Modernization of Canadian Military Criminal Justice

BEHIND THE TIMES

by Honourable Gilles Létourneau and Professor Michel W. Drapeau

A matter of priority for Canadian democracy.

March 30, 2017
PREFACE

As was said by The Right Honourable Chief Justice of Canada in 2004, Canadians are privileged to live in a peaceful country. Much of the collective sense of freedom and safety comes from our community’s commitment to a few key values: democratic governance, respect for fundamental rights as well as the rule of law and accommodation of differences.

The commitment to these values must be renewed on every occasion and the institutions that sustain them must be cherished. Among those who valiantly uphold these values and institutions are the soldiers, men and women, of the Canadian Armed Forces who put their lives on the line to protect and defend the country and what Canadians stand for. Many recognise that gratitude is owed to them, but few acknowledge, let alone are prepared to remedy the fact that they have been deprived of important legal rights by failing to reform and modern-
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The antiquated military justice system. Canadian soldiers and civilians tried in Canada before military ‘courts’, including summary trials, courts martial and other quasi-judiciary or administrative proceedings, are subject to a different treatment that denies them some of the fundamental rights Canadians are proud of and committed to.

Unlike what prevails in other allied systems, the current Canadian military ‘justice’ system fails to provide many of the guarantees set forth in the Canadian Constitution or under international law. Canadian military ‘judges’ are ‘soldiers first’ and part of a military chain of command that is, to say the least, very loath to evolve and embrace positive change. As a result, Canadian soldiers and civilians falling under the military jurisdiction loose many of the important rights and freedoms conferred upon Canadian citizens.

The Canadian military ‘justice’ system is in desperate need of reform. Members of the Canadian Forces expect, are entitled to and deserve a modern, equitable system of justice that Canadians would be proud of.

Society cannot and must not fail them in this endeavour.

EXECUTIVE SUMMARY

The body of law in Canada known as ‘military law’ with its own governance regime and penal justice system tends to evolve quite separately and apart from the civilian justice system. This is due in large part to two interconnected factors. First, the law confers upon the Judge Advocate General alone, who reports to the Minister of National Defence, the unfettered governance over all the key actors in the military justice system. Second, there is the fact that only a very tiny number of judges, lawyers, professors, legislators and public officials concern themselves with military law. As a result there is very little legislative, political or judicial scrutiny of that system.

Suggestions for much-needed modernization and enhanced fairness of the military justice system have so far been met with an indifferent reception from the lawmakers. Such matters as sexual assaults in the military, mistreatment of military families and Post-Traumatic...
Stress Disorders (PTSD) sufferers, in camera military Boards of inquiry instead of public Coroners’ inquests, a broken military grievance system, the lack of military police competence or the occasional hues and cries from the public, driven principally by media reports, might all appear *ab initio* to be forceful agents for real change.

However in reality such clamouring has not led parliamentarians to make legislative changes that would contemporize the military justice system. Yet, one would legitimately expect changes which are in-line with the *Charter of Rights and Freedoms* and contemporary Canadian legal doctrine and principles as well as in harmony with reforms enacted by a majority of the Canadian allies. Ironically, however, when Parliament did act, the military was able to delay the implementation of many of such reforms. For instance, as of November 8, 2016, only 63 of the 134 sections of Bill C-15 (47%) which were enacted into law in June 2013 have now been put in force. The rest of the provisions covering areas such as extensions of limitation periods for civil claims, the scope of sentencing principles, absolute discharge, intermittent sentences, restitution and victim impact statements aimed at rendering fairer our military justice system is simply side-tracked.

The expansion of the military justice system has resulted in a corresponding loss of a high number of rights for soldiers, including the constitutional right to a jury trial, the right to a preliminary inquiry, the loss of the benefits of a hybrid offence, etc., for those prosecuted before and tried by military tribunals. Of note, civilians including dependants, contractors and journalists as well as members of their family accompanying the Canadian Forces abroad fall under the jurisdiction of military tribunals while the international trend is to withdraw such jurisdiction over civilians.

Similarly, the summary trial system, whose constitutional validity has been openly questioned by experts, remains intact despite the fact that it substantially deviates from the norms of fundamental fair-
# TABLE OF CONTENTS

**PART I — GENERAL**

- **INTRODUCTION** ................................................................. 13
- **MILITARY JUSTICE** ................................................................ 19
  1. **Scope of Military Justice** ................................................. 20
  2. **Principal Actors** .............................................................. 21
- **CODE OF SERVICE DISCIPLINE** ......................................... 32

**PART II — PURPOSE** ............................................................. 39

**PART III — REFORMS** .......................................................... 42

**CONSTITUTIONAL ISSUES**

1. The Summary Trial System ................................................. 42
2. The Court Martial System ..................................................... 52
   2.1 The Loss of the Constitutional Right to a Jury Trial .......... 52
   2.2 The Lack of Independence of the Prosecution Services ...... 61
   2.3 The Lack of Independence of the Defence Legal Services ... 62
   2.4 The Scope of the Prosecution's and Accused's Right of Appeal ... 63
   2.5 The Minister of National Defence's Power to Appeal .......... 65
   2.6 The Chain of Command's Power to Issue Search Warrants ... 67
   2.7 The Scope of the Arrest Power and the Duty Not To Arrest ... 70
   2.8 The Chain of Command's Power to Review and Substitute ... 73

**SYSTEMIC ISSUES**

1. Office of the Judge Advocate General ..................................... 76
2. Military Rank of Military Judges ............................................. 79
3. Military Police Independence ................................................... 80
4. Board of Inquiries and Coroner's Inquests ................................. 82
5. Right to Grieve ........................................................................ 88
6. The Grievance System ............................................................ 89
7. Operation HONOUR and Sexual Assaults ................................. 96
8. Professional Associations and the Right to Association ............. 102

**PART IV — CONCLUSION** ....................................................... 106

**AUTHORS' BIOGRAPHIES** .................................................... 112
PART I–GENERAL

INTRODUCTION

The recently announced round of Public consultations on the Defence Policy Review (DPR) is currently focused on three fundamental areas of inquiry:  

1. a) main challenges to Canada’s security, b) roles of the Canadian Armed Forces (CAF) in addressing current threats and challenges and c) the resources and capabilities needed to carry out the CAF mandate.

The Public Consultation Paper developed by the Department of National Defence (DND) to guide the discussion goes further by emphasizing that the following areas will be under consideration by the De-


fence Policy Review: namely, the security environment, the roles and defence capabilities, defence budget, the size, structure and composition of the Armed Forces and solutions for how DND and the CAF can improve the way they support the health and wellness of military members?

“Sed quis custodiet ipsos Qustodes?”
[But who will guard the guards themselves?]

Dealing with the health and wellness of military members is no doubt appropriately broad enough to encompass Canada’s military justice system and, in particular, its legal and institutional frameworks established a very long time ago, but which are now in large part incompatible with the Constitution, the Canadian common law and internationally recognized human rights standards. Therefore, the health and wellness of military members rest in great part on embedding civilian and parliamentary control as well as oversight over the CAF as an integral part of this Defence Policy Review process.

In an academic conference on military law hosted by the Faculty of Law at the University of Ottawa on November 13, 2015, several international speakers of renown and some twenty additional speakers and panelists illuminated the fact that military justice globally, particularly in allied countries with whom Canada shares a common legal heritage and similar values, are going through a period of evolution. 3


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4 For instance, the Judge Advocate General (JAG) for the United Kingdom who attended the November 13, 2015 conference is a civilian High Court Judge. In contrast to the Canadian counterpart, the UK JAG is totally independent from the Executive branch and is not accountable to the government. He is also held to and possesses the same standards of independence and impartiality as a civil court judge. Moreover, the JAG is responsible for appointing civilian judges to preside over military tribunals.

On the other hand, the Judge Advocate General in Canada is neither a Judge nor a Judicial Officer. The Canadian JAG is a lawyer with a military rank whose role is one of legal advisor. However, as discussed below, the Canadian JAG has been conferred a plenipotentiary mandate over the administration of the military and penal disciplinary justice system.

These countries have enacted major reforms, shrunk military justice jurisdictions in favour of increased civilian capacity and strived towards a fairer military as well as an administrative justice system that afford rights to military personnel. 5

This academic conference served as an eye opener and “une prise de conscience” by civil society that clearly illustrated just how far removed and alienated the Canadian military justice system is from the very Canadian society it is supposed to represent and defend.

One of the highlights of the conference was also the acknowledgment that members of the armed forces do not surrender their human rights and fundamental freedoms upon joining the Armed Forces.

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5 Several countries have recently started limiting the scope of military jurisdictions. Two major trends can be identified:

a. The first trend is to transfer competence to civilian courts; [Austria; Belgium; Czech Republic; Denmark; France; Germany; Finland; Honduras; Italy; Japan; The Netherlands; Sweden; Switzerland; Tunisia etc.] The objective being to ensure a judicial process free from the chain of command’s interference; and

b. The second one is to limit the military court’s jurisdiction over civilians. Indeed, the current development of international law is towards the prohibition of military tribunals trying civilians.

Source: Geneva Centre for the Democratic Control of Armed Forces (DCAF); “Understanding Military Justice” by Mindia Vashakmadze. 2010.
It raised awareness that there are existing differences between the Canadian military and the Canadian civilian justice system which are no longer warranted or justified as they fundamentally deny justice and fairness to Canadian military members.

Similarly, as will be discussed below, the recent expansion of the Canadian military justice system runs contrary to these advancements in both international as well as domestic law. It has resulted in the corresponding loss of a high number of rights for soldiers and civilians tried by Canadian military tribunals. For example and strangely, but in keeping with this divide, victims of crime investigated or prosecuted under military jurisdiction have been excluded from the recently enacted Canadian Victims Bill of Rights, S.C. 2015 c. 13.⁶

The special character of military duties and service conditions may justify some restrictions on the enjoyment of certain civil rights and fundamental freedoms which would not be acceptable for civilians. However, barring a sound justification, members of the CAF, like all any other members of our society, should have these rights and freedoms respected and protected. This includes the right of everyone, including members of the CAF, to a fair trial by an independent and impartial tribunal established by law and notably separate, both in reality and appearance, from the military chain of command. While some progress has been made on this front as a result of several compelling judicial decisions, some changes are still needed to achieve the full independence of military judges.

The terms and conditions of military service⁷ should recognize the limitations to some of the rights and freedoms that a serving member has voluntarily accepted upon enrolment. These terms and conditions of military service should be fair as well as commensurate in return for the commitment and risks to which service personnel are subject during their careers. Such conditions must necessarily include an effective and expeditious grievance procedure capable of providing actual redress and effective remedies without fear of reprisals or sanctions.

Over the years, attempts to modernize the National Defence Act (NDA) to bring it more in line with globally accepted standards of justice, or even with our own domestic civilian penal system, have been serially resisted by the Canadian military legal establishment. Several of the reforms that have been made are the result of pressures that were initiated from outside, none the least the judiciary, but not within the DND or the military itself.⁸

It is now necessary to bring the military justice system more in line with contemporary Canadian as well as international legal doctrine.

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⁶ It is somewhat unseemly to think that CAF members, who volunteer to put their lives on the line to defend our security and values, must give up their basic human rights that are so essential to those not in uniform.

⁷ Broadly speaking, terms and conditions of military service encompass such matters as discipline and standards, career structures and career development, promotions and rank structure, postings, uniforms, healthcare, pay and allowances, grievance procedure, accommodation, leave, release, annuities.

⁸ In July 2016, the Judge Advocate General has directed one of its immediate subordinates to conduct an internal legal and policy analysis of all aspects of the court martial system. This represents a mere fraction of the overall military justice system. Moreover, in conducting such a review in-house creates at least an apprehension of a lack of independence.
and principles in order to not only prevent it from falling further behind global standards of justice, but also to ensure that all members of the CAF benefit from the very fundamental rights and freedoms they defend. This can only be accomplished by conducting a full-scale parliamentary review of the NDA.9


“Codes of military justice should be the subject to (sic) periodic systematic review conducted in an independent and transparent manner, so as to ensure that the authority of military tribunals correspond to the “strict functional necessity, without encroaching on the jurisdiction that can and should belong to ordinary civil courts.”

1. MILITARY JUSTICE

The bulk of Canadian military law is derived, in large part, from customs and traditions as well as a statute of Edward I in 1279, in which it was enacted that, by virtue of Royal Prerogative, the Sovereign had the “right to command” all the military forces in the nation.10 The Royal Prerogative also accorded the Crown the power to regulate and discipline the army and the navy. This mechanism was replaced by medieval Rules and Ordinances of War, a list of regulations issued by the King at the beginning of every expedition or campaign. The Articles of War (originally established in 1653)11 and amended in 1749 by an Act of Parlia-

10 In the Assizes of Arms of 1181, Henry II ordered that all free men should keep arms and be prepared to defend the country. This marked the beginning of the militia system in England.

11 The requirement for summary proceedings was first recognized by the British Parliament with the passage of the Mutiny Act in 1689. Centuries later, and despite the enactment of the Canadian Bill of Rights, 1965; the Canadian Human Rights Act, 1997; the Charter of Rights and Freedoms, 1982, summary trials are still in existence under the National Defence Act.

9, 10, 11 Modernization of Canadian Military Criminal Justice by Honourable Gilles Lapoune and Professor Michel W. Drapeau © March 2017
ment were drawn up in 1757 to govern British military and naval forces and to regulate the behaviour of soldiers and sailors.12

It should be noted that in Canada the federal government is granted exclusive jurisdiction over the “Militia, Military and Naval Service, and Defence” pursuant to section 91(7) of the Constitution Act, 1867. In the exercise of this jurisdiction, the Canadian Parliament passed An Act respecting the Militia and Defence of the Dominion of Canada, S.C. 1868, c. 40 [The Militia Act, 1868] to govern Canada’s armed forces. The Naval Services Act and the Royal Canadian Air Force Act were subsequently enacted in the 1940s.

Following these legal documents, Parliament re-examined all legislation applicable to the armed forces in Canada in 1950 before enacting a comprehensive NDA which included in a single statute all legislation related to the DND, the Royal Canadian Navy, the Canadian Army and the Royal Canadian Air Force establishing, inter alia, a uniformed process for administering military justice in the three services.

Today, the NDA still constitutes the main statute pertaining to regulate the conduct of the Canadian Armed Forces (CAF). It determines the conditions and terms of the constitution, organization and maintenance of the CAF as well as the criteria governing the command, conduct, discipline, enrolment, promotion, release and dismissal of those who have joined the ranks.

1.1 Scope of Military Justice. Military justice cuts across every aspect of the law: administrative, constitutional, contracts, civil, criminal, disciplinary, estate, human rights as well as humanitarian, international, labour, private and public law.


The main purpose of military law, as outlined in the NDA and in the supporting regulations—Queens’ Orders and Regulations (QR&O), is to promote good order and a strict disciplinary standard by providing for the prosecution of military personnel determined to have contravened statutes and/or regulations.

1.2 Principal Actors. The NDA fixes the legislative and regulatory parameters of the management and military activities of the CAF. In order to achieve this objective, the NDA defines the role, powers and responsibilities of various actors and interveners in the military justice system.13

i) Minister of National Defence.14 (Section 4 of the NDA) The Minister of National Defence (MND) carries legal responsibility and is accountable to Parliament for the administration of the NDA, the Emergencies Act, the Emergency Preparedness Act, the Visiting Forces Act, the Aeronautics Act (in relation to Defence), the Canadian Forces Superannuation Act, the Garnishment Attachment and Pension Diversion Act, and the Pension Benefit Division Act. The MND is also accountable to Cabinet for the Communications Security Establishment, the Commu-

13 The NDA is supplemented by a large number of regulations, orders and instructions applicable to the Regular Force, the Special Force and the Reserve Force when subject to the Code of Service Discipline and, unless otherwise directed by the MND, to any person that is subject to the Code of Service Discipline. It is interesting to note that an officer or a non-commissioned member who becomes a prisoner of war continues to be subject to these regulations, orders and instructions. These regulations, orders and instructions are called the Queen’s Regulations and Orders (QR&O). They relate to the organization, training, discipline, efficiency, administration and good government of the CAF.

14 The MND, like any other minister of the Crown, is bound by the rules and principles of ministerial responsibility and cabinet solidarity which means that they cannot act individually and in isolation from any political and partisan consideration when dealing with the nature and scope of prosecutions of criminal matters in the penal military justice system.
BEHIND THE TIMES

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i) CSE Commissioner. The CSE Commissioner is appointed by the Governor-in-Council.

ii) Deputy Minister of National Defence. (Section 7 of the NDA.) The Deputy Minister (DM) of National Defence is appointed under the NDA by the Governor-in-Council on the advice of the Prime Minister. The DM offers the MND advice which includes supporting the MND in consulting and informing Parliament and the Canadian public on defence issues. More specifically, the DM is responsible for policy advice, internal departmental management and interdepartmental coordination.

iii) Chief of the Defence Staff. (Section 18 of the NDA.) The Chief of the Defence Staff (CDS) is charged with the control and administration of the Canadian Armed Forces and advises the MND on all these matters—including military requirements, capabilities, options and the possible consequences of undertaking or failing to undertake various military activities. The CDS is the senior military advisor to the Government. Like the DM, the CDS is appointed by the Governor-in-Council on the advice of the Prime Minister.

iv) Vice Chief of the Defence Staff. (Section 18.1 of the NDA.) The Vice Chief of the Defence Staff [VCDS] serves at National Defence Headquarters [NDHQ] and acts as the CDS in the latter’s absence. He also acts as the Chief of Staff to both the Deputy Minister and the CDS by coordinating cross-boundary issues, helping to resolve differences between Group Principals and service chiefs. He reviews and oversees security and military police operations and manages cadets and safety policy.

v) Chief Military Judge. The Office of the Military Judge is an independent unit of the CAF. Its personnel include military judges, the Court Martial Administrator, the Deputy Court Martial Administrator, military court reporters and technical, financial, human and administrative resources and support.

The Chief Military Judge holds the rank of Colonel. As will be discussed later, the fact that the Chief Military Judge and each of the military judges wear a rank does nothing to promote their independence, at least in terms of appearance of justice to the layperson. This perception is

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15. The NDA provides for recourse and remedies open to officers or non-commissioned members who feel aggrieved by decisions taken by military authorities. The Military Grievances External Review Committee reviews grievances referred to it and provide findings and recommendations in writing to the CDS and the person who submitted the grievance.

16. The NDA defines and circumscribes the role, powers, duties and responsibilities of the military police. It gives the government the authority to enact by way of regulations a Military Police Professional Code of Conduct to govern police conduct. Complaint against the conduct of a member of the military police can be laid by anyone who wants to do so. The NDA provides for the establishment of a Military Police Complaints Commission whose role is to examine complaints, investigate them and send its conclusions and recommendations to the MND.

17. When considering that the JAG, who notwithstanding the use of the word “judge” in the title, is in fact a lawyer who has been elevated to the rank of Major-General, the rank of Colonel assigned to the Chief Military Judge, who after all is not only a Judge but is the Chief Judge, is disproportionate in terms of relative importance and powers.

In fact, Military Judges require no military rank at all. The title “Judge” is quite sufficient as an indicator of their role, function, authority and, above all, independence from the military chain of command.

18. From times immemorial, the use of formalized military ranks is a system of hierarchical relationships in the armed forces by virtue of which a person exercises their command authority.
enhanced when the accused actually outranks the presiding military judge.19

Of interest, Strengthening Military Justice in the Defence of Canada Act S.C 2013 c.24 (Bill C-15), enacted in 2013, amends the NDA with the following new provisions:

a) Appointment of a Deputy Chief Military Judge. (Section 165.27 of the NDA.) At present, there is one chief military judge and three military judges for a total of four. Surprisingly, Bill C-15 proposes the addition of a deputy chief military judge.

b) Reserve Force Military Judge Panel. (Section 165.22 of the NDA.) This provision authorizes the Governor-in-Council to appoint as a military judge any lawyer with ten (10) years or more standing at the bar of a province who is an officer in the reserve force.20

c) Grievances. (Section 29 (2.1) of the NDA.) Military judges can submit a grievance in a matter that is not related to the exercise of their judicial duties. This provision runs counter to the judicial independence of military judges. The CDS, who acts as the Final Authority in the CAF Grievance Process, enjoys no penal and disciplinary immunity and is subject to the Code of Service Discipline as well as to prosecution before the courts martial and the military judges (whose grievances the CDS has the authority to decide). In this respect and with regard to the principles of natural justice, the appearance of independence is just as important as actual independence itself.21

vi) Military Judges. Military judges are appointed by the Governor-in-Council.22 They are normally drawn from officers (Regular or Reserve) serving in the rank of

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19 In R. v. Ménard, 2010 CM 1012, Colonel M. Dutil, Chief Military Judge, sentenced Brigadier-General Ménard to a $3,000 fine. In R. v. Ménard, 2011 CM 3001, Lieutenant-Colonel L.V. d’Auteuil, Military Judge, sentenced Brigadier-General Daniel Ménard (retired) to a demotion to the rank of Colonel and a fine of $7,000. In In R. v. Rouleau, 2016 CM 1020, Lieutenant-Colonel L.V. d’Auteuil, Military Judge, sentenced Major-General Michael N. Rouleau to a fine in the amount of $2,000.

20 Such a proposal may run counter to recent decision by the Federal Court of Appeal which, in Felipa v. Minister of Citizenship and Immigration (2011) FCA 272, declared that the Chief Justice of the Federal Court does not have the authority to rely on deputy judges. Also, only a very small handful of senior military lawyers would qualify for these additional judicial appointments.

21 Having the CDS decide a grievance filed by a Military Judge would seriously imperil — or be perceived as imperilling — the ‘judicial independence’ of the military judiciary. Having the CDS hear a grievance from a military judge effectively subordinates the rights of these judges to the Executive which is contrary to the notions of judicial independence. Basic constitutional theory recognizes that the arm of the Judiciary should be separate and distinct from the Executive.

22 Legislative measures have been taken to improve the judicial independence of the military tribunals. Appointments are now made by the Governor-in-Council and removal is ‘for cause’ on the recommendation of an Inquiry Committee.
BEHIND THE TIMES

lieutenant-colonel. 23 Military judges are only removable by the Governor-in-Council upon the recommendation of an independent Inquiry Committee. *Strengthening Military Justice in the Defence of Canada Act S.C 2013 c.24* (Bill C-15 insists that, to be appointed as a military judge, one must have been an ‘officer’ for at least 10 years.)

The retirement age for military judges has been fixed by legislation at 60.

Military judges adjudicate at courts martial and other military proceedings such as judicial review of persons held in pre-trial custody. 24

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23 At present, there are a total of 167 military lawyers which includes one officer of general rank, eight (8) officers serving in the rank of colonel and 27 serving in the rank of lieutenant-colonel. According to the *Reply of the Government of Canada to the Military Judges Compensation Committee* dated June 4, 2012 at page 6 note 15, only 18 lawyers in private practice are eligible Reserve Officers for appointment as a military judge.

24 In reply to the *Report of Military Judges Compensation Committee 2012* mandated pursuant to section 165.2(22) of the *NDA* and article 204.23 of the *QR&O* to inquire into matters relating to salaries and benefits to military judges, the Government noted that the current military judicial salaries of $220,009 for the military judges and $226,609 for the Chief Military Judge are reasonably substantiated.

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vi) Judge Advocate General 25 (Section 9 of the *NDA.*) The JAG is statutorily responsible to the MND and ‘accountable’ for the legal advice given to the CDS, the military chain of command and to the DM. The JAG also acts as the legal advisor to the Governor General, the MND, the DND and the

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25 The appointment of a special officer to conduct courts martial during a war campaign (i.e. a JAG) can be traced back to 1587 during the reign of Elizabeth I when a Judge Martial (or Marshall) accompanied the Earl of Leicester’s army. In those days, the Judge Martial was independently responsible for military discipline. At the start of a war campaign acting on the advice of the Judge Martial, the Sovereign would issue a list of *Rules and Ordinances of War*.

In the 1630s, the phrase ‘judge advocate’, or variants thereof, became increasingly in common use. In 1639, for instance, an Advocate served with the Army of Charles I. On June 7, 1645, an *Ordinance for constituting Commissioners and a Council of War for trial of all persons...* appointed a Judge Advocate and a Provost Marshall. The Ordinance enabled and authorized the Judge Advocate to receive all “...accusations, articles, complaints and charges against all or any of the offenders...” By 1659, the Office of the JAG was created to supervise “courts martial”.

Prior to 1893, in the U.K. the JAG was a Privy Councillor, a junior Minister in the government, usually a Member of Parliament and a spokesman for the Commander in Chief in Parliament. In those days, the appointment was regarded as a political office and the JAG had direct access to the Sovereign on matters pertaining to their office. However, in 1893 the Judge-Advocate ceased to be a Minister. From that date the Office of the JAG was responsible for both judicial and advisory functions. That changed in 1948 when the UK Parliament decided to appoint a *civilian* member of the bench as the JAG and entrusted them with the exclusive role of chief magistrate of the penal military justice system accountable not to the military chain of command but to the Lord Chancellor.

Meanwhile in 1911, Canada appointed its first Judge Advocate General. At the time the expectation was that a *civilian* barrister would be named as the JAG by the Governor in Council but the Prime Minister opted instead to appoint a friend who happened to also be a reservist. Since that time the Canadian JAG has been a military officer.

In 1997, in the wake of the Somalia Inquiry which clearly indicated the need for fundamental reforms to the penal military justice system, the JAG was divested of all judicial functions when full-time military judges were appointed to ensure, to the fullest extent possible, judicial independence from the chain of command. However, the JAG retained prosecutorial and defence functions, a matter of continued debate raising serious apprehension about the real independence and impartiality of those particular offices. The JAG was also allowed the continued use of the “Judge” title which not only misrepresents the factual reality but caused it to be wrongly viewed and perceived, to this day, as the titular head of the military judiciary apparatus which is not the case.
CAF as separate organizations. The JAG also has a number of other important duties:

a) The JAG has ‘command’ over all military lawyers posted to a position within the Office of the Judge Advocate General.26

b) The JAG oversees the CAF Legal Branch27 and has the authority to manage the career of all legal officers including their posting, assignments, appointments, selection for postgraduate training and performance evaluation and eventually promotions to higher rank.

c) The JAG supervises the military Director of Military Prosecutions who is invested with the authority to conduct prosecutions as well as the Director Counsel Defence Services who provides defence counsel services to those accused. The JAG also not only determines total numbers of personnel, but decides which military lawyers will be posted to each of these directorates.

d) The JAG is responsible for the superintendence of the administration of military justice in the CAF.28 This officer has monopolistic authority to provide advice to all stakeholders in the military justice system on practices, developments and reforms.

e) Being part of the executive, the JAG either proposes changes to the NDA or opposes any such reform.

f) The JAG causes the periodic review of the NDA.29

26 Pursuant to QR&O, article 4.081 (1), every military legal officer whose duty is the provision of legal services to the CAF shall be posted to a position established within the Office of the Judge Advocate General. This means that every legal officer on the JAG establishment is responsible to the said JAG for the proper and efficient performance of their duties. (QR&O article 4.01 refers). This also means that the duties of a military legal officer posted to a position within the Office of the Judge Advocate General are determined by a military legal officer who is NOT subject to the command of an officer who is not a legal officer. (QR&O article 4.081(4) refers).

27 All CAF military legal officers or lawyers are members of the Legal Branch.

28 As such, the JAG actually acts as a sort of Inspector General of the Military Justice System. This more or less collides with the principle of independence of the military judiciary as it provides the JAG with full authority and freedom to act within the military justice system. The fact that such carte blanche is given to the legal advisor to the military, who reports directly to a political minister, impairs the perception of independence from the chain of command both by the military judiciary and the public.

29 Amendments to the NDA were made in 1998 by Bill C-25, An Act to amend the National Defence Act. Bill C-25 requires the MND to initiate an independent review of the provisions and operation of the Bill every five years and to table a report of the review in Parliament.

- In March 2003, the MND appointed the late Right Honourable Antonio Lamer, former Chief Justice of the Supreme Court to conduct the review. Former Chief Justice Lamer submitted his report (the “Lamer Report”) to the Minister on September 3, 2003, and the Minister tabled the report in Parliament on November 5, 2003. In his report titled: First Independent Review of the Provisions and Operations of Bill C-25, an Act to amend the National Defence Act and to make consequential amendments to other Acts, [Lamer] former Chief Justice Lamer made 88 recommendations: 57 pertaining to military justice, 14 regarding the Canadian Forces Provost Marshal and the Military Police Complaints Commission and 17 concerning the Canadian Forces grievance process. However many of these recommendations of great importance have still not been implemented.

- In March 2011, former Chief Justice of the Ontario Superior Court, the Honourable Patrick J. LeSage, was appointed by the MND to conduct an independent review of the amendments to the NDA. On June 8, 2012, the MND tabled the report of the second independent review in Parliament. In conducting the review, former Chief Justice LeSage was asked to consider amendments contained in Statutes of Canada 1998, c.35 (“Bill C-25”), and Statutes of Canada 2008, c.29 (“Bill C-60”).
viii) Director of Military Prosecutions. (Section 165.11 of the NDA) The DMP holds office upon appointment by the MND for a period not to exceed four years but is renewable. He acts under the general supervision of the Judge Advocate General, therefore under the supervision of the chain of command.

ix) Director of Counsel Defence Services. (Section 249.18 of the NDA) The DCDS holds office upon appointment by the MND for a period not to exceed four years but is renewable. He also acts under the general supervision of the Judge Advocate General, therefore under the supervision of the chain of command. The DCDS provides legal representation at public expense to an accused person as well as legal advice to a person who is the subject of an investigation under the Code of Service Discipline, a summary investigation or a board of inquiry.

x) Military Police. The Code of Service Discipline defines and circumscribes the role, powers, duties and responsibilities of the military police. It gives the government the authority to enact by way of regulations a Military Police Professional Code of Conduct to govern police conduct. The NDA also provides the establishment of a Military Police Complaints Commission whose role is to examine complaints, investigate them and send its conclusions and recommendations to the MND.

The Military Police is headed by the Provost Marshall (Section 18.3 of the NDA), a military officer serving in the rank of Colonel. Military police officers who are distributed across the CAF normally assume investigative responsibilities unless the alleged offence is of a serious and/or sensitive nature. Whenever a complaint is made or where there are reasons to believe that a service offence has been committed, an investigation is normally conducted to determine whether sufficient grounds exist to lay a charge.

When a matter is brought within the ambit of a ‘serious and sensitive nature’ the investigation is conducted by a centralized organization under the control of the Provost Marshall i.e. the Canadian Forces National Investigative Service (CFNIS).
2. CODE OF SERVICE DISCIPLINE.

The Code of Service Discipline (Code) constitutes a complete code of military law applicable to persons under service jurisdiction. The Code is the basic legal framework and is supplemented by QR&O, Defence Administrative Orders and Directives (DAOD), Canadian Forces Administrative Orders (CFAO) and other orders that are promulgated under the authority conferred by section 12 of the NDA. In fact, section 12 of the NDA provides the Governor-in-Council and the MND with the power to make regulations related to the organization, training, discipline, efficiency, administration and government of the CAF, so long as such regulations are not inconsistent with the NDA.

1. Jurisdiction. Over time the disciplinary jurisdiction of military tribunals has been expanded to the point where only offences of murder, manslaughter and abduction of children, all when committed in Canada, cannot be tried by service tribunals. Section 60 of the NDA deals with the jurisdiction of the Code of Service Discipline by outlining all those who are subject to the Code and who can, therefore, be prosecuted before the military court. The Code not only applies to all military personnel, but also to civilians and members of their family accompanying the CAF.

2. Contents and Scope. The Code is designed to deal with offences ranging from purely military offences resulting from either the conduct of operations or breaches of discipline to far more serious offences such as treason. However, it also includes by reference all ordinary criminal law or civilian offences. Depending upon the circumstances, these offences fall under the jurisdiction of military justice and courts. The incorporation of Criminal Code offences in the NDA as disciplinary offences entails a number of consequences for an offender. For example, hybrid offences that can be prosecuted either by in-
dictment or by summary conviction under the Criminal Code lose that characteristic in the military penal system.32

3. Service Tribunals.33

Ordinarily modern democracies rely on courts of general jurisdiction to ensure an orderly society by punishing conduct that is proscribed by the criminal law. Special court system was common in the Middle Ages but have inexorably been subsumed within the general system for the administration of justice. A holdout in the process is the military justice system. The military is the rare part of contemporary society that enjoys the privilege of policing the behavior of its own members, with special courts and separate body of rules. This goes beyond, for example, the power of a medical society, bar association, or church group to discipline or expel its erring members or officials; it includes criminal sanctions such as imprisonment and even capital punishments and of course the enduring stigma of criminal conviction.

i) Summary Trials.34 These trials are normally conducted by the Commanding Officer of an accused or a Superior Officer. These trials are designed to deal with service offences which are minor in nature but have an important impact on the maintenance of military discipline and efficiency. They may be conducted anywhere in the world, in peace and wartime. Officers having jurisdiction may also decide to refer the matter to a court martial if they feel that their powers of punishment are insufficient, having regard to the gravity of the alleged offence, or if there are reasonable grounds to believe that the accused is unfit to stand trial or was suffering from a mental disorder at the time of the commission of the alleged offence.

Over the past five years, there was an average of 1,100 summary trials per year.

ii) Courts Martial. There are two types of courts martial:

a) General Court Martial may try any person charged with a service offence. It is composed of a panel of five military officers.35 It is presided by a military judge.

b) Standing Court Martial may try any person charged with a service offence. It is presided over by a military judge. Although called standing court, the

32 Dixon v. Her Majesty the Queen, 2005 CMAC 2. A hybrid offence is one that can be prosecuted either by indictment or by summary conviction. In case of a prosecution by way of summary conviction, the penalty is limited to a maximum period of imprisonment of six (6) months or to a fine of not more than $2,000, or to both. (Section 787 of the Criminal Code refers.)

33 See: Military Justice: A very short introduction, Oxford University Press, 2016 by Eugene Fidell at page xx and xxi:

34 In 2012, the Standing Committee on National Defence heard several days of testimony during which the summary trials system came under heavy criticism. In 2013 and 2014 articles published in Hill Times refer to the Canadian Summary Trials system as “Victorian.”

35 Members of the panel are not necessarily the peers of the accused. Non-commissioned members cannot sit on a panel trying an officer. Three of the five members sitting on a panel trying a non-commissioned member would be of non-commissioned rank. Findings of guilty or not guilty by a court martial panel must be arrived at by a unanimous vote. The military judge presiding at a General Court Martial determines the sentence. (Section 192.1 of the NDA refers.)
court is not permanent. The only thing that is standing with this court is the fact it has no permanence. The court comes to birth every time a case is heard and dies with it.

There are on average 62 Courts Martial per year.36

4. Punishments. A service tribunal can impose one or more of the following punishments.37

i) Life imprisonment;

ii) Imprisonment for two years or more;38

iii) Dismissal with disgrace;

iv) Imprisonment for two years or less;

v) Dismissal;

vi) Detention;

vii) Reduction in rank;

viii) Forfeiture of seniority;

ix) Severe reprimand;

x) Reprimand;

xi) Fine; and

xii) Minor punishments.

36 The 2012 Military Judges Compensation Committee Report, the Honorable Norman W. Sterling writes:

The four (4) military judges have presided an average of 64 courts martial per year in average in the past four years... For example, the four judges sat a total of 1725 days in court, and another 152 days were for temporary duty. For 2011-2012, 213.5 days were spent in court and another 343 days were on temporary duty.

37 As the Court Martial Appeal Court (CMAC) pointed out in R. v. Dixon, 2005 CMAC 2 at par. 21 and 22, the range of sentences authorized by section 139 of the NDA does not include absolute or conditional discharge, conditional sentences, suspended sentence, imprisonment served in the community or probation. See also footnote 158 C- Sentencing range.

38 Members of the CAF charged with Criminal Code offences punishable by imprisonment for five (5) years or more are not entitled to a trial by jury, a jury whose members are qualified and empanelled to serve in criminal proceedings in accordance with the procedure laid out in the Criminal Code of Canada. Paragraph 11(f) of the Charter denies them this benefit conferred upon civilians.
PART II – PURPOSE

The purpose of this Brief is to present recommendations for the modernization and rejuvenation of the NDA to ensure its harmony with the ordinary laws of Canada and evolving international human right standards.
PART III – REFORMS

CONSTITUTIONAL ISSUES

Because a Canadian in uniform is a Canadian citizen first, prosecutorial and judicial decisions on legal issues that affect them, as well as the rights and responsibilities of these Canadian ‘citizens in uniform’ should be immune from interference by the military chain of command as they are from political interference in the civilian penal system. As discussed below, unfortunately, this is currently not the case.

39 The chain of command is first an authority and accountability chain extending from the office of the CDS to the lowest element of the CAF and back to the office of the CDS. It is also a hierarchy of individual commanders taking decisions within their linked functional formations and units. The chain of command, therefore, is a military instrument joining a superior officer. This means that any officer or non-commissioned member who, in relation to any other officer or non-commissioned member, is by the NDA, regulation or custom of the service, authorized to give a lawful command to those other officers or non-commissioned officers.
1. THE SUMMARY TRIAL SYSTEM. 40

A summary trial is typically presided by an accused’s Commanding Officer (CO). 41 Given that the communal life inside a military unit is hierarchical and heavily regulated, Commanding Officers (COs) are expected to know everyone under their command. When CAF members accused of a service offence are brought before their COs, the COs would most likely know them and the witnesses, all of them likely being their subordinates. Moreover, through regular internal reporting of incidents, COs are likely to be well abreast of the circumstances surrounding the alleged offence(s) prior to the commencement of the trial. 42 In a civil court, a judge is independent and unaffiliated with the accused, deals with strangers and hence relies on counsel and witnesses to present evidence.

A summary trial commences when the accused is ‘marched in’ under escort by a Sergeant-Major 43 who bellows a succession of orders. The accused comes to a ‘halt’ within a couple of feet of the CO’s desk and is normally made to remain standing throughout the trial. 44

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40 Canada’s Militia Act of 1868 introduced the two-tier system of summary trials and courts martial. As noted earlier, in 1950 a comprehensive NDA which included in a single Canadian statute all legislation relating to the Department of National Defence (DND), the Royal Canadian Navy, the Canadian Army and the Royal Canadian Air Force, established a uniform process for administering military justice within the three services.

Also see Office of the Judge Advocate General, Eleventh Report of the Judge Advocate General on the Administration of Justice in the Canadian Forces, Number 11, (Ottawa: Department of National Defence, 2010) at 13 [Office of the Judge Advocate General, Eleventh] (covering period April 1, 2009 to March 31, 2010 made pursuant to section 9.3 of the Act].

41 Office of the Judge Advocate General, Eleventh Report, supra 40, page 23 where the JAG writes at note 76:

The officers who can exercise summary trial jurisdiction over CAF members are the commanding officers, delegated officers and superior commanders. A commanding officer is normally in respect of an accused person the Commanding officer of that person, but may also include the officers described in QR&O article 101.01.

42 In a presentation to the House of Commons Standing Committee on National Defence entitled “Supporting the troops: Fairness for Canada’s soldiers,” the British Columbia Civil Liberties Association made the following statement:

Summary trials must be conducted by a ‘presiding officer,’ who is usually the accused’s commanding officer or someone delegated to act on their behalf. The presiding officer essentially fulfills the duties of a judge, and is responsible for presiding over the trial, deciding on the accused’s guilt or innocence, and imposing a sentence. The fact that a commanding officer may try an accused is a serious concern. An accused’s commanding officer may have had significant contact with the accused before the trial, which could serve to significantly bias the decision.


43 Sergeant-major is a senior non-commissioned rank or appointment in many militaries around the world having specific responsibility to the officer in charge for their soldiers’ performance, standards, discipline, morale and welfare.

44 The procedure to be followed at a summary trial is set out in QR&O, art 109.20
In lieu of counsel, COs must appoint an ‘Assisting Officer’, a subordinate, to ‘assist’ an accused in mounting a defence. The Assisting Officer has no duty of confidentiality toward the accused who is also deprived of the protection offered by the solicitor-client privilege.

The CO and the Assisting Officer have no legal training. They received instead some basic procedural training provided by the Office of the JAG.

The summary trial process is not governed by any rules of evidence. Thus contrary to the law applicable to trials before criminal courts, the accused is a compellable witness and the constitutional right to protection against self-incrimination does not apply. Nor does the spousal privilege. Adverse inferences can be drawn from accused silences. Accused have no right to counsel. There may be full reliance on hearsay and opinion evidence.

Inter alia, there is no ability for accused to make Charter arguments that might result in a stay of proceedings or dismissal of the case against them. Also, the level of disclosure provided to the accused at a summary trial is not as thorough as the level of disclosure provided at a court martial. Therefore their constitutional right to full answer and defense is in serious jeopardy.

Yet, a conviction at a summary trial may entail a criminal record for the accused. Also, in its study of Bill C-15, An Act to amend the National Defence Act and to make consequential amendments to other Acts, on February 13, 2013, the Standing Committee on National Defence heard from Mr. Eric Granger and Ms. Anne London-Weinstein from the Canadian Criminal Lawyers’ Association who indicated their objection to the imposition of a criminal record to an accused facing a summary trial:

It is understood that summary trials are meant to deal with matters that are of the least significance—minor offences and that type of thing—but the primary concern of the Criminal Lawyers’ Association in particular is that an individual who is undergoing a summary trial procedure can be subject to the stigma and the long-lasting effect of a criminal record that may follow that individual outside of their life in the service, affecting their mobility, their ability to travel, and their employment, when the procedural safeguards that a person accused in the civil system would normally enjoy are not in place.
Some of those concerns are that a person who is in a summary trial and who could receive a criminal conviction at the end of it does not have the right to counsel; they have an assisting officer, who does not have formal legal training. The trial is presided over by a commanding officer, and the assisting officer is the subordinate of the commanding officer. That, in my respectful submission, could create a possible appearance of the apprehension of potential unfairness towards an accused person in those circumstances.

There are also no transcripts of summary trials. Only the sentence and the punishments are recorded on a summary sheet. From this, there is no right to appeal to a judicial tribunal verdicts or sentences imposed by the CO which could deprive those accused of their liberty. This is contrary to the

Pursuant to subsections 249(3) and (4) of the NDA and art 108.45 of the QR&O, a review of Summary Trial proceedings is possible by designated command authorities.

These provisions provide a mechanism for reviewing the findings made and punishments imposed at summary trial, including: who can request a review and who can conduct a review as a review authority. Since there is no requirement that an audio or written record of the summary trial be made, the request for review must be made in writing and may be in the form of either a memorandum or a letter. The request must set out the relevant facts and reasons why the finding is unjust or why the punishment is unjust or too severe. See Office of the Judge Advocate General, Military Justice at the Summary Trial Level, [Ottawa: Department of National Defence, 2011] at Chapter 15 [Office of the Judge Advocate General, Military Justice at the Summary Trial Level].

When a summary trial has been completed, the officer who presided at the summary trial shall complete a Record of Disciplinary Proceedings (RDP) which is maintained by each unit’s Registry of Disciplinary Proceedings. The RDP contains a summary of the Record of Disciplinary Proceedings, a list of witnesses as well as documentary and physical evidence presented at trial, the pre-trial disposal of charges by a delegated officer and the commanding officer, the information provided to the accused, election of the commanding officer, and the assisting officer is the subordinate of the commanding officer. That, in my respectful submission, could create a possible appearance of the apprehension of potential unfairness towards an accused person in those circumstances.

Conclusions and recommendations reached by resolution 17/2 of the UN Human Rights Council transmitted to the General Assembly by the Secretary General on August 7, 2013 under the title “Independence of Judges and Lawyers”.

V. CONCLUSIONS

The Special Rapporteur on the Independence of Judges and Lawyers, UNHCR, 69th Session, A/68/285 dated August 7, 2013. The report focuses on the administration of justice through military tribunals and in particular on four issues of concern, namely: (a) the independence and impartiality of military tribunals; (b) the personal jurisdiction of military tribunals, including the question of investigation and prosecution of civilians; (c) the subject matter jurisdiction of military tribunals, including the question of investigation and prosecution of serious human rights violations allegedly perpetrated by military personnel; and (d) fair trial guarantees in proceedings before military tribunals. The Special Rapporteur on the independence of judges and lawyers addresses these concerns and proposes a number of solutions that are premised on the view that the jurisdiction of military tribunals should be restricted to offences of a military nature committed by military personnel.

51 Pursuant to subsections 249(3) and (4) of the NDA and art 108.45 of the QR&O, a review of Summary Trial proceedings is possible by designated command authorities.

52 Pursuant to art 163(2) of the QR&Os, a commanding officer at a summary trial may pass a sentence of detention for a period of thirty (30) days. See Tepanier v R., 2008 CMAC 8 at para 41 which details the harsh conditions of detention in a CAF Detention Barracks whose administration, accommodation, daily routine and training, restraints etc. are set out in the Regulations for Service Prisons and Detention Barracks.

53 Report of the Special Rapporteur on the Independence of Judges and Lawyers, UNHCR, 69th Session, A/68/285 dated August 7, 2013. The report focuses on the administration of justice through military tribunals and in particular on four issues of concern, namely: (a) the independence and impartiality of military tribunals; (b) the personal jurisdiction of military tribunals, including the question of investigation and prosecution of civilians; (c) the subject matter jurisdiction of military tribunals, including the question of investigation and prosecution of serious human rights violations allegedly perpetrated by military personnel; and (d) fair trial guarantees in proceedings before military tribunals. The Special Rapporteur on the independence of judges and lawyers addresses these concerns and proposes a number of solutions that are premised on the view that the jurisdiction of military tribunals should be restricted to offences of a military nature committed by military personnel.
or breaches do not amount to serious human rights violations. Exceptions are to be made only in exceptional circumstances and be limited to civilians abroad and assimilated to military personnel.

90. In order to ensure the independence and integrity of the justice system, States have the obligation to guarantee that ordinary tribunals are independent, impartial, competent and accountable and therefore able to combat impunity. Failure to do so cannot be used as justification for the use of military or special tribunals to try civilians.

[...]

VI. RECOMMENDATIONS

[...]

94. Domestic legislation should include specific guarantees to protect the statutory independence of military judges vis-a-vis the executive branch and the military hierarchy and to enhance, in line with the Bangalore Principles of Judicial Conduct, the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

[...]

110. All persons convicted by a military tribunal have the right to have their conviction and sentence reviewed by a higher civilian tribunal. States should determine the modalities by which such review is to be carried out, as well as which court should be responsible.

In recent years, the European Convention on Human Rights (ECHR) and various rulings on its applicability to military trials have also caused some countries, in particular the United Kingdom, to overhaul and amend their military judicial processes. The reforms aim at bringing their processes into compliance with Articles 5 and 6 of the ECHR. These Articles provide that no one may be deprived of their liberty, except by a competent and impartial tribunal, and that accused may declare their right upon a criminal charge to a fair and public hearing by an independent and impartial tribunal as established by law.

54 See The Honourable Gilles Létourneau, Introduction to Military Justice and Overview of Military Penal Justice System and its Evolution in Canada, (Montréal: Wilson Lafleur, 2012) at 37, who writes that the case of Findlay v. The United Kingdom, (1997) I ECHR 8 is, in a way, the starting point for a series of legislative changes brought about in the United Kingdom. This led to the Human Rights Act, 1998 which came into force in November 1998 and the Armed Forces Discipline Act 2000 both in order to ensure that military law met the standards of the Convention. Further changes were introduced in the Armed Forces Act, 2001.

While these legislative reforms were underway, the European Court continued to hear cases. In the matter of Hood v. The United Kingdom (1999) I ECHR 1; Jordan v. the United Kingdom [2001] I ECHR 327; Morris v. the United Kingdom (2002) I ECHR 162 as well as Cooper v. The United Kingdom [GC], (2003) XII ECHR 686, these cases led the European Court to insist upon better guarantees of independence and impartiality to an accused facing a summary trial. It led in turn to the enactment of the Armed Forces Act of 2006. See also His Honour Jeff Blackett, Rant on the Court Martial and Service Law, 3d ed. (London: Oxford University Press, 2009) at 215.


56 See an article written by Captain R. Lorenzo Ponce de Leon, Spanish Armed Forces (Legal Services) “The Coming of Age of Military Law and Jurisdiction in the English-Speaking Countries” (2010) 49 Military Law and the Law of War Review 263, in which the author provides an exhaustive review of the pervasive effect the decisions by the European Court of Human Rights have had on national military justice systems built on the so-called ‘Anglo-Saxon’ legal tradition.

Lately, the United Kingdom and Ireland recognized this specific deficiency and so, as a result of decisions of the European Court of Human Rights, soldiers now convicted at a summary trial have an unfettered right to a hearing before an appeal tribunal made up of three members where they may be represented by a lawyer. There is no legal or operational reason why similar changes could and should not be incorporated in Canada’s military system of justice since our Charter is, in most respects, analogous in values and terms to the ECHR. Canada has yet to contemplate similar changes.

58 The Republic of Ireland also carried out substantial legislative amendments in 2007 in The Defence (Amendment) Act, 2007 amending the Irish Defence Act, 1954, all with a view to comply with the case law of the European Court.


59 A Summary Appeal Court (SAC) was established in 2000 after procedures for summary trials (Royal Navy) or summary dealings (Army and the Royal Air Force) were found not to be ECHR compliant. The SAC comprises a civilian judge advocate and two ‘lay members’ who are officers or warrant officers and who decide all matters of fact and sentence together. An appeal against findings is a ‘fresh hearing’ of the relevant evidence. See sections 140-142, 146, 149 of the United Kingdom’s Armed Forces Act 2006, c 52.

60 In the UK legal aid is available for the hearing of an appeal before the SAC. See Joint Service Publication (JSP) 838: The Armed Forces Legal Aid Scheme dated April 12, 2013 which supersedes all previous UK single Service [Single Service refers to any one of the Army, the Navy and the Royal Air Force] and joint [the expression Joint Services refers to all three Service] Service Regulations. Paragraph 10(a) stipulates that legal aid case management and funding for defendants or appellants is available for appeals against findings and/or awards following summary dealings.

Recommendation.

Canada could adopt the solution implemented by the UK and others and establish a Summary Appeal Court where the accused would be given the full panoply of rights. It could also decriminalize the summary trial process so that only disciplinary issues would be addressed at a summary trial. This approach would necessarily exclude any punishment of detention or any other penalties giving rise to the creation of a criminal record.
2. THE COURT MARTIAL SYSTEM

2.1 Loss of the Constitutional Right to a Jury Trial.

Paragraph 11 (f) of the Canadian Charter of Rights and Freedoms (Charter) denies a person prosecuted before a service tribunal the right to a jury trial. In lieu of a jury trial, the accused is given a trial by a General Court Martial composed of a panel of five (5) military members and presided over by a military judge. The loss of a jury trial in this context is quite significant.

While the existence of a separate penal justice system for the military was constitutionally upheld by the Supreme Court of Canada in R. v. Généreux, it is also clear from the Supreme Court’s decision that not each component or aspect of the system is necessarily constitutional. Indeed, the Supreme Court found the General Court Martial to be unconstitutional as a result of a lack of guarantees of judicial independence of the military judges. So did twice thereafter the Court Martial Ap-
BEHIND THE TIMES

Modernization of Canadian Military Criminal Justice
by Honourable Gilles Létourneau and Professor Michel W. Drapeau © March 2017

peal Court (CMAC) with respect to the Standing Court Martial.67

At the time of the enactment of the Charter in 1982, the general understanding of the state of the law with respect to prosecutions before military tribunals was that the military tribunals’ jurisdiction was conditional on the existence of a military nexus, in other words that the offence committed was a ‘service connected’ offence. By ‘service connected’ offence, McIntyre J. and Dickson J. of the Supreme Court of Canada meant an offence which would tend to affect the standard of efficiency and discipline in the service.68 They wrote:

Section 2 of the National Defence Act defines a service offence as ‘an offence under this Act, the Criminal Code, or any other Act of the Parliament of Canada, committed by a person while subject to the Code of Service Discipline’. The Act also provides that such offences will be triable and punishable under military law. If we are to apply the definition of service offence literally, then all prosecutions of servicemen for any offences under any penal statute of Canada could be conducted in military courts. 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 so far. It may well be said that the military courts will not, as a matter of practice, seek to extend their jurisdiction over the whole field of criminal law as it affects the members of the armed services. This may well be so, but we are not concerned here with the actual conduct of military courts. Our problem is one of defining the limits of their jurisdiction and in my view it would offend against the principle of equality before the law to construe the provisions of the National Defence Act so as to give this literal meaning to the definition of a service offence. The all-embracing reach of the questioned provisions of the National Defence Act goes far beyond any reasonable or required limit. 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. 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.69

They could not accept that crimes committed in Canada by members serving in Canada could be prosecuted before and tried by military tribunals.70 In a powerful dissent, then Chief Justice Laskin and Justice Estey went further as they could not conceive that offences under the ordinary criminal law be prosecuted before military tribunals. They expressed themselves in the following terms:

68 MacKay v. The Queen, [1980] 2 SCR 370 at 411 [Mackay].
69 Ibid at paras 408-409 [Emphasis added].
70 Ibid at para 409. See also Ionson v. R. (1987), 4 CMAR 433; Ryan v. The Queen (1987), 4 CMAR 563.
In my opinion, it is fundamental that when a person, any person, whatever his or her status or occupation, is charged with an offence under the ordinary criminal law and is to be tried under that law and in accordance with its prescriptions, he or she is entitled to be tried before a court of justice, separate from the prosecution and free from any suspicion of influence of or dependency on others. There is nothing in such a case, where the person charged is in the armed forces, that calls for any special knowledge or special skill of a superior officer, as would be the case if a strictly service or discipline offence, relating to military activity, was involved. It follows that there has been a breach of s. 2(f) of the Canadian Bill of Rights in that the accused, charged with a criminal offence, was entitled to be tried by an independent and impartial tribunal. Section 2(f) provides that no law of Canada shall be construed or applied so as to deprive a person charged with a criminal offence of the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause.

In short, I regard the provisions of the National Defence Act as inoperative in so far as they provide for the trial of offences against the ordinary law by service tribunals.

I am of the opinion that the appellant is also entitled to succeed in this appeal on the second ground taken by him, namely, that he was denied equality before the law, contrary to s. 1(b) of the Canadian Bill of Rights. I cannot conceive that there can be in this country two such disparate ways of trying offences against the ordinary law, depending on whether the accused is a member of the armed forces or is not.  

For four of the nine members of the Supreme Court panel on the MacKay case, the differential treatment afforded by the military justice system to persons tried by service tribunals, especially the loss of the right to a jury trial, was a major concern.

Hence, as McIntyre and Dickson J.J. found, the need to permit a derogation from the civilian justice system, but only to the extent necessary to enforce and promote discipline and morale in the CAF. Hence the need for the requirement of a military nexus.

Parliament is deemed to know the state of the law when it enacts new legislation or amends an existing statute. It is reasonably fair to conclude that it knew of the existence of the requirement for a military nexus for a military prosecution when the Charter became law. In fact, when the Supreme Court in the Généreux case recognized the constitutionality of the military penal justice system, Chief Justice Lamer reasserted the requirement of a military nexus by restating the rationale for the existence of the military penal justice system. The Chief Justice expressed for the majority of the Court in the following terms the rationale for the existence of a separate military penal justice system and acknowledged again the need for a military nexus when he enunciated the purpose 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.  

72 Ibid at para 408.
73 Généreux, supra note 66 at 293[Emphasis added].

There is nothing new in what the majority of the Supreme Court said in Généreux. This is precisely what McIntyre and Dickson JJ. had said in the MacKay case and the CMAC in Regina v. MacEachern.\footnote{74}{(1986) 24 CCC (3d) 439. See also Ryan v. Her Majesty the Queen (1987), 4 CMAR 563; Catudal v. Her Majesty the Queen (1988), 4 CMAR 38.} Indeed in the Brown case\footnote{75}{R. v. Brown (1995), 5 CMAR 280 [Brown];}, subsequent to the decision of the Supreme Court in Généreux, Hugessen J.A. of the CMAC re-affirmed the need for a military nexus and its link to paragraph 11(f) of the Charter. At paragraphs 13 and 14 of his reasons for judgment, he wrote:

> It is now well settled that the exception to the guarantee of the right to a jury trial in paragraph 11(f) is triggered by the existence of a military nexus with the crime charged. That requirement was first authoritatively articulated by McIntyre J. in the pre-Charter case of MacKay v. The Queen.

> The question then arises: how is a line to be drawn separating the service-related or military offence from the offence which has no necessary connection with the service? In my view, an offence which would be an offence at civil law, when committed by a civilian, is as well an offence falling within the jurisdiction of the courts martial and within the purview of military law when committed by a serviceman if such offence is 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.

> I do not consider it wise or possible to catalogue the offences which could fall into this category or try to describe them in their precise nature and detail. The question of jurisdiction to deal with such offences would have to be determined on a case-by-case basis. A serviceman charged in a service court who wished to challenge the jurisdiction of the military court on this basis could do so on a preliminary motion. It seems, by way of illustration, that a case of criminal negligence, causing death resulting from the operation of a military vehicle by a serviceman in the course of his duty, would come within the jurisdiction of the court martial, while the same accident, occurring while the serviceman was driving his own vehicle on leave and away from his military base or any other military establishment, would clearly not.\footnote{76}{Ibid at paras 13, 14 [Emphasis added].}

However, in a recent decision\footnote{77}{R. v. Moriarity 2015 SCC 255} the Supreme Court of Canada expanded considerably the notion of military nexus. From a ‘service connexion’ test the Court moved to a ‘status’ test like the American courts did a number of years ago. This means that a member of the Canadian Armed Forces, whether on duty or not, 24 hours a day, 7 days a week, 365 days a year (366 days in a leap year) is liable to be prosecuted before military tribunals, even when the offence is committed in civilian-like circumstances. The ‘status’ test has been bitterly criticized in the United States for its unfairness and the loss of rights it entails for the accused.

Further, sections 71 and 273 of the NDA maintain the jurisdiction of Civil Courts over persons subject to the Code of Service Discipline, even for offences committed outside Canada. In addition, children of accompanying persons fall under the jurisdiction of military tribunals. If prosecuted before military tribunals pursuant to the NDA, they would be deprived of the benefits of the Youth Criminal Justice Act\footnote{78}{SC 2002, c 1.} which attach to a prosecution before a civilian tribunal. This is no doubt an-
other important consideration to be taken into account when determining whether the prosecution should take place before a military tribunal.

Recommendation.
Persons prosecuted before military tribunals for conduct amounting to violations of the Criminal Code of Canada or to crimes against humanity punishable by imprisonment for a period of five (5) years or a more severe punishment, in accordance with the constitutional right to a trial by jury conferred by s.11 (f) of the Charter, should be given the right to elect for a jury trial before a civilian criminal court.


Section 7 of the Charter protects the constitutional right of an accused to an independent prosecutor, that is to say, the right to a prosecutor who is objectively able to act independently, at every stage of the judicial process, when making decisions concerning the nature and extent of prosecutions and who can reasonably be perceived as independent. Independence of the prosecution is a constitutionalized principle of fundamental justice recognized by the Canadian courts.

In R. v. Gagnon 2015 CMAC 2, the Court held that section 230.1 of the NDA, which gives the Minister a right of appeal of a CMAC decision, is invalid as being inconsistent with the constitutional requirement of prosecutorial independence. The declaration of invalidity was suspended for a six-month period ending on June 21, 2016. The hearing of the appeal per se on the merits was adjourned to a date to be determined after

the expiry of the period during which the effect of the declaration of invalidity was suspended. On February 9, 2016, Her Majesty the Queen sought to appeal that decision to the Supreme Court of Canada and was granted leave to appeal. This case has yet to be decided by the Supreme Court of Canada.

Recommendation.
To ensure the independence of the Military Prosecution Services, these Services should not be under the supervision of the JAG who is the head of the legal chain of command. They should be under the supervision of the Attorney General of Canada or the Federal Director of Penal Prosecutions.

Recommendation.
As is the case with legal aid in Ontario, Quebec and other Canadian Provinces, the Defence Services should be independent and be a separate statutory legal entity falling under the supervision of the Attorney General.

2.4 Scope of the Prosecution’s and Accused’s Rights of Appeal. Under section 230.1 of the NDA the prosecution can appeal to the CMAC against the legality of a finding of not guilty. Section 228 deems the terms ‘legality’ and ‘illegal’ to relate to either a question of law alone or to questions of mixed law and fact. As a result of the broad meaning given to these terms, the prosecution in military trials can appeal on a question of mixed law and fact.

In a criminal trial before a civilian tribunal no such power exists for the prosecution. The prosecution’s appeal is limited to a pure question of law. In R. v. Biniaris, 200 SCC 15 (Can-LII) the Supreme Court of Canada ruled that different policy considerations apply in providing the Crown with a right of appeal against acquittals. There is no principle of parity, the Court held, of appellate access in the criminal process that must inform the interpretation of the access issue.

Moreover, the concept of an unreasonable acquittal is incompatible with the presumption of innocence and the burden that rests on the prosecution to prove its case beyond a reasonable doubt. Although the unreasonableness of a verdict raises a question of law, the prosecution in a criminal case before a civilian tribunal is barred from appealing an acquittal on the sole basis that it is unreasonable. It has to assert another error of law leading to it.

Thus the military prosecution possesses a broader right of appeal which puts an accused at greater jeopardy than that of a civilian facing criminal prosecution before a civilian trib-
nal. This military prosecution’s right of appeal on questions of mixed law and fact is prone to a constitutional challenge as a violation of the presumption of innocence.

Also, an accused’s right to appeal against a military finding of guilt is narrower than an accused’s right against a similar finding made by a civilian criminal court. As a matter of fact subparagraph 675(1)(a) (ii) of the Criminal Code allows a person convicted by a civilian criminal court to appeal against the finding of guilt on a question of fact with leave of the Court of Appeal or a certificate of the trial judge that the case is a proper case for appeal. An accused tried by a military tribunal is not given that right by the NDA.

Thus at law, the balance with respect to appeals is tipped in favour of the accused in criminal proceedings before a civilian tribunal. However, in proceedings held before a military tribunal, the same balance is tipped in favour of the prosecution to the detriment of the accused. Once again it appears that this situation runs afoul of the presumption of innocence.

Recommendation.
The military prosecution should not have the right to appeal on a mixed question of fact and law. Like its civilian counterpart, its right of appeal should be limited to questions of law. However a person prosecuted before a military tribunal and found guilty should not have their right of appeal limited to questions of law and questions of mixed facts and law. As granted to a person convicted by a civilian criminal court by subparagraph 675(1)(a) (iii) of the Criminal Code, the accused should have the right to appeal with leave a question of fact.

2.5 The Minister of National Defence’s Power to Appeal.
Under section 230.1 of the NDA, the MND or counsel instructed by the Minister has the right to appeal to the CMAC decisions of a court martial. Under such circumstances, the MND cannot reasonably be perceived as being an independent prosecutor who can act in a manner that is autonomous and independent from the chain of command.

Moreover, it is very difficult to see how the granting of a minister’s power to appeal can be reconciled with the legislative intent surrounding the reforms made in 1999, which was to ensure that the military justice system remained independent of the chain of command.

Indeed, the principle of independence with regard to decisions to prosecute requires that such decisions also be protected as much as possible from interference by members of the military hierarchy. When a member of the military hierarchy, like the MND, is entrusted with decisions of this sort, the problems are substantial.

Therefore, as determined in R v Gagnon (2015) CMAC 2, section 230.1 of the NDA, which confers on the MND the right to appeal, does not satisfy the constitutional requirement of prosecutorial independence. It is of no force and effect to the extent that its holder is not independent. The section is not a justifiable limit that can be saved under section 1 of the Charter.
of convergence with the civilian criminal justice system after the adoption of the Canadian Charter of Rights and Freedoms in 1982. 83

Recommendation.
As found recently by the Court Martial Appeal Court of Canada in the case of R v Gagnon (2015) CMAC 2, presently under appeal to the Supreme Court of Canada, and proposed by the Right Honourable Brian Dickson in his Second Report84, the right to appeal against an acquittal by a court martial or the Court Martial Appeal Court of Canada should be exercised by an independent authority, without interference by or pressure from the chain of command. The MND is part of the chain of command and should not have this right.


2.6 The Chain of Command’s Power to Issue Search Warrants. Pursuant to s.273.3 of the NDA, warrants can be issued for the search of quarters under the control of the Canadian Forces and occupied for residential purposes by any person subject to the Code of Service Discipline. The search also extends to any locker or storage space located in those quarters.

The warrants may be issued by a CO satisfied by information on oath that there is in these places evidence of the commission of an offence against the NDA or anything intended to be used for the commission of an offence against a person for which a person may be arrested without a warrant. The CO must have reasonable grounds to believe that an offence has been committed.

S. 273.4 provides that the commanding officer who carries out or directly supervises the investigation of any matter may issue a warrant only if he believes on reasonable grounds that conditions for the issuance of a warrant exist and no other CO is available to determine whether the warrant should be issued.

Finally, under s.273.5, all the requirements and safeguards contained in s.273.3 do not apply to a commanding officer of a military police unit.

The general rule for a valid search is that the police will require prior judicial authorization to conduct the search (for example, by obtaining a search warrant) and that there are reasonable and probable grounds that justify it. Once these requirements are satisfied, state intrusion on privacy would be justified. These standards apply where there is a reasonable expectation of privacy and section 8 Charter protection varies depending on the context. For example, there will be greater
constitutional protection when the search involves state intrusion into a person’s home. However, the safeguards may be reduced in the case of a search at the border.

Although this is the general rule, there are exceptions. It is recognized that a prior authorization is not always feasible. With respect to these exceptions, the courts require some authority, provided either in statute or at common law, to conduct warrantless searches. The existence of such authority is not enough, however, because the courts will also review this authority to ensure that it is reasonable. In defining what is reasonable, the courts have established that warrantless searches should generally be limited ‘to situations in which exigent circumstances render obtaining a warrant impracticable’.85

Other types of search warrants are available under the Criminal Code, for example a warrant to obtain DNA samples and a general warrant which authorizes the police to ‘use any device or investigative technique or procedure or do anything described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or person’s property’. This general warrant can only be used when there is no other provision in the Code or other federal legislation that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done. One such example is the use of video surveillance. In all cases, the requirements to obtain such warrants are set out in the Code and must be satisfied.

The Code also allows a police officer to exercise all of the powers described in subsection 487(1) without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impractical to obtain a warrant. This allows a police officer to conduct a search without a warrant in emergency situations. Warrantless searches are the exception to the rule.86

Chief Justice Lamer summarized the law as follows with respect to searches incidental to arrests:

In summary, searches must be authorized by law. If the law on which the Crown is relying for authorization is the common law doctrine of search incident to arrest, then the limits of this doctrine must be respected. The most important of these limits is that the search must be truly incidental to the arrest. This means that the police must be able to explain, within the purposes articulated in Cloutier ... (protecting the police, protecting evidence, discovering evidence), or by reference to some other valid purpose, why they searched. They do not need reasonable and probable grounds. However, they must have had some reason related to the arrest for conducting the search at the time the search was carried out and that reason must be objectively reasonable. Delay and distance do not automatically preclude a search from being incidental to arrest, but they may cause the Court to draw a negative inference. However, that inference may be rebutted by a proper explanation.87

Better and greater safeguards in the form of judicial control over the issuance of search warrants should be put in place.

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85 See also Criminal Code sections 117.02(1) for weapon used in commission of offence, and section 487 for searches in general.

86 Warrantless Searches – under the Fatality Inquiries Act, or otherwise justified by the common law (for example, as determined in Cloutier v. Langlois, a search incidental to arrest) or the Criminal Code. See MPCC Final Report with regard to – MPCC-2011-004: http://www.mpcc-cppm.gc.ca/01/1400/3700/2011-004/part4-1-6-eng.aspx

Recommendation.

Pursuant to section 8 of the Canadian Charter which guarantees to everyone the constitutional right to be secure against unreasonable search or seizure, search warrants should be issued by military judges and not by commanders who have an inadequate or no knowledge of the law and lack and are perceived to lack, the necessary independence to authorize such an invasive intrusion on one's property or person. This is necessary to ensure and maintain public confidence in the administration of penal military justice.

2.7 The Scope of the Arrest Power and the Duty not to Release.

Pursuant to sections 154 and 155 of the NDA, an officer and a non-commissioned member are invested with the power and authority to arrest, or order the arrest, without a warrant, of every person 'who has committed, is found committing or is believed on reasonable grounds to have committed a service offence, or who is charged with having committed a service offence'. In a proposed addition, i.e. section 155 (2.1) enacted in 2013 through Bill C-15 [Strengthening Military Justice in the Defence of Canada Act, SC 2013 c. 24]88, limitations were put on that power to arrest without a warrant. Unless ordered by a superior officer to do so, an officer or a non-commissioned member cannot arrest or order the arrest of a person without a warrant for an offence that is not a serious offence if, broadly stated, the public interest may be satisfied without so arresting the person or there are reasonable grounds to believe that the person will not fail to attend before a service tribunal.

There are three fundamental problems with these three provisions.

• First, the arrest power without warrant is not only broad and without judicial control, it is also unfettered: a superior officer can always bypass the limitations and proceed with the arrest of the person.

• Second, the limitations to the arrest power without warrant apply only to instances where the offence is not a serious one. This is to be contrasted with similar limitations contained in the Criminal Code where the scope of the duty not to arrest has a much broader spectrum than the duty under the military justice system. Under subsection 495(2) of the Criminal Code the duty not to arrest applies to hybrid offences which constitute the vast majority of offences under the said Code. It should be recalled that hybrid offences are offences which can be prosecuted either by way of an indictment or by way of summary conviction procedures. The summary conviction procedure is used when the offence is not serious by nature and the full force of the indictment procedure is not warranted in the circumstances. In other words, the duty not to arrest under the Criminal Code applies to serious and non-serious offences as well, except for those few that can be prosecuted by indictment only. The narrow scope of the application of the duty not to arrest found in sections 155 and 156 of the NDA is open to a constitutional challenge as the power to arrest still lends itself to abuse.

• Third, while the limitations to the arrest power were enacted in 2013, the provisions containing them have

88 See the Legislative Summary at http://www.lop.parl.gc.ca/content/lop/LegislativeSummaries/41/1/c15-e.pdf
still not been proclaimed into force, thereby leaving the power unfettered.

Recommendation.
Pursuant to section 7 of the Charter which guarantees to everyone the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice, arrest with or without a warrant should be judicially authorized by a military judge or, as found by the court martial in R. v. Levi-Gould, 2016 CM 4002, by persons capable of acting judicially so as to ensure and maintain public confidence in the administration of penal military justice.

Moreover, the duty not to arrest should not be limited to instances of arrest for minor offences. The same protection given to an accused who is arrested by civilian authorities and prosecuted before civilian tribunals should be given to persons arrested by and prosecuted before military authorities.

2.8 Chain of Command’s Power to Review and Substitute Findings and Punishment. Pursuant to sections 249, 249.11, 249.12, 249.13 and 249.14 of the NDA, a finding of guilty and sentences imposed can be reviewed by reviewing authorities outside the judicial hierarchy. Where the finding and the sentence emanate from summary trials, the review is conducted by the CDS or his delegate. It is the Governor-in-Council who acts as the reviewing authority when the finding and the sentence are made and imposed by a court martial. These ‘powers conferred by these sections can be traced as far back as 1883.’ The same authors wrote the following with respect to these powers:

From a constitutional as well as an administration of penal justice perspective, these provisions are surprising. In relation to decisions made by a court martial, they authorize the Governor-in-Council to review the court’s guilty findings as well as the punishment that it imposed. Both the accused and the CDS can seek a review.

Where the guilty finding has been made or the sentence imposed by a person presiding over a summary trial, the review authority is the CDS or such other military authorities as prescribed by regulations. However, contrary to a review by the Governor in Council, the review authority in this case may not only act on demand, but also on its own initiative: see s.s. 249(4).

In the exercise of its review functions, the review authority may quash the guilty finding, substitute a new guilty finding for the one under review or a new guilty finding for an offence other than the one for which the accused was found guilty by a service tribunal.

89 NDA subsection 249(3)
90 Military Justice in Action, supra note 12 at 568-569.
It may also substitute for an illegal sentence passed by a court martial any new punishment that it considers appropriate. In the same vein, it may mitigate, commute or remit any or all of the punishments included in a sentence imposed by a service tribunal.

These review powers of a verdict and a sentence do not in any manner limit or affect Her Majesty’s royal prerogative of mercy: see section 249.1.

It is one thing for Her Majesty to mercy a convict under the Royal Prerogative or for the Governor in Council to exceptionally grant a pardon to a convicted person or remit in whole or in part a pecuniary penalty as provided for in ss. 749, 750 and 751 of the Criminal Code. It is quite another to authorize the executive to sit in effect on appeal of a guilty finding made or a sentence imposed by an independent judicial tribunal as ss. 249 and 249.11 to 249.15 authorize. It is also quite a different thing to routinely authorize, as a substitute for an appeal to the court martial, a review by the CDS of the guilty findings and sentences issued pursuant to a summary trial.

Summary trials and the review by the CDS perpetuate and encourage the chain of command’s involvement in the administration of penal military justice which is not limited to minor disciplinary offences in the strict sense, but extends to convictions and sentences for serious offences under the Criminal Code of Canada.

The legislative amendments of 1998 to the National Defence Act aimed at establishing an independent and impartial system of penal military justice. Sections 249 and 249.11 to 249.15 are a reminder that the work is still not completed.91

Indeed, a review by the chain of command of a verdict rendered and sentence passed at a summary trial is conducted without any parameters such as grounds for a review, limits as to the process of the reviewing authority, right to counsel, procedural guarantees, etc. There are no records and no transcripts of the evidence tendered at the summary trials which could help the reviewing authority in the exercise of its functions and assist the accused either in their demand for review or their opposition to the prosecutor’s demand.

Again there are no parameters guiding the mitigation, commutation or remittance of all or part of the punishment imposed, including a sentence passed by a service tribunal.92 As for the review of findings of guilt, the NDA is silent on the criteria for interfering with the punishments imposed, thereby opening the door to secretive arbitrariness.

Recommendation.

Only in exceptional circumstances, under strict criteria and where it is necessary to do so to maintain the operational readiness and efficiency of the CAF should the chain of command have the power to review and quash findings made and punishments imposed by a judicial authority like the court martial and proceed to substitute findings and punishments of its own.

91 Ibid at paras 569-570.

92 NDA section 249.14
SYSTEMIC ISSUES

1. OFFICE OF THE JUDGE ADVOCATE GENERAL

Section 9 of the NDA stipulates that the Governor-in-Council may appoint an officer to be the Judge Advocate General of the CAF. Section 9.1 specifies that the JAG acts as the legal advisor to the Governor General, the MND, the DM and the CAF in matters related to military law. Section 9.2 details that the JAG has the superintendence of the administration of military justice in the CAF. Taken together, these sections reveal that the primary, if not unique function, of the JAG of the CAF is to act as a 'legal advisor'\(^7\). His appointment title of 'judge' is therefore a misnomer.\(^9\)

Since 1998, it is the Chief Military Judge, not the JAG, who is the supreme judicial authority within the CAF. All persons subject to the Code of Service Discipline, including: the CDS, the VCDS, Commanders of Command, the JAG Branch (consisting of approximately 170 military lawyers), the Provost Marshal, the Director of Military Prosecution, the Director of Counsel Defence Services as well all other CAF officers and non-commissioned members as well as their subordinates, are all subject to the judicial authority of the Chief Military Judge, if they were to appear before a military court.

Section 9.2 of the NDA also charges the JAG with the superintendence of the administration of the military justice system. It also authorizes the JAG to 'conduct, or cause to be conducted, regular reviews of the administration of military justice'.\(^9\) The role of the JAG with respect to the penal component of the military justice system raises serious concerns as to the necessary independence and transparency of that component.

\(^7\) Please see Termium Plus, The Government of Canada's terminology and linguistic data bank at: http://www.btb.termiumplus.gc.ca/tpv2alpha/alpha-eng.html?lang=eng&i=1&srchtxt=legal%20advisor&codom2nd_wet=1&index=alt


\(^9\) NDA subsection 9.2 (2)
Recommendations.
In Canada, the JAG is not a judge. The JAG is an advocate, or a lawyer. The JAG is not a judicial officer and performs no judicial functions. The JAG's function, instead, is that of a legal advisor. Labelling the JAG a 'judge' is both inappropriate and misleading. The title should therefore be changed to reflect the real nature of this function and to dissipate any ambiguity.

The JAG currently acts as the legal advisor to the highest military command and, yet, at the same time, this officer also generally supervises both the prosecution and the defence services as well as the career and the promotions of the incumbents of these same armed services. A reasonable person informed of this current state of affairs could reasonably believe, or would be justified to reasonably believe, on the one hand, that the independence and transparency of the entire military penal justice system may be compromised and, on the other hand, that the JAG may not be the independent and impartial auditor the military penal system requires in order to ensure fairness, effectiveness, trustworthiness and credibility.

The JAG’s role needs to be seriously looked into to remove them entirely from the administration of military justice. The appointment title should also be changed to that of Military Advocate General.

2. MILITARY RANK OF MILITARY JUDGES

Why does a military judge need to have a military rank in the first place? The absence of military rank would eliminate the present dichotomy in having the Chief Military Judge much junior in rank to the JAG and approximately one hundred (100) CAF general officers as well as the CDS and the VCDS who are all subject to the Code of Service Discipline and, in the final analysis, are all subject to the Chief Military Judge’s judicial authority. In the case of the military judges who hold the rank of lieutenant-colonel they are over-ranked by over 430 officers of senior rank. They also share the same rank with 1,280 officers of equal rank within the military hierarchy. Of note, the United Kingdom, Australia, New Zealand, and Ireland (to name only a few) have civilianized judges presiding over military tribunals.

Recommendation.
Merging the Office of the Chief Military Judge (total of 21 personnel) with the Federal Court of Canada and creating a ‘military division’ therein would address this issue. Besides realizing
substantial personnel and operations financial savings by having, for example, a single registry as well as technical, financial and clerical support staff, 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 NDA, since many of them regularly sit on the already established Court Martial Appeal Court. Also, 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.96

3. MILITARY POLICE INDEPENDENCE97

Police independence from interference in individual investigations is vitally important and has been recognized by the Supreme Court of Canada as an unwritten constitutional principle derived from the rule of law. Military police officers operate with a duality of roles. On the one hand, they are peace officers under s.2 of the Criminal Code and are an autonomous policing body within the CAF. On the other hand, they are members of the CAF, subject to the military chain of command and are duty-bound to follow orders from superior officers.

Members of the Military Police are subject to the authority of the Canadian Forces Provost Marshal, the highest-ranking military police officer.98 However, pursuant to subsection 18.5(1), (2) of the NDA the VCDS has statutory powers of ‘general supervision’ and can issue ‘general instructions or guidelines’ to the Provost Marshal.

Military Police independence is compromised by way of subsection 18.5(3) of the NDA which permits the VCDS to ‘issue instructions or guidelines in writing in respect of a particular investigation’. Under this statutory power, the VCDS is able to provide instructions and guidelines in specific cases which could presumably include instructions to and/or not to investigate a particular person or matter. This is problematic because it strips the Military Police of the ability to freely investigate without the interference of the military chain of command or an executive arm of Government. Moreover, there is no requirement to make these instructions or guidelines public. It is therefore difficult to understand why the VCDS should retain such power.

The military police should be allowed to proceed with an investigation without interference from non-military police command structures, including the VCDS. Just like command in-
fluence should not play a role with respect to the laying of charges under the Code of Service Discipline, the military chain of command should not be permitted to instruct the conduct of a military police investigation in a specific case.

Recommendation.
Section 18.5(3) of the NDA should be repealed.

4. BOARD OF INQUIRIES AND CORONER’S INQUESTS

When a member of the CAF dies from a sudden death, the CAF normally conducts an in-camera military Board of Inquiry (BOI) which may be ordered pursuant to section 45 of the NDA.

The purpose of a military BOI into sudden death is taken from the convening order, which typically states: ‘to investigate the causes and contributing factor(s) that may have led to the death of [that member] and identify applicable preventative measures, if any’. Customarily present on a BOI panel are a president and several CAF members, including a public af-

99 QR&O, art 21.46 (Investigation of Injury or Death)

100 See Office of the Judge Advocate General, Military Administrative Law Manual [hereafter: JAG Manual] (Ottawa: Department of National Defence, 1 August 2008) at 4 para 23, which states in part:

See also Gordon v. Canada (Minister of National Defence), [2005] FCJ 409 where the court ruled that the Board of Inquiry held in the wake of the fire onboard HMCS Chicou-timi which caused the death of Lieutenant (Navy) Chris Sanders was a ‘private investigation’ and therefore there was no requirement to be held publicly.

101 See section 45 of the NDA. Also see: CANLANDGE Message 047/06 Instruction on BOI which directs that an investigation will be conducted in many instances of death or serious injuries.

102 Defence Administrative Orders and Directives (DAOD) 7002-1 outlines the staffing procedures for the submission, review and approval of a BOI report.


104 Ibid.
The discrepancies between a military BOI and a Coroner’s inquest are marked:

- At a BOI there is no right to standing for relatives of a deceased. In fact the family of a deceased member plays no role in the BOI.105 However, spouses or parents of a deceased member may be ‘summoned’ to appear and be compelled to answer any question relating to the matter before the board.106 At a Coroner’s inquest, any person having a substantial and direct interest in the inquest can apply to have ‘standing’ and, if granted, can play an active role during the inquest, including cross-examining witnesses, introducing evidence and asking questions during the hearing.107

- A Coroner’s inquest typically has a jury of five persons drawn from the general public.108 Contrast this with a BOI in which, instead of a jury, there are CAF public affairs officers, CAF legal officers, CAF medical doctors and other CAF members who are named as advisors to the BOI.109 The public and the family of the victim play no part in the inquiry process.110

- A Coroner’s inquest is public111 while a BOI is conducted in camera.112

- The final report of a BOI is not revealed to the public nor is a copy given to the family of the deceased although a redacted copy of that report may be obtained through Access to Information law.113 A Coroner’s inquest report is immediately made public.114

- In response to a Coroner’s inquest, officials typically have weeks to address or implement the changes recommended by the inquest. As for the BOI, its report requires at least two additional approvals. Firstly, the BOI report is sent for approval to the convening authority that is normally in the chain of command of the deceased.115 Secondly, the BOI report is then referred to NDHQ for review on behalf of the CDS who, as discussed above, will, in the fullness of time, provide final approval of its findings and recommendations.116 This last step may take several years.117

105 JAG Manual, supra note 100 para 28.
106 Ibid at paras 50-54; and section 45(2)(a) of the NDA.
107 Coroners Act, RSO 1990, c C-37 s 41 [Persons with standing at inquest].
108 Ibid section 33.
109 JAG Manual, supra note 100 paras 41-46.
110 Ibid at para 23.
111 Coroners, supra note 107, section 32.
112 JAG Manual, supra note 100, para 23.
113 Ibid at para 98.
114 Coroners, supra, note 107, section 32.
115 JAG Manual, supra, note 100, para 99.
116 JAG Manual, supra, note 100, para 105 (which stipulates that the minutes of proceedings of a BOI shall be forwarded to NDHQ for approval, by or on behalf of the CDS).
117 In accordance with information tabled by the Parliamentary Secretary to the Leader of the Government in the House of Commons in response to Question 1198 by the Honourable Scott Brison (Kings-Hants) on Sessional Paper No. 8555-411-1198 on April 15, 2013, it takes years, in many instances four years or more, to have the final report of a Board of Inquiry (BOI) approved by the CDS.
BEHIND THE TIMES

Given that Article 2 (Right to life) of the ECHR obliges the State to carry out a full investigation on the contentious death of a soldier, in September 2005 the UK Ministry of Defence (MOD) published a Protocol for the investigation of deaths on land or premises owned, occupied or under the control of the MOD.\textsuperscript{118} The primacy for conducting the investigation of all deaths rests with the Chief of Police under whose jurisdiction the death occurs.\textsuperscript{119}

In \textit{Jordan and others v. UK},\textsuperscript{120} the court held that deaths in England and Wales can be investigated by Coroners through the medium of inquests. Furthermore, in \textit{R v. Secretary of State for Defence and another}\textsuperscript{121} the United Kingdom Supreme Court agreed that, where there is reason to suspect a substantive breach by the State of Article 2 of the ECHR, the State on its own motion should carry out an investigation into the death.\textsuperscript{122} This investigation exhibits the following features: there is a sufficient element of public scrutiny, it is conducted by an independent tribunal, it involves the relatives of the deceased and is prompt and effective.\textsuperscript{123} Implementing in the

\textsuperscript{118} Association of Chief Police Officers “Protocol for the investigation of deaths on land or premises owned, occupied or under the control of the MOD” Online: The Association of Chief Police Officers of England, Wales and Northern Ireland www.acpo.police.uk/documents/crime/2009/200906CRIMOD01.pdf. The 2005 Protocol relates to deaths which occur within Defence establishments in England, Wales and Northern Ireland and their respective Territorial waters. Due to different legislative provisions, a separate protocol has been negotiated for Scotland and its Territorial waters. This protocol records an Agreement between the Secretary of State for Defence and the Association of Chief Police Officers (England, Wales and Northern Ireland).

\textsuperscript{119} Ibid section 2.1.

\textsuperscript{120} Supra, note 54.

\textsuperscript{121} [2010] UKSC 29.

\textsuperscript{122} Ibid at para 84.

\textsuperscript{123} Ibid at para 133.

Canadian military justice system the ratio decidendi from this decision would provide the guarantees contained in Article 2 of the ECHR.

Recommendation.
The disparity of treatment between a Canadian soldier and a Canadian citizen who both die on Canadian soil is hardly justified and likely discriminatory.

For the benefit of the deceased’s family and society as a whole, a Coroner’s inquest should be conducted each time a CAF member suffers a sudden death in Canada, whether connected to a military installation or not. This would not prevent the military from having its own BOI to investigate
any other incident connected with the service. This is precisely what is happening in the United Kingdom for instance.124

5. RIGHT TO GRIEVE

Grievances in the military, whether dealing with mistreatment, intimidation, faulty weapons or equipment, promotions, poor clothing, bad rations and medical care are as old as recorded military history. The historic ‘right to grieve’ has its legislative origins in the Articles of War of 1672 (UK).125 In older times, the ‘right to grieve’ was designed to ensure the protection of service rights, correct the misuse of military authority particularly in areas of pay and clothing126 and, most important, attune Commanders to the effect or implantation of various military policies. Modern militaries have created a complaint mechanism which remains mainly with the chain of command.127

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6. THE GRIEVANCE SYSTEM

The CAF Grievance system is a system designed to prevent individuals’ dissatisfaction from spreading to a crescendo of
voices which could result in acts of insubordination, poor morale or even mutiny. The NDA now provides a remedy:

An officer or non-commissioned member who has been aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces for which no other process for redress is provided under this Act is entitled to submit a grievance. 130

Section 29 of the NDA allows CAF members to grieve any administrative act or omissions of their superiors, but not one

128 In 1949, the Royal Canadian Navy’s inability to recognize and promptly deal with growing frustrations boiled over when, during a fueling stop in Mexico, 90 members of HMCS ARTHABASKAN locked themselves in their mess decks, refusing to come out until the Captain heard their grievances. Two weeks later, 83 junior ratings in HMCS CRESCENT staged a similar protest while at dockside in Nanjing, China. Then, 32 aircraft handlers aboard the carrier HMCS MAGNIFICENT in the Caribbean refused to return to morning cleaning stations as ordered. While collectively of great concern to the senior naval leadership, these sailors never became mutinous principally because the ships’ officers, from the Captain on down, recognized the validity of the complaints and took immediate action to address their grievances. A subsequent Commission of Inquiry, headed by Rear Admiral Rollo Manguy, investigated the matter and his quintessential report became the blueprint for the modern CAF, especially in terms of leadership and superior-subordinate relationships within the CF hierarchical system – at least for a while.


129 See Laurel Fulkerson, No Regrets: Remorse in Classical Antiquity (Oxford [UK]: Oxford University Press, 2013. Chapter 8 – Command Performance: Mutiny in the Roman Army at 171 describes how the able generalship of Roman General Scipio (in the year 206 B.C. during the Hannibalic Wars) coped with the mutinous behaviours, in volatile situations with a “perfect blend of caution and severity”. It details also how General Scipio “delivered a lengthy shaming speech which, in effect, suggests to the soldiers that they mutually agree to blame only a few men lest he have to punish all.”


130 NDA subsection 29(1).

committed by their fellow soldiers or subordinates. Their grievance must also relate to a service matter. In submitting a grievance, the member must explain the remedy being sought. Chapter 7 of the QR&O provides specific direction about the grievance process which has two levels, the Initial Authority and the Final Authority.

With limited exception, COs of aggrieved persons are normally the Initial Authority though they may delegate their authority if there is a conflict of interest real or perceived. Pursuant to article 7.05 of the QR&O, an Initial Authority has sixty (60 days) to make a determination. One would expect that the 60-day period would only be exhausted in the most difficult cases. Yet currently, the average time taken to adjudicate a grievance at the first level is upwards of 12 months.
Perhaps more problematic is that, in many cases, the Initial Authority requests consent for an extension of time to determine the grievance. Experience shows that such requests have been made for up to one year.\footnote{137} If consent is not granted, the grievance is automatically elevated to the Final Authority level for adjudication where there is no statutory time limit and where the average wait is expressed in years.\footnote{138}

Section 29.16 creates a civilian Military Grievance External Review Committee (MGERC) so as to provide an impartial review of grievances and make Findings and Recommendations for the consideration of the Final Authority. However, the MGERC is deprived of any power to order a remedy. The power to order a remedy is vested in the hands of the CDS as Final Authority in all grievances.\footnote{139} That said, aside from limited \textit{ex gratia} authority conferred in 2012,\footnote{140} the CDS cannot award pecuniary compensation to an injured party. Somewhat surprisingly, that authority is given to government lawyers at the Department of Justice.\footnote{141}

In 2003, pursuant to section 29.14 of the NDA and article 7.09 of the QR&O, the CDS created the office of the Director General Canadian Forces Grievance Authority, charging it with the responsibility for monitoring all grievances and staffing grievances submitted to the MGERC.\footnote{142} The Grievance Authority has delegated power to settle any grievance at the Final Authority level that is not subject to a mandatory referral to the MGERC.\footnote{143}

What all this means is that the CDS and senior generals have divested to an officer serving in the rank of Colonel one of the most important tools of generalship: to be immediately, directly and personally involved in addressing or redressing instances of abuses and/or other systemic deficiencies brought to their attention by soldiers aggrieved by the actions or omissions of junior commanders. In this way, the regulations,

\begin{footnotesize}
\footnote{137} Ibid. \\
\footnote{138} Brison, supra note 131. In accordance with information disclosed in the House of Commons by the government on February 27, 2013 following Inquiry number Q-1195, as of February 15, 2013 a number of grievances dating as far back to 2009 and 2010 were still awaiting determination by the CDS. \\
\footnote{139} QR&O arts 7.11(a), 7.14(1)(a) \\
\footnote{140} Canadian Forces Grievance Process \textit{Ex Gratia} Payments Order, PC 2012-0861, (2012) C. Gaz. II, 146 [Order]. Privy Council Order 2012-0861 which authorizes the CDS to provide financial relief whereas there was no authority previously. The order stipulates: “The CDS may authorize an \textit{ex gratia} payment to a person in respect of whom a final decision is made under the grievance process established under the \textit{National Defence Act}.” \\
\footnote{141} Defense Administrative Orders and Directives (DOAD) 2117-1 Military Grievances Process. \\
\footnote{142} On Jan 1, 2003 the Armed Forces Council created a Grievance Authority (titled: Director General Canadian Forces Grievance Authority) responsible for the management of the CF Grievance System. By the same occasion, the CDS delegated, pursuant to section 29.14 of the Act, the powers, duties and functions as Final Authority in the grievance system to the Director General of the Grievance Authority except for those grievances which must be referred to the MGERC. The Grievance Authority also plays a role in the findings and recommendations forwarded from the MGERC to the CDS. The Grievance Authority reviews the MGERC’s findings and recommendations and conducts their own file review before preparing a decision letter for the CDS. See Canadian Forces Grievance Board, Report on Plans and Priorities for period 2007-2008 to 2009-2010 (Ottawa: Minister of National Defence, 2007) at 8. \\
See also the Brief presented to the Honourable Justice Le Sage by the Military Grievances External Review Committee for the Second Independent Review of the Provisions of Bill C-25 and Bill-60 (Ottawa: Department of National Defence, 2011) (online: Military Grievances External review Committee \texttt{http://mgerc-ceegm.gc.ca/rpt/le sage-eng.html}), for an interesting discussion on the role and multiplicity of functions of the Grievance Authority, and in particular their comment that “the administrator of the grievance process should not act as the Final Authority’s delegate nor should they be the CDS’ advisor. The MGERC is also of the view that, by re-analyzing their findings and recommendations prior to the final decision, the DGCFGA has been given a role that undermines the Board’s mandate and affects the integrity of the process as well as the integrity and fairness of the final decision.” \\
\footnote{143} QR&O art 7.09
\end{footnotesize}
therefore, empower the military hierarchy to get between the MGERC and the CDS in adjudicating grievances.

Section 29.11 of the NDA appoints the CDS as the Final Authority in the grievance process. Section 29.13 indicates that the CDS is not bound by any finding or recommendation of the MGERC while section 29.15 emphasizes that the CDS decision is final and binding and, except for a judicial review under the Federal Courts Act, is not subject to appeal or to review by any court. The primary regulatory deficiency at the Final Authority level is the fact that there is no statutory time period to adjudicate. This means that, theoretically, grievances may remain on the Final Authority’s desk indefinitely. Practically, they remain on that desk for up to two years or more.

The current CAF Grievance system does not fulfill its purpose. Despite the existence of a rather large administration spread out throughout various levels of the chain of command, the grievance process cannot and does not meet its statutory obligations towards the serving men and women of the Canadian military. Grievances procedures are a means of dispute resolution designed to be used by a military organization to address complaints and provide a hierarchical structure for presenting and settling workplace disputes. As a matter of principle, these grievances should be settled in a timely and cost-effective manner, before they result in litigation.

Ideally, an effective grievance procedure helps the chain of command to discover and remedy problems before they can cause discontent and adversity in the workplace. In order to ‘fix the process’, in 2003 the late Chief Justice Lamer recom-
adversity in the workplace. In order to address this problem of delays the sage recommendations made by the late Chief Justice Lamer should be implemented and, decisions respecting grievances should now be rendered within a time limit of twelve months.\(^7\)

Also in 2003, the Chief Justice recommended that the CDS ‘be required to report annually on the CAF Grievance Process, including the timeliness of the review of grievances’\(^147\). This is still not happening. These recommendations should now be formalized in the NDA.

7. MILITARY OPERATION ‘OPERATION HONOUR’ AND SEXUAL ASSAULTS\(^148\)

For well over two decades now, sexual assaults in the CAF have been a source of much coverage in the national media. Each time, there have been statements and declarations by the military leadership and the MND that robust steps would be taken to adopt a more vigilant ‘zero tolerance’ policy concerning sexual misconduct. Repeatedly, the military has been at pains to extol the virtue of its military justice system and its capacity to deal with such serious crimes.

One of the key findings of the External Review Authority (ERA), or the March 27, 2015, Deschamps Report,\(^149\) is that there is an underlying sexualized culture in the CAF that is hostile to women and LGBTQ\(^150\) members, and conducive to more serious incidents of sexual harassment and assault. Cultural change is therefore key. According to the ERA, it is not enough to simply revise policies or to repeat the mantra of ‘zero tolerance’.

The ERA found that there is an undeniable problem of sexual harassment and sexual assault in the CAF, which requires direct and sustained action. In particular, the CAF needs to engage in broad-based cultural reform to change the underlying norms of conduct that are giving rise to pervasive low-level harassment, a hostile environment for women and LGBTQ members, and, in some cases, more serious and traumatic incidents of sexual assault. Dismissive responses such as ‘this is just the way of the military’ are no longer appropriate.\(^151\)

The ERA findings and resulting recommendations also concluded that there is evidence to show that sexual assaults continue to occur at too high a frequency in the military, despite the recent strongly worded statements by the CDS and other leaders in the military hierarchy. CAF policy reviews initiated under Op HONOUR as well as the presence of the Military

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\(^7\) Ibid at para 4.

\(^147\) Ibid at para 4.

\(^148\) The Canadian Forces Mental Health Survey, 2013, was conducted by Statistics Canada, in conjunction with the DND. It surveyed currently serving members only and would not have included anyone who was sexually assaulted and left the military before the survey was conducted. The statistics agency surveyed 6,700 full-time regular members of the Forces with a proportional percentage of women and men to the military from April to August 2013. It found that a total of 1,400 of the 8,900 full-time female CF members (in 2013) have been sexually assaulted, or sexually touched against their will while on base, on an operation or by military or non-military DND personnel, according to the survey.

\(^149\) The review was conducted by retired Supreme Court Justice Marie Deschamps. Her report was submitted on March 27, 2015. http://www.forces.gc.ca/en/caf-community-support-services/external-review-sexual-mh-2015/summary.page

\(^150\) LGBTQ stands for lesbian, gay, bisexual, transgender and queer.

Ethos such as leadership and concern for the health, welfare and morale of subordinates, discipline, supervision and oversight (two-levels down), esprit de corps and camaraderie should in unison curb such a criminal culture of abuse.

Added to this mix is also the equally disturbing fact, as reported by retired Madam Justice Marie Deschamps, that many survivors of sexual misconduct are unable to trust the chain of command as well as the military police to take affirmative action against their assailants.\(^{152}\)

It was readily apparent throughout the consultations that a large percentage of incidents of sexual harassment and sexual assault are not reported. First and foremost, interviewees stated that fear of negative repercussions for career progression, including being removed from the unit, is one of the most important reasons why members do not report such incidents. Victims expressed concern about not being believed, being stigmatized as weak, labelled as a trouble-maker, subjected to retaliation by peers and supervisors, or diagnosed as unfit for work. There is also a strong perception that the complaint process lacks confidentiality. Underlying all of these concerns is a deep mistrust that the chain of command will take such complaints seriously. Members are less likely to be willing to report incidents of sexual harassment and assault in a context in which there is a general perception that it is permissible to objectify women's bodies, make unwelcome and hurtful jokes about sexual interactions with female members, and cast aspersions on the capabilities of female members. That such conduct is generally ignored, or even condoned, by the chain of command prevents many victims from reporting incidents of inappropriate conduct.\(^{153}\)

The ERA found that members appear to become inured to this sexualized culture as they move up the ranks. For example, non-commissioned officers (NCOs), both men and women, appear to be generally desensitized to the sexualized culture. Officers tend to excuse incidents of inappropriate conduct on the basis that the CAF is merely a reflection of civilian society. There is also a strong perception that senior NCOs are responsible for imposing a culture where no one speaks up and which functions to deter victims from reporting sexual misconduct.

On November 26, 2016 Statistics Canada\(^{154}\) released the results of a survey on Sexual Misconduct in the Canadian Armed Forces, 2016. The purpose of the survey was to collect information about the prevalence and nature of inappropriate sexual behaviour within the military, the reporting of inappropriate sexual behaviour to authorities and military member’s perception of the CAF response to this issue. The survey was conducted from April 11 to May 13, 2016. The survey was apparently distributed to 56,000 Regular Force members and 27,000 Reservists. Responses were received from 43,000 members. The response rate among Regular Force members was 61% and 36% for Reserve Force members. The survey established that as of February 2016, women accounted for 15% of the armed forces.

\(^{152}\) Many CAF members have learned at their peril that the reporting of a sexual assault can bring about inevitable adverse career and reputational consequences.

\(^{153}\) Supra. ERA Executive Summary, page iii.

\(^{154}\) See link: http://www.statcan.gc.ca/daily-quotidien/161128/dq161128a-eng.pdf
This is a summary of the key findings of the survey:

- 960 of the 43,000 respondents reported being victims of a sexual assault during the previous 12 months either in the military workplace or in situation involving military members, DND employees or contractors.

- Among working Canadians, less than 1% of persons experienced sexual assault. In the armed forces, more than one quarter (27%) of women will be victims of sexual assault at least once during their military careers. The proportion for men is 3.8%.

- In 2016, nearly 1 in 20 Regular Force and nearly 1 in 12 female reservists report being sexually assaulted. Nearly half of these (49%) were committed by a supervisor of higher military rank.

- Less than 1 in 4 reported sexual assault to someone in authority.
- Only 7 percent of victims of sexual assault reported the incident to the Military Police.
- 35% of women did not report being sexually assaulted for fear of negative consequences.
- 18% of women did not report being sexually assaulted because they have no confidence in the CAF complaint procedure.

Recommendation.

The willingness of the CAF to take a hard look at its own practices and procedures through this independent review is a measure of the seriousness with which the military takes the problem of inappropriate sexual conduct. However, serious consideration must be given to returning to the civil society jurisdiction over sexual assaults.155

However, there is a broadly held perception in the lower ranks that those in the chain of command either condone inappropriate sexual conduct or are willing to turn a blind-eye to such incidents.156

This might explain, at least in part, why there is so much under-reporting of sexual misconduct in the military. In addition, victims have purposely

155  This can be done by adding “Sexual Assault” to the list of offences not triable by service tribunals at section 70 of the NDA.

been excluded from the protection extended to every other person in Canada under the Canadian Victims Bill of Rights.

Assault against a CAF soldier is more than an issue of military discipline. It is a serious violation of a victim’s most fundamental right to integrity, dignity and security of the person.

8. PROFESSIONAL ASSOCIATIONS AND THE RIGHT TO ASSOCIATION

On January 16, 2015, in a 6-1 ruling the Supreme Court of Canada extended the Freedom of Association provision in the Charter to permit members of the RCMP to form a professional association to engage into collective bargaining to address long-standing issues, mostly related to service conditions, grievances, equipment and consultations on work-place issues. This leaves the CAF as the only workplace in Canada where the constitutional right of freedom of association is not authorized.

On enrolment, a new recruit is required to accept certain professional obligations and responsibilities under the Code of Service Discipline and the Statement of Defence Ethics. This is not unusual. In fact, this is pretty common nowadays. Consider that many professions have Codes of Conduct that are to be followed. These Codes do not suspend, displace or supplant the Charter of Rights and Freedoms. At best, they may be seen to ‘limit’ a given right, on explicit consent of that soldier, sailor or airperson. In this respect, military discipline is no different from the discipline of a profession, a university, a political party or a labour union. The military Code of Service Discipline makes specific requirements of the individual; so do theirs. It has a system of punishments; so do theirs. Their main object is, equally, to preserve the interests and further the opportunities of the cooperative majority. One difference between discipline in the military and in any other ‘free’ institution is this: if civilians disagree with the position and direction of their company, they have the privilege to quit or to mobilize others to their way of thinking—military soldiers do not.

In 2010, the Council of Europe adopted a recommendation on the Human Rights of Members of Armed Forces which states, inter alia, that members of armed forces have the right to freedom of peaceful assembly and to freedom of association and that they have the right to join independent organizations representing their interests. As a result, there is currently a well-structured social dialogue taking place in Austria, Belgium, Bulgaria, Denmark, Finland, Hungary, Ireland, Norway, Romania, Switzerland and the Netherlands concerning military associations. The central question in these debates is how to respect the rights of military personnel to the freedom of association and assembly while at the same time meeting the needs and legitimate concerns of the military, given its unique function.

Perhaps surprisingly, the experience of these European nations is that the right of association has not compromised combat efficiency or military discipline. In fact, permitting democratic military associations may have de facto improved the morale and loyalty of troops. In these European countries, a
culture shift has occurred and military associations are now recognized as valuable partners for defence administrations.

a) Sweden and Germany currently have functioning independent military associations. In Germany, the *Deutscher Bundeswehr Verband* was created in 1956, and has approximately 200,000 members—three times the size of Canada’s entire Regular Force. The *Deutscher Bundeswehr Verband* is financed by members’ fees and they employ their own advisory staff.

b) Another successful model is the *European Organization of Military Associations* (EUROMIL) which was founded in 1972. EUROMIL is a conglomerate of more than 42 associations from over 24 EU countries representing approximately 500,000 military members! The mission of EUROMIL is: ‘Representing human rights, fundamental freedoms and professional interests of military personnel in Europe,’ including the improvement of the living and working conditions of military personnel and the application of and correct implementation of EU social legislation for military personnel.

**Recommendation.**
Members of the CAF should fully enjoy the right to set up a specific professional association geared to protecting their professional interests in the framework of democratic institutions.

Without a professional association to represent their collective social interests, Canadian soldiers rely on bodies such as the Military Police Complaints Commission, the DND/CAF Ombudsman or the House of Commons (in particular the Standing Committee on National Defence) to present a counterweight or to correct a wrong. But this is clearly not enough.
PART IV – CONCLUSION

Over the years, the body of law in Canada known as ‘military law’ with its own governance regime and penal justice system has tended to evolve quite separately and apart from the civilian justice system. This is due in large part to two interconnected factors. First, there is the fact that the law confers upon the Judge Advocate General (JAG), who is a military officer reporting not to the CDS but to the MND, the unfettered governance over all uniformed actors in the military justice system. Second, there are only a very tiny number of judges, lawyers, law professors, legislators and public officials who concern themselves with military law. As a result there is little legal, political and judicial scrutiny of that system. Not even the Canadian Bar Association, which has the mandate to pursue improvement in the law and the administration of justice, has the means or will to intervene.

158 For instance, the Strengthening Military Justice in the Defence of Canada Act, SC 2013 c. 24 assented on June 19, 2013 is still not in force for the vast majority of its contents.
The steady expansion of the military justice system over the recent decades has resulted in a corresponding loss of a high number of rights for soldiers, including the constitutional right to a jury trial for those prosecuted before and tried by military tribunals. This loss of rights applies to members of families accompanying the CAF abroad as well as to civilians, including contractors and journalists. All these

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159 There are a number of other fundamental, procedural and sentencing rights denied an accused under the military justice system. For instance:

a. The loss of a preliminary inquiry. As a result of the transformation of Criminal Code offences into service offences, an accused before a military tribunal loses the right to a preliminary inquiry. Traditionally the preliminary inquiry was used to discover and test the prosecution’s evidence. With the judicially imposed duty on the prosecution to disclose its evidence to the defence [See: R. v. Stinchcombe, [1995] 1 SCR 754], the preliminary inquiry is practically no longer used as a disclosure mechanism. However, it is still used in appropriate cases to test before trial the strength and reliability of the prosecution’s evidence and case.

b. The loss of the benefits of a hybrid offence. Hybrid offences under the Criminal Code loose that characteristic in the military penal justice system where they become service offences. [R. v. Dixon, 2005 CMAC 2 at para 23]. For example, a person charged under paragraph 130(1)(b) of the Act for a sexual assault is not charged with a breach of the Criminal Code. The possibility of a prosecution by way of summary conviction, with the corresponding benefit of a limit on the penalty, does not exist for a member of the Armed Forces even if the Criminal Code offence is committed in civilian like circumstances. [See R. v. Page [1996] 5 CMAR 383 at 387.]

c. Sentencing range. There is a significant gap between the range of punishments and sanctions available to military tribunals in comparison with the range available under the civilian criminal justice system. Taking into account the amendments, still not in force, brought by the Strengthening Military Justice in the Defence of Canada Act, an accused prosecuted before military tribunals is not entitled to a suspended sentence, a conditional discharge, a probationary order and a sentence of imprisonment to be served within the community or their unit. These are all options available to a civilian tribunal sitting in criminal matters. While the Act will allow for the passing of an intermittent sentence of detention or imprisonment when the 2013 amendments will come into force, the fact remains that such sentence will be available only if its length does not exceed fourteen (14) days. This contrasts with, and is more restrictive than, section 732 of the Criminal Code which fixes at ninety (90) days the maximum length of imprisonment for the availability of an intermittent sentence.

Example (d) of this footnote is continued on the next page.

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159 This footnote is continued from the previous page:

d. A military tribunal can only pass one sentence on an offender. Section 148 of the NDA (to be renumbered 203.95 when the Strengthening Military Justice in the Defence of Canada Act will come into force) states that only one sentence shall be passed on an offender when multiple findings of guilt are made at trial under the Code of Service Discipline. This provision has been criticized by the CMAC in R. v. Larocque 2001 CMAC 438; R. v. Lui, 2005 CMAC3; and R. v. Thompson, E.R. 2009 CMAC 8. In the Lui case, the CMAC ruled that a single sentence “creates, at the sentencing level, operational difficulties when one or more convictions are set aside. In such circumstances, it is impossible to know the impact and influence that these convictions had on the nature and length of the sentence imposed by the military judge.” See: R. v. Thompson, E.R. (2009) CMAC 8 at paras, 54-54. It is also often difficult for the CMAC to determine the appropriate sentence since it has not heard the evidence. It is now well accepted that the trial judge is in a better position to impose a sentence and the reviewing court should exercise great deference.
dency and a capacity to delay the implementation of legislative reforms. Consider for instance, Bill C-15—Strengthening Military Justice in the Defence of Canada Act which was enacted into law on June 19, 2013. At the time of writing, 71 of the 134 sections have yet to be put in force. Some of these provisions deal with several subjects of importance to the rendering of a fairer military justice such as the scope of sentencing principles, absolute discharge, intermittent sentences, restitution, victim impact statements, etc.

As Professor Nathalie DesRosiers, then Dean of the Law Faculty, University of Ottawa said during the Conference and Debate on Canadian Military Law in November 2015 the ‘subject of military justice ought to be studied through the prism of good democratic government’. As also noted by her, the military cannot separately operate in silos from societies that it represents and supports. Reform of the Canadian military system has been rather untimely and conducted internally in a piecemeal fashion. Just like ‘war is too important to be left to generals,’ reform of the military justice system is too serious and important to leave to the military alone.

Attempts to modernize the NDA to bring it more in line with global trends or the Canadian civilian penal system have been serially resisted by the military. Several reforms made as a result of pressures were initiated from outside, especially the judiciary, but not within DND. At present, the Canadian penal military justice system mitigates the right to equality before and under the law as well as the right to equal protection and benefit of the law guaranteed by section 15 of the Canadian Charter of Rights and Freedoms. There is an urgent need for Parliament to embark upon a review of the Canadian military justice system which will lead to its evaluation and rejuvenation to ensure its harmony with the ordinary law of Canada. Such reform of the military justice system not only would have implications for those in the military, but would also ensure the CAF assumes its rightful place within Canadian society.

160 “La guerre! C’est une chose trop grave pour la confier à des militaires.” Translation: “War is too serious a matter to entrust to military men” as quoted in Clémenceau and the Third Republic (1946) by John Hampden Jackson, at 228.
HONOURABLE GILLES LÉTOURNEAU, B.A., LL.L, LL.M, PH.D., QC.

Served in both the private and public sectors, including several years as Professor of law at University of Laval, and as President of the Law Reform Commission of Canada.

Appointed judge of the Federal Court of Appeal of Canada and of the Court Martial Appeal Court of Canada in 1992, he attained public prominence as Chairman of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia in the mid 1990’s.

In June 2013, he was invested with the “Médaille du Barreau du Québec” in recognition of his outstanding contribution and the excellence of his significant contribution to the advancement of the law since his call to the Quebec Bar in 1969.

He is the author and co-author of numerous texts, reports and articles including:

Canadian Military Law Annotated, Thompson Carswell, 2005

PROFESSOR MICHEL W. DRAPEAU, O.M.M, C.D., LL.L, LL.B.

Professor Drapeau retired from the Canadian Forces in 1993 after accumulating 34 years of military service. He was invested as an Officer in the Order of Military Merit in 1992.

Following retirement, Colonel Drapeau went on to obtain a common law as well as a civil law degree. Called to the Bar of Ontario in 2002, he specializes in military and veterans matters. He is an adjunct professor of law at the University of Law.

He appeared often before the House and Senate committees as an expert witness on military issues. He is a member of the International Society for Military Law and the Law of War as well as the International Society for the Reform of Criminal Law.

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