

Police Independence and the Military Police

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Abstract

This article examines police independence in the context of the military police. The author concludes that the independence of the military police to investigate both Criminal Code and Code of Service Discipline offences should be recognized as part of the unwritten constitutional principle associated with the rule of law and as a principle of fundamental justice under section 7 of the Charter. The author examines the increased recognition of the importance of police investigative independence since the Somalia Inquiry, including the recent expansion of the command authority of the Canadian Forces Provost Marshal over all military police. The relation between police independence and the rule of law is discussed. The author notes that while the military command structure has a legitimate interest in providing general and public policy guidance to the military police, clause 18.5131 of Bill C-15-which has been introduced but not enacted in Parliament-would violate police independence by enabling the Vice Chair of Defence Staff to issue instructions to the military police in specific cases. Such interference with the investigative independence of the military police would be inconsistent with increased post-Somalia recognition of the importance of police independence and could undermine the application of the rule of law to the Canadian military.

Keywords

Canada--Armed forces--Military police; Police power; Rule of law; Law enforcement; Canada

Police Independence and the Military Police

KENT ROACH *

This article examines police independence in the context of the military police. The author concludes that the independence of the military police to investigate both *Criminal Code* and *Code of Service Discipline* offences should be recognized as part of the unwritten constitutional principle associated with the rule of law and as a principle of fundamental justice under section 7 of the *Charter*. The author examines the increased recognition of the importance of police investigative independence since the Somalia Inquiry, including the recent expansion of the command authority of the Canadian Forces Provost Marshal over all military police. The relation between police independence and the rule of law is discussed. The author notes that while the military command structure has a legitimate interest in providing general and public policy guidance to the military police, clause 18.5(3) of Bill C-15—which has been introduced but not enacted in Parliament—would violate police independence by enabling the Vice Chair of Defence Staff to issue instructions to the military police in specific cases. Such interference with the investigative independence of the military police would be inconsistent with increased post-Somalia recognition of the importance of police independence and could undermine the application of the rule of law to the Canadian military.

Cet article examine l'indépendance de la police dans le contexte de la police militaire. L'auteur conclut que l'indépendance de la police militaire pour ce qui est de mener des enquêtes sur les infractions au *Code criminel* et au *Code de discipline militaire* devrait être reconnue dans le cadre du principe constitutionnel non écrit associé à la règle de droit et en tant que principe de justice fondamentale conformément à l'article 7 de la *Charte*. L'auteur examine la reconnaissance accrue de l'importance de l'indépendance de la police en matière d'enquêtes depuis l'enquête sur la Somalie, qui comprend la récente expansion de l'autorité de commandement du Grand Prévôt des Forces canadiennes sur la totalité de la police militaire. La relation entre l'indépendance de la police et la suprématie du droit est abordée. L'auteur fait remarquer que, bien que la structure du commandement militaire ait un intérêt légitime à fournir une

* Professor of Law and Prichard-Wilson Chair of Law and Public Policy, University of Toronto. I thank the Military Police Complaints Commission, which commissioned the research on which this article was based, while noting that the views expressed in this article are only my own and do not necessarily represent those of the Commission. I also thank two anonymous referees and my colleague Marty Friedland for challenging but helpful comments on an earlier draft of this article.

orientation générale et publique à la police militaire, l'article 18.5(3) du projet de loi C 15 – qui a été déposé, mais non promulgué au Parlement – enfreindrait l'indépendance de la police en permettant au sous-directeur d'état-major de la Défense d'émettre des instructions à la police militaire dans des cas particuliers. Une telle interférence avec l'indépendance de la police militaire en matière d'enquêtes serait incompatible avec la reconnaissance accrue ultérieure à la Somalie de l'importance de l'indépendance de la police, et pourrait saper l'application de la règle de droit aux militaires canadiens.

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THE CONCEPT OF POLICE INDEPENDENCE from government is complex and involves what has been referred to as a “delicate balance.”¹ On the one hand, the rule of law would be offended and there would be a danger of creating a police state if a police officer could be instructed that he or she must or must not investigate or lay charges against a particular person. Such interference with police investigations would bring the administration of justice into disrepute. On the other hand, the

1. *Report of the Ipperwash Inquiry: Policy Analysis*, vol 2 (Toronto: Government of Ontario, 2007) at 303 [*Ipperwash Inquiry*].

police—like other governmental actors—must be accountable to superiors and ultimately responsible to the people through the responsible ministers. The vital importance of police independence from interference in individual investigations must be weighed against the ability of the government to provide general policy direction to the police and to ensure accountability for police conduct.

Although police independence is a nuanced subject at the best of times, it is even more complex when applied to military policing.² The Somalia Inquiry³ revealed how the rule of law—the principle that the law applies equally to all, including those in the military—can suffer when the military obligation to respect the chain of command overwhelms the military police's law enforcement duty to investigate fully and impartially misconduct within the military. Similar concerns have recently been raised concerning the role of the military police with respect to the transfer of Afghan detainees from the Canadian Forces to Afghan authorities for possible torture. At the other extreme, complete independence of the military police from the chain of command would be inconsistent with their military status and might undermine legitimate interests of the military command and the responsible minister in providing general policy guidance to the military police.

The military police have evolved considerably since the Somalia Inquiry, and the trajectory of these developments so far has been towards stressing greater independence for the law enforcement role of the military police. This evolution has gone hand in hand with a greater recognition of legal norms, including those involving the *Canadian Charter of Rights and Freedoms*,⁴ in the Canadian military. In 1998, the Canadian Forces Provost Marshal (CFPM) and the Vice Chief of Defence Staff (VCDS) agreed to an accountability framework that allows the VCDS to exercise management responsibilities over the military police while at the same time not interfering with individual investigations. The 1998 amendments of the *National Defence Act*⁵ also recognized the importance of the military police's independence by allowing individual members of the military police to bring complaints of interference by other members of the military in investigations to the then newly created Military Police Complaints Commission (MPCC).

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2. Andrew Halpenny, "The Governance of Military Police in Canada" (2010) 48 Osgoode Hall LJ 1; Martin L. Friedland, *Controlling Misconduct in the Military: A Study Prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia* (Ottawa: Public Works and Government Services, 1997).
 3. For more information on the Somalia Affair and the Somalia Inquiry, see Part II(B), below.
 4. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
 5. RSC 1985, c N-5, s 250.19.

The MPCC has considered a number of such complaints, and there is increasing recognition of the importance of non-interference by the military chain of command in military police investigations. On 1 April 2011, the Canadian Forces announced that the military police will no longer be subject to command authority when exercising military police functions. Rather, they will be subject to the authority of the CFPM, who is the highest military police official in the military.⁶ This reform brings the situation of military police officers considerably closer to that of individual civilian police officers, who are subject to a single chain of command with the police chief at the apex of the command hierarchy.⁷ At the same time, however, I will suggest that this recognition of military police independence has been threatened by legislation introduced but not enacted in the last Parliament—legislation that was reintroduced in Parliament as Bill C-15⁸ in fall 2011.

In the first Part of this article I will examine the scope and legal status of police independence. In the second Part I will discuss the evolving nature of police independence in relation to the military police. The military police context is an excellent vehicle to explore and understand the rationales for police independence because the stakes and competing factors are often magnified in the military setting. For example, the events in Somalia underline how the need to apply the rule of law to serious misconduct can be critical. However, the same military setting also illustrates that complete independence of the police, both from the command structure and ultimately from accountability to the government, is impossible. In the third Part of this article I will assess the degree to which Bill C-15, which was introduced in Parliament in October 2011, is consistent with military police independence. It will be suggested that the clauses of this Bill that recognize the ability of the military command to provide general and public guidelines to the military police strike an appropriate balance between police independence and command responsibility. Other provisions that would allow the military command to issue potentially confidential instructions in respect of a particular investigation are, however, inconsistent with the investigative independence of the military police.

6. National Defence and the Canadian Forces, "The Canadian Forces Military Police Group," online: <<http://www.forces.gc.ca/site/news-nouvelles/news-nouvelles-eng.asp?cat=03&id=2921>> [Military Police Group].

7. Halpenny, *supra* note 2.

8. *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1st Sess, 41st Parl, 2011 (first reading 7 October 2011) [Bill C-15].

I. POLICE INDEPENDENCE

Police independence is an evolving and somewhat controversial constitutional concept. Philip Stenning concluded in 2000 that there is

very little clarity or consensus among politicians, senior RCMP officers, jurists (including the Supreme Court of Canada), commissions of inquiry, academics, or other commentators either about exactly what 'police independence' comprises or about what its practical implications should be for the RCMP-government relations.⁹

Support can be found in the jurisprudence for four very different models of police-governmental relations: full police independence; governmental policing; core police independence over law enforcement decisions; and democratic policing based on published directives from the government.¹⁰

Although much has been written about the appropriate relationship between police and government in the context of a variety of crises, less has been written about the precise legal status and scope of police independence from government more generally. Before the 1999 Supreme Court of Canada decision in *R v Campbell*,¹¹ many would have maintained that police independence was at most a constitutional convention based on practice and principle. Constitutional conventions are matters of wisdom, practice, and principle that constrain the exercise of legal powers and are enforced by the relevant constitutional actors but do not override or invalidate legal powers.¹² However, there is a danger that constitutional conventions are becoming somewhat quaint in the *Charter* age, where the ultimate question tends to concern the legality, as opposed to the wisdom or morality, of governmental action.¹³

As a result of the *Campbell* decision, police independence may be recognized as a constitutional principle, rendering it more directly enforceable by the courts than a constitutional convention. *Campbell* qualified the reference in the *Royal Canadian Mounted Police Act*¹⁴ that the police, via a commissioner, are under the direction of the minister at least with respect to core investigatory functions such

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9. "Someone to Watch over Me: Government Supervision of the RCMP" in W Wesley Pue, ed, *Pepper in Our Eyes: The APEC Affair* (Vancouver: UBC Press, 2000) 87 at 113.
 10. Kent Roach, "The Overview: Four Models of Police-Government Relations" in Margaret E Beare & Tonita Murray, eds, *Police and Government Relations: Who's Calling the Shots?* (Toronto: University of Toronto Press, 2007) 16.
 11. [1999] 1 SCR 565 [*Campbell*].
 12. *Reference Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 [*Reference Re Constitution*].
 13. Peter H Russell & Lorne Sossin, eds, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009).
 14. RSC 1985, c R-10, s 5(1).

as the decision to investigate and lay a charge. There is a growing consensus in Canada that at the core of police independence is the protection of police officers from interference with law enforcement discretion relating to the investigation and laying of charges.

A. *EX PARTE BLACKBURN*

The modern doctrine of police independence is generally traced to a 1968 British common law case, *R v Police Commissioner of the Metropolis Ex parte Blackburn*, in which Lord Denning concluded that the commissioner of the London police, “like every constable in the land,” was and should be

independent of the executive. ... he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.¹⁵

Lord Denning relied on a number of British civil liability cases in stressing the independence of the police from the government. The Supreme Court of Canada in a 1902 civil liability case, *McCleave Estate v Moncton (City of)*, had similarly decided that

[p]olice officers can in no respect be regarded as agents or officers of the city. Their duties are of a public nature. ... The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are entrusted are derived from the law, and not from the city or town under which they hold their appointment.¹⁶

Similar British civil liability cases provided an awkward base for Lord Denning’s sweeping comments because they were not concerned with general constitutional principles. Rather, they were concerned with the limited proposition that “there is no master and servant relationship between constables and their employers in the rather special sense which has been given that phrase in the law of torts.”¹⁷

15. [1968] 2 QB 118 at 135-36 [*Ex parte Blackburn*].

16. (1902), 32 SCR 106 at 108-09, quoting *Buttrick v Lowell (City of)*, 1 Allen 172 (Mass Sup Ct 1861). For an examination of other early Canadian civil liability jurisprudence, see Philip C Stenning, *Legal Status of the Police* (Ottawa: Minister of Supply and Services Canada, 1982) at 102-12. Professor Stenning concludes that “[n]one of these cases, however, determines the implications of the constitutional status of the police in terms of their liability to receive direction of any kind with respect to the performance of their duties” (*ibid* at 110).

17. Geoffrey Marshall, *Police and Government: The Status and Accountability of the English Constable* (London: Methuen, 1965) at 34. See also Geoffrey Marshall, *Constitutional*

B. *R v CAMPBELL*

The Supreme Court's 1999 decision in *Campbell* involved two people, Campbell and Shirose, who were charged with drug offences as a result of a reverse sting operation in which RCMP officers sold them drugs. The Crown sought to defend the police conduct on the basis that the police were part of the Crown or were agents of the Crown and thus were protected by the Crown's public interest immunity. Justice Binnie for the unanimous Supreme Court emphatically rejected such an argument on the basis that a "police officer investigating a crime is not acting as a government functionary or as an agent of anybody. He or she occupies a public office initially defined by the common law and subsequently set out in various statutes."¹⁸

Justice Binnie emphasized that the court was "concerned only with the status of an RCMP officer in the course of a criminal investigation, and in that regard the police are independent of the control of the executive government" and "not subject to political direction. Like every other police officer similarly engaged, he is answerable to the law..."¹⁹ He declared that this principle "underpins the rule of law,"²⁰ which the Court had elsewhere noted "is one of the 'fundamental and organizing principles of the Constitution.'"²¹ Notably, Justice Binnie's comments about police independence in *Campbell*—like Lord Denning's comments in *Ex parte Blackburn*—were technically *obiter dicta* and so not essential to the resolution of the case. However, given the paucity of judicial authority on police independence, they may be no less influential. The recognition of police independence in this case was consistent with the rule of law by stressing that the police did not enjoy a form of Crown immunity for their illegal actions. However, Parliament responded to this decision by enacting legal authorization for the police to engage in investigative conduct that would otherwise have been illegal.²²

C. THE GROWING CONSENSUS ABOUT POLICE INDEPENDENCE

The *Campbell* decision has reinvigorated discussion of the doctrine of police independence from government with respect to law enforcement matters. The

Conventions: The Rules and Forms of Political Accountability (Oxford: Clarendon Press, 1984) ch 8.

18. *Campbell*, *supra* note 11 at para 27.

19. *Ibid* at paras 29, 33.

20. *Ibid* at para 33.

21. *Ibid* at para 18, quoting *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at 240 [*Secession Reference*].

22. *Criminal Code*, RSC 1985, c C-46, s 25.1.

understanding of police independence demonstrated in this decision is consistent with influential commentary by commissions of inquiry both before and after it was rendered.

In 1981, the McDonald Commission²³ concluded that

[t]he Minister should have no right of direction with respect to the exercise by the R.C.M.P. of the powers of investigation, arrest and prosecution. To that extent, and to that extent only, should the English doctrine expounded in *Ex parte Blackburn* be made applicable to the R.C.M.P.²⁴

In other respects, the McDonald Commission defended ministerial control on the basis of democratic principles, stressing that it was

axiomatic that in a democratic state the police must never be allowed to become a law unto themselves. Just as our form of Constitution dictates that the armed forces must be subject to civilian control, so too must police forces operate in obedience to governments responsible to legislative bodies composed of elected representatives.²⁵

The Royal Commission on the Donald Marshall, Jr., Prosecution concluded in 1989 that “[i]nherent in the principle of police independence is the right of the police to determine whether to commence an investigation.”²⁶ In an appropriate circumstance, the police should be prepared to lay a charge even if it was clear that the Attorney General would refuse to prosecute the case. In the Royal Commission’s view, such an approach “ensures protection of the common law position of police independence and acts as an essential check on the power of the Crown.”²⁷ It found that the RCMP “failed in its obligation to be independent and impartial”²⁸ in its investigation of two Nova Scotia cabinet ministers and that this reflected a “double standard” that “undermines public confidence in the integrity of the system.”²⁹

23. The McDonald Commission examined this issue in the course of investigating illegalities committed by the RCMP’s Security Service and recommending the creation of a new civilian intelligence agency. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security Under the Law*, vol 2 (Ottawa: Canadian Government Publishing Centre, 1981).

24. *Ibid* at 1013.

25. *Ibid* at 1005-06.

26. This Commission examined police independence in the course of examining the investigation of Donald Marshall, Jr. and two other individuals. Royal Commission on the Donald Marshall, Jr., Prosecution, *Findings and Recommendations*, vol 1 (Halifax: Province of Nova Scotia, 1989) at 232.

27. *Ibid*.

28. *Ibid* at 213.

29. *Ibid* at 212-14, 216.

In the 2001 interim report concerning complaints arising from the Asia-Pacific Economic Cooperation (APEC) Conference, Justice Hughes stressed that “[w]hen the RCMP are performing law enforcement functions (investigation, arrest and prosecution) they are entirely independent of the federal government and answerable only to the law.”³⁰ In such circumstances, Justice Hughes recommended, the RCMP should not submit themselves to governmental direction. At the same time, when the RCMP are not performing the law enforcement functions of investigation, arrest, and prosecution, Justice Hughes recognized that “they are not entirely independent but are accountable to the federal government through” the responsible minister.³¹ This statement is consistent with the findings of both the McDonald Commission and the Marshall Commission, as well as with the subsequent *Campbell* decision.

The Arar Commission³² concluded in 2006 that while

the outer limits of police independence continue to evolve ... its core meaning is clear: the Government should not direct police investigations and law enforcement decisions in the sense of ordering the police to investigate, arrest or charge—or not to investigate, arrest or charge—any particular person.³³

The Arar Commission went on to state that this principle is rooted in the rule of law because “[i]f the Government could order the police to investigate, or not to investigate, particular individuals, Canada would move towards becoming a police state in which the Government could use the police to hurt its enemies and protect its friends... ”³⁴

The Ipperwash Inquiry suggested in 2007 that, in light of *Campbell*, “the government should not direct the police on specific law enforcement decisions,

30. The Commission examined police independence in the course of investigating a complaint against policing of demonstrations. Commission for Public Complaints Against the RCMP, *Commission Interim Report: Following a Public Hearing into the Complaints Regarding the Events that Took Place in Connection with Demonstrations During the Asia Pacific Economic Cooperation Conference in Vancouver, B.C. in November 1997 at the UBC Campus and at the UBC and Richmond Detachments of the RCMP* (Ottawa: Commission of Public Complaints, 2001) at 86.

31. *Ibid.*

32. The Commission examined police independence in the course of recommending a new review mechanism for the RCMP’s national security activities in light of the mistreatment of Maher Arar. Commission of Inquiry into the Action of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP’s National Security Activities* (Ottawa: Public Works and Government Services Canada, 2006).

33. *Ibid.* at 458.

34. *Ibid.*

including who should be investigated, arrested, and/or charged.”³⁵ It recommended that Ontario policing legislation be amended to make clear that the minister should not be able to give directions to the police about law enforcement decisions in individual cases. At the same time, the Ipperwash Inquiry defended a democratic model of police-government relations that would allow the minister to provide published directives to the police on various policy matters such as public order policing.³⁶

The Air India Inquiry recognized the importance of police independence when it proposed in 2010 that once the Prime Minister’s National Security Advisor decided to pass on information to the RCMP, he or she would have “no ongoing role in the investigation. It is a police matter. The RCMP is duty bound to conduct the investigation independent of any outside influence.”³⁷ At the same time, the National Security Advisor could “have contact with the RCMP about policy, dispute resolution or about general matters relating to the effectiveness of operations...”³⁸

D. THE CONSTITUTIONAL STATUS OF POLICE INDEPENDENCE

Although there is growing consensus that police independence is limited to law enforcement decisions, the exact constitutional status of the principle is not completely clear. The Court in *Campbell* derived the principle of police independence from the constitutional principle of the rule of law, which stresses the importance of impartially applying the law to all and especially to those who hold governmental power. The decision raises the possibility that courts might enforce the principle of police independence as part of the unwritten constitutional principle of the rule of law. Nevertheless, it remains unclear whether a constitutional principle can override clear legislation. At the same time, the constitutional principle of police independence in the investigation and laying of charges may inform the principles of fundamental justice in section 7 of the *Charter*—which

35. The Inquiry examined police independence in the course of examining allegations of political interference in the policing of Aboriginal demonstrations at Ipperwash Provincial Park and the resulting death of Aboriginal protester Dudley George. *Ipperwash Inquiry*, *supra* note 1 at 318.

36. *Ibid.* at 357. See recommendation 71.

37. The Air India Commission examined police independence in the course of its recommendation that the Prime Minister’s National Security Advisor be given enhanced responsibilities in reviewing the exchange of information between the RCMP and the Canadian Security Intelligence Service. Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Air India Flight 182: A Canadian Tragedy*, vol 3 (Ottawa: Public Works and Government Services Canada, 2010) at 40.

38. *Ibid.*

can invalidate inconsistent legislation—and may also inform application of abuse of process doctrine in individual cases.

E. POLICE INDEPENDENCE AS AN UNWRITTEN CONSTITUTIONAL PRINCIPLE BASED ON THE RULE OF LAW

The principle of police independence in the investigation and laying of charges is derived in *Campbell* from the constitutional principle of the rule of law. This raises the question of the status of constitutional principles in Canadian law. Traditionally, the Canadian Constitution has been divided between matters of constitutional law and matters of constitutional convention. Constitutional law includes the *Constitution Act, 1867*,³⁹ the *Constitution Act, 1982*,⁴⁰ and the *Charter*. Section 52(1) of the *Constitution Act, 1982* provides that “the constitution of Canada is the supreme law of Canada” and that inconsistent laws are of no force or effect to the extent of their inconsistency.⁴¹ Constitutional conventions are commonly understood as principles that constrain the way that constitutional actors exercise legal powers but that do not give courts the legal authority to invalidate clear statutory powers.⁴² Thus, constitutional principles seem to lie somewhere between constitutional laws, which have clear overriding effect, and constitutional conventions, which are matters of political practice and morality.

Campbell was decided in the wake of previous Supreme Court decisions that invoked unwritten constitutional principles in support of various findings. These decisions included the determination that in order to respect the unwritten principle of judicial independence, governments cannot negotiate salaries with the judiciary⁴³ and the determination that the unwritten constitutional principles of federalism, minority rights, and democracy should guide any decision involving the secession of Quebec from Canada.⁴⁴ In the 1997 *Judges Remuneration Reference*, the Court concluded that “the express provisions of the *Constitution Act, 1867* and the *Charter* are not an exhaustive written code for the protection of judicial independence in Canada.”⁴⁵ Despite a strong dissent by Justice LaForest, the Court looked to the preamble of the *Constitution Act, 1867* as a source of enforceable legal principle. It stressed that the constitutional principle of the rule

39. (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

40. *Supra* note 4.

41. *Ibid.*

42. *Reference Re Constitution*, *supra* note 12.

43. *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 [*Judges Remuneration Reference*].

44. *Secession Reference*, *supra* note 21.

45. *Supra* note 43 at para 109.

of law had been used in the *Manitoba Language Reference*⁴⁶ to provide temporary validity to laws that would otherwise have been struck down because they had only been enacted in English.⁴⁷ This case established that the principle of the rule of law thus has a constitutional status that can temporarily sustain unconstitutional laws notwithstanding the clear wording of section 52(1) that they are of no force and effect.

In 1998, the Court indicated in the *Secession Reference* that

underlying constitutional principles may in certain circumstances give rise to substantive legal obligations ... which constitute substantial limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be specific and precise in nature. The principles are not merely descriptive, but also involve a more powerful normative force...⁴⁸

At the same time, the Court did not indicate that the judiciary should enforce the unwritten constitutional principles at stake at the *Secession Reference*, including democracy and the rule of law. Rather, the Court held that these unwritten principles should guide political negotiations in the event of a clear vote in Quebec supporting secession.

More recently, the Court's enthusiasm for recognizing unwritten constitutional principles—let alone enforcing them—has waned. In 2005, the Court rejected the idea that the rule of law requires that prospective legislation must not target specific legal persons, namely tobacco companies. It reasoned “that in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous legal principles of our Constitution, but in its text and the ballot box.”⁴⁹ The Court was unwilling to enforce an understanding of the unwritten principle of the rule of law that went beyond the text of the *Charter* and to apply unwritten principles based on the rule of law against publicly debated and enacted legislation. This case is particularly important in the context of police independence because it suggests that courts may be reluctant to use the constitutional principles of police independence and the rule of law to invalidate democratically enacted legislation.

Furthermore, in its 2007 decision in *British Columbia (AG) v Christie*, the Court favoured the more restrictive text of the *Charter* over the idea that access

46. *Reference re Language Rights Under s 23 of Manitoba Act, 1870 and s 133 of Constitution Act, 1867*, [1985] 1 SCR 721 [*Manitoba Language Reference*].

47. *Ibid* at para 99.

48. *Supra* note 21 at para 54. See generally Robin Elliot, “References, Structural Argumentation and the Organizing Principles of Canada’s Constitution” (2001) 80 Can Bar Rev 67.

49. *British Columbia v Imperial Tobacco Canada Ltd*, [2005] 2 SCR 473 at para 66.

to legal services is part of the rule of law.⁵⁰ In that decision, it rejected the idea that general access to legal services was an unwritten constitutional principle that followed from the application of the principle of the rule of law. Instead, the Court defined the components of the rule of law as embracing at least three principles: (1) “that the ‘law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power’”; (2) a requirement of “...the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order”; and (3) a requirement that “the relationship between the state and the individual ... be regulated by law.”⁵¹ The Court thus provided content to the rule of law principle without clarifying its precise status or its enforceability by the courts.

Interference with police independence with respect to the investigation and laying of charges could offend the rule of law principle as defined in *Christie* if it resulted in the law not being supreme over all persons, including governmental officials. In such circumstances, the most basic relationship between the individual and the state might be governed by the arbitrary exercise of power by those who interfered in police investigations as opposed to the impartial application of the law.⁵² In extreme situations, such as the events that gave rise to the Somalia Inquiry or the possible transfer of detainees to torture in Afghanistan, a refusal to allow the military police to investigate allegations of serious crime might even produce a lawless situation that lacks normative order. Thus, police independence may be necessary to respect the rule of law. Accordingly, courts may be willing to enforce a constitutional principle of police independence in a more direct and substantive manner than simply declaring its existence as a constitutional convention.

There are, however, some pragmatic considerations that might render courts reluctant to enforce police independence in this fashion—that is, to promote police independence as an unwritten constitutional principle based on the rule of

50. [2007] 1 SCR 873 [*Christie*]. See also *Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 SCR 350 at paras 133-37 (also rejecting the idea that an appeal or a rule against automatic detention was part of the unwritten constitutional principle of the rule of law). See also *Babcock v Canada (AG)*, [2002] 3 SCR 3 (rejecting the proposition that the rule of law invalidated s 39 of the *Canada Evidence Act*, RSC 1985, c C-5, which confers evidentiary privilege upon Cabinet confidences).

51. *Christie*, *supra* note 50 at para 20, quoting *Manitoba Language Reference*, *supra* note 46 at paras 59-60 and *Secession Reference*, *supra* note 21 at para 71.

52. The Court has stressed that the unwritten principle of judicial independence protects judges from arbitrary and discretionary removal from office. See *Ell v Alberta*, [2003] 1 SCR 857.

law so as to invalidate legislation that clearly restricts police independence. One concern is simply the lack of precedent or legal authority. The courts have never, in a published decision, applied unwritten constitutional principles to invalidate legislation. In the *Judges Remuneration Reference*, mentioned earlier in this Part, the Court appealed to unwritten constitutional principles but ultimately based its ruling that laws reducing judicial salaries were unconstitutional on the fact that they constituted an unjustified violation of section 11(d) of the *Charter*.⁵³ Although interference with police independence might violate the unwritten constitutional principle of the rule of law, it is unclear whether the courts would invalidate democratically enacted legislation that authorized such interference solely on this basis. This makes it very important that Parliament not enact such laws. As will be seen in Part III of this article, certain clauses of Bill C-15—if enacted—would do just that by authorizing the military command to interfere with individual military police investigations.

F. POLICE INDEPENDENCE AS A POSSIBLE PRINCIPLE OF FUNDAMENTAL JUSTICE

Even if courts will not enforce the unwritten constitutional principle of the rule of law to invalidate democratically enacted legislation, concerns about the rule of law will likely inform their interpretation of section 7 of the *Charter*. A principle of fundamental justice, to be recognized as such within the meaning of that section, must be (1) a legal principle that is (2) generally accepted as fundamental to the way a legal system ought to operate fairly and is (3) capable of being applied with precision.⁵⁴ Although the Court has rejected both harm⁵⁵ and best interests of children⁵⁶ as principles of fundamental justice, it might hold that police independence as recognized in *Campbell* is a principle of fundamental justice. In contrast to these more controversial policy matters, police independence is a legal principle rooted in concerns about the rule of law. As discussed above in Part I(C), there is a growing consensus about the core meaning of police independence with respect to law enforcement discretion in investigation, arrest, or prosecution. Police independence with respect to such matters could be said to be an integral part of any fair legal system. Finally, *Campbell* demonstrates that police independence can be defined with precision when it relates to unauthorized interference in police decisions about whether to investigate, arrest, or charge a person.

53. *Supra* note 43.

54. *R v DB*, [2008] 2 SCR 3 at para 46.

55. *R v Malmo-Levine; R v Caine*, [2003] 3 SCR 571.

56. *Canadian Foundation for Children, Youth and the Law v Canada (AG)*, [2004] 1 SCR 76.

However, even if police independence is held to be a principle of fundamental justice, section 7 of the *Charter* does not protect principles of fundamental justice in the abstract. There must be a violation of life, liberty, or security of the person. If a person faced a criminal prosecution as a result of improper interference with police independence, then it should be relatively easy to establish that the prosecution threatened the person's liberty and/or security of the person. As will be discussed below, in Part I(G), such a prosecution might also constitute an abuse of process. It would be more difficult to demonstrate a violation of rights to life, liberty, or security of the person in cases where, for example, interference with police independence prevented a full police investigation from taking place and consequently prevented prosecution. In some extreme cases, however, the absence of a full police investigation of a serious crime might threaten the rights of crime victims to life and security of the person.⁵⁷ Unfortunately, victims of such interference with police independence might have difficulty gaining knowledge about secret acts of interference and therefore be unable to establish that their section 7 rights were in fact violated.

G. POLICE INDEPENDENCE AS A BASIS FOR ABUSE OF PROCESS DOCTRINE

Even if courts were reluctant to constitutionalize police independence under section 7 of the *Charter* or to enforce it as an unwritten constitutional principle, they should be more willing to allow police independence to inform the enforcement of their jurisdiction to protect judicial processes from abuse. The Supreme Court has recognized that courts have a residual discretion under both the common law and section 7 of the *Charter* to stay proceedings on the basis of abuse of process. Here, abuse of processes is defined as abuse that will be perpetuated by the conduct of the trial or that cannot otherwise be remedied.⁵⁸ A prosecution that was tainted by improper interference with a police investigation might qualify as an abuse of process. However, this doctrine would

57. There is little direct authority for recognizing the rights of crime victims under the *Charter*. The Court has recognized that refugee applicants' right to life may be threatened even though the Canadian state would not persecute them. See *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177. The Court has also recognized that court processes may affect the rights of victims to privacy and security of the person under s 7. See *R v Mills*, [1999] 3 SCR 668. More recently, a lower court has held that legislation concerning prostitution is unconstitutional because it forces prostitutes to work in dangerous environments. See *Bedford v Canada (AG)* (2010), 102 OR (3d) 321 (Sup Ct).

58. *R v Regan*, [2002] 1 SCR 297.

not be able to remedy interference with police investigations that precluded the police from conducting a full investigation, making an arrest, or laying a charge. In such circumstances, the only available constitutional remedy would be declaratory relief or damages under section 24(1) on the basis that the interference with the police investigation violated the section 7 *Charter* rights of the victim of an uninvestigated crime. Executive foreclosure or truncation of police independence will be less transparent than executive direction of a police investigation, and the difficulty of applying the *Charter* or abuse of process doctrine to such actions underlines the limits of the legal enforcement of police independence. As I will argue in Part III of this article, police independence needs to be internalized as an administrative matter in both police and government.

H. SUMMARY

Investigative police independence was recognized in *Campbell* as part of the unwritten constitutional principle of the rule of law. There is a consensus among Canadian commissions of inquiry that police independence in these core law enforcement decisions should be protected from political direction, even though governments have legitimate powers to provide general guidelines to the police. Even if courts hesitate to apply unwritten constitutional principles to invalidate democratically enacted legislation that authorizes interference with police independence, police independence might be indirectly enforced under section 7 of the *Charter* or under the abuse of process doctrine. However, such enforcement might be more difficult in cases such as the Somalia Affair, where interference with police independence prevented a full investigation culminating in charges.

II. POLICE INDEPENDENCE AND THE MILITARY POLICE

The military police are both police officers charged with enforcing the law and members of the military. The balance defining the military police's dual status is best understood in historical context. There has been an evolving recognition of police independence in the military, especially since the Somalia Inquiry,⁵⁹ which culminated in the April 2011 expansion of the jurisdiction of the CFPM to include command of all military police when they exercise military policing duties. This increased recognition of military police independence is, however, vulnerable to legislative incursion, particularly if the courts are unwilling to

59. For more detail see Halpenny, *supra* note 2.

enforce police independence as a constitutional principle that can invalidate democratically enacted legislation.

A. THE ROLE OF THE MILITARY POLICE

In certain circumstances, the military police have peace officer status under the *Criminal Code*. In *R v Nolan*,⁶⁰ the Supreme Court ruled that a military police officer is a peace officer under section 2(g)(ii) of the *Criminal Code* when making a breathalyzer demand to a civilian stopped on a public highway in relation to a breach of traffic regulations on an armed forces base. To the extent that military police exercise peace officer powers under the *Criminal Code*, there is no reason to think that police independence, as articulated in *Campbell*, would not apply to them.

The military police also exercise law enforcement powers such as detention and arrest with respect to military personnel who are subject to the Code of Service Discipline “regardless of the person’s rank or status...”⁶¹ The Code of Service Discipline is set out in the *National Defence Act*. Although many of its offences relate to specific matters of military discipline such as insubordination, disgraceful conduct, malingering, and drunkenness, many other offences overlap with *Criminal Code* offences. Indeed, section 130 of the *National Defence Act* makes it a service offence to commit acts or omissions either in or outside of Canada that would be punishable under the *Criminal Code* or any other Act of Parliament.⁶² The maximum penalty for Code of Service Discipline offences is life imprisonment.⁶³ This suggests that Code of Service Discipline offences are serious matters and that the military police should enjoy independence when investigating them.

However, under articles 107.02 and 107.12 of the *Queen’s Regulations and Orders for the Canadian Forces*,⁶⁴ commanding officers have powers to lay charges for Code of Service Discipline offences and to decide against proceeding with such charges. These provisions might support an argument that the military police should not enjoy police independence because Code of Service Discipline offences are ultimately matters of military discipline and subject to the chain of command. However, the power of the commanding officers is exercised *after* the

60. [1987] 1 SCR 1212.

61. *National Defence Act*, *supra* note 5, s 156(a).

62. *Ibid.*

63. *Ibid.*, s 139.

64. Online: National Defence and the Canadian Forces <<http://www.admfincs.forces.gc.ca/qro-ortf/vol-02/doc/chapter-chapitre-107.pdf>>.

military police have conducted a full investigation free from chain of command influence.⁶⁵ Comparably, the civilian police enjoy independence even though their rights to lay charges are sometimes restricted by statutory requirements for the consent of the Attorney General and by administrative pre-charge screening practices. The fact that civilian police officers are not always free to lay charges does not take away from their claims to independence from interference in law enforcement decisions. Full police investigations will allow for better accountability in decisions not to proceed with charges regardless of whether these decisions are made by Crown attorneys in the civilian system or by commanding officers in the military system. Indeed, full and unfettered investigations are arguably more critical in the military system, where decisions of whom to charge are made by those who, unlike Crown attorneys, may have incentives not to enforce the law fully because of the embarrassment, discredit, and disgrace that full enforcement might bring upon the military.

As a practical matter, it would be difficult to bifurcate the independence of the military police and claim that the military police only enjoy independence when enforcing the *Criminal Code*. At the start of an investigation, especially one involving allegation of serious misconduct, it may not be possible to know whether the matter will be handled as a Code of Service Discipline offence or as a *Criminal Code* matter. Section 250.19 of the *National Defence Act*, as added in 1998 in response to the Somalia Affair, provides statutory recognition of police independence by allowing complaints to be made to the Military Police Complaints Commission (MPCC) for all interferences with military police investigations regardless of whether they relate to the *Criminal Code* or to the Code of Service Discipline. It would be very difficult for the military police to accept interference in their investigations with respect to Code of Service Discipline offences but to resist it with respect to *Criminal Code* offences. In extreme combat situations, the rule of law still requires a full police investigation even if a commanding officer ultimately decides that a prosecution for a Code

65. See Military Police Polices and Technical Procedures A-SJ-100—004/AG-000, ch 2, para 79 [on file with author]. It is particularly important in this regard in providing,

Except for technical police duties or functions, the MP personnel are subject to orders and instructions issued by their respective Commanders or on their behalf. Nevertheless, commanders may not direct specific investigative or law enforcement action. This is a mandate and responsibility of the CFPM and the MP technical net.

These policies and procedures are being revised in light of the command changes for military police announced on 1 April 2011 (see Military Police Group, *supra* note 6), but they still reflect a recognition of police investigative independence.

of Service Discipline offence is not warranted given the difficult circumstances faced by the military. The investigative independence of the military police is an indivisible good.

B. THE SOMALIA INQUIRY AND THE INDEPENDENCE OF THE MILITARY POLICE

The Somalia Inquiry found that the lack of military police independence was a deficiency in the conduct of the Armed Forces in Somalia in 1992 and 1993. It found sixty-two incidents during the 1993 Canadian mission in Somalia that should have been investigated by the military police but were not. These incidents included “allegations of serious criminal or disciplinary misconduct, such as mistreatment of detainees, killing of Somalis, theft of public property, and self-inflicted gunshot wounds.”⁶⁶ Some of the incidents, including the death of Shidane Arone, were subject to summary investigations by members of the military who were not military police. The Somalia Commission of Inquiry found that these investigations were tainted by conflict of interest. It concluded that

commanding officers can exert tremendous influence over investigations because Military Police fall within the chain of command. That influence may be intentional or unintentional, but it can affect the scope of an investigation and the resources available to carry it out. ...[A] commanding officer might be tempted to hinder ... a broad investigation if it might cast the commander, the commanding officer, the unit, or the [Canadian Forces] in a bad light.⁶⁷

The inquiry stressed that commanding officers had their own interests in not pursuing possible misconduct. Also, commanding officers were not peace officers and so were “not subject to a peace officer’s oath of office or code of conduct, and ha[d] no overriding obligation to advance the administration of justice.”⁶⁸ It also observed that

Military Police are part of the chain of command. They take orders from their commanding officers about which incidents to investigate, and their chances for promotion are affected by their commanding officer’s assessment of them. This makes it difficult for MP to treat their superiors as ordinary witnesses or suspects.⁶⁹

66. Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair*, vol 5 (Ottawa: Public Works and Government Services Canada, 1997) at 1263 [*Somalia Inquiry*].

67. *Ibid* at 1272.

68. *Ibid* at 1284.

69. *Ibid* at 1271.

Furthermore, the Somalia Inquiry found a “soldier first”⁷⁰ attitude among the military police:

In essence, Military Police investigate only to the point of satisfying the commanding officer. This poorly serves the needs of the military justice system, for the system in fact needs investigations that will support convictions, not simply satisfy commanding officers. At the same time, setting the commanding officer’s satisfaction as the benchmark for deciding whether an investigation has been adequate fosters an environment ripe for command influence.⁷¹

The Somalia Inquiry recommended that “Military Police be independent of the chain of command when investigating major disciplinary and criminal misconduct.”⁷² To promote military police independence, it recommended the appointment of a Director of Military Policing. It warned, however, that “total independence can never be guaranteed as long as Military Police are members of the CF [Canadian Forces]; they will always face a subtle pressure to consider the impact of an investigation on the CF.”⁷³ It proposed that prosecutors—not the military police—lay charges, in part because of a lack of tradition of military police independence. It made this recommendation in 1997, before the Supreme Court’s decision in *Campbell*, which included the laying of charges within police investigative independence.

C. THE DICKSON REPORTS

In addition to the Somalia Inquiry, the Minister of Defence asked retired Chief Justice Brian Dickson to examine various matters concerning the military police and military justice. In its first report in 1997, the Dickson Committee distinguished the “field and garrison duties” of the military police—which “are essentially of a military nature” and as such subject to “the established chain of command”—from their investigative responsibilities, “which are almost wholly of a policing nature.”⁷⁴ The latter should result in discretion to lay charges and involve a duty to report “independently of the chain of command” under the new position of Canadian Forces Provost Marshal (CFPM), who would function as the chief military police officer.⁷⁵ Like the Somalia Inquiry, the Dickson Committee

70. *Ibid* at 1285.

71. *Ibid* at 1286.

72. *Ibid* at 1296.

73. *Ibid* at 1297.

74. *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services* (Ottawa: Ministry of National Defence, 1997) at ii.

75. *Ibid*.

warned that the power of commanding officers over the military police could compromise the investigative independence of the military police. It concluded that “for matters that are sensitive or of serious criminal nature, it is imperative that the investigation be conducted independently of the chain of command. This should include the final decision of whether or not to lay a charge.”⁷⁶ In this respect, the Dickson Committee embraced a more robust vision of military police independence than even the Somalia Inquiry; unlike the Somalia Inquiry, the Dickson Committee’s vision of police independence included the ability of the military police to lay charges free of interference. This approach is consistent with the subsequent *Campbell* decision.

A 1998 follow-up report after Chief Justice Dickson’s death disagreed with a proposal that the CFPM, as the effective Chief of the Military Police, should assume the command of all military police except those on field duties or deployment.⁷⁷ It noted the importance of base-wing military police being subject to the operational chain of command. It also pointed out that such military police would, under the 1998 amendments of the *National Defence Act*, be able to report interference with military police investigations to the newly created MPCC.⁷⁸ Andrew Halpenny has criticized the Dickson Committee approach for subjecting the military police to “many masters”⁷⁹ and noted that 90 per cent of military police were subject to operational commands.⁸⁰ As will be seen, command structure should change with the April 2011 increases in the command authority of the CFPM to include all military police exercising military policing duties. In fact, the military has now embraced a more robust administrative operationalization of police independence than contemplated by the Dickson task force.

D. THE 1998 ACCOUNTABILITY FRAMEWORK BETWEEN THE VCDS AND THE CFPM

The 1998 *Dickson Committee Report* also approved of a 1998 Accountability Framework that was “meant to ensure that the reporting relationship of the [Canadian Forces Provost Marshal (CFPM)] to the [Vice Chief of Defence Staff (VCDS)] does not in any way compromise the independence of the CFPM in relation to the investigatory role of the military police... .”⁸¹ To this end, the

76. *Ibid* at 36.

77. *Report of the Military Police Services Review Group* (Ottawa: Ministry of National Defence, 1998) at 30 [1998 *Dickson Committee Report*].

78. *Ibid* at 12.

79. *Supra* note 2 at 44.

80. *Ibid* at 47.

81. *Supra* note 77 at 14.

Accountability Framework contemplated that while the VCDS would establish “general priorities and objectives for military police services” and be responsible for “general administrative and financial control,” the VCDS would “*have no direct involvement in individual ongoing investigations but will receive information from the CFPM to allow necessary management decision making.*”⁸² As will be discussed below in Part III, this latter provision would be statutorily abrogated by a controversial part of Bill C-15.

Although the 1998 Accountability Framework was formulated a year before *Campbell*, it was broadly consistent with the understanding of police independence in that decision. Consistent with *Campbell*, the Accountability Framework ensured that the VCDS, who is not a peace officer, will not have direct involvement in individual ongoing investigations. The 1998 Accountability Framework also recognized the legitimate management and policy oversight responsibilities of the VCDS and the need for the CFPM to provide the VCDS with information necessary to allow the discharge of those management responsibilities.

E. THE 1998 AMENDMENTS AND THE RECOGNITION OF THE CONCEPT OF IMPROPER INTERFERENCE IN MILITARY POLICE INVESTIGATIONS

Increased recognition of the investigative independence of the military police was also supported by the 1998 enactment of section 250.19 of the *National Defence Act*, which allows the military police to complain to the newly created MPCC about improper interference with an investigation. In 2002, the then chair of the MPCC, Louise Cobetto, issued a paper that concluded that

the Military Police, when performing its law enforcement duties, is completely independent of the non-military police chain of command and the government. When the Military Police perform non-military police duties, it is not completely independent, but it reports to the federal government through the Chief of the Defence Staff.⁸³

82. *Ibid* at 15 [emphasis added], quoting Accountability Framework of 2 March 1998 signed by VCDS GL Garnett and CFPM Samson (found in *ibid*, Annex B). The commentary to the Accountability Framework elaborated on these matters by providing,

The VCDS will give general direction to the CFPM and monitor and review program activity, however, the day to day direction of individual investigations rests with the CFPM. The CFPM has a duty to advise the VCDS on emerging and pressing issues where management decisions are required. However, the degree of detail provided on the day to day investigations rests within the discretion of the CFPM in keeping with the respective roles, responsibilities, and principles enunciated in this document. ... The CFPM will monitor individual investigations and provide a general overview of investigations to the VCDS. Discussions with the VCDS of specific details of any investigation are to be avoided unless specific circumstances warrant attention of management.

83. *Interference with Military Police Investigations: What is it About?* (Ottawa: Military Police Complaints Commission, 2002) at 13.

Now, when deciding interference complaints, the MPCC can develop a nuanced jurisprudence about the exact scope of military police independence. The MPCC's jurisdiction to consider interference complaints might, however, be truncated should the *National Defence Act* be amended to authorize command direction and interference in military police investigations as proposed in Bill C-15.

F. THE 2011 INCREASES IN THE COMMAND AUTHORITY OF THE CFPM

Until recent changes announced by the military in April 2011, most members of the military police were subject to chain of command in their particular division of the military. One exception was the Canadian Forces National Investigation Service, which investigates the most serious and sensitive offences, but they only constitute about 10 per cent of the military police.⁸⁴ Halpenny observed in 2010 that this state of affairs made it difficult to transfer independence concepts taken from civilian policing to the military police, in part because the military police have many potential commanders—including high ranking base and wing commanders—whereas the civilian police are all subject to direction by a single chief of police.⁸⁵ Halpenny recommended that this situation be rectified by placing all military police under the command of the CFPM. As discussed above, this kind of proposal had previously been rejected by the Dickson Committee as discounting the need for the military police to function within their particular garrison. Nevertheless, the suggestions were accepted by the military in 2011 when it announced that the military police will no longer be subject to command authority within their environmental (army, navy, or air force) or operational command divisions when exercising military police functions. Rather, they will be subject to the authority of the CFPM in much the same way as individual police officers are subject to the command of their police chief.⁸⁶ This change, combined with the 1998 Accountability Framework and recognition of a complaint mechanism for claims of interference with military police investigations, highlights the growing acceptance that the military police should enjoy police independence when they investigate *Criminal Code* and Code of Service Discipline offences.

G. SUMMARY

The concept of police independence has increasingly been applied to the military police and should be applied to military police investigations of potential violations

84. Halpenny, *supra* note 2 at 44-45, 47.

85. *Ibid* at 44.

86. National Defence, Backgrounders, "The Canadian Forces Military Police Group," online: <<http://www.forces.gc.ca/site/news-nouvelles/news-nouvelles-eng.asp?cat=03&cid=2921>>.

of both the *Criminal Code* and Code of Service Discipline. The Somalia Inquiry demonstrated the serious dangers of allowing chain of command interference with military police investigations. Both the 1998 Accountability Framework and the 1998 enactment of section 250.19 of the *National Defence Act* recognized military police independence, the former by prohibiting chain of command direction in individual investigations and the latter by recognizing that the military police could complain to the MPCC about interference by the chain of command. No distinctions in the need for military police independence were made between *Criminal Code* and Code of Service Discipline matters; such distinctions would be unworkable in practice given the extensive overlap between the *Criminal Code* and the Code of Service Discipline and the need for police independence in all investigations. In April 2011, the military increased its commitment to police independence by placing all military police exercising police functions under the command of the CFPM as opposed to under their base or wing command.

III. BILL C-15 AND POLICE INDEPENDENCE

Bill C-15, as introduced in Parliament in October 2011, provided for many amendments to the *National Defence Act*. The focus here will be on amendments that relate to the military police and how they could impact police independence. The most relevant provisions of Bill C-15 are as follows:

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

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

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

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

(5) Subsection (4) does not apply in respect of an instruction or guideline, or of a part of one, if the Provost Marshal considers that it would not be in the best interests of the administration of justice for the instruction or guideline, or that part of it, to be available to the public.⁸⁷

87. *Supra* note 8.

It will be suggested below that clause 18.5(3) infringes police independence. Unfortunately, it was not deleted in the amendments proposed by the Standing Committee on National Defence in late March 2011 and was reintroduced without change as part of Bill C-15 in October.

A. STATUTORY RECOGNITION OF THE ROLE OF THE CFPM

Responding to recommendations made by the late Chief Justice Antonio Lamer,⁸⁸ Bill C-15 proposes to recognize the position of CFPM in the *National Defence Act*. Clause 18.3(3) of the Bill would provide for the appointment of a CFPM, who would hold office during good behaviour for a renewable four-year term and could only be removed for cause on the recommendation of an inquiry. The protections in clause 18.3 for the CFPM are more substantial than those provided for the commissioner of the RCMP or other police chiefs. This may well be appropriate given the influence of rank in the military and the fact that the CFPM will be outranked by others in the military structure, including the VCDS.⁸⁹ Clause 18.3 advances the idea that military police should enjoy some degree of independence from others who may outrank them in the military command structure.

B. RECONCILING POLICE INDEPENDENCE WITH MANAGEMENT RESPONSIBILITIES: GENERAL SUPERVISION AND PUBLIC INSTRUCTIONS AND GUIDELINES FROM THE VCDS TO THE CFPM

Clause 18.5(1) of Bill C-15 would recognize that the CFPM “acts under the general supervision” of the VCDS and clause 18.5(2) would provide that the VCDS may issue “general instructions or guidelines” about how the CFPM exercises his or her general responsibilities. Clause 18.5(2) would ensure the transparency of any “general instructions” by requiring the CFPM to ensure that all general guidelines “are available to the public.” This recognition of the management responsibilities of the military as represented by the VCDS is consistent with the 1998 Accountability Framework, which contemplates that the VCDS will have “general administrative and financial control” and can

88. *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts as required under section 96 of Statutes of Canada 1998, c 35* (submitted to the Minister of National Defence, 3 September 2003) at 75, online: <http://www.cfgb-cgfc.gc.ca/documents/LamerReport_e.pdf>.

89. Bill C-15, *supra* note 8, cl 18.3(2) (providing that the CFPM should hold the rank of at least a colonel).

establish general priorities and objectives for the military police.⁹⁰ This structure is consistent with civilian policing practices, where the police cannot be totally independent from management and policy direction by the government.

Clause 18.5(2) is generally compatible with the recommendations made by the Ipperwash Inquiry that favoured a “democratic policing” model that would allow the responsible minister to issue general policy directives to the police, provided those directives are public.⁹¹ In the context of military policing, the analogue to democratic accountability through the responsible minister or police board is the management roles of the Chief of Defence Staff and the VCDS.⁹²

C. CLAUSE 18.5(3) AND SPECIFIC INSTRUCTIONS FROM THE VCDS TO THE CFPM IN RESPECT OF PARTICULAR INVESTIGATIONS

If Bill C-15 had ended at clauses 18.5(1) and (2), it would have been consistent with military police investigative independence. Indeed, it would have provided a sound statutory framework for reconciling competing interests in investigative or law enforcement independence with the need to ensure that the military police are subject to general policy and management direction by the military, as represented by the VCDS.

Unfortunately, clause 18.5(3) of Bill C-15 would go beyond the ability of the VCDS to provide “general supervision, instructions or guidelines” to the CFPM and would empower the VCDS to “issue instructions or guidelines in writing in respect of a particular investigation.”⁹³ Moreover, clause 18.5(5) would open the possibility that such instructions not always be made public. Clause 18.5(3) of Bill C-15 is contrary to paragraph 7(A) of the 1998 Accountability Framework, which provided that “the VCDS will have no direct involvement in individual ongoing investigations but will receive information from the CFPM to allow necessary management decision making.”⁹⁴ If enacted, clause 18.5(3) would

90. 1998 *Dickson Committee Report*, *supra* note 77, Annex B.

91. *Ipperwash Inquiry*, *supra* note 1, ch 12.

92. Andrew Halpenny has suggested that a Military Police Service Board be created and that it, rather than the VCDS, should provide policy guidance to the military police through the CFPM. See Halpenny, *supra* note 2 at 50-52. However, such an innovation was not announced as part of the April 2011 reforms. One concern with Halpenny’s suggestion is that such a board would further insulate the Minister of Defence from ultimate accountability for the military (including the military police) and would further diffuse accountability. The Ipperwash Inquiry considered but ultimately did not recommend the creation of a province-wide police services board for the Ontario Provincial Police. See *Ipperwash Inquiry*, *supra* note 1 at 351-55.

93. Bill C-15, *supra* note 8, cls 18.5(1), (3).

94. 1998 *Dickson Committee Report*, *supra* note 77 at 15, quoting 1998 Accountability Framework of 2 March 1998 signed by VCDS GL Garnett and CFPM Samson (found in *ibid*, Annex B).

displace the non-statutory Accountability Framework. Moreover, clause 18.5(3) is inconsistent with the core tenet of police independence recognized in *Campbell* because it would give a very high-ranking member of the military explicit statutory powers to interfere in a police investigation by issuing instructions in respect of a particular investigation. For example, clause 18.5(3) would allow the VCDS to give instructions not to investigate a particular person or matter or to investigate a particular person or matter in a specified way. In making such instructions, the VCDS could be motivated by a desire to protect the reputation, standing, and funding of the military. The VCDS would be acting not as a peace officer but as the second highest-ranking member of the Canadian Forces. The rule of law could potentially suffer from the absence of a full and impartial investigation by the military police.

Clause 18.5(3) does apply some restrictions on interference by the chain of command on police investigations. Specific instructions about a particular investigation to the investigating military police officer must come from the VCDS and not from the investigating officer's immediate superior. Indeed, restrictions on immediate command interference with the military police have been strengthened by the April 2011 announcement that the CFPM will assume command over all military police. The proposed powers in clause 18.3(3) only reside in the VCDS, and they cannot be delegated to base or wing military commanders.

Although the VCDS has a legitimate management interest in issuing general guidelines and instructions to the CFPM, it is difficult to understand why this power should extend to individual cases. Although it is possible that a policy matter may emerge for the first time in the context of a specific investigation, there is a danger that the VCDS's instructions in a specific case may not necessarily be related to general policy or managerial matters, but rather may constitute an arbitrary interference in a particular investigation. The fact that the VCDS's instructions in specific cases, as opposed to his or her general instructions, may not necessarily be made public also increases the danger that the VCDS's interventions will be perceived as arbitrary interferences with police investigative independence. It is also troubling that the proposed legislation would abrogate one of the 1998 Accountability Framework's important restrictions, which dictated that the VCDS have no direct involvement in individual ongoing investigations.⁹⁵ As discussed above, the 1998 Accountability Framework was approved by the Dickson Committee report and is consistent with the subsequent 1999 decision in *Campbell*, which recognized police investigative independence as an unwritten

95. *Ibid.*

constitutional principle derived from the rule of law. There is no public evidence that the balance set in the 1998 Accountability Framework is flawed. Nonetheless, clause 18.5(3) would be a step backward in the recognition of police independence, even while the proposed statutory recognition of the role of the CFPM in Bill C-15 and the April 2011 increase in the CFPM's command authority to all military police are significant steps forward in this regard.

The rationale for clause 18.5(3) is unclear, especially given its incongruence with the 1998 Accountability Framework and the military's willingness in April 2011 to dramatically expand the CFPM's command authority to all military police. Clause 18.5(3) in some respects mimics clause 165.17(3) of the *National Defence Act* as amended in 1998, which contemplates that the Judge Advocate General may issue not only general instructions and guidelines to the director of military prosecutions, but may also issue them "in writing in respect of a particular prosecution."⁹⁶ The difference, however, is that the Judge Advocate General would issue instructions and guidelines with respect to a particular case in his or her capacity as a legal officer with responsibilities for the administration of military justice and not as part of the overall military chain of command. Clause 18.5(3) of Bill C-15 is very different because it has the potential to allow the second highest-ranking officer in the Canadian Forces to shut down or to direct a military police investigation.

The best possible rationale for clause 18.5(3) would be an argument that the VCDS's legitimate policy interests should not be restricted to issuing general and prospective guidelines and instructions because policy issues can crystallize in an individual investigation. There is some support for this idea in the McDonald Commission, which stressed the need for the responsible minister to be informed of operations even in individual cases because they may raise important policy or operations issues. Yet even the McDonald Commission did not go as far as clause 18.5(3) because it concluded that "the Minister should have no right of direction with respect to the exercise by the R.C.M.P. of the powers of investigation, arrest and prosecution."⁹⁷ This statement, made in 1981, has been supported by the subsequent recognition of police law enforcement and investigative discretion as a constitutional principle in *Campbell*. The conclusion now seems inescapable that even when an investigation raises policy issues, the military police should be allowed to proceed with their investigation without

96. *Supra* note 5, s 165.17(1).

97. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security Under the Law*, vol 2 (Ottawa: Minister of Supply and Services Canada, 1981) at 1013.

interference from non-military police command structures—including the VCDS. Command influence may play a role with respect to the laying of service discipline charges, but it should not affect the military police investigation in a specific case. Policy issues may result in the VCDS articulating general guidelines and instructions under clause 18.5(2) to guide future investigations. At the same time, allowing these policy issues to be resolved in real time in the form of instructions pertaining to specific investigations presents considerable risk of undermining police investigative independence.

D. REFORM OPTIONS

What should be done about clause 18.5(3)? In my view, the best course would be to delete this clause and the related clauses 18.5(4) and (5). As suggested above, the remaining clauses provide a sound statutory framework to reconcile the competing demands of police independence and accountability. Unfortunately, the Standing Committee on National Defence did not make this simple reform when it reported on Bill C-41 to the House of Commons in March 2011. The Committee made only a bare-bones report that did not address this issue,⁹⁸ despite submissions made on this issue by the Military Police Complaints Commission, which expressed concerns about the adverse effects of clause 18.5(3) on the independence of the military police.⁹⁹

It is not advisable to amend clause 18.5(3) to restrict the ability of the VCDS to provide instructions in specific cases to those investigations proceeding under the Code of Service Discipline as opposed to those under the *Criminal Code*. As suggested above, there is overlap between the more serious Code of Service Discipline offences and the *Criminal Code*. There is a public interest in full investigations of Code of Service Discipline offences even if, in the final analysis, a decision is made by commanding officers not to prosecute them. Another option would be to amend clause 18.5(3) so that it only applies in minor cases. I do not think this is appropriate since the Code of Service Discipline runs the gamut from very serious *Criminal Code* offences to relatively minor matters of military discipline and management. It is also very unlikely that the VCDS would take an interest in minor matters.

98. House of Commons, Standing Committee on National Defence, *Report 7: Bill C-41, An Act to amend the National Defence Act and to make consequential amendments to other Acts* (March 2011) (Chair: Maxime Bernier).

99. Submission by Military Police Complaints Commission to Standing National Defence Committee (31 January 2011), online: <http://www.mpcc-cppm.gc.ca/alt_format/1100/1103-eng.pdf>; Supplementary Submission by Military Police Complaints Commission to Standing National Defence Committee (16 February 2011), online: <http://www.mpcc-cppm.gc.ca/alt_format/1100/1104-eng.pdf> [Supplementary Submission].

The transparency of clause 18.5(3) could be increased by requiring that any specific instruction be made public. In some respects, this would follow the model used in *Director of Public Prosecutions Act*, including the federal procedure when the Attorney General issues instructions to the Director of Public Prosecutions.¹⁰⁰ Although such an amendment would increase transparency, it would also invite legal challenges on abuse of process and section 7 *Charter* grounds in individual cases for which the VCDS issued instructions and if those investigations result in prosecution. The analogy with the model adopted by the Attorney General and Director of Public Prosecution is also misplaced because, even when the Attorney General intervenes in an individual case, he or she does so as a law officer of the Crown¹⁰¹ whereas, as already noted, the VCDS would be intervening in a military police investigation as the second highest-ranking official in the military who might have an interest—or be perceived by the public as having an interest—in stopping investigations of embarrassing misconduct and crime in the military.

E. THE CONSEQUENCES OF CLAUSE 18.5(3) BECOMING LAW

The refusal of the Standing Committee on National Defence to amend or delete clause 18.5(3) meant that this provision is again found in Bill C-15, reintroduced in October 2011. From a policy perspective, the enactment of clause 18.5(3) would harm post-Somalia Affair developments, which have increasingly recognized the investigative independence of the military police. If enacted, clause 18.5(3) would place the CFPM in a difficult—if not impossible—position. As a member of the military, the CFPM would have to accept specific instructions from the VCDS, the second highest-ranking member of the military. As a police officer, however, the CFPM should not follow instructions that conflict with police investigative independence or, at the very least, should respond to such instructions by making an interference complaint to the MPCC.

The MPCC would also be placed in a difficult—if not impossible—position should clause 18.5(3) become law. On the one hand, the MPCC would continue to have a responsibility under section 250.19 of the *National Defence Act* to hear complaints of command interference with military policing. On the other hand, the MPCC would have to reconcile this jurisdiction with clause 18.5(3), which would clearly authorize the VCDS to issue instructions and potentially inter-

100. *Director of Public Prosecutions Act*, s 10, being Part III, s 121 of the *Federal Accountability Act*, SC 2006, c 9.

101. See generally J L J Edwards, *The Law Officers of the Crown: A Study of the Offices of Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (London: Sweet & Maxwell, 1964) chs 10-11.

fere in individual investigations. The MPCC has indicated that it would “read down” its jurisdiction over interference complaints to exclude instructions from the VCDS that are specifically authorized in legislation.¹⁰² However, even if the MPCC changed its mind and found that police independence should prevail, the Chief of Defence Staff—who ultimately must respond and decide whether to implement MPCC recommendations on an interference complaint—may take a different view of the matter and rely on the statutory authorization for specific instructions.

There is a possibility that clause 18.5(3), if enacted, might be found to be inconsistent with the unwritten constitutional principle of police independence recognized in *Campbell*. As I discussed in Part I of this article, it is not clear whether the courts would strike down democratically enacted legislation on the basis of an unwritten constitutional principle. Even if the courts were not prepared to do so, they might invalidate instructions issued under clause 18.5(3) that they find to be an arbitrary interference with the principle of police independence as expressed in *Campbell*. There is also a possibility that clause 18.5(3) might violate section 7 of the *Charter* if, as discussed in Part I, police independence were accepted as a principle of fundamental justice and if a particular interference with police independence violated rights to life, liberty, or security of the person.

Furthermore, courts might find a prosecution resulting from specific instructions under clause 18.5(3) to be an abuse of process because of executive interference with police investigations. Such litigation, however, may be practically difficult because interference by the VCDS in military police investigations is more likely to result in curtailed investigations that do not result in charges as opposed to charges that can be challenged by the accused on constitutional or abuse of process grounds. Although political interference that results in charges is possible, it is telling that the mischief in the Somalia Affair comprised incidents of misconduct that were not independently investigated by the police.

Ex post constitutional and abuse of process remedies after the enactment of clause 18.5(3) are possible but far from ideal. The best arguments against clause 18.5(3) are based not on uncertain predictions about whether the provision would survive a legal challenge or interference complaint, but on a recognition that the provision is unwise, unnecessary, and inconsistent with widely accepted understandings of police independence that have increasingly been applied to the military police since the Somalia Affair. The mere possibility of legislatively sanctioned military command direction of individual investigations may erode confidence in the investigative independence of the military police. It would be an unnecessary step backwards.

102. Supplementary Submission, *supra* note 99 at 2.

IV. CONCLUSION

Police independence is sometimes seen as an obscure subject that is only discussed at times of crisis and controversy, following incidents such as the Somalia Affair or the shooting of Aboriginal protester Dudley George. The findings of the Somalia Inquiry, as well as allegations of interference with the discretion of the military police pertaining to Afghan detainees, underline the dramatic consequences of interference with the independence of military police investigations. In recognition of the importance of this investigative independence, in 1998 the federal government allowed military police to make interference complaints. Canada also signed an agreement that recognized that while the VCDS has a legitimate management and policy interest in providing general guidelines to the military police, the VCDS, as the second highest-ranking officer in the Canadian military, should not provide instructions that would interfere with individual military police investigations.

In many ways, Bill C-15, if enacted, would continue the healthy trend toward increased recognition of military police investigative independence. It would acknowledge and protect the important role of the CFPM as the de facto military police chief—an office that has become more significant given the April 2011 expansion of the CFPM's command to all military police. Bill C-15 would also recognize that the independence of the military police is not absolute and that the VCDS can continue to issue general and public guidelines to the CFPM.

Unfortunately, Bill C-15 also proposes to give the VCDS statutory authority to provide instructions to the CFPM on the conduct of specific investigations without even the guarantee that such instructions will be made public. If enacted, these powers would constitute a step backwards in the recognition of the investigative independence of the military police. The result would be a statutory abrogation of the 1998 Accountability Framework, which recognizes that the VCDS's legitimate management responsibilities should not involve instructions in individual cases—a change that, if realized, would constitute a serious incursion into the core constitutional principle of police independence as recognized by *Campbell*. If Parliament proceeds in this way, *ex post facto* constitutional and abuse of process remedies may be sought, and the MPCC may receive increased interference complaints and will have to reconcile its jurisdiction to hear such complaints with specific statutory authorization of interference by the VCDS in specific military police investigations.

Such after-the-fact remedies should not, however, be made necessary; clause 18.5(3) is clearly problematic for the investigative independence of the military

police and serves no compelling policy objective that could not otherwise be accomplished by the VCDS's ability to issue general and transparent guidelines to the CFPM. If enacted, clause 18.5(3) will re-open a door that was rightly shut after the Somalia Affair.

