Royal Canadian Mounted Police
External Review Committee

Annual Report

2006 – 2007

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Royal Canadian Mounted Police
External Review Committee

Comité externe d'examen
de la Gendarmerie royale du Canada

June 22, 2007

The Honourable Stockwell Day, P.C., M.P.
Minister of Public Safety
Sir Wilfrid Laurier Building
340 Laurier Avenue West
Ottawa, Ontario
K1A 0P8

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 2006-2007, so that it may be tabled in the House of Commons and in the Senate.

Yours very truly,

Catherine Ebbs
Chair

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PART I – MESSAGE FROM THE CHAIR

The last year has been one of significant activity for the RCMP External Review Committee. The Committee's annual report provides an opportunity to put the work of the Committee into context in a year in which a number of interesting issues arose in relation to labour relations and the RCMP. This year's annual report provides an overview of our activities throughout the 2006 – 2007 year and is available on our Web site, along with our *Communiqué*, case summaries and other government reports (www.erc-cee.gc.ca).

The Committee has a very distinct mandate. Since its inception almost twenty years ago, the Committee's role has been to conduct impartial and independent reviews of RCMP labour relations cases. Over the years, the RCMP has made changes in a variety of areas because of recommendations made by the Committee. Specific areas of concern have been raised, leading to policy changes with regard to medical discharge, suspension without pay, and harassment. Procedurally, the Committee has raised diverse issues, such as maintaining and protecting procedural fairness, ensuring access to information, preventing bias or the appearance of bias in the decision-making process, and protecting the right to be heard. This year, the Committee dealt with areas such as harassment, travel entitlements, and relocation, and also examined a number of interesting questions in disciplinary appeals.

The Committee does not conduct an external review of every Level II grievance within the RCMP. By law, only five specific categories of grievances are referred for a Committee review. However, the Committee does review all appeals of disciplinary rulings and discharge and demotion cases. It should also be noted that referrals to the Committee only take place after a first decision has been made internally. As a result, given that the Committee is a second level or appeal tribunal, it tends to see cases that could not be resolved at an earlier stage due to complex legal issues, factual issues or policy considerations.

The Committee's important and distinct role in the area of oversight of the RCMP is entirely focused on the domain of labour relations. It does not have any authority in the area of complaints by the public. In the Committee's view, the separation of the two functions of public complaints oversight and labour relations oversight is extremely important. It is true that prior to the creation of the Committee, the government considered a recommendation for an ombudsman to deal with both public complaints and labour relations matters *(Commission of Inquiry relating to Public Complaints, Internal Discipline and Grievance Procedure within the Royal Canadian Mounted Police)*. There have been significant changes in the thirty years since that report was written, not only in the RCMP, but in labour relations systems and in the realm of public oversight in Canada generally. For example, it is interesting to note that at the time of writing this annual report, the Government of Ontario has just passed a law that replaces one single body with separate processes for police discipline and public complaints oversight of the police. In addition, this winter, in his Final Recommendations to the *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, Justice O'Connor stated that public complaints oversight and discipline review should be separate functions.

The distinct recognition of labour relations oversight through a separate agency offers a better possibility of preventing potential perceptions of bias or conflict of interest, and ensures focus on the specific issues surrounding each mandate. In this way, trust and respect in both oversight functions can be protected so that stakeholders can freely access and have confidence in these functions. That is not to say that expanding or improving the functions governing each of these mandates should not occur. In the Committee's view, for example, an expanded outreach and research function would enhance its role, as would a number of other improvements to the labour relations administration within the RCMP.

Over the last few years, I believe that the Committee has consistently had an extraordinary output, in spite of its very small size. This year, it issued a near record number of recommendations. The Committee strives for even greater success in this area, and adheres to its goal that the backlog be removed. The Committee secured funding to assist in this process and is also exploring the possibility of additional financial support to meet its many corporate and operational demands.

Apart from the case review function, this fiscal year has been busy in the area of outreach. The Committee continues to issue a quarterly Communiqué and has a Web site with all case summaries and articles of interest. In addition, the Chair and staff members met with a variety of stakeholders throughout the year.

On the corporate side, the Committee conducted its own evaluation of its management accountability framework and provided significant information toward the government wide management accountability framework assessment of its work. It is hoped that the exchange arising from this exercise will allow for constructive and positive change. With regard to the rise of corporate demands from central agencies, the Committee values the work of all the agency networks, such as the Heads of Federal Agencies (HFA), the Small Agency Administrators Network (SAAN) and the Personnel Agency Group (PAG).

In closing, I am honoured to work as Chair of this Committee, and I look forward to the work we have ahead. My vision is not only for the Committee to continue its quality work in the area of case review and outreach, but for it to expand its ability to do so – to enhance the case review process and develop a more robust infrastructure to support the Committee in meeting standards of excellence in its mandate of labour relations oversight and review.

Catherine Ebbs
Chair

PART II – THE MANDATE OF THE RCMP EXTERNAL REVIEW COMMITTEE

A. The *RCMP Act* and the RCMP External Review Committee

Members of the RCMP are subject to a distinct system of grievance adjudication and discipline and discharge, as outlined in Parts II, III, IV and V of the *RCMP Act* (*Act*). The internal RCMP labour relations system makes the initial decision in labour relations matters affecting members. The *Act* provides for an external review with certain categories of grievances and all discharge and demotion and all disciplinary appeals. The mandate of the RCMP External Review Committee (Committee) then, is to undertake this external review and issue a recommendation to the Commissioner.

The review the Committee undertakes is adjudicative in nature, robust and detailed. The Committee reviews the entire record before it: the original documents, the decision made, and the submissions of the parties. In appeals of disciplinary or discharge and demotion decisions, the transcript of the Board hearing is also before the Committee, as well as any exhibits entered at the hearing. All the evidence, legal issues, relevant legislation and case law are considered in determining the findings and recommendations. The Chair may request that the parties provide additional information or submissions. If this is done, the other party is given the chance to respond. The Chair also has authority to hold a hearing if it is considered necessary. This is not often done however.

The Chair's findings and recommendations are issued to the parties and the Commissioner of the RCMP who makes the final decision. Should the Commissioner decide not to follow the Committee's recommendation, she or he is required by law to give reasons for not doing so.

Grievances constitute the largest component of the Committee's work. Cases referred to the Committee often present complicated or unresolved policy issues, challenging legal questions and complex fact situations. In reviewing these cases, the objective of the Committee is to positively influence labour relations within the RCMP. The need for case review which is both impartial and arms length to the RCMP is crucial in meeting this objective, as is the need for information exchange and outreach with its stakeholders.

B. External Review of Grievances, Disciplinary Appeals, Discharge and Demotion Appeals: Similarities and Distinctions

The *Act* creates the Committee under Part II. Part III discusses the grievance procedure and the Committee's role in reviewing grievances. Part IV and Part V address disciplinary and discharge and demotion appeals respectively. In order for a case to be reviewed by the Committee, it must be referred by the Commissioner of the RCMP or by the delegate. This is required by the *Act*. In any case, the member can request that the matter not be referred to the Committee. However, this rarely occurs.

There are, nonetheless, some important distinctions in the area of reviews of grievances, discipline and discharge and demotion.

For example, with grievances, the Committee does not have the statutory or regulatory authority to review every grievance that is subject to a Level II review. The *Act* and *Regulations* provide that only five categories of grievances must be referred to it for review:

1) interpretation and application of government-wide policies that apply to members of the RCMP;
2) stoppage of pay and allowances during suspension of a member;
3) interpretation and application of the *Isolated Posts Directive* (IPD);
4) interpretation and application of the *Relocation Directive* (RD);
5) administrative discharge on grounds of physical or mental disability, abandonment of post, or irregular appointment.

With discharge and demotion matters, there is no restriction on what types of appeals will be referred.

In the area of discipline, it is only when formal disciplinary action is being considered, i.e. for more serious violations of the *RCMP Code of Conduct*, that cases come before the Committee. The Committee does not undertake an external review of disciplinary measures arising from an informal disciplinary process as described by the *Act*.

The following table outlines key components of the review functions for grievances, discipline and discharge and demotion. It also provides statistics on the total number of cases reviewed by the Committee since its inception and up to March 31, 2007.

Grievances	Formal Disciplinary Matters	Discharge and Demotion
Part III of the *RCMP Act*	Part IV of the *RCMP Act*	Part V of the *RCMP Act*
Initiated by Member presenting a grievance on an area of concern.	Initiated by investigation and subsequent decision of Commanding Officer to hold a hearing, where allegation that member has violated the *Code of Conduct* and decision to address under formal disciplinary proceedings.	Initiated by a Commanding Officer serving a Notice of Intention. A member may be subject to discharge or demotion proceedings for failing to perform his or her duties in a satisfactory manner, after having been given "r*easonable assistance, guidance and supervision in an attempt to improve the performance of those duties*".
Level I review conducted by an RCMP officer designated as a Level I Adjudicator.	Decision made by Adjudication Board, comprised of three officers of the RCMP.	The member has the right to examine the material in support of the Notice of Intention and to request that a Discharge and Demotion Board, consisting of three senior officers of the Force, be convened.
The Level I Adjudicator makes a decision based on a review of written submissions.	An Adjudication Board holds a hearing to determine whether there has been a violation of the C*ode of Conduct*. If *Code of Conduct* is found to have been violated, a subsequent hearing is held to determine sanction.	A Discharge and Demotion Board holds a hearing and issues a decision.
If a member is dissatisfied with the decision, then the member presents a Level II grievance.	Either the member or the Commanding Officer can appeal the decision to the Commissioner. The member has an unlimited right of appeal. The Commanding Officer can appeal a finding that no violation of the *Code of Conduct* but has a very limited right to appeal the sanction.	Either the member or the Commanding Officer may appeal the decision of an RCMP Discharge and Demotion Board.
Five categories of grievances are referred to the Committee for subject to a Level II review. 1) interpretation and application of government wide policies that apply to members of the RCMP; 2) stoppage of pay and allowances during suspension of a member; 3) interpretation and application of the Isolated Posts Directive;	There is no limitation on the type of disciplinary matters that can be reviewed by the Committee. The appeal is referred to the Committee, unless the member requests that the matter proceed directly to the RCMP Commissioner. This rarely happens.	Appeal submissions are made in writing and the appeal is then referred to the Committee unless the member requests that the matter proceed directly to the RCMP Commissioner. This rarely happens.

Grievances	Formal Disciplinary Matters	Discharge and Demotion
Part III of the *RCMP Act*	Part IV of the *RCMP Act*	Part V of the *RCMP Act*
4) interpretation and application of the Relocation Directive; 5) administrative discharge on grounds of physical or mental disability, abandonment of post, or irregular appointment. ***** Grievances not in these categories are reviewed through internal RCMP processes. For those grievances referable to the Committee, the grievance is referred to the Committee, unless the member requests that the matter proceed directly to the RCMP Commissioner. This rarely happens.		
The Committee reviews the case and makes a recommendation.	The Committee reviews the case and makes a recommendation.	The Committee reviews the case and makes a recommendation.
The Committee issues findings and recommendations to the parties and the RCMP Commissioner in those categories of grievances referred to it.	The Committee issues findings and recommendations to the parties and the RCMP Commissioner.	The Committee issues findings and recommendations to the parties and the RCMP Commissioner.
The RCMP Commissioner makes the final decision.	The RCMP Commissioner makes the final decision.	The RCMP Commissioner makes the final decision.
As of March 31, 2007, the Committee has issued a total of 433 grievance recommendations since its inception.	As of March 31, 2007, the Committee has issued a total of 103 recommendations coming out of disciplinary appeals since its inception.	As of March 31, 2007, the Committee has issued a total of 4 discharge and demotion cases recommendations since its inception.
In 89% of all the grievance recommendations issued since the Committee's inception, the RCMP Commissioner has followed the recommendations of the Committee.	In 71% of all disciplinary appeal recommendations issued since the Committee's inception, the RCMP Commissioner has followed the recommendations of the Committee.	In 75% of all discharge and demotion appeal recommendations since the Committee's inception, the RCMP Commissioner has followed the recommendations of the Committee.

C. Outreach and Communication Activities in 2006-2007

The Committee's outreach and communication function is essential to meeting its mandate. The Committee utilizes a number of tools for outreach, including its Web Site, its quarterly publication, requests for information, and ongoing training, meetings, and capacity building.

Web Site and Quarterly Publication

The Web site (www.erc-cee.gc.ca) and the *Communiqué*, a quarterly publication, carry articles of interest, summaries, and updates on all cases that have been before the Committee.

Requests for Information

In the span of a year, the Committee receives a number of requests for information. Some of these are simple, but others can be quite complicated and require more time. This year, the Committee received and responded to 123 requests for information, on average in 2.8 days.

Ongoing Training and Capacity Building

The Committee gave presentations at training sessions for the Staff Relations Representative Program (SRR), new Disciplinary Board Adjudicators, and staff of the Office for the Coordination of Grievances. It also held meetings with stakeholders and engaged in ongoing capacity building:

- *The SRR Program*: The SRR Program is made up of regular and civilian members of the RCMP. It is designed to provide members of the RCMP with a formal system of elected representation. The Committee met with the executive of the SRR in this fiscal year. The Committee also provided an orientation to new SRRs on the work that it does and on a number of substantive and procedural legal issues in the area of grievances. The Chair also gave a presentation at a regional meeting of SRRs in Winnipeg in October 2006.
- *Disciplinary Board Adjudicators*: In March 2007, Committee staff provided an orientation on the Committee's mandate to new disciplinary board adjudicators in Sydney, Nova Scotia.
- *Office for the Coordination of Grievances*: In March 2007, Committee staff provided an orientation on grievance issues to the staff who administer member grievances in the RCMP.
- *Meetings*: Representatives of the Committee met with the RCMP Professional Standards and External Review Directorate of the RCMP, which administers the grievance and disciplinary and discharge and demotion processes within the RCMP. Meetings were also held with the executive of the SRR Program and with the RCMP Commissioner.

- *Ongoing Capacity Building*: Staff of the Committee attend training and conferences throughout the year to ensure currency in a variety of areas such as the *Charter of Rights and Freedoms*, administrative law, labour relations, decision writing and drafting, discipline and human rights law.

D. Other Activities

The Committee is a very small tribunal of 6 people. Over the last few years, corporate requirements at the federal level have risen significantly. These requirements must be met by every agency, regardless of size or scope. The Committee regularly meets with other components of government to address various federal government reporting and accountability requirements. The Committee places a high level of importance on these requirements. However, it has limited resources. It is seeking ways to address this issue and it has sought additional funds. It has also participated in a roundtable discussion of various government representatives on the burden of reporting on small agencies, through the Canada School of Public Service.

The Committee continues to integrate the new *Public Service Modernization Act* (PSMA) into the workplace. It has consulted staff on all policies and embarked on a number of initiatives including educating staff on the PSMA, and career planning and training needs in the 2006-2007 year. The Committee will ensure that all staff are fully informed on the general principles of the PSMA.

This year, the Committee provided significant data and information to central agencies for their assessment of the Committee's integration of the Management Accountability Framework. In doing so, the Committee undertook its own internal assessment of the work that it does and has identified areas to address further. This has included finding ways to ensure a robust form of evaluation, in spite of its small size.

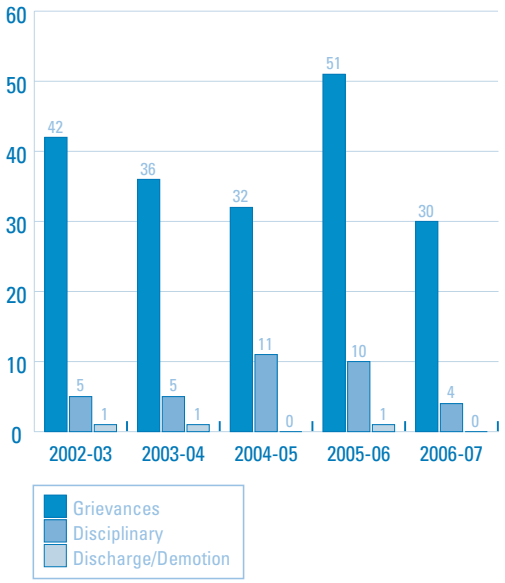
PART III – THE YEAR IN REVIEW

A. Statistics

Referrals

There were fewer cases referred to the Committee in this fiscal year. A total of 30 grievances were referred to the Committee, compared to 51 in the previous year and 32 in 2004-05. Four disciplinary appeals were referred to the Committee, which is also a decrease from the number of disciplinary cases referred to it in previous years (10 in previous year; 11 in 2004-2005). No discharge and demotion appeals were referred to the Committee this year.

Number of cases received



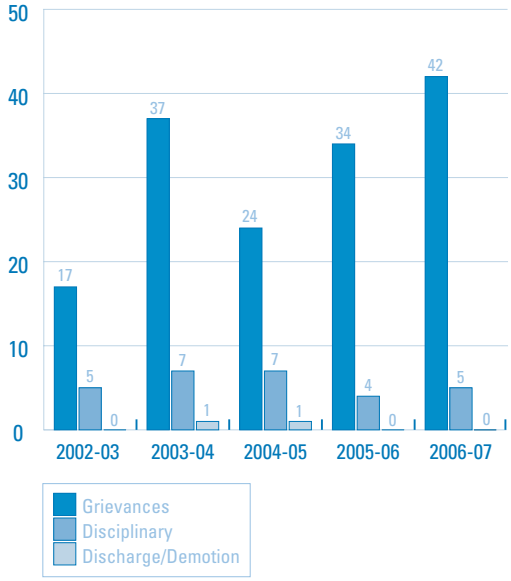
Recommendations Issued

The number of cases completed by the Committee from year to year may vary depending on the complexity of issues raised. For grievances, the objective of the Committee is to have issued its recommendation within three months of the case being referred to it. For discipline and discharge and demotion cases, the standard that the Committee strives for is six months. There is a waiting period at this time before cases are reviewed and largely because of this, these service standards are not met.

However, the Committee continues to strive to meet these standards and it sought, and was granted, short term additional resources to do so. As of the end of this fiscal year, these resources were not yet in place. In addition, the Committee is exploring the possibility of securing resources to assist with rising corporate demands.

There was an increase in the number of recommendations issued this year. The Committee reviewed 42 grievances and issued 40 recommendations, compared to 34 cases reviewed in 2005-06 (and 30 recommendations issued) and 24 cases reviewed (and 23 recommendations issued) in 2004-05. The Committee issued 5 recommendations on disciplinary appeals. No recommendations in the area of discharge and demotion were issued.

Number of cases completed*



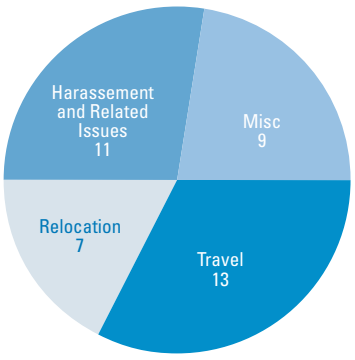
* In 2006-07, 42 cases were reviewed, but 40 recommendations were issued. In 2005-06, 34 cases were reviewed but 30 recommendations were issued. In 2004-05, 24 cases were reviewed but 23 recommendations issued.

Grievances

General

The subject matter of this year's grievance recommendations fell into the following general categories:

Grievances*



* In 2006-07, 42 cases were reviewed, but 40 recommendations were issued. In 2005-06, 34 cases were reviewed but 30 recommendations were issued. In 2004-05, 24 cases were reviewed but 23 recommendations issued.

The Committee continues to observe a large number of Level II grievance reviews where the Level I Adjudicator denied the case on the basis of preliminary matters such as time limits or standing. Similar to last year, the Committee has recommended a reversal of these procedural Level I findings in several recommendations. The Committee has also expressed concern in some cases about the manner in which the harassment policy was applied. Given that there is a time gap before the Committee reviews grievances at Level II, these issues may not reflect the current practice within the RCMP.

Disciplinary Appeal and Discharge and Demotion Cases

This year, the Committee received four disciplinary appeals. Of these four appeals, three were initiated by the member and one involved an appeal by the Commanding Officer. Only one appeal involved a sanction of an order to resign within 14 days, failing which the member would be dismissed. The Committee issued five findings and recommendations on disciplinary appeals this year and did not review any discharge and demotion cases.

Conclusion

In conclusion, a total of 34 cases were referred to the Committee this year, and 47 cases were completed. At year end, 59 active cases remained before the Committee, including 46 grievances, 12 discipline appeals and one discharge and demotion appeal. Several interesting recommendations, both in the area of grievances and discipline, were issued by the Chair of the Committee in the last year. These are discussed in the following sections.

B. Issues of Interest in Grievance Cases

Harassment Grievances

The Committee has noticed an increase in harassment grievances being referred to it. This has been especially apparent over the last two years. Statistics on harassment cases and key trends in harassment-related Level II grievances are noted in section a) and the table on page 12. These statistics cover an eight-year time frame to the end of March 31, 2007. It should be noted that the increase in harassment cases referred to the Committee does not necessarily reflect the statistical composition of harassment complaints within the RCMP itself.

a) Statistics on Harassment Grievances at Level II: 1999-2000 to 2006-2007

The Committee has reviewed approximately 41 harassment-related grievances in the past eight years. This is approximately 20% of all its grievances in that time frame. The grievances were mostly initiated by the complainant, but in 13 grievances, the Grievor was the member accused of harassment (the 13 grievances came from 5 members in total). Eight of the 41 harassment-related grievances were presented by women.

The large majority of the harassment-related reviews at the Committee pertained to harassment in the workplace of a general nature (i.e. not linked to a human rights ground).

Of the harassment related grievances filed by women (eight in total):

- five involved situations where the Grievor alleged having been harassed;
- three involved allegations that the Grievor had engaged in harassment;
- five were based on harassment related to personal interaction/misconduct alone;
- one claimed harassment on the basis of sex, marital status, family status and national origin (although the actual grievance was the failure to investigate);
- one alleged harassment in the form of sexual discrimination; and
- one alleged harassment and discrimination on the basis of a medical condition.

Of the harassment cases filed by men (33):

- 24 involved situations where the Grievor alleged having been harassed;
- nine involved allegations that the Grievor had engaged in harassment;
- 29 cases were not based on a human rights associated ground;
- in one the alleged harassment directed towards the Grievor was not human rights based, but general allegations of racist and sexist behaviours were made;
- one grievance related to discrimination based on age and disability/medical condition; and
- in two files the issue of race discrimination arose.

Harassment Statistics from 1999-2000 to 2006-2007

Year	Findings and Recommendations Issued	Initiated by		Committee's Recommendation
		Female	Male	
1999-2000	2	1	1	Both to allow.
2000-2001	2	1	1	one to allow (female initiated, sexual harassment); one to deny.
2001-2002	0	0	0	0
2002-2003	2	0	2	Both to deny, but statement made in one regarding fact that entitled to have it investigated, but was not, due to time frame.
2003-2004	11	2	9	All to deny, though issues of standing and merits raised. Five grievances brought by three members accused of harassment.
2004-2005	4	1	3	All to deny, though merits and standing issue raised as well as issue with harassment procedure and choice of investigator.
2005-2006	9	1	8	Two to allow on refusal to investigate; six to deny, though issues regarding standing and disclosure raised; one inadmissible.
2006-2007	11	2	9	Ten to allow (five on basis Level I erred on a preliminary issue, and five for failure to follow policy) Of the ten to allow, five sent back to resume grievance process or for harassment investigation. One to deny on basis Grievor had not met onus. Four grievances brought by two members accused of harassment.

b) *Harassment Grievances : Issues Raised This Fiscal Year*

This year, the Committee issued findings and recommendations in 11 harassment-related grievances. In the large majority of these, the Committee could not make a finding on the merits either because of procedural problems with the way the complaint was handled or because of errors in the Level I Adjudication. The procedural problems included the failure to investigate the harassment complaint or properly apply the harassment policy.

In six grievances the Committee determined that there was an error related to a non-existent or inadequate harassment complaint investigation. The Committee also noted an error in process at the Level I stage in one grievance.

In addition, the Committee made three general recommendations aimed at improving the harassment complaint process. Also, the Committee's findings and recommendations in three harassment files (G-378, G-402 and G-403) related to the failure of the Level I Adjudicator to adhere to the duty to act fairly. The Commissioner's decision in these three files is pending.

c) *Choice of Investigator*

In G-377, the Grievor received an anonymous e-mail from an unattended computer terminal which he found offensive. The Grievor filed a harassment complaint with his Commanding Officer (the Respondent), who ordered the noncommissioned officer (NCO) in charge of the section to investigate. This NCO had a previous history of discord with the Grievor and the Committee found that the Respondent did not make an appropriate choice of investigator. The Commissioner has yet to render a decision in this matter.

d) *Complaint Process Issues*

In G-378, the Grievor complained that she had been harassed by two supervisors. The Officer in Charge (OIC) declined to investigate after discussing the matter with the District Commander (DC) and one of the alleged harassers. The Committee found that both the Treasury Board (TB) and internal policies on harassment needed to be followed. If there was a contradiction, the TB policy would prevail. The Committee found that the OIC and the DC followed none of the preliminary steps set out in TB and Force policies. They erred in deciding not to initiate an investigation into the Member's complaint because the Member's allegations, if founded, would have constituted harassment. Further, reviewing the complaint by speaking to one of the alleged harassers, but not to the Grievor, was a violation of the duty to act fairly. Finally, even if the issue was one of workplace conflict, nothing was done to resolve this issue, as required by both policies. The Commissioner has yet to render a decision in this matter.

In G-382 the Grievor filed a harassment complaint against three superior officers. He alleged a conspiracy to harass him and also complained of a series of specific acts which he alleged amounted to harassment. The Respondent declined to investigate the complaint on the basis that there was no evidence of a conspiracy and the specific acts complained of amounted to

administrative decisions or workplace conflict. The Committee found that the Respondent failed to follow the process required by the TB policy and erred when he concluded that no investigation was required because the allegations were mostly workplace conflict issues. A number of the allegations were related to administrative decisions, but this in itself did not rule out the possibility of harassment. Abuse of authority, a type of harassment, could be made up of a series of administrative decisions. A full investigation should have been ordered. The Commissioner has yet to render a decision in this matter.

In G-410.1, G-410.2, and G-410.3, the Committee clarified when a full harassment investigation should be ordered. After reviewing the harassment complaint, the rebuttals and a *Code of Conduct* investigation report, the Respondent declined to order an investigation. The Committee found that the officer responsible for responding to a harassment complaint may make a decision without initiating a formal investigation, but this should be done only in rare cases where it is inconceivable that the full investigation would lead to a conclusion that harassment had occurred. One of the three allegations advanced by the Grievor, if proven, might amount to harassment and it was premature and unfair for the Respondent to conclude that no investigation was required. At a minimum, the TB and RCMP policies required that the Respondent meet with the complainant prior to making any determination. Further, absent an investigation, the Grievor should have been given an opportunity to respond to the rebuttal. The Commissioner has yet to render a decision in these matters.

Finally, in G-402 the Grievor filed a harassment complaint. The Respondent concluded that the complaint related to workplace conflict, not harassment. A grievance followed. The parties failed to file an early resolution outcome document within the time allowed in the Force policy. The Level I Adjudicator found that the Grievor had abandoned his grievance when he had not filed the outcome document. The Committee determined that the Level I Adjudicator erred on this point. It noted that the more appropriate way to proceed would have been for the Level I Adjudicator to declare that, because the administrative time frame was not respected, the Early Resolution Phase was terminated, with the result that the grievance would have moved to the Submissions Phase. The Commissioner has yet to render a decision in this matter.

e) Redress

A significant amount of time has often passed between the initial events leading to allegations of harassment, and the Level II review before the Committee. Because of the passage of time, it might not be appropriate to order a new investigation even when the Committee recommends upholding the grievance.

In G-377, the Committee agreed with the Level I Adjudicator that the e-mail the Grievor complained of likely constituted harassment, but disagreed with the Level I

conclusion that a new investigation should be ordered. The original e-mail had been sent in 1997, and the Committee found that too much time had passed to allow for a new investigation. A similar conclusion was reached in G-382, where the events stretched back to 1999. The Commissioner's decision is pending in both cases.

In other cases the Committee has concluded that it is appropriate to send the matter back to the RCMP to be properly investigated. In G-378, the Committee recommended that the file be returned so that the harassment complaint, arising in 2004, could be dealt with according to policy. In G-402, G-403 and G-405, the Committee recommended that these matters be referred back to Level I in order for it to proceed from that point. The Commissioner's decision is pending in these cases.

The Committee has considered the unique circumstances of each case in recommending a variety of other types of redress. For example, this year the Committee recommended:

- that a different decision-maker be appointed to review the complaint (G-378);
- that the Commissioner order two senior members to undergo training on proper procedures for dealing with harassment complaints (G-378);
- that a decision be made regarding the appropriate Respondent on the file before any further action is taken (G-378);
- that the Commissioner confirm that the Respondent erred in his choice of investigator and apologize to the Grievor for a procedural error (G-377);
- that the Commissioner apologize to the Grievor for the fact that his complaint was not dealt with according to policy (G-382); and
- on the single grievance where the Member requested financial compensation, the Committee declined to recommend this redress, based on the specific facts of that case (G-377).

The Commissioner has yet to render a decision in these cases.

f) General Recommendations

In three harassment cases, the Committee made recommendations to the Commissioner aimed at improving grievance procedures: one related to the process to be followed for disclosure; one aimed at clarifying who has the onus of supplying the Level I Adjudicator with material and one recommending an amendment to the administrative policy on extension of time for filing grievance submissions.

In G-405, the Grievor filed a harassment complaint against two superiors. He was dissatisfied with the investigation and the corrective action taken and he filed a grievance. The parties negotiated an acceptable structure for the informal resolution process, but they could not agree on what constituted appropriate disclosure. The Grievor refused to proceed without the materials he was seeking. The

Committee found that this issue of process was grievable. Disclosure was a statutory right, whereas the order in which various steps of the grievance were to unfold was administrative. The Committee found that where a Grievor requests disclosure in advance of the early resolution efforts, the Respondent should attempt to answer that request, as there might be times when disclosure in advance of the early resolution efforts would be beneficial.

In G-407, the Grievor filed a grievance after her complaint of harassment was determined to be unfounded. She was advised to file her Level I submissions and failed to do so, but she did reply to the Respondent's submissions. However, she went beyond simply replying to the Respondent's position, which is not allowed under the grievance policy. Further, at no time did she provide documentation to support her claim. The Committee found that the Grievor had not met the onus of establishing her claims on a balance of probabilities, as she had given no details to support her allegations.

In addition, the Committee found that the *Commissioner's Standing Order* (Grievances) (CSO-G) and the associated grievance policy lack an explanation of what constitutes the grievance file and who provides the relevant material to the Level I Adjudicator. Therefore, the Committee recommended that the Commissioner order a review of the CSO-G and the RCMP policy on grievances to clarify who has the responsibility to ensure that the Level I Adjudicator receives a complete record.

Finally, in G-402 the Committee recommended that the Commissioner consider amending the existing administrative procedures to allow the Level I Adjudicator or the Case Manager to give retroactive extensions of administrative time frames. The Commissioner's decision is pending in these cases.

Duty to Act Fairly

The duty to act fairly is a key principle in administrative law. It requires that certain procedural rights of the parties be met. For example, it requires that parties be given adequate notice, a right to be heard and an impartial decision maker. This principle has been discussed a number of times both in Federal Court and in the Supreme Court of Canada. Of particular note is the landmark Supreme Court of Canada decision in *Baker v. Minister of Citizenship and Immigration* ([1999] 2 S.C.R. 817) that reconfirmed that the duty to act fairly applied to a wide variety of administrative proceedings and expanded the right to written reasons, in certain circumstances.

This year, there were thirteen instances where the Committee found that the duty to act fairly had not been respected by the Level I Adjudicator. In twelve cases, the Committee found that the Level I Adjudicator ruled on time limits without giving the parties an opportunity to be heard on that issue. In one case, the Level I Adjudicator denied a grievance as abandoned without notice to the parties and without providing them with an opportunity to present their position on the issue.

In a series of grievances related to the quality of meals and accommodations during the G8 Summit in Kananaskis, Alberta, the issue of procedural fairness was discussed (G-387, G-388, G-389, G-390, G-391, G-393, G-395, G-396, G-401). These grievances were denied at Level I on the basis that the Grievors had been advised of the conditions in advance and therefore any grievance would have to be filed within 30 days of the advance notice. However, the parties had not been advised that the Level I Adjudicator was considering denial on this basis and the parties were never given an opportunity to provide their position on this question. As a result, the Committee found that the decisions on time limits were not procedurally fair. Of the cases, the Commissioner's decision is pending in all except G-387. There the Commissioner agreed with the Committee's recommendation to deny the grievance. However, she did not consider this issue in her decision.

The issue of fairness also arose with rulings made on standing, the threshold question as to whether the person bringing an action or complaint has a sufficient personal stake in the matter. In three cases, the Level I Adjudicator decisions on standing, which were made prior to the parties being given the opportunity to be heard, were found to be procedurally unfair (G-378, G-398 and G-403). The Commissioner's decision is pending in these cases.

Procedural fairness was also discussed in G-402. The Grievor failed to file the Outcome Document required after the conclusion of the early resolution phase of the grievance process. The Level I Adjudicator found that the Grievor had abandoned the grievance. The Committee concluded that the Level I Adjudicator had failed to respect procedural fairness in that the decision was made without notice to the parties and without their having had an opportunity to make submissions. The Committee recommended that the file be returned to Level I and the parties be given the opportunity to make submissions. The Commissioner's decision is pending.

Referability

Referability relates to the issue of whether or not a grievance can be sent to the Committee to be reviewed. Under section 36 of the *RCMP Regulations*, only five categories of grievances can be referred to the Committee for a Level II review. Four of the categories are those grievances that involve a Force interpretation of the isolated post; relocation directives; administrative discharge on the basis of irregular appointment, physical or mental disability or abandonment of post; or stoppage of pay and allowances while suspended. The determination of referability in these categories is relatively straightforward. However, the fifth category has been the source of interpretive difficulties. According to section 36(a) of the *Regulations*, in order for a grievance to be referable under this subsection it must fulfill a four part test.

1. it must involve an interpretation or application by the Force;
2. the interpretation of application must involve a government policy;
3. that government policy must apply to government departments; and,
4. that policy must have been made to apply to members.

The Committee reviews the grievances sent to it by the RCMP to ensure that each one has been properly referred. If the matter does not fall within one of the five categories, the Committee has no jurisdiction to review it. Most grievances have been properly referred, but occasionally, the Committee comes to the conclusion that a file, or some part of it, is not referable. 2006-2007 saw an interesting mix of files where referability was an issue. A discussion follows.

a) No Government-wide Policy

In G-386, the Grievor grieved after he was recalled from a United Nations deployment. The Committee concluded that the authority to limit or cancel that deployment came from an unwritten policy based within the RCMP and not from any government-wide policy that has been made to apply to the RCMP. Therefore, the grievance was not referable. The Commissioner has not yet rendered a decision in this matter.

b) RCMP Specific Law, Regulation or Policy

In other cases it is clear that the statute, regulation or policy in question applies only to the RCMP. In G-381, the Member grieved the decision to exclude his acting pay in the calculation of his pensionable earnings. This grievance related to the application and interpretation of the superannuation regime for the RCMP. This only applies to the RCMP and, therefore, the Committee concluded the grievance was not referable.

The Committee also found it had no mandate to review the RCMP *Workforce Adjustment Directive*. In G-399 and G-400, two Members claimed the right to severance pay under this directive. The Committee concluded that this directive was only applicable to the RCMP, not other government departments and, therefore, these grievances were not referable. The Commissioner has not rendered a decision in either of these matters.

However, where there is a general, government-wide umbrella policy on a subject, the file may be referable to the Committee, even where the specifics are contained in a policy or directive that only applies to the RCMP. This was the case in two grievances resulting from the G8 Summit in Kananaskis, Alberta. A number of Members claimed entitlement to overtime payments. While specific overtime entitlement was governed by either TB directives/minutes or Force policies that were applicable only to the RCMP, the TB *Management of Overtime Policy*, was the umbrella policy. At the time of the grievances in question, it applied to both the RCMP and other government departments. As a result, the Committee issued findings and recommendations on this issue. (The TB policy on overtime that applied to these cases was cancelled on June 1, 2006.) The Commissioner's decision is pending in these cases.

c) Partial Referability

In some grievances, only a portion of the file fails the referability test. In this case, the Committee provides findings and recommendations on those areas within its mandate.

In G-381, despite finding that the Committee could not offer findings and recommendations on the superannuation regime, it noted that the Grievor had also raised a discrimination claim. The Committee concluded that grievances of this type are referable, and provided findings and recommendations to the Commissioner on this portion of the grievance. The Commissioner considered the Committee's analysis in coming to his decision on this issue.

In G-391, a G8 Summit grievance, the Committee concluded that the portion of the grievance dealing with work schedules and shifts was based on internal RCMP policy. As a result the Committee did not comment on this aspect of the grievance, but did address the Grievor's complaints about the government-wide policies on meals and accommodation not being respected. The Commissioner has not rendered a decision in this matter.

d) When Referability Cannot be Determined

In one grievance the Committee was unable to make a finding on referability due to the lack of information on the file. In G-374, the Committee considered a complaint by a civilian member related to how her transfer from the public service into the Force was processed. The file did not contain any information on which laws or policies were applied in processing the transfer. The Committee concluded that there was not enough information on the file to assess referability and recommended that the matter be sent back to Level I. The Commissioner agreed.

C. Disciplinary Issues

Several interesting issues arose in the context of disciplinary appeals dealt with by the Committee in 2006-2007. Among the substantive issues addressed in the last year was the extent to which the Force may impose discipline related to a member's poor performance. The Committee also examined parity of sanction and procedural issues.

Knowingly Neglecting Duty

In the RCMP, as in any other work environment, employees may fail to perform their work-related duties at an acceptable standard. There can be many reasons for poor performance, ranging from ignorance of workplace standards, to an inability to properly do the job owing to a lack of required skills. Labour arbitrators reviewing disciplinary action imposed for poor performance have drawn an important distinction. Discipline, up to and including dismissal, may be imposed for performance problems where deficiencies are caused by culpable behaviour on an employee's part. However, when it is established that failure is non-culpable, that is, not owing to fault or wrongdoing on the employee's part, discipline is not imposed. Although termination of the employment relationship is a possible consequence of non-culpable performance problems, such a measure will normally be contingent upon the employer showing that the employee was given the opportunity to improve performance through supervision and assistance.

A similar delineation exists under the *Act*. On the one hand, members and officers may be demoted or discharged from the Force when there is a repeated failure to perform duties in a manner fitted to the requirements of the officer or member's position. This process is set out in Part V of the *Act*, which requires that sufficient and reasonable assistance be provided to an affected member or officer in an attempt to improve the situation, prior to initiating discharge or demotion proceedings. There is no reference to any blameworthy component in Part V, which is clearly geared towards dealing with non-culpable cases where performance problems do not give rise to disciplinary concerns.

On the other hand, the Act recognizes that there may be situations where performance problems are the result of culpable conduct, in which case initiating the Part V process may not be the appropriate solution. Section 47 of the *RCMP Code of Conduct* lays the groundwork for performance related discipline by stating that "a *Member shall not knowingly neglect or give insufficient attention to any duty the member is required to perform*". An allegation under s.47 of the *Code of Conduct* can be dealt with under the disciplinary provisions of Part IV of the *Act*. The use of the word "knowingly" in s.47 is what distinguishes this section from the Part V discharge and demotion process, in that it imposes an onus on the Appropriate Officer (AO), in discipline cases, to establish that a member had intent to neglect a duty.

The Committee recently addressed this distinction in D-099. A Member faced allegations as to his failure to follow up on a complaint, failures to complete paperwork, and failures to send blood samples relating to impaired driving charges to a laboratory. The Adjudication Board found that the Member had contravened s.47. The Member appealed three of those four findings as well as the sanction of dismissal imposed by the Board.

In considering the issue of neglect of duty, the Committee highlighted the more obvious elements: the existence of a duty; the Member's knowledge of that duty; and failure to carry it out or insufficient attention to it. The Committee concluded that two elements needed to be established, with regards to knowledge:

- the member must be aware of the fact that he or she is neglecting the duty or giving insufficient attention to it, and;
- the knowing neglect, or knowing giving of insufficient attention, must be the result of something within the control of the member.

The Committee also noted that the AO needs to establish all of the elements of the offence including that of intent, so that a *prima facie* case may be made out. The burden then shifts to the member or officer to make out a plausible case that failure to perform satisfactorily is not because of any fault or wrongdoing on his or her part. With regard to one of the allegations, in the Committee's view, although the AO had, at first glance, established that the Member's neglect was intentional and blameworthy, the Member had then shown that the neglect was not within his control. The Committee noted that the Member had longstanding problems managing his files, and that this had been treated in the past as a performance problem. Further, the Member had not

been receiving adequate supervision at the time of the alleged misconduct. Finally, there were an unusual number of personal stressors which exacerbated his existing performance problem. As for the other two allegations, the Committee found that the member had not neglected duties he knew he had and that there was no evidence that his inaction was intentional. The Committee recommended that the Board's findings on three of the four allegations be set aside, and recommended that a sanction less severe than dismissal be imposed. The Commissioner has not yet rendered a decision in this matter.

Procedural Issues

Issues related to process often raise questions of fairness and require that the Adjudication Board balance competing interests. This year, the Committee addressed a variety of procedural issues, including the one year time limitation for initiating a disciplinary hearing; the use of an Agreed Statement of Fact as a substitute for evidence under oath; how findings in criminal proceedings affect the outcome of a disciplinary hearing under Part IV on the same subject-matter; and adjournments.

a) The Interpretation of Section 43(8) of the Act

Section 43(8) of the *Act* states that disciplinary proceedings must be initiated within twelve months from the time the AO, the Commanding Officer of a division, learned of the alleged contravention of the *RCMP Code of Conduct* and the identity of the Member. Section 43(9) of the *Act* allows a certificate to be provided at the hearing which indicates the time an alleged contravention and the identity of the Member became known to the AO. The *Act* states that in the absence of evidence to the contrary, such a certificate is proof of the time the AO became aware.

In D-100, a Member allegedly conducted several unauthorized, non-duty related queries on the police information data systems and disclosed confidential information between October and December 2000. The allegations had been made in a public complaint received by the Force in May 2002. On May 24, 2002, the Officer in Charge of the Member's detachment ordered a *Code of Conduct* investigation and a public complaint investigation into the allegations. The s.43(9) certificate presented at the hearing indicated that the AO had been made aware of the contraventions and the identity of the Member on April 28, 2003. The AO initiated the disciplinary hearing on July 21, 2003.

The Board ordered that the allegations against the Member be quashed. In the Board's view, there was a duty on senior officers to inform the AO of the Member's internal investigation initiated in May 2002 within a reasonable period of time. It found that the time limit was to be interpreted as starting on the date that the AO *ought to have known* about the contravention and the identity of the Member.

The AO appealed the Board's finding on various grounds, including that of the Board's interpretation of the time limit amendment section 43(8). The Committee found that the Board had erred in its interpretation of s.43(8), and that the one year time limit starts to run on the date that the AO receives actual knowledge of the required information. Parliament could

have used wording to indicate that the time limit starts to run when the AO ought to have known of the required information. However, it did not do so.

The Committee found that evidence submitted by the MR about what senior officers knew prior to the certificate date did not prove that the AO was told about the matter prior to the date in the certificate. In addition, it could find nothing in the *Act, Regulations*, CSOs or RCMP policy to substantiate the Board's finding that senior officers had a duty to inform the AO of the alleged misconduct and identity of the Member at some point prior to July 21, 2002.

The Committee also disagreed with the Board's finding that the overriding purpose of s.43(8) is to provide for a timely process and avoid problems associated with delay. The Committee pointed out that since the Board had made its decision, the Federal Court of Appeal had examined the disciplinary time limitation in *Thériault v. Canada (Royal Canadian Mounted Police)*, [2006] F.C.J. No. 169, 2006 FCA 61. The Court found that timeliness was not the only focus. Parliament had written section 43(8) to balance the need for timeliness with the need to protect the public and the credibility of the institution.

The Committee recognized the Board's concern that the time limit could be extended by having senior officers choose when to inform the AO of the required information. In the Committee's view, any such inappropriate delay might well contribute to a finding of abuse of process. However, the question of whether an AO should have been advised sooner was not relevant to s. 43(8) time limit.

The Committee recommended that the appeal be allowed and that the matter be returned for adjudication. The Commissioner has not yet rendered a decision in the matter.

b) Agreed Statements of Fact

At the beginning of disciplinary proceedings, parties may introduce an Agreed Statement of Fact (ASF). An ASF is a document which sets out certain facts, and normally it allows the Board to consider those facts as proven without the requirement that they be established through witnesses or documentary evidence. In D-098, the Member admitted to one allegation, and an ASF containing witness statements was introduced. The Member argued that the statements noted in the ASF had been made on the dates specified, but did not admit the content of the statements. The Board nonetheless considered the content of the statements in reaching its decision, and concluded that they revealed aggravating factors justifying a more severe sanction. The Board ordered the Member to resign. The Member appealed. The Committee recommended that the appeal be allowed and that the allegations be dismissed because the AO failed to initiate the hearing within the time frame required. However, the Committee addressed the sanction appeal in the event that the Commissioner disagreed with its recommendation on the question of whether the time frame had been respected.

In considering the appeal on sanction, the Committee observed that it was unsure as to what the Member's representative was doing by agreeing to facts that

he believed the Board would not be bound to consider. The Appropriate Officer Representative had obviously signed the ASF believing that the Member was admitting to the truth of the witness statements as well as agreeing that they had been made. According to the Committee, given the position of the parties, the Board could have taken a more prudent approach and questioned whether there was actually agreement on what was included in the ASF. The Committee noted that the Act requires that, absent consent of the parties, the Board is to consider only oral testimony under oath or written evidence on affidavit. If there was no agreement, the Board could have rejected the ASF and required that the facts be proven.

The Committee concluded that the Board's reliance on the ASF in this case was one of the factors justifying its recommendation that a lesser sanction be considered. In his decision, the Commissioner did not speak to the issue of sanction. He followed the Committee's recommendation that the allegations be dismissed because of the AO's failure to initiate a hearing within the time frame required by the *RCMP Act*.

c) Effect of Prior Criminal Acquittals

In some disciplinary cases, there have been prior criminal proceedings coming out of the same incident. The question arises as to what impact the verdict in the criminal trial should have on the disciplinary hearing under Part IV of the *Act*.

In D-101, four allegations of disgraceful conduct were brought against a Member. The misconduct alleged involved both physical and verbal abuse of the Member's spouse. The hearing into the allegations was adjourned pending the conclusion of criminal proceedings relevant to three of the four allegations. Although the Member was convicted of the three charges initially, he was acquitted of the charges on appeal. The Board ruled that it could proceed with allegations against the Member even though a criminal court had entered acquittals on charges related to the same facts. After holding its hearing, the Board ordered the Member's dismissal.

One of the Member's arguments on appeal was that the Board had erred when it denied his application for a stay of proceedings based on the criminal acquittals. In reviewing the question, the Committee referred to the Supreme Court of Canada's decision in *Toronto (City) v. C.U.P.E., Local 79* [2003] 3 S.C.R. 77 (*CUPE*).

In *CUPE*, a criminal conviction had been entered against a recreation instructor for having abused a child. When the instructor was fired, he grieved his dismissal. The labour arbitrator who heard the evidence about the circumstances of the abuse reinstated the instructor. The Supreme Court held that it is improper for a decision-maker to attempt to impeach a judicial finding through relitigation in a different forum. However, the Supreme Court recognized that there were certain factors that would make it unfair to bind a second tribunal to judicial findings made by another tribunal, such as when fairness dictated that the original result should not be binding in the new context.

The Committee agreed that an acquittal at a criminal trial did not prevent the Adjudication Board from hearing evidence on the same issues because it was held to a lesser standard of proof. It referred to the reasoning of the Nova Scotia Court of Appeal in *Haché v. Lunenburg County District School Board* [2004] NSJ no. 120. Nonetheless, not all acquittals turned on the burden of proof and there therefore might be certain situations where relitigation of a criminal acquittal might be improper.

The Committee concluded that in order to determine whether it was improper to relitigate a criminal acquittal, a tribunal would have to answer the following questions:

- firstly, did the first tribunal deal with exactly the same issues?
- secondly, is there inconsistency or unfairness in the conclusion reached by the second tribunal when compared to the conclusion reached by the first tribunal? and,
- thirdly, if there is inconsistency or apparent unfairness, then do any of the *CUPE* factors apply to allow the two conclusions to stand?

The Committee found that it was not in a position to determine whether the finding of the Board had been proper in this case, given the lack of information on the file. There was no description of the particulars of the criminal accusations, and the Committee could therefore not confirm that they were addressing the identical elements raised in the allegations. Further, because the file did not indicate the reasons for the acquittals, the Committee could not determine if there was any inconsistency or unfairness. Finally, even assuming that there was inconsistency between the criminal court's findings and the Board's findings, there was no information as to whether any of the other *CUPE* factors were present. In recommending to the Commissioner that the Member's appeal be allowed and that a newly constituted Board consider the matter, the Committee emphasized that the new Board should ensure that it has all of the information necessary in order to carry out the analysis required by the Supreme Court of Canada as set out in *CUPE*. The Commissioner has not yet rendered a decision in this matter.

d) Requests for Adjournment

Parties routinely request adjournments for a variety of reasons. In D-101, discussed previously, the Board had initially adjourned the hearing on the basis that the Appellant was medically unfit to attend or to instruct counsel. Shortly before the hearing was to resume, counsel for the Appellant advised the Board that he was seeking further appointments with his psychiatrist, and that these would probably not be scheduled until after the new hearing date. Counsel advised he was unable to obtain instructions and that he could not see the hearing proceeding as scheduled. The Appellant's counsel also provided medical reports to the Board which indicated that the Appellant was still ill and in need of psychotherapy. The Respondent opposed the adjournment, noting that the medical reports were outdated, and did not prove that the Appellant was not fit to participate in the hearing. Without

holding a hearing into the matter, the Board denied the request for an adjournment, and held a full hearing into the allegations and appropriate sanction without the Member or his counsel being in attendance. The Board ordered that the Member be dismissed. The Board's refusal to adjourn was one of the grounds of appeal.

The Committee noted that the Board, in refusing to adjourn, had relied on unsworn documents that spoke of facts upon which the parties did not agree. Yet the *Act* and relevant Regulations required evidence before the Board to be given under oath or affirmation. Since the parties did not agree to an adjournment, and because there were facts in dispute, the Board should have reconvened the hearing to receive sworn testimony and oral arguments.

The Committee found that because the Board did not handle the adjournment request properly, the Appellant was unfairly denied the opportunity to be present and make his defence. It recommended that the Commissioner allow the appeal and refer the matter back to a differently constituted Board. The Commissioner has yet to issue a decision in this matter.

Parity of Sanction

Parity of sanction is an important principle in the area of disciplinary law. It reflects a concern for fairness and consistency and means that cases which resemble one another should be treated in a similar fashion in the area of sanction. This does not mean that Adjudication Boards are bound to apply identical sanctions from previous disciplinary decisions, but it does mean that they should consider sanctions imposed in similar cases.

This year, the Committee was called upon to examine whether Adjudication Boards had respected this principle in three cases. In D-098, D-099 and D-102, Boards had ordered Members to resign after finding that the allegations against them had been established. In those three cases, the Members argued on appeal that the Boards had not properly considered the principle of parity of sanction.

In D-098, the Member admitted to an allegation of having engaged in inappropriate conduct with a citizen complainant in a criminal matter he was investigating. The conduct included sexual relations while the Member was on duty, as well as holding hands with the citizen while she attended court. The Board ordered that the Member resign from the Force.

The Committee observed that the Board had simply stated that the cases submitted by the AO were more serious than the Appellant's case, and that the cases submitted by the Appellant were not sufficiently similar. In the Committee's view, it would have been helpful for the Board to elaborate further on its analysis of the cases submitted by the parties. Several of the cases presented in support of the Member revealed conduct or a context which was more serious than the Member's circumstances, yet the members had been allowed to stay with the Force. The Committee recommended that this was one of the factors which justified considering whether a less onerous sanction than dismissal should have been ordered. As previously noted, the Commissioner decided this matter on another ground.

In D-099, an Adjudication Board found four allegations of knowingly neglecting duties, two allegations of knowingly making a false statement to a superior, and one allegation of disgraceful conduct to have been established against the Member. The Committee noted that in many cases raised by the Member, a sanction less than dismissal was imposed for similar misconduct. Although some of these cases were distinguishable from the Member's case because of important mitigating factors, there were nonetheless several previous decisions that supported the Member's argument that termination was too severe a sanction in his case. As in D-098, this was one of the factors which led the Committee to recommend that a sanction short of termination be imposed on appeal. The Commissioner's decision in this matter is pending.

Conversely, the Committee agreed with the Board's approach to parity of sanction in D-102, a case where the Member had forged two prescriptions and admitted to one allegation of disgraceful conduct. The Committee stated that it would have been useful for the Board to address the cases raised by the Member in more depth, but noted that the Board had discussed some of them. Those not discussed by the Board did not reveal a pattern of discipline applicable to the Member's situation. Finally, some of the cases raised by the Member could be distinguished because the facts of the misconduct were different, or the personal circumstances of the Members were not the same. The Committee recommended to the Commissioner that the appeal be denied. The Commissioner has not rendered a decision in this matter.

PART IV – FEDERAL COURT CASES

A. Cases before the Federal Court

Decision pending

D-095 and D-096

These two members faced allegations of disgraceful conduct. More specifically, the allegations involved inappropriate use of the RCMP's Mobile Work Stations (MWS). At the hearing, both Appellants admitted that while on duty, they had sent numerous communications over the MWS that were derogatory towards colleagues and members of the public.

At the sanction hearing, evidence of previous discipline against both Appellants was presented. It was established that the Officer in Charge of the Appellants testified that he had lost confidence in both Appellants. Counsel for the Appellants suggested that the OIC's personal dislike of one of the Appellants may have influenced his decision to proceed formally with discipline.

The reports prepared by a psychologist were filed as evidence. They concluded that the offensive communications were out of character and were the result of each Appellant trying to distinguish himself. The psychologist found that the careers of both Appellants were salvageable, and he encouraged the Board to apply corrective/remedial measures rather than dismissal.

The Adjudication Board concluded that an order to resign was the appropriate sanction, given that the Appellants had been disciplined previously for similar conduct. The messages were vulgar, racist, and sexist, and they disregarded the RCMP Core Values.

On appeal, the Committee found that the Appellants' claim of institutional bias could not succeed, as a reasonable person fully informed would not find an appearance of bias based solely on the fact that the Adjudication Board members were of a lower rank in the organization than the appropriate officer.

The Committee confirmed that there was a breach of procedural fairness in having the Respondent's representative include in his closing submissions facts that had not been introduced as evidence through witnesses. However, the Committee felt that the breach could not have affected the outcome of the case.

The Committee also found that the Board had made no errors in its findings of fact, and properly assessed the relevant factors. It was not obligated to follow the expert opinion, although it would have been helpful if it had given more explanation for its conclusions in this regard. Given the mitigating and aggravating factors identified, it was appropriate for the Board to order the Appellants to resign.

The Commissioner followed the Committee's recommendations and confirmed the decision of the Adjudication Board.

The Appellants filed an application for judicial review before the Federal Court. At year end, this matter had not yet been resolved.

Decision rendered

Sinclair v. Canada (Attorney General)
2006 FC 528

An appeal was filed against the decision of a Discharge and Demotion Board

(the Board) which directed that the Appellant be discharged from the Force because he repeatedly failed to meet the requirements of his position. An initial performance appraisal in 1993 indicated that the Appellant was having some difficulty adjusting to the workload. At the time, the Appellant's wife was suffering from chronic depression, and she committed suicide in January 1994. The Appellant's performance appraisals in the years following these events stated that the Appellant was not meeting the expectations of his supervisors and that he would have to make major improvements. Despite extensive direction provided to the Appellant, the supervisor remained dissatisfied with his performance. In June 1999, he was removed from duty, and discharge proceedings were initiated the following year.

The Appellant's evidence before the Board included the testimony of two psychologists who attributed his performance shortcomings to a mild depression that sapped his energy and made it difficult for him to concentrate on his tasks. The psychologists concluded that treatment could enable the Appellant to once again meet performance expectations but indicated that he should also be transferred to another detachment. The Board concluded that the supervisor had made a sincere and ongoing effort to assist the Appellant in improving his performance. It stated that a transfer was not a viable option because the nature of the Appellant's shortcomings was such that he would not be able to meet performance expectations at other detachments. The Board acknowledged that the Appellant had been suffering from depression but determined that this condition was not a major factor in explaining why his performance was unsatisfactory.

The Committee found that the psychological evidence only established that depression was a factor influencing the Appellant's performance, but not that treatment for the condition was likely to significantly improve his ability to competently complete tasks assigned to him. Since the evidence established that the same performance shortcomings as those noted by the Appellant's most recent supervisor had been observed by previous supervisors, it was not unreasonable for the Board to find that the Appellant's depression was not the principal cause of his performance shortcomings. The evidence also supported the Board's finding that the Appellant received reasonable assistance from his supervisor. The Commissioner agreed with the findings and recommendation of the Committee and dismissed the appeal.

Further to a new review of the case under subsection 45.26(7) of the *Act*, the Commissioner confirmed the decision to dismiss the appeal.

On April 27, 2006, the Federal Court dismissed the application for judicial review. The Court found that the standard of review in this case was patent unreasonableness.

In its review of the case, the Court found that the review of the Commissioner's two decisions showed that the Commissioner had considered the expert evidence on the Appellant's state of depression and the untimely death of his spouse. However, the Court found that the Appellant's mental health issues could not fully explain the numerous shortcomings in his performance. The Court stated that it was not

its role to re-weigh the evidence before the Commissioner and that, because it could not be said that his decision was patently unreasonable, it should be upheld.

The Court disagreed with the Applicant's argument that the Commissioner should have found that the Applicant's depression constituted a disability under section 7 of the *Canadian Human Rights Act* (*CHRA*). First, he did not raise these arguments before either the Board or the Commissioner, and at no time did he allege that his depression was a disability within the scope of the *CHRA*.

On the other hand, the Applicant's inadequate performance had its grounding in his early performance evaluations, well before his depression. The Appellant's mental health could not account for his shortcomings. Consequently, the Court confirmed the Commissioner's decision.

B. Cases before the Federal Court of Appeal

Decision pending

Gill v. Canada (Attorney General)
2006 FC 1106

Constable Gill was alleged to have engaged in four instances of disgraceful conduct in his relations with the public. The member admitted to the first allegation, but denied any misconduct in the three other cases.

The second allegation was that he had mistreated a motorist whom he had arrested for failing to heed his instruction to stop his vehicle. The motorist claimed that the Appellant made demeaning remarks to him and that he choked him.

The Board concluded that the motorist's evidence was not credible. Nevertheless, it found that the Appellant's conduct to be disgraceful because he damaged the motorist's vehicle by hitting it with a flashlight and used excessive force in making the arrest.

The third allegation was that the Appellant made an unwarranted arrest of an individual who came up to him in a bar and uttered a derogatory remark. The Appellant claimed that the arrest was warranted because the individual had pushed him.

The Adjudication Board rejected the Appellant's evidence of being pushed, because an RCMP member who was standing nearby indicated that he did not see Constable Gill being pushed, as other patrons of the bar also testified.

The fourth allegation was that the Appellant punched a prisoner in the face while he was handcuffed and seated in the back seat of a police vehicle. The Appellant acknowledged that he had punched the prisoner in the face prior to placing him in the vehicle, as a means of gaining control over him after the prisoner had kicked him twice.

The Board accepted the Appellant's version of events but found that the allegation had been established anyway. The Adjudication Committee considered that the prisoner's actions could not have represented a threat to the safety of Constable Gill since he was handcuffed at the time that the Appellant punched him.

For the first and second allegations, the Board imposed on the member forfeiture of pay and a reprimand for each incident. It ordered his dismissal as the sanction for the third allegation, and it also imposed an order to resign from the RCMP within 14 days, failing which he would be dismissed, in respect of the fourth allegation.

The member appealed, and the case was referred back to the Committee which recommended that the appeal by allowed, in part.

Regarding the second and fourth allegations, the Committee found that the Adjudication Board had exceeded its jurisdiction by relying on facts that were neither described in the statements to the allegations nor relied upon by the Appropriate Officer.

As for the third allegation, the Committee found that the Adjudication Board's finding of disgraceful conduct was not patently unreasonable. However, the Committee found that the sanction imposed for that allegation was too harsh, given that the Board's findings on only two of the four allegations could be supported.

The Commissioner disagreed with the Committee, confirmed the Adjudication Board's decision, and dismissed the appeal. He found that the particulars complied with the requirements set out in the *Act*, because they indicated the place and time concerning each allegation, and were sufficiently detailed to allow the member to understand the allegations made against him and to prepare a proper defence.

The Commissioner also disagreed with the sanction recommended by the Committee. In his view, the member's conduct showed a pattern of anger and violence, which is unacceptable and is a clear violation of the *RCMP Code of Conduct* and Core Values. The Commissioner upheld the sanctions imposed by the Adjudication Board.

The member appealed the decision before the Federal Court of Canada. On September 18, 2006, the Court rendered its decision.

The Federal Court found that the issue of whether the applicant had adequate notice of the allegations against him was a matter of procedural fairness and that if he had been denied this fairness, the Commissioner's decision must be set aside.

While the Court found that details provided to support an allegation of professional misconduct did not need to have the same degree of precision required in criminal prosecutions, the particulars must still meet a minimum standard. Specifically, the particulars must allege conduct which, if proven, could amount to professional misconduct. Further, they must provide sufficient detail to give the person charged both reasonable notice of the allegations and the ability to prepare a full defence.

With respect to the second allegation, the Court agreed with the Committee and found that the Board had relied on a different finding of misconduct from that alleged in the particulars. By making findings of disgraceful conduct based on other facts, the Board did not give the Member adequate notice of the allegations of misconduct.

The Court found that the Member was unable to prepare a proper defence to the allegations that he inappropriately struck

the person's car and used excessive force in arresting the person on the basis of the details supplied in the particulars. As a result, the Court found that the Commissioner had made an error in upholding the Board's decision on the second allegation.

With respect to the fourth allegation, the Court noted that the particulars set out a specific set of facts: that the Member was accused of assaulting a prisoner while the prisoner was secured in the rear seat of the police vehicle. The Court agreed with the Committee that it was important for the Member to know whether his conduct outside the vehicle was potentially the basis for the finding of disgraceful conduct. Had he known this, the Member may, for example, have called evidence on the appropriate use of force to subdue the person who is handcuffed, but still violent. As a result, the Court determined that the Commissioner also made an error when he upheld the Board's finding on the fourth allegation.

The Court then turned to the third allegation. The Court found that the impugned decision turned on whether there were reasonable grounds for the Member to arrest the person in question. The Court held that the Appropriate Officer must demonstrate on the basis of clear and compelling evidence that the Member conducted the arrest without lawful grounds. The Member testified that he had been assaulted by a bar patron. The bar patron denied this, and another RCMP member who was there also did not see the incident. However, the second member testified that he was ahead of Constable Gill and looking forward. Two other witnesses testified, and neither saw Constable Gill be pushed, but both had been drinking and their testimony was not conclusive.

The Board, the Committee and the Commissioner rejected the evidence of the Member that he was pushed. However, the Court, after reviewing the evidence, disagreed. Therefore, the Court concluded that the Commissioner's decision on the third allegation was patently unreasonable and ordered it set aside.

In light of these findings, the sanctions imposed by the Commissioner were also set aside. The application for judicial review was allowed, the decision of the Commissioner was set aside and the matter was referred back to the Commissioner for redetermination.

In October 2006, the Crown filed a Notice of Appeal in the Federal Court of Appeal asking that the decision of the Federal Court be set aside and the decision of the Commissioner be reinstated.

At year end, a decision had not yet been rendered.

Decision rendered

Girouard v. Canada (Attorney General)
2006 FCA 209

In 1994, the RCMP created a classification committee to determine whether the merger of administrative services at "A" Division with those at headquarters would have an impact on the position classification of the administrative services officer. The classification committee concluded that the classification was not

affected, and this decision was grieved by the incumbent. The Committee recommended that the grievance be allowed, but the Commissioner did not accept this recommendation. The decision was nevertheless overturned by the Federal Court, which ordered a new evaluation. This evaluation was conducted by a new classification committee, which arrived at the same conclusions as the first committee.

Again, the Committee recommended that the grievance be allowed; it acknowledged the expertise of the classification committee, but maintained that it should compare the position level with that of other similar positions within the organization. The Commissioner disagreed with the Committee's recommendation and dismissed the grievance.

The Federal Court found that the role of the Commissioner as the Level II authority was limited in cases of classification grievances to "an error of fact or process." In this case, the fact that the classification committee should have extended its analysis does not compromise the entire review.

The Federal Court of Appeal dismissed the application on June 8, 2006. The Federal Court found that the Appellant had been treated fairly as far as process was concerned and that he had not sustained any harm because his grievance was dealt with at Level II rather than Level I. The Court pointed out that he had succeeded in having the Commissioner reconsider his initial decision, which took into consideration the Appellant's allegations about the errors of fact and process invoked. In all fairness, a new review was also requested and obtained from the second classification committee, which specifically examined some of the Appellant's allegations. The Court concluded that the Commissioner had rendered three decisions, each one dismissing the Appellant's grievance and giving reasons for doing so. These three decisions and the reasons answered the Appellant's allegations. Therefore, the judge was correct in dismissing the Appellant's application for judicial review.

C. Cases before the Supreme Court of Canada

Read v. Canada (Attorney General)
2006 FCA 283

Corporal Read believed that irregularities had been committed by Immigration section officials on assignment in Hong Kong, in collusion with some RCMP members, and he shared his suspicions with the media. According to Corporal Read, the scheme had allowed some criminals to enter Canada.

The member was accused of inappropriate conduct and of disobeying a lawful order. The Adjudication Committee found that Corporal Read's behaviour had discredited the RCMP, and he was ordered to resign within 14 days. The member appealed to the Commissioner, and the case was referred back to the Committee.

The member disagreed with the Adjudication Board's findings in which members of the RCMP were held to a higher standard of loyalty than public servants and recommended that the Commissioner allow the appeal. However, the Commissioner agreed with the

Adjudication Committee's findings. The Commissioner stated that the matter-of-public-concern standard used by the Committee with regard to the whistle-blower defence was much too broad and the information disclosed in this case was not of legitimate public concern. He upheld the sanction imposed by the Adjudication Committee.

On June 2, 2005, the Federal Court ruled that Corporal Read's criticisms related directly to his duties as a member of the RCMP. It found that even though criminals may have entered Canada on false documents, the risk was too low to substantiate an exception to the duty of loyalty based on public health or safety. The Court ruled that there needed to be some rational basis for the allegations. Moreover, even if the statement had been justified, Corporal Read should not have expressed himself publicly, as he had not exhausted all avenues of internal recourse available to him. The Court ruled that the whistle-blower defence was not justified, and that consequently, it was not necessary to consider whether peace officers and public servants have different duties of loyalty.

Corporal Read filed an appeal in the Federal Court of Appeal, which dismissed his application on August 22, 2006. The Federal Court of Appeal agreed with the standard of review applied by the trial judge, which was the correctness or reasonableness of the decision.

The appeal judge stated that freedom of expression, as guaranteed by the Canadian *Charter of Rights and Freedoms* was not an absolute value and that it had to be balanced against other competing values. Although members of the RCMP are held to a greater degree of loyalty, the appeal judge would not confirm that this degree was higher than that of other public servants. The appeal judge stated that the degree of loyalty should be determined relative to the position and visibility of the civil servant involved.

The appeal judge found that Corporal Read acted in an irresponsible manner and clearly breached his duty of loyalty to his employer. Moreover, the appeal judge found that the sanction imposed, i.e. dismissal, was warranted.

Corporal Read has now brought a motion in the Supreme Court. At year end, a decision had not yet been rendered.

D. Informal Settlement

Stenhouse v. Canada (Attorney General)
2004 FC 375

In this case, the Federal Court referred the issue of sanction back to the Committee for a hearing to consider evidence that had not been disclosed. The Chair of the Committee made a recommendation to the parties concerning the preliminary issues, relating to the extent of the testimonies to be heard and the order in which witnesses would appear.

This case was settled informally. Consequently, the Committee was not required to hear the case again.

PART V – 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. Upon Philippe Rabot's departure in April 2005, Catherine Ebbs assumed the role of Acting Chair of the Committee. A lawyer of the Bar of Saskatchewan, Catherine Ebbs spent sixteen years as Board member for the National Parole Board, the last ten as Vice-Chair in charge of the Appeal Division of the Board. Ms Ebbs joined the Committee in 2003 and prior to becoming Acting Chair, served as Legal Counsel and Executive Director and Senior Counsel. Ms Ebbs has been appointed full-time Chair on November 1, 2005 for a three year term.

Appendix 2: The Committee and its Staff in 2006-2007

Catherine Ebbs, Chair
Virginia Adamson, Executive Director and Senior Counsel (Acting)
Lorraine Grandmaitre, Manager, Administrative Services and Systems
Martin Griffin, Counsel
Monica Phillips, Counsel
Janet Reid, Counsel
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