

CANADIAN MILITARY JUSTICE SYSTEM: AT A CROSSROADS

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PART I – INTRODUCTION TO CANADIAN MILITARY LAW

1.1 Constitution

The Constitution of Canada includes the *Constitution Act, 1867*¹ and the *Constitutional Act, 1982* both enacted for Canada by the United Kingdom.² The “*Constitution of Canada*” is defined in subsection 52(2) of the *Constitution Act, 1982*.

The *Charter of Rights and Freedoms* is itself part of the Constitution of Canada. Paragraph 11(f) of the *Charter* (reproduced below) is explicit that the right to trial by jury does not apply in the case of an offence under military law tried before a military tribunal.

11. Any person charged with an offence has the right . . .

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

¹ Originally the *British North American Act, 1867* (U.K. 30 & 31 Victoria C. 3) was enacted on March 29, 1867 by the British Parliament. It provided for the confederation of the Province of Canada (Ontario and Quebec), Nova Scotia, and New Brunswick into a federal state with a parliamentary system modelled on that of Great Britain. The *Act, inter alia*, provides for a distribution of powers between the central Parliament and the provincial legislatures. Under this *Act*, Parliament was granted exclusive jurisdiction over the “*Militia, Military and Naval Service, and Defence*” pursuant to sub-section 91(7).

In the exercise of this jurisdiction, in 1868 Parliament established its first codification of military law with the *Militia Act*. The *National Services Act* and the *Royal Canadian Air Force Act* were subsequently enacted in the 1940s. Following these enactments, Parliament re-examined all legislation applicable to the armed forces in Canada. As a result, the *National Defence Act (NDA)* was enacted in 1950 in order to regulate matters related to the Canadian Armed Forces.

² The final stage in the history of imperial statutes in Canada came with the passage of the *Canada Act 1982* which included, as Schedule B, the *Constitution Act, 1982*.

1.2 Code of Service Discipline

Canada's system of military justice is deeply rooted in the English tradition.³

The *National Defence Act (NDA or Act)* is the main statute regulating the conduct of the Armed Forces. The *NDA* fixes the legislative and regulatory parameters of the management and the military activities of the Canadian Armed Forces. In order to emphasize the importance of discipline, the *Act* also contains the *Code of Service Discipline* (Code) found in Part III with related provisions in Part VII. The Code seeks to promote discipline in the military and is applicable to persons under service jurisdiction.⁴ The Code is the basic legal framework guiding discipline in the Canadian Armed Forces and is supplemented by the *Queens' Regulations and Orders (QR&Os)* and other orders and directives promulgated under the authority of the *Act*.

The Code prescribes service offences and provides for summary trials and courts martial and appeal procedures. It goes beyond what constitutes, by any standard,

³ Given Canada's historic experiences and status as a former British colony, this is not surprising. The Canadian Armed Forces' *Code of Service Discipline* has clearly defined English roots. The proposition is not without some merit given the pre-eminent role played by Britain in the defence of Canada in the period immediately prior to the Confederation of provinces, which, in 1867, gave birth to the modern Canadian nation state.

In fact, until 1868 British forces comprised the only regular force in the Dominion of Canada. Canada's *Militia Act of 1868* organized the Canadian Army as the country's first military force and essentially adopted the British Army model for a *Code of Discipline*. This was a *sine qua non* given the presence of British regular forces in Canada during the colonial period and the then prevailing philosophy that the Canadian Army should be trained and organized to support British forces. The *Militia Act of 1868* introduced a two-tier system of summary trials and courts martial. Although much has changed, Canada's two-tier service tribunal structure has endured.

⁴ Officers and non-commissioned members of the Regular Force, the Reserve Force (while undergoing drill or training, in uniform, on duty, called out in aid of the civil power, called out on full-time service or placed on active service) and the Special Force are subject to the Code. Spouses, dependants, children, contractors, journalists and other persons when they accompany members of the Canadian Armed Forces are also subject to the Code. The Code applies to spies for the enemy, prisoners of war and persons in civil or service custody for any service offence they are alleged to have committed.

disciplinary offences. It includes offenses related to operations, prisoners of war, spies for the enemy, advocating governmental change by force, insubordinate behavior, striking or offering violence to a superior officer, and disobedience of a lawful command, to name a few. It also includes by reference all ordinary criminal law or civilian offences (committed in Canada or abroad that would be punishable under Canadian criminal law) which, depending on the circumstances, fall under the jurisdiction of military justice and courts.

1.3 Tribunals

The Code structures the military tribunal system, which contains two types of service tribunals and an appellate court, the Court Martial Appeal Court of Canada (CMAC) for courts martial. The majority of charges laid under the Code can be tried by either summary trial or court martial and, when required, the accused are offered an opportunity to ‘elect’ or chose what type of trial they desire. Normally, the rank of the accused, the nature of the offence and the severity of the punishment determine the method of trial procedure, whether court martial or summary trial, used to try an offence.

- a. Summary trials are formal disciplinary hearings convened as necessary by the chain of command to hear and adjudicate minor service offences which take place inside or outside Canada. There are close to 2,000 such trials each year and these trials have an average conviction rate of 97%.⁵ Despite the fact that Summary Trial

⁵ In the UK, all three Services operate a separate system of minor administrative action (MAA) — a system of administrative discipline, distinct from their criminal disciplinary systems—for minor infringements. Examples of offences attracting minor administrative action include relatively trivial misdemeanours – a few minutes late for guard duty, poor performance in a routine task etc. Usually it will mean a quiet word with a superior in a relatively formal setting with a minor punishment e.g. reduced shore leave, extra guard duty. The presiding officer could be one or several ranks above the individual concerned, but this would depend on circumstances and possibly on repetition. MAAs are not recorded on an individual’s service record but are recorded centrally within a unit.

This procedure allows junior commanders to deal with the lowest level of misconduct, and it has resulted in a 50% reduction in the number of summary dealings in the Army. This has empowered junior leaders and improved discipline without resorting to the more time-

proceedings could lead to a sentence with ‘*true penal consequences*’,⁶ amazingly, there is no right to legal counsel⁷ at summary trial even if an accused is being tried on Canadian soil, during peace time, for an offence which may result in detention of imprisonment. A summary trial conviction may also result in a criminal record, despite that:

- i. there are no records of proceeding;
- ii. there are no rules of evidence, including non-compellability of the accused to be a witness against himself, self-incrimination, adverse inference from the accused’s silence, or, spousal privilege;
- iii. there may be full reliance of hearsay evidence; and
- iv. there is no right of appeal.

consuming summary dealing procedures removing the risks associated with convening a summary hearing. Lawyers and civilians would not be involved in this form of discipline. In Canada, although it might exist in practice, there is no formal recognition of an alternative to formal summary proceedings.

⁶ The powers with respect to sentencing vary depending on whether it is determined by a superior commander, a commanding officer or a delegate of the latter. The Commanding Officer can sentence an accused to a term of detention up to 30 days, this term is restricted to 15 days where the sentence is handed down by a delegate and, there is no term of detention for officers and non-commissioned members above the rank of sergeant. The sentence which a superior commander may hand down to officers and non-commissioned members are a severe reprimand, a reprimand or a fine or any combination thereof.

⁷ An accused has the right to have an ‘assisting officer’ help him prepare his defence, to advise him on calling witnesses, submitting evidence or on any other issue relating to the charge(s) or trial. The Assisting Officer, who is typically appointed by the Commanding Officer of the accused’s parent unit, many also assist the accused at trial and speak on his behalf during the actual conduct of the trial.

b. Courts Martial. They are two types of court martial as listed below. At present there is one Chief Military Judge and three [3] military judges to handle approximately 64 court martial trials a year.⁸

- i. General Court Martial (GCM): The GCM comprises a military judge and, as a general rule, a panel of five military officers.⁹ However, when the accused is a non-commissioned member, the panel must include two non-commissioned members at or above the rank of warrant officer or petty officer first class.¹⁰ The panel is responsible for the finding on charges and the military judge makes all legal rulings and imposes the sentence.

⁸ On November 15, 2012 the fourth quadrennial Military Judges Compensation Committee report on the compensation of military judges was presented to the Honorable Peter MacKay, the then Minister of National Defence, on September 28, 2012. It addressed the workload of the existing four military judges as follows:

(. . .) The four (4) military judges have presided an average of 64 courts martial per year on average in the past four years. (. . .)

- in 2010-2011 for example, the four judges sat a total of 172.5 days in court, and another 152 days were for temporary duty (meaning that 152 days were spent to perform judicial duties outside of the location of the Office in the National Capital Region). This number includes travelling days;
- In 2011-2012, 213.5 days were spent in court and another 343 days were on temporary duty;
- As of June 28, 2012, 57.5 days were spent in court and another 80 days were on temporary duty.

These numbers are the total numbers of days spent on judicial duties for the four (4) judges combined.

⁹ The senior member of that panel must be of or above the rank of colonel, who, in passing, may outrank the military judge. See: Gilles Létourneau, *Introduction to Military Justice*, (Montréal, Wilson and Lafleur Ltd., 2013) at 31.

¹⁰ However, a recent legislative change to subsection 167(7) of the NDA, which was enacted on June 19, 2013, now provides for a majority of non-commissioned members on the panel if the accused person is a non-commissioned member. [See *Statutes of Canada* 2013, c. 24]

167(7). If the accused person is a non-commissioned member, the panel is composed of the senior member, one other officer and three non-commissioned members who are of or above both the rank of the accused person and the rank of sergeant.

- ii. Standing Court Martial. The SCM is conducted by a military judge sitting alone, who is responsible for the finding on the charges and imposing a sentence if the accused is found guilty.

1.4 Jurisdiction

Military tribunals are tribunals of exception, that is to say tribunals that derogate from the penal system usually in place for the prosecution of civilian offenders charged with *Criminal Code of Canada*¹¹ or statutory offences. The military justice system entails a differential treatment for persons subject to the Code.¹² In Canada, the scope of the jurisdiction of military tribunals has expanded in recent years. Previously, there was a requirement that there be a military nexus before the military courts could acquire and exercise their jurisdiction. Currently, the issue is in doubt. However, two cases are scheduled to be heard by the CMAC late in the Fall of 2013.¹³

¹¹ *Criminal Code*, R.S.C. 1985, chapter C-46

¹² The persons enumerated in section 60 of the *Act* fall under the reach of the Code and can be prosecuted before the military courts. As enumerated at note 5 above, the reach of the Code extends to civilians, who normally would not be subject to the military regime, but who become so because they accompany a unit or other elements of the Canadian Armed Forces that is on service or active service in any place.

¹³ CMAC 553- *Her Majesty the Queen v. Paul Wehmeir* and CMAC 560 - *Moriarity v. Her Majesty the Queen*

PART 2: DOMESTIC PRESSURE FOR CHANGE

2.1 Background

In recent years, many of our European allies have made substantial changes to their military justice system to bring it more in line with contemporary human rights values and, as importantly, to bring it in sync with their civilian criminal justice system.¹⁴ Canada has yet to contemplate similar changes. I know of no legal or operational reasons as to why similar changes should not be incorporated in Canada's military system of justice, since our *Charter of Rights and Freedoms (Charter)*¹⁵ is, in most respects, analogous in values to the *European Convention for the Protection of Human Rights*.¹⁶

Truth be told, the core features of the *NDA* have been static for decades. Any attempts to modernize it and bring it more in line with our own civilian penal system have been successfully resisted by our own military. Be that as it may, many reforms have been made as a result of pressures from outside, not within, the Department of National Defence.

In this next section, I will illustrate how external pressure was brought to bear on the military establishment to bring needed reforms. However, important structural reforms are urgently required if Canada is to keep pace with a worldwide developments by borrowing proven concepts to both democratize and ameliorate their military justice systems. Some of these needed military justice developments will be outlined in the penultimate part to this paper.

¹⁴ See: George Nolte (ed.), *European Military Law Systems*. 2003, De Gruyter Recht, Berlin.

¹⁵ *Canadian Charter of Rights and Freedoms*, section 2, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

¹⁶ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols numbers 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

2.2 Royal Commission of Inquiry (1998) and follow-on legislative change

The 2 ½ year Royal Commission of Inquiry presided over by the Honorable Justice Gilles Létourneau into the actions of Canadian Airborne Regiment during its deployment to Somalia in 1993¹⁷ resulted in an awakening of the political class and the national media¹⁸ to such an extent that the *NDA* underwent major reforms.¹⁹ The principal reforms enacted via Bill C-25 in 1998²⁰ included, *inter alia*, the following:

- a. Abolition of the death penalty;²¹
- b. Some strengthening of the independence of military judges relating to their appointment, powers and tenure:²²

¹⁷ Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair*, June 1997 (Somalia Report).

¹⁸ The Report chronicles a litany of failures and, more significantly leadership shortcomings by the chain of command whether in theatre or at National Defence Headquarters (NDHQ). It also revealed the existence of a climate of cover-up as well as deep moral and legal failings. The Report made hundreds of findings, both large and small, and provided 160 recommendations, forty-five (45) of which dealing exclusively with the restructuring of the Military Justice System.

¹⁹ Bill C-25 – *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, *Statute of Canada* 1998, c. 35.

²⁰ The Bill received Royal Assent on December 10, 1998. The various parts of the bill came into force between 1999 and 2000.

²¹ Capital punishment had been abolished in Canada's *Criminal Code* on July 26, 1976. Therefore, military judges were the only judges in Canada who, operating under renewable terms could between 1976 and 1998 sentence an offender to death. See: *Introduction to Military Justice* at 45.

²² Before the enactment of Bill C-25, in courts martial where there is a panel, the presiding military judge (then called the judge advocate) decided and gave instructions to the panel on all issues of law, just like a judge in a civilian jury trial. It was the panel, however, that was in charge of the proceedings and the president or senior member of the panel who decides such administrative matters as adjournments and the exclusion or admission of members of the public. Moreover, unlike the case in a civilian jury trial, it was the panel, not the judge advocate, who determined and imposed the sentence. Finally, all decisions of the panel, including the verdict and sentence

- i. The military judges would be assigned to particular cases by the Chief Military Judge. With the concurrence of the Chief Military Judge, military judges would also be eligible to conduct boards of inquiry.
 - ii. Military judges would hold office for renewable five-year terms, but could be removed for cause on the recommendation of an Inquiry Committee established under regulations made by the Governor in Council which would be deemed to have the powers of a court martial. Reappointment of judges would be on the recommendation of a Renewal Committee established under regulations made by the Governor in Council.
 - iii. Rates and conditions of pay for the judges would be prescribed by the Treasury Board, however, their remuneration would be reviewed regularly by a Compensation Committee established under regulations made by the Governor in Council.
 - iv. Military judges would cease to hold office on reaching the retirement age prescribed in the regulations.
- c. Clarification and limitation of the functions of the Minister of National Defence;²³
- i. The power to appoint military judges has been transferred from the Minister to the Governor in Council (Cabinet);

(except in death penalty cases) were based on a majority of members, in contrast to a civilian criminal jury trial where unanimity is required for a verdict.

²³ Before the amendments brought by Bill C-25, the Minister enjoyed, under the *NDA*, numerous powers of a quasi-judicial nature. For example, the Minister could entertain petitions for release from pre-trial custody, order courts martial or designate other persons who would have this power, suspend punishments of imprisonment or detention, approve certain sentences, review or alter convictions in the case of a summary trial, etc. As noted earlier, his power to appoint military judges has been transferred to the Governor in Council.

- ii. The power that the Minister approve certain sentences has been removed;
 - iii. The power that the Minister suspend punishments of imprisonment or detention or to appoint officials to do so has been removed;
 - iv. The ministerial authority to review or alter convictions in the case of summary trials has been transferred to the CDS; and
 - v. The ministerial discretion to dispense with any retrial ordered by the Court Martial Appeal Court (CMAC) or the Supreme Court of Canada has been repealed.
- d. Finally, Bill C-25 also brought about a number of significant legislative changes to the roles and functions of the principal actors within the Canadian military justice system:
- i. Chief Military Judge. The Office of the Chief Military Judge was created. The Chief Military Judge is now appointed by the Governor in Council (versus the Minister).²⁴ He may make rules governing practice and procedure at courts martial. A judge holds office during good behaviour for a term of five years, removal is for cause under recommendation of an Inquiry Committee.
 - ii. Military Judges. Military judges preside at all courts martial. This means that they, and not the members of the court martial panel, conduct the proceedings and make all decisions of law or mixed law and fact in the

²⁴ Another recent legislative change enacted on June 19, 2013 provides at subsection 165.24(2) for the Chief Military Judge to hold a rank that is not less than colonel.

proceedings. Specifically, it is the military judge who orders the exclusion of the public from the proceedings; corrects technical defects in charges; and/or grant all adjournments. Moreover, the presiding military judge determines and imposes the sentence and grants release pending appeal. Thus, the role of the president of the panel (whose title was changed to the "senior member" of the panel) is now more like the foreperson of a civilian jury.

- iii. Court Martial Administrator. The Court Martial Administrator now convenes courts martial in accordance with the determination made by the Director of Military Prosecutions. In the case of a General Court Martial, the Administrator appoints the panel members. The Court Martial Administrator also has the power to summon the accused person to appear before a court martial. The Court Martial Administrator acts under the general supervision of the Chief Military Judge;
- iv. Director of Military Prosecution.²⁵
 - The Director of Military Prosecutions (DMP) is now responsible for all court martial prosecutions and decides which type of court martial should be held. The DMP also makes the ultimate determination of whether, in fact, there should be a court martial at all.²⁶ The DMP has

²⁵ The Director of Military Prosecutions (DPM), who is a military officer with at least ten (10) years' experience as a qualified lawyer in Canada would be appointed by the Minister of National Defence for renewable terms of up to four years. The incumbent would be removable for cause on the recommendation of an Inquiry Committee, established under regulations, which would be deemed to have the powers of a court martial. In addition to court martial responsibilities, The Director could also act as counsel for the Minister on appeals when so instructed. The DMP could be assisted and represented in all these duties by officers who were qualified lawyers.

²⁶ Before the enactment of Bill C-25, the decision to convene a court martial, and which type of court martial, was the responsibility of senior officers in the chain of command called "convening authorities." The prosecutor assigned to a court martial was the agent of the convening authority and had no independent authority to decide not to proceed to trial by court martial, to amend the charge, or to opt for a different type of court martial.

the authority to withdraw charges (without prejudice) and to refer cases back to the chain of command for summary trial where such powers of punishment were deemed adequate.

- The DMP now acts under the general supervision of the Judge Advocate General who may issue general instructions or guidelines to the Director as well as specific instructions in respect of a particular prosecution. All instructions from the Judge Advocate General have to be in writing and available to the public (unless the DMP considered that it would be contrary to the best interest of military justice) with copies to the Minister of National Defence.

v. Director of Defence Counsel Services.²⁷

- The Director of Defence Counsel Services (DDCS), who is a military officer, is now responsible for the provision of *pro-bono* legal services to accused persons subject to the Code.
- The DDCS now acts under the general supervision of the Judge Advocate General, who may issue general instructions or guidelines to the DDCS as well as specific provisions governing the provision of defence counsel services so long as those instructions or guidelines are available to the public. The DDCS is appointed by the Minister for renewable terms of up to four [4] years.

²⁷ The Director of Defence Counsel Services (DDCS), who is a military officer with at least ten (10) years' experience as a qualified lawyer in Canada, is appointed by the Minister of National Defence for renewable terms of up to four years. The DDCS must be an officer with at least ten [10] years standing as a qualified lawyer in Canada. The DDCS can be assisted by civilian lawyers.

- e. The military tribunals also acquired jurisdiction over sexual assault offences committed in Canada. These offences were previously within the exclusive jurisdiction of the civilian justice system. Section 22 of the Bill achieved that result by amending section 70 of the *NDA* and removing the sexual assault offences from the list of offences subject to the exclusive jurisdiction of the civilian criminal justice system;
- f. In a break with tradition, clause 42 amended the *National Defence Act* to allow senior non-commissioned members (warrant officer or above) to serve on panels for General Courts Martial where the accused was a non-commissioned member;²⁸
- g. A reduction in the powers granted to a Commanding Officer presiding over summary trials. Prior to the amendments, the Commanding Officer possessed an unfettered discretion regarding the prosecution of offences by way of summary trials. His decision not to prosecute, even for serious crimes, was not subject to review. In addition, he had no legal knowledge and very little training, if any, in the holding of summary trials;²⁹

²⁸ Clause 42 also amended the list of persons ineligible to sit on court martial panels. Some amendments to this list are consequential to other changes proposed in the bill. Since the task of convening courts martial would be transferred from officers in the chain of command to the DMP and the Court Martial Administrator, the officers who currently perform this function would be removed from the ineligibility list. Clause 42 would also clarify that all Canadian Armed Forces members with the power to arrest as set out in section 156 of the Act, would also be ineligible. Existing practice would also be confirmed by the exclusion from court martial panels of military personnel from other armed forces who are attached, seconded or on loan to the Canadian Armed Forces. Clause 42 would also exclude CF members who are lawyers from court martial panels; this is consistent with the laws governing civilian juries.

²⁹ Constitutional concerns that were grounded on the *Charter* and related to procedural fairness prompted a number of corrective measures. Among these was a guarantee that the Commanding Officer who carries out or supervises the investigation of an offence, who issues a search warrant in relation to that offence, or who lays the charge or causes it to be laid, cannot then preside over the summary trial. There was also a reduction of the maximum period of detention that the Commanding Officer can impose from 90 to 30 days, a limitation on the type of offences that he can try and a referral procedure to an officer authorized to refer charges to the DMP when the

- h. The three-year limitation period for the prosecution of service offences was abolished, thereby ensuring that heinous crimes – such as torture – would not remain unpunished and potentially increasing the workload of the military tribunals (section 21 of the Bill amended section 69 of the *NDA*);
- i. Establishment of the Military Police Complaints Commission (MPCC) to provide independent oversight of complaints about the conduct of the military police and allegations of interference in investigations conducted by the military police;
- j. Application of common law provisions concerning ineligibility for conditional release; and
- k. Creation of the Canadian Forces Grievance Board (CFGB)³⁰, an independent body responsible for the impartial disposition of (some) grievances in the Canadian Armed Forces.

2.3 Lamer Report (2003)³¹

Clause 96 of Bill C-25 required that the Minister undertake an independent review of the *NDA* every five years following the bill's coming into force.

Commanding Officer decides not to prosecute. Pursuant to the reform, mandatory training on procedural fairness and the conduct of summary trials was administratively organized for Commanding Officers. Moreover, the Commanding Officer's power to order a reduction in rank is now limited to a reduction of one rank below the rank held before the trial. In order to facilitate subsequent review by higher authorities, evidence at summary trial is now taken under oath or solemn affirmation.

³⁰ In 2013, this was renamed the Military Grievances External Review Committee.

³¹ *The First Independent Review by the Right Honorable Antonio Lamer, P.C., C.C., C.D., of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c. 35* which was submitted to the Minister of National Defence on September 3, 2003.

Accordingly, former (retired) Chief Justice of the Supreme Court, the Right Honourable Antonio Lamer, began the first review in March 2003. His report was tabled in Parliament on November 2003.³²

His eighty-eight (88) recommendations were primarily designed to provide better guarantees of the independence of key players, in particular military judges and the Director of Defence Counsel Services, and to improve the grievance and military police complaints process. However, some important recommendations remain unaddressed.

2.4 The Supreme Court of Canada

In *MacKay v. The Queen*, (1980) 2 SCR at 408-409, McIntyre J. commented on the relationship of military law to the ordinary civil law and more specifically whether a trial by court martial under military law deprives one of equality under the law:

In a country with a well-established judicial system serving all parts of the country in which the prosecution of criminal offences and the constitution of courts of criminal jurisdiction is the responsibility of the provincial governments, I find it impossible to accept the proposition that the legitimate needs of the military extend to prosecutions of servicemen for any offences under any penal statute of Canada could be conducted in military courts . . . It is not necessary for the attainment of any socially desirable objective connected with the military service to extend the reach of the military courts to that extent. The serviceman charged with a criminal offence is deprived of the benefit of a preliminary hearing or the right to a jury trial. He is subject to a military code which differs in some particulars from the civil law, to differing rules of evidence, and to a different and more limited appellate procedure. His right to rely upon the special pleas of “*autrefois convict*” or “*autrefois acquit*” is altered for, while if convicted of an offence in a civil court he may not be tried again for the same offence in a military court, his conviction in a military court does not bar a second prosecution in a civil court. His right to apply for bail is virtually eliminated.

³² The independent review related solely to the provisions and operation of Bill C-25, and did not encompass the *NDA* as a whole.

While such differences may be acceptable on the basis of military need in some cases, they cannot be permitted universal effect in respect of the criminal law of Canada as far as it relates to members of the armed services serving in Canada [MY EMPHASIS].

In other words, Justice McIntyre saw the application of the criminal law by military tribunals as an exception when the crimes were committed in Canada. In addition, the military offence had to be so connected with the service in its nature and in the circumstances of its commission that it would tend to affect the general standard of discipline and efficiency of the service: *id.*, p. 410.

However, doubts have been cast on this requirement and the jurisdiction of the military courts increased pursuant to Bill C-25 which amended the *NDA* in 1998 (*R. v. Reddick* (1996), 5 CMAR 485, at pp. 498 to 506; but see *contra R. v. Brown* (1995), 5 CMAR 280). This notion of ‘military nexus’ has no place when the issue is one of division of constitutional powers. It merely distracts from that issue and it is misleading (*ibidem*).

Be that as it may, in a decision, *R. v. Nystrom*, 2005 CMAC 7, at paragraph 67, the CMAC narrowed the scope of the ruling in the *Reddick* case and left for another time the determination of the need for a military nexus.³³ For a comparative analysis of the military nexus requirement,³⁴ see Justice Gilles Létourneau, *Introduction to Military Justice*, (Montréal, Wilson and Lafleur Ltd., 2013) at pp. 13 ff.

³³ In *R v. Reddick*. (1997) CMAC 393. The court unanimously issued a reminder as to the need to remove the useless disparities between the civil penal system and the military penal system so as to ensure, within the military system, the best possible compliance with guarantees and rights enshrined in the *Charter*.

³⁴ As an aside, in *Re Colonel Aird; Ex Parte Alpert*, 209 Austl. L. Rep. 311. (2004) HCA 44 the court addressed whether there was court-martial jurisdiction over a rape committed overseas while the accused was on recreational leave. Kirby J. (dissenting) concluded that the jurisdiction of the service tribunal was only available under the Constitution for the limited purpose of maintaining or enforcing service discipline, properly so called. In the context of the exceptional character of service tribunals, the crime of rape allegedly committed by the defendant, whilst a tourist off duty, in the circumstances described in the special case, was one to which service discipline applied. The present is not a time to expand the jurisdiction and powers of military

The Supreme Court of Canada (SCC), in *R. v. Généreux*, (1992) 1 S.C.R. 259, recognized the constitutional validity of the penal military justice system. A parallel system of courts for the military that exists alongside the ordinary criminal courts is not by its very nature inconsistent with paragraph 11(d) of the *Charter*. At p. 293, writing for a majority of the Court, Lamer, Chief Justice, wrote the following in support of a system of military tribunals:

The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military.³⁵ The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military [MY EMPHASIS].

Obviously, the constitutionality of the system as a whole does not necessarily entail that every military tribunal is constitutional or that provisions of the *Act* relating to the penal military justice system are immune from successful constitutional attacks. In *Généreux* itself, the SCC found that the structure and constitution of the General Court Martial were in breach of paragraph 11(d) of the *Charter* because they did not meet the essential conditions of judicial independence: namely, insufficient protection against discretionary or arbitrary interference by the executive and, therefore, a lack of objective

tribunals in Australia. It is at times like the present that this Court must adhere steadfastly to the protection of basic civil rights in Australia's constitutional arrangements.

³⁵ In stating that, he is in fact asserting the need for a military nexus.

guarantee that the career of a military judge would not be affected by decisions tending to favour an accused rather than the prosecution.³⁶

A similar finding was made by the CMAC in *Lauzon v. The Queen* (1998), CMAC 415 with respect to the Standing Court Martial (see also *Bergeron v. Her Majesty the Queen* (1999), CMAC-417). At par. 32 and 33 of its decision, the Court wrote:

In short, if one wanted to apply the existing principles for Courts martial to the judges of the civil jurisdictions, the judges of the Court of Quebec, for example, would have to be appointed by the Minister of Justice, the positions of these judges would have to be assigned to and located within the litigation section of the department, to hear the department's cases, argued by counsel for the department, on behalf of the Minister of Justice and the Executive, over and above the fact that the appointments of these judges would have to be for short terms only and that the power to re-appoint them would lie with the Minister of Justice, and that his or her Deputy Minister would have an influential role at certain crucial stages of the process. This is a completely unacceptable situation in the civil context. The acknowledged need for military discipline and for special courts to enforce it is not sufficient to justify such a significant and fundamental infringement of the principle of the separation of powers, especially because military personnel who face charges based on the *Criminal Code* have the right to essentially the same guarantees offered by criminal and constitutional law as ordinary citizens (except the right to a trial by jury, s. 11(f) of the *Charter*).

The organizational and institutional relationship among the Minister, the Judge Advocate General and the members of his or her Office who represent the Executive, and the military trial judges who hear the Department's cases does not, in our view, afford sufficient guarantees of institutional impartiality and

³⁶ In a paper submitted by then Justice Ian Binnie on behalf of the Supreme Court of Canada to the World Conference on Constitutional Justice on January 16-18 2011 in Rio de Janeiro, "in Canada, judicial independence has been characterized as an unwritten constitutional principle." He notes also that the principle of judicial independence, which has been a fixture of the Constitution of the United Kingdom since at least the Act of Settlement of 1701, was incorporated into the preamble of Canada's *Constitution Act, 1867*. He notes that in its jurisprudence, the Supreme Court of Canada has identified the following requirements for judicial independence: a) the essence of security of tenure is a tenure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner; b) the essence of financial security is that the right to salary and pension should be established by law; and, c) administrative independence which focuses on 'judicial control' over the administrative decisions that bear directly and immediately on the exercise of judicial function.

independence. A reasonable person who became aware of the prevailing state of the law and the embarrassingly close relationship which exists between the Executive and the judiciary could only conclude, or at least would be justified in perceiving and believing, that the Presidents of the Standing Courts Martial are not free from pressure by the Executive at the institutional level. In other words, such a person could reasonably conclude that the military trial judges act through the Executive, with the Executive and for the Executive. (MY EMPHASIS)

2.5 The Court Martial Appeal Court of Canada

Over the years, and particularly since 1998, the CMAC has declared several provisions of the *National Defence Act* unconstitutional:

- a. *R v. Lauzon* (1998) CMAC 415. Once again, courts martial were declared unconstitutional. See discussion above under Supreme Court of Canada.
- b. *R v. Gauthier*, (1998) CMAC 414. The court held that the *Charter* places limits, similar to those which apply under the *Criminal Code*, on the discretion to arrest without a warrant conferred in sections 154 to 156 of the *NDA*.
- c. *R. v. Nystrom*, (2004) CMAC 483. The court alerted the military to the unfair and unconstitutional provision giving the Director Military Prosecution rather than the accused the right to choose the type of court martial. Yet, nothing was done to correct this, which led to the decision in *R v. Trépanier*.
- d. *R. v. Trépanier*, (2008) CMAC 3 the Court declared unconstitutional the provisions enabling the Director of Military Prosecutions to choose the type of court martial for a given accused (subsection 165.14 of the *NDA*).
- e. *R v. Leblanc*, (2011) CMAC 2 declared courts martial unconstitutional because judges were appointed on terms. Bill C-15 was introduced into the House of Commons on the same day as Bill C-16, *the Security of Tenure of Military*

Judges Act, which provides security of tenure for military judges until a fixed age of 60 years, subject only to removal for cause on the recommendation of an Inquiry Committee. Bill C-16 received Royal Assent on November 29, 2011.

- f. *O'Toole v. The Queen*, (2012) CMAC 5 the Court offered the comment that in enacting the current provisions governing military justice, introduced by Bill C-25, the intent was to bring military justice into alignment with the civilian justice system noting that:

(32) The military justice should therefore resemble the civilian justice system insofar as there is no military rationale for adopting a different approach.

PART 3: REFORMING A “VICTORIAN” SYSTEM OF MILITARY JUSTICE

3.1 Introduction

Recently, the Canadian Parliament enacted Bill C-15 to amend the *NDA*.³⁷ This provided Canada with yet a new opportunity to bring our military justice on par with civilian society standards and to ensure that it more closely reflect the provisions of our own *Charter of Rights and Freedoms*. It also provided a rare opportunity to join a global effort to democratize the operation of national military law systems.³⁸ However, despite a considerable amount of debate in the House of Commons³⁹ and, the Senate⁴⁰ clamoring for reforms⁴¹ (particularly, but not limited to, the summary trial process) as well as significant

³⁷ Bill C-15 was enacted on June 19, 2013. See *Statutes of Canada* 2013, c. 24

³⁸ Eugene Fidell “A Worldwide Perspectives on Change in Military Justice”, 48 A.F.L. Rev. 195 (2000) and “*Evolving Military Justice*” (2004) as published in Chapter 20 – Law Reform and Globalization, Military Justice: Cases and Materials (Second Edition) by Eugene Fidell, Elizabeth L. Hillman and Dwight H. Sullivan, LexisNexis, at 1281-1327.

³⁹ See House of Commons Debates (Hansard) 41st Parliament, 1st Session at Second Reading on following dates re Bill 15 – *Strengthening Military Justice in the Defence of Canada Act*: November 4, 2011; March 29, 2012; April 5, 2012; June 19, 2012; October 22, 2012; October 23, 2012; December 07, 2012; December 11, 2012; and December 12, 2012. See also House of Commons Debates (Hansard) at Third Reading on the following dates: April 30, 2013 and May 01, 2013.

⁴⁰ See Debates of the Senate (Hansard) 1st Session, 41st Parliament, Volume 148, Issue 160 on May 7 and May 21, 2013 as well as Proceedings of the Standing Committee on Legal and Constitutional Affairs of the Senate on May 23, 28, 29 and 30 as well as June 5, 2013

⁴¹ See Final Report on a Special Study by the Senate Committee on Constitutional and Legal Affairs titled “Equal Justice: Reforming Canada’s System of Courts Martial”, May 2009 which observed that: “It must be noted that by joining the military, one does not surrender one’s rights under the *Charter of Rights and Freedoms* (the Charter), and that, the military, as an organization, benefits when the rules that govern it largely reflect those that apply to Canadian society in general.

Citing a 1997 Report to the then Prime Minister by the then Minister of National Defence, the report went on to say:

number of witnesses appearing before various parliamentary committees⁴² voicing their support for such reforms, at the end of the day no changes at all were made to either modernize the *NDA* or bring it in line with a global movement to reduce, if not eliminate, the derogations between the military justice system and the civilian penal system.

3.2 Needed Reforms

3.2.1 Summary Trial

The Black's Law Dictionary, the authoritative century-old reference of choice for the language of law, defines 'trial' as a formal judicial examination of evidence, and determination of legal claims in an adversary proceeding. In common parlance, a trial may be defined as the determination of a person's innocence or guilt, by due process of law.

In Canada, summary trials are not trials because there is no judicial examination of the evidence. Despite the fact that a Commanding Officer, or a delegated officer, at summary trial has the ability to examine facts, decide on issues of law and sentence a military member to detention for up to thirty (30) days - a conviction which may result in a criminal record – there is no due process. How come? First off, there is no right to be represented by legal counsel. Secondly, there are no rules of evidence which in a *real* trial

“The record of modern warfare clearly demonstrates that military effectiveness depends upon armed forces being integral parts of the societies they serve, not being isolated from them. The society in which and for which the CF (Canadian Forces] serve is in the process of rapid legal, economic and social change. . . .”

By approaching military justice in the manner recommended by the former Minister Young, the Senate concluded that “the public is also likely to have increased confidence in the military justice system. Such increased confidence could, in turn, have a positive effect on military recruitment.”

⁴² See Minutes of Proceedings for the House of Commons Standing Committee on National Defence for Meeting 62 on January 30, 2013; Meeting 63 on February 4, 2013; Meeting 64 on February 6, 2013; Meeting 65 on February 11, 2013; Meeting 66 on February 13, 2013; Meeting 67 on February 25, 2013; Meeting 68 on February 27, 2013; and, Meeting 69 on March 4, 2013.

would limit the admissibility of evidence to ensure that an accused has a trial based only on the most reliable evidence available.

At a proper trial, guilt or innocence is not based on rumour, speculation or reputation; an accused is tried solely on evidence related to the matter in issue. This is not so at Summary Trial, where hearsay evidence is readily relied upon.

There are also no records of proceeding at Summary Trial, and, perhaps most importantly, there is no right of appeal. To this we ask: what fundamental elements of a trial are present at Summary Trial? The answer, we propose, is none.

The fact that a criminal record may result from some of the convictions at summary trial, despite that little procedural safeguards are available to an accused, may be unconstitutional. In our opinion, this aspect of the Summary Trial process is in need of urgent reform. We believe that Canadian society at large has an interest in knowing that fundamental rights, freedoms and protections are recognized and protected by military trials.

Discussion

On March 11, 2011, The British Columbia Civil Liberties Association submitted a paper to the House of Commons Standing Committee on National Defence in which they observed:

“Canadian soldiers are entitled to the rights and freedoms they fight to uphold.”

The BCCLA went on to state:

BCCLA believes that the summary trial process, which is used to try individuals for offences under the Act in an expedited manner, fails to meet minimum standards for procedural fairness. Despite the potential for

significant criminal penalties, including imprisonment and stigmatizing criminal records, the summary process deprives Canadian soldiers of basic standards of fundamental justice, including the right to legal representation, the right to be tried according to the standard of guilt beyond reasonable doubt, the presumption of innocence, and the right to an impartial adjudication of one's case. Weak trial procedures and limited mandatory training for decision makers tend to induce poor quality adjudication, false convictions and wrongful imprisonment. During deployment or active combat there may be sufficient reason to justify a departure from basic standards of procedural fairness, but absent such urgency and necessity, the rule of law and the principles of fundamental justice demand more for our soldiers.”

In May, 2013, retired Justice Gilles Létourneau, appearing before the Senate Committee on Constitutional and Legal Affairs stated his belief that summary trials, in their current form, are “unconstitutional”, and in need of procedural “safeguards”, as have been implemented in the UK, via a decision of the European Court on Human Rights, a supra-national and international court established by the *European Convention of Human Rights* (which is almost identical to Canada's *Charter of Rights and Freedoms*).

Suggested Reform

In our opinion, the Summary Trial shortcomings can be easily resolved by making two reforms. Firstly, Summary Trials should be renamed as “Disciplinary Proceedings”, because this is what they were designed to be – no more, no less. Secondly, any charge warranting detention (the loss of liberty) or the imposition of a criminal record should *automatically* be referred to Courts Martial, where full procedural rights (including right to counsel etc.), as guaranteed under the *Charter of Rights and Freedoms*, are provided.

In Europe, the European Court of Human Rights has considered the question of constitutionality of Summary Trials and decided that their current system, which was identical to our system, was in clear and unequivocal contravention of the rights owed to serving service persons. In reaction, the UK immediately implemented reforms allowing for

an appeal mechanism from summary trials, where a right to counsel and rules of evidence are available.⁴³

Furthermore, the summary trial system in the UK has now been decriminalized, and there are mandatory referrals to Courts Martial for matters where imprisonment (or detention) may be contemplated.⁴⁴ Australia followed suit. Ireland followed suit. New Zealand followed suit. And in France and Germany, they have eliminated summary trials of criminal offences by transferring prosecution of such offences before a civilian court.

The advancements and success in Great Britain in reforming their Summary Trial system demonstrates that a civilian court *can* handle such trials of offences having a military nexus. In Canada, like-reforms need to be made to protect the rights of our men and women in uniform.

⁴³ In the UK, a Summary Appeal Court was established over fifteen years ago, in 1998; See Rant, J (Hon) and Blackett, J. *Courts Martial, Discipline, and the Criminal Process in the Armed Service*. (2003). 2nd Edition. Oxford University Press. The Summary Appeal Court is a standing court. Judge Advocates for the Summary Appeal Court are appointed by the Judge Advocate General. No person can be so appointed unless he /she is qualified under section 84B(2) of the 1995 Acts for appointment as the judge advocate in relation to a court-martial. Any person convicted summarily whether by a commander, subordinate commander or appropriate superior authority has an absolute right to appeal within fourteen days of the award being announced. An appeal lies against finding and sentence, or finding or sentence alone. The Summary Appeal Court cannot increase sentences or award costs against an unsuccessful appellant. The appellant has the right to legal representation and to legal aid. The procedures are formal, and the cases are heard in public.

The power of a reviewing authority to intervene after a summary hearing has not been removed but it has been transformed. A reviewing authority now has the power to refer any case to the Summary Appeal Court for the court to consider, even when no notice of appeal has been given to the defendant.

The person who brought the appeal may question any judgment of the Summary Appeal Court on the ground that it is wrong in law or in excess of jurisdiction, by applying to the Summary Appeal Court to have a case stated for the opinion of the High Court in England and Wales.

⁴⁴ Ibid.

3.2.2 Military Judges.

I Chief Military Judge

- a. Since 1998, the Chief Military Judge, not the JAG, is the supreme judicial authority within the Canadian Armed Forces. All persons subject to the Code, and this includes the Chief of the Defence Staff, the Vice Chief of the Defence Staff, Commanders of operational commands, the JAG (more about this later), as well as approximately 150 military lawyers, the Provost Marshall, the Director of Military Prosecution, the Director of Defence Services Counsel as well as other officers and non-commissioned members, are all subject to the judicial authority of the Chief Military Judge, if and when they were to appear before his court.

- b. The Chief Military Judge must hold a rank not lower than colonel. To anyone familiar with the purpose of holding military rank, this poses an obvious problem. Consider that, currently, the Chief Military Judge, as “supreme authority”, is junior in rank to over one hundred officers, including the Judge Advocate General. In any military organization that is dependent on a chain of command, a power structure, the supreme authority in the military justice system may be subject to orders of persons being tried in his court. This is problematic.

- c. From this, two obvious questions arise:
 - i. One: How is the administration of justice supposed to operate effectively, when its senior officials, including the Chief Military Judge, are subordinated to over one hundred members of the Chain of Command? In our estimation, it can't.

- ii. Two: How can the military justice system maintain the perception of independence when its senior officials, including the Chief Military Judge, are subordinated to over one hundred members of the Chain of Command. In our estimation, it can't.

Suggested Reform

- d. In our opinion, this conundrum can be overcome easily with two simple reforms:
 - i. Firstly, remove any rank from the Chief Military Judge to ensure that he is not subordinate to the Chain of Command. This would involve simply giving him the same title as all judges in Canada: "Judge" or "Justice". Removing rank from the Chief Military judge would also help ensure the perception of independence is maintained within his position, because he will no longer be subordinate to the chain of command or any members thereto.
 - ii. Secondly, follow in the footsteps of the UK, Australia, New Zealand and Ireland (to name only a few) by civilianizing these judges. This can easily be accomplished by merging the Office of the Chief of Military Judge (total of 21 personnel) with the Federal Court of Canada and creating a 'military division' therein. Substantial financial savings would result from using the Registry as well as technical, financial and clerical support staff existing at the Federal Court. In addition, a military division at the Federal Court would give access to a pool of qualified federal court judges who are already well experienced in all aspects of federal

law, including the *National Defence Act*, since many of them sit on the already established Court Martial Appeal Court.⁴⁵

II Military Judges

- a. Bill C-15 which was enacted in June 2013, added a Deputy Chief Military Judge⁴⁶ and a Reserve Force Military Judges Panel. The rationale for having both a Chief and Deputy Chief Military Judge as well as a Reserve Force Military Judges Panel is not obvious when there are only four [4] military judges and a small yearly caseload. In these circumstances, the creation of a Reserve Force Military Judges Panel appear a costly extravagance hardly justified so far by the tenants of the proposals.
- b. A Military Judge may submit a grievance unrelated to his judicial functions which is to be considered and determined by the Chief of the Defence Staff (CDS). The perception of a military judge presiding at a Court Martial having his grievance awaiting adjudication by the CDS does not inspire a neutral observer as to the independence from the chain of command.⁴⁷

⁴⁵ According to the existing *Federal Courts Act*, any judge of the Federal Court may sit and act at any time and at any place in Canada hence by their very nature they would be available to sit at Court Martial proceedings anywhere in Canada.

⁴⁶ The Supreme Court of Canada has a total of nine judges, including a Chief Justice but no deputy judge. The Federal Court of Appeal has a total of 12 judges, including a Chief Justice but no deputy judge. The Court Martial Appeal Court has a total of 55 judges including a Chief Justice but no deputy judge. The Federal Court of Canada has a total of 34 judges, including a Chief Justice but no deputy judge.

⁴⁷ This does not give the appearance of judicial independence. This may cast a shadow over judicial independence. The CDS is subject to the Code and therefore to prosecution before the judges whose grievance(s) he has the authority to decide. A reasonably well informed person may be justified in perceiving and believing that the integrity and neutrality of the process is compromised.

Suggested Reform

- c. Instead of augmenting these military judicial resources, to reiterate, the Office of the Chief Military Judge should be merged with the Federal Court.

3.2.3 Judge Advocate General

The term Judge Advocate General (JAG) is inherited from the British military justice system where it is still in use. However the term is misleading. In Canada, the JAG, is a serving military officer reporting to the Minister of National Defence.⁽¹⁾ He is situated organizationally within National Defence Headquarters and he fulfils two separate and, as we shall see, conflicting functions:

- a. legal advisor to the executive branch (to the Governor General, the Minister of Defence and the Chief of the Defence Staff): and,
- b. superintendence of the military judiciary system. In both capacities, the JAG reports to the Minister of National Defence.

However, one thing is clear. The Canadian JAG is not a judge; he has been stripped of that function many years ago. He is an Advocate, a lawyer. However, he performs no judicial function. His function is advisory and his role is one of legal adviser on military law matters.

The Canadian JAG has been conferred a plenipotentiary mandate over the administration of the military criminal justice system. He has monopolistic authority for providing advice to all stakeholders in the military criminal justice system on practices, procedures, developments and reforms. He monitors the functioning of the military criminal justice system and he advises government on its efficiency and effectiveness and proposes changes to the *National Defence Act*.

As importantly, on a day to day basis, the JAG also has general supervision of both the Director of Military Prosecutions (DPM) and the Director of Defence Counsel Services (DDCS) – who respectively assume the prosecution and the defence of an accused person before a court martial. I will discuss these two functions below. Of note also, currently the JAG has responsibility over the selection and career management of the military lawyers posted to these two directorates which performs key prosecutorial and defence functions within the military justice system.

Transformation Abroad

Recognizing that the multiplicity of roles played by the then UK JAG presented a situation of conflict, in 1948 the British Secretary of State for War moved to alter his status. Since then the UK JAG is a High Court judge and he is no longer part of the UK Department of Defence. He does not have a military rank. He is part of the Royal Courts of Justice Group of Her Majesty's Courts Service. As a civilian judge, the Judge Advocate General is independent of the executive branch and is not accountable to Government.⁴⁸ That being said the title Advocate General remains misleading because he is not an advocate. The same goes for the JAG team of Judge Advocates who sit as trial judge in Courts Martial and Summary Appeal Court.

It is because of this perception of a conflict of interest that many common law jurisdictions (Ireland, Australia, New Zealand) followed suit and civilianized the judicial function of the JAG. There are equal compelling reasons for Canada to follow that trend, but this would require that the JAG and its judicial functions be civilianized and moved outside the realm of the Department of National Defence.

⁴⁸ The UK JAG, who is a judicial officer, is responsible for appointing civilian judges to preside over military tribunals (Courts-Martial and Appeal of summary trials convictions). He is responsible for the conduct of proceedings at Courts Martial and monitoring the military criminal justice system. He provides guidance to all stakeholders in the military criminal justice system on practices and procedures, developments and reforms. However, he no longer provides legal advice to the military chain of command.

Suggested Reform

In many European countries there has been an effort to put civilian judges in military tribunals (United Kingdom, Ireland etc.). They have concluded that the presence of civilian judges reinforces the principle of civilian supremacy over military justice and the impartiality and independence of such tribunals since they are no longer part of the military hierarchy.

Canada should be doing the same. As stated earlier, for cost and efficiency reasons military judicial powers should be assigned to the Federal Court.

To that effect, it would be a beneficial move if the word “Judge” were to be removed from the JAG title.

In addition, it would also be beneficial if the position of Chief Military Judge as well as that of the Director Military Prosecution, as is the case in the United Kingdom, Ireland, Australia, New Zealand, were to be occupied respectively by a civilian judge and a civilian lawyer. Furthermore, their offices should be relocated outside of the Canadian national military headquarters to ensure a greater appearance of independence.

3.2.4 Reviewing Authorities

At present, section 249 of the *NDA* continues to grant the following two reviewing authorities power to uphold, quash, substitute sentences in respect of findings of guilt and mitigate, commute or remit in respect of punishments imposed at trial.

- a. the Governor in Council for findings of guilty made and punishments imposed by courts martial; and

- b. the Chief of the Defence Staff for findings of guilty made and punishments imposed at summary trials.
 - i. The power bestowed by section 249 is based on the premise that, at the end of a day, the Executive may interfere with the decision of a service tribunal made in the exercise of its judicial power in the traditional sense. This runs against the fundamental and overriding notion of judicial independence and autonomy, as well as due process, providing for the trial and punishment of ordinary offences by courts of law.

Suggested Reform

As noted by the Honourable Gilles Létourneau in his essay, *Introduction to Military Justice*, (Montréal, Wilson and Lafleur Ltd., 2013) at pp. 40:

It is surprising that the Governor in Council, i.e. the executive, can, for all practical purposes, sit on appeal from a finding of guilty and a sentence handed down by an independent judicial body such as a service tribunal, since there is already a court of appeal in respect of judicial decisions. It is also astonishing that the Chief of the Defence Staff, who, once again, belongs to the executive, can exercise similar powers with respect to ordinary law offences under the *Canadian Criminal Code*.

Any review of the findings or punishments made by a Court Martial should be the exclusive province of the Court Martial Appeal Court.

3.2.5 Suspending Authorities

At present, sections 216, 217 and 218 of the *NDA* continue to grant the following suspending authorities the ability to suspend a punishment of imprisonment or detention imposed by a service tribunal. The suspending authorities are members of the military chain of command, not judges. At present there are no safeguards contained in the legislation to prevent potential abuse. However, Bill C-15 (which has yet to be in force) provides that a suspending authority may suspend a punishment only if there are “imperative reasons

relating to military operations or the offender’s welfare” (New section 216(2) of the *NDA*).⁴⁹

- a. In respect of punishments imposed at court martials, the Chief of Defence Staff and an officer commanding a command may act as suspending authorities. (Article 114.02 QR&Os)
- b. In respect to punishments imposed at summary trials, the Chief of Defence Staff, an officer commanding a command, a commanding officer or an officer acting as a review authority under article 108.45 of the QR&Os.

Sections 216 to 218 of the *NDA* give the administrative authorities the power to interfere not only with the decision of a service tribunal, but also with a decision of the Court Martial Appeal Court by suspending the execution of a sentence of imprisonment or detention or postponing a committal to imprisonment or detention. Such a power is an executive interference with a judicial decision.

Suggested Reform:

The continued existence of these provisions runs counter to the judicious recommendation of Chief Justice Lamer who recommended that:

“the *National Defence Act* be amended to provide that the authority to suspend a custodial sentence shall reside with a military judge or judge of the Court Martial Appeal Court”

⁴⁹ The suspending authority must still review the suspension every three months. The suspending authority may, at the time of the review, remit the punishment, in accordance with regulations to be made by the Governor in Council, as provided by Clause 66. Bill C-15 does not alter the provisions of the *NDA* that provide for automatic remission of punishments and detention in certain circumstances. (Ss. 217(2) and 217(3) of the *NDA*.)

PART 4: CONCLUSION

Despite the fact that military justice around the world is going through a period of ferment by enacting major reforms - shrinking military jurisdictions in favor of increased civilian capacity - the Canadian military justice system pays precious little attention to these developments. These changes are taking place in countries with whom we share a common legal heritage, and value system. It seems that the time has come to conduct a full-scale independent systemic review of our military justice system to ensure that it corresponds to strict functional necessity, without encroaching, as it currently does, on the jurisdiction that can and should belong to ordinary (civilian) courts.

The Canadian military justice system is in need of a major overhaul. In consonance with the long established 'separation of powers' that guides our democracy, the Canadian civil judiciary is free from the control of the executive. The time has come to recognize that the functioning of our military criminal justice system must also be untrammelled by the executive and the chain of command. Because a Canadian in uniform is a Canadian citizen first, decisions on questions of law and legal rights and responsibilities of our 'citizens in uniform' should be equal to those provided for in the civilian penal system and should no longer be an attribute of the military mind and command. This is currently not the case.