP police act that would lay out all responsibilities and legal jeopardy to all non-policing military commanders. This new federal legislative instrument is the next evolutionary process ascending from the outdated Accountability Framework, which would finally ensure that unprincipled and morality sentiment are removed from the conundrum of professional policing and military command influence. The new *Military Police Services Act* would:

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<sup>90</sup> Roach, Kent “Police independence and the Military Police” (2011), online: <[www.athabascau.ca](http://www.athabascau.ca)>

<sup>91</sup> Roach, Kent “Police Independence, the Military Police and Bill C-41” (2011), pg. 1.

- Remove any potential misunderstandings between the MP and the VCDS.
- Enhance the association between the oversight committees, the MP and the CF.
- Solidify the responsibilities of MP when they act in the role of soldier or police officer.
- Govern the obligations of MP while serving both military and criminal justice systems.
- Foster a better understanding in relation to the military and civilian legal framework.
- Promote and provide a clear and undisputed law enforcement mandate.
- Provide an enhanced and improved law enforcement service to the benefit of the DND.
- Protect MP from direct or indirect influence during their policing function mandate.
- Bestow a genuine police identity through federal statute that can be interpreted clearly by provincial governments and court of justice.<sup>92</sup>

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<sup>92</sup> Viau (2001) Under the Canadian constitution, there is shared jurisdiction over policing whereby federal parliament establishes a national police force in accordance with subsection 91(7) of the Constitution Act of 1876. The provinces are entitled to organize police forces within the boundaries of their respective territories in accordance with subsection 92(14) of the said Act.

- Justify the conception of complete peace officer status in accordance with the Criminal Code in order that MP are a legitimate police authority outside DND, thereby potentially enhancing the legal powers of MP with provincial constable status in order to provide competent law enforcement within all DND jurisdictions.

## **Recommendations**

1. The creation of the first Military Police Services Act (MPSA) would clearly establish the responsibilities of the MP service, military commanders at various levels and meet the expectations of civilian oversight for both military and civilian justice systems. This Act would provide higher transparency for civilian oversight and public interest, while aligning military policing with civilian police service and civil court etiquette, and balancing the needs of military commanders/operational interests. This proposed legislation creates legal accountability in which MP and military commanders must accept and conform due to its federal statute status and its separation from founding legislation - the National Defence Act.
2. Facilitate the creation of a new Bill to amend the Criminal Code of Canada to include MP with the definition of Peace Officer in order that all provincial and federal statutes can be enforced on all DND establishments and jurisdictions across Canada. Complete peace officer status would drastically improve the law enforcement function on DND establishments as only Highway Traffic Act offences can be enforced through parent legislation (Contraventions Act).

3. The MP recruitment and training process should be revised in order to cause MP and MP commissioned officers to require mandatory academics in police foundations or criminal justice prior to CF enrollment. Potential MP officer candidates should be commissioned from the ranks after completing 10 years of MP police duties and must obtain a degree related to criminal justice, law or criminology, then course loaded for basic officer training or the commissioning from the ranks program.
4. A new tailored personal appraisal system should be developed in order to promote competent supervisors that possess suitable knowledge in relation to military and police competencies that are required to mentor junior personnel in both military and criminal justice systems. The evaluation system needs to be separate from the CF Personal Appraisal system.
5. Promotion must be based on closed book written exams testing the individual comprehension of military law, criminal law, moral and ethical competencies, just as every other civilian police service.
6. A complete revision of the entire MP qualification program with the assistance of civilian police services and justice departments should be implemented in order to bring MP policing competencies to a higher level of proficiency. The MP should be mentored by the police and legal community instead of non-policing military commanders, as the current organizational design suppresses professional development and investigative competencies.

## Summary

In summation, additional legal deliberation stimulates supplementary considerations that may be advantageous for future policing concerns. As demonstrated, the Italian Carabinieri form an independent fourth branch of their military services and enjoy autonomy from various levels of command during the course of criminal investigation and law enforcement. In the United States, the United States Army Criminal Investigation Command (USACID) deploy CID Special Agents to investigate crimes while completely autonomous from the chain of command, and then submit their findings to the appropriate legal authority that will determine if charges are warranted.<sup>93</sup>

Yet even more beneficial to military law enforcement agencies is the manner in which the French Gendarmerie, Spanish Guardia, Italian Carabinieri, and Austrian Federal Gendarmerie are governed by both the Ministry of Interior and the Ministry of Defence depending on what role they are actively engaged. They either police both military and civil jurisdiction or are employed directly in support of military operations as combat soldier. However, this analysis is reserved for another exposition.

From the Canadian perspective, MP could follow the same functionality by serving the interests of the Minister of National Defence and the Minister of Justice, yet a new operational hybrid could also incorporate the Minister of Public Safety and Emergency Preparedness in order to provide unwavering police and law enforcement services. However, to legitimize and justify this premise would require an in-depth study supporting a new organizational hypothesis

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<sup>93</sup> Mitchell, Matthew “The Criminal and Investigative Agencies of the Armed Forces of the United States: A Brief description of their Organization and Mission” (2005).

whereby MP answer to ministers rather than commanders who are also soldiers that are subject to military law, yet are also dispensers of military law and punishment.

Regardless of futuristic policing and architectural planning, the 21<sup>st</sup> century MP of today require the first building block of complete peace officer status under the Criminal Code and clearly defined police legislation to govern them during the course of their lawful duty, service to military communities while serving two systems of justice, and for the benefit of the Department of National Defence and the overall interest of the Canadian public.

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