Commission of Inquiry into the Deployment of Canadian Forces to Somalia



Commission d'enquête sur le déploiement des Forces canadiennes en Somalie

Independence in the Prosecution of Offences in the Canadian Forces

Military Policing and

Prosecutorial Discretion

a study prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia

James W. O'Reilly Patrick Healy

Independence in the Prosecution of Offences in the Canadian Forces

Independence in the Prosecution of Offences in the Canadian Forces Military Policing and Prosecutorial Discretion

a study prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia

James W. O'Reilly Patrick Healy © Minister of Public Works and Government Services Canada 1997 Printed and bound in Canada

Available in Canada through your local bookseller or by mail from Canadian Government Publishing Ottawa, Canada K1A 0S9

Catalogue No. CP32-64/8-1997E ISBN 0-660-17080-9

Canadian Cataloguing in Publication Data

O'Reilly, James W., 1955-

Independence in the prosecution of offences in the Canadian Forces: military policing and prosecutorial discretion: a study

Issued also in French under title: L'indépendance des poursuites engagées relativement à des infractions commises dans les Forces canadiennes.
Includes bibliographical references.
ISBN 0-660-17080-9

Cat. no. CP32-64/8-1997E

1. Military police - Canada.

- 2. Courts-martial and courts of inquiry Canada.
- 3. Prosecution Canada Decision making.
- I. Healy, Patrick.
- II. Commission of Inquiry into the Deployment of Canadian Forces to Somalia.

III. Title.

UB825.C3073 1997 355.1'3323'0971 C97-980273-3

Contents

CHAPTER ONE — INTRODUCTION 1
CHAPTER TWO — THE ROLE OF THE MILITARY POLICE
Introduction 3 Necessity 3 Trust 4
Functions 5 Order and Discipline 5 Field Operations 5 Civilian Law in the Military Context 5 Special Cases 6
Organization 6 The Legal Arrangements 7 The Administrative Arrangements 9
Deployment of Military Police 10 Defined Responsibilities 10 Policing with or without Military Police 11
Conduct and Control of Investigations 12 Commencement of an Investigation 12 Management and Conclusion of an Investigation 12
Conclusions and Recommendations 17 Recommendation One 18 Recommendation Two 18 Recommendation Three 19

Recommendation Four 19 Recommendation Five 19

CHAPTER THREE — PROSECUTORIAL DISCRETION IN THE MILITARY SETTING 21

Introduction 21

Prosecutions in the Military Justice System 21
The Jurisdiction of the Military Justice System 22
The Exercise of Prosecutorial Responsibilities within the Military 29

The Importance of Independence in the Exercise of Prosecution Functions in the Civilian Setting 38

Prosecutorial Discretion in Other Settings 40
The Civilian Context 40
Other Jurisdictions 56

Prosecutorial Discretion in the Military Setting 59
The Significance of Independence in Military
Prosecutions 60
The Commanding Officer as Local Prosecutor 62
Relevant Factors Affecting Prosecutorial Discretion in the Military 65

Prosecutorial Decision Making in Relation to Events in Somalia 66

Areas of Concern 70
The Public Interest in Military Prosecutions 70
Multiplicity of Functions of the Commanding Officer 72
Lack of Structure in Prosecutorial Discretion 74
Conclusion 75

Prosecutors 101

Conclusions and Recommendations 76

Conclusions and recommendations
Guiding Principles 76
Recommendation Six 77
Recommendation Seven 78
Recommendation Eight 78
Recommendation Nine 80
Recommendation Ten 80
CHAPTER FOUR — SUMMARY OF RECOMMENDATIONS 91
The Role of the Military Police 91
Recommendation One 91
Recommendation Two 91
Recommendation Three 91
Recommendation Four 91
Recommendation Five 92
Prosecutorial Discretion in the Military Setting 92
Recommendation Six 92
Recommendation Seven 92
Recommendation Eight 92
Recommendation Nine 92
Recommendation Ten 93
APPENDIX – GUIDELINES AND STANDARDS RELATING TO PROSECUTIONS 95
Report of the Royal Commission on the Donald Marshall, Jr. Prosecution, Volume 1: Findings and Recommendations 95
Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions 96
Department of Justice (Canada), Crown Counsel Policy Manual 98
United Kindom, Crown Prosecution Service, Code for Crown

viii Contents

Australian Commonwealth Director of Public Prosecutions, Prosecution Policy of the Commonwealth 105

United Nations Guidelines on the Role of Prosecutors 110

NOTES 113