

BRIEF

BY THE BARREAU DU QUÉBEC

Bill C-77 — An Act to amend the National Defence Act and to make related and consequential amendments to other Acts

October 31, 2018

Mission of the Barreau du Québec

To ensure the protection of the public, the Barreau du Québec oversees professional legal practice, promotes the rule of law, enhances the image of the profession and supports members in their practice.

Acknowledgements

The Barreau du Québec would like to thank the members of its Criminal Law Advisory Committee:

Pascal Lévesque, Chair
Claude Beaulieu
Nicolas Bellemare
Alex Dalpé
Sophie Dubé
Lucie Joncas
Pénélope Lemay Provencher
Michel Marchand
Patrick Michel
Julie Pelletier
Danièle Roy
Richard Roy

Secretariat support services for this Committee are provided by the Barreau du Québec's Secrétariat de l'Ordre et Affaires juridiques:

Siham Haddadi

Published in October 2018 by the Barreau du Québec

ISBN (PDF): 978-2-924857-46-5

Legal deposit — Bibliothèque et Archives nationales du Québec, 2018
Legal deposit — Library and Archives Canada, 2018

Overview of the Barreau du Québec's Position

✓ Integrating the *Canadian Victims Bill of Rights* into military justice

The Barreau du Québec supports the government's desire to integrate provisions of the *Canadian Victims Bill of Rights*, with any necessary amendments, most notably in order to allow victims of service offences to have the right to information, protection, participation and restitution. That said, we question the scope of the right to information, which could compromise the personal information of the offender.

Furthermore, the Barreau du Québec commends the initiative taken by Parliament to create the role of a victim's liaison officer that allows for an intermediary between judicial actors and victims. However, we believe that it would be advisable for the victim's liaison officer to receive appropriate minimum training before assuming the role and to ensure that he/she has the necessary professional skills to carry out this function.

Lastly, the Barreau du Québec questions why this system of protection and rights granted to victims would only apply to service offences and not to service infractions. If infractions can involve victims, then logically and for the sake of consistency, these victims should have the same rights.

✓ The reform of summary convictions in the context of military justice

The bill proposes a major paradigm shift compared to the current system. Generally speaking, it departs from a criminal justice system to approximate a disciplinary system of law, similar to the system in place for some professions or trades.

The Barreau du Québec commends the initiative of this reform, which reduces the inherent stigma associated with a criminal justice system. Nevertheless, we believe that it fails to adequately protect soldiers, particularly in terms of procedural fairness.

In fact, the bill does not address the issue of the independence of the decision-maker, no longer allows soldiers to opt for a court martial when facing criminal consequences, and is silent about the representation of soldiers facing allegations of misconduct. Moreover, the bill says nothing about the possibility of recording summary hearings or about how decision-makers should explain the reasons for their decisions and does not provide for the right to appeal the decisions of summary hearings.

In addition, we should point out that the bill does not define service infractions or minor sanctions and simply refers to future regulations. In the interest of the predictability of law and transparency, the Barreau du Québec believes that it would be advisable for the Act to clearly define the range of what soldiers could potentially be accused of.

Finally, in the opinion of the Barreau du Québec, it would be wiser to postpone the reform of summary convictions to a later date in order to give all due consideration to protecting the rights of military personnel.

✓ **Other amendments intended to align military justice with civil justice**

The Barreau du Québec commends the various measures in the bill intended to ensure better protection of victims and witnesses. That said, section 16 of the bill provides a victim with the option of requesting an order prohibiting the person subject to the Code of Service Discipline from communicating with the victim or the victim's family members. The Barreau du Québec questions the use of the term "victim," which seems restrictive.

The bill also proposes significant changes in sentencing. Indeed, it requires that during sentencing, special attention should be given to the circumstances of Aboriginal offenders and it provides for the possibility of serving a sentence intermittently, the possibility of suspending a sentence and finally, the possibility of giving an offender an absolute discharge. While the Barreau du Québec welcomes these significant changes, it questions, first and foremost, why Parliament limited the possibility of ordering an intermittent sentence for periods of imprisonment or detention not exceeding 14 days whereas in the *Criminal Code*, this type of order can be given for sentences of up to 90 days. Next, we question why a suspension can be ordered only when imprisonment or detention is required unlike what is allowed by the *Criminal Code*. Lastly, we welcome the fact that a military judge has the power to give an absolute discharge, but we question why this power was not extended to giving conditional discharges.

Finally, the Barreau du Québec questions the change in the fundamental purpose of sentencing, which no longer aims to "contribute to respect for the law and the maintenance of a just, peaceful and safe society". The Barreau du Québec believes that the previous formulation is more consistent with the duality of military justice, which is partly similar to civil justice and partly unique.

Table of Contents

INTRODUCTION	1
1. INTEGRATING THE <i>CANADIAN VICTIMS BILL</i> OF RIGHTS INTO MILITARY JUSTICE	1
1.1 Same rights and protections granted to victims.....	1
1.2 Modulations for adaptation to the military context	2
2. THE REFORM OF SUMMARY CONVICTIONS IN THE CONTEXT OF MILITARY JUSTICE	5
2.1 From a criminal system to a disciplinary system	5
2.2 Elimination of detention.....	6
2.3 Lowering of the standard of proof	7
2.4 Regulatory definition of “service infractions”	8
2.5 Regulatory definition of "minor sanctions"	9
2.6 Protecting soldiers' rights.....	10
2.6.1 Independence of the decision maker	10
2.6.2 Court martial option	11
2.6.3 Representation of soldiers	11
2.6.4 Recording of proceedings.....	11
2.6.5 Decision makers reasons provided in writing	12
2.6.6 Review and appeal	12
2.7 Postponement in order to re-examine the reform of summary convictions	13
3. OTHER AMENDMENTS INTENDED TO ALIGN MILITARY JUSTICE WITH CIVIL JUSTICE	14
3.1 Orders to abstain from communicating	14
3.2 Communication of certain sensitive records.....	15
3.3 Protecting vulnerable persons from testifying.....	16
3.4 Inquiry of court.....	17
3.5 Related and coordinating amendments.....	19
3.5.1 New trial.....	19
3.5.2 Objectives and principles of sentencing.....	19
3.5.3 Disparities in intermittent sentences	20
3.5.4 Sentences of imprisonment or suspended detention.....	21
3.5.5 Absolute discharge.....	22

INTRODUCTION

On May 10, 2018, the Minister of National Defence, the Honourable Harjit Singh Sajjan, tabled Bill C-77 entitled *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts* (hereinafter referred to as the “bill”) in the House of Commons.

Essentially, this federal bill incorporates the “Declaration of Victims’ Rights” into the Code of Service Discipline, which grants victims of service offences the right to information, protection, participation and restitution, as well as the right to file a complaint in the event of violation or denial of the rights conferred upon them by the Declaration.

The bill also aims to reform military justice by changing the summary trial process to a non-criminal summary hearing process for dealing with minor service offences. One of the significant consequences of this paradigm shift is that the burden of proof, which was previously beyond any reasonable doubt, is now that of a balance of probabilities.

It also provides for major changes in sentencing, including the addition of a sentencing principle that requires service tribunals to take into account the special circumstances of an Aboriginal offender when evaluating the possibility of incarceration.

We also note that the tabling of this bill builds on the recently issued decree concerning the entry into force of certain provisions of the *Strengthening Military Justice in the Defence of Canada Act*,¹ which aims to allow victims to be heard before courts martial and to offer more flexibility to service tribunals.

The Barreau du Québec has reviewed this bill with interest and hereby submits its comments thereon for your information.

1. INTEGRATING THE *CANADIAN VICTIMS BILL OF RIGHTS* INTO MILITARY JUSTICE

1.1 Same rights and protections granted to victims

This bill adds to the Code of Service Discipline a new section entitled, “Declaration of Victims’ Rights,” which grants victims of military offences the right to information, protection, participation and restitution. The text adds or amends several definitions, including “military justice system participant” and “victim” and specifies who can act on behalf of a victim for the purposes of the application of this section.²

¹ S.C. 2013, c.24.

² C-77, section 2(3) amending section 2(1) by adding definitions.

The Barreau du Québec supports the government's desire to include provisions from the *Canadian Victims Bill of Rights*,³ with any necessary amendments. When it was adopted in 2015, subsection 18(3) excluded "military offences" from the scope of application of the Act. Since the commission of this type of offence can reasonably involve a victim, we felt that this exclusion seemed unjustified. In this sense, the legislative proposal corrects an anomaly. Especially since, according to the decision rendered by the Supreme Court of Canada in *R. v. Moriarity*, the spectrum of what constitutes a "military offence" is very broad.⁴

1.2 Modulations for adaptation to the military context

Section 71.16 added by section 7 of the bill

Victim's liaison officer

71.16 (1) Unless he or she is of the opinion that it is not possible to do so for operational reasons, a commanding officer shall, at the request of the victim, appoint an officer or non-commissioned member, who satisfies the conditions established in regulations made by the Governor in Council, to be a liaison officer to assist the victim as provided for in subsection (3). The commanding officer shall, to the extent possible, appoint the officer or non-commissioned member who has been requested by the victim to be their liaison officer.

Absence or incapacity

(2) In the event of the absence or incapacity of the victim's liaison officer, a commanding officer shall appoint another officer or non-commissioned member to replace the liaison officer during that absence or incapacity, unless it is not possible to do so for operational reasons.

Role of victim's liaison officer

(3) Assistance by a victim's liaison officer consists of:

- a)** explaining to the victim the manner in which service offences are charged, dealt with and tried under the Code of Service Discipline; and
- b)** obtaining and transmitting to the victim information relating to a service offence that the victim has requested and to which the victim has a right under this Division.

The Barreau du Québec commends the initiative taken to create the role of the victim's liaison officer in section 71.16 of the bill. Provinces have a long-standing tradition of establishing agencies that play this particular role of intermediary between judicial actors and victims. For example, in

³ S.C. 2015, c. 13, sections 5 to 29 (hereinafter referred to as the "Victims Bill").

⁴ 2015 SCC 55 (CanLII). However, the Court Martial Appeal Court recently limited the jurisdiction of the court martial for offences under the Criminal Code in *Beaudry v. R.*, 2018 CanLII 4 (CMAC).

Quebec, there is the Crime Victims Assistance Center, more commonly known as the CAVAC. It goes without saying that in the context of applying the right to information granted to victims, military justice needs to get with the program.

The bill also provides that the person designated as the victim's liaison officer shall serve in that capacity for that victim only. This suggests that victim's liaison officers would not serve as liaison officers permanently, like the CAVAC staff do, for example. It would therefore be advisable to include, in the conditions specified by regulation, that the victim's liaison officer should receive appropriate minimum training before assuming the role; it would also be advisable to ensure that he or she has the necessary professional skills to carry out this function.

Sections 183.1(1), 183.2(1), 183.3(1), 183.4(1) and 183.7(1) added by article 28 of the bill.

Support person — witnesses under 18 or with disability

183.1 (1) In proceedings against an accused person in respect of a service offence, a military judge or, if the court martial has been convened, the military judge assigned to preside at the court martial shall, on application of the prosecutor in respect of a witness who is under the age of 18 years or who has a mental or physical disability, or on application of such a witness, order that a support person of the witness's choice be permitted to be present and to be close to the witness while the witness testifies, unless the military judge is of the opinion that the order would interfere with the proper administration of military justice.

[...]

Testimony outside courtroom — witnesses under 18 or with disability

183.2 (1) In proceedings against an accused person in respect of a service offence, a military judge or, if the court martial has been convened, the military judge assigned to preside at the court martial shall, on application of the prosecutor in respect of a witness who is under the age of 18 years or who is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, or on application of such a witness, order that the witness testify outside the courtroom or behind a screen or other device that would allow the witness not to see the accused person, unless the military judge is of the opinion that the order would interfere with the proper administration of military justice.

[...]

Accused not to cross-examine witnesses under 18

183.3 (1) In proceedings against an accused person in respect of a service offence, a military judge or, if the court martial has been convened, the military judge assigned to preside at the court martial shall, on application of the prosecutor in respect of a witness who is under the age of 18 years, or on application of such a witness, order that the accused person not personally cross-examine the witness, unless the military

judge is of the opinion that the proper administration of military justice requires the accused person to personally conduct the cross-examination. If such an order is made, the military judge shall direct the Director of Defence Counsel Services to provide counsel to conduct the cross-examination.

[...]

183.4 (1) In proceedings against an accused person in respect of a service offence, a military judge or, if the court martial has been convened, the military judge assigned to preside at the court martial may, on application of the prosecutor in respect of a witness, or on application of a witness, make an order directing that any information that could identify the witness not be disclosed in the course of the proceedings, if the military judge is of the opinion that the order is in the interest of the proper administration of military justice.

[...]

183.7 (1) In proceedings against an accused person, a military judge or, if the court martial has been convened, the military judge assigned to preside at the court martial may, on application of the prosecutor or a witness or on his or her own motion, make any order other than one that may be made under section 180, if the military judge is of the opinion that the order is necessary to protect the security of any witness and is otherwise in the interest of the proper administration of military justice.

The Barreau du Québec notes that section 28 of the bill provides for new powers that will be conferred upon military judges to facilitate the testimony of victims and witnesses. The Barreau du Québec understands the logic behind these provisions and supports them. The provisions are most notably consistent with the rules of the International Criminal Court and other international criminal tribunals. These tribunals are confronted with the challenges of victims' fear of reprisals. We can also think of a witness in the military who hesitates to testify when faced, most notably, with pressure from his or her peers who impose a "law of silence".

Section 71.04 (1) added by section 7 of the bill

Information about offender or accused

71.04 (1) Every victim has the right, on request, to information about:

- a) the offender while they are in a service prison or detention barrack;
- b) the release of the offender from a service prison or detention barrack;
- c) hearings held for the purpose of making dispositions under any of sections 201, 202 and 202.16 and the dispositions made at those hearings; and
- d) hearings held by a Review Board under section 202.25 and the dispositions made at those hearings.

That said, the Barreau du Québec questions the scope of the victim's right to information in the context of subsection b) of the above provision, where an offender is "in a service prison or detention barrack".

Compared to the Victims Bill, this provision is a new right.⁵ Does this mean that a victim can obtain information about the behaviour of an offender within these walls?

⁵ Victims Bill, *supra*, note 3, sections 6 to 8.

For example, whether the offender was found to have engaged in misbehaviour,⁶ whether the offender was subjected to corrective measures,⁷ whether the offender was restrained⁸ or whether he or she was given a remission of punishment.⁹ In the opinion of the Barreau du Québec, this information is personal information that must, unless there are exceptions, be protected.

Furthermore, the Barreau du Québec notes that the bill includes interpretive provisions. These provisions modulate the interpretation and application of the rights and protections granted to victims. They must be applied “in a manner that is reasonable in the circumstances and in a manner that is not likely”, most notably, to infringe on the discretionary power of military justice actors, “to endanger the life or safety of any individual” or “cause injury to international relations, national defence or national security”.¹⁰ The Barreau du Québec understands the logic behind this modulation, given the particular context in which military justice operates. We will be able to observe how these provisions will be applied in practice after the adoption of the bill.

Lastly, the Barreau du Québec questions why the regime of protections and rights granted to victims only applies to “service offences” and not “service infractions”. If “infractions” can involve victims, then logically and for the sake of consistency, the victims should have the same rights.

2. THE REFORM OF SUMMARY CONVICTIONS IN THE CONTEXT OF MILITARY JUSTICE

2.1. From a criminal system to a disciplinary system.

The bill proposes a major paradigm shift compared to the current system. In general, it departs from a criminal justice system to approximate a disciplinary system of law, which is similar to the system in place for some professions or trades. “Service offences” are now “service infractions”.¹¹ “Summary trials” become “summary hearings”.¹² At the end of these hearings, a verdict of guilty or not guilty will not be rendered; instead, the decision will indicate whether a “person has committed one or more service infractions”.¹³ “Sentences” become “sanctions”.¹⁴

⁶ *Queen's Regulations and Orders for the Canadian Forces* (hereafter, “QR&O”), vol. IV, Appendix 1.4, “Regulations for Service Prisons and Detention Barracks”, s. 6.01, online: <<http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-04/index.page>>.

⁷ QR&O, *Id.*, sections 6.10 to 6.16.

⁸ QR&O, *Id.*, sections 6.20 to 6.22.

⁹ QR&O, *Id.*, sections 5.08.

¹⁰ C-77, section 7 adding sections 71.17 to 71.19.

¹¹ C-77, particularly section 25, which adds sections 162.3 to 163.5.

¹² C-77, section 25 amending the expression in all of division 5.

¹³ C-77, section 25 adding section 163.1(2).

¹⁴ C-77, particularly sections 2(2) and 24, which amend sections 2(1), 160, 161 and 161.1.

More specifically, it is expressly stated that a “service infraction” is not an offence under this Act.¹⁵

The Barreau du Québec commends the initiative of this reform that reduces the inherent stigma associated with a criminal justice system. Soldiers do not deserve to be unduly penalized for conduct of minor objective seriousness that is only considered reprehensible in the military community. It is illogical that the disgrace associated with a “service infraction,” which is usually of lower importance, would create a criminal record outside the military world. For example, absence without leave, conduct to the prejudice of good order and discipline such as an unauthorized discharge or an act of insubordination, often considered minor, comprised 62.87% of the cases tried in the context of summary trials for the 2017-2018 period.¹⁶

This is even more unfair when soldiers leave the Canadian Armed Forces and try to find work as they transition to civilian life. In this sense, the legislative proposal corrects an anomaly.

Furthermore, the Barreau du Québec reiterates that this paradigm shift must not come at the expense of reducing the rights of military personnel.

2.2 Elimination of detention

Section 162.7 amended by section 25 of the bill

Scale of sanctions

162.7 The following sanctions may be imposed in respect of a service infraction, and each is a sanction less than every sanction preceding it:

- a)** reduction in rank;
- b)** severe reprimand;
- c)** reprimand;
- d)** deprivation of pay, and of any allowance prescribed in regulations made by the Governor in Council, for not more than 18 days; and
- e)** minor sanctions prescribed in regulations made by the Governor in Council

The bill removes from the scale of sentences (or should we say, “sanctions”), the possibility of a commanding officer imposing a sentence of detention of up to 30 days in a military detention facility.¹⁷ We question several aspects of this change. While a reduction of soldiers’ exposure to penal consequences for minor misconduct is technically desirable, certain questions remain about the consequences of this elimination.

¹⁵ C-77, section 25 adding section 162.5.

¹⁶ NATIONAL DEFENCE, *A Report to the Minister of National Defence on the Administration of Military Justice from 1 April 2017 to 31 March 2018*, Annex B: Summary of charges disposed of at summary trial, online: <http://www.forces.gc.ca/assets/FORCES_Internet/docs/en/jag/jag-annual-report-17-18.pdf>.

¹⁷ C-77, explanatory notes in Division 5 for section 163(3)a).

First, by eliminating detention, aren't too many "teeth" being removed from summary convictions? Military justice addresses misconduct committed in the theater of operations, most notably deviations from international humanitarian law or sexual misconduct. When such allegations arise, the provision – in one sense or the other – must intervene as quickly as possible, because in the meantime, cohesion is undermined, the reputation of the Canadian Armed Forces is tarnished, and the success of the mission is compromised. We understand that for more serious offences, there is the need to send the case to court martial. However, since it takes longer and it is more complicated to hold a court martial abroad, wouldn't it be more useful, in certain circumstances, to provide for such a prison sentence through summary conviction, which would be severe and short term but can be imposed more quickly?

With the elimination of detention, the most severe sanction a soldier would then face is a reduction in rank. This has significant consequences on the career of a soldier, in terms of status, pay and even pension. The impact can be felt for years whereas in comparison, detention only lasts for a maximum period of 30 days.

In the opinion of the Barreau du Québec, it is not detention in itself that is problematic. This sentence is useful because it “seeks to rehabilitate service detainees, by re-instilling in them the habit of obedience in a structured, military setting.”¹⁸ The real challenge in this context is guaranteeing respect for basic rights when soldiers are exposed to detention.

2.3 Lowering of the standard of proof

Section 163.1(1) amended by section 25 of the bill

Sanctions imposed by superior commander

163.1 (1) A superior commander who finds on a balance of probabilities, at a summary hearing, that a person has committed one or more service infractions, may impose one or more of the sanctions referred to in section 162.7.

The bill lowers the standard of proof required from “beyond reasonable doubt” to “a balance of probabilities” when determining perpetration of a service infraction.

Initially, this seems consistent with the desire to decriminalize summary convictions and move towards a model of administrative disciplinary law. On its own, this lowering of the burden of proof is not illegitimate, but despite this paradigm shift, soldiers will continue to be exposed to serious penal consequences such as a reduction in rank or even “deprivation of pay, and of any

¹⁸ QR&O, vol. II “Disciplinary”, s. 104.09, Note A, online: <<http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-02/index.page>>; See also *R v. St-Onge*, 2010 CanLII 7 (CMAC), paragraph 58.

allowance prescribed in regulations made by the Governor in Council, for not more than 18 days”.¹⁹ This sanction, similar to a fine, can have a substantial negative financial impact on soldiers. For example, for a non-specialist corporal at the bottom of the pay scale, receiving a monthly base pay of \$5,014 before taxes, but with no allowances, the maximum amount applicable under this sanction would represent up to \$3,008.40 of her gross pay.²⁰

In this context, the Barreau du Québec considers that the lowering of the standard of proof strips soldiers of an important protection. As a suggestion, just like under disciplinary law, it would be worth adding that in order to satisfy the burden of proof by a balance of probabilities, the evidence must be clear and convincing.²¹

2.4 Regulatory definition of “service infractions”

Surprisingly, the bill does not define the misconduct subject to sanctions. In fact, section 2(3) of the bill instead provides that these infractions will be specified by regulations made by the Governor in Council. We can reasonably believe that these infractions will cover what is generally recognized as reprehensible in a military context. For example, insubordination, disobedience or inappropriate wearing of the uniform. However, it is currently impossible to be sure that this would in fact be the case.

The Barreau du Québec is concerned that misconduct would be defined in this way, by reference to regulations, instead of being explicitly described in the Act. For the sake of predictability of the law, it would be advisable for the Act to clearly define the range of what soldiers could potentially be accused of. It can be assumed that here, for reasons related to military operations, the idea is to maintain a certain degree of flexibility vis-à-vis the determination of what is or is not an infraction. Nevertheless, parliamentarians should be aware of what soldiers charged with offences can be accused of. Moreover, for reasons of transparency, Parliament must ensure, in advance, that these provisions comply with the *Canadian Charter of Rights and Freedoms*.²²

This reference is particularly worrisome in that military regulations are exempt from the more formal requirements of registration, prepublication and review of regulations.²³ An interested person who would like to share comments about a draft “service infraction” would only be able to do so after it has been adopted. Similarly, parliamentary scrutiny could only be exercised after the fact.²⁴

¹⁹ C-77, section 25 adding section 162.7a) and d).

²⁰ Directives on pay and benefits, chapter 204.30 and its table, online: <<http://www.forces.gc.ca/en/about-policies-standards-benefits/ch-204-pay-policy-officers-ncms.page>>.

²¹ *Brisson c. Lapointe*, 2016 CanLII 1078 (QC C.A), paras. 63 to 67.

²² Part I of the *Constitution Act, 1982* [Schedule B to the *Canada Act 1982*, 1982, c.11 (U.K.)].

²³ *Statutory Instruments Act* (hereinafter referred to as “SIA”), R.S.C., 1985, c. S-22, sections 5(1) and 20(b); *Statutory Instruments Regulations*, C.R.C. c. 1509, sections 3a) and 7a).

²⁴ SIA, *Id.*, sections 19 and 19.1.

2.5 Regulatory definition of “minor sanctions”

Section 162.7e) amended by section 25 of the bill

Scale of sanctions

162.7 The following sanctions may be imposed in respect of a service infraction, and each is a sanction less than every sanction preceding it:

- a) reduction in rank;
- b) severe reprimand;
- c) reprimand;
- d) deprivation of pay, and of any allowance prescribed in regulations made by the Governor in Council, for not more than 18 days; and
- e) minor sanctions prescribed in regulations made by the Governor in Council.

The Barreau du Québec has a similar concern regarding “minor sanctions,” which are not defined in the bill, but will be defined in future regulations. We wonder whether these “minor sanctions” will simply continue the “minor punishments” under the current system. If so, this could pose a problem.

In addition, these “minor punishments” include “confinement to ship or barracks”.²⁵ Commanding officers, who can impose a confinement of up to 21 days,²⁶ have wide discretion regarding the conditions of application.²⁷ This punishment, which includes the punishment of additional work and drills,²⁸ requires soldiers to not go beyond “the geographic limits prescribed by the commanding officer in standing orders.”²⁹ In certain cases, the deprivation of freedom is very restrictive, similar to a suspended prison sentence under section 742.1 of the *Criminal Code*. As expressed by Lieutenant-colonel D’Auteuil, military judge, in *R. v. Private Bergeron S.J.L.S.*:

“[...] the punishment of confinement to barracks comprises a specific schedule that includes a series of inspections of the room and the person as well as additional work. The movements of a person given such a punishment are controlled and restricted as much as possible. In fact, such a person is no longer in charge of his or her movements and must receive an authorization to move about.”³⁰

In such a context, the Barreau du Québec suggests that the “minor sanctions” should be defined in the Act. Confinement to the barracks or a ship, should be considered as a serious sanction. It may be possible to consider the option of splitting this sanction into two parts; a strict one and a

²⁵ QR&O, *supra*, note 18, section 104.13(1) a).

²⁶ QR&O, *Id.*, section 108.24 and table; Delegated officers can impose up to 14 days of confinement, see QR&O, *Id.*, section 108.25 and its table.

²⁷ QR&O, *Id.*, section 104.13(2).

²⁸ QR&O, *Id.*, section 108.37(2).

²⁹ QR&O, *Id.*, section 108.37(1).

³⁰ *R v. Private S.J.L.S. Bergeron*, 2008 CanLII 3011 (C.M.), para. 32.

partial one, with the first leading to a higher level of procedural safeguards. Here, once again, it is not the actual confinement to barracks or ship that we find to be problematic, but the level of protection given to soldiers who are exposed to this sanction.

2.6 Protecting soldiers' rights

The Barreau du Québec believes that it is necessary to better protect soldiers, despite the elimination of certain penal attributes from the system of military justice by summary conviction. Even in approximating the model of administrative disciplinary law applicable to professional bodies, the reform fails to offer certain procedural safeguards, especially given the penal consequences that soldiers still face.³¹

To illustrate what this means, the proposed system will be compared to the laws concerning internal discipline applicable to the Sûreté du Québec³² (hereinafter referred to as the "SQ"), adopted under the *Police Act*³³ and those currently applicable to the Royal Canadian Mounted Police³⁴ (hereinafter referred to as the "RCMP").

However, this comparison takes into account the fact that soldiers practice a profession that is unique in many ways. For example, police officers address all breaches of internal discipline (misconduct between a police officer and his/her superiors or a colleague) and breaches in ethics (a police officer's divergence from standards in his or her dealings with the public) in accordance with separate processes, with the second generally being more elaborate than the first. Conversely, the military address these two types of breaches in accordance with a common process, as ethical misconduct is necessarily considered to be a breach of discipline.

2.6.1 Independence of the decision maker

The bill does not change the fact that it is the commanding officers who determine whether soldiers have committed a service infraction and who impose a sanction, where necessary. It is easy to understand that because of their duty to prevent and punish any misconduct among their troops, particularly any violation of international humanitarian law in the theater of operations abroad,³⁵ the power to maintain discipline, ultimately through military justice, is closely related to the Command position.

By removing some penal aspects from the current system, the bill reduces the need for an independent decision maker within the meaning of paragraph 11d) of the *Canadian Charter of Rights and Freedoms*. That said, compared to the regime applicable to police officers, particularly in terms of ethics, military decision makers are less independent.

³¹ *Guindon v. Canada*, 2015 SCC 44 (CanLII), paras. 44-46.

³² *By-law respecting the internal discipline of members of the Sûreté du Québec* (hereinafter referred to as the "SQ By-law"), CQLR, c. P13.1, r. 2.01.

³³ *Police Act*, CQLR, c. P-13.1; *Code of Ethics of Québec Police Officers*, CQLR, c. P-13.1, r 1.

³⁴ *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10; *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 (Can Gaz.. II).

³⁵ *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)*, 8 June 1977, art. 85, online: <https://ihl-databases.icrc.org/ihl-treaties/INTRO/470>.

The Barreau du Québec therefore suggests the adoption of counterbalancing measures to ensure that commanding officers carry out their tasks as impartially as possible, but without requiring total independence that would undermine the efficiency of the commanding officers in their roles as custodians of discipline among the troops.

2.6.2 Court martial option

By moving towards the depenalization of summary convictions, the bill no longer seems to give soldiers the ability to opt for a court martial when faced with serious consequences.³⁶

As long as soldiers remain exposed to penal consequences for service infractions that are yet to be defined, the Barreau du Québec believes that is advisable to ensure that soldiers maintain their right to opt for a court martial.

2.6.3 Representation of soldiers

The bill is silent about the representation of soldiers facing allegations of misconduct. Will the position of “the assisting officer” be continued?³⁷ Even though, in theory, the current system allows an accused officer to request representation by counsel in the context of a summary trial, it seems that in practice, the presiding officers react by referring the case to court martial. For now, only legal counsel from the Director of Defence Counsel Services is authorized to give “legal advice of a general nature to an accused person ... on matters relating to summary trials”,³⁸ which does not include the ability to give comprehensive legal opinions or to provide representation.

In comparison, at the RCMP, an officer subject to serious disciplinary measures can benefit from legal assistance provided by the Member Representative Directorate.³⁹ A member of the SQ who is cited to appear at a disciplinary hearing, may “be represented by an advocate of his or her choice, at the member’s expense, an advocate designated by the member’s union or professional association, a member of that association or a member of the Sûreté.”⁴⁰

Consequently, the Barreau du Québec recommends that the legal services of the Director of Defence Counsel Services should be extended to include the ability to represent soldiers, free of charge, during summary trials or should at least offer the possibility of providing comprehensive legal opinions.

2.6.4 Recording of proceedings

The bill makes no mention about the possibility of recording summary hearings. Will the *status quo* of the current regulation, which does not impose any requirement in this regard, continue to prevail? Conversely, depositions of witnesses before discipline committees of the SQ are

³⁶ QR&O, *supra*, note 18, art. 108.17.

³⁷ QR&O, *Id.*, art. 108.14.

³⁸ QR&O, *Id.*, s. 101.11(1)d).

³⁹ *Commissioner’s Standing Orders (Conduct)*, *supra* note 34, sections 29 to 31.

⁴⁰ SQ By-law, *supra*, note 32, article 66.

recorded.⁴¹ Like the SQ, hearings before the ethics committee of the RCMP are also recorded, and if an appeal is filed, a transcript is also produced.⁴²

We understand the desire to avoid imposing more rigid formalism; summary hearings can take place in an operational environment where there are limited resources. However, procedural fairness and accountability require reasonable measures to be taken in order to give an accurate account of hearings. Modern technology actually allows this flexibility.

Therefore, the Barreau du Québec recommends that summary hearings should be recorded using any reliable technology. When operational circumstances preclude such a recording, provisions could be made for a soldier to be designated to take verbatim notes of the hearing. Moreover, in the event of a review, it must be possible to produce a transcript of the recording.

2.6.5 Decision maker's reasons provided in writing

The bill is also silent about how decision makers are to explain the reasons for their decisions. Under the current system of summary trials, the regulation does not require the presiding officers to state the reasons for their decisions in writing, with respect to the verdict⁴³ or the sentence.⁴⁴ At most, the QR&O only requires the outcome to be entered in the "Record of Disciplinary Proceedings".⁴⁵ Conversely, a disciplinary authority of the RCMP and the discipline committee of the SQ must state the reasons for their decision in writing.⁴⁶

The Barreau du Québec believes that, in the interest of transparency, fairness and accountability, it should be required that authorities in the context of summary proceedings, i.e., the commanding officer, the superior commander or delegated officer, should provide written reasons for their decisions. This does not mean requiring the format or level of development of a court decision; due regard for efficiency specific to the military environment requires brevity. Nevertheless, the reasons must be presented in a sufficiently intelligible manner, so that the logic behind the outcome may be understood upon reading the document.

2.6.6. Review and appeal

Section 163.6(1) and (2) amended by section 25 of the bill

Chief of the Defence Staff and other military authorities

163.6 (1) The review authorities in respect of a finding that a person has committed a service infraction and in respect of a sanction imposed by an officer who has conducted a hearing are the Chief of Defence Staff and any other military authorities that are prescribed by the Governor in Council in regulations.

⁴¹ SQ By-law, mentioned above, note 32, article 75.

⁴² *Commissioner's Standing Orders (Conduct)*, supra, note 34, sections. 22 and 26f).

⁴³ QR&O, supra, note 18, sections 108.20(7) and (8).

⁴⁴ QR&O, *Id.*, section 108.20(11).

⁴⁵ QR&O, *Id.*, section 108.42(1).

⁴⁶ *Commissioner's Standing Orders (Conduct)*, supra note 34, s. 8; SQ By-law, supra, note 32, section 82.

When authorities may act

(2) A review authority in respect of a finding that a person has committed a service infraction and in respect of a sanction imposed by an officer who conducted a summary hearing may act on its own initiative or on application, made in accordance with regulations made by the Governor in Council, of the person found to have committed the service infraction.

The bill states that the decision or sanction imposed by a summary authority may be reviewed by “the Chief of the Defence Staff and any other military authorities that are prescribed by the Governor in Council in regulations”, on their own initiative or on application of the accused person “made in accordance with regulations made by the Governor in Council”.

In this context, we wonder whether the review on application⁴⁷ and the review done on initiative⁴⁸ under the current regime will be continued. Here again, it is difficult to say since the regulation is not yet available. Would decisions resulting from summary hearings and review authorities be excluded from the scope of the military grievance procedure since they are “decisions made under the Code of Service Discipline”?⁴⁹ The terminology seems to suggest that this is the case. What recourse would be left for soldiers who are sentenced to a reduction in rank or confined to barracks if the review confirms the initial authority? Will they be able to petition the Chief of Defence Staff in a timely manner? At the end of the process, wouldn't the only recourse left be a judicial review, which, incidentally, is limited to a lack or excess of jurisdiction?⁵⁰

Considering the penal consequences to which soldiers are exposed, the Barreau du Québec believes that there should be a provision that allows for the right to appeal the decisions of summary hearings. This appeal could be made on completion of the review process and only be possible when the soldier has received a penal consequence, such as a reduction in rank, strict deprivation of freedom or substantial financial penalties. In the interest of efficiency and jurisdiction, this appeal could, in principle, be considered by a military judge, based on the record. The military judge would have the discretion to listen to the evidence again, either in whole or in part, by using technological means, such as videoconferencing, most notably in order to overcome the geographical constraints that the Canadian Armed Forces generally faces.

2.7 Postponement in order to re-examine the reform of summary convictions

On its face, it seems that the reform only aims to eliminate the most obvious penal aspects of summary convictions (elimination of detention, summary conviction no longer leads to a criminal record) and to change the terminology. This is presumably in order to reduce the risk of a constitutional challenge. However, for the most part, the commanding officers retain their powers to impose penal consequences on soldiers who engage in misconduct, which is yet to be defined.

⁴⁷ QR&O, *supra*, note 18, section 108.45.

⁴⁸ QR&O, *Id.*, section 116.02.

⁴⁹ QR&O, vol. I “Administration”, section 7.03, online: <<http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-0>>.

⁵⁰ *Federal Courts Act*, R.S.C. 1985, c. F-7, section 18; *Constitution Act, 1867*, 30 &31 Vict., c.3 (U.K.), section 96; *Courts of Justice Act*, CQLR c. T-16, article 39.

Ultimately, soldiers will be afforded even less protection than they have under the current system as a result of the lowered standard of proof.

From a strictly organizational point of view, the reform may seem desirable. However, it does not seem to have taken the protection of soldiers' rights into account and also continues to expose them to penal consequences. However, it is important to remember that the men and women who enlist in the Canadian Armed Forces are Canadian citizens who voluntarily agree to comply with additional legal obligations. These individuals do not renounce fundamental judicial guarantees or principles of procedural fairness simply because they enlisted in the Armed Forces. Moreover, these individuals cannot resort to using the tools normally available to other workers in Canadian society to defend their rights. In this sense, if the particular context in which soldiers work requires different treatment, we must err on the side of offering greater protection of their rights.

This part of the bill raises several problematic aspects. In the opinion of the Barreau du Québec, it would be wiser to postpone the reform to a later date in order to give every necessary consideration to the protection of soldiers' rights.

3. OTHER AMENDMENTS INTENDED TO ALIGN MILITARY JUSTICE WITH CIVIL JUSTICE

3.1 Orders to abstain from communicating

Section 147.6(1) and (3) added by section 16 of the bill

If injury or damage feared

147.6 (1) An information may, in accordance with the regulations made by the Governor in Council, be laid before a military judge by or on behalf of any victim who fears on reasonable grounds that a person who is subject to the Code of Service Discipline will cause physical or emotional harm to the victim, to the victim's spouse, to a person who is cohabiting with the victim in a conjugal relationship having so cohabited for a period of at least one year, or to the victim's child or will cause damage to the victim's property.

...

Order

(3) The military judge may, if satisfied by the evidence that there are reasonable grounds for the victim's fears, order that the person who is subject to the Code of Service Discipline and who is referred to in the information

a) abstain from communicating, directly or indirectly, with any of the following individuals who are specified in the order:

(i) the victim

(ii) the victim's spouse,

(iii) a person who is cohabiting with the victim in a conjugal relationship, having so cohabited for a period of at least one year,

- (iv) the victim's child;
- b) refrain from going to any place specified in the order; or
- c) comply with any other condition specified in the order that the military judge considers necessary.

The bill will allow a victim who has reasonable grounds to fear that a soldier will attack him or her or his or her relatives to contact a military judge to obtain an order for protection. The military judge may order the person subject to the Code of Service Discipline to abstain from communicating with the victim or his or her relatives and “comply with any other condition specified in the order that the military judge considers necessary”. There is an obvious parallel with the “peace order” in the *Criminal Code*.⁵¹

The Barreau du Québec welcomes this change, which increases the ability of military judges to protect victims. Nevertheless, there are two aspects that should be clarified. First, when compared with the similar regime in the *Criminal Code*, there is no time limit for the order the judge can impose.⁵² For the sake of consistency, the order should be limited to a maximum period of 12 months.

Second, the bill limits a “victim’s” power to denounce. The Barreau du Québec questions the use of the term “victim”. In effect, if a crime has yet to be committed, can we really talk about a “victim”? If not, can the person who fears for his or her safety request an order as a precautionary measure? In order to avoid a situation where individuals fearful of physical or emotional damage or damage to their property are not being covered under section 147.6, we believe that it would be more appropriate to extend the ability to denounce to every “person”, as is the case in the *Criminal Code*.⁵³

3.2 Communication of certain sensitive records

Section 180.02(1) added by section 16 of the bill

Production of record to accused

180.02 (1) Except in accordance with sections 180.03 to 180.08, no record relating to a complainant or a witness shall be produced to an accused person in any proceedings in respect of any of the following offences or in any proceedings in respect of two or more offences at least one of which is any of the following offences:

- a) an offence punishable under section 130 that is an offence under section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3 of the *Criminal Code*;
- b) any offence under the *Criminal Code*, as it read at any time before the day on which this paragraph comes into force, if the conduct alleged involved a violation of the

⁵¹ *Criminal Code*, RSC 1985 c. C-46, section 810.

⁵² *In contrast, Criminal Code, Id.*, section 810(3).

⁵³ *Criminal Code, Id.*, section. 810(1).

complainant's sexual integrity and would be an offence referred to in paragraph (a) if it had occurred on or after that day.

The bill provides that the personal records of a complainant or witness can only be communicated to the accused in specific situations.

The Barreau du Québec welcomes this change. In fact, the Canadian Armed Forces has a significant quantity of soldiers' records that include personal data, not only on their health but also on their performance, any misconduct, pay and benefits. Therefore, in order to minimize the fear of unduly becoming the subject of proceedings, victims and witnesses must be assured that their personal information will not be exposed for all to see.

Section 180.07(1) added by section 16 of the bill

Order to produce

180.07 (1) If the military judge is satisfied that the record or a part of the record is likely relevant to an issue at trial or to the competence of a witness to testify and that its production is necessary in the interests of military justice, the military judge may order that the record or the part of the record, as the case may be, be produced to the accused person, subject to any conditions that may be imposed under subsection (3).

As a rule of thumb, the bill establishes that personal records should not be disclosed, subject to exceptions. The exception to this rule seems logical to us, i.e., that it applies in situations where “the record or a part of the record is likely relevant to an issue at trial or to the competence of a witness to testify and that its production is necessary in the interests of military justice.”

3.3 Protecting vulnerable persons from testifying

Section 28 of the bill proposes making testimonial aids more accessible to vulnerable witnesses.⁵⁴ For example, a military judge may:

- 1) Order that a support person accompany a witness who is under the age of 18 or who has a disability so that the support person stays by the witness during testimony.
- 2) Order that testimony can be given outside the hearing room or behind a screen or a device that would allow the witness not to see the accused;

⁵⁴ C-77, section 28 adding sections 183.1 to 183.7.

- 3) Prohibit the accused, when representing himself or herself, from conducting the cross-examination of the witness and to appoint an advocate from the Defence Counsel Services for this purpose;
- 4) Prohibit the disclosure, during the proceedings, of any information that could identify the witness;
- 5) Prohibit the publication or broadcast in any way of any information that could identify the victim or a witness, in sexual offences;
- 6) Prohibit the publication or broadcast in any way of any information that could identify the victim or a witness, especially any person associated with the military justice system who is participating in the proceedings, primarily in offences related to terrorism, criminal organizations or the disclosure of information, economic espionage or the accomplishment of preparatory acts for these foreign organizations or powers;
- 7) Make an order in addition to a private hearing if he believes it is necessary to ensure the safety of a witness.

The bill provides that for each order, the military judge will have to weigh a series of factors to determine whether the order is in the interest of the proper administration of military justice.

The Barreau du Québec welcomes these changes, which give flexibility to the front line actors of military justice. The proposed changes will also allow them to better protect vulnerable witnesses while taking the imperatives of justice into account, every time.

3.4 Inquiry of court

Section 189.1(8) and (9) added by section 29 of the bill

189.1 (1) [...]

Inquiry of court — serious personal injury offence

(8) If the accused person is charged with a service offence that is a serious personal injury offence and the accused person and the prosecutor have entered into an agreement under which the accused person will enter a plea of guilty of the service offence charged — or a plea of not guilty of the service offence charged but guilty of any other service offence arising out of the same transaction, whether or not it is an included offence — the military judge shall, after accepting the plea of guilty, inquire of the prosecutor whether reasonable steps were taken to inform the victims of the agreement.

Inquiry of court — certain offences

(9) If the accused person is charged with a serious offence that is not a serious personal injury offence and the accused person and the prosecutor have entered into an agreement referred to in subsection (8), the military judge shall, after accepting the plea of guilty, inquire of the prosecutor whether any of the victims had advised the prosecutor of their desire to be informed if such an agreement were entered into and, if so, whether reasonable steps were taken to inform that victim of the agreement.

Section 203.7(1) added by subsection 63(21)h) of the bill

Inquiry by court martial

203.7 (1) As soon as feasible after a finding of guilt and in any event before imposing sentence, the court martial shall inquire of the prosecutor whether reasonable steps have been taken to provide the victim with an opportunity to prepare a statement referred to in subsection 25 203.6(1).

Section 203.81(2) added by section 63(21)l) of the bill

203.81 (1) ...

Inquiry by court martial

(2) As soon as feasible after a finding of guilt and in any event before imposing the sentence or directing that the offender be discharged absolutely, the court martial shall inquire of the prosecutor whether reasonable steps have been taken to provide the victims with an opportunity to indicate whether they are seeking restitution for their losses and damages, the amount of which must be readily ascertainable.

The bill establishes that in certain situations, the military judge will be obliged to contact the prosecutor to find out whether reasonable measures were taken to inform victims of the conclusion of an agreement between the accused and the prosecutor. The judge's obligation of inquiry is in addition to the obligation of allowing victims to write a statement on the consequences of the offence, or the obligation of allowing victims to state whether they are claiming compensation for any damage suffered or losses incurred.

The Barreau du Québec welcomes these provisions because they ensure that the interests of victims have been properly considered during the judicial process.

3.5 Related and coordinating amendments

The Barreau du Québec notes that other changes were made to military justice in the coordinating amendments.⁵⁵ Even though these amendments are not the main purpose of the bill, we would nevertheless like to submit a few comments.

3.5.1 New trial

Section 249(1) amended by section 41 of the bill

249 (1) Every person who has been tried and found guilty by a court martial has a right, on grounds of new evidence discovered subsequent to the trial, to petition the Minister for a new trial.

The bill provides for the possibility of petitioning the Minister of National Defence to request that a new trial be held when new evidence is discovered. The Barreau du Québec welcomes this change in that it offers an additional means of correcting a judicial error. This procedure is similar to the one in the *Criminal Code*.⁵⁶ It makes it possible to avoid having to go through the longer and more complex process related to exercising the Royal Prerogative of Mercy held by Her Majesty the Queen.

3.5.2 Objectives and principles of sentencing

Section 203.3(c) and d) amended by section 63(23) of the bill

63 (23) On the first day on which both section 62 of the other Act and this section are in force, paragraphs 203.3(c) and (d) of the *National Defence Act* are replaced by the following:

- c)** an offender should not be deprived of liberty by imprisonment or detention if less restrictive punishments may be appropriate in the circumstances;
- c.1)** all available punishments, other than imprisonment and detention, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders;
- d)** a sentence should be the least severe sentence required to maintain the discipline, efficiency and morale of the Canadian Forces;

⁵⁵ *Strengthening Military Justice in the Defence of Canada Act*, supra, note 1.

⁵⁶ *Criminal Code*, supra note 51, sections. 696.1 to 696.6.

Sections 203.1 to 203.72 of the Act list the objectives and principles of sentencing applicable to courts martial in addition to defining the aggravating factors for military justice.⁵⁷ In particular, there is the addition of the obligation to give special consideration to the situation of Aboriginal offenders.

The Barreau du Québec welcomes this legislative clarification of the goals of sentencing in courts martial. We also note the change in the formulation of the fundamental purpose. Bill C-15 of 2013 states that:

“The fundamental purposes of sentencing are (a) to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and (b) to contribute to respect for the law and the maintenance of a just, peaceful and safe society.”⁵⁸

In the current bill, this section becomes:

“The fundamental purpose of sentencing is to maintain the discipline, efficiency and morale of the Canadian Forces.”⁵⁹

Does this mean that the courts martial system is abandoning its duty “to contribute to respect for the law and the maintenance of a just, peaceful and safe society” that it had previously shared with its civilian counterpart?⁶⁰

The Barreau du Québec believes that the initial formulation is more consistent with the duality of military justice, which is partly similar to civil justice and partly unique. Military justice cannot be a perfect system or a system of exclusion. It is a specialized system of justice that must be in line with its civilian counterpart, while taking operational requirements into account.

3.5.3 Disparities in intermittent sentences

Section 148(1) amended by section 63(5) of the bill

Imprisonment or detention

148 (1) A court martial that sentences an offender to imprisonment or detention for a period of 14 days or less may, on application of the offender and having regard to the offender’s age and character, the nature of the offence and the circumstances surrounding its commission, and the availability of appropriate accommodation to ensure compliance with the sentence, order:

- a)** that the sentence be served intermittently at the times specified in the order; and
- b)** that the offender comply with any conditions prescribed in the order when the offender is not in confinement during the period during which the sentence is served.

⁵⁷ C-77, section 63(21)a) to h), which modifies or adds sections 203.1 to 203.72.

⁵⁸ *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, bill C-15 (adopted by the House of Commons — 1 May 2013), 1st sess., 41st Parliament. (Can.), section 62 adding section 203.1(1) to the *National Defence Act*.

⁵⁹ C-77, section 63(21)b) amending section 203.1(1).

⁶⁰ Criminal Code, supranote 51, section 718.

A court martial that sentences an offender to a maximum period of imprisonment or detention of 14 days can order this punishment to be served intermittently.

The Barreau du Québec welcomes this change, which provides an alternative to firm and continuous incarceration when appropriate under the circumstances. However, we question the limit of 14 days. Why was Parliament unwilling to extend this timeframe to a maximum period of 90 days, as is the case in the *Criminal Code*?⁶¹ Is it related to the fact that an authority can commit a service detainee to a local unit detention room for a period not exceeding 14 days⁶² and that after this period of time, the sentence must be served in the service prison and detention barracks of the Canadian Forces in Edmonton? If so, wouldn't it be more advisable to amend the regulation to allow for an exception of up to 90 days in the case of an intermittent sentence? In this context, the Barreau du Québec suggests, following the example of criminal law, extending the maximum period of imprisonment or detention that can be served intermittently to 90 days.

3.5.4 Sentence of imprisonment or suspended detention

Section 215(1) (2) and (3) amended by section 63(25)a) of the bill

Suspension of execution of punishment

215 (1) If an offender is sentenced to imprisonment or detention, the execution of the punishment may be suspended by the court martial that imposes the punishment or, if the offender's sentence is affirmed, is substituted or is imposed on appeal, by the Court Martial Appeal Court.

Consideration of victim's safety and security

(1.1) If the court martial or the Court Martial Appeal Court, as the case may be, makes a decision that the execution of the punishment be suspended, it shall include in the decision a statement that it has considered the safety and security of every victim of the offence.

Copy to victim

(1.2) The court martial tribunal or the Court Martial Appeal Court, as the case may be, shall, on request by a victim of the offence, cause a copy of the decision to be given to the victim.

Conditions

(2) In suspending the execution of a punishment, the court martial or the Court Martial Appeal Court, as the case may be, shall impose the following conditions on the offender:

- a)** to keep the peace and be of good behaviour;
- b)** to attend any hearing under section 215.2 when ordered to do so by the appropriate person referred to in paragraph 215.2(1)a) or (b); and

⁶¹ *Criminal Code*, supra, note 51, section 732.

⁶² QR&O, supra note 18, section 114.11(3)

c) in the case of an offender who is not an officer or a non-commissioned member, to notify the Provost Marshal in advance of any change of name or address, and to promptly notify the Provost Marshal of any change of employment or occupation.

Other conditions

(3) The court martial or the Court Martial Appeal Court may, in addition to the conditions described in subsection (2), impose any reasonable conditions.

In addition, a court martial that imposes a sentence of imprisonment or detention can order the suspension thereof and attach the order of suspension to mandatory and optional conditions. The Barreau du Québec welcomes this change, which allows for an alternative to firm prison sentences.

However, there is one aspect that raises questions: suspension of the sentence is possible only when the military judge concludes that imprisonment or detention is required. Consequently, unlike his/her civilian colleagues, the military judge does not have the option of suspending sentencing and ordering the release of the accused, in accordance with the conditions of a probation order, in cases that do not require imprisonment.⁶³ The Barreau du Québec suggests considering this latter option in the context of a future reform.

3.5.5 Absolute discharge

Section 203.8(1) amended by section 63(21)i) of the bill

Absolute discharge

203.8 (1) If an accused person pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for 14 years or for life, the court martial before which the accused appears may, if it considers it to be in the accused person's best interests and not contrary to the public interest, instead of convicting the accused person, direct that they be discharged absolutely.

Finally, it is provided that the court martial can order the absolute discharge of an accused person when he or she pleads guilty to or is found guilty of an offence "other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for 14 years or for life". The Barreau du Québec welcomes this change, which allows the military judge, under the appropriate circumstances, to order an absolute discharge when the judge considers that it is in the best interests of the accused person, without adversely affecting the public interest.⁶⁴

Nevertheless, we question why military judges were not given the power to order a conditional discharge. Is it because the current system does not allow them to issue a probation order⁶⁵ and order the preparation of a presentence report for this purpose?⁶⁶ The Barreau du Québec suggests that in the context of a future reform, military judges should be given the power to attach conditions

⁶³ *Criminal Code*, supra, note 51, section 731(1)a).

⁶⁴ *Criminal Code*, supra, note 51, section 730.

⁶⁵ *Criminal Code*, supra, note 51, section 731.

⁶⁶ *Criminal Code*, *Id.*, section 721. This will also be useful when determining whether a sentence of imprisonment or detention should be served intermittently or whether these sentences should be suspended.

to the discharge order, to issue a probation order and should also be given the power to order the preparation of a presentence report for these purposes.