SUBMISSION

to

The Third Independent Review of the Canadian Military Justice/Discipline

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Submitted by email on 5 January 2021

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Recommended Citation: Dunne, Timothy J., "Submission Regarding the Third Independent Review of Canadian Military Justice : An Act to amend the National Defence Act and to make consequential amendments to other Acts (The Statutes of Canada 1998, chapter 35) (2021).

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Major Tim Dunne (retired) is a Halifax-based professionally accredited, award-winning lecturer, instructor, writer and communications practitioner with more than 40 years Canadian and international experience with the Canadian Armed Forces and as an independent practitioner, instructor and lecturer. His experience includes communications work in conflict and post-conflict regions in Egypt, Israel, Bosnia Herzegovina, Macedonia and Kosovo; communications instruction to members of ministries of defence in eastern and western Europe, the Middle East and north Africa; and communications support to NATO simulations and operations in Bulgaria, Romania, France and Turkey. He conducted communication seminars in Algeria, Austria, Italy, Jordan, Mauritania and Ukraine.

At the request of the RCMP and the Canadian Transportation Safety Board, he established and co-managed the international media centre for the September 1998 crash of Swissair 111.

He researched and prepared the submission that led to the establishment of Canada's Defence Public Affairs Learning Centre. He assisted Medialøven AS of Oslo, Norway, in the training of instructors for the Public Affairs Regional Centre of Skopje, North Macedonia, a communication centre of excellence in public sector communication and public affairs instruction.

He was the senior Canadian public affairs officer in Zagreb, Croatia, with the United National Peace Force (1995); deputy-chief of the NATO Public Information Centre in northern Bosnia Herzegovina (1996); chief of the NATO Press Information Centres for the Cooperative Key air exercises in Romania (2000), Bulgaria (2001 and 2003) and France (2002).

He was appointed the Military Affairs Advisor for the Province of Nova Scotia from 2007 to 2009, a first in Canada. He has written extensively about military affairs, NATO and the United Nations; was an experienced crisis and emergency communicator with NATO, often deployed into conflict areas with no notice; and has worked with military, media and NGOs in troubled regions, including the UN High Commissioner for Refugees, Office of the UN Special Representative and the International Committee of the Red Cross. He received his Master of Arts (history and political science) from the Royal Military College of Canada in 2008.

His awards include The National Award of Excellence from the Canadian Public Relations Society (1988), citation from the Privy Council of Canada (1991), the International Association of Business Communicators Silver Leaf and Gold Quill awards (1998), the Bulgarian Order of Loyal Service (2001), United Nations peacekeeping medals for service in the Middle East (1978) and the Balkans (1995) and military service medals for Bosnia Herzegovina, Kosovo and Macedonia (2002 to 2004). He is the former chair of the Royal United Services Institute (Nova Scotia) Security Affairs Committee, the founder of the Canadian Observatory for Military Justice Reform and the director of RUSI-NS's Military Justice Project.

He is currently an adjunct professor of communications studies at Mount Saint Vincent University in Halifax, a defence and security affairs columnist with the Halifax Chronicle Herald, former chair of the Royal United Services Institute's Security Affairs Committee.

INTRODUCTORY NOTE

I wish to note that I am not a lawyer and have not received any legal training. I have undertaken this submission to the Third Independent Review Authority of the Department of National Defence as an advocate for the women and the men of the Canadian Armed Forces. I have had the honour and privilege of serving with so many of our servicemen and women in Canada and in a number of conflict and post-conflict regions. Canada has many reasons to be proud of our military women and men and their selfless service and dedication to the mission and operational objectives of the nation and our nation's military.

My approach to this submission is that military discipline is evolutionary and changes in response to the social, security and political circumstances of the nation. Accordingly, I have included some historical context in relation to selected issues within the category of military discipline or military justice.

TJD

Acronyms and Terminology

ADF: Australian Defence Force

AJAG: (Canada) Assistant Judge Advocate General

AMC: Australian Military Court

BGen: Brigadier General

CAF: Canadian Armed Forces

CCRF: Canadian Charter of Rights and Freedoms

Capt: abbreviation for Captain

Capt(N): (Canada) abbreviation for Captain (Navy) – the naval equivalent of colonel

CBA: (Canada) Canadian Bar Association

CFAO: Canadian Forces Administrative Orders (replaced by Departmental Administrative Orders and Directives)

CFB: (Canada) Canadian Forces Base

CFPM: (Canada) Canadian Forces Provost Marshal (in effect, the CFPM is the chief of the Canadian Forces Military Police)

CFSPDB*:* (Canada) Canadian Forces Service Prison and Detention Barracks

Chain of command: (Canada) The succession of commanding officers from a superior to a subordinate through which command is exercised.

CIS: Criminal Investigation Section

CMA: (Canada) Court Martial Administrator

CMAC: (Canada) Court Martial Appeal Court

Cmdre: Commodore the naval equivalent of brigadier general)

Col: abbreviation for Colonel

CSD: (Canada) Code of Service Discipline

DAOD: (Canada) Departmental Administrative Orders and Directives

DCS: (Canada) Defence Counsel Services

DFDA: (Australia) Defence Force Discipline Act Cth (1982)

DLaw: (Canada) Director of Law

DMP: (Canada) Director of Military Prosecution

DND: (Canada) Department of National Defence

GCM: General Court Martial

Gen: abbreviation for General

JAG: Judge Advocate General

LCol: abbreviation for Lieutenant-Colonel

LGen: abbreviation for Lieutenant General

Maj: abbreviation for Major

MCpl: (Canada) Master Corporal

MGen: Major General

MND: (Canada) Minister of National Defence

MP: Military Police

MPCC: (Canada) Military Police Complaints Commission

OCMJ: (Canada) Office of the Chief Military Judge

Pte: (Canadian) Private

QR&O: (Canada) Queen's Regulations and Orders

RAN: (Australia) Royal Australian Navy

RCAF: (Canada) Royal Canadian Air Force

RCN: (Canada) Royal Canadian Navy

rtd: (Canada) retired

SCC: (Canada) Supreme Court of Canada

SCM: Standing Court Martial

SIPA: (Canada) Security and Intelligence Prosecution and Appeal

UCMJ: (United States) Uniform Code of Military Justice

VAdm: abbreviation for Vice Admiral (equivalent to Lieutenant General)

MILITARY JUSTICE OR MILITARY DISCIPLINE

In the opinion of British General Sir John Hackett, "The function of the profession of arms is the ordered application of force in the resolution of a social problem." Harold Lasswell, in his book, *The Analysis of Political Behaviour* (p.152), described this function as the management of violence. (Hackett, 1983, p. 9) Armed forces are military institutions established by the state for the primary purpose of national defence against external threats and internal conflicts. (Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2015, p. 2) The presence of and training in the employment of lethal weapons requires a strict regime of law and discipline to control the use of weapons and the employment of those who use them on behalf of the state.

As Canada is a *Common Law* nation many of our legal traditions and laws are based on Britain's.

Virtually from the departure of the Romans in 383 CE until the arrival of William the Conqueror, and for centuries afterwards, there was no professional naval service or army in England. Vessels were merely armed troop transports designed to carry the English kings and their followers to the English territories in France. The relative absence of expeditionary military operations left little use for naval vessels or for a permanent professional naval force in the 11th to 15th centuries. The king's prerogative permitted him to make rules and regulations for the government and discipline of his troops while they were so employed. These *rules and regulations* were the Articles of War initiated by Richard I (8 September 1157 – 6 April 1199), also known as *Richard the Lionheart*, to control and discipline the *sailors* while deployed on the king's missions.

Civilian "justice" was harsh and brutal in those times, and military justice was particularly so. The captains of these ships were expected to manage any and all infractions, minor and serious, according to the customs and the law dictated by maritime courts that were established by the coastal towns that provided the ships. The laws and their resulting punishments were not standardized and were based on the "customs of the sea", developed over time by nations with maritime traditions, and commanders, commanding officers and senior personnel used corporal punishments to maintain discipline among the crews. Keel hauling and flogging were most popular, but other punishments could be fatal. Sleeping while on watch could have a bucket of water thrown over the sailor for the first three offences, but the fourth would have him placed in a basket or net hung below the bowsprint with beer, bread and a knife. When he had nothing else to drink and eat, he faced a choice: stay and starve or cut his way out and drown in the sea. (McDonald, 1985)

Beginning in the medieval period until the William III's Mutiny Act of 1689, there was no separation between civilian and military jurisdiction. Offenders in England's feudal armies were brought before the courts of chivalry, *curia militaris*, imported to England by William the Conqueror in 1066. As the use of courts of chivalry diminished the use of military courts, known as *councils of war*, were authorized by the sovereign's *Articles of War*. These *councils of war*

eventually evolved into the modern court martial, the most visible and well-known manifestation of military discipline.

Canada's body of military law is contained within the National Defence Act (NDA), with the Code of Service Discipline (CSD) established under Part III of Queen's Regulations and Orders (QR&O), which interprets and amplifies the NDA.

> ***This Code sets out the jurisdiction of the Canadian Armed Forces, the service offences and punishments, provides for arrest and pretrial custody of service members, sets out the military tribunals empowered to hear cases under the Code, and establishes a Court Martial Appeal Court composed of civilian judges.***
>
> ***Members of the Canadian Armed Forces are subject to the Code of Service Discipline and are also subject to all other laws of Canada.***
>
> ***The National Defence Act and the system of military justice provided by the Act are subject to the Constitution Act, including the Canadian Charter of Rights and Freedoms. The Special Advisory Group on Military Justice and Military Police (Investigation) Services headed by a former Chief Justice of the Supreme Court of Canada has recognized the need of a separate and distinct military justice system while the Supreme Court of Canada has recognized its purpose and legitimacy in the case of R. v. Généreux, [1992] 1 S.C.R. 259.***

The Judge Advocate General branch, the Canadian military's legal branch, explains the need for its *justice* system:

> ***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. (...) Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Discipline to allow it to meet its particular disciplinary needs.*** (Military Justice System, 2018)

It was 30 years ago that the Supreme Court of Canada (SCC) passed its judgment on the unique requirements of the Canadian miltary disciplinary system:

> ***"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. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs.***

> ***In addition, special service tribunals, rather than ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military."*** (R. v. Généreux, 1992)

During these three decades there has been significant social change in Canada that has had a significant impact on the nation and its various institutions. These include but are not exclusive to:

- The Charlottetown Accord and referendum: While the Accord did not receive the assent of the Canadian people in the 26 October 1992 referendum, it did create a higher level of awareness of social, political and cultural issues relating to First Nations, Quebec, institutional reform and federalism.
- Prison reform: Bill C-83, an amendment to the Corrections and Conditional Release Act, received Royal Assent in June 2020 and as of Jan. 1, 2020, solitary confinement was [supposedly] abolished, among other measures.
- The Truth and Reconciliation Commission (2008 – 2015) in which Canadian society, through the federal and provincial governments, recognized the institutional wrongdoings and their impact on Canadian First Nations.
- RCMP unionization: In the early twentieth century federal legislation prevented the RCMP from unionizing. However, in 2015, the Supreme Court of Canada determined this was unconstitutional, permitting the force to become a bargaining unit for salary and working conditions.

These developments bring into sharp focus that Canada is undergoing social and institutional change that has, with some exceptions, left the institution of military discipline/justice[1] untouched.

The concurrent and interrelated histories of warfare and of armed forces reflect that military discipline largely reflected the level of social development of its society.

> The leaders of Sparta believed that the persistent threat of war justified its subjugation of all other considerations to the maintenance and employment of its military. Spartan elders determined if a male child was a candidate for military service he was left with his mother until the age of seven, when he was trained for military service from 21 to 60. If he was judged to be unfit for the army he was left to die from exposure. (Hackett, 1983, pp. 11-13)

[1] I draw the distinction that the Canadian Armed Forces does not have a justice system, but a disciplinary system.

> The Roman armies of Augustus, Antony and Caesar employed public degradation for failure, death for desertion, mutiny, or insubordination, and decimation (execution of one in ten soldiers, selected by lot) and occasionally destruction of the entire unit. (Hackett, 1983, p. 19)

> British courts martial had three non-capital forms of serious punishment:[2] imprisonment, flogging and "marking.[3]" Flogging was the preferred punishment, but it was partially abolished in 1867 following the death of 74th Highlanders Private Robert Slim who died in February 1867 from his sentence of fifty lashes with the cat o'nine tails, the equivalent of 450 strokes. (IGT Administration, 2016)

> "Flogging was finally abolished by the British Army in 1881. . . . The War Office court martial returns for the years 1899 to 1902, the period of the Boer War, show that very few executions were carried out in South Africa. The usual sentences for offences of desertion and sleeping on post varied between a few months' imprisonment with hard labour and ten years' penal servitude." (Babington, 1983, p. 2) Punishments increased in severity fifteen years later, during the First World War. "Viewed by the standards of today few of the executed men received the most elemental form of justice. They were tried and sentenced by courts which often regarded themselves as mere components of the penal process and which, until the final year of the war, were asked to perform a complex judicial function without any sort of legal guidance." (Babington, 1983, p. xi) Official records show that 346 soldiers of the British Expeditionary Force were executed during the First World War, (Oram G. , 2001, p. 94) twenty-five of whom were Canadian.

In general, as the society's level of social development grew, the level of sadism and torture associated with military punishment decreased in civil prisons. Regrettably, there remains much progress to be achieved in the Canadian Forces Service Prison and Service Detention Barracks (CFSPDB), beginning with the issue of whether it should continue to exist at in 21st century Canada.

Beginning in the medieval period until the William III's Mutiny Act of 1689, there was no separation between civilian and military jurisdiction. Offenders in England's feudal armies were brought before the courts of chivalry, *curia militaris*, imported to England by William the Conqueror in 1066. As the use of courts of chivalry diminished the use of military courts, known as *councils of war*, authorized by the sovereign's *Articles of War*. These councils of war eventually evolved into the modern court martial, made necessary by the distances from the British seat of justice. (Trueman, 2015) Troop transport would take weeks, if not months, to

[2] Capital punishment (execution) was principally accomplished by hanging.
[3] Also known as "branding."

return offenders to England for trial, a situation that would persist until the mid-twentieth century.

Canada was subject to the provisions of British military law during the first three expeditionary campaigns, specifically the Boer War, and the First and Second World Wars. British courts martial ordered and implemented the executions of twenty-five Canadians during the First World War. Only a single Canadian soldier was executed during the Second World War. With the Korean War looming in 1950 the Canadian government of Louis St. Laurent was anxious to pass its own legislation for military law and appointed the Hon. Brooke Claxton as Minister of National Defence (MND). Claxton brought the National Defence Act (NDA) to the House of Commons for passage on 7 June 1950. It received Royal Assent on 9 September 1950.

Claxton's version of the NDA of 1950 does not contain the term "military justice" nor does it assign any responsibilities for the "stewardship" or "superintendence" of military justice, as the current version of the NDA does, however, states that "The Judge Advocate General has the superintendence of the administration of military justice in the Canadian Forces." (NDA, 2020, Section 9.2(1))

But the respective functions of "justice" and "discipline" are fundamentally different. The Corrections and Conditional Release Act (S.C. 1992, c. 20) Section 3 noted that the purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by (b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community. An example of rehabilitation under the Canadian criminal justice system for one of Canada's most reviled prisoners, Karla Homolka, which included correspondence courses in sociology through nearby Queen's University. She was paroled with a Bachelor of Arts degree in psychology while incarcerated at Kingston's Prison For Women.

However, the Canadian military "justice" system provides a very different experience. Private Kyle Brown, convicted of manslaughter in the torture and death of 16-year-old Somali Shidane Arone, served part of his sentence at the Canadian Forces Service Prison and Detention Barracks at CFB Edmonton, AB. In *Scapegoat: How the Army Betrayed Kyle Brown*, the book which he co-wrote with the Toronto Sun's editor Peter Worthington, Brown describes a very different incarceration system which was coercive and authoritarian, where there is no liberty. There were, however, frequent inspections, drill and a routine in which service prisoners and detainees[4] were required to request permission to even use condiments on their meals. (Worthington & Brown, 1997)

[4] In the Canadian Armed Forces, the terms "imprisonment" and "detention" are not synonymous, and they have different objectives. A "service prisoner" serves a sentence imposed by a court martial for offences for which s/he has been found guilty, while a "detainee" is serving a punishment for a minor infraction imposed by a summary trial. Sentences for a service prisoner can be "two years less a day" at the Canadian Forces Service Prison and Detention Barracks (CFSPDB) and if there is additional time left on the sentence, it is to be served at a federal penitentiary. Service detainees serve thirty days or less.

The expression, "Canadian Military Justice System" is misleading and inaccurate. It describes an approach to misconduct that is disciplinary, punitive and coercive, absent the normal measures to reorient an offender to reintegrate into Canadian society as a contributing citizen. The Canadian military's system is focused on adjustment of the offender to conform to the expectations of military obedience and compliance. This is an inaccurate description which endows it with a false aura of rehabilitative correction.

> ***Recommendation 1**: The term "Canadian military justice" be replaced with the term "Canadian military discipline" and references to "military justice" be replaced with "military discipline."*

THE CHANGING CANADIAN MILITARY ENVIRONMENT

The first *tectonic* revision of the NDA was the Canadian Forces Reorganization Act of 1 February 1968, which amalgamated the three services into a single military force with common uniform, logistics, financial and legal systems. Over time, the services regained their individual uniforms and identities while retaining the common logistics, administrative and legal infrastructure.

The second *tectonic* revision was the Operation DELIVERANCE, the deployment to Somalia in 1992-93 to assist with United Nations efforts to address the civil war and famine.

In December 1992, approximately 1,400 Canadian troops, mostly of the Canadian Airborne Regiment, the Army's paratroop regiment, arrived in the town of Belet Huen to establish order and distribute relief supplies in the region. Airborne troops experienced difficulty from impoverished locals who would pilfer and steal whenever possible and whatever was available. Somali looters repeatedly broke into the Canadian camp at Belet Huen to search for food, and whatever attractive items they could find.

In response Canadian commander, Lt.-Col. Carol Mathieu directed his men to shoot looters in the legs ("between the skirts and the flip-flops") if they ran from soldiers patrolling the compound. Another unnamed officer allowed the soldiers to capture and abuse thieves. Canadian soldiers fired at Somalis fleeing from the camp in January and February 1993, and occasionally capturing intruders to beat them and take photographs of their captives. A small group of Canadian troops laid a trap for people trying to sneak into the compound at nighttime, 4 March 199, leaving food and water near a perimeter fence to entice locals to break in. Two Somalis crawled through the fence and grabbed the food, ignoring the Canadians' orders to stop. Both were shot in the back as they fled, killing Mr. Achmed Aruush.

These soldiers escaped punishment.

On 16 March, 16-year-old Shidane Arone broke into the compound and was taken prisoner. Bound and blindfolded, the teenager was beaten and tortured for hours, punched and kicked,

the soles of his feet burned with a cigarillo and his shins struck with a metal bar. Arone pleaded for the torture to stop. He was dead by morning. Much of his suffering was photographed by his abusers, including paratroopers Master-Corporal (MCpl) Clayton Matchee and Private (Pte) Kyle Brown. Other soldiers who did not take part in the beatings could hear Arone's screams and pleas for mercy but did nothing to intervene.

Military Police arrested MCpl Clayton Matchee who, while in custody, tried unsuccessfully to hang himself with bootlaces, leaving him permanently brain damaged. Pte Brown was charged, convicted by court martial of manslaughter and torture, sentenced to five years and dismissed from the military.[5] The mentally incapacitated Matchee was found unfit to stand trial and never prosecuted. Another soldier who witnessed the abuse pleaded guilty to negligent performance of duty and was briefly imprisoned and the demoted. Lt.-Col. Mathieu was the only officer charged and court-martialled for creating a culture of aggression within his unit that led to Arone's death.

In November 1994, the Canadian government disbanded the Canadian Airborne Regiment and announced an independent public inquiry into the *Somalia scandal*.

LÉTOURNEAU INQUIRY

The Commission of Inquiry into the Deployment of Canadian Forces to Somalia, headed by Federal Court Justice Gilles Létourneau held public hearings from late 1995 until the fall of 1996 revealing that military officers had altered reports and documents relating to the scandal before they were released to the media, and that such tampering of information led a number of senior officers and generals, resulting in several courts martials and resignations.

Justice Létourneau's inquiry was prematurely concluded before it could investigate the actual atrocities in Somalia. The final report was released in 1997, focusing on what it considered the institutional failures of the Canadian Armed Forces (CAF) that led to those crimes, and on the cover-up by military leaders. The 2,000-page report was a critique of the military's senior leadership and chain of command and included 157 recommendations for the transformation of the military justice system and the quality of the officers corps.

DIXON INQUIRY

Minister of National Defence, the Honourable Douglas Young, on 17 January 1997, directed the establishment of the Special Advisory Group on Military Justice and Military Police Investigation Services as an external advisory group. The Right Honourable Brian Dickson was

[5] There are three forms of separation from the Canadian Armed Forces: "release" describes administrative separation for voluntary termination, retirement and completion of a defined period of service; "dismissal" is a punitive separation; and "dismissal with disgrace" is the most egregious form of punitive dismissal.

appointed chair, and Lieutenant-General Charles H. Belzile (Ret.) and Mr. J.W. Bud Bird as members of the Special Advisory Group.

The mandate of the Special Advisory Group was: "to assess the Code of Service Discipline (CSD), not only in light of its underlying purpose, but also the requirement for portable service tribunals capable, with prompt but fair processes, of operating in time of conflict or peace, in Canada or abroad. (Dickson, p. 2)

The Ministerial Direction also identified specific areas to be considered by the Special Advisory Group:

- the jurisdiction, powers of punishment, structure and procedures of both summary trials and courts martial;
- the adequacy of review mechanisms for summary trials and of civilian appellate review of courts martial;
- the role of the chain of command in the investigation of complaints and the laying of charges;
- the appropriate role, responsibility and organization of the Office of the Judge Advocate General in support of military justice;
- the relationship that should exist between the chain of command and the Office of the Judge Advocate General in the administration of military justice;
- the effectiveness of the current legal structure of the Code of Service Discipline in setting clear duties and standards for caving out those duties in the administration of military justice; and,
- actions, including changes in legislation, regulation or policy, to implement the Advisory Group recommendations.

The Special Advisory Group was also mandated to:

> ***assess the roles and 'functions of the military police, including the independence and integrity of the investigative process, against the delivery of effective police services to the Canadian Forces and the Department. The Special Advisory Group should consider and make recommendations that are responsive to the requirements of operational commanders.*** (Dickson, 1997, p. 3)

The Special Advisory Group summarized their intent of the Independent Reviews:

> ***We think that it is very important that CF members be given a voice, consistent with the appropriate authority of the chain of command, so that their concerns and complaints can be independently investigated and, if necessary, dealt with.***

> ***For in the broadest sense, military justice must include an effective, independent channel or mechanism through which service members can express their concerns about any aspect of the military establishment, without feeling that their only outlet is the media.***
>
> ***Such a mechanism would ultimately strengthen the chain of command.*** (Dickson & Belzile, 1998, p. 82)

This Group submitted its report, *The Dickson Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, on March 14, 1997. This led to the development and passage of Bill C-25: An Act to amend the National Defence Act and to make consequential amendments to other Acts (assented to 10 December 1998).

The Létourneau and Dixon reports culminated in the Bill C-25: An Act to amend the National Defence Act and to make consequential amendments to other Acts (assented to 10 December 1998), followed by Bill C-7, An Act to amend the National Defence Act on 27 April 2006. (DND, 2006) As noted above, among its many provisions was the requirement to regularly conduct reviews of the "provisions and operation of this Act" and section 96(2) clearly states that "The Minister shall cause the report on a review conducted under subsection (1) to be laid before each House of Parliament within five years after the day on which this Act is assented to, and within every five year period following the tabling of a report under this subsection" (House of Commons, 1998, p. 89) – emphasis mine. The military justice provisions of Bill C-25, which became effective on Sept. 1, 19990, include:

- clarifying the roles and the responsibilities of the Minister of National Defence and the Judge Advocate General;
- separating, on an institutional basis, the system's investigative, prosecutorial, defence and judicial functions;
- instituting summary trial reform;
- eliminating the death penalty; and
- establishing the Canadian Forces Grievance Board and the Military Police Complaints Commission.

LAMER REPORT

As noted above and in addition to these provisions, Bill C-25 required the Minister to create an independent review authority to conduct a review of the provisions and operation of Bill C-25 every five years. Former Chief Justice of the Supreme Court of Canada, the Right Honourable Antonio Lamer, was the first independent review authority, and his mandate began in March 2003, limited only to the provisions of the *National Defence Act* that were amended by Bill C-25. This led to amendments that were incorporated in Bill C-7, which:

- *enhanced the independence of military judges;*
- *permitted appointment of part-time military judges;*
- *required the unanimous decision of a court martial panel to find an accused guilty or not guilty;*
- *provided for additional sentencing options, including absolute discharges, intermittent sentences and restitution orders; and*
- *clarified the responsibilities of the Canadian Forces Provost Marshal and the Military Police Complaints Commission.* (DND, 2006)

LeSage Report

The second Independent Review of the provisions and operation of Bill C-25 was conducted by the Honourable Patrick LeSage, former Chief Justice of the Ontario Superior Court of Justice, whose report was submitted in December 2011.

Unlike his predecessors, the Ontario Superior Court's Justice Patrick LeSage had no military service. In his foreword, Justice LeSage noted the cadre of professionals who provided "valuable comments, recommendations and observations that have helped [...J shape the content of the Report. That list includes Colonel Patrick K. Gleeson (Deputy Judge Advocate General Chief of Staff) Colonel Michael Gibson (Deputy Judge Advocate General-Military Justice) and numerous other members of JAG, who undertook "the considerable challenge of educating me, regarding the military justice system."

He also added Major Patrick Vermette (Directorate of Law - Military Justice Strategic) "who shepherded us through all the base visits, was unwavering in his patience, courtesy, and providing me with invaluable information and guidance throughout this process" (LeSage, December 2011).

This begs several questions:

> With so much participation by Judge Advocate General legal staff in educating Justice LeSage, just how independent was his "independent review?"
>
> How much influence did the support, advice and guidance of legal officers' influence Justice LeSage?

What began as a gifted idea of a respected jurist who is unaffected by military service could be quickly compromised by the intervention of so many legal officers.

> ***Recommendation 2: Appointees to the Chair of future Review Authorities circumscribe the role and contributions of the Judge Advocate General office and legal officers and maintain an arms-length relationship to allow only their contributions to the work of the Review Authority as interested proponents and consider having a legal officer only as a member of the support staff in the role of liaison officer to act as intermediary between the Review Authority and***

JAG. This will prevent inappropriate influence of the Review Authority by the JAG and legal officers.

The Dickson-Belzile-Bird Special Advisory Group summarized their intent of the Independent Reviews: "We think that it is very important that CF [Canadian Forces] members be given a voice . . . ." (Dickson & Belzile, 1998, p. 82)

This is an important perception as the Department of National Defence and the Canadian Armed Forces have a significant number of senior representatives who proport to represent the interests of the general membership of the CAF but actually have little or no experience about life *in the trenches, in the lower decks or on the flightline.* The Independent Reviews are one of the very few the mechanism which the Special Advisory Group intended to give CF members a voice.

Recommendation 3: Future Review Authorities take the innovative step of including a highly knowledgeable service member or veteran who is not serving and has not served as a military legal officer in either the regular or the reserve components of the Canadian Armed Forces. This person should bring to the Review Authority a different series of perspectives of military justice and formal military discipline to inject different and, perhaps, differing insights on the issues surrounding this subject.

Recommendation 4: Future Review Authorities include a knowledgeable advocate to represent the interests of the rank and file of our military forces.

Unions for military personnel exist in Denmark, Sweden, Norway, Finland, Germany, Switzerland, Austria, Belgium, and The Netherlands, but are prohibited in England, the United States, Canada, France, Portugal, Turkey, and Greece. Perhaps it is time for this to change and give the members of the Canadian Armed Forces a voice through an official organization that is established to represent their interests.

Recommendation 5: The DND carefully select a team to investigate joining the RCMP's National Police Federation or creating an association or organization similar to the military unions of Europe. The selected team members must be disabused of anti-union biases for the Canadian military.

THE JUDGE ADVOCATE GENERAL

The Mutiny Act of 1689 empowered the Judge Advocate to act as legal adviser in all matters to the Commander in Chief, and he and his deputies advised on the charges and the evidence in cases of difficulty before a court martial was convened. The judge advocate attended courts martial to provide prosecutorial guidance and legal advice to the court. Over time, these dual responsibilities were recognized as problematic and the judge advocate and the advocate general functions of this position separated. (Dickson & Belzile, 1998. p. 25; Lawson, 1951, p. 245)

Until 1660, the monarch filled the role of the supreme commander and normally led the military into battle. After 1660, the role was normally delegated to an individual to lead their troops in battle, with the exception of King William III (aka: William of Orange). Initially, the supreme commander had the title of Captain General or Commander-in-Chief of the Forces.

In the British tradition, command of the Army was vested in the Crown, giving the monarch the prerogative of personally appointing the commander-in-chief. The office was replaced in 1904 with the creation of the Army Council and the appointment of Chief of the General Staff. The title, "Commander-in-chief of the British Armed Forces" reverted to the monarch. In Canada that precedent mandates that the Governor-General is appointed the Commander-in-Chief of the Canadian Armed Forces.

The JAG's role in advising the sovereign about confirming the findings of general courts martial was formal and had the strength of constitutional precedence. Until 1806 the JAG made submissions concerning legality through the offices of the Secretary at War. However, beginning in 1806, the office of JAG underwent several significant changes. First, the incumbent was granted Privy Council status giving him direct access to the sovereign; and second, the position became a ministerial appointment with a seat in the House of Commons, and, together with the Secretary of State for War and the Colonies, renamed in 1854 to Secretary of State for War, he was required to respond to questions in the House of Commons concerning the activities of the army. Over time, his ministerial responsibilities included submitting the annual Mutiny Bill and guiding it through Parliament, the relevant votes on the army estimates, and responding to House of Commons questions and debates concerning military law and courts-martial. (Rubin, pp. 48-49)

In 1893 the office ceased to be a political appointment and from that year until 1905 was held by the President of the Probate, Divorce and Admiralty Division of the High Court. In 1905 it was decided that the office should in future be filled by a person having suitable legal attainments who would be subject to the orders of the Secretary of State for War. (Lawson, p. 246)

In 1911, by Order in Council, Colonel Henry Smith was appointed the first Judge Advocate General of the Canadian Militia. However, it was not until the following year that the duties of the Judge Advocate General were promulgated by way of an amendment to the King's Regulations and Orders. In keeping with the duties of the British model, the Canadian Judge Advocate General was assigned responsibility for reviewing and maintaining records of courts martial and providing advice to both the Department and the militia on legal questions when required to do so. These duties remained largely constant for the first half of this century, with the Judge Advocate General exercising an oversight role on courts martial and acting as counsel to the department with duties to provide legal advice and services to both the military chain of command as well as departmental officials. (Dickson & Belzile, p. 25)

In 1948, a further change made the Judge Advocate General in the United Kingdom responsible to the Lord Chancellor and given largely judicial, as distinct from advisory and administrative functions. (Lawson, p. 246)

The duties of the Judge Advocate General have evolved through two world wars, a variety of peacekeeping/peacemaking operations, the introduction of a new *National Defence Act,* the

unification of the CF, and the integration of the military and civilian headquarters. As the chief, champion and commander of the legal branch, the Judge Advocate General (JAG) decides who will be posted, positioned and promoted. S/He also significantly influences who is evaluated above his/her peers, and consequently who, among the eight colonels working for her/him, will succeed him/her as the next JAG.

Over the years, the JAG branch has benefited from phenomenal growth. According to recent figures, today there are 207 regular force officers and 48 reserve force officers in the JAG branch, of which 251 are lawyers and four are military judges.

These four military judges are, inexplicably, "taking up positions on the JAG establishment," according to DND. The JAG branch also employs 16 paralegals and 97 (civilian and military) administrative staff. This brings the JAG branch to a complement of 366 personnel.

Only members of the military legal branch are eligible for appointment as a military judge. JAG sits on their selection committee and provides advice to the minister on the appointment of military judges. "If civilian judges were picked in this manner, the Canadian Bar Association would have fits of anger!" Ottawa-based lawyer and retired army Colonel Drapeau said. These military judges are not accountable to any complaint mechanism.

As the "superintendent of the military justice system," JAG is empowered to recommend legislative changes, to comment on any proposal by Parliament to change military law, to address Parliamentary committees and to comment on any piece of legislation being presented that affects military law, almost always legislation that s/he and her/his staff have drafted. The incumbent has absolute authority over the administration of the military penal and disciplinary system and has monopolistic power to provide legal advice to all stakeholders in the Canadian military system on practices, procedures, development and reforms. S/He monitors the functioning of the system, advises government on its efficiency and effectiveness and proposes changes to the National Defence Act.

As a central figure in the military's executive branch while reporting to a political minister, JAG suffers from a disturbing conflict of interest. The incumbent holds a military rank and is part of the hierarchy within National Defence Headquarters. S/He controls, influences or commands virtually every aspect and element of military law and military "justice" within the Canadian Armed Forces. Not even the managing partner of a large law firm has anything close to this collection of powers.

Reform of the Canadian military's legal branch is long overdue and perhaps we should look to the British experience, the same system Canada abandoned in 1950, for indications of how we should address our own system.

The House of Lords has argued that everybody should be subject to the same law. In the collective view of the British Upper House, a military member's service on the battlefield,

his/her rank and position or being awarded a couple of rows of medals does not justify treating military personnel to a different value system and different rights and freedoms than the civilian population whom the military are mandated to protect.

In 1948, Britain's secretary of defence civilianized the Judge Advocate General position and moved it to the court services, rendering the JAG a civilian judicial officer of the High Court with a staff of civilian judge advocates. This ensured that whoever was going to preside at the trial would be a judicial officer independent from the chain of command. The British JAG is a judge performing a judicial and adjudicative function. His position is in stark contrast to his Canadian counterpart.

A 2014 report explained allegations of beatings, electrocution, mock executions and sexual assault of Iraqi military prisoners by their British captors. The report was passed to the International Criminal Court. About this time, the British government recognized that a military legal officer may not be as independent and attentive to the values of British society when prosecuting military personnel. Consequently, the director of military prosecution was civilianized and moved to the U.K. Attorney General office.

In the U.K., there are no military lawyers to defend an accused military member. Military personnel tried by court martial must hire their own lawyers. If acquitted, the defence department will reimburse legal costs to a certain level. This puts a military person accused of committing a crime on the same footing as any civilian. (Létourneau & Drapeau, 2015)

Currently, a Canadian military member undergoing a court martial is provided legal counsel by the defence department without charge, but only after charges have been laid and the service member is to be tried by court martial. In several cases, service personnel appealed their convictions to the Supreme Court, the legal fees and cost of which are out of reach for the average Canadian. Given the many additional strata of legal responsibilities and jeopardy for the CAF member, this is appropriate and should continue.

Canada's adoption of measures similar to Britain's would provide justice with the assurance that people sitting as judges in courts martial were independent, trained and experienced and would apply the same legal standards to military personnel as to Canadian civilians.

If the Canadian military bench were occupied by civilian judges, they would receive the same instruction and training available to judges in comparable civilian courts. They would also be accountable to the Canadian Judicial Council, the same body that reviewed the cases of Justices Robin Camp ("Why couldn't you just keep your knees together?") and Ontario Superior Court Justice Frank Newbould for speaking against a land claim near his family cottage.

The Department of Justice Act requires Justice Minister David Lametti to "have the superintendence of all matters connected with the administration of justice in Canada, not within the jurisdiction of the governments of the provinces." However, the Justice Department

has surrendered absolute power over military law to one military officer, the Judge Advocate General. As the 19th-century British politician Lord Acton observed, "Absolute power corrupts absolutely."

The JAG is the focal point in the need to address the reforms for the proper implementation of military law in Canada. First, the title is misleading. The current and previous occupants of that position are lawyers, neither a judge nor a judicial officer and the occupant performs no judicial functions and is, for all intents and purposes, the military's legal advisor. The JAG is the steward and superintendent of Canadian military law and the head of DND's 350-member "law office," with absolute authority over administration of Canadian military law.

"I know of no other democracy where this situation exists," says Col. Michel Drapeau.

JAG'S RELATIONSHIP WITH THE MND

JAG is subordinate in rank to the chief of defence staff, but answers to the Minister of National Defence, a partisan and elected member of Parliament and a member of the government caucus, with partisan interests. The holder of that position is, first and foremost, a legal advisor and corporate counsel to the defence minister, an elected, partisan political master. Concurrently, the appointee is also corporate counsel to Governor General, the Right Honourable Julie Payette, Canada's head of state in her capacity as commander-in-chief of the Canadian Armed Forces, and corporate counsel to the chief of the defence staff, Canada's most senior military leader, and to the deputy minister of defence as well as the military's commanders, commanding officers and leaders.

Col. Drapeau explains JAG's schizophrenic legal function: "There is provision in law for a 'joint retainer' in which a lawyer could simultaneously act for two or more people: spouses, business partners or associates. However, the counsel must be completely and equally open with all parties and cannot keep confidential any information relating to any of his clients on joint retainer." While this may not have been previously problematic, the contemporary military, legal and political environments in which the JAG must concurrently operate have become much more complex and challenging with the requirements of the Canadian Charter of Human Rights, the constantly evolving perceptions of Common Law, of Natural Law and of Peace, Order and Good Government, and the ever-evolving arena of international human rights.

The Judge Advocate General is a military officer subordinate in rank to the Chief of the Defence Staff, but responsible to the Minister of National Defence, a partisan elected member of the governing party of the federal government. Ordinarily, there is a deputy minister between a public servant (which, in the broader sense, includes the JAG and his/her staff). (Treasury Board, 2005, p. 22). The Canadian parliamentary system requires cabinet ministers to discuss government business behind closed doors and to express unconditional agreement about all

decisions outside the caucus chambers. Potentially, this can lead to improper political interference in the military disciplinary process.

> Is it beyond the realm of possibility that a member of the Canadian Armed Forces be publicly accused of wrongdoing that could be the subject of discussion at the Cabinet?
>
> And, during a Cabinet meeting, is it possible the Prime Minister or another member of Cabinet would say to the defence minister that it would be politically advantageous for the accused member to be charged and subjected to a public court martial to give the appearance that the government were managing the issue?

This could be passed to the JAG under solicitor/client privilege, protecting it from disclosure. Major General Lewis Mackenzie made this allegation in relation to the court martial of Captain Robert Semrau. (see page 22 below)

Many would dismiss this possibility out-of-hand, but events that reflect on the government in a less than flattering manner should suggest otherwise. Circumstances such as the Airbus 310 acquisition, the Sponsorship Scandal of 1996 to 2004, the Airbus- Karlheinz Schreiber affair, the Vice Admiral Mark Norman debacle, and the SNC Lavelin affair legitimately give rise to concern about the possibility of political meddling in high-profile and potentially sensitive military disciplinary matters.

> ***Recommendation 6:*** ***The Judge Advocate General's chain of command be re-drawn to make the branch responsible to either the Chief of the Defence Staff or the Vice-Chief of the Defence Staff, similar to the military forces of both the United States and New Zealand.***

It is easily forgotten amid the priorities, activities and operations of a highly complex and busy multi-dimensional department like the Department of National Defence that, in the legal jurisdiction of the Canadian Armed Forces (CAF), its members are subject to a panoply of additional liabilities than the average Canadian civilian. It is critical that DND and CAF officials remember that the rights and freedoms members of Canada's military should not be given less attention than any other Canadian. These rights and freedoms have evolved beginning with the Magna Carta of 1215, article 39 of which states:

> ***No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land*** (15 June 1215).

British Common Law has historically protected the concept of innocence until proof of guilt is established in a court of law. We presume an accused person's innocence until proven guilty. The preeminent English jurist William Blackstone wrote, "[B]etter that ten guilty persons escape, than that one innocent suffer." This principle has found its way into American

jurisprudence when Benjamin Franklin argued "it is better a hundred guilty persons should escape than one innocent person should suffer" (The Cato Institute, n.d.).

> ***Recommendation 7: The chief of defence staff and the deputy minister should have separate legal counsel to advise about deployments, rules of engagement, international deployments and departmental legal, disciplinary and administrative matters.***

COURTS MARTIAL

In his foreword to Captain Robert Semrau's 2013 book, *The Taliban Don't Wave*, now-retired Major-General Lewis MacKenzie (ret'd) gave a disturbing description of Semrau's court martial. The Captain deployed to Afghanistan in 2009 to train Afghan National Army soldiers. On October 19, an Apache helicopter fired 30mm high-explosive rounds against Taliban fighters just prior to Semrau's team emerging from a cornfield. Following the helicopter assault against their adversary, Captain Semrau inspected the aftermath and saw a disembowelled Taliban fighter whom Afghan soldiers later testified that Semrau euthanized. Although the body of the Taliban fighter was never seen again, Canadian news media called it a mercy killing, however, he was charged with second-degree murder, the first Canadian soldier to be accused of homicide on the battlefield.

"The high-profile court martial of Captain Semrau highlighted, in the eyes of many, including yours truly," MGen. MacKenzie wrote, "a deficiency in the court martial procedures within the Canadian Forces."

MacKenzie spoke of the modern changes to the Canadian military justice system, and how it changed to withstand the challenges launched under the *Canadian Charter of Rights and Freedoms* by DND personnel. This included five-member panels to provide the military version of a jury at general courts martial, "To withstand Charter challenges to the independence of military courts." Semrau's panel initially consisted of a navy commodore, an army lieutenant-colonel, two air force majors and an army captain, but the lieutenant-colonel withdrew.

"No one on Semrau's panel," MacKenzie wrote, "had any background in combat operations."

Acquitted of second-degree murder, attempted murder and negligent performance of duty, Robert Semrau was convicted of "disgraceful conduct," and released from the Army. MacKenzie wrote that this was a *"catch-all . . . to appease those who didn't understand the context and wanted some form of punishment."* Many of the general's colleagues, themselves senior serving Canadian Forces representatives, opined that Semrau's prosecution was simply a deterrent to soldiers who may face similar dilemmas in the future. (Semrau, 2012, pp. xiii-xiv)

MGen. MacKenzie's inference is that military justice lacks the impartiality and objectivity that Canadians come to expect of the Canadian legal system, and that the practitioners of Canadian

military discipline are oblivious to the standards of Canadian jurisprudence. If true, this places an additional layer of jeopardy on all those who come under the authority of the NDA and the Code of Service Discipline (CSD).

When a Court Martial convenes

There are several significant decisions a military member must make when s/he is charged and is to undergo a court martial.

First, the accused can choose a full defence at public expense or a civilian lawyer at his/her own expense. If defended by JAG lawyers, one or two military lawyers are assigned and, in the event of an appeal, take the matter to the Court Martial Appeal Court. If the accused decides, and legal support at public expense is approved, the defence will take the appeal as far as the Supreme Court of Canada, at no cost to the defendant.

Second, as the court martial process advances, the defence for the accused has the option of plea bargaining. Outside the military jurisdiction, prosecutors are taken from the Crown prosecution services and accused persons retain defence lawyers privately. But the Canadian military's procedure is unlike its civilian counterpart: The prosecuting and defence attorneys are all members of the same "military law firm", the Office of the Judge Advocate General.

This is not to denigrate the legal officers who work within the Directorate of Defence Counsel Services. In fact, these officers have acquitted themselves admirably of their responsibilities to those whom they defend, even placing their military careers in some jeopardy. In its 2009 report about the Defence Counsel Service, the Bronson Group observed:

> ***While the requirement for DCS to be independent may contribute to the isolation of the DCS from the rest of the JAG branch, most interviewees felt that the reason for the isolation ran deeper. The interviewees, almost without exception, were of the view that the DCS was not a well-respected part of the JAG branch. We heard from almost all interviewees, including lawyers that worked for the prosecution at some point in their career, that there was a negative attitude toward the DCS within the JAG branch. We heard from some interviewees that working at the DCS was considered to be a "dead-end job" or even a career-ender" if one stayed in it too long. More than one lawyer was warned by even very senior officers to be careful about that he/she did while at DCS because it would reflect on him/her when he/she returned to the branch.*** (Bronson Consulting Group, 2009, p. 39)

While the Bronson Report is more than a decade old, I was told by a legal officer within DCS that this remains the case to the present day. I have interviewed several defence legal officers and I found their dedication to their clients to be praiseworthy and beyond reproach. But this calls into question the validity of JAG's approach to its responsibilities: "[T]he system must be fair, just and applied transparently." (DND, 2006)

> ***<u>Recommendation 8</u>: The Directorate of Defence Council Services be re-established as an independent legal office, separate from the Judge Advocate General; the position of "Director" changed to "Director General" and filled by a legal officer of Brigadier General/Commodore rank with an increased staff and that the legal officers who work within be deemed to be defence counsel as a career or until such time as a legal officer applies for a career transfer.***

There are eight Assistant Judge Advocate General (AJAG) offices: Esquimalt, Edmonton, Winnipeg, Toronto, Montreal, Halifax, NORAD HQ (USA), and Germany, which fill the role analogous to civilian Crown prosecution offices. The prosecution counsel who staff these offices work with Military Police to identify and frame offences and determine the charges. They collaborate with the Director of Military Prosecutions and the Office of the Chief Military Judge to coordinate courts martial. The accused, however, is left with no option other than a telephone conversation with the Office of Defence Counsel Services. The accused is assigned military defence counsel only when charged and going to court martial. Otherwise, s/he can retain counsel at his/her own expense. This decidedly one-sided system leaves the accused vulnerable to aggressive and predatory practices by Military Police investigators.

> ***<u>Recommendation 9</u>: Offices of the newly-constituted Director General Defence Counsel Services be established in the same geographical locations as Assistant Judge Advocate General offices and sufficiently staffed to permit any service member who is being investigated for, or is charged with, an offence to be assigned competent legal defence counsel as soon as s/he becomes aware of an investigation or inquiry about her or him.***

<u>Two forms of court martial</u>

There are two types of court martial, general and standing. A general court martial (GCM) is presided by a military judge and a five-member court martial panel of military members that decides guilt or acquittal. The panel composition depends on the rank of the accused. The standing court martial (SCM) has the military judge without a panel. Despite its name, it is not a "standing" tribunal but is convened when there is an accused to try. It is similar to a civil court where the judge exercises criminal jurisdiction alone. GCMs normally try offences punishable by a maximum of imprisonment for life, unless both parties consent to a SCM, which normally deals with offences punishable by imprisonment for less than two years or a lesser punishment, or punishable by summary conviction under any Act of Parliament. In all other cases, he accused person has the right to choose between trial by GCM or SCM.

JAG's Director of Military Prosecutions (DMP) assigns a military prosecutor and lays charges, frequently with an alternate charge under NDA Section 129, which states "*Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment.*" (Department of Justice, 2020)

This clause has no parallel in the civilian justice system and can be anything from being late for work to attempted murder, a *catch 22* to give the court martial (or summary trial) an additional option to find the accused guilty if the primary charge fails to secure a conviction. In earlier times under English military law, this was referred to as *The Devil's Clause* because it gave the presiding officer or judge an almost unlimited opportunity to find the accused guilty of something . . . or anything.

Today, it serves the same purpose and is in opposition to the spirit of the Canadian Charter of Rights and Freedoms.

***Recommendation 10*: Section 129 be removed from the NDA.**

Who is subject to the Code of Service Discipline?

The surprising answer to this question is that more than regular force (full time) members can be charged, tried and convicted under Canadian military law. Reservists while on duty, spouses, dependent children, contract workers, journalists and other persons become subject to the medieval provisions of the CSD when they accompany the Canadian Armed Forces.

For civilians charged with an ordinary law offence under the *Criminal Code,* the loss of entitlement to a conventional trial by jury and their submission to a panel of five service members and a military judge invariably beg the question whether they should be tried by a civilian court.

The formidable reality of the CSD is that its jurisdiction is virtually unlimited. Besides the lists of military offenses sprinkled throughout the CSD, JAG also can prosecute by court martial any offense under NDA Section 130 -- Offences Punishable by Ordinary Law, which includes the Criminal Code or any act of Parliament.

Perhaps most surprising is the treatment which young offenders could receive at the hands of the JAG. Youth between the ages of 16 and 18 can enroll in the Canadian Armed Forces, as a university or military college student, or at age 17 with parental consent. Equally vulnerable are the dependent sons and daughters accompanying a CAF member serving abroad. The youth membership of the Canadian military is small and there are a number of decision points at which a young suspect's age can be considered and the young person diverted toward civil authorities to be handled under the provisions of the Youth Criminal Justice Act. However, the possibility remains that a young member of the Canadian Armed Forces could be charged and tried within Canada's military justice system.

Col (ret'd) Drapeau notes the court martial process is intimidating even for military members, "But for a civilian victim or witness who has no ties to the military, it is like entering another

world." With its unique military protocols, the presence of military lawyers, a five-member military panel in place of a jury and a judge, all wearing military uniforms, it is a daunting experience, even for long-serving military members. In light of Col Drapeau's insight, it would be difficult to even imaging the psychological trauma that a young person would suffer in such a situation.

As a military affairs journalist I have attempted to interview serving and retired military members who were accused on wrongdoing, regardless of guilt or innocence, and civilian employees who were compelled to testify as witnesses. Almost without exception, their traumas resulting from their active attendance at a court martial render them unable to revisit and recount their experiences. There have been cases of post trauma stress disorder resulting from these occasions (Boesveld & Doiron, November 2017) and disciplinary investigations and tribunals have been identified as significant triggers of suicide among military members. (Zamorski, 2010, pp. 5 & 15)

> ***Recommendation 11**: Service personnel below the age of majority not be subjected to summary hearings or courts martial, but be permitted to benefit from diversionary programs or the provisions of the Youth Criminal Justice Act.*

MILITARY JUDGES

The Office of the Chief Military Judge (OCMJ), established in 1997 as an independent unit of the Canadian Forces, comprises four military judges, the Court Martial Administrator, the Deputy Court Martial Administrator, military and civilian court reporters as well as personnel for court administration, technical, financial, human resources and administrative support. Canada's military judges are drawn from the relatively small number of military lawyers with 10 years experience.

The OCMJ's principal responsibility is to provide military judges to preside at courts martial and other judicial responsibilities under the NDA. It also administers convening of courts martial, appoints panel members of general courts martial, and provides court reporting services and transcription of the proceedings of courts martial for appeals and other judicial hearings. Military judges can also be appointed as a board of inquiry, if the Chief Military Judge agrees.

The Court Martial Administrator is responsible for any matters dealing with court administration, including the preparation of a record for appeals to the Court Martial Appeal Court, manages the OCMJ and supervises personnel, other than military judges, within that Office.

BRITISH MILITARY JUDGES

In 1948, the British Secretary of State for War changed the status of the Judge Advocate General, an actual judge, and redesignated the position of the JAG as a High Court judge, effectively removing him/her from the United Kingdom's Department of Defence. S/He does not have a military rank, but, is part of the Royal Courts of Justice Group of Her Majesty's Courts Service. As a civilian judge, the JAG is independent of the executive branch and is not accountable to Government. The JAG has a team of civilian Judge Advocates, who sit as trial judges in Courts-Martial.

The United Kingdom's JAG appoints civilian judges to preside over military tribunals (courts-martial and appeal of summary trials convictions), is responsible for the conduct of proceedings at courts martial and monitoring the military penal justice system. S/He provides guidance to all stakeholders in the military penal justice system on practices and procedures, developments and reforms. However, s/he no longer provides legal advice to the military chain of command.

Other common law jurisdictions, including Ireland, Australia, and New Zealand have adopted the same processes and there are equally compelling reasons for Canada to follow suite. This would require that conduct of proceedings at courts martial and the monitoring of the military penal justice system be moved outside the jurisdiction of the Department of National Defence. (Létourneau & Drapeau, 2015, pp. 105-106)

CANADA'S MILITARY JUDICIAL BENCH

Canada's military judicial system is composed of a small cadre of military judges of senior field officer rank[6] which draws its members from a very narrow pool of JAG legal officers who have a minimum of 10 years experience. This limits the historical and jurisprudential response to Canadian military disciplinary proceedings to only those circumstances in which military legal officers normally conduct their professions. The limitations of this system became apparent when the Chief Military Judge, Colonel Mario Dutil, was charged and subjected to a court martial. However, the presiding judge, Col Dutil's deputy, LCol. Louis-Vincent d'Auteuil, presided over the court martial at first, but eventually recused himself and refused to name another military judge to take over, saying two of them had conflicts of interest and the third wasn't bilingual enough. (Berthiaume, 2020) All military judges were members of Col. Dutil's chain of command, and as a consequence, all charges against him were dropped.

This has the effect that the Director of Military Prosecutions is no longer able to assert that the Canadian military justice systems treats all accused persons equally.

[6] A field grade officer (major, lieutenant colonel and colonel) is superior to a junior officer (second lieutenant, lieutenant and captain, but junior to general and flag (naval) officers.

Assigning the military bench to the Federal Court and opening it to civilian lawyers to become defence (as opposed to military) lawyers could provide a larger pool of qualified judges with a greater vista of response by the judge hearing the testimony of a military member and adjudicating the guilt or innocence of a service member. It is not necessary for a judge to be military to competently hear and assess testimony in a miltiary tribunal.

It is worth recalling that the military of contemporary Canada is not the product of a cloistered military environment any longer. Our military personnel live in the community, they normally interact with civilian friends and neighbours, and their family lives cause them to engage with the broader civilian community.

> ***Recommendation 12**: Canadian military judges be drawn from the broader legal community and form a new military bench within the Federal Court structure comprising qualified civilian judges.*
>
> ***Recommendation 13**: As the Judge Advocate General is not a judge and has no judicial function, the title should be changed to a more accurate description, such as Director General Legal Support Services (DGLSS) to prevent misinterpretation of the role of that incumbent.*

THE CHARTER OF RIGHTS AND FREEDOMS OR COURTS MARTIAL: PANEL OR JURY?

In a civil trial, the jury comprises 12 people chosen by the prosecution and the defence from a list of individuals who qualify for jury duty. A general court martial, however, has a panel of only five, all members of the Canadian Armed Forces, trained, indoctrinated and socialized by their common membership in the military. They are not chosen by the prosecution or the defence, but randomly selected by the Court Martial Administrator (CMA). The panel's composition varies according to the rank of the accused. There are no apparent mechanisms in the description of the CMA that permit challenges to the panel membership.

The civilian jury in a criminal trial and the military's court martial panel have one element in common, they unanimously determine the guilt or acquittal of the accused. But that is where the similarity ends.

The court martial panel members are normally drawn from the local military and may be acquaintances or friends, and perhaps even colleagues possibly from within the same chain of command, especially at the officer level. The military judge presiding at the GCM is often of lower rank than some members of the panel.

Col Drapeau, as a lawyer with prior military experience, describes his perspective: "All share the unique bond, professional ethic, warrior ethos and value system of the military, as well as

its unique traditions, missions, structures, and operating procedures. All are part of a highly structured and authoritarian way of life with a sense of community and camaraderie, unlike any other profession."

The highly-respected retired judge of the Court Martial Appeal Court, former president of the Law Reform Commission of Canada and Somalia Inquiry Commissioner, Justice Gilles Létourneau opines that it may be easier to obtain a unanimous verdict from only five, as opposed to twelve, people. It is particularly so when the five people are trained in the same mindset and have the same institutional socialization and indoctrination than from twelve people coming from different walks of life. Unlike the panel, the civilian jury do not share the same school of thought and do not have common institutional experiences. Furthermore, there is the institutional pressure at work exerted by the chain of command to which the members of the panel belong and on which they depend for their career advancement. As in a civilian criminal court, the panel decides guilt or innocence by unanimous vote and the presiding military judge makes all judicial rulings and determines the sentence in a finding of guilty. (Létourneau, 2012, p. 6)

Justice Létourneau finds it disturbing that an accused service member is denied the right to a trial by jury under paragraph 11(f) of the Charter, even for an offence as serious as murder.

An accused person's right to a hearing by an independent and impartial tribunal is guaranteed to all other Canadians under paragraph 11(d) of the Charter. A general court martial is composed of a panel of Canadian military members, a military judge and prosecution and defence lawyers taken from the legal staff of the Judge Advocate General. The accused risks being frog-marched from the courtroom in handcuffs to serve a life sentence without the possibility of parole for 20 or 25 years. (Létourneau, 2012, p. 4)

CHANGE IS OVERDUE

Canadians tried before military tribunals are denied many rights that a person prosecuted before a civil court has, the most striking of which is the loss of the right to a jury trial.

When paragraph 11(f) of the Charter was drafted and enacted, there was the requirement for a "military nexus," or a direct link to the circumstances of an alleged offence and the discipline, efficiency or morale of the military. More recently, the "military nexus" has been dropped as a factor in determining jurisdiction of military offenders of ordinary criminal law. Under NDA s. 130 (Offences Punishable by Ordinary Law -- Service trial of civil offences) the JAG has jurisdiction.

Did the Canadian Parliament intended to deprive Canadian soldiers of their constitutional right to a jury trial for a serious criminal offence that is in no way related to military service or to the performance of their military duties?

During the January 12, 1981 meeting of the *Special Joint Committee of the Senate and House of Commons on the Constitution of Canada,* the wording of what is now paragraph 11(f) of the Charter was tabled for the first time. During 1980-81, discussions had taken place on a proposal by New Democratic MP Svend Robinson to the effect that military personnel be entitled to jury trials. The only explanation and justification for the exception set out in paragraph 11 (f) was provided by the then Attorney General, Jean Chrétien, who stated: "Jury trials in cases under military law before a service tribunal have never existed either under Canadian or American law." But when Mr. Chrétien made this statement, the *military nexus* factor was in force, requiring a connection between the offence and the accused's military service.

A better explanation is provided in a 1996 article by Rubsun Ho entitled "A World that has Walls: A Charter Analysis of Service Tribunals":

> ***The standard justification for allowing the military to deny an individual right to trial by jury is derived from the special conditions under which service tribunals may be forced to proceed. During times of war or insurrection, convening a jury may be impracticable or unfeasible. The military hierarchy must be able to work efficiently and expeditiously to dispose of any disciplinary problems it may encounter, and wide discretion must be given to front line officers to enforce their authority.*** (Ho, 1996, p. 163, from Létourneau, p. 9)

This justification refers to military offences in a military context and in time of conflict, and not to offences of a civil nature committed in peacetime, in purely civil circumstances. This leads to the question: Are courts martial necessary in Canada in peacetime?

Justice Létourneau noted in "Introduction to Military Justice," that in Canadian society, the commission of a criminal offence, by any resident of Canada, results from a lack of personal and collective discipline. Every person, civilian, police and military, must obey the law, therefore, each person in Canada is obligated to abide by, and comply with, the law, therefore, all residents of Canada who violate the law should be subject to the same treatment under the law. A service member convicted of a serious criminal offence will usually be incarcerated and dismissed from the armed forces, whether or not she or he was tried before a civil court or a service tribunal. The individual's release or dismissal from the armed forces makes a military disciplinary tribunal irrelevant.

Collective discipline and deterrence are guaranteed by detecting and charging the person. The example is set by conviction and imprisonment, and ultimately, dismissal, whether the judgment and sentence are handed down by a civil court or a court martial. The conviction also renders collective deterrence irrelevant since the offender has been dismissed and returned to civilian life, where any recidivism will occur.

As the British Columbia Civil Liberties Association noted in its 2011 report, Fairness for Canada's Soldiers: "Canadian soldiers are entitled to the rights and freedoms they fight to uphold."

Perhaps it is time to consider following the example of other nations which have abandoned military justice. These include:

- **Belgium, Germany, Austria, Sweden** and **France,** which abolished military courts in peacetime;
- The **Czech Republic,** which refers military disciplinary issues to the civil judiciary;
- **Finland,** where military prosecution is conducted by public prosecutors;
- **Japan,** whose military personnel are subject to ordinary criminal law.

In my discussions with Canadian military legal officers, they have unanimously upheld the Canadian military use of courts martial with the justification that legal officers must maintain their court martial skills by continuing to resort to them. This suggests that Canadian military legal officers' capabilities to argue for or against an accused military member will deteriorate with disuse and that the only means of maintaining these skills is through the continuation of courts martial. This relegates our military personnel to the role of training aids. The *court room* skills of prosecution and defence trial lawyers could easily be maintained by simulated courts. This concept of simulations and exercises is in common use throughout the Canadian military in the form of exercises and *war games* to maintain members' military skills.

Courts martial are creations of an era when it would take weeks and months for a soldier or sailor to be returned to England to stand trial for infractions committed elsewhere. Over time, changes and improvements were introduced including, *inter alia*, habeas corpus, rules of evidence, rights and freedoms, the presumption of innocence, elimination of corporal punishment, and the establishment of the Court Martial Appeal Court. Today, a service member can be returned to Canada from virtually anywhere in 24 hours.

In actuality, there is no practical rationale for a military member to be treated differently than his or her civilian colleague while assigned to normal duties in Canada. Much to the dismay of some, the process of creeping civilianization of military discipline (aka: *military justice*) is already well underway. The Canadian Charter of Rights and Freedoms, the Canadian Human Rights Commission, the Federal Court, the Court Martial Appeal Court, the Military Police Complaints Commission, and the Supreme Court of Canada have all become substantial non-

military actors in the operations and policies of the Judge Advocate General and the Military Police.

Notwithstanding the decision of Supreme Court of Canada Justices Wagner, Abella, Moldaver, Côté and Brown who have interpreted that the NDA Section 130(1)(a) is not inconsistent with s. 11 (f) of the Canadian Charter of Rights and Freedoms (CCRF) (R. v. Stillman, 2019), we should look at the intent of the Hon. Brooke Claxton, the Minister of National Defence who introduced the original NDA on 7 June 1950.

When Claxton rose in the House of Commons to pass the NDA on Third Reading, he addressed a question from Arthur LeRoy Smith, the Progressive Conservative Member of Parliament for Calgary West concerning section 62, which was the equivalent of s. 130 of today's NDA:

> ***Nothing in the Code of Service Discipline affects the jurisdiction of any civil court to try a person for any offence triable by that court.***
>
> ***Where a person, sentenced by a service tribunal in respect of a conviction on a charge of having committed a service offence, is afterwards tried by a civil court for the same offence or for any other offence of which he might have been found guilty on that charge, the civil court shall in awarding punishment take into account any punishment imposed by the service tribunal for the service offence.***
>
> ***Where a civil court that tries a person in the circumstances set out in subsection two either acquits of convicts the person of an offence, the unexpired term of any punishment of imprisonment for more than two years, imprisonment for less than two years or detention, imposed by the service tribunal in respect of that offence, shall be deemed to be wholly remitted as of the date of the acquittal or conviction by that civil court.*** (House of Commons, 1950, p. 494)
>
> ***I should like to point out, with respect, that the hon. member is clearly under a misapprehension as to the state of the existing service law, and also as to what is proposed under this bill concerning the relationship of service law to civil law. In the first place, it is part of the existing law of the land, whether it be service or civil, and it is fundamental to our system of law, that the civil authority is supreme.*** (House of Commons, 1950, p. 3320)[7] – Emphasis is mine.

It is apparent that Minister Claxton did not intend for the military's legal branch to automatically have jurisdiction over infractions of *other Canadian law* by the military's legal branch.

> ***Recommendation 14: Until and unless the above-noted recommendation regarding military judges is implemented, Offences Punishable by Ordinary Law are to be tried by the relevant departments of government and not by the***

[7] These two references are available on the website for the Canadian Observatory for Military Justice Reform at https://military-justice.ca/reports-and-papers.

Director of Military Prosecution as a service trial of civil offences. That is to say, criminal offences unrelated to the military should be tried by Canadian criminal courts.

REPORTING CYCLE OF THE REVIEW AUTHORITY

Bill C-25: *An Act to amend the National Defence Act and to make consequential amendments to other Acts* (The Statutes of Canada 1998, chapter 35) was the legislative consequence of the report of the Special Advisory Group on Military Justice and Military Police Investigation Services. The first Independent Review was conducted by the Right Honourable Antonio Charles Lamer. But it took only a little time for the Defence Department to fall behind what should have been an easy timeline to follow. The second Independent Review of the provisions and operation of Bill C-25 was conducted by the Honourable Patrick LeSage, former Chief Justice of the Ontario Superior Court of Justice, whose report was submitted in December 2011.

The Legislation originally required that Justice LeSage's appointment as the Second Independent Review Authority should have been assigned in March 2008 - making and the statutory requirement for the review three years late, and in direct contravention of section 96 of Bill C-25. Accordingly, in 2014 section 273.601 was added to the National Defence Act, changing the reporting period for the third independent review of Bill C-25 to seven years from five, with the clock starting "after the day on which this section comes into force, and within every seven-year period after the tabling of a report under this subsection" (Minister of Justice, 2019, s. 273.601). In 2016, DND communications advisor Laura McIntyre-Grills advised that, "the next report of an independent review must be tabled between now and 1 June 2021."

This created a gap of ten years between Justice LeSage's second Independent Review and Justice Fish's third in the series, to be followed by a review every seven years. Had the intent of Chief Justice Dickson's initial report been followed, the third independent review would have been submitted in 2008, the fourth in 2013, the fifth in 2018, and we would be looking forward to the sixth in 2023. However, the change in the length of time between reports has Parliament and the people of Canada awaiting the third Independent Review, and the members of the Canadian Armed Forces an unacceptably long time with the voice that Justice Dickson and Lt-Gen Belzile intended.

The Canadian Bar Association's (CBA) National Military Law Section (NMLS) has been a particularly active commentator on the revisions to the National Defence Act and the various reviews and studies conducted by the Department of National Defence and the Judge Advocate General.

In addressing the First Independent Review (the Lamer Report), the NMLS expressed its substantial agreement with Lamer:

> ***On the issue of an independent review of the NDA, the CBA/NMLS submission and the Lamer Report are in substantial agreement. Both advocate that the requirement for an independent review of military law should be retained and incorporated into the NDA rather than left in Bill C-25. However, positions diverge in respect of the scope of the review. The CBA/NMLS suggested that the entire NDA be subject to an independent review every five years, whereas the Lamer Report proposed that the review be restricted to the military justice system and the CF grievance process.***
>
> ***The CBA/NMLS maintains that the entire NDA should be periodically subject to an independent review. Were the review limited in the manner proposed by Chief Justice (ret'd) Lamer, he would not have been empowered to review some important issues. Nevertheless, the CBA/NMLS is mindful of the burden in conducting a comprehensive review of the NDA. Accordingly, the CBA/NMLS proposes a compromise, that the entire NDA be subject to an independent review every ten years. Under this proposal, the entire NDA (including the military justice system and the CF grievance process) would be subject to independent review in 2008, but in 2013 the independent review would be limited to the military justice system and the CF grievance process.***
>
> ***The compromise CBA/NMLS proposal would ensure that the entire panoply of military law issues would receive an independent review every ten years. This proposal is a balanced approach that is mindful of the large burden involved in such an independent review. (National Military Law Section - Canadian Bar Association, April 2004, pp. 15-16).***

The far-reaching authority and powers of the Judge Advocate General, include charges, prosecution, defence and tribunals. The military judiciary can impose formidible sentences, including fines, reprimands, forfeiture of seniority (which affects advancement, salary and pension), dismissal, dismissal with disgrace, and imprisonment up to life. Both JAG and the military's judiciary lack general oversight which renders these delays in the Independent Reviews of the military disciplinary system unethical, unacceptable and unpardonable.

OVERSIGHT FOR THE JUDGE ADVOCATE GENERAL BRANCH

The CBA- NMLS recommends that "the entire NDA [National Defence Act] should be periodically subject to an independent review, and that the reporting period for these Independent Reviews return to each five years. However, it should be noted that the Independent Review process constitutes the only existential oversight of the actions, activities policy formulation and operations of the Judge Advocate General branch. It must be recognized that the JAG, whoever is selected to occupy that position, has no effective oversight other than the septennial Independent Reviews. JAG has plenipotentiary powers, with far-reaching impact on the careers, lives and professional standing of individual service persons in the military community. DND should consider the creation of an independent office that conducts a continuous review of the National Defence Act and the JAG branch, and report to Parliament

quadrennially on the state of military law and, in particular, the Code of Service Discipline. This quadrennial cycle would allow time for reflection and appeals from contentious decisions to progress through that process between reports and would allow for the normal Parliamentary cycle. (Wentzell, 2020) This office could also function as an oversight agency analogous to an Inspector General and similar to the Military Police Complaints Commission is for the Provost Marshal, the CF National Investigation Service and the Military Police. This office could be attached to and function with the DND/CF Ombudsman Office or the Auditor General's Office to develop a symbiotic relationship, or it could stand alone.

> ***RECOMMENDATION 15: DND establish an agency, independent of the Judge Advocate General branch, to undertake investigations as necessary into complaints of unprofessional and unethical conduct by members of the legal branch, similar to the Military Police Complaints Commission; to continuously review the operations, activities, policies and practices of the Judge Advocate General Branch; report annually to the Minister of National Defence and Parliament about complaints, investigations, inquiries and observations of the JAG branch; to undertake investigations as necessary into complaints of unprofessional and unethical conduct by members of the legal branch; and report quadrennially on the state of the National Defence Act and the practice of Canadian military law.***

This proposed oversight agency would be empowered to provide oversight of the Judge Advocate General branch, which it currently lacks. Its responsibilities could include the authority to investigate the practices and procedures of the Judge Advocate General branch as a whole and its various branches, services and offices to discover any conduct, behaviours, actions and processes that do not conform to the accepted conventions of Canadian justice. A case in point would be the practice of some legal officers to prepare solicitor-client privilege letters in response to a Military Police investigation when investigators did not uncover any evidence of wrongdoing. Such letters compromise military members' right to the presumption of innocence. (see page 42 below)

Given the importance and the impact that the enforcement of the National Defence Act in general, and the Code of Service Discipline in particular, consideration should be given to the spirit of the CBA- NMLS recommendation that "the entire NDA [National Defence Act] should be periodically subject to an independent review, and that the reporting period for these Independent Reviews return to each five years.

However, we need to go one step farther and consider the merits of DND establishing an independent office that conducts a continuous review of the National Defence Act which would report to Parliament quadrennially on the state of military law and, in particular, the Code of Service Discipline. This quadrennial cycle would allow time for reflection and appeals resulting from contentious decisions to progress through that process between reports and would allow for the normal Parliamentary cycle (Wentzell, 2020). This office could also function as an oversight agency, as the Military Complaints Commission is for the Provost Marshal, the CF

National Investigation Service and the Military Police. This office could be attached to and function with the DND/CF Ombudsman Office or the Auditor General's Office to develop a symbiotic relationship, or it could stand alone.

It is easily forgotten amid the priorities, activities and operations of a highly complex and busy multi-dimensional department like the Department of National Defence that in the legal jurisdiction of the Canadian Armed Forces, its members are subject to a panoply of additional liabilities than the average Canadian civilian. It is critical that DND and CAF officials remember that the rights and freedoms of members of Canada's military should not be given less attention than any other Canadian.

MILITARY POLICE

Canadian statistics show that there is one policeman for every 500 people. In stark contrast, there is one Military Police for every 50 military members. MPs conduct facility security checks, intrusion alarm responses and protection of critical equipment and infrastructure, requirements that can accomplished by the Canadian Corps of Commissionaires, augmented when necessary by military duty personnel. The MPs' additional security responsibilities in Canada and at Canadian embassies can be undertaken by Canadian army personnel, many of whom already have experience in these duties from pervious deployments.

Statistics Canada estimated the operating expenses of policing across Canada totalled more than $15 billion in fiscal year 2017-2018. Canada's Military Police (MP) are responsible for about one per cent of this total, or $150 million annually.

MPs are responsive to the local military authorities, but responsible to the Ottawa-based Canadian Forces provost marshal, the military's police commissioner. The MP chain of command was transferred from base commanders to the Military Police Group in 2011. Operationally, the change eliminates local influence over investigations and inquiries and provides a nation-wide standard of police services within the defence department. Local military authorities can present their observations and complaints to the CF Provost Marshal, but they have no authority to direct MP resources, personnel or operations for policing matters.

As with any police agency, there are shifts to cover the 24-hour cycle, with four regular shifts to respond 24/7, and a "super shift" when necessary. Duties include security sweeps, patrols, minor investigations and initial police actions on cases of sudden death to name only a few examples. Requirements for security, operations and deployments are in addition to local detachment requirements.

Formerly issued a weapon, handcuffs and a radio, MPs are now equipped with, and trained to use, pepper spray and naloxone, enabling them to address a larger spectrum of incidents. In-car cameras, in-vehicle mobile data terminals and multi-band encrypted radios allow MPs two-way

communication with each other and with the Halifax Military Police Unit. Incidents involving use of force by a MP are reported and investigated, as with any Canadian police service.

Today's Military Police are said to be far better trained than the mid-1990s and more competent to deal with contemporary issues, like mental health concerns and opioid use. They react faster and have benefitted from modern training provided by recognized police agencies and police training institutes.

But the question remains: with the RCMP as the national police agency, are MPs necessary?

Training and education

Since 1990, improved recruiting and training programs are said to yield better recruits. The Canadian Forces Military Police Academy (CFMPA), opened in October 2015, is a new and specially designed facility at CFB Borden, ON, as an accredited police academy that provides reciprocal training opportunities with other police forces.

The results of a 2002 occupational analysis of the MP branch raised the bar of professional expectations and qualifications. One is the basic requirement to enrol as a MP recruit. Previously, applicants simply needed high school graduation. Prospective MPs must now complete a two-year Law and Security or Police Foundations program at a police school or community college at their own expense prior to applying for entry into the Military Police as regular force (full time).

Military Police Assessment Centres screen candidates for specific competencies. On enrollment they undergo basic military qualification at the Canadian Forces Recruit School, Farnham, QC, followed by military police training at the new Canadian Forces Military Police Academy, CFB Borden, ON, which opened in October 2015.

Its annual operating budget is approximately $825,000, plus pay and allowances of instructors, staff and students.

The new academy can accommodate 144 students per year but accept an additional 24 when necessary. Promoted to corporal on graduation of the MP Branch's basic military qualification, they become the uniformed MPs and credentialed peace officers visible in and around military facilities.

But, Canada already has a national police service in the Royal Canadian Mounted Police, with an existing recruiting, assessment and training program whose existence goes back to 1885.

The Canadian Forces National Investigation Service (CFNIS)

The MP branch's criminal investigatory branch, the Canadian Forces National Investigation Service, conducts investigations on criminal or sensitive matters, and examines all sudden

deaths of service members, major accidents occurring on DND establishments and, since 2015, criminal and non-criminal sexual misconduct cases. Additionally, it investigates criminal allegations and return non-criminal files, such as cases of harassment, to their local Military Police detachments.

MP representatives are quick to assert that the specialized training they receive from the 20 municipal, provincial, federal and foreign police training opportunities is among the best available and provides a comparable level of equivalency between the MP, CFNIS and any of Canada's police forces.

Here, as well, the CFNIS does nothing that the RCMP doesn't already do.

The costs of military police

The Defence Department operates its own incarceration network comprising *cells* at CF Bases and the Canadian Forces Service Prison and Detention Barracks (CFSPDB) at CFB Edmonton, sarcastically dubbed "Club Ed." The Vice Chief of the Defence Staff, the military's second-in-command, assigns responsibility for the operation, financing and equipping of the facility to the Canadian Forces Military Police Group.

Bill C-77 came into force June 2019. It replaced *summary trials* (trial by commanding officer for minor infractions) with *summary hearings*, removing detention up to thirty days from the scale of punishments for summary trials. The CFSPDB will remain the facility for service prisoners, sentenced by a military judge at a court martial for a significant breach of the Canadian military's CSD or the criminal code. Service prisoners sentenced to "two years less a day" are incarcerated at the CFSPDB. If sentenced to longer terms, they move to a federal penitentiary as service convicts on completion of two years of their sentences at CFSPDB. Between 2015 and 2019, CFSPDB detainees, prisoners and convicts have declined from 26 in 2015 to three in 2019, averaging 16 personnel per year. This costs the Canadian taxpayer slightly more than $2 million per year including staff salaries.

A quick change of incarceration practices to send service prisoners directly to federal penitentiaries would negate the requirement for the CFSPDB and its staff, saving the cost of the military prison and its staff for other departmental priorities.

According to DND's Cost Factors Manual, personnel salaries and benefits of the 1357 regular force military police are about $140 million annually. The operation of the CF Service Prison and Detention Barracks and the CF Military Police Academy increase that cost by an estimated $3 million.

Historically, the RCMP served with the Canadian Army's wartime Provost Corps for investigations and more demanding police work while the military members of the Provost

Corps were responsible for custody of prisoners of war, dealing with stragglers and vehicle management on roadways within the combat zone.

In matters of policing, the RCMP does everything that MPs do, and more, and can easily replace the MPs in their Provost responsibilities. One of the very few exceptions is that the MPs operate the Canadian Forces Service Prison and Detention Barracks.

However, those who have been sentenced at a court martial to two years or more, the civilian equivalent is accomplished by the Canadian Corrections Services. Service prisoners' sentences of incarceration for serious infractions are often served two years less one day at the Canadian Forces Service Prison and Detention Barracks (CFSPDB) and any remaining time at a federal penitentiary, normally followed by dismissal from the Canadian Armed Forces. This begs the question: With detention absent from the scale of punishments for summary hearings and dismissal for serious infractions and offences, what is the justification for retaining the CFSPDB?

> ***Recommendation 16: The Canadian Forces Service Prison and Detention Barracks be decommissioned, and service prisoners' sentences of incarceration be served at federal penitentiaries.***

Today's RCMP are experienced in investigation and enforcement at national, provincial and municipal levels. Their membership of 18,500, compared to 1,300 regular force MPs, gives it a comparatively increased body of professional knowledge and experience. Federally, they are responsible to the Attorney General of Canada, the Hon. David Lemetti, and provincially to Lemetti's provincial counterparts.

With proven expertise and experience in all aspects of nation-wide police work, the RCMP provides community policing in regions of Canada where there are no municipal police. It conducts investigations into activities involving criminal, forensic, narcotics and controlled substances and unexpected death investigations, as well as provincial legislation and, sometimes, municipal by-laws. The RCMP has also deployed on international peacekeeping, peace enforcement and humanitarian assistance and disaster relief operations.

Replacing the Military Police with the RCMP for investigations and assigning Commissionaires for routine facility security with augmentation when necessary by military duty personnel, such as the *base defence force*, would negate the need for the Canadian Forces Military Police Academy. This could result in annual savings of $2.5 million, according to budgeting and business plans obtained under access to information.

The Royal Canadian Mounted Police Act (1985) notes that, "There shall continue to be a police force for Canada, which shall consist of officers and other members and be known as the Royal Canadian Mounted Police . . . . The Force may be employed in such places within or outside Canada as the Governor in Council prescribes."

Not only can the RCMP deploy, but they also have a long and honoured legacy of international service, including the Boer War and both World Wars. Since 1989 some 4,000 RCMP and Canadian civilian police officers have served in over 33 countries, including Sudan, Kosovo, Haiti and Afghanistan. The RCMP serve throughout Canada and its members collectively bring a level of experience that includes community-based policing, law enforcement in large and small communities, criminal investigation, VIP security, facility and critical infrastructure security.

Replacing the Military Police with the RCMP serving under the authority of the Canadian Forces Provost Marshal, could simply be mandated by legislative changes. However, it could provide increased capacity and a broader range of experience. It may also alleviate some infrastructure costs and some of the approximately $140 million in annual personnel salaries.

Expanding RCMP responsibilities to include the Canadian Armed Forces would: First, provide the Canadian military with the same level, quality and spectrum of police services as the rest of Canada and Canada's public institutions; Second, give the Canadian military equal access to the resources and policing infrastructure of the RCMP; Third, it would provide a seamless process for all criminal investigations, where the MPs are unable to investigate murder, manslaughter and child abduction; Fourth, it could reduce the bureaucracy and support staff currently associated with the MP branch; and Fifth, it would provide a single federal police agency to enforce all federal legislation.

This would not be unique among allied nations. France's "Gendarmerie nationale," Italy's "Carabinieri," Netherland's "Marechaussee," Spain's "Guardia Civil," Portugal's "Guarda Nacional Republicana" and Turkey's "Gendarmerie" are police agencies with both military and civil responsibilities.

> ***Recommendation 17**: The Royal Canadian Mounted Police absorb the Canadian Forces Military Police assume responsibilities for domestic and deployed military policing and provide "conversion and transition" training as necessary. **This would allow all future** training **to be done by the RCMP at Regina** Depot, assuring a common standard and syllabus of training. This could permit the closure of the Military Police academy at CFB Borden.*
>
> ***Recommendation 18**: RCMP include "provost detachments" at Canadian military headquarters, bases, stations, camps and installations, replacing Military Police in situ.*
>
> ***Recommendation 19** The approximately 1,300 reserve (part time) Military Police be transferred to the RCMP as "auxiliary police, provided conversion training and assigned to the nearest provost detachment of the RCMP.*

Solicitor-Client Privilege

Correspondence referred to in this section is available to the Review Authority in either redacted or unredacted form, contingent on possible understandings and agreement concerning privilege of the content.

The relationship which the JAG branch has with the convention of Solicitor-Client Privilege is quite interesting. In my correspondence with representatives of the legal branch both printed and email replies have carried the term "Solicitor-Client Privilege," sometimes in ways that were comically inept. One email thanked me for providing a copy of a published article about courts martial to one of JAG's trial lawyers, and his reply was "Solicitor-Client Privilege." Colonel Bruce MacGregor explained that JAG's legal personnel use this as *header* or *footer* on virtually all their correspondence. (MacGregor, 2018)

> ***Recommendation 20: JAG legal officers exercise greater discretion in using the convention of "Solicitor-Client Privilege" in their correspondence, ensuring that it is used only in situation where there is bona fide need.***

The Canadian Forces Base (CFB) Halifax Military Police Detachment conducted a criminal investigation of a major from 12 September 1994 to 1 February 1995 based on the questionable allegations of his subordinate junior officer and concluded without any charges laid against the accused. (CFB Halifax Military Police Criminal Investigation Section, 1994)

Ordinarily, one would think this would be the natural conclusion to the matter. But, a senior legal officer at the office of the Assistant Judge Advocate General examining the matter prepared a letter under solicitor-client privilege in which he wrote that the subject of the investigation "appears to have escaped formal disciplinary action." (Legal-Officer, 1995)

His superior officer provided a copy of the letter to the accused officer. I have been given a copy of the letter.

In response to a DND/CF Ombudsman investigation, Colonel D.A. Cooper, the Canadian Forces Provost Marshal (CFPM), wrote "I would like to extend my sincerest apology to **** **** for any undue hardship arising from the lapse in judgment by Military Police and shortcomings in work performance." She went on to excoriate her investigators for failing to use "best police practices," for unprofessional conduct and for not turning their attentions to the accuser, who escaped accountability. (Cooper, 2003)

At that time (early 1990s), the military member's chain of command was responsible for disciplinary action, but inexplicably the legal officer's letter was directed for action only to the Director of Law (Security and Intelligence Prosecution and Appeal), which was unrelated to the accused, the accuser, and their chain of command. Other addressees received the legal officer's letter only for information, which is merely to inform and not for action.

At least 12 and possibly more than 25 unauthorized people read this this "privileged" letter. It ended any opportunity for advancement, affected the accused's pension and lifelong earnings, and adversely affected his professional standing among those with whom he worked and interacted. It also carried personal costs to his mental and physical health.

In the factum of the intervener, Canadian Bar Association in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SC 23, [2010] 1 S.C.R. 815 (Factum of the Intervener, Canadian Bar Association), the CBA asserted that Solicitor-Client Privilege is an all-or-nothing venture: "Disclosure of privileged information is all or nothing: once privileged information is disclosed, the privilege is lost." (Dodek, 2011, p. 3)

There are factors that indicate the Privilege of the legal officer's letter was voided, but JAG, both personally and institutionally, refused to acknowledge it .

First, Col. Cooper's letter affirms the principle of *Innocence at stake* (Irwin Law, 2000)

Second, is the injudicious dissemination of the letter to people who were unauthorized to read it, including the accused.

Third, is the shared opinion of several non-military lawyers that the legal officer's letter constitutes a *de jure* denial of the presumption of innocence, guaranteed by the Charter of Rights and Freedoms s. 11(d) and the criminal code s. 6(1)(a).

Fourth, are the three Supreme Court of Canada decisions that when an individual is affected by a decision, that individual has the right to know the case to be met and must be given a fair opportunity to respond: Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police 1 R.C.S. [1979] , Cardinal v. the Director of the Kent Institution 2 R.C.S [1985], and Baker v. Canada 2 R.C.S. [1999]. The Federal Court felt this requirement also applies in regard to information received from third parties, that he or she is to be consulted during the decision-making process (El Maghraoui, 2013 FC 883, 2013), there is a requirement that the essence of the decision-maker's concerns be communicated to the applicant (Krishnamoorthy, 2011 FC 1342, 2011).

Although the matter is 25 years old, JAG still declines to address this matter, to acknowledge if this is a continuing practice or to answer any questions. The subject of the investigation has a copy of the letter but is not permitted to challenge it, discuss it or disclose it.

In researching this, I contacted the federal Crown prosecution service and each of the provincial prosecution services. The six replies I received were unanimous – once a police investigation concludes there was no wrongdoing the matter is ended. This stands in stark contrast with the actions of the legal officer in question and the failure of three JAGs to address this matter and waive privilege. The Department of National Defence and the Canadian Armed Forces as the only jurisdiction in Canada where this is practiced.

This is a form of extra-judicial punishment that is shielded from disclosure only to the subject of the letter, but is open to many other people, colouring the opinions of the service members so targeted, affecting their performance assessments, and ultimately affecting their opportunities for employment, deployment and professional development, reducing their lifelong earnings.

As the players in this matter are lawyers and are presumably well-versed in the law, conventions and traditions surrounding *Solicitor-Client Privilege,* they can be expected to know when Privilege has been voided or vacated. This calls into question the ethical standards of the JAG staff in writing these letters and continuing to protect both the writer and the letter by refusing to address the matter.

The accused officer's call for the legal officer in question to be charged and tried by a court martial have similarly fallen on deaf ears.

The JAG system continues to protect the legal officer who wrote the letter that resulted in the abrupt ruin of the accused's military career.

No one outside the JAG branch knows how often these letters are written and how many careers are affected, not even those who are the victims of these instances of bad faith.

> ***Recommendation 21: Legal officers of the Department of National Defence and Canadian Armed Forces cease the practice of preparing letters that are Solicitor-Client Privilege and classified concerning members of the Canadian Armed Forces who are not charged with offences.***
>
> ***Recommendation 22: JAG be required to "open the books" and disclose to serving and retired service members who have been the subjects of such letters and compensate each for the impact of these letters on their careers, their service and their post-retirement benefits.***

CONCLUSION

The highly respected Justice Gilles Létourneau (ret'd) asserts that "Every person must obey the law, whether of not he is a service member. Therefore, each of us must exhibit discipline in order to abide by, and comply with, the law." (Létourneau G. , 2012, p. 19) He underscores French Emperor Napoléon Bonaparte's philosophy that "an equal and unified form of justice for all French citizens:"

> ***There is but one justice in France: one is a French citizen before being a soldier. If one soldier kills another in France, he has no doubt committed a military offence, but he has also committed an offence under ordinary law. All crimes must first and foremost be tried by civil tribunals each time such a tribunal is available.*** (p. 17)

In an identical manner, the members of the Canadian Armed Forces are, first and foremost, Canadian citizens. While there have been arguments for and against the ubiquitous applicability of military law, the most important question should focus on whether Canadian military tribunals have any place in Canada in peacetime? The natural extension of this issue would pose the question: Are military tribunals necessary at all, as we now have the capability of transporting the accused back to Canada to stand before a civil tribunal to answer to charges borne out of a unified criminal code that integrates civil and military jurisdictions?

The members of the Canadian Armed Forces have a plethora of legislation to which they are subject, from the commanding officer's routine orders, Canadian Forces Base and Station standing orders Departmental Orders and Directives, Queen's Regulations and Orders and the National Defence Act. With the NDA s. 130, the military member's jeopardy is increased by all federal legislation, offences against which can be considered an offence against military law. And let us not forget that amid this morass of governance, jeopardy and regulation is the ever-present possibility of capricious charges under s. 129 (*Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment*) to be adjudicated by the commanding officer for minor offences that are not listed in the Code of Service Discipline.

Military regulation began as an effort to control the men who were either duped into *accepting the King's shilling* or were *pressed* into service, to keep them in productive service and out of the *alehouses.* The nature of their "adoption" into military service did not engender loyal service and patriotic duty.

Our service personnel have volunteered to serve Canada and they have done so very honourably in many of the world's most inhospitable locations, under the most dangerous of conditions and, in many cases, at severe personal risk. These people deserve a "justice" system that reflects their service and conforms to the values of twenty-first century Canada.

SUMMARY OF RECOMMENDATIONS

#	RECOMMENDATION	PAGE
1	The term "Canadian military justice" be replaced with the term "Canadian military discipline" and references to "military justice" be replaced with "military discipline."	11
2	Appointees to the Chair of future Review Authorities circumscribe the role and contributions of the Judge Advocate General office and legal officers and maintain an arms-length relationship to allow only their contributions to the work of the Review Authority as interested proponents and consider having a legal officer only as a member of the support staff in the role of liaison officer to act as intermediary between the Review Authority and JAG. This will prevent inappropriate influence of the Review Authority by the JAG and legal officers.	15-16
3	Future Review Authorities take the innovative step of including a highly knowledgeable service member or veteran who is not serving and has not served as a military legal officer in either the regular or the reserve components of the Canadian Armed Forces. This person should bring to the Review Authority a different series of perspectives of military justice and formal military discipline to inject different and, perhaps, differing insights on the issues surrounding this subject.	16
4	Future Review Authorities include a knowledgeable advocate to represent the interests of the rank and file of our military forces.	16
5	The DND carefully select a team to investigate joining the RCMP's National Police Federation or creating an association or organization similar to the military unions of Europe. The selected team members must be disabused of anti-union biases for the Canadian military.	16
6	The Judge Advocate General's chain of command be re-drawn to make the branch responsible to either the Chief of the Defence Staff or the Vice-Chief of the Defence Staff, similar to the military forces of both the United States and New Zealand.	21
7	The chief of defence staff and the deputy minister should have separate legal counsel to advise about deployments, rules of engagement,	22

	international deployments and departmental legal, disciplinary and administrative matters.	
8	The Directorate of Defence Council Services be re-established as an independent legal office, separate from the Judge Advocate General; the position of "Director" changed to "Director General" and filled by a legal officer of Brigadier General /Commodore rank with an increased staff and that the legal officers who work within be deemed to be defence counsel as a career or until such time as a legal officer applies for a career transfer.	24
9	Offices of the newly-constituted Director General Defence Counsel Services be established in the same geographical locations as Assistant Judge Advocate General offices and sufficiently staffed to permit any service member who is being investigated for or is charged with an offence to be assigned competent legal defence counsel as soon as s/he becomes aware of an investigation or inquiry about her or him.	24
10	Section 129 be removed from the NDA.	25
11	Service personnel below the age of majority not be subjected to summary hearings or courts martial, but be permitted to benefit from diversionary programs or the provisions of the Youth Criminal Justice Act.	26
12	Canadian military judges be drawn from the broader legal community and form a new military bench within the Federal Court structure comprising qualified civilian judges.	28
13	As the Judge Advocate General is not a judge and has no judicial function, the title should eb changed to a more accurate description, such as Director General Legal Support Services (DGLSS) to prevent misinterpretation of the role of that incumbent.	28
14	Until and unless the above-noted recommendation regarding military judges is implemented, Offences Punishable by Ordinary Law are to be tried by the relevant departments of government and not by the Director of Military Prosecution as a service trial of civil offences. That is to say, criminal offences unrelated to the military should be tried by Canadian criminal courts.	32-33
15	DND establish an agency, independent of the Judge Advocate General branch, to undertake investigations as necessary into complaints of unprofessional and unethical conduct by members of the legal branch, similar to the Military Police Complaints Commission; to continuously review the operations, activities, policies and practices of the Judge Advocate General Branch; report annually to the Minister of National Defence and Parliament about complaints, investigations, inquiries and	35

	observations of the JAG branch; and report quadrennially on the state of the National Defence Act and the practice of Canadian military law.	
16	The Canadian Forces Service Prison and Detention Barracks be decommissioned, and service prisoners' sentences of incarceration be served at federal penitentiaries.	39
17	The Royal Canadian Mounted Police absorb the Canadian Forces Military Police assume responsibilities for domestic and deployed military policing and provide "conversion and transition" training as necessary. This would allow all future training to be done by the RCMP at Regina Depot, assuring a common standard and syllabus of training. This could permit the closure of the Military Police academy at CFB Borden.	40
18	RCMP include "provost detachments" at Canadian military headquarters, bases, stations, camps and installations, replacing Military Police in situ.	40
19	The approximately 1,300 reserve (part time) Military Police be transferred to the RCMP as "auxiliary police, provided conversion training and assigned to the nearest provost detachment of the RCMP.	40
20	JAG legal officers exercise greater discretion in using the convention of "Solicitor-Client Privilege" in their correspondence, ensuring that it is used only in situation where there is bona fide need.	41
21	Legal officers of the Department of National Defence and Canadian Armed Forces cease the practice of preparing letters that are Solicitor-Client Privilege and classified concerning members of the Canadian Armed Forces who are not charged with offences.	43
22	JAG be required to "open the books" and disclose to serving and retired service members who have been the subjects of such letters and compensate each for the impact of these letters on their careers, their service and their post-retirement benefits.	43

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