



January 24, 2012

The Honourable Vic Toews  
Minister of Public Safety  
House of Commons  
Ottawa, Canada  
K1A 0A6

VIA FAX: (613) 995-1049

Dear Minister Toews:

**RE: Head of Commission for Public Complaints Against the RCMP**

We are writing to you to request that the federal government now appoint a permanent, full time head for the CPC and to express our concerns about what appears to us to be the current maladministration and ineffectiveness of the CPC.

On January 18, 2010, more than two years ago, your office appointed Mr. Ian McPhail, Q.C., whose background is as a real estate and wills lawyer, to be the part-time "acting" head of the Commission for Public Complaints Against the RCMP ("CPC").

We are extremely concerned that there has not been a full-time leader and spokesperson for such a critically important organization to the RCMP and to Canadians generally for more than two years. Mr. McPhail still advertises himself as being available as a full-time lawyer in Toronto, Ontario, without mention of his role as head of the CPC. Indeed, after reciting several boards he worked on from the late 1990's to the mid 2000's, Mr. McPhail says that he:

*...returned to his private law practice in 2004, which now holds a special emphasis on personal legal issues, including real estate, wills and estate planning and administration, and business issues.<sup>1</sup>*

It would appear from these other activities as a lawyer in private practice that Mr. McPhail regards his appointment as acting head of the CPC as being part-time in nature.

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<sup>1</sup> <http://www.mcphailaw.ca/whoweare.htm> Accessed on 19 January 2012.

We have serious concerns about an unwillingness of the CPC to assume a leadership role in relation to police accountability in British Columbia and Canada. In particular, we have just received correspondence from the CPC (copy attached) in which they refuse to assume any jurisdiction to approve and forward to the RCMP concerns about “off-duty conduct” of RCMP officers. We understand now, for the first time, that the CPC may have been refusing to accept, potentially for years, complaints about RCMP “off-duty conduct” up to and including spousal abuse, drinking driving, theft, and other criminal code offences. As a duly qualified lawyer and member of the Manitoba Bar, we take it that you will understand that professional disciplinary matters often are not limited to “on-the-job” conduct, but include matters that raise concerns about character and conduct even though they relate to “off-duty” dealings. The same kind of a principle ought to apply in relation to police officers.

Off-duty conduct is expressly included in the legislated jurisdiction of the CPC. The CPC’s refusal to investigate such conduct is a misinterpretation of the legislation. In particular, under the Code of Conduct regulation of the RCMP Act, sections 39(1) and (2)(b) [prohibition on disgraceful or disorderly act or conduct that could bring discredit on the RCMP, including criminal offences], as well as section 42 [non-civilian members must take appropriate police action to aid any person exposed to danger], clear duties are set out for off-duty officers. Allegations involving the failure to fulfil these duties, and the oversight of investigation of such matters, fall squarely within the CPC’s jurisdiction. Perhaps unsurprisingly, the CPC did not point us to any legal justification for their puzzling decision to refuse to accept such complaints and forward them to the RCMP, requiring complainants instead to contact the RCMP directly.

Four recent examples of off-duty conduct in the news that involved, or should have involved, police oversight bodies in B.C. are: (a) an RCMP officer was involved in an alleged drinking and driving offence in the course of which he caused the death of a motorcycle driver; (b) three drunk off-duty police officers beat up a man in an incident that resulted in criminal charges; (c) an off-duty RCMP officer was involved in an alleged assault of a civilian at a bar fight that the officer allegedly initiated in relation to on-duty concerns; and (c) an off-duty RCMP officer snuck an underage girl into a drinking area of a public festival.

The Supreme Court of Canada in *R. v. Beaudry* 2007 SCC 5, per Charron, J., in relation to a case in which a police officer in Quebec was convicted of obstruction of justice for failing to administer a breathalyzer test to an

off-duty police officer pulled over for impaired driving, said this about police discretion:

38 The required justification is essentially twofold. First, the exercise of the discretion must be justified subjectively, that is, the discretion must have been exercised honestly and transparently, and on the basis of valid and reasonable grounds (reasons of Chamberland J.A., at para. 41). Thus, a decision based on favouritism, or on cultural, social or racial stereotypes, cannot constitute a proper exercise of police discretion. However, the officer's sincere belief that he properly exercised his discretion is not sufficient to justify his decision.

39 Hence, the exercise of police discretion must also be justified on the basis of objective factors. I agree with Doyon J.A. that in determining whether a decision resulting from an exercise of police discretion is proper, it is important to consider the material circumstances in which the discretion was exercised. However, I do not agree with him on the importance of the factors he regarded as part of the legal context, that is, the administrative directives and the administration of justice in the province.

I mention that case because it is, one would have hoped, obvious that in instances where a police officer has been charged and prosecuted, both the police and Crown counsel have determined that there is sufficient evidence to carry forward. For the CPC to decide that it will not bother to perform its public duty in such circumstances is, in reality, quite shocking. It amounts, to use the Beaudry analogy, to a failure to exercise discretion in an appropriate manner.

We should not be taken to say that in instances where the police and Crown do not charge an officer the CPC ought not proceed to investigate. It is obvious that its duty is a broader one than that of the criminal charge and prosecution channel. Our point is that where charges and prosecutions occur, *pro tanto* a complaint investigation must be justified and the failure to proceed with one is simply wrong.

Our office has taken complaints about off-duty conduct by RCMP officers making threats of violence to third parties and claiming impunity as a result of status as a police officer. While we took that complaint directly to the RCMP itself, we never contemplated that the CPC would be unwilling to take on that matter if the RCMP had not taken it seriously. The lines between "on duty" and "off duty" are at best fuzzy when it comes to

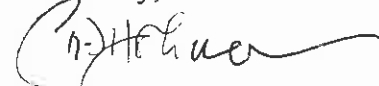
criminal conduct involving police officers, who often claim or expect impunity as a result of their special public status, which is why off duty conduct is expressly included in the RCMP "Code of Conduct" regulation, which itself is part of the jurisdiction of the CPC.

We are also concerned that the CPC has been tolerating multi-year delays on the part of the RCMP in reviewing and returning investigation files to the CPC for public release. The most notorious of these files is the investigation into the death of Clayton Alvin Willey in Prince George, which has been on the RCMP's desk for review for two years now, with no public release of the file. The CPC has been enduring such delays without holding the RCMP to account, including through enforcement and oversight of the duties of senior RCMP members to faithfully perform all legislative duties and not to withhold documents from the public. A complaint about this conduct by senior RCMP officers filed by the BCCLA is currently being investigated by the RCMP.

The RCMP force has endured an unending bad news cycle of accountability concerns, including the latest allegations of sexual harassment by female officers and civilian staff. The RCMP members who do a good job every day, and the citizens who count on them, deserve a complaints body with a full time head that takes its mandate seriously and is willing to defend, aggressively if necessary, its jurisdiction and oversight role.

Refusing to accept off-duty conduct complaints, and sitting patiently by without acting while the RCMP refuses to release controversial files to the public, is not consistent with the public's expectations of the CPC or the law. We urge you to act immediately to appoint a full-time head for the CPC willing to uphold its obligations under the RCMP Act not just for citizens, but also for all of those members of the RCMP who expect their colleagues to be held to account if they break the law or violate professional standards expectations. Anything less is a disservice to the RCMP, the public, and the CPC. We look forward to hearing from you on this matter.

Yours truly,

A handwritten signature in black ink, appearing to read "R. Holmes", written over a circular stamp or mark.

Robert Holmes, Q.C.

*President*

cc. *Commission for Public Complaints Against the RCMP*