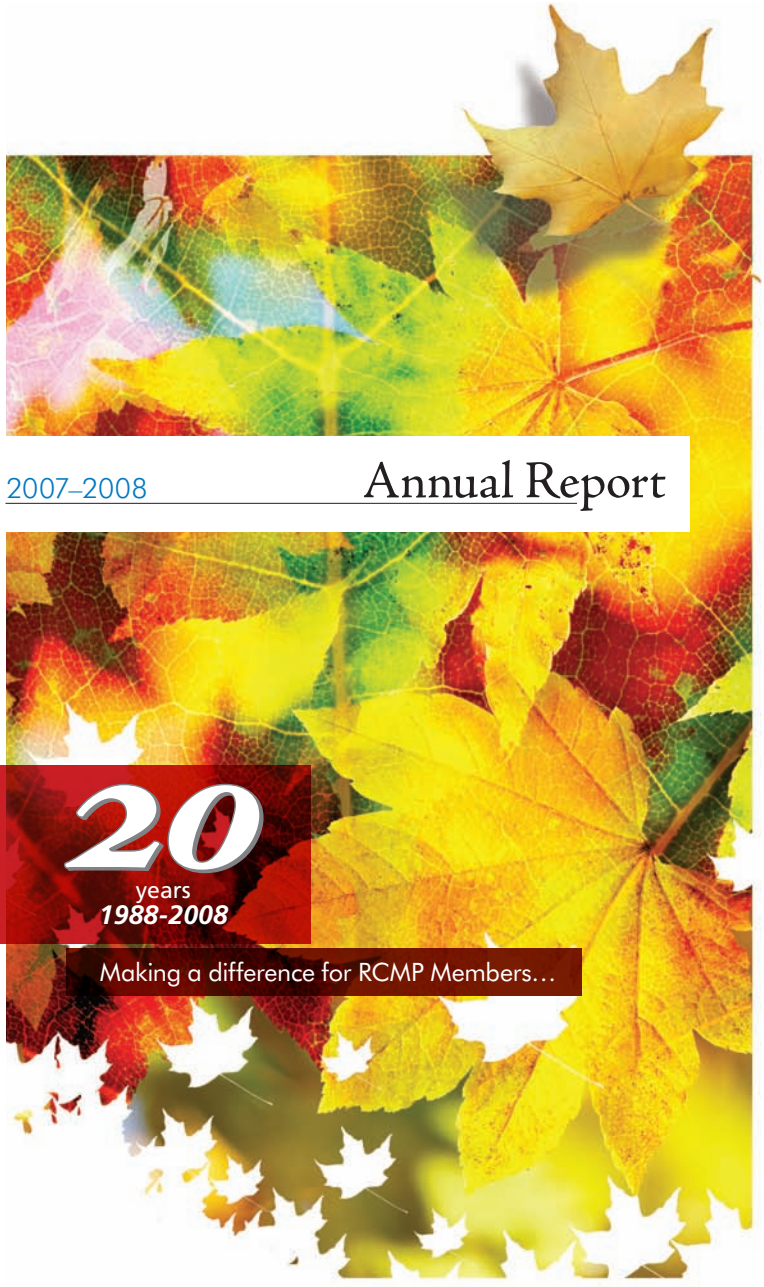
Royal Canadian Mounted Police
External Review Committee



Canada

Cat. Number PS20-2007
ISBN 978-0-662-69795-4

Royal Canadian Mounted Police
External Review Committee

Comité externe d'examen
de la Gendarmerie royale du Canada

June 20, 2008

The Honourable Stockwell Day, P.C., M.P.
Minister of Public Safety
269 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 2007–08, so that it may be tabled in the House of Commons and in the Senate.

Yours very truly,

Catherine Ebbs
Chair

P.O. Box 1159, Station 'B'
Ottawa, Ontario K1P 5R2
Tel.: (613) 998-2134
Fax: (613) 990-8969

Casier postal 1159, succursale 'B'
Ottawa (Ontario) K1P 5R2
Tél. : (613) 998-2134
Téléc. : (613) 990-8969

Table of Contents

Part I
Message from the Chair

This last year was one of important accomplishments and dialogues for the RCMP External Review Committee ("Committee"). The Committee issued recommendations in a number of difficult cases. It also took advantage of various opportunities for outreach, which is a critical component of its work. The Committee addressed larger strategic issues related to the proposals for change to the labour relations system in the RCMP, including the *Brown Task Force on Governance and Cultural Change in the RCMP* ("*Brown Task Force*").

The 2007–08 year represents an important milestone for the Committee. In 1988, the *RCMP Act* ("*Act*") was made law in Canada. At the time, it represented a major change in the approach to labour relations for the RCMP. The new legislation moved away from a punitive approach to discipline, and placed greater emphasis on the principle of rehabilitation. The *Act* also brought more openness and transparency to the grievance, discipline, and discharge and demotion processes through the introduction of impartial and independent civilian review of many RCMP related employment issues through an external labour relations tribunal.

The Committee was established under Part II of the *Act*, with rights of review and recommendation making power on all matters brought before it—all discipline, discharge and demotion matters concerning RCMP members, and certain types of grievances that were set out in the *RCMP Regulations* ("*Regulations*"). The final decision on all of these matters rests with the Commissioner of the RCMP. In each case, the law requires that the Commissioner give reasons for not following the Committee recommendation.

In 1987–1988, the Committee began to set up shop, appointing its first Chair and hiring its staff. Twenty years later, it continues to carry out its mandate. With this twentieth anniversary in mind, it is important to take stock of all the work that has been done, and to celebrate the accomplishments of the Committee over the years. For this reason, this year's Annual Report will differ from those we have issued previously. It will not only review the last year, as is expected of an Annual Report, but it will also revisit how the Committee has made a difference in the lives of members of the RCMP over two decades. As well, it contains a discussion on possible areas of reform and future directions of external review.

In closing, there are a number of people that I would like to acknowledge. There have been three previous Chairs before me. Judge René Marin was the founding Chair. Jennifer Lynch performed the

duties and functions of the Vice-Chair and Acting Chair for approximately six years. Likewise, Philippe Rabot held the position of Acting Chair and Chair from 1998 to 2005. They each demonstrated a strong commitment to the mandate of the Committee, and made significant contributions to the Committee's work. They have my gratitude for laying out the groundwork for the impartial and independent review function of the Committee.

I would be highly remiss if I did not also acknowledge the dedication and contributions of the staff of the Committee, past and present. Without their commitment and focus, the work of the Committee could not be accomplished. I am indebted to them for their hard work, sound guidance, sage advice and day-to-day support.

I hope you enjoy reading about the Committee's accomplishments in carrying out an unusual and important mandate.

Catherine Ebbs
Chair

Part II
Overview

A: Mandate

Members of the RCMP are subject to different systems for grievances, discipline, and discharge and demotion than members of the broader public service. Parts III, IV and V of the *Act* detail each respective system. Part II establishes the Committee, which is an integral part of this unique and specialized labour relations regime.

The internal RCMP system makes the initial decisions in labour relations matters affecting members. In certain circumstances, initial decisions are subject to review by the Committee. The Chair's findings and recommendations are issued to the parties and to 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.

While the three categories of labour relations matters can be very different, the Committee's approach remains consistent. It undertakes a robust and detailed adjudicative review. The Committee considers 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 also has authority to hold a hearing if it is considered necessary. However, such hearings are infrequent.

Cases referred to the Committee often present complicated or unresolved policy issues, challenging legal questions, and complex fact situations. The Committee's objective in reviewing these cases 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 stakeholders.

Grievances constitute the largest component of the Committee's work, making up some 80% of the referrals received in 2007–08. Yet discipline and discharge reviews remain a vital part of the Committee's activities. Appendix A contains information about these three categories of reviews, including a table which provides detailed information on the Committee's mandate in all three areas, as well as key information related to process and outcomes.

In addition to case reviews, the Committee engages in a variety of other activities that support and enhance its core mandate. Outreach, in a variety of forms, continues to be a major priority for the Committee. The Committee publishes a quarterly *Communiqué*, answers both formal and informal requests for information, and provides training to various labour relations sections within the RCMP. Further details about the Committee's activities in this area in 2007-08 appear later in this section.

The Committee also continues to deliver on reporting and corporate requirements stemming from the *Public Service Modernization Act* and other government initiatives. The Committee has a permanent staff of only five, with a temporary staff of three. As a result, everyone in the Com-

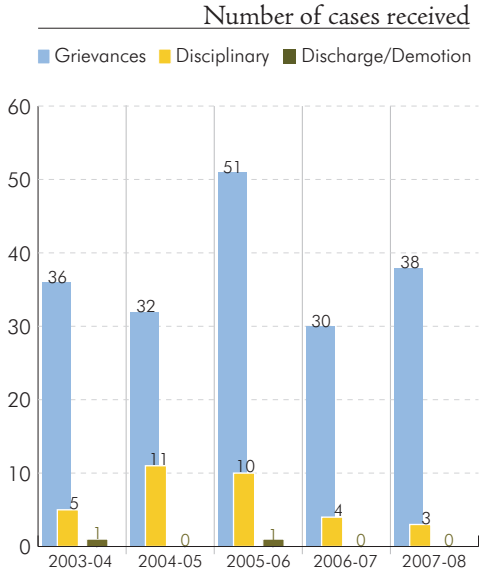
mittee has committed significant time and resources to meeting government-wide management priorities. Temporary funding has been of assistance in this regard, but more permanent, stable solutions are required.

Finally, the Committee has been an engaged participant in the review of the current RCMP governance structure by providing written submissions and a presentation to the *Brown Task Force*. The Committee is very supportive of the *Brown Task Force*'s broad objective to enhance the accountability and transparency of RCMP labour relations processes. It is committed to supporting the Minister as he prepares his response and formulates a plan of action. Section E contains more information about the Committee's involvement with the *Brown Task Force* and the Committee's vision in relation to enhancing the RCMP labour relations systems.

B: Year in Review 2007–08

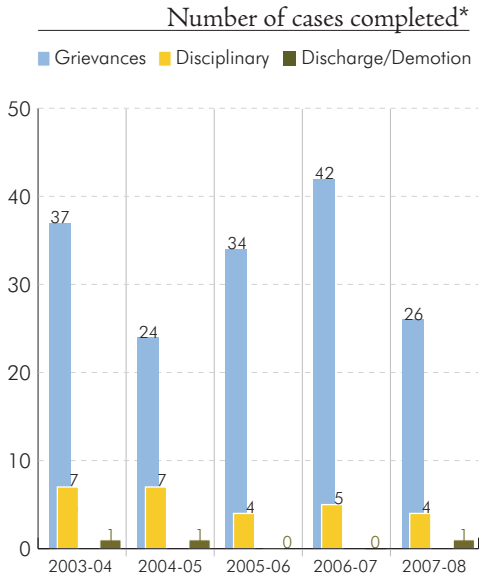
i. Referrals

There were more cases referred to the Committee in this fiscal year than in the prior fiscal year. A total of 38 grievances were referred to the Committee, compared to 30 in the previous year and 51 in 2005-06. Three disciplinary appeals were referred to the Committee, which is a decrease from the number of disciplinary cases referred to it in prior years (four in the previous year; 10 in 2005–06). No discharge and demotion appeals were referred to the Committee this year.



ii. Recommendations Issued

The number of cases that the Committee completes from year to year may vary depending on the complexity of the issues raised. The Committee neither has control over, nor advance notice of, the number or complexity of the files that are referred to it in any given year. It therefore routinely deals with, and must respond to, significant fluctuations in workload.



* In 2007-08, 31 cases were reviewed, but 28 recommendations were issued.
In 2006-07, 42 cases were reviewed, but 40 recommendations were issued.
In 2005-06, 34 cases were reviewed, but 30 recommendations were issued.

There was a decrease in the number of recommendations issued in 2007–08. The Committee reviewed a total of 31 cases this year. In the area of grievances, 26 grievances were reviewed and 24 recommendations were issued. The Committee issued 3 recommendations on disciplinary appeals. One recommendation in the area of discharge and demotion was issued.

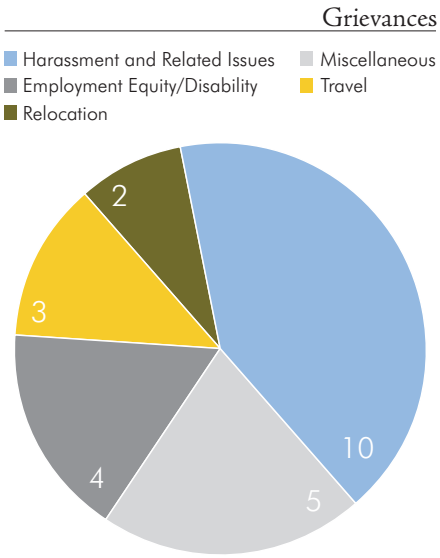
There are several reasons why fewer findings and recommendations were issued this year. As has been noted, it is difficult to predict the number and complexity of cases that will be seen by the Committee in any given year. The Committee also had some unusually difficult cases before it

in this fiscal year that required more time than usual to review. One pertained to harassment. Another involved a lengthy discharge and demotion appeal. The Committee also dedicated significant time and resources to the strategic issues raised by the *Brown Task Force*, and matters with the RCMP generally.

iii. Grievances

The Committee continued to observe a large number of Level II grievances in which Level I Adjudicators deny cases on the bases of preliminary matters such as time limits or standing. Similar to last year, the Committee frequently recommended a reversal of these procedural Level I findings. The Committee also expressed concern in some cases about the manner in which the Force applied harassment policy. As noted in last year's Annual Report, given that there is a time gap before the Committee reviews grievances at Level II, these issues may or may not reflect the current practice within the RCMP.

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



iv. Disciplinary Appeals

This year, the Committee reviewed three disciplinary appeals. One was initiated by a member and two involved an appeal by Commanding Officers ("CO"). One of the CO appeals also involved a cross-appeal by a member. Only one appeal dealt with a sanction consisting of an order to resign within 14 days, failing which the member would be dismissed.

v. Discharge and Demotion Cases

The Committee issued findings and recommendations in one discharge and demotion case in 2007-08, only the fifth in its history. This case is discussed in detail below.

vi. Outreach in Detail

This year, the Committee continued participating in ongoing outreach activities.

a. Quarterly Publication

The Committee publishes a quarterly publication, the *Communiqué*. It contains articles of interest, summaries of all the Committee's Findings and Recommendations, summaries of all of the Commissioner's decisions, as well as summaries of relevant court cases. An article that was written by one of the Committee's lawyers attracted particular attention this year. It is entitled *What Makes a Good Grievance?* It provided practical knowledge and wisdom concerning what is needed, both in terms of procedure and substance, to properly address common grievance issues.

b. Website

The Committee maintains a Website (www.erc-cee.gc.ca) which includes access to all previous editions of the *Communiqué*, a searchable database of summaries of the Committee's findings and recommendations, copies of all of the Committee's discussion papers as well as specialized reports, such as the Committee's submissions to the *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* ("*Arar Commission*") and the *Brown Task Force*. The Website had over 375,000 page views for the year.

c. 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 time-consuming. This year, the Committee received 96 requests for information. The average response time was 4 days.

d. Ongoing Training and Capacity Building

The Committee engaged in a variety of training, education and other public events in 2007–08. For example:

- the Chair of the Committee spoke at the Pacific Region, Staff Relations Representative (SRR), Sub-Representative conference;
- the Chair of the Committee and the Committee's Executive Director appeared before the *Brown Task Force*;
- the Chair of the Committee appeared before the House of Commons Standing Committee on Public Accounts hearing in relation to its study of the Auditor General's November 2006 audit of Pension and Insurance Administration in the RCMP;
- the Chair and Committee staff attended the annual meeting of the newly elected SRRs;
- Committee staff visited the Atlantic Regional Office for the Coordination of Grievances (OCG);
- the Chair and Committee staff spoke to the Level I Adjudicators; and,
- staff participated in three detachment visits, including two ride-along opportunities.

e. Strategic Issues

As noted in the Chair's message above, the Committee dedicated significant time to its vision of the key components and structure of an enhanced external labour relations review body for members of the RCMP. It met with the *Brown Task Force* and appeared before the Public Accounts Committee of Parliament. The Committee's presentation to the *Brown Task Force*, and the statistics it provided at that body's request, are on the Committee Website at www.erc-cee.gc.ca.

f. Corporate Activities

Historically, small agencies such as the Committee have been formed with operational issues in mind. For the Committee, this means that when it was designed and originally resourced, the focus was on the case reviews, not administrative and corporate functions. However, irrespective of size, the Committee must meet all government-wide corporate requirements. With a clear need to address growing demands for transparency and accountability, the Committee has made every effort to ensure that it has built corporate and policy frameworks, particularly in the human resources area. For example, the Committee continued its development of *Public Service Modernization Act* implementation. It also followed up on the Management Accountability Framework feedback it received in the last fiscal year, and developed additional tools for its Risk Management Framework in consultation with all staff. Through a number of common staffing circumstances, the Committee was also able to engage in a succession planning exercise.

Using its regular staff meetings and special training sessions as the key springboard for communication of corporate matters, the Committee provided staff with presentations or learning sessions on important areas including: the *Federal Accountability Act*, informal conflict management systems, the *Public Service Modernization Act*, political activities, official languages, the *Public Service Disclosure Protection Act*, access to information requests and privacy, and emergency preparedness.

The Committee also continued its contributions to the Canada School of Public Service's facilitated Action Research Group on the Burden of Reporting on Small Agencies.

Part III
20 Years of
Making a Difference in the Lives of RCMP Members

A: Introduction, Statistical Overview & Impact Outside the Cases

In 1987, when the *Act* was passed, the notion of an external review body for labour relations issues was a step forward in the approach to employment issues within the RCMP. Through this new legislation, the Committee, as the external and arms-length arbiter, was enabled to provide recommendations to the Commissioner. Moreover, the Commissioner was required by law to provide reasons in the event that he or she chose not to follow the recommendation.

There are many ways to evaluate the impact of the Committee's work. For example, the Committee has always ensured that it issues impartial, independent findings and recommendations that are based on sound principles of law. At its core, the very existence of an outside review tribunal also provides for independent adjudication, supports transparency and ensures accountability.

In much the same way, the very creation, successful implementation and continuation of the Committee, as a quasi-judicial mechanism to review differences between a member and the RCMP in the area of labour relations, has represented progress in that context.

The Committee's findings and recommendations have provided clarity and guidance in a number of areas with regard to how the *Act*, *Regulations* and policies should be interpreted. In the realm of grievance adjudication, there was the need, for example, to clarify numerous procedural matters, such as standing and time limits.

The Committee has also frequently raised concerns about procedural fairness in labour relations processes. Its findings and recommendations have helped guide the internal RCMP grievance system's re-calibration of what constitutes acceptable limits in a number of areas. In one notable case, for example, on the subject of irregular appointment, the Committee ruled on the need to allow the member to be heard, where there were profound questions as to credibility (G-272). In other cases, many of which are discussed below, the Committee has addressed serious concerns regarding the manner in which harassment investigations have been carried out.

The Committee has also informed the RCMP's policy-development process by ensuring that issues such as the interpretation of the duty to accommodate are in alignment with rulings of the Supreme Court of Canada ("SCC"). This, in turn, led to policy changes within the RCMP as to the principles that were to be applied in determining the duty to accommodate. The Committee has also dealt with several challenging human rights issues. It has mapped out concerns about the manner in which the RCMP administers relocation and integrated relocation policy, and more recently it has highlighted the lack of clarity in travel policies.

In the area of discipline, the Committee has provided numerous findings and recommendations on the issue of the timely initiation of a disciplinary hearing. It has also raised concerns about particulars in Notices of Disciplinary Hearing and the need to ensure that they provide adequate information to allow members to know the cases to be met and argued. It has offered many findings and recom-

mendations that have clarified principles of sanction, and has refined the distinctions between discipline and discharge. It has contributed to the very public debate on "whistleblowing" through its comprehensive findings and recommendations in *Stenhouse* and *Read*. The Committee has also provided many comprehensive and thoughtful findings and recommendations on disciplinary issues that have arisen out of the personal tragedies of members and the day-to-day stresses of doing police work.

While cases in the area of discharge and demotion are few, they are complex and each one has required extensive review. These cases have provided an opportunity for the Committee and the Force to consider the nature of police work, and the standard at which discharge for incompetence should be imposed.

In the area of outreach, the Committee has made many efforts over its entire history to inform stakeholders of its work in order to ensure that there is knowledge of how to access independent processes for review. Judge René Marin worked with Commissioner Inkster to clarify the concept of referability, and to establish general agreement as to what kinds of cases could be referred to the Committee. Philippe Rabot also continued the dialogue with the RCMP on different approaches that might be used to clarify the concept of referability. Committee Staff helped educate and train new grievance administration staff, adjudicators and staff representatives at the RCMP Depot.

In more recent years, under the current Chair, the Committee has acknowledged the need for engaged and consistent outreach as a key program activity. There have been increased efforts to ensure ongoing outreach to the OCGs within the RCMP, to SRRs and to members in general. The Committee also made a submission to the *Arar Commission*. In addition, the Chair of the Committee made appearances before the *Brown Task Force* and before the House of Commons Standing Committee on Public Accounts.

"Honest differences are often a healthy sign of progress."

Mahatma Gandhi

In the spirit of acknowledging the importance of arms length and independent mechanisms for deliberating upon "honest differences" in how to address labour relations matters, the sections below highlight the values that lead to such differences, and how the Committee has interpreted them. Those values include: protecting access to the avenues to grieve and appeal; ensuring procedural fairness; ensuring transparency; ensuring compliance with the *Act*; ensuring fair hearings; ensuring a quality workplace; protection from reprisal where a whistle-blower defence is legitimately raised; valuing members; the importance of rehabilitation and correction as a guiding principle in discipline; public confidence in the exercise of police authority; protecting public trust; and meaningful assistance with employee performance issues.

B: Grievances

i. Protecting Access

Section 31 of the *Act* establishes two preliminary requirements for presenting a grievance. First, the issue being grieved must qualify as a grievance, as defined in the *Act*. This qualification is referred to as standing. Secondly, the grievance must be presented within specified time periods at both Level I and Level II.

These are statutory requirements, and unless a matter meets the criteria for standing and is presented within the time allowed, the grievance will be rejected. The only exception to this is that the Commissioner of the RCMP has the power, under s.47.4(1) of the *Act*, to extend time limits. This power can be, and has been, delegated to Level I Adjudicators within the RCMP grievance system.

A finding that a member does not have standing or has failed to meet the time limits is fatal to a grievance. It is therefore very important that the provisions of the *Act* that deal with these sections are interpreted fairly and reasonably to

ensure that legitimate grievances are not unnecessarily blocked. It is also particularly important for adjudicators to turn their minds to the appropriateness of extensions of time, where the time limit has not been met.

The Committee receives a significant number of cases each year where grievances were denied at Level I on the basis of standing, or untimeliness, or both. The Committee has disagreed with these conclusions in many of these cases. Several years ago, the Committee produced two articles on standing and time limits in order to help address some common misunderstandings. The Committee has also published additional articles on those issues, and often discusses them when it delivers training. Articles of interest and training material can be found on the Committee's Website at http://www.erc-cee.gc.ca/english/publications_articles.html.

Of the twenty six grievance cases that the Committee completed this year, eleven were denied at Level I on the basis of standing, or time limits, or both. Some of the more significant of these cases are discussed later in this section. The Committee found that three of the eleven grievances were out of time, but that all warranted an extension; an issue that was not addressed by the Level I Adjudicator in either case. The Committee disagreed with the Level I Adjudicators' conclusions in five grievances and found that in three files the record was insufficient to allow a conclusion to be reached. In one grievance, the Committee found that it did not have jurisdiction to review the matter.

a. Standing

The *Act* sets out a five-part test for establishing standing:

1. the grievor must be a member;
2. the grievor must be aggrieved;
3. the grievance must involve a decision, act or omission;
4. the decision act or omission must have been taken in the administration of the affairs of the Force; and,
5. there must not be any other process for redress provided by the *Act*, the *Regulations* or the *Commissioner's Standing Orders* ("CSO").

While this list may appear to be straightforward, there are significant challenges in interpreting the test for standing in a way that does not prevent valid grievances from being considered.

The Committee has made findings on issues such as the threshold to establish standing, the "aggrieved" requirement, the effect of the reversal of a decision on standing and the right of retired members to grieve. It is important to note that a finding that a grievor has standing is not the same as a finding that the grievance has merit.

a.1 Aggrievement

While the law requires that the member be aggrieved by an act, decision or omission, the Committee has rejected the interpretation that this requires the member to have suffered a financial loss. In G-098, the Grievor was asked to pay costs that were billed to the Force in relation to her relocation. Although the money had not yet been recovered from the Grievor, the Committee concluded that she had a direct and personal interest in having the request for recovery overturned, and therefore had standing. The Commissioner did not discuss this matter in his decision, however he considered the case on the merits.

The Committee has also developed a low threshold for establishing when a member is aggrieved. In G-125, the Member grieved the denial of his request to have his periodic medical assessment conducted by the doctor of his choice. The Level I Adjudicator denied the grievance on the basis that the Member did not have standing. The Committee concluded that the Grievor did have standing as he had a direct and personal interest in the matter as opposed to a theoretical objection to Force policy that had not been applied to him. The Commissioner did not address this matter in his decision, but he did consider the case on the merits.

a.2 Corrected Decision

Another interesting question arose in G-301, where the Grievor's standing to grieve was called into question as the decision that he objected to had subsequently been reversed. The Level I Adjudicator concluded that the Grievor lacked standing. The Committee disagreed, finding that

in order to assess standing, the appropriate question to be answered was "whether it is at least possible that the Grievor was prejudicially affected by the…" decision.

a.3 Existence of Another Process May not Prevent Presentation of Grievance

As noted above, one of the conditions for standing is that there be no other process for redress provided by the *Act*, the *Regulations* or the CSOs. The Committee has frequently rejected reasoning that interprets this principle to mean that a grievance cannot be presented where there is **any** other available redress process. For example, the Committee has found that harassment can be the subject of a grievance. In G-326, the Grievor filed a grievance, claiming to have been harassed. The Level I Adjudicator rejected the grievance on the basis that the Grievor was required to file a harassment complaint. The Committee concluded that the existence of a harassment complaint process did not deprive the Grievor of standing to grieve, as the harassment policy did not derive from the *Act*, *Regulations* or a CSO. The Committee reached the same conclusion in G-354-6. The Commissioner has agreed with this reasoning.

The Committee came to a similar conclusion in G-390. There, the Member complained that the accommodation and meals that were supplied to her while on special duty were inadequate. The Level I Adjudicator determined that the grievance lacked standing as it involved occupational health and safety concerns, which the Grievor was required to pursue through occupational health and safety policy. The Committee disagreed, finding that the occupational health and safety provisions were contained in the Force Administration Manual, not the *Act*, *Regulations* or a CSO. The Commissioner has yet to issue a decision in this matter.

a.4 Retired Members

One of the most significant developments in the application of the test for standing has been the Committee finding that retired members have standing in certain contexts. The Committee's interpretation of the word "member" in s.31(1) of the *Act* has been liberal rather than literal, with an eye to accomplishing the goals of the grievance process. The result has been a line of cases that provide retired members with the right to grieve where the matter in dispute relates to the employer-employee relationship.

> *"Waiting until after the member has retired would shield the decision from scrutiny through the grievance process and thus an important level of accountability could be bypassed."*
>
> G-324

In G-321, the Member grieved the results of a classification committee review. The Committee recommended upholding the grievance, but the Commissioner did not accept that recommendation. The Member filed an application for judicial review in Federal Court of Canada ("FCC"), which ordered a new classification evaluation. The second evaluation confirmed the results of the first classification committee. The Member filed a second grievance, but in the interim, he had retired from the RCMP. The second grievance was denied at Level I on the basis that the Grievor was no longer a member.

The Committee disagreed with the Level I Adjudicator. It found that the *Act* requires only that a grieved decision pertain to the rights of a person as a member of the RCMP; it is unnecessary for a grievor to still be a member of the RCMP when the grievance is presented. The Commissioner agreed that the Member had standing.

In G-324, the Grievor filed a complaint claiming that he had been harassed and subjected to discrimination on the basis of age. The Force denied his complaint about 10 months after he retired from the Force. The Level I Adjudicator denied the grievance on the basis that the Grievor was no longer a member. The Committee concluded that the Grievor had standing because he was a member of the Force at the time that he initiated the complaint, which was the subject of the challenged decision. The Commissioner agreed.

Finally, in G-332, the Grievor filed a grievance after he was denied reimbursement of costs associated with his relocation on retirement.

His request for reimbursement was submitted after his retirement. The Level I Adjudicator concluded that retired members were not entitled to access to the grievance process. The Committee disagreed. It found that s.31(1) of the *Act* was not intended to deprive retired members of access to the grievance process in order to challenge a decision arising out of their employment with the Force. The Commissioner agreed.

b. Time Limits

Although Parliament has given members a broad right to grieve, this right is subject to limitation periods. Under s.31(2) of the *Act*, the Force must reject a grievance that is filed outside the statutory time limits unless the Commissioner grants an extension of time. At Level I, the time limit is 30 days from the date the member knew or ought to have known he or she was aggrieved. At Level II, the time is 14 days from the date of service of the Level I decision.

The Committee has considered time limits in a significant number of cases. Some of its more relevant findings include commentary on the onus of establishing that the time limit was met, the effect of subsequent events on the time limits, the concept of continuing grievances and the need for personal impact on the Grievor in order for the time limit to be triggered.

In G-210, the record was not specific as to when or how the Grievor became aware of the decision complained of, but the Grievor had included a date on the grievance form which placed the grievance within the time limits. The Committee concluded that it was reasonable to accept the date supplied by the Grievor as accurate in the absence of any evidence or argument to the contrary. The Commissioner agreed that the grievance was timely.

Even where a time limit has expired, later events may place the grievance in a different context which requires the Force to make another decision. The new decision may be grieved, if the time limit of 30 days from the new decision is respected. This concept was first advanced in G-091. In that case, the Committee concluded that the refusal to reconsider a decision, or the confirmation of the original decision, could create a new, grievable decision, but only where some new evidence or information was advanced which placed the question in "a whole new light". A simple request to reconsider will not revive the time limits. The Commissioner did not comment on the time limits in this case, however he considered the grievance.

The "whole new light" test has been used in many grievances involving time limit questions. It has provided members with the flexibility to grieve new or modified Force decisions, while respecting time limits.

Another, similar issue of importance is the effect of time limits on continuing grievances. In G–206, the Committee concluded that the non-payment of wages could be viewed as the subject of a continuing grievance since it was a decision that reoccurred at each pay-day. The Grievor could file a grievance a year after the non-payment commenced, but would only be eligible to recover the amounts that were withheld in the previous 30 days (see also G-064). The Commissioner agreed with the Committee on the merits and upheld the grievance, although he did not comment on the issue of time limits.

The Committee has also considered the question of the point at which time limits start to run, and has concluded that the trigger is the point in time when the member is personally effected. In G-365, the Grievor filed a grievance related to vacation travel advances. Some months prior, a bulletin had been issued regarding how advances were to be calculated. The Level I Adjudicator concluded that the grievance was out of time as it should have been presented within 30 days of the issuance of the bulletin. The Committee disagreed, holding that the time limit began to run from the date that the Grievor received a response to his request for a vacation travel advance, as that was the point where he became personally aggrieved. The Commissioner agreed.

In contrast, in G-280 the Grievor was given advanced approval with respect to accommodation which included specific instructions regarding what would be allowed. The Grievor did not follow those instructions. Two months later, he submitted an expense claim, which was denied. The Grievor argued that it was not until his expense claim was denied that he was aggrieved. The Committee

agreed with the Level I Adjudicator that the matter was out of time as the Grievor was required to file his grievance within 30 days of the advanced approval.

c. Extensions of Time

Section 47.4(1) of the *Act* authorizes the Commissioner to extend time limits if he or she is satisfied that the circumstances justify the extension. The Committee has recommended to the Commissioner that he extend time limits on a number of occasions and for a variety of reasons, including in situations where:

- unreasonable Force delays made the extension equitable (G-041, G-362);
- the Force declined to implement a Level I decision after the time limit for filing a Level II grievance had expired (G-106, G-204);
- significant confusion and misunderstanding occurred in the administration of the grievance by the Force (G-138, G-244);
- the Force left the impression that a decision was provisional, not determinative or that it may be reviewed (G-144, G-302);
- the advice or information given by the Level I Adjudicator related to a Grievor's Level II review rights was confusing or misleading (G-140, G-214, G-216), or the Level I decision was sufficiently confusing that it led to the delay (G-270);
- the failure to file within the time limit was not within the Grievor's control, such as where a SRR undertook to file the form for the Grievor (G-232, G-375); and,
- there may be ambiguity in the interpretation of facts, and the case would serve as a test case on an important issue and it would be in the interests of all parties to have the matter decided on its merits (G-128).

d. 2007–08

As indicated in the introduction to this section, the questions of standing, time limits and extensions of time continued to be live issues before the Committee in 2007-08.

In G-423, the Committee found that the Grievor, who was seeking to have his duties modified in order to accommodate a disability, had standing to grieve. It reached this conclusion because the decision not to accommodate the Grievor was made in the administration of the affairs of the Force, had a personal impact on the Grievor and there were no alternate forms of redress. The Commissioner's decision is pending in this matter.

In G-419, the Level I Adjudicator held that the Grievor did not have standing to grieve the Force's refusal to investigate his harassment complaint as he was not prejudiced by that decision. The Committee disagreed with this conclusion, noting that the Grievor had a personal interest in how the Force dealt with his allegations, and therefore, he had standing.

Interestingly, the Committee also found that, in three grievances, the record was not sufficient to allow the Level I Adjudicator to make a finding with respect to standing. It recommended that the matters be returned to Level I in order to make the record complete (G-429, G-430, G-433).

The Committee also confirmed that it may be reasonable for a member to wait for written reasons prior to grieving, and that time limits will run from the date written reasons are delivered, as opposed to the date that a decision is communicated orally (G-420).

In all three of the cases where the Committee agreed with the Level I Adjudicator that the matter was out of time (G-412, G-413 and G-419), the Committee recommended that the Commissioner extend the time limits. G-412 and G-413 related to a dispute regarding buy-back of pension for members in job share arrangements, a largely female group. The Committee recommended the extension on the basis that the Force had not dealt with the part of the grievance involving discrimination. In G-419, the Grievor filed harassment complaints against six individuals. The Respondent refused to investigate all six, but delivered the decision with respect to two of the individuals days before the decision with respect to the other four. The Grievor was found to be within the time limit for the latter decision, but outside the time limit for the first decision. The Committee concluded that the confusion created by the decision being made in two parts warranted an extension. The Commissioner has not yet rendered a decision in these matters.

ii. Ensuring Procedural Fairness and Transparency

The Force is required to respect the duty to act fairly when deciding grievances. If this very important duty, commonly called procedural fairness, is not followed, then a decision taken may not stand. To be procedurally fair, the Force must generally ensure that a grievor is provided with notice, an opportunity to be heard, reasons that explain the decision and an unbiased decision-maker. From as early as G-002, the Committee has focused on helping the Force comply with its duty to act fairly and has made many findings and recommendations that have clarified how procedural fairness principles apply to the Force's grievance process. It has also discussed the subject of fairness in various articles, reports and speeches, which can be found on its Website.

"...management must take great care to ensure that it treats the complaint in a scrupulously fair and unbiased manner; part of this responsibility is to ensure the appearance of fairness..."

G-191

a. Notice and the Opportunity to be Heard

The rules of procedural fairness generally provide that parties whose rights will be affected by a decision must be informed of the case against them, and of the possible consequences that could arise as a result of the decision. Parties must also be given the chance to be heard.

In G-177, the Committee considered the Force's decision to stop a Member's pay without first letting the Member look at, and respond to, the written recommendation to suspend his pay. The Committee concluded that the Force committed an error of procedural fairness by not affording the Member the opportunity to examine and comment on the stoppage of pay recommendation. It also noted that, while the Member's ability to grieve and obtain disclosure of relevant material allowed the error to be corrected in this particular situation, the grievance procedure would not rectify such an error in all cases. The Commissioner did not discuss this issue in his decision, however he did allow the grievance on the merits.

In G-366, the Committee reviewed a Level I Adjudicator's decision to deny a travel claim grievance on the basis that it was untimely. The Adjudicator made that determination without first hearing arguments on the timeliness issue. The Committee found that, in accordance with procedural fairness, Adjudicators should hear parties on the issue of timeliness before deciding that a grievance is untimely. The Commissioner did not discuss this issue in her decision, but she followed the Committee's recommendation and allowed the grievance.

The Committee considered a similar matter in G-378. In that case, a Member grieved the Force's decision not to investigate her harassment complaint. The Level I Adjudicator dismissed her grievance on the basis that she did not have standing, without first allowing the parties to be heard on that issue. The Committee found that Adjudicators must hear parties on the issue of standing before dismissing a grievance on that basis. The Commissioner's decision in this matter is pending.

b. Sufficiency of Reasons

The *Act*, and procedural fairness, require Adjudicators to give reasons for their decisions. The provision of proper reasons is crucial in many respects. It establishes transparency and accountability in decision making. It helps decision makers weigh evidence and identify relevant considerations. It shows the parties that their arguments have been considered and understood. It also helps to guide future behaviour.

The Committee has found that Adjudicators are required to explain their reasons in a way that makes it clear why a decision was made. It is not enough to merely say that "after consulting with X, I find I cannot support..." (G-002, G-039). The Committee has also found that Adjudicators must provide full reasons for their decisions, since doing so allows for a meaningful review on appeal (G-353). The FCC has reinforced these important

principles in the RCMP context, for example, in *Muldoon v. Canada (Attorney General)* ([2004] FC 380).

In 2007–08, the Committee made a key finding that relates to the issue of providing sufficient reasons. The Commissioner's decision in this matter is pending.

In G-414, a Grievor argued that the Force's refusal to grant him leave without pay amounted to harassment. In denying the grievance, the Level I Adjudicator made various findings that were not supported with reasons. The Committee recommended that the Commissioner decide the matter instead of referring the Grievor back to Level I. It made that unusual recommendation because there had been a long delay, the parties had been given a full opportunity to present their positions and fairness demanded that the final decision not be further delayed.

c. Bias

The notion of bias, whether real or perceived, is of particular concern in situations where the rights of individuals are being decided. The law is clear that it is not enough that a decision-maker be impartial; he or she must also appear to be impartial. As the old saying goes, justice must not only be done, but it must also be seen to be done. Even where decision-makers may feel that they could proceed in an unbiased and fair manner, they should consider excusing themselves from a case if there is any issue that would raise the appearance that they could not be objective. The appearance of impartiality is necessary in order to maintain public confidence in the decision-making process.

In D-055, the Committee adopted the test for reasonable apprehension of bias, as set out by the SCC: "whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator."

In G-191, the Committee explained that the Force's harassment complaint process must appear to be fair if it is to be successful. It therefore recommended that the Force use investigators and decision-makers who are independent from the events and parties involved in harassment complaints, especially in cases where there are subordinate-superior relationships that might call into question the appearance of objectivity. The Commissioner agreed with the Committee. In G-377, the Committee stressed the importance of having objective parties investigate harassment complaints. At year-end, a decision by the Commissioner had not yet been rendered

In G-233, the Committee considered whether or not a Health Services Officer ("HSO") should have been involved in making a decision on a Grievor's medical profile given that the Grievor had once accused him of harassment. It found that a reasonable apprehension of bias was the proper test to determine if the HSO should have been involved in the process, given the implications of the decision on the Grievor's career. The Committee concluded that the HSO's involvement tainted the decision-making process. The Commissioner disagreed. He felt that the HSO's integrity and professionalism had been questioned without supporting evidence.

In 2007–08, the Committee emphasized that Treasury Board's Policy on the *Prevention and Resolution of Harassment in the Workplace* requires delegated managers to be impartial in any harassment complaint process in which they are involved. It explained that such impartiality is a key part of the duty to act fairly (G-417). The Commissioner's decision in this case is pending.

d. Disclosure

Making disclosure available helps ensure that parties have relevant materials and can address issues based on complete information. This often results in better, more informed, decisions.

"The information...must be made available to members...[t]hese forms must not be confined to management use; these and other grievances must surely demonstrate to management the need for greater transparency in the process."

G-046

The *Act* requires the Force to grant a grievor access to any requested information under its control that is shown to be relevant, and reasonably required, to properly present a grievance. Force policy provides that once a grievor meets this low threshold, the onus will shift to the Force to provide the information requested. Note that disclosure obligations do not extend to information that could reasonably be expected to harm the defence of Canada or its allies; the detection, prevention or suppression of subversive or hostile activities; or law enforcement.

This issue is also addressed in the Committee's *Rules of Practice and Procedure*, which provide that when the Committee holds a hearing, any party to the matter may request that another party to the matter disclose a record. If the person to whom a request is made does not disclose the record in a reasonable time, (s)he may not be allowed to present it in evidence.

The Committee has found that grievors do not have to make access to information ("ATI") requests for information that they are entitled to receive under the disclosure process (G-350-352). It has also observed that the *Privacy Act* does not prevent the Force from giving a grievor documents that contain relevant personal information under its control. The Committee has commented that unnecessary personal information should be severed from a document before disclosure. The Commissioner has agreed with this position (G-380, G-394).

The Committee made numerous findings involving the issue of disclosure in 2007–08. The Commissioner's decisions in all of these cases are pending.

In G-405, the Committee found that the Early Resolution Phase may be more productive if a grievor is fully informed of all relevant information from the outset. It also suggested that, if a grievor asks for disclosure before any Early Resolution meeting, a Respondent should try to respond to the request.

In G-412 and G-413, pay equity grievances relating to job sharing benefits, the Level I Adjudicator denied the Grievors' request for disclosure of several documents, including copies of federal legislation and policy, research materials, minutes, study results and recommendations concerning job sharing in the Force. The Committee found that the Force did not have to disclose copies of documents that were already accessible to the Grievors through the Internet, such as federal legislation and policies. However, it noted that the Force should disclose the other requested documents, if they existed, since those materials would be related to the relevant issue of whether the Force had engaged in unlawful discrimination.

In G-414, the Grievor and the Force disagreed about what should be made available through the disclosure process. The Grievor ultimately filed an ATI request for certain documents, and continued seeking disclosure. The Force subsequently provided the requested materials to the Grievor through the ATI route. The Committee re-emphasized an earlier finding that grievors should not have to make ATI requests to obtain relevant and reasonably required documents. Yet it found that since the Grievor actually received the materials that he had sought through the ATI process, any prejudice that may have been caused by a lack of disclosure was offset.

In G-417, the Committee a found that the failure of the Respondent to provide all of the documentation identified by the Level I Adjudicator as relevant breached the duty to act fairly. The Committee recommended that the matter be returned to a new Delegated Manager to be dealt with in accordance with policy.

iii. Ensuring a Quality Workplace

A healthy workplace is critical to retaining and attracting top-quality talent. A significant element in creating a healthy, dynamic work environment is the prevention of harassment and discrimination. Further, health and safety standards and policies are necessary to promote safe, healthy, cooperative and productive workplaces for the benefit of the Force, its membership and the public. Finally, where issues arise, the organization must have a robust accountability structure that reflects the underlying purposes and values of maintaining a quality work environment.

The Committee has considered numerous cases over the last 20 years dealing with discrimination

claims, the investigation of harassment complaints, harassment in the workplace, and occupational health and safety issues. Some of the more significant cases are discussed below.

a. Discrimination

Discrimination generally means treating people differently or negatively without a proper reason. It can harm personal dignity, and sometimes break the law. The *Canadian Human Rights Act* ("*CHRA*") protects against discrimination on the grounds of race, origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has not been granted. Treasury Board and RCMP policy set out the Force's obligations to comply with the *CHRA* and to provide a work environment free of "any form of discrimination". The Committee has written articles on the subject of discrimination, which can be found on its Website. The Committee has also made many findings and recommendations that have helped the Force take steps to achieve its goal of a discrimination-free workplace.

a.1 Sexual Orientation

In G-184, a Member who was in a same-sex relationship grieved the refusal of compassionate leave to care for her common-law partner. She argued that such a denial was discriminatory on the basis of sexual orientation. The grievance turned on the interpretation of a Force policy that permitted members to take compassionate leave to care for a "spouse/common law partner". The Force was not sure how to construe that particular term given that it was not defined in the policy. The Committee recommended that the grievance be allowed. It found that Canadian human rights law required the RCMP to interpret the term in a way that was not discriminatory. The Commissioner agreed. Force policy now expressly provides that a member's "spouse" may include "a same-sex partner" for the purpose of taking compassionate leave.

a.2 Disability

In G-266 and G-267, the Committee considered the issue of medical discharge and the 'bona fide occupational requirement' ("BFOR"). It observed that a recent SCC decision had changed the test for establishing a BFOR. The new test imposed a higher standard on the duty to accommodate by requiring the Force to prove that it would face undue hardship if it accommodated a disabled member's needs. The Committee found that the Force's process for accommodating disabled members fell short of the new standard. The Commissioner agreed. The Force merged the new standard into existing policy.

a.3 Marital Status

In G-280, the Committee considered if a Grievor's accommodation expense claim should have been denied on the ground that the Grievor did not share accommodations with his spouse, who was also a member. Although the Committee found the grievance to be untimely, it added that if the Commissioner chose to retroactively extend the deadline for filing the grievance, he ought to hold that the Grievor and his spouse should not have been compelled to share accommodations just because they were married to each other. The Committee felt that the couple was entitled to be treated the same as any other members, none of whom were forced to share accommodations. The Commissioner denied the grievance because it was untimely.

a.4 Age

In G-325, a Member grieved the refusal of his application for an extension of service. The Committee grappled with the question of whether the law still permitted the RCMP to enforce a mandatory retirement regulation. It provided the Commissioner with an extensive analysis of the issue. The Commissioner believed that the matter would be more properly debated outside the context of the grievance process. He therefore decided to presume that the mandatory retirement regulation was valid, and determine the grievance on the merits. The Committee continues to closely monitor legal trends concerning this live issue.

a.5 2007-08

The Committee recently reviewed grievances involving an important pay equity matter. In G-412 and G-413, it was asked to consider the issue of whether job-sharing members should be permitted to buy back pension contributions for hours they had not worked, up to that of full-time employment. The Grievors, who were female, claimed to be discriminated against because they were being

treated differently than members working full-time or on various types of leave. In assessing the grievances, the Committee noted that the Force had not addressed the Grievors' discrimination complaints. It therefore recommended that the Commissioner order a full review, and that the Force apply the over-arching principles in Canadian human rights law and Force policy when performing its review.

The Committee also recently clarified that the RCMP must provide evidence in order to demonstrate that it is impossible to accommodate a disabled member short of undue hardship (G-423). It further recommended that the Force review its process for establishing medical standards to ensure that they are developed in harmony with Canadian human rights principles (G-427). The Commissioner's decisions in these cases are pending.

b. Harassment

Over the last few years the Committee has seen an increase in harassment cases, as a percentage of grievance referrals, as demonstrated in the below table.

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	n/a
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.
2007-08	10	1	9	Nine to allow (four on basis of error in investigation/process, four on basis of errors at Level I, one as premature at Level II). One grievance denied on the merits. Two grievances were filed by members accused of harassment.

b.1 Harassment: Procedural cases

The Committee has traditionally reviewed the harassment complaints process in an expansive fashion, rejecting limitations that would deprive members of access to remedies for harassment or interfere with the right to procedural fairness.

For example, in G-216, the Level I Adjudicator rejected a complaint related to abuse of authority on the basis that abuse of authority was not included in the then existing Force policy on harassment. The Committee concluded that the Treasury Board policy included reference to abuse of authority, and the internal Force policy could not override the Treasury Board policy. The Committee found that the Grievor had suffered harassment. The Commissioner agreed.

The Committee has also taken a strong stand with respect to the needs to fully investigate harassment complaints and ensure compliance with the policy requirements related to process.

In G-251, the Delegated Manager declined to investigate a harassment complaint and based his decision that the complaint was unfounded on the written complaint alone. The Committee concluded that Treasury Board policy required the Force to conduct an investigation into every harassment complaint, except in rare cases where it is simply inconceivable that a full investigation would lead to a conclusion that harassment had occurred. The Acting Commissioner agreed.

The above conclusion was expanded upon in 2005 in G-362. There the Committee concluded that a harassment investigation was required and that the Delegated Manager was not entitled to rely exclusively on the material submitted by the Member in coming to his decision. As well, the Committee found that the fact that other avenues for recourse existed was not a reason to reject the harassment complaint. Finally, the Committee indicated that the fact that one or both parties had subsequently been transferred did not remove the requirement to investigate. The Commissioner agreed.

The Committee has also rejected the conclusion that no investigation is required where the allegations were mostly workplace conflict issues. The Committee concluded that where the allegations are related to administrative decisions, this in itself does not rule out the possibility of harassment, because abuse of authority can be made up of administrative decisions. The Commissioner agreed (G-382).

b.2 Harassment Complaint Determinations

The Committee has also reviewed cases to assess whether harassment had actually occurred in order to assist the Force in its goal of providing a respectful, harassment-free workplace.

> *"What happened to the Grievor was terribly wrong and it ought not have taken 18 months to correct it. He may not have been harassed but he was certainly not treated with the dignity and respect that he deserved from his employer."*
>
> G-268

The Committee has rejected the conclusion that harassing behaviour must be intentional in nature to qualify as harassment under the policies. For example, in G-235, the Committee found that the conclusion of a harassment complaint investigation—that the evidence did not establish deliberately harassing behaviour on the part of the accused harasser—was incorrect. Rather, the Committee explained, the correct test is whether the actions amounted to improper conduct, which was offensive to the Grievor, and which the accused harasser ought to have known would be unwelcome.

The Committee expanded on that principle in G-253. Again, a harassment complaint was rejected on the basis that the evidence did not disclose an intention to harass. The Committee concluded that subjective intention was not the benchmark, rather the improper conduct must be assessed on the basis of whether the accused harasser should have known that the comment amounted to harassment.

In both cases, the Committee recommended that the Commissioner find that one, some or all of the allegations of harassment were established. In both cases, the Commissioner agreed.

The Committee has also required that the assessment of whether the conduct is unwelcome must be maintained from an objective, as well as subjective, point of view, and has found that not all unwelcome conduct will amount to harassment.

In G-270, the Grievor objected to his removal from an Emergency Response Team (ERT). The Committee concluded that the accused harasser had failed to follow the conventional process, but that he had not breached any formal requirement for removal from the ERT and the action was a legitimate exercise of managerial discretion, not an abuse of authority.

In G-354-356, the Grievor claimed that three members had conspired against him to ensure that he failed a training program. The Committee concluded that there was insufficient evidence to establish that the three members had colluded against the Grievor. It also found that their conduct, taken from the perspective of a reasonable person, would not be considered offensive.

The Committee recommended that both grievances be denied. The Commissioner agreed.

b.3 2007-08

2007-08 continued the trend of an increased number of referrals to the Committee of harassment grievances. Of the findings and recommendations in grievance matters issued in the last year, almost 45% of the files involved harassment complaints or harassment complaint process issues.

Of particular note, the Committee has provided guidance with respect to the amount of information which must be shared with members who are accused of harassing behaviour, including sufficient details of the allegations to allow the member to properly respond, and, ideally, copies of witness statements and the draft investigation report. A failure to provide adequate information may result in the decision resulting from the harassment investigation being overturned (G-416). The Commissioner's decision in this matter is pending.

The Committee also reaffirmed the policy requirement for holding an investigation unless it is inconceivable that the full investigation would show that harassment had occurred (G-420: Commissioner's decision pending).

c. Occupational Health and Safety:

The Committee has also considered questions related to a range of issues concerning occupational health and safety, including proper equipment, the acceptable standard of accommodations and the adequacy of meals provided to members on special duty.

In addition to providing findings and recommendations on occupational health and safety issues, the Committee published a comprehensive discussion paper entitled "Occupational Health and Safety— An Employer Perspective". This paper is available on the Committee's Website at http://www.erc-cee.gc.ca/Discussion/english/eDP9.htm.

c.1 Equipment

In G-107, the Grievor, a member of a maintenance unit, objected to the Force's failure to provide safety footwear or, in the alternative, to reimburse members for the full cost of safety footwear. During the course of the grievance, the Force agreed to reimburse the full amount of the cost of the safety footwear. However, the Grievor maintained his right to be provided with the actual footwear. The Committee concluded that the Grievor's safety concerns had been adequately addressed by the reimbursement and recommended that the grievance be denied. The Commissioner agreed.

Conversely, in G-245, the Grievor submitted a claim for reimbursement of prescription sunglasses to combat light sensitivity that he experienced while he was on patrol. The Force denied the claim on the basis that the RCMP Health Services Program did not provide for the reimbursement. The Committee, while indicating that it was not within its mandate to interpret the RCMP medical and dental programs, concluded that the Treasury Board and RCMP policies on occupational exposure to sunlight allowed for reimbursement up to $25. The Acting Commissioner agreed.

c.2 Accommodation and Meals

In G-301, the Grievor was on extended travel status for the purpose of conducting an investigation. Due to the cost of hotel facilities, the Grievor was ordered to reside in a Force-owned facility which had no phones or televisions in the rooms,

no daily cleaning or linen service and shared shower and toilet facilities. The Committee concluded that the accommodation did not meet the minimum standard of "comfortable and of good quality" as per the applicable Treasury Board policy, nor did it meet the Administration Manual's minimum requirements as "suitable police quarters". The Commissioner agreed and allowed the grievance.

The question of suitable accommodation and meals was also raised in a series of grievances resulting from the G-8 summit in Kananaskis, Alberta. The Committee concluded that some Grievors had not met the onus of establishing that their accommodations and/or meals were substandard (G-387; G-388; G-393). However, in other grievances, the Committee concluded that the accommodation, meals, or both, failed to meet the minimum standards.

On the issue of the adequacy of the accommodations, while acknowledging that the unique circumstances in Kananaskis warranted having members stay in non-commercial accommodation, the Committee concluded that some accommodations failed to meet the Treasury Board minimum of "comfortable and of good quality", including:

- overcrowded accommodations, (G-388; G-395; G-396);
- inadequate toilet facilities (G-388; G-389; G-395; G-396);
- excessively hot and dirty environment (G-389);
- inappropriate and disruptive level of noise (G-389; G-391; G-395; G-396); and,
- rooms/accommodations not properly cleaned (G-391).

On the issue of the adequacy of the meals provided, the Committee noted that there were few specifics contained in the Treasury Board policy related to the minimum standards for meals. However, the Committee concluded that some basic minimum standards were not respected, including the failure to provide three meals per day (G-391); the failure to provide any hot meals over the course of six days (G-393; G-395) and the provision of only military rations, with no fresh food for an extended period of time (G-396).

iv. Recommendations for Policy Reviews

In addition to providing individual grievors with findings and recommendations on their specific case, the Committee, from time to time, has identified more systemic issues or problems and has provided the Commissioner with recommendations for broader policy reviews.

a. Suspension Without Pay

The Committee had concerns that the Regulations establishing when a member may be suspended without pay amounted to an illegal sub-delegation of Treasury Board's authority to make Regulations on this subject (G-318, G-319, G-320, G-328, G-342, G-353, G-359). While he declined to address the question of whether the Regulations were valid or not, the Commissioner acknowledged that the validity of the Regulations was a live issue and ordered a complete review (G-342). This issue has since been settled by decisions of the FCC (2006 FC 1531) and the Federal Court of Appeal ("FCA") (2007 FCA 332).

b. Duty to Accommodate Disabled Members

The Committee's analysis on the issue of accommodation for disabled members, including its review of recent and significant SCC case law, led the Commissioner to review the issue and conclude that the Force, while incorporating some of the principles of accommodation into its practices, was not meeting the legal requirements. As a result, he ordered a full policy review, including a consultation with the Staff Relations Representatives (G-266, G-267).

c. Isolated Post Transfers versus Retirement Moves

More recently, in G-369, the Committee noted some confusion about the interplay between the Force policy on the entitlement to a retirement move at Force expense and the relocation provision of Treasury Board's *Isolated Post Directive*. The Committee recommended that the Commissioner consider a review of this issue. In February 2008, the Commissioner ordered a full review of the interaction between these two policies.

d. Operational Planning Consultation

In G-388, G-391 and G-393, all G-8 grievances, the Grievors requested that the process for planning major security operations be reviewed in the context of the adequacy of the accommodation and meals provided to members. While the Chair did not recommend this review, she did recommend that the Grievors be invited to participate if one was held. The Commissioner's decisions in G-391 and G-393 are pending. In G-388, the Commissioner instructed the Director of Professional Standards and External Review Directorate to make a vetted version of her grievance decision available to National Headquarters Major Events for future planning purposes.

e. Entitlement on Travel Status

In G-375, the Committee recommended that the Commissioner order a review of the Treasury Board and Force policies on travel expenses as well as the Treasury Board Minutes on travel for RCMP members, as there was uncertainty and confusion regarding their application and contradiction, and inconsistencies existed which required correction (see also G-376).

In 2007-08, a similar issue arose in G-432. The Grievor was transferred, but grieved the transfer. He was ordered to report to the new post, a five-hour drive away from his substantive posting and he sought overtime for the time spent travelling each week between his residence and the new post. The Committee concluded that the grievance had not been filed within the time limits. However, it also recommended that the Commissioner undertake a review of the issue of compensation for travel time with the view of providing clearer and more comprehensive policy direction on the issue.

At year-end, a decision by the Commissioner had not yet been rendered in these cases.

f. Transfer Allowances

In G-383, the Committee recommended to the Commissioner that he consider ordering a review of the various policies that touch on transfer allowances to confirm the status of older Treasury Board Minutes, to establish a clearer framework for assessing claims related to the transfer allowance, and to recommend changes to the applicable policies to address existing contradictions and inconsistencies. The Commissioner's decision is pending.

C: Discipline

The Committee's mandate in the area of discipline pertains to the review of formal disciplinary matters. These are typically cases that arise from allegations of more serious violations of the *Code of Conduct*. Part IV of the *Act* describes disciplinary processes and sanctions for members of the RCMP who are found to be in violation of the *Code of Conduct*. In cases of formal discipline, the matter is referred to an adjudication board ("Board"), which holds a hearing to determine if a member has violated the *Code of Conduct*, and if so, what sanction should be imposed. The Board's decision can be appealed to the Commissioner of the RCMP, and the appeal is then referred to the Committee.

Disciplinary appeals examined by the Committee have raised a multitude of issues of significant importance to members over the years. Among these issues, the Committee has examined the scope of section 43(8) of the *Act*, which states that disciplinary hearings cannot be initiated against a member after one year from the date the contravention and the identity of the member became known to the Appropriate Officer ("AO"), and has helped to clarify the meaning of that section. The Committee has also addressed many procedural fairness issues to ensure that members receive fair hearings in disciplinary matters.

The Committee has also commented on whether various types of conduct amounted to *Code of Conduct* violations. For instance, it has examined appeals regarding findings that members had violated the *Code of Conduct* by disclosing sensitive information. In those cases, the Committee interpreted the scope of the "whistle-blower" defence, which allows public servants to disclose information, if certain criteria are met. The Committee has also issued findings and recommendations pertaining to the analysis of whether a member has used excessive force in the course of his or her duties. A further example is the Committee's interpretation of the extent to which

allegations of "disgraceful conduct" may target a member's off-duty behaviour.

Finally, the appropriate sanction to be imposed, once a member has been found to contravene the *Code of Conduct*, has often been at issue in appeals before the Committee. In those cases, the Committee has emphasized the principle that the RCMP disciplinary system should be one which, at its core, seeks to correct and rehabilitate members, except in those cases where misconduct is simply too fundamentally opposed to what is expected of police officers for there to be a continued viable employment relationship.

i. Ensuring Compliance with the *Act*

Section 43(8) of the *Act* establishes the limitations for initiating a formal disciplinary hearing. It states that an AO cannot initiate a hearing after one year from the date that the contravention and the identity of the member became known to the AO. The purpose of the limitation period, as stated by the FCA in *Thériault v. Canada (Royal Canadian Mounted Police)* ([2006] FCJ No. 169 (D-082)), is to enable members to mount a defence which could be compromised by undue delay, and to reconcile "the need to protect the public and the credibility of the institution with that of providing fair treatment for its members and persons involved in it".

Proper interpretation of this section is critically important as the Force cannot legally subject a member to formal discipline, and possibly cause the member to lose his or her career, if s.43(8) is not complied with.

Over the years, s.43(8) has proved to be difficult to apply. The Committee continues to strive for fair interpretations and applications of the provision, and has suggested improvements to the definition of the limitation period. One of the most common issues raised in disciplinary appeals has been whether or not the Force complied with s.43(8), and thus whether the hearing could be held. The Committee has helped to clarify the s.43(8) requirements by addressing a number of issues concerning the proper interpretation and application of the provision, such as who is the "AO"; whether the section requires that the AO have actual knowledge of the contravention; how much detail the AO must know; and who has the burden of proving that the limitation period has been respected. The FCA, through its decision in *Thériault* (D-082), confirmed a number of the Committee's findings and recommendations in this area.

In its recent presentation to the *Brown Task Force*, the Committee suggested that s.43(8) be amended to make it easier to objectively determine when the time limit begins to run, and to permit applications for transparently extending the limitation period, where necessary. The *Brown Task Force* report did not adopt this suggestion, but it did advocate for a shorter process.

a. Who is the "Appropriate Officer"?

In D-039, the Member argued that the term "Appropriate Officer" should be interpreted as referring to Force management in general, and not just to the CO. The Board reasoned that because only the AO has the power to initiate a hearing, the term "Appropriate Officer" must be interpreted only as the CO, and not as other representatives of Force management. The Committee and the Commissioner agreed with this reasoning.

Although this interpretation continued to be applied, it also continued to be challenged. The issue was finally put to rest in D-082, where a Superintendent, who had prior knowledge of a member's alleged misconduct, became the Acting AO on several brief occasions. The Member argued that the s.43(8) limitation period commenced as soon as the Superintendent occupied the Acting AO position. The Committee and the Commissioner disagreed.

The FCC found that the Acting AO did not have sufficient knowledge to initiate a hearing. However, it held that it did not matter whether the person occupying the duties of the AO was the permanent, interim, or acting AO. The FCA agreed with this principle, but found that the Superintendent did have sufficient knowledge to initiate the hearing.

b. Does s.43(8) Require that the AO Have Actual Knowledge?

A few cases have raised the question of whether, to commence the limitation period, the AO must actually possess knowledge of the contravention and the member's identity, or if it is sufficient that the AO's subordinates have that knowledge.

In D-090, the AO initiated a hearing one day after acquiring the requisite knowledge to do so. The Board nevertheless ruled that the AO failed to initiate the hearing in time because the AO "should have been informed" of the allegations 18 months earlier when a criminal investigation had been ordered. Although the Committee agreed that the AO should have been informed earlier, it stated that the Board's outrage at the 18-month delay did not allow it to disregard the evidence of the date on which the AO actually acquired the knowledge. The Commissioner agreed that the limitation period runs from the time when the AO acquires actual knowledge, and not from when the AO ought to have known.

In D-082 (*Thériault*), the Committee and the Commissioner agreed with the Board's statement that, to start the limitation period, the required knowledge must be acquired by the person occupying the position of the AO. The FCA confirmed this interpretation and stated that knowledge by third parties, even if they are the AO's subordinates, will not trigger the start of the limitation period.

c. What Degree of Knowledge is Sufficient to Start the Limitation Period?

Another common question concerns the amount of knowledge the AO must have before the limitation period is triggered. In D-052, the Committee stated that an AO has sufficient knowledge to trigger the limitation period once he or she has been informed of the main information upon which an allegation is based. The Commissioner agreed with this interpretation. The Committee expanded on it in D-082, explaining that an AO does not need the results of a completed investigative report to initiate the disciplinary process. The FCA confirmed this interpretation, and clarified that an AO will have satisfactory knowledge when (s)he has "sufficient credible and persuasive information about the components of the alleged contravention and the identity of its perpetrator to reasonably believe that the contravention was committed and that the person to whom it is attributed was its perpetrator".

d. Onus

Proof of the date on which the AO acquired the required knowledge is key to determining whether the limitation period has been respected and a hearing can proceed. Section 43(9) of the *Act* permits an AO to prove the date on which he or she acquired the requisite knowledge by signing a certificate attesting to the date. The Committee recently clarified the issue of who has the burden of proving the date.

In D-098, the AO did not tender a s.43(9) certificate at the hearing, and the Member argued that the hearing had not been initiated in time. The AO could not confirm when he had first become aware of the contraventions and the Member's identity. In addition, there was some evidence that the time limit may have expired. The Board found that the Member was responsible for proving the date on which the AO acquired the required knowledge.

The Committee found that where no s.43(9) certificate is tendered, there is no presumption that the limitation period has been met. Thus, the AO has the burden of providing other evidence to prove that the limitation period has been respected. Since the AO did not provide such evidence in this case, the Commissioner followed the Committee's recommendation, allowed the Member's appeal and dismissed the allegations.

Section 43(9) creates a presumption that, without evidence to the contrary, the AO's certificate is proof of the date on which the AO became aware of the alleged breach and the Member's identity. Therefore, if a member wishes to dispute the date on the certificate, the member must provide evidence that the AO acquired the knowledge more than one year before the hearing was initiated.

In D-052, there was some evidence that the AO knew of the alleged violations before the date on the AO's certificate. The Board held that the AO had not complied with the limitation period. The

Committee and the Commissioner agreed that the evidence displaced the presumption created by the certificate. The Committee clarified that if a member presents some evidence to the contrary, the presumption no longer applies, and the Board must determine whether the limitation period was respected by the usual procedure of considering the evidence at its disposal.

In D-054, the Member tendered an affidavit of the former CO, who attested that he had knowledge of the alleged breaches well over a year before the disciplinary hearing was initiated. The Committee found, and the Commissioner agreed, that the Board was correct to hold that this evidence displaced the presumption created by the current AO's certificate.

If a member has introduced evidence to the contrary, the next logical question is: what can an AO do to prove that the date on the certificate is, indeed, correct? In D-075, the Member introduced evidence at the hearing that contradicted the AO's certificate. The Board stated that it considered the Member's evidence to be of equal weight to the AO's certificate. The Board found that the hearing had not been initiated in time, and the AO appealed its decision. The Committee agreed with the Board and clarified that when evidence to the contrary is introduced, the burden then shifts back to the AO, as the party who initiated the proceedings, to prove that the information relied on to prepare the certificate was factually correct.

e. What Constitutes "Evidence to the Contrary"?

The Committee has also addressed the question of what type of evidence is required to rebut the presumption that the date on the AO's certificate is accurate. In D-075, the Committee explained that "evidence to the contrary" is any credible evidence that the AO learned of the alleged misconduct on an earlier date than that indicated by the certificate, whether or not such contrary evidence is considered to be of higher probative value than the certificate.

f. Abuse of Process

As an alternative to arguing that the s.43(8) limitation period was not respected, members have also contended that the Force abused the disciplinary process by intentionally not informing the AO of the alleged misconduct so as to delay the start of the limitation period. The Committee has considered whether proceedings against a member constituted an abuse of process, even though the hearing had been initiated in time.

In D-100, the Member sought a stay of proceedings due to abuse of process caused by, among other things, delay. The MR submitted that the Representative ("AOR") deliberately withheld information from the AO for 11 months so as to delay triggering the limitation period, and that as a result, key evidence was lost, and witnesses' memories faded. Although the Board found that there had not been a deliberate withholding of information, it held that the 11-month delay was an abuse of process. The Committee observed that there was no direct evidence that the Member suffered any prejudice as a result of the delay. The Committee relied on the SCC's decision in *Blencoe v. British Columbia (Human Rights Commission)* ((2000) 2SCR 307) ("*Blencoe*"), where it stated that delay, in itself, is not sufficient to find an abuse of process. The Commissioner agreed.

Similarly, in D-105, the Member sought a stay of proceedings for abuse of process caused by delay. The Member alleged that the AOR's delay in advising the AO of the contravention affected the Member's ability to make full answer and defence. The Board did not agree that the AOR's delay in informing the AO amounted to an abuse of process. It also found that the hearing had been initiated within 10 months and was therefore in time. However, the Board went on to find that the 10-month delay, in and of itself, constituted an abuse of process, and stayed the proceedings. The AO appealed the Board's decision. The Committee found that the Board's decision was contrary to the direction in *Blencoe* that "delay, without more, will not warrant a stay of proceedings as an abuse of process". The Committee acknowledged that there may be situations were an abuse of process exists even though the limitation period has been respected. However, because the facts in that case

did not establish any abuse of process, the Committee recommended that the Board's decision be reversed, and that the matter be returned for adjudication. The Commissioner's decision in this matter is pending.

ii. Ensuring Fair Hearings

Adjudication boards have a duty to act fairly. This requires that members be notified of the case against them and be given an opportunity to respond. One of the purposes of the Committee's independent and impartial review of disciplinary appeals is to ensure that members receive procedurally fair hearings. This helps to maintain confidence in the disciplinary process. The FCA recognized the need for a high standard of justice, particularly when officers may be facing dismissal, in the case of *Jaworksi v. Canada (Attorney General)* ([2000] FCJ No. 643 (D-047)).

> *"...the ultimate objective in ensuring fairness at the hearing must be kept in mind."*
>
> D-037

The Committee is dedicated to ensuring that hearings are conducted fairly, and that the disciplinary process is reliable and transparent. Through its independent and impartial reviews, the Committee continues to be committed to maintaining a high standard of justice within the RCMP disciplinary system.

In striving for this high standard of justice, the Committee has addressed a number of procedural fairness issues over the years to ensure that members received adequate notice of the allegations and particulars; that both parties had the opportunity to be present and heard at the hearing; that the Board was independent and impartial; that the Board based its decision solely on the evidence before it; and that the Board provided adequate reasons for its decision.

a. Adequate Notice of Allegations and Particulars

Fairness requires that members receive adequate notice of their alleged contravention(s). The particulars as described in the Notice of Hearing into the alleged contravention(s) will make up the "four corners" of the alleged misconduct. In addition, it requires that the hearing and the Board's decision be restricted to those "four corners".

In D-083, the Board found evidence of other acts of disgraceful conduct, but it was also of the view that none of the particulars, as specified in the Notice of Hearing, had been established. Nonetheless, it found that disgraceful conduct had been established. The Committee noted that s.43(6) of the *Act* requires that a statement of particulars in a Notice of Hearing contain "sufficient details" of the allegation to ensure that the member can "prepare a defence and direct it to the occasion and events indicated". In addition, s.45.12(1) limits the Board's jurisdiction to determining whether or not each allegation contained in the Notice of Hearing is established. The Committee held that the Board exceeded its jurisdiction by relying on facts that were neither described in the particulars, nor relied on by the AO to support the allegation.

The Commissioner disagreed. On judicial review to the FCC, the Court agreed with the Committee's findings. The FCA also agreed with the Committee. The FCA noted that the *Act* contains onerous requirements for providing sufficient notice and particulars, and that Boards and the Commissioner should not base their decisions on findings that are outside of the specified particulars (*Gill v. Canada (Attorney General)*, [2007] FCJ No. 1241).

b. Requests for Adjournments/ Right to Be Present

Another aspect of fairness is a party's right to be present throughout the hearing, although this is not an absolute right. A party may request an adjournment, however there is no "right" to an adjournment, even if both parties agree to one. Rather, adjournments are granted at the Board's discretion. The Committee has sought to ensure that, when deciding to grant or deny requests for

adjournments, Boards give paramount consideration to safeguarding the fairness of the hearing.

In D-101, after receiving testimony from the Member's doctor, the Board adjourned the hearing for four months because the Member was medically unfit to participate. Before the next scheduled hearing date, the Member's counsel requested a second adjournment because the Member was still awaiting treatment. The Board was of the view that the Member had not followed through with the required treatment, and denied the request. The Board held the hearing without the Member or his counsel present, and found that the allegations were established. Although the AO was not seeking dismissal, the Board ordered that the Member be dismissed.

The Committee found that the Board's conclusion that the Member had not followed through with treatment was based on unsworn emails and documents, contrary to the requirement that all testimony be given under oath or affirmation. The Committee emphasized the fundamental importance of the right of a party to be present at a disciplinary hearing, and noted that fairness is the paramount consideration when responding to a request for adjournment on the basis of illness. The Committee found that the Board unfairly deprived the Member of the opportunity to be present and defend himself. The Commissioner agreed with the Committee's recommendation, and referred the matter back to a differently constituted Board for a hearing.

c. Right to Be Heard

Parties have a right to be heard before a Board renders its decision. The Committee has ensured that parties and Boards understand that this right includes the right to be heard not only on the allegation portion of the hearing, but also on the sanction portion of the hearing.

In D-015, the AO reduced the original sanction sought from a dismissal to a reprimand and forfeiture of three days' pay. The Member admitted the allegation, and the Board held a sanction hearing. In its decision, the Board stated that it "wrestled" with the issue of whether the Member should remain in the Force, and imposed a sanction of a reprimand and forfeiture of 10 days' pay. The Committee relied on the Ontario Court of Appeal's decision in *College of Physicians and Surgeons of Ontario v. Petrie*((1989), 37 Admin.L.R. 119) for the principle that, if a Board seeks to impose a sanction greater than that proposed by the parties, it must first give the parties an opportunity to make submissions on the greater sanction being contemplated. Because the Board failed to do that, the Committee found that it breached the Member's right to be heard. The Commissioner agreed and varied the sanction to a reprimand and forfeiture of three days' pay.

In D-061, the parties made a joint submission for a sanction of a reprimand and forfeiture of five days' pay. The Member was not present at the sanction hearing because he was at the hospital with his child who was undergoing cancer tests. However, because the Board considered the misconduct to be very serious, it wished to hear witnesses on sanction. The Board offered to adjourn the hearing for a while so that the Member could testify. Two hours later, the hearing resumed. The Member and his line supervisor testified, and the parties argued that their joint submission on sanction was reasonable. The Board ordered the Member to resign.

> *"While the Board has more flexibility than a court in terms of the evidence it is allowed to hear, there are still limits. The evidence adduced must be relevant and deemed fit in order to be admissible. As well, procedures must be fair."*
>
> D-100

The Committee found that the Board violated the Member's right to be heard and to make full answer and defence. First, the Board did not clearly notify the parties that it intended to reject their joint submission, or that it was considering a sanction as severe as an order to resign. Second, the short notice given by the Board did not provide the parties with sufficient opportunity to prepare. Third, the inadequacies of notice

deprived the parties of a meaningful opportunity to be heard. The Committee found that the Board should have properly notified the parties and adjourned the hearing for at least a few weeks to permit the parties adequate time to prepare. The Commissioner agreed, set aside the Board's order for resignation, and imposed a sanction of a reprimand and forfeiture of 10 days' pay.

d. Submissions

The right to be heard includes the right to make submissions and arguments in favour of one's case. The Committee has sought to ensure that submissions are made fairly, and do not introduce facts that were not raised in evidence.

In D-095/096, the Members argued that they did not get a fair hearing because the AOR tendered evidence in his submissions that the AO had lost confidence in them. The Committee noted that s.10 of the *Commissioner's Standing Orders (Practice and Procedure)* (SOR 88/367, as amended) requires that all testimony be given under oath or affirmation. The Committee found that, because the AO did not testify at the hearing, the AOR should not have introduced the AO's opinion during submissions. The Committee stated that it is a general rule of fairness that parties should not introduce any facts in their submissions that have not been introduced as evidence. The Commissioner agreed that AORs should limit their submissions to facts for which there is an evidentiary basis.

iii. The "Whistle-blower" Defence

Public servants, including police officers, owe a duty of loyalty to the Crown. This duty includes the obligation to refrain from criticising the employer and the obligation to keep confidential information private. An exception to this duty is known as "the whistle-blower defence". This allows public servants to comment publicly or disclose information in circumstances where the government is engaged in illegal activity; a government policy endangers life, health or safety; and the comment or disclosure does not affect the employees' ability to perform their duties. Also, as a general rule, public servants must try to resolve matters internally before going public.

The Committee has made Findings and Recommendations in two high-profile discipline appeals involving the "whistle-blower" defence; the cases of *Stenhouse and Read*.

Staff Sergeant ("S/Sgt.") Stenhouse (D-076) had been accused of misconduct for sharing confidential documents with an author about police strategies to investigate organized motorcycle gangs. He defended his actions as being designed to draw attention to a matter of legitimate public concern. A Board found that the allegation of misconduct against S/Sgt. Stenhouse had been established and ordered him to resign or face dismissal from the Force.

On appeal, one of the arguments advanced by S/Sgt. Stenhouse was that the finding that disgraceful conduct was established was incorrect on the grounds that his disclosure raised a matter of legitimate public concern. He also argued that the sanction imposed was excessive.

The Committee concluded that the evidence did not substantiate the argument that the Force's strategies to counter motorcycle gangs endangered public safety or were unethical. Rather, it was of the view that a reasonable person would not want RCMP members disclosing such information, knowing just how serious the consequences might be.

With regard to sanction, the Committee found that, although S/Sgt. Stenhouse's positive career record with the RCMP was a relevant consideration, the Force could not be expected to retain a member who did not fully understand the duty of loyalty and did not appear to be trustworthy. The Committee recommended that the appeal be dismissed. The Commissioner agreed with the Committee's findings and recommendations and dismissed the appeal. S/Sgt. Stenhouse made an application to the FCC, asking that the Commissioner's decision be overturned.

The FCC (2004 FC 375) did not support S/Sgt. Stenhouse's argument that the whistle-blower defence applied in his case. However, the Court returned the matter to the Committee on other grounds.

Corporal ("Cpl.") Read (D-081) was one of a series of investigators assigned to review the system used to issue visas at the Canadian Mission in Hong Kong. He became convinced that senior Immigration Department officials, aided and abetted by members of the RCMP, had covered up flaws in the visa issuance system and potentially allowed criminals into Canada. His supervisors did not agree with his assessment and he was removed from the file. After becoming concerned that he was being "set up" for releasing a classified report to a third party, Cpl. Read gave a number of media interviews in which he discussed the Hong Kong investigation. He had previously been ordered not to discuss the Hong Kong file with the press.

A Board found that Cpl. Read's conduct violated the *Code of Conduct*, and ordered him to resign or face dismissal. In making this finding, it stated that RCMP members should be held to a higher duty of loyalty than civil servants. The Committee disagreed. It was also of the view that the whistleblower defence was not limited to matters of public health and safety alone. It was also available where the information disclosed involved a matter of "legitimate public concern". The Committee recommended that the Commissioner allow the appeal.

The Commissioner delegated his decision making function on the basis that he had previously been involved in the investigation into Cpl. Read's alleged wrongdoing. The delegated decision maker agreed with the Board that a higher standard applied with respect to the duty of loyalty of RCMP members. He further stated that the "public concern" standard used by the Committee regarding the whistleblower defence was overly broad, and that, in any event, the matters disclosed did not involve genuine public concern. The sanction of the Board was upheld. The Member file an application for judicial review to the FCC.

The FCC (2005 FC 798) found that Cpl. Read's conduct violated the duty of loyalty, but that if he was entitled to speak on the basis of the whistleblower defence, the Force would be prevented from imposing discipline. The Court held that, while there was a possibility that criminals might have entered Canada using bogus documentation, this risk was too remote to trigger the exception to the duty of loyalty based on public health or safety. While the Court found that Cpl. Read honestly believed the accusations, honest belief was not enough. There had to be some rational basis for the belief and Cpl. Read failed to prove his allegations. Finally, the Court rejected the Committee's conclusion that there was an exception to the duty of loyalty related to matters of legitimate public concern. The Court acknowledged that there could be other exceptions to the duty of loyalty, but that public interest as a general concept was not such an exception. Finally, the Court concluded that, even if the speech was otherwise justified, Cpl. Read was precluded from going public as he had not exhausted the internal recourse process.

Cpl. Read appealed to the FCA (2006 FCA 283). The FCA supported the lower court's conclusions, finding that legitimate public concern was not an exception to the duty of loyalty. The FCA also held that, based on the nature of the duties of police officers, they must necessarily be held to a very high standard of the duty of loyalty. Yet the Court was not willing to go so far as to say that it was necessarily higher than the standard to be applied to other public servants.

Cpl. Read sought leave to appeal to the SCC ((2007), 153 C.R.R. (2d) 375), which was denied on May 10, 2007. As is its custom, the Court provided no reasons for its decision.

These two very important cases clarified the law surrounding public disclosure of wrongdoing in the policing context, including providing guidance on the questions of the extent of the duty of loyalty for police officers and the exceptions to that duty.

On April 15, 2007, the *Public Servant Disclosure Protection Act* (2005 c.46), an act to encourage public servants to report suspected wrongdoing, came into force. It includes a definition of "wrongdoing" and provides protection for public servants who report wrongdoing, including in some cases, protection when the public servant has engaged in public disclosure. That statute includes protections for RCMP members who disclose wrongdoing. However, access to reprisal complaints is more limited for RCMP members.

They must exhaust internal mechanisms related to discipline, discharge and demotion and administrative discharge before accessing the complaint process established under the Public Sector Integrity Commissioner. The whistle-blower defence remains available to members in relation to any formal disciplinary hearing, and the Committee continues to have the mandate to review appeals of formal discipline.

iv. Use of Force

In the course of their duties, members may face circumstances which escalate into threatening or violent situations, and which require some use of force. Disciplinary appeals sometimes involve allegations that a member used excessive force in handling these situations. In assessing the use of force by members, the Committee has acknowledged that such reviews are always conducted in hindsight, and that care must be taken not to measure decisions made by members, in often challenging circumstances, to an excessively exacting standard. However, where the use of force is excessive, taking into account policing standards and the perspective of a well-informed reasonable person, discipline will likely be necessary. The public must have confidence that the significant authority police officers possess will be exercised appropriately.

The Committee's findings and recommendations in D-084 provide an example of the challenging analysis which is required to assess whether a member used excessive force. In that matter, the Member had detained an intoxicated prisoner. The prisoner refused to move towards the booking-in room of the Detachment, in order to be searched. The Member pushed him into the room and the prisoner leaned into the Member, taunting him verbally. The Member attempted to turn the prisoner around to search him, but the prisoner avoided that attempt. Further efforts to subdue the prisoner failed. The Member then struck him several times and the prisoner stopped resisting. One allegation of disgraceful conduct was presented against the Member, in which it was alleged that he had used an excessive level of force.

The Member testified before a Board that he had been concerned that the prisoner could become violent, a concern corroborated by several other witnesses. Two expert witnesses defended the Member's actions because the prisoner was displaying threatening and aggressive behaviour. The experts discussed use of force models, including the Force's Incident Management Intervention Model (IMIM), which outlines specific steps in handling potentially violent situations. The IMIM indicates a range of responses by members, from verbal intervention to the use of force in increasing degrees, which vary depending on the situation a member faces. The experts acknowledged that the IMIM and other use of force models place considerable emphasis on the need to use verbal communication skills, and that the Member had made an ineffective use of such skills. However, the experts were persuaded that more effective communication would not have had any impact on such a highly resistive individual.

Two of the three Board members concluded that the Member's conduct was not disgraceful because he had acted within the parameters of use of force model. The Board's Chair dissented, noting that the prisoner had been highly intoxicated and that there had been a lack of clear verbal direction by the Member.

In considering the AO's appeal, the Committee stated that a Board must consider allegations of disgraceful conduct from the perspective of a reasonable person with knowledge of all relevant circumstances, including the realities of policing in general and the RCMP in particular. This assessment should go beyond whether a member's actions had fallen within the parameters of use of force models. Whether the member's own actions may have contributed to an escalation of the situation, and the efforts made by the member to communicate with the prisoner, were factors to consider. The expert opinions gave little consideration to whether the member's perception of a threat was reasonable and whether the member himself had contributed to triggering the prisoner's aggression. The Committee recognized that a member's use of force ought not be "measured to a nicety". However, it agreed with the dissenting Board Chair that, in this case, the Member ought to have provided the prisoner with clear verbal

direction as to what was expected of him, particularly because of the prisoner's level of intoxication. As a result, the Committee recommended that the appeal be allowed and that the Board be directed to conduct a new hearing into the allegation. The Commissioner agreed with the Committee.

The Committee has also commented on issues surrounding fairness to the member when excessive force is alleged. For example, it is important that all relevant circumstances be considered in imposing a sanction on members found to have used excessive force, and that the sanction be in line with those imposed on others in similar circumstances. In D-069, the Committee considered whether the Member's conduct warranted dismissal from the Force. In that case, the Member responded to a call involving a domestic assault incident and took a suspect into custody. While attempting to search the suspect, the Member became physically aggressive towards him, and shouted profanities. The Member then released pepper spray in the prisoner's face. The Member admitted the allegation before an Adjudication Board. Even though the AOR did not seek the Member's dismissal from the Force, the Board found that the Member had acted with a degree of premeditation and with the intent to punish the prisoner, and ordered him to resign. The Member appealed the sanction.

The Acting Chair of the Committee determined that the record was lacking as to whether the Member's actions were premeditated and intended as punishment, and therefore he conducted a hearing into the matter. The Committee received additional evidence relating to the Member's behaviour and the circumstances that might have caused the Member to resort to that level of force. On the basis of all of the evidence received at the two hearings, the Committee found that the evidence did not support a conclusion that the Member had acted with premeditation and intent to punish the prisoner. Rather, the Member's use of force was a spontaneous outburst that arose primarily from frustration in attempting to carry out the search of a prisoner who, although not clearly uncooperative, was presenting some difficulties. The Committee recommended that the Commissioner rescind the Board's sanction and impose a sanction of forfeiture of seven days' pay and a reprimand. The Commissioner agreed with the Committee's recommendations, and imposed the lesser sanction.

v. Off-Duty Conduct

In its Discussion Paper entitled "*Off-Duty Conduct*" the Committee looked at the question of when off-duty conduct may attract discipline. A rational connection between the conduct and the legitimate interests of the Force must be demonstrated and the proper balance between the Force's interests and the member's private life is crucial.

Section 39(1) of the *Code of Conduct* addresses certain types of off-duty conduct by stating that a member "shall not engage in any disgraceful or disorderly act or conduct that could bring discredit on the Force". In examining what type of off-duty conduct could be targeted by s.39(1), the Committee has stated that a two-part test must be applied to the circumstances (D-025). An adjudication board must first address whether the conduct is disgraceful, from the perspective of a "reasonable person with knowledge of all relevant circumstances, including the realities of policing in general and the RCMP in particular." The second part of the test examines the nexus between the disgraceful conduct and the employment relationship. In D-019, the Committee indicated that this must be assessed by asking if a reasonable person would be of the opinion that the off-duty conduct was sufficiently related to the employment situation to warrant discipline against the member. All of the circumstances surrounding the conduct must be assessed to determine if it could bring discredit to the Force.

The Committee addressed the criteria for establishing "discredit" in D-079. In that matter, a Member had used a hotel access card to enter a cadet's hotel room because he was concerned for the well-being of that cadet. The Member allowed others who were accompanying him to remove clothing from the room as a prank, despite having realized by then that there were two cadets sleeping in the room. The Committee found that in allowing others to engage in the prank, and thereby violating the privacy of the two cadets in the room, the Member had engaged in disgraceful conduct.

As for the discredit brought on the Force through this off-duty incident, the Committee noted that the hotel's reputation and that of its employees was compromised. From the perspective of the hotel management and it staff, the Member's actions must have been seen as bringing discredit to the Force. The Commissioner concurred with the Committee's findings.

Conversely, in D-088, the Committee found that the required nexus had not been established. In that case, the Member was off-duty and assisting his spouse in operating a bar. The Member observed an ex-employee removing money from the ceiling. The ex-employee told the Member that the money was to be used to purchase cocaine. The Member directed the ex-employee to leave the premises and retrieved the money. Within the next hour, several RCMP members arrived searching for a suspect in an armed robbery. They told the Member that the suspect was tall and thin but he replied that no one fitting that description had been at the bar during the previous hour. The Member accompanied his colleagues as they checked the footwear of the patrons and went to an apartment on an upper floor. As they were leaving the premises, the Member approached them and indicated that he had just remembered that the ex-employee had been at the bar and told them that he might be the suspect. He also provided them with the two $20 bills that he had retrieved. The Member assisted his colleagues in locating the ex-employee.

The basis for the first allegation of misconduct was that the Member had turned a blind eye to possible criminal wrongdoing by the ex-employee as he should have been aware that money hidden in a ceiling likely had been stolen. The rationale for the second allegation was that the Member had not been forthright with his colleagues when he initially told them that no one fitting the suspect's description had been at the bar. The Adjudication Board concluded that neither allegation had been established, and the AO appealed.

The Committee recommended that the appeal be dismissed. In its view, no discipline was warranted. Not every error made by a member while off-duty can generate disciplinary action, and it is only when the error can be attributed to an ethical shortcoming that discipline is an appropriate response. The evidence before the Board established that the Member's actions could be attributed to inattentiveness and poor judgment but not to a failure to be in a state of ethical readiness while he was off-duty. This might have been the case if, for example, there was evidence that the Member had been attempting to protect his ex-employee. Given that the Member did not delay in apprising his colleagues of information concerning the ex-employee once he realized that the person might be a suspect in the armed robbery, disciplinary action was not a justifiable response on the part of the Force.

The Commissioner agreed with the Committee's findings and dismissed the appeal.

vi. Progressive Discipline

In its Discussion Paper entitled "*Sanctioning Police Misconduct—General Principles*", the Committee noted the Marin Commission's central recommendation that the disciplinary system of the Force be more remedial than punitive. This discussion paper described the philosophy behind modern police discipline, which includes a recognition that a police force's members are its most valuable resource, and an emphasis on correcting behaviour rather than punishing.

In the Discussion Paper, the Committee welcomed the changes to the *Act* in 1988 which added sanctions aimed more at correction than punishment. However, the Committee also noted that the new *Act* did not specifically direct that a remedial approach should always precede one that is punitive:

> Although the new RCMP Act gives discipliners the opportunity to use these corrective sanctions, it does not mandate their use. It is unfortunate that the new RCMP Act does not include some sort of specific legislative direction to the effect that a disciplinary approach which seeks to correct and educate a member should always precede one that seeks to assign blame and impose punishments.

Although the *Act* does not explicitly refer to a requirement that remedial discipline be valued

above a punitive approach, the Force itself has embraced this principle by including, in its *Policy on Discipline* (AM XII-6), the following provisions which reflect the remedial approach to its disciplinary system:

> E.2 When disciplinary action is necessary, the first effort should be in correcting/reforming a member's personal conduct rather than assigning immediate blame/punishment.

As well, the Committee has often emphasized recognition of the value of members and the importance of correcting rather than punishing through discipline. That being said, there are instances where misconduct is simply too fundamentally opposed to what is expected of police officers for there to be a continued viable employment relationship. In such cases, the Committee has recommended that the Commissioner end a member's employment with the Force.

In endorsing the principle that correction should be a guiding principle in discipline, the Committee has sometimes recommended that employment be maintained where facts suggested that members were unlikely to re-offend, and where they enjoyed the continued trust of the Force. This can be seen in some of the Committee's earliest recommendations. In D-011, a Member had removed special VIP protection group pins from other members' suits. A Board concluded that the Member's integrity was put into question by the incident, and ordered that he resign or be dismissed. The Committee was of the view that the Member should not lose his career with the Force. He had readily admitted to taking the pins, even though supervisors had invited the perpetrator to return them anonymously. The Member's colleagues had continued confidence in him, as displayed by their decision to elect him as organiser for their social fund, his supervisor chose not to suspend him, and the Force had sent him on training courses since the incident. In the Committee's view, there was a reasonable prospect of rehabilitation, and it recommended that a lesser sanction be imposed. The Commissioner agreed.

> *"...while deterrence is important, it should not outweigh other factors; the key issue is whether the employee is beyond rehabilitation and no longer fit to perform his or her functions."*
>
> D-043

In a similar fashion, in D-023, a Member who was in charge of a social fund at a Force detachment used some of the fund's money for personal purposes. He also misrepresented the amount contained in the fund to two other members. He was ordered to resign from the Force or be dismissed, and appealed the sanction. The Committee found that it was the Member's first incident of misconduct in nine years of exemplary service. Moreover, he had cooperated with investigators, repaid the amounts he owed the fund and had been subjected to difficult family related problems at the time of the misconduct. The Committee also noted that the Member had, by consulting a psychologist forty times from the time of the investigation to the hearing, shown that he understood the severity of his conduct and that he wished to rehabilitate himself. The Committee recommended that a lesser sanction be imposed and that the Member remain with the Force. The Commissioner agreed.

The Committee's recognition of the principles of positive and progressive discipline has continued in more recent findings and recommendations. For instance, in D-099 the Member faced allegations of knowingly neglecting his duties on several occasions by failing to follow up on an investigation, failing to process exhibits pertaining to three impaired driving offences, and lying to a superior about whether an exhibit had been processed. The Board found the allegations to be established, and ordered the Member to resign with fourteen days. The Member appealed the Board's findings, as well as the sanction.

The Committee recommended that the Commissioner find that the allegations of neglect of duty had not been established. The Committee also recommended that the appeal on sanction be allowed, finding that the Board had erred in not placing significant weight on the evidence that the

Member was under an unusually high level of stress during the time of the misconduct. According to an expert opinion, those stressors caused the Member to be overwhelmed, made his thinking more disorganized and made him more prone to poor judgment. Although the Member had prior instances of discipline that were similar, the Committee concluded that the Board had exaggerated the seriousness of that disciplinary record, and on the basis of the principle of progressive discipline, the Committee found that termination from the Force was too harsh a penalty.

Although the Commissioner found that most of the allegations had been established, he agreed with the Committee that a sanction less than dismissal should be imposed. The many stressful events in the Member's life were given insufficient weight, and there was reason to believe that he could be rehabilitated. The Commissioner imposed reprimands and forfeiture of pay.

Over the last 20 years, the Committee has also recognized that, if the nature of misconduct raises serious concerns about the Member's character, and if those concerns are fundamentally incompatible with continued employment with the Force, termination of the Member's employment may be considered a legitimate option.

An early example of this is D-012. There a Member lived with two individuals who frequently possessed and consumed marijuana and hashish while he was present. The Member had taken no action, and had on occasion used the substances himself in the presence of others who knew he was a member of the RCMP. He was charged with disgraceful conduct, and the Board concluded that he should be discharged from the Force. The Committee found that the Member had shown a lack of judgment which was incompatible with the position of a police officer. In its view, the Member did not possess the essential quality of demonstrating leadership and control in a situation where he could be tempted to abdicate some of his duties. Although there was some limited evidence that the Member had been subjected to certain stressors, they were insufficient to mitigate the misconduct. As well, the Member had not sought professional help to assist him with his stressors, and chose not to use available Force counselling services. Finally, the Member revealed his true character when he chose to "fit in" by engaging in the misconduct. The Committee recommended that the dismissal be upheld. The Commissioner agreed.

More recently, in D-077, the Member was found to have engaged in disgraceful conduct for having alerted an individual who was the subject of an ongoing investigation that a search was about to be conducted. As a result, the individual was able to arrange for the premises to be closed and the search could not be carried out. At the sanction hearing, the Member maintained that he had acted impulsively and he had not intended to impede the investigation. 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 concluded that the Member "has learned a valuable lesson, one that surely will guide him in his future work endeavours". The Board found that the Member's telephone call was designed to obstruct the investigation, and ordered him to resign from the Force or be dismissed. The Member appealed.

The Committee found that the very nature of the Member's misconduct was a corrupt practice. The Member could not be trusted to uphold the law at all times or to support the efforts of other agencies involved in law enforcement. By showing himself to be corruptible, the Member forfeited his entitlement to continue his career with the Force, even though he was highly regarded by his colleagues and was genuinely remorseful for his actions. The Committee recommended that the appeal be dismissed. The Commissioner agreed, finding that the Member's conduct violated the trust placed in him as a police officer.

Similarly, in D-078 a Member was ordered to resign for having made unauthorized enquiries on an electronic database known as the Canadian Police Information Centre ("CPIC") concerning members of a criminal gang. The Board found that the Member had consulted CPIC to help the gang members counteract attempts by the police to learn more about their

involvement in the murder of a rival gang member. The Member appealed the decision on sanction.

The Committee was of the view that, although the Member appeared genuinely remorseful for what he had done, the nature of the breach of trust was significant. The Member demonstrated that he regarded loyalty towards a friend as more important than helping a colleague from another police force in the investigation of a serious crime, and that such a set of values could not be reconciled with the values expected of a member of the Force. The Committee recommended that the order to resign be maintained. The Commissioner agreed.

Over the course of its history, the Committee has strived to apply a progressive and positive approach to disciplinary appeals. The Committee has also attempted to foster discussion on further structural ways of ensuring that the RCMP disciplinary process is less punitive and more remedial. In its "*Preliminary Report on Disciplinary Processes and Dispute Resolution Techniques in the RCMP*", issued in 2001, the Committee proposed discussion on the option of amending the *Act* to increase the range of sanctions that could be administered by a Board. There will always be cases where continued employment of a member is simply not an option. But in the Committee's view, any efforts to give more flexibility to Boards in imposing sanctions will result in a system which better achieves the correction and rehabilitation of members, and recognizes their significant value to the Force.

D: Discharge and Demotion

Under Part V of the *Act*, a member may be the subject of discharge or demotion proceedings for failing to perform his or her duties in a satisfactory manner, after having been given "reasonable assistance, guidance and supervision in an attempt to improve the performance of those duties". The member may request that a Discharge and Demotion Board ("Board") be convened to determine if discharge or demotion is warranted, and either the member or the CO may appeal the decision of the Board to the Commissioner. Prior to rendering a decision on the appeal, the Commissioner must refer the matter to the Committee.

Discharge and demotion cases, while rare, are significant as they potentially involve the end of a member's career. The Force's response to performance problems is a key factor when deciding if discharge or demotion is warranted, as the *Act* requires that reasonable assistance, guidance and supervision be provided in an attempt to improve a member's performance. In its recommendations in discharge and demotion matters, the Committee has highlighted the importance of providing meaningful assistance to members whose performance is problematic and who may eventually be subjected to discharge and demotion proceedings. Further, members with work performance problems sometimes face significant stressors in their lives which affect their ability to perform duties to the proper standard. The Committee has commented on the importance of taking a member's personal circumstances into account when assessing performance problems. Finally, the Committee has underscored the importance of considering, in appropriate circumstances, whether transferring a member constitutes a plausible option to improve a member's performance.

In some circumstances, the Committee has relied on one or more of the above factors to find that the Force had not properly established that a member should be discharged.

For instance, in R-001, the Board found that the Member's performance had been unsuitable for a period of over four and a half years, despite the fact that reasonable help and advice had been provided to her. The Board directed that she be discharged.

The Committee disagreed. It found that it had not been established that the Member was completely unable to satisfactorily perform the duties of a general policing constable, because the record suggested that the Member had been able to perform well elsewhere. Further, the evidence showed that the Member suffered from depression during the period in which her performance had deteriorated. In the Committee's view, the Member's performance problems had likely been caused by her depression, and the evidence

indicated that her depression would eventually be overcome. The Committee recommended that the Commissioner order her transferred to a posting where she could show her ability to be a productive member of the Force. The Commissioner found that unsuitability had been established. The Commissioner was also not satisfied that the Member had suffered a state of depression, sufficient or of such long standing, to explain the poor performance. He ordered the Member discharged. The FCC and FCA dismissed the Member's applications for judicial review ([1994] 2 F.C. 356 (T.D.); [1998] F.C.J. No. 42 (C.A.)).

The Committee also found that the Member should not be discharged in R-004. In that matter, a Board heard evidence that the Member had repeatedly failed to meet performance expectations over the span of several years. However, it concluded that the Member had not been provided with reasonable assistance and therefore could not be discharged from the Force. The Board was critical of the Member's supervisor for not doing much beyond documenting the Member's errors. It suggested that he should have adopted a more hands-on approach to the management of the Member's performance. The Board further indicated that the Member should have been transferred because there was a poisoned work environment at the detachment to which she had been posted since the beginning of her career. The evidence of a psychologist before the Board showed concern about very serious family and health issues that the Member was confronting during the same period of time that she was attempting to improve her performance. The psychologist testified these issues would have affected her work performance.

The Board's decision was appealed by the CO. The Committee found that the Board had to assess the measures taken by management to bring about an improvement in performance and determine whether they were sufficient. The evidence indicated that the supervisor had a deep distrust of the Member and was far more interested in laying the groundwork for eventual discharge proceedings than in helping her to improve her performance. As well, the evidence concerning the working environment indicated that it was not conducive to the Member making major improvements in job performance because of the hostility she faced from several of her colleagues. As it had been shown that the Member performed well during a five-month period that she was posted to another detachment, the Committee concluded that a transfer should have been considered. The evidence also indicated that the Member's inability to maintain a consistent level of performance could be attributed to very serious family and health issues that she was confronting at the time. The Committee recommended that the appeal be dismissed.

The Commissioner was "struck" by the inadequacy of the "hands-off" supervision that was provided to the Member, and agreed with the Committee's assessment that the supervisors appeared more focussed, right from the outset, on building an adequate justification for eventually discharge. The Commissioner agreed that the Member should have been transferred, as there were reasons to believe that either the environment or the relationship with the supervisor were significant factors in the Member's poor performance. The Commissioner ordered that the Member be transferred to a new detachment, a thorough assessment of her training needs, and the development of a training plan, including appropriate supervision and guidance.

There have also been cases where the Committee has considered a member's personal situation, efforts by the Force to assist, and the possibility of a transfer and concluded that a discharge was the appropriate response.

For instance, in R-003, the Member had remained posted at the same detachment for his entire career. Shortly after he had joined the Force, his wife committed suicide. In the year following that tragic event, the Member had difficulty prioritizing his work. However, performance issues continued in subsequent years, particularly with respect to time management and conducting criminal investigations. Extensive direction was provided to the Member but his performance continued to be considered unsatisfactory, and discharge proceedings were initiated.

Before the Board, two psychologists attributed the Member's performance shortcomings to a

depression brought about by his wife's death and the stress of having to endure a difficult working relationship with his supervisor. They concluded that treatment could enable the Member to once again meet performance expectations, but indicated that he should also be transferred to another detachment. The Board held that the supervisor had made a sincere and ongoing effort to assist the Member in improving his performance, and that a transfer was not a viable option because the nature of the Member's shortcomings was such that he would not be able to meet performance expectations at other detachments, either. The Board acknowledged that the Member had been suffering from depression, but determined that this condition was not a major factor in explaining why his performance was unsatisfactory. The Board ordered that the Member be discharged from the Force.

The Member appealed. The Committee concluded that, although depression was a factor influencing the Member's performance, treatment for that condition was not likely to bring about a significant improvement in his ability to complete his tasks satisfactorily. From the outset of his career with the Force, the Member had performance difficulties in workload management, knowledge of procedures, as well as leadership and initiative. It was reasonable for the Board to find that the Member's depression was not the principal cause of his performance issues. The evidence also supported the Board's finding that the Member received reasonable assistance from his supervisor. Further, a transfer was not likely to lead to significant improvement in the Member's performance, as neither the Member's environment nor his relationship with supervisors were key reasons for his performance shortcomings. The Commissioner agreed with the Committee's findings and dismissed the appeal. The FCC dismissed the Member's application for judicial review (2006 FC 528).

This year, in R-005, the Committee also concluded that a Board's decision to discharge a Member was appropriate. In that case, the Member had been hired by the Force to transcribe intercepted communications and translate them from a foreign language. Although translation had, for a long time, been the Member's principal task, the nature of her duties had changed to the point where she was mainly transcribing and summarizing recordings in French and English, rather than translating from a foreign language. Gradually, problems with the Member's work performance were noted by the Member's supervisors, and discharge proceedings were initiated. The Board ordered that the Member be discharged, and the Member appealed.

The Committee agreed with the Board that the Member had known the standard she was expected to meet. Although she had originally been hired mainly to translate from a third language, the circumstances in her section had evolved and the Member had access to appropriate assistance to perform her new duties. As well, the Member had, on her own initiative, taken English language training to improve her work performance, and it was reasonable for her supervisors to expect that she would use that language. The Committee agreed that the Member had repeatedly failed to perform her duties in a satisfactory manner, and that she had been given reasonable assistance, guidance and supervision to improve her performance. Despite that help, the Member continued to show an inability to meet the standards attached to her duties, thorough errors in her transcriptions, translations and conversation summaries, and in refusing to follow workplace directives. The Committee also concluded that the Force had made reasonable attempts to transfer the Member to other duties, noting that on at least two occasions, the Member had shown reluctance in exploring such an option. That reluctance had included grieving a recommendation that she be transferred. The Committee recommended that the Commissioner deny the appeal. The Commissioner has not yet rendered a decision in this matter.

E: Future Direction of Labour Relations Oversight of the RCMP

This year's Annual Report reviews the difference that the Committee has made in the lives of RCMP members over its history, and highlights important areas where it has made recommendations for a better functioning labour relations regime.

"We are made wise not by the recollection of our past, but by the responsibility for our future."

George Bernard Shaw

The objective of the Committee has always been to be thorough, detailed, impartial and independent in its adjudication of cases before it. Throughout twenty years of its review function, it has managed to constructively inform the process of labour relations in the RCMP, to the extent that its mandate provided. The Committee's values, which are set out in the introduction, have served and continue to serve as a foundation for its work. Perhaps not surprisingly, they also inform its future vision.

As part of the effort to support the Minister in his decision-making with respect to the future direction of the RCMP, the Committee has identified six major elements which contribute to a robust, independent and transparent labour relations review process. In the Committee's opinion, these are the most important elements for any new external review system to encompass, namely:

- the labour relations process should remain independent and arms length;
- members should have direct access to the appeal process;
- the external arms length and independent review body should be the final decision maker;
- the scope of external review of labour relations matters should be broadened;
- mediation should be introduced into the functions of the external review agency;
- the external review agency for labour relations should have the resources needed to fulfill its expanded mandate.

More details on these six points and how they would contribute to more effective labour relations review function for the RCMP can be found at the Committee's Website.

Part IV
Federal Court Cases 2007–08

In 2007-08 a number of court decisions were issued in matters previously before the Committee. The Committee monitors all judicial developments to ensure that its reviews take into account the latest case law. The Committee also summarizes relevant cases in its *Communiqué* and makes these summaries available in its Website.

A: Cases before the Federal Court of Canada

Kinsey and Dhaliwal v. Canada (Attorney General) [2007 FC 543]

Constables Kinsey and Dhaliwal faced allegations of disgraceful conduct due to the inappropriate use of the RCMP's mobile computer system. The messages they sent on this system were derogatory towards colleagues and members of the public, contained profanities and obscenities, expressed a desire to use improper force, and stated a lack of commitment to their work.

At the Board hearing, evidence was presented regarding previous disciplinary action against both Members for similar conduct. The Officer in Charge of the detachment testified that he had lost confidence in both Members. The Board ordered the Members to resign as their lack of judgement and clear disregard for the RCMP's values repudiated essential elements of the employment relationship.

The Members appealed the Board's decision. They argued institutional bias among the Board members on the ground that its members ranked below the AO, a RCMP Deputy Commissioner. The Committee found that there was no evidence to suggest that the Board members were biased.

The Members also argued that there was a breach of procedural fairness, as the AO, acting through the AOR, presented the AO's personal opinion during the closing submissions, without introducing this as evidence during the Board hearing. The Committee dismissed this argument. It found that while there was a breach of procedural fairness, it would not have affected the hearing outcome.

The Members further asserted that the sanction was disproportionately high. The Committee also rejected this argument. The Committee recommended that the Commissioner dismiss the Members' appeal. The Commissioner agreed with the Committee and directed the Members to resign. The Members appealed to the FCC.

The FCC found that the AO's comments were inappropriate and that there was a flagrant breach of procedural fairness. The Court found that the AO was provided an opportunity to present evidence, cross-examine witnesses, and make representations at the hearing. However, the AO chose to participate through a representative, did not testify, and could not be cross-examined. The Court found this to be unfair to the Members. The Court found that a breach of procedural fairness will render a decision invalid in all but the most unusual cases. It ordered the Commissioner's decision to be set aside and a new Board to hear the case. No appeal of the decision was filed with the FCA.

Smart v. Canada (Attorney General) [T-1465-07]

There is currently one case pending before the FCC. Cst Smart was alleged to have conducted several unauthorized, non-duty related queries on the police information data systems and to have disclosed confidential information between October and December 2000. A hearing was initiated on July 21, 2003. The Member brought a motion for an order that the Notice of Hearing be quashed for lack of jurisdiction, given that the statutory time limit for initiating the disciplinary hearing under section 43(8) was not respected and a second motion for a stay of proceedings on the basis of abuse of process.

The Board found that the AO ought to have been advised of the matter prior to July 21, 2002, and therefore, the time limit had expired. They also found that there had been an abuse of process and quashed the proceedings. The AO appealed.

The Committee found that the Board erred in its conclusion that the time limits were not respected. Section 43(8) requires that the AO have actual knowledge of the allegations and the identity of the member. The Committee also found that the Board erred in its conclusion that there was an abuse of process.

The Deputy Commissioner delegated to hear the appeal agreed with the Committee's recommendations and allowed the AO's appeal. A hearing date for this appeal is pending.

B: Cases before the Federal Court of Appeal

Gill v. Canada (Attorney General) [2007 FCA 305]

Four allegations of misconduct were presented against the Appellant. They related to incidents in which he allegedly interacted too aggressively with the public. The Appellant admitted the first allegation, but denied that his conduct in the other instances was disgraceful.

The Board found that the Member had conducted himself in a disgraceful manner that brought discredit to the Force. It imposed sanctions consisting of forfeiture of 10 days' pay for each of the first two allegations (mistreating a restaurant patron and a motorist, respectively), dismissal for the third allegation (making an unwarranted arrest), and an order to resign for the fourth allegation (punching a handcuffed prisoner).

The Member appealed to the Committee. The Committee recommended that the Member's appeal be allowed, in part. With respect to the second and fourth allegations, the Committee found that the Board had exceeded its jurisdiction by relying on facts that were neither described in the particulars nor relied upon by the AO. With respect to the third allegation, it found that, while the Board's conclusion that disgraceful conduct occurred was justifiable, the sanction imposed was too harsh, given that only two of the four allegations could be supported.

The Commissioner disagreed with the Committee. He found that the statements of particulars met the requirements of the *Act* as they contained the place and date of each allegation and were sufficiently specific for the Member to know the case against him and prepare a proper defence. In his view, the Appellant's conduct established an unacceptable pattern of anger and violence that clearly violated the *Code of Conduct*, as well as the Force's core values. The Commissioner upheld the decision of, and sanctions that were imposed by the Board.

The Member applied for judicial review of the Commissioner's decision to the FCC, but did not contest the sanction imposed in relation to the first allegation. The Court held that the Commissioner's conclusions could not stand. In its view, the Force had not given the Appellant particulars that were detailed enough to constitute reasonable notice of the allegations. This prevented the Member from preparing a full defence. The Court also held that the Board's finding that the third allegation had been established was unreasonable since the evidence at the hearing did not support that conclusion. The Court therefore set aside the Commissioner's decision. It referred the matter back to the Commissioner for a redetermination.

The Crown appealed. It asked the FCA to set aside the FCC decision and reinstate the Commissioner's decision. The FCA held that although the FCC did not make any overriding errors, it had failed to confirm that the Appellant had not contested the sanction imposed for the first allegation. The FCA corrected that oversight by ordering that the matter be returned to the Commissioner in order to confirm the sanction for the first allegation, but did not otherwise disturb the FCC decision.

On December 19, 2007, the Commissioner instructed the Force to reinstate the Appellant and ordered the forfeiture of 10 days' pay and the issuance of a reprimand in relation to the first allegation. The Commissioner declined to order a new hearing on the remaining three allegations.

C: Cases before the Supreme Court of Canada

Kindratsky v. Canada (Attorney General) [2007] S.C.C.A. No. 602

The Grievor allegedly fired his firearm at a driver without legal justification; failed to notify communications that he was engaged in a pursuit; failed to notify his superiors or co-workers of the shooting; and made a series of false statements concerning the discharge of his firearm. The Grievor was suspended from duty, and approximately five months later, a stoppage of pay and allowances ("SPA") order was made.

The Grievor filed a grievance against the SPA order, arguing that the SPA regulations constituted an improper delegation of powers because the Treasury Board delegated the responsibility for making the regulations without setting out any criteria for its application. The Grievor simultaneously brought an application in the FCC to quash the SPA order on the basis that the SPA regulations were an illegal subdelegation.

The Level I Adjudicator denied the grievance. He adopted the Commissioner's position in G-342 that the SPA regulations were presumed to be valid, and found that the SPA order was rendered in a fair and equitable manner and in accordance with policy.

The Grievor brought a Level II grievance on the sole ground that the Force had no authority to make the SPA order because the SPA regulations constituted an improper delegation of powers.

The FCC ruled that the SPA regulations were legal as "a reasonable and necessary delegation of an appropriate apportion of power to a suitable person", and dismissed the Grievor's application. The Grievor appealed to the FCA.

The Committee concluded that the Committee and the Commissioner were bound by the FCC's decision, that the proper process had been followed, and that the SPA order had been made based on the established criteria.

The FCA found that Treasury Board complied with the authority provided to it by legislation and that the SPA regulations are valid. The Grievor appealed to the SCC.

The SCC dismissed the application for leave without reasons. The Commissioner's decision in this matter is pending.

Part V
Appendices

A: The Mandate in Detail

The *Act* creates the Committee under Part II. The Committee is an independent, arms length agency reporting to Parliament through the Minister of Public Safety.

Part III of the *Act* details 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 delegate. This is required by the *Act*. A member may request that the matter not be referred to the Committee, but this rarely occurs.

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

For example, 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 are to be referred to it for review. They include:

1) interpretation and application of government-wide policies that have been made to 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*;
4) interpretation and application of the *Relocation Directive*;
5) administrative discharge on grounds of physical or mental disability, abandonment of post, or irregular appointment.

The result of this is that many grievances receive no independent review. Note that the above criteria can be difficult to interpret, and that it is the RCMP, rather than the Committee, that decides if a matter should be referred to the Committee.

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 has been undertaken, i.e. for more serious violations of the *Code of Conduct*, that cases come before the Committee. The Committee does not have a mandate to review disciplinary measures arising from an informal disciplinary process, as defined in 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.

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 *"reasonable 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 *Code 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* occurred 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.

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*
Five categories of grievances are referred to the Committee for 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*; 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.	There is no limitation on the type of disciplinary matters that can be reviewed by the Committee. Appeal submissions are made in writing and the appeal is referred to the Committee, unless the member requests that the matter proceed directly to the RCMP Commissioner. This rarely happens.	There is no limitation on the type of discharge and demotion matters that can be reviewed by the Committee. 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.
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, 2008, the Committee has issued a total of 457 grievance recommendations since its inception.	As of March 31, 2008, the Committee has issued a total of 106 disciplinary appeal recommendations since its inception.	As of March 31, 2008, the Committee has issued a total of 5 discharge and demotion recommendations since its inception.
Of all grievance recommendations issued since the Committee's inception, the RCMP Commissioner has followed the recommendations of the Committee in 89% of the cases where a decision has been rendered.	Of all disciplinary appeal recommendations issued since the Committee's inception, the RCMP Commissioner has followed the recommendations of the Committee in 72% of the cases where a decision has been rendered.	Of all discharge and demotion appeal recommendations since the Committee's inception, the RCMP Commissioner has followed the recommendations of the Committee in 75% of the cases where a decision has been rendered.

B: 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 1993, 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, 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 was appointed full-time Chair on November 1, 2005, for a three-year term.

C: The Committee and its Staff in 2007–08

Current Complement

Catherine Ebbs, Chair

Virginia Adamson, Executive Director and Senior Counsel

Lorraine Grandmaitre, Manager, Administrative Services and Systems

Joshua Brull, Counsel

Melvin Chuck, Counsel (Acting)

Martin Griffin, Counsel

Jill Gunn, Counsel

Monica Phillips, Counsel

Employees Who Left the Committee During the Year

Tanya Dorion, Administrative Services

Marie-Christine Rioux, Counsel (Acting)

Address

The Committee's offices are located in downtown Ottawa, at 60 Queen Street, Suite 513. The Committee's coordinates are as follows:

P.O. Box 1159, Station B
Ottawa, Ontario
K1P 5R2

Telephone: 613-998-2134
Fax: 613-990-8969
E mail: org@erc-cee.gc.ca

The Committee's publications are available on its Internet site at: **http://www.erc-cee.gc.ca**