Royal Canadian Mounted Police
External Review Committee


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External Review Committee

Comité externe d'examen
de la Gendarmerie royale du Canada

May 30, 2003

The Honourable Wayne Easter, P.C., M.P.
Solicitor General of Canada
Sir Wilfrid Laurier Building
340 Laurier Avenue West
Ottawa, Ontario
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Dear Minister:

In accordance with Section 30 of the *Royal Canadian Mounted Police Act*, I am pleased to submit to you the annual report of the RCMP External Review Committee for fiscal year 2002-2003, so that it may be tabled in the House of Commons and in the Senate.

Yours very truly,

Philippe Rabot,
Chair

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# Part I – The past year

## Strategic objectives

In order to fulfil its mandate, the Committee set out two strategic objectives in its 2002-2003 *Report on Plans and Priorities:* first of all, the impartial review of cases, and secondly, promoting the sharing of information.

In keeping with the objectives set at the beginning of the year, the Committee adopted certain measures it deemed conducive to its internal management and to reporting on its activities. These measures were based on a study evaluating the Committee's management practices, which was completed in October 2002 as part of the implementation of the modern comptrollership initiative. The measures put forward during the year included, in particular, an information system on current cases, which indicates the number of weeks spent on a case at the various internal stages. This provides for better internal management and also allows for more precise reporting on the amount of time required to complete cases.

In conducting its impartial review of cases, the Committee ensured that it was informed of all the latest legal developments in matters related to its areas of jurisdiction, including administrative law, labour law and human rights. In addition to taking part in symposia on these areas of the law, Committee staff also attended training sessions on matters of particular interest to the Committee, including the duty to accommodate employees with disabilities and access to information issues.

This year, the Committee's staff once again strived to foster a harmonious working relationship with RCMP staff, most notably, members' representatives, appropriate officer representatives, staff of the Internal Affairs Branch and of the External Review and Appeals Section. Moreover, Committee lawyers attended training sessions offered to the adjudicators and lawyers who will be part of the new grievance resolution process.

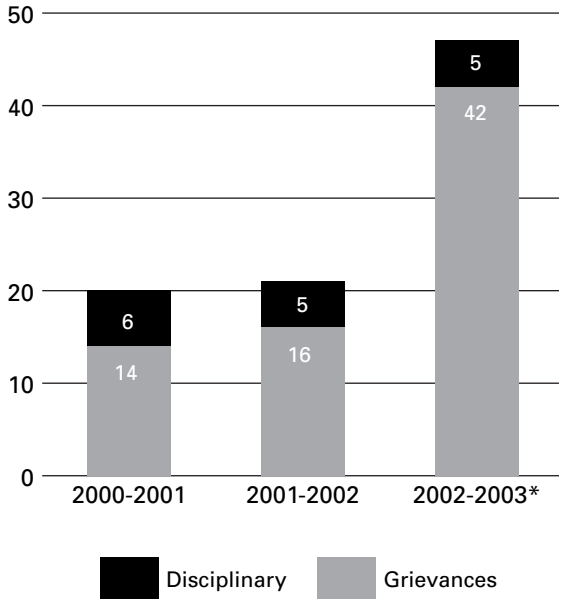
All the Committee's conclusions and recommendations were reported in *Communiqué*, a quarterly publication, which is available on-line. The Committee's Internet site was updated to facilitate navigation and to allow for more detailed searches on the cases heard by the Committee since it was created. These various activities have provided for a

good flow of information between the Committee and its partners, as reflected in the feedback received in this regard from various stakeholders.

## Statistics for the year

At the beginning of the year, 14 cases were active before the Committee. From April 1st 2002 to March 31st 2003, the Commissioner of the RCMP referred 48 cases to the Committee made up of 42 grievances, five disciplinary appeals and one case of discharge on the grounds of unsuitability. During the same period, the Committee issued conclusions and recommendations in 20 cases and saw the closure of two cases (one because the member withdrew the grievance, the other because the parties came to an agreement). Thus, the Committee ended the year with 40 active cases: 35 grievances, four disciplinary appeals, and one case of discharge on the grounds of unsuitability.

**Number of cases received**




**Also received: one case of discharge*

That being said, a number of grievances can be grouped together. There were seven grievances from various members pertaining to the same decision. In a few other instances, two or more grievances were presented by the same member with regard to decisions based on the same facts. A total of about twenty separate issues were raised by these 42 grievances. It should also be noted that among the 42 grievances received, three pertained to a decision to discharge the member, either for medical reasons or for irregular appointment. These cases raise important issues and are addressed in Part II.

The average processing time was about eight months, both for grievances and disciplinary appeals. As compared to the Committee's service standard of processing 60% of grievances in three months and 60% of disciplinary appeals and discharges in six months, grievances took considerably longer. To a large extent, this is attributable to factors beyond the Committee's control. Cases are becoming increasingly complex, especially disciplinary appeals, and the parties are raising ever more important issues on evolving points of law. For a single case, the Committee may have to assign one of its lawyers full-time for two or three months to analyze the case and, if necessary, to gather additional information, while respecting rule disclosure. The Chair must then draw his own conclusions on the case and draft recommendations.

# Part II – Issues of special interest

## Grievances

Among the 16 grievances the Committee finalized this year, some of the issues examined in the past arose again: language profile, travel costs, harassment. Other issues of special interest also arose during the year, including cases of discharge for disability and requests for legal services.

### Administrative discharge for disability

Under the provisions of the *RCMP Act* and the *RCMP Regulations*, a member may be discharged by the RCMP. Section 19 of the *Regulations* sets out the circumstances potentially leading to this procedure. The reasons for discharge include disability, which is sometimes referred to as discharge for medical reasons.

The Committee did not issue conclusions and recommendations on these types of cases in 2002-2003. Nevertheless, further to recommendations the Committee made in 2001-2002, the Commissioner made two important decisions in August 2002 in cases of discharge for medical reasons. In both cases, (*G-266* and *G-267*), the members were deemed to have such medical conditions that they no longer met the minimum requirements for a general duty constable. The RCMP accordingly undertook a process to determine whether they should be discharged on medical grounds. The members grieved the notices of discharge.

After reviewing the relevant case law on the duty to accommodate, the Committee had recommended that the grievances be allowed. Pursuant to the Supreme Court of Canada decision in *British Columbia (Public Service Employee Relations Committee)* v. *BCGSEU*, [1999] 3 R.C.S. 3 (*Meiorin*), the RCMP would have had to demonstrate that accommodating the members would have created "undue hardship" for the RCMP. Yet no evidence was put forward in this regard in either of the cases. The Committee therefore concluded that the RCMP had not met the requirements set out in *Meiorin* to assist disabled members to secure alternate employment with the Force, up to the point of undue hardship.

In light of the Committee's conclusions and recommendations, the Commissioner noted in his two decisions that RCMP policies

were not consistent with the framework of section 15 of the *Canadian Human Rights Act* as regards professional requirements, as set out by the Supreme Court of Canada in *Meiorin*. With regard to the specific cases before him, the Commissioner arrived at specific and different conclusions regarding the two members. As to the issue of accommodation in general, however, he ordered that the RCMP's policies on the subject be reviewed and more clearer directives on the duty to accommodate be developed. This review began in 2002. The Commissioner recommended a four-step process:

- Determine if the member can perform the duties of their existing job as it is;
- If the member is not able to do so, determine if the member can nevertheless perform the duties of their existing position, either in modified or in "re-bundled" form.
- If the member is not able to do so, determine if the member could perform the duties of another position in its existing form;
- If the member is not able to do so, determine if the member could perform the duties of another position, either in modified or in "re-bundled" form.

As of March 31, 2003, the RCMP was still reviewing its internal policies on medical discharge. On that same date, the Commissioner's decision to dismiss the grievance in one of the two cases of medical discharge was subject to an application for judicial review by the Federal Court. Three other grievances regarding discharge (from two members) were being examined by the Committee. Since this issue is extremely important to members of the RCMP, it can be expected that new cases will come before the Committee over the coming years, unless the RCMP displays greater flexibility, which has not been the case thus far.

## Administrative discharge for irregular appointment

In addition to discharge for physical or mental disability, a member can be discharged on the ground of "irregular appointment". This procedure is rarely used. When irregular appointment is invoked, an administrative discharge board must be created. This board must weigh the evidence and arguments presented and may hold a hearing when credibility is at issue. When a notice of discharge is issued, the member may grieve that decision.

This is what happened in *G-272*, for which the Committee issued conclusions and recommendations this year. In this case, the RCMP claimed the member had been appointed on the basis of a "fraudulent statement" made by the member during the hiring process. According to the RCMP, the member had failed to mention that he had been involved in various illegal activities while employed at the family-run auto body shop. The member's former sister-in-law had alleged that the member had indeed been involved in such activities. At the time of hiring, the initial investigation indicated that this allegation was unfounded. After the member was appointed, however, additional information led the RCMP to conclude that there were grounds for discharge.

While recognizing that the evidence presented had been deficient, the administrative discharge board decided not to hold a hearing. In coming to the conclusion that the member should be discharged, the board stated that it accepted that the member had been involved in the alleged fraudulent activities because he had not specifically denied them. The responsible officer who issued the notice of discharge accepted the board's conclusions without reservation. The member filed a grievance which was refused by the Level I adjudicator for the same reasons cited by the board.

In its conclusions, the Committee stated that the failure to hold a hearing left too many crucial issues unresolved. If the board had held a hearing, the member would have had a better opportunity to defend himself of the allegations against him. He would have had the opportunity to question the witnesses who had accused him of criminal wrongdoing and the board members would have been in a better position to assess his credibility.

According to the Committee, this case raised a serious credibility issue, making it essential that a hearing be held. The RCMP may have had evidence that the member's family was involved in suspicious activities, but the RCMP had the duty in a matter of discharge to demonstrate that the member knew about those activities and did nothing to stop them or turned a blind eye to them. Nothing in the evidence presented demonstrated this in a clear and convincing fashion. In fact, the only evidence of a link between the member and the serious misdeeds in question was the testimony of three persons whose credibility was called into question, even though the member did not have the opportunity to ask them questions.

The Committee also commented on the lack of legal representation for the member at certain stages in the administrative discharge process. In particular, the Committee stressed that it was an anomaly that a member could be assisted by a members' representative (who is a lawyer) when a grievance is filed against a discharge decision by a board but that such assistance was not available in the proceedings before the discharge board. This is especially surprising given that members can receive the assistance of a members' representative when involved in proceedings before an arbitration board in a disciplinary matter or a discharge/demotion board, in accordance with the Commissioners' standing orders. The Committee recommended that this situation be remedied.

After considering the possibility of calling a hearing itself, the Committee decided that this would be unfair in view of the time that had elapsed. As a result, and in keeping with the facts on file, the Committee recommended that the grievance be allowed. In making his decision, the Commissioner agreed to allow the grievance, although the reasons he cited were somewhat different. Moreover, the Commissioner noted that the Committee had raised a very important issue as regards the right to representation and asked that the Force's Policy Centre review this matter and submit recommendations for changes.

## Legal representation at public expense

Over the years, the Committee has often been called upon to address grievances involving the provision of legal services for members of the RCMP at public expense. These grievances pertained in general to the RCMP's refusal to authorize payment for legal services provided to members involved in an investigation or a court hearing. In such cases, the Committee must determine whether the RCMP has correctly interpreted and applied the *Policy on the Indemnification of and Legal Assistance for Crown Servants*. This policy is applicable to all civilian and regular members of the RCMP, by virtue of the *Public Service Staff Relations Act*. It is also repeated in the *Commissioner's Standing Orders on Legal Assistance to RCMP Employees* found in the RCMP Administrative Manual, Part VIII.4. It should be noted that this provision was completely revamped in January 2002 to be more consistent with Treasury Board policy. It replaces the former *Commissioner's Standing Order on Civil Actions and Statutory Offences*.

The Treasury Board policy provides for the members to have their costs for legal representation reimbursed to the extent that these costs pertain to acts committed in the performance of their duties. The Treasury Board policy, like the RCMP policy, entitles public servants to legal representation when required to participate in court proceedings (legal action before civil courts, offence charges, appearance before a judicial body, interrogation relating to an investigation or any other recourse to legal services under other serious circumstances). The necessary conditions for obtaining legal services are that the member was acting within the scope of duties and that the act in question was in keeping with RCMP expectations.

During the past year, the Committee reviewed three cases of members contesting the RCMP's refusal to authorize legal services at public expense. The first case, *G-277*, pertained to an administrative investigation by the Force conducted in response to a harassment complaint filed against a member. The Level I adjudicator concluded that such a request could not be entertained because the applicable policy on the right to legal representation did not include internal RCMP procedures. In its conclusions, the Committee stated that refusing the request for legal assistance was justified since nothing in the applicable policy established a member's right to legal representation at public expense in an administrative investigation conducted in response to a harassment complaint. This was an internal investigative procedure to a related harassment complaint and the *Commissioner's Standing Orders on Interpersonal Conflict and Harassment in the Workplace* clearly state that at this stage of the proceedings, the member has *"the right to be accompanied by a person of his/her choice for moral support during any proceedings relating to the investigation of the complaint providing no costs are incurred by the RCMP"* (AM XII. 1.I.3.a.5.3.). The request for legal services was therefore denied.

The two other grievances involved establishing whether the member had acted within the scope of duties and in keeping with the RCMP's expectations. In case *G-282*, the member had asked for legal representation at public expense to defend himself against a claim for damages by the RCMP. The member

was subject to a criminal investigation in the disappearance of stereo equipment that was in his custody. When the member learned that he was under criminal investigation, he requested that the cost of legal services for his defence be paid for by the Force. Before approving the request, the RCMP sought an opinion from the Department of Justice, which recommended that legal services be provided because it considered that the member was acting within the scope of his duties, in keeping with the Treasury Board policy. The RCMP then approved the member's request, but for the criminal investigation only. Following the investigation, no criminal charges were laid, but disciplinary measures were imposed on the member. As well, the member was asked to reimburse the cost of stereo equipment and was threatened with legal action if he refused to do so. As a result, the member once again asked for legal representation at public expense, but this time the request was denied. The RCMP found that the member was not acting within the scope of his duties. In reviewing the case, the Committee concluded that the threat of legal action was not imminent and therefore the Force was not obligated at that stage to pay the cost of the member's legal representation. The Commissioner concurred with the Committee.

In grievance *G-283*, the member had been charged with wilful obstruction of airport security staff. The member was carrying ammunition in his hand luggage and became involved in a dispute with airport security staff who did not want to let him board the aircraft with ammunition. He ultimately handed the ammunition over to the authorities, but only after the airport security staff boarded the aircraft and asked him to return to the security zone.

Three months later, the member submitted a request for legal services to defend himself in court against charges of wilful obstruction relating to these events. The RCMP granted this request, in accordance with a Department of Justice opinion, being convinced that the member was acting within the scope of his duties. The RCMP nevertheless revoked the approval three months later, accusing the member of failing to disclose that he knowingly contravened the UN instructions on ammunitions. The Committee concluded that the RCMP could only change its decision to pay the member's legal fees if there had been a fraudulent representation of the facts by the member. In the Committee's opinion, the member's failure to mention the UN instructions did not constitute a fraudulent representation of the facts. Moreover, the RCMP could not refuse to pay the expenses relating to the meetings with the lawyer when it had initially decided to cover the costs of defending the member in court.

The Commissioner ruled on this case after the end of the year, in April 2003. He did not accept the Committee's recommendation, stating that there is nothing abnormal about the RCMP revisiting an earlier decision to pay legal expenses if it receives new information.

These two grievances shed new light on the interpretation of the policy on the provision of legal services at public expense. Some issues are nevertheless still open to interpretation.

## Formal disciplinary measures

The Committee issued four recommendations during the year on disciplinary appeals. Two issues of particular interest are explored below: disclosure of information in the workplace and the question of when an error in judgement becomes a transgression of a member's duties as an employee of the RCMP.

### Disclosure of confidential information

In this case, *D-76*, a member had disclosed confidential information and provided documents about police investigative strategies respecting Outlaw Motorcycle Gangs (OMGs) to an author who was in the process of writing a book on OMGs and organized crime. The documents were later reproduced in this book, which accused the RCMP in engaging in "dirty tricks" in order to obtain additional funding from governments for the purpose of investigating OMGs. The events occurred before the coming into force of the Treasury Board *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*. The member believed that the RCMP could have more effectively investigated OMGs within existing budgets simply by realigning existing resources. He had met with his commanding officer to discuss a proposal to that effect but his proposal was rejected. Afterwards, he turned to the author in question and shared information that he hoped would expose how the law enforcement community, through national and provincial strategies on OMGs, was putting public safety at risk and engaging in unethical practices. Specifically, the member was critical of a communication plan which he considered had been designed "to scare the public to force the Government to give us more money." The member defended his actions as being designed to draw attention to a matter of legitimate public concern. He also maintained that the documents which he disclosed did not contain confidential information, in that they did not reveal anything about ongoing operations or intelligence-gathering activities.

The RCMP Adjudication Board distinguished the jurisprudence cited to it on the grounds that the special status and duties of RCMP members imposed a higher standard of loyalty than would apply to public servants, and consequently dismissed the whistleblowing defence. The Board focused on the harm the member's disclosure had caused to the RCMP and found that, because the member had disclosed information received from other law enforcement agencies, "the consequences would be observed at a higher level of the organization and more specifically in the forming of partnerships."

At the sanction hearing, the member maintained that he had believed that he was acting out of concern for the public interest, and not for any personal gain, and he acknowledged that his disclosure had been an error in judgment, in that he had wrongly assumed that the documents would not be published by the author to whom they were provided. The Board ordered the member to resign from the Force within 14 days because it considered that he had failed to demonstrate that he was prepared to "fully embrace the values of the Force."

In reviewing the member's appeal, the Committee found that the Board's approach to the defence of whistleblowing was flawed. The Committee explained that the special status and responsibilities of RCMP members as peace officers did not warrant imposing a more stringent threshold for whistleblowing than would otherwise apply. Instead, the principles developed in the context of whistleblowing by civil servants provided guidance for assessing the appropriate balancing of the competing values, as discussed in the Fraser [*Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R 455] and Haydon [*Haydon and Chopra v. Canada*, [2001] 2 F.C. 82 (F.C.T.D.)] cases. The Haydon case established that disclosures made in the course of legitimate whistleblowing activities are protected by s.2(b) of the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of expression.

In applying these authorities to the facts, the Committee acknowledged that "the disclosure of corrupt practices by the leadership of the policing community might be amongst the activities that no sensible person in a democratic society would want to prohibit." Nonetheless, the Committee determined that the member's disclosure did not raise a matter of legitimate public concern, and thus the whistleblowing defence was therefore not available to the member. The Committee found that the member drew unsubstantiated conclusions about OMG strategies that had been adopted at the national and provincial levels. The documents that were disclosed did not lend support to his contention that these strategies endangered public safety or were unethical. The Committee stated:

> "… It is not sufficient that the Appellant himself believed that the national and provincial strategies created a risk for public safety in addition to being a corrupt practice. For his actions to be considered to fall within the permitted exceptions to the duty of loyalty as described by the case law, such as where there is a matter of legitimate public concern requiring a public debate, there would need to be corroborating evidence. There was none. Other members did testify that they had concerns about OMG strategies but it is not clear how familiar they actually were with the provincial and national strategies. As for the Appellant's contention that the Force was not prepared to consider realigning existing resources, it appears that the only basis he has to make that contention was that his commanding officer did not give effect to the proposal he had shared with him in December 1998. That, to me, is hardly a sufficient basis upon which to draw such a damning conclusion as to suggest that the entire leadership of the law enforcement community had somehow conspired to endanger the Canadian public in order to strengthen its case for additional funding to combat OMGs."

The Committee stated that the member's disclosure was recklessly made because it was not borne out of a real concern for the public interest. Instead, it was an expression of his frustration with not having been able

to persuade his commanding officer to implement the proposal that he had put forward to him to realign resources.

The Committee concluded that the member could not successfully invoke the whistle blowing defence and Charter guarantees, and that the allegation of misconduct had been substantiated:

> "The Appellant's actions were not a protected form of free speech. They violated his duty of loyalty towards his employer, which in itself amounts to disgraceful conduct that could bring discredit to the Force but, in addition, they constituted a breach of trust. It cannot therefore be said that the disclosures were inconsequential insofar as concerns the Appellant's ability to carry out his duties as an RCMP member, even though the nature of the information which was disclosed did not appear to be significant."

Regarding the sanction imposed, the Committee noted that the member had gone to great lengths in his testimony to rationalize his actions by referring to what he termed as being his "passion for justice." The Committee indicated that it would be difficult to conclude that there was no basis to the Board's finding that the member's professional and personal tribulations had little influence on his actions. The fact that this incident was the first time in his 18 year career that the member ever faced a disciplinary proceeding, that his annual performance evaluation reports throughout that period revealed no performance shortcomings or character flaws and that he was twice promoted and had scored very well in the Officer Candidate Program Regional Interview Board in the two years prior to this incident, were all found to be relevant considerations. Nonetheless, the Committee determined that the Force could not be expected to retain a member whose understanding of the obligations which the duty of loyalty entails is somewhat limited and who does not appear to be trustworthy. The Committee therefore recommended that the appeal be dismissed and the Commissioner agreed (the Commissioner's decision is currently the subject of an application for judicial review in the Federal Court).

The Committee will once again have an opportunity in 2003-2004 to review the issue of whether it is appropriate to discipline a member for speaking to the media on confidential matters. This is further to an appeal of a decision of an Adjudication Board that was referred to the Committee after a member was ordered to resign because he spoke to the media regarding a specific investigation.

## Disgraceful Conduct and Error of Judgement

The *RCMP Code of Conduct* states that members must not conduct themselves in a "disgraceful or disorderly" manner that "could bring discredit on the Force." One of the more frequent issues to arise during disciplinary proceedings is whether the nature of the misconduct at issue is truly disgraceful or merely constitutes an error in judgement that could be attributed to inexperience or a lack of attention. These points were raised in two cases referred to the Committee during the year, *D-77* and *D-79*.

In *D-77*, a member alerted an individual who was the subject of an ongoing investigation for employment insurance fraud that the business records of his employer were about to be searched. As a result, the individual was able to arrange for the employer's premises to be closed when the investigator arrived. Consequently, the search could not be carried out. Formal disciplinary proceedings were brought against the member.

At the hearing, the member maintained that he had acted impulsively. He had not intended to impede the investigation. He stated that he was surprised to learn that the business was closed when the Employment Insurance Investigator arrived there. Several colleagues testified that the member's conduct was out of character. A psychologist's report attributed the misconduct to *"those of an inexperienced young Officer whose loyalties to friends or associates conflicted with his duties and responsibilities as an Officer"* and he concluded that the member *"has learned a valuable lesson, one that surely will guide him in his future work endeavors."* In her submissions, the member's counsel stated that his actions had not compromised police operations or endangered public safety and that ordering him to resign would be a discriminatory penalty. The Board disagreed with that interpretation and with the psychologist's report. It found that the member's telephone call was designed to obstruct the investigation and that the member's evidence was not credible. Concluding that the member had not accepted full responsibility for his actions, it ordered him to resign from the Force within 14 days, failing which he would be dismissed.

The member appealed the decision on sanction only. On appeal, the Committee found that the sanction should not vary based on whether or not the member is judged to be a credible witness and whether or not his actions were premeditated. The Committee stated that the evidence from the member's colleagues about his trustworthiness, discretion and reliability did not begin to address the fundamental question as to why the misconduct occurred. Nor could the member's youth and inexperience justify a more lenient sanction. The conduct in question amounted to a corrupt practice and was far more serious than an error of judgment because it demonstrated that the member could not be trusted to uphold the law. By showing himself to be corruptible, the member forfeited his entitlement to continue his career with the Force. The Committee recommended that the appeal be dismissed and the Commissioner agreed.

A peculiar sidebar to this case was that the material introduced in support of the appeal included a petition of some 500 local residents asking the Commissioner to overturn the Board's decision. Not to be outdone, the Appropriate Officer presented a petition of 600 signatures of local residents who were supportive of the Board's decision. The Committee indicated that such material did not constitute evidence in the true sense of the term and that it should not be considered by the Commissioner. The Chair of the Committee further remarked that:

> "[T]he RCMP disciplinary process is not a popularity contest. Members do not get to retain their employment with the organization merely because they are well liked by their colleagues and by members of the community in which they serve. I am particularly disturbed by the practice of gathering signatures on petitions in an attempt to influence decision-makers in what has been designed as a quasi-judicial process."

In *D-79*, the member was working with a group of RCMP cadets. At one point, he had an emotional meeting with one of the cadets who was unsure of his future in the Force. It was not uncommon for this cadet to discuss personal issues with the member as they knew each other and shared cultural ties and values. The cadet told him that he was considering dropping out of the recruit training program and returning home. The following day the member became concerned when the cadet was the only one of the group who did not attend a barbecue. Concerned about his absence, the member called him that evening and reached him at the hotel where he was staying for the weekend. They arranged to meet later that evening at a bar, but again the cadet did not show up. Shortly after 11:00 PM, after an unanswered call to the cadet, the member decided to go to the hotel with three of the cadets who had been at the bar and at the barbecue, thinking that their presence might be helpful.

When at the hotel, the member told the hotel clerk that he was the instructor for the cadet and that he was concerned about him because he did not show up at a party. He stated that he would like to check up on him. When asked for identification, he showed his RCMP photo card, but not his police badge. The desk clerk provided an access key. The member then proceeded to the cadet's room with the three other cadets. He knocked on the door and, when no one answered, he entered. The member quickly realized that a woman was sleeping in the room with the cadet and he motioned the other cadets to exit the room. As they were leaving, he observed one of the cadets removing clothing from the floor and placing it into a bag. The cadets in this particular troop often played pranks on each other and the member did not interfere. As they left the room, however, he took the bag from the cadets and left it at the hotel reception. He informed a hotel employee that the bag contained the cadet's clothing and that the clothes had been taken out of his room as a prank.

The cadet who had been the intended object of the prank found it amusing. The woman with him, a cadet from another troop, was upset. The unintended negative impact of the prank on the female cadet eventually led to an investigation and formal disciplinary proceedings against the instructor, on the grounds that his conduct had been disgraceful. Upon concluding its hearing, the Board imposed a reprimand and a forfeiture of pay. The member appealed the finding that the conduct was disgraceful.

On appeal of the Board's findings, the Committee was critical of the Board's lack of detail in rejecting the member's contention that he had only made an error of judgment

but not conducted himself in a disgraceful manner. It noted that in the present case, the circumstances surrounding the member's conduct could influence a reasonable person's judgment as to whether that conduct was disgraceful. Issues such as the reason why the member decided that he needed to have access to the hotel room, the efforts that the member made to minimize the inconvenience caused by the prank and the fact that the male cadet found the prank amusing were all relevant factors for the Board to consider at the hearing on the allegations. The Committee noted that the Board only considered them on sanction. In addition, the Committee rejected the Board's reasoning that the fact that the member *"admitted he ought to have stopped the joke from taking place"* meant that *"by his own admission the allegation is established"*.

However, the Committee found that the conduct was nonetheless disgraceful because it caused harm, regardless of the fact that the member had not intended to harm anyone. Both cadets in the hotel room would have reason to be perturbed by his visit to their hotel room, especially since they were not aware that the visit had been prompted by concern. They were led to believe that the member and the cadets had come for the purpose of playing a prank and nothing was done to dispel that impression. The Committee also stated that the female cadet's reaction to the incident was understandable. Four people that she did not know well, three of whom were men, were able to gain access to her hotel room in the middle of the night, see her while she slept and then left with some of her clothing and other personal effects. As noted by the Committee, to any woman, such an occurrence would be deeply unsettling. The Committee therefore recommended that the appeal be dismissed. The Commissioner agreed with the Committee's recommendation.

Both these cases help to define what is the nature of disgraceful conduct and when is discipline an appropriate response to inappropriate conduct, as opposed to managing a member's work engaging in the performance and evaluation process. It is also significant that, in both cases, the members failed to take immediate steps that might have alleviated the harm caused by their actions.

# Part III – Outstanding cases before the Federal Court

At Level II of the grievance process or in the appeal of a disciplinary decision, the Committee makes its recommendations to the Commissioner, who then renders his decision. Pursuant to section 32 of the *RCMP Act*, the Commissioner is not bound to act on the ERC's recommendations, but if he does not act on them, he must give reasons for not doing so in his decision. Section 32 also stipulates that the Commissioner's decision on a grievance or an appeal of disciplinary measures or discharge or demotion proceedings "is final and binding and, except for judicial review under the *Federal Court Act*, is not subject to appeal to or review by any court." When an application for judicial review is made, the Federal Court generally reviews the ERC's conclusions and recommendations. For example, in *Millard* (*Millard v. Canada* (2000-02-02), FCA A-495-98), the Federal Court of Appeal reviewed the decision of the Commissioner, who had agreed with the ERC's conclusions and recommendations concerning a grievance about the application of the Home Equity Assistance Program (HEAP). The Federal Court rejected the application for judicial review. In its analysis of the review criteria, the Court established the following standard of review:

> "… It would seem clear that a decision of the Commissioner that relies on reasoned and detailed findings by the External Review Committee interpreting the *Directive* should be subject to minimal judicial scrutiny. Hence, only if the decision is patently unreasonable should it be set aside."

A few years earlier, the Federal Court had also recognized the applicable standard in *Jaworski v. Canada (Attorney General)* [1998] 4 F.C. 154, confirmed by the Federal Court of Appeal (*Jaworski v. Canada (Attorney General)* [2000] F.C.A. 643):

> "One might expect that when the Commissioner receives a strongly worded detailed recommendation

> from the ERC it should carry significant weight. However, the Commissioner is entitled to decide not to act on the findings or recommendations of the ERC and his decision is not reviewable unless an error of the type referred to in subsection 18.1(4) of the *Federal Court Act*, R.S.C., 1985, c. F-7 [as enacted by S.C. 1990, c. 8, s. 5], is disclosed."

In general, the Federal Court is very cautious in reviewing the Commissioner's disciplinary decisions, since it considers that the Commissioner, basing his decisions on the Committee's recommendations, is in the best position to decide on the disciplinary measures to be imposed. In *Jaworski*, Evans J. of the Federal Court of Appeal restated that the Court should intervene in rare cases only:

> "Nonetheless, I am not satisfied either that this is one of those rare cases in which judicial intervention in a tribunal's fact-finding is warranted, or that the Commissioner's reasons are so defective that the decision should be set aside."

In 2002-2003, the Federal Court of Appeal rendered a decision in connection with a case heard by the Committee in 2001, disciplinary case *D-72*. The Court refused to grant an extension for making an application for judicial review of the RCMP Commissioner's decision. See *Aubertin v. Canada (Attorney General)*, [2003] F.C.A. 309.

In this case, the RCMP Adjudication Board had ordered the discharge of a member following allegations of disgraceful conduct. In its ruling on the appeal of this decision, the Committee recognized that the member's actions were serious enough to justify the RCMP terminating his employment. However, the Committee recommended that the sanction be changed to give the member the opportunity to resign, as is customary in disciplinary cases. The Commissioner rejected this recommendation and discharged the member. To support his decision, the Commissioner argued that the public's expectations of police officers require police leaders to treat repetitive behaviour, such as the member displayed, with the greatest severity.

This decision was the subject of an application for judicial review by the Federal Court, Trial Division, but the application was dismissed because the member had missed the deadline. The Federal Court of Appeal upheld this decision.

As of March 31, 2003, three more decisions by the Commissioner were subject to applications for judicial review by the Federal Court. Case *G-267* is a grievance against a medical discharge. In this case, the Committee concluded that the RCMP had failed in its duty to accommodate the member subject to the discharge process (see Part II above). However, the Commissioner dismissed the grievance, indicating that the file contained enough information for him to render a decision, taking into account the points raised by the Committee. The Commissioner expressed the view that neither section 15 of the *Canadian Human Rights Act* nor the principles set out in the *Meiorin* case obliged the employer to accommodate an employee who was totally incapable of

performing work, of whatever kind. The member's medical profile stated that he was medically unsuitable for any duties in the RCMP. Moreover, the Commissioner concluded that continuing to employ the member would represent an undue hardship for the Force, as defined by the Supreme Court of Canada in the *Meiorin* case. This decision was the subject of an application for judicial review by the Federal Court.

In case *D-68*, a member was subject to disciplinary measures as the result of an allegation of sexual assault which he disputed. The member admitted that he had sex with the individual in question but maintained that the relationship was entirely consensual. The member was ordered to resign within fourteen days of the Adjudication Board's decision. The member appealed the Board's conclusion and challenged the way it had assessed credibility. The Committee concluded that the Adjudication Board had drawn hasty conclusions from testimony provided by a taxi driver and that the Board had misinterpreted the evidence provided by a forensic psychologist and the alleged victim. The Committee recommended that the allegation of misconduct was not founded and that the Commissioner allow the member's appeal. In the Committee's opinion, the Adjudication Board appeared to have attributed the member's misconduct to his alcohol abuse; the Committee did not believe that the evidence supported such a conclusion.

However, the Commissioner found the allegation of disgraceful conduct to be established. He stated that the member had an obligation to respect the position of trust that existed between himself and the victim, and he failed to do so. Given all the circumstances of this case, the Commissioner ordered that the member be discharged.

Lastly, in case *D-76*, the member also appealed the Commissioner's decision to the Federal Court (see "Formal disciplinary measures" above).

# Part IV – Appendices

## Appendix 1: About the Committee

Established in early 1987, the Committee was one of two entities created as civilian oversight agencies for the RCMP, the other being the Commission for Public Complaints Against the RCMP. The first Chair of the Committee was the Honourable Mr. Justice René Marin, who from 1974 to 1976 had chaired the *Commission of Inquiry relating to Public Complaints, Internal Discipline and Grievance Procedure within the Royal Canadian Mounted Police*. In 1992, the Vice-Chair, F. Jennifer Lynch, Q.C., became Acting Chair of the Committee, a position which she held until 1998. Philippe Rabot then assumed the position on an acting basis and, on July 16, 2001, he was appointed Chair of the Committee for a five-year term.

Mr. Rabot joined the federal public service in 1983 as an appeals adjudicator with the Public Service Commission of Canada, where he later served as Assistant Director General of the Appeals Directorate. In 1990, he was appointed Secretary of the Copyright Board of Canada. From 1993 to 1997, Mr. Rabot was Vice-Chair of the Assessment Review Board of Ontario, a tribunal which adjudicates disputes concerning property assessments and municipal taxation issues throughout the province.

### Mandate

The RCMP External Review Committee is an independent, neutral agency established under the *Royal Canadian Mounted Police Act*. Its main mandate is to provide recommendations to the RCMP Commissioner concerning Level II grievances, appeals against disciplinary measures imposed by adjudication boards, and appeals of discharge and demotion decisions. If the Commissioner does not accept the recommendations of the Committee, reasons must be provided.

Under the *RCMP Act*, the RCMP Commissioner refers all appeals of formal discipline and all discharge and demotion appeals to the Committee unless the member requests that the matter not be referred. In addition, pursuant to section 33 of the *RCMP Act*, the RCMP Commissioner refers certain types of grievances to the Committee in accordance with regulations made by the Governor in Council.

Section 36 of the *RCMP Regulations* specifies the grievances which the RCMP Commissioner must refer to the Committee. These are grievances respecting: a) the Force's interpretation and application of government policies that apply to government departments and that have been made to apply to members; b) the stoppage of pay and allowances of members made pursuant to subsection 22(3) of the *RCMP Act*; the Force's interpretation and application of the *Isolated Posts Directive*; d) the Force's interpretation and application of the *RCMP Relocation Directive*; e) administrative discharge on the grounds of physical or mental disability, abandonment of post, or irregular appointment.

The Committee Chair can dispose of matters referred to the Committee either on the basis of the material in the record or following a hearing. In conducting its review of matters referred to it, the Committee attempts to achieve a balance amongst the many complex and different interests involved while ensuring that the principles of administrative and labour law are respected and the remedial approach indicated by the *RCMP Act* is followed. In each case, the Committee must consider the public interest and ensure that members of the RCMP are treated in a fair and equitable manner.

# Appendix 2: The Committee and its staff

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Chair

Norman Sabourin,
Executive Director and Senior Counsel

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# Appendix 3: Legislative Provisions

## Part II of the *Royal Canadian Mounted Police Act*

## Royal Canadian Mounted Police External Review Committee

*Establishment and Organization of Committee*

**25.** (1) There is hereby established a committee, to be known as the Royal Canadian Mounted Police External Review Committee, consisting of a Chairman, a Vice-Chairman and not more than three other members, to be appointed by order of the Governor in Council.

(2) The Committee Chairman is a full-time member of the Committee and the other members may be appointed as full-time or part-time members of the Committee.

(3) Each member of the Committee shall be appointed to hold office during good behaviour for a term not exceeding five years but may be removed for cause at any time by order of the Governor in Council.

(4) A member of the Committee is eligible for re-appointment on the expiration of the member's term of office.

(5) No member of the Force is eligible to be appointed or to continue as a member of the Committee.

(6) Each full-time member of the Committee is entitled to be paid such salary in connection with the work of the Committee as may be approved by order of the Governor in Council.

(7) Each part-time member of the Committee is entitled to be paid such fees in connection with the work of the Committee as may be approved by order of the Governor in Council.

(8) Each member of the Committee is entitled to be paid reasonable travel and living expenses incurred by the member while absent from the member's ordinary place of residence in connection with the work of the Committee

(9) The full-time members of the Committee are deemed to be employed in the Public Service for the purposes of the *Public Service Superannuation Act* and to be employed in the public service of Canada for the purposes of the *Government Employees Compensation Act* and any regulations made under section 9 of the *Aeronautics Act*.

R.S., 1985, c. R-10, s. 25; R.S., 1985, c. 8 (2nd Supp.), s. 16.

**26.** (1) The Committee Chairman is the chief executive officer of the Committee and has supervision over and direction of the work and staff of the Committee.

(2) In the event of the absence or incapacity of the Committee Chairman or if the office of Committee Chairman is vacant, the Minister may authorize the Vice-Chairman to exercise the powers and perform the duties and functions of the Committee Chairman.

(3) The Committee Chairman may delegate to the Vice-Chairman any of the Committee Chairman's powers, duties or functions under this Act, except the power to delegate under this subsection and the duty under section 30.

R.S., 1985, c. R-10, s. 26; R.S., 1985, c. 8 (2nd Supp.), s. 16.

**27.** (1) The head office of the Committee shall be at such place in Canada as the Governor in Council may, by order, designate.

(2) Such officers and employees as are necessary for the proper conduct of the work of the Committee shall be appointed in accordance with the *Public Service Employment Act*.

(3) The Committee may, with the approval of the Treasury Board,

(a) engage on a temporary basis the services of persons having technical or specialized knowledge of any matter relating to the work of the Committee to advise and assist the Committee in the exercise or performance of its powers, duties and functions under this Act; and

(b) fix and pay the remuneration and expenses of persons engaged pursuant to paragraph (a).

R.S., 1985, c. R-10, s. 27; R.S., 1985, c. 8 (2nd Supp.), s. 16.

*Duties*

**28.** (1) The Committee shall carry out such functions and duties as are assigned to it by this Act.

(2) The Committee Chairman shall carry out such functions and duties as are assigned to the Committee Chairman by this Act.

R.S., 1985, c. R-10, s. 28; R.S., 1985, c. 8 (2nd Supp.), s. 16.

*Rules*

**29.** Subject to this Act, the Committee may make rules respecting

(a) the sittings of the Committee;

(b) the manner of dealing with matters and business before the Committee generally, including the practice and procedure before the Committee;

(c) the apportionment of the work of the Committee among its members and the assignment of members to review grievances or cases referred to the Committee; and

(d) the performance of the duties and functions of the Committee under this Act generally.

R.S., 1985, c. R-10, s. 29; R.S., 1985, c. 8 (2nd Supp.), s. 16.

*Annual Report*

**30.** The Committee Chairman shall, within three months after the end of each fiscal year, submit to the Minister a report of the activities of the Committee during that year and its recommendations, if any, and the Minister shall cause a copy of the report to be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the day the Minister receives it.

R.S., 1985, c. R-10, s. 30; R.S., 1985, c. 8 (2nd Supp.), s. 16.

## Part III of the *Royal Canadian Mounted Police Act*

## Grievances

*Presentation of Grievances*

**31.** (1) Subject to subsections (2) and (3), where any member is aggrieved by any decision, act or omission in the administration of the affairs of the Force in respect of which no other process for redress is provided by this Act, the regulations or the Commissioner's standing orders, the member is entitled to present the grievance in writing at each of the levels, up to and including the final level, in the grievance process provided for by this Part.

(2) A grievance under this Part must be presented

(a) at the initial level in the grievance process, within thirty days after the day on which the aggrieved member knew or reasonably ought to have known of the decision, act or omission giving rise to the grievance; and

(b) at the second and any succeeding level in the grievance process, within fourteen days after the day the aggrieved member is served with the decision of the immediately preceding level in respect of the grievance.

(3) No appointment by the Commissioner to a position prescribed pursuant to subsection (7) may be the subject of a grievance under this Part.

(4) Subject to any limitations prescribed pursuant to paragraph 36(b), any member presenting a grievance shall be granted access to such written or documentary information under the control of the Force and relevant to the grievance as the member reasonably requires to properly present it.

(5) No member shall be disciplined or otherwise penalized in relation to employment or any term of employment in the Force for exercising the right under this Part to present a grievance.

(6) As soon as possible after the presentation and consideration of a grievance at any level in the grievance process, the member constituting the level shall render a decision in writing as to the disposition of the grievance, including reasons for the decision, and serve the member presenting the grievance and, if the grievance has been referred to the Committee pursuant to section 33, the Committee Chairman with a copy of the decision.

(7) The Governor in Council may make regulations prescribing for the purposes of subsection (3) any position in the Force that reports to the Commissioner either directly or through one other person.

R.S., 1985, c. R-10, s. 31; R.S., 1985, c. 8 (2nd Supp.), s. 16; 1994, c. 26, s. 63(F).

**32.** (1) The Commissioner constitutes the final level in the grievance process and the Commissioner's decision in respect of any grievance is final and binding and, except for judicial review under the *Federal Court Act*, is not subject to appeal to or review by any court.

(2) The Commissioner is not bound to act on any findings or recommendations set out in a report with respect to a grievance referred to the Committee under section 33, but if the Commissioner does not so act, the Commissioner shall include in the decision on the disposition of the grievance the reasons for not so acting.

(3) Notwithstanding subsection (1), the Commissioner may rescind or amend the Commissioner's decision in respect of a grievance under this Part on the presentation to the Commissioner of new facts or where, with respect to the finding of any fact or the interpretation of any law, the Commissioner determines that an error was made in reaching the decision.

R.S., 1985, c. R-10, s. 32; R.S., 1985, c. 8 (2nd Supp.), s. 16; 1990, c. 8, s. 65.

*Reference to Committee*

**33.** (1) Before the Commissioner considers a grievance of a type prescribed pursuant to subsection (4), the Commissioner shall refer the grievance to the Committee.

(2) Notwithstanding subsection (1), a member presenting a grievance to the Commissioner may request the Commissioner not to refer the grievance to the Committee and, on such a request, the Commissioner may either not refer the grievance to the Committee or, if the Commissioner considers that a reference to the Committee is appropriate notwithstanding the request, refer the grievance to the Committee.

(3) Where the Commissioner refers a grievance to the Committee pursuant to this section, the Commissioner shall furnish the Committee Chairman with a copy of

(a) the written submissions made at each level in the grievance process by the member presenting the grievance;

(b) the decisions rendered at each level in the grievance process in respect of the grievance; and

(c) the written or documentary information under the control of the Force and relevant to the grievance.

(4) The Governor in Council may make regulations prescribing for the purposes of subsection (1) the types of grievances that are to be referred to the Committee.

R.S., 1985, c. R-10, s. 33; R.S., 1985, c. 8 (2nd Supp.), s. 16.

**34.** (1) The Committee Chairman shall review every grievance referred to the Committee pursuant to section 33.

(2) Where, after reviewing a grievance, the Committee Chairman is satisfied with the disposition of the grievance by the Force, the Committee Chairman shall prepare and send a report in writing to that effect to the Commissioner and the member presenting the grievance.

(3) Where, after reviewing a grievance, the Committee Chairman is not satisfied with the disposition of the grievance by the Force or considers that further inquiry is warranted, the Committee Chairman may

(a) prepare and send to the Commissioner and the member presenting the grievance a report in writing setting out such findings and recommendations with respect to the grievance as the Committee Chairman sees fit; or

(b) institute a hearing to inquire into the grievance.

(4) Where the Committee Chairman decides to institute a hearing to inquire into a grievance, the Committee Chairman shall assign the member or members of the Committee to conduct the hearing and shall send a notice in writing of the decision to the Commissioner and the member presenting the grievance.

R.S., 1985, c. R-10, s. 34; R.S., 1985, c. 8 (2nd Supp.), s. 16.

## Part IV of the *Royal Canadian Mounted Police Act*
## Discipline
### *Appeal*

**45.14.** (1) Subject to this section, a party to a hearing before an adjudication board may appeal the decision of the board to the Commissioner in respect of

(a) any finding by the board that an allegation of contravention of the Code of Conduct by the member is established or not established; or

(b) any sanction imposed or action taken by the board in consequence of a finding by the board that an allegation referred to in paragraph (a) is established.

(2) For the purposes of this section, any dismissal of an allegation by an adjudication board pursuant to subsection 45.1(6) or on any other ground without a finding by the board that the allegation is established or not established is deemed to be a finding by the board that the allegation is not established.

(3) An appeal lies to the Commissioner on any ground of appeal, except that an appeal lies to the Commissioner by an appropriate officer in respect of a sanction or an action referred to in paragraph (1)(b) only on the ground of appeal that the sanction or action is not one provided for by this Act.

(4) No appeal may be instituted under this section after the expiration of fourteen days from the later of

(a) the day the decision appealed from is rendered, if it is rendered in the presence of the party appealing, or the day a copy of the decision is served on the party appealing, if it is rendered in the absence of that party, and

(b) if the party appealing requested a transcript pursuant to subsection 45.13(2), the day the party receives the transcript.

(5) An appeal to the Commissioner shall be instituted by filing with the Commissioner a statement of appeal in writing setting out the grounds on which the appeal is made and any submissions in respect thereof.

(6) A party appealing a decision of an adjudication board to the Commissioner shall forthwith serve the other party with a copy of the statement of appeal.

(7) A party who is served with a copy of the statement of appeal under subsection (6) may, within fourteen days after the day the party is served with the statement, file with the Commissioner written submissions in reply, and if the party does so, the party shall forthwith serve a copy thereof on the party appealing.

R.S., 1985, c. 8 (2nd Supp.), s. 16.

**45.15.** (1) Before the Commissioner considers an appeal under section 45.14, the Commissioner shall refer the case to the Committee.

(2) Subsection (1) does not apply in respect of an appeal if each allegation that is subject of the appeal was found by the adjudication board to have been established and only one or more of the informal disciplinary actions referred to in paragraphs 41(1)(a) to (g) have been taken by the board in consequence of the finding.

(3) Notwithstanding subsection (1), the member whose case is appealed to the Commissioner may request the Commissioner not to refer the case to the Committee and, on such a request, the Commissioner may either not refer the case to the Committee or, if the Commissioner considers that a reference to the Committee is appropriate notwithstanding the request, refer the case to the Committee.

(4) Where the Commissioner refers a case to the Committee pursuant to this section, the Commissioner shall furnish the Committee Chairman with the materials referred to in paragraphs 45.16(1)(a) to (c).

(5) Sections 34 and 35 apply, with such modifications as the circumstances require, with respect to a case referred to the Committee pursuant to this section as though the case were a grievance referred to the Committee pursuant to section 33.

R.S., 1985, c. 8 (2nd Supp.), s. 16.

## Excerpt From The rcmp Regulations (1988)

### (Section 36: grievances that can be referred to the Committee)

**36.** For the purposes of subsection 33(4) of the Act, the types of grievances that are to be referred to the External Review Committee of the Force are the following, namely,

(a) the Force's interpretation and application of government policies that apply to government departments and that have been made to apply to members;

(b) the stoppage ofthe pay and allowances of members made pursuant to subsection 22(3) of the Act;

(c) the Force's interpretation and application of the *Isolated Posts Directive*;

(d) the Force's interpretation and application of the *R.C.M.P. Relocation Directive*; and

(e) administrative discharge for grounds specified in paragraph 19(a), (f) or (i).