CANADA'S MILITARY JUSTICE SYSTEM IS IN A MELTDOWN: WILL GOVERNMENT ACT?

COLONEL-MAÎTRE® MICHEL W. DRAPEAU, O.M.M., C.D.

and

HONOURABLE GILLES LÉTOURNEAU, Q.C.

in collaboration with

Mr. JOSHUA JUNEAU

and

Me STÉFANIE BÉDARD

The need to reform military law and justice to better regulate military service

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Canada's Military Justice System is in a Meltdown: Will Government Act?

Le système de justice militaire du Canada est en voie de s'effondrer : Est-ce que le gouvernement va agir?

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FOREWORD

Cognizant of the growing and persistent systemic flaws found in the military justice system as exposed by several official reports,[1] as well as the cultural issues plaguing our military as recently reported by Canadian media (briefly outlined below)[2], we are convinced of the urgent need to reinforce its trustworthiness, independence, and fairness. Recently, the military has faced an unprecedented crumbling of the organisation as we know it, and the deep-rooted, systemic issues within the Canadian Armed Forces [CAF] are starting to be exposed to the civilian world.

a. Since February 2021, both the former and current Chiefs of Defence Staff face media attention in relation to allegations of sexual misconduct. First, retired General Jonathan Vance is currently under investigation concerning allegations of inappropriate behaviour during his military service made by two women who were subordinates.[3] General Vance was the architect of the 2016 Operation Honour – the program designed to combat sexual misconduct in the military. At the time, General Vance explained the *raison d'être* for implicating the chain of command in reports of sexual misconduct, claiming that, as CDS, he wanted to be personally apprised of every single complaint of sexual misconduct or harassment within the CAF. Second, Admiral Art McDonald, who was General Vance's successor and who also acted as the Commander of the Royal Canadian Navy during much of the Operation Honour era, was suspended from his duties amid an investigation into allegations of sexual misconduct.

b. Weeks later, reports surfaced in the media that Chief of Military Personnel and Commander of Military Personnel Command, Vice-Admiral Haydn Edmundson, had been subject to allegations of inappropriate behaviour with females subordinates in the late 1990's.

c. In early March 2021, the Minister of National Defence announced the appointment of a new Vice Chief of the Defence Staff. The new appointee would be the eighth (8th) general officer to serve in that important and prestigious position since 2016. Such a record high turnover rate of executive-level leadership can only lead to potential instability and turbulence in the entire CAF organization.

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1 In particular: the Honourable Marie Deschamps, retired Justice of the Supreme Court of Canada, External Review Authority (27 March 2015) *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces – Recommendations;* Statistics Canada, "*Sexual misconduct in the Canadian Armed Forces, 2016*", in *The Daily* (28 November 2016), catalogue no. 11-001-X; Office of the Auditor General, *Report 3 – Administration of Justice in the Canadian Armed Forces,* 2018 Spring Reports of the Auditor General of Canada to the Parliament of Canada; and Statistics Canada, "*Sexual misconduct in the Canadian Armed Forces, 2018*", in *The Daily* (22 May 2019), catalogue no. 11-001-X.

2 Over the past decade alone there has been a proper, balanced and accurate newsworthy coverage of such a military justice issue, in order to improve public understanding of this specialized and little-known field of Canadian law. For instance, in April 2014, after an 8-month investigation, *MacLean's* and *Actualité* magazines each published a long exposé on sexual misconduct in the armed forces titled "*Our Military's Disgrace'.* On April 21, 2016, *Radio-Canada* aired a documentary *"Femmes au Combat"* chronicling the story of five women who dared to complain about incidents of sexual assaults and in doing so put their military careers at risk. **"***Femmes au combat"* openly questioned both the efficacy of courts martial and the measures taken by the Canadian Forces leadership under Operation Honnour to change the military culture. On March 12, 2021 CBC's Fifth Estate televised another documentary titled "*Broken Honour. Sexual Misconduct in the military*". That CBC investigation revealed how military police and military justice officials "*fell below the standards of the civilian world, and how the man at the top, General Jonathan Vance, touted the program's success even though it secured few criminal convictions."*

3 In 2018, the then DND/CAF Ombudsman brought one of these allegations to the Minister of National Defence, which was then passed on by his staff to the Privy Council Office. Recently, the Minister explained that he did not intervene as this would have amounted to "*political interference*."

d. After a decade-long quest for justice, victim of sexual assault and advocate for victims' rights Stéphanie Raymond learned that her assailant would plead guilty before the Québec Superior Court of Justice.[4]

Things could have had a different outcome had an Inspector General of the Armed Forces been appointed as strongly recommended in 1997 by the Commission of Inquiry into the Deployment of the Canadian Airborne Regiment.

> "Control by Parliament is essential to democracy in Canada and to the well-being of the relationship between the CF and society, but this is made difficult by the vast amount of information in the CF and DND and by the technical nature and necessary secrecy of defence policy and defence relations with other states […] There are no routine reports to Parliament by the CDS and DND beyond those provided during the annual departmental estimates process. This handicaps Parliament in its role of supervising military affairs because it does not have easy access to critical analyses of defence matters. The evidence before us suggests that this has resulted in a serious deficiency in the oversight of the CF and DND by Parliament and in the treatment of members of the CF who have grievances against individuals in the chain of command. […] We believe that a civilian Inspector General, properly supported and directly responsible to Parliament, must form an essential part of the mechanism Canadians use to oversee and control the CF and the defence establishment. […] The Inspector General of the Armed Forces should be appointed by the Governor in Council and make accountable to Parliament. He should be a civilian and have broad authority to inspect, investigate, and report on all aspects of national defence and the armed forces. The Inspector General, moreover, should be provided with resources including auditors, investigators, inspectors and support personnel."[5]

The creation of such an office would have provided victims with access to a trusted and independent office to investigate allegations of misconduct and Parliament would have been able to rely on the presence of a dedicated and skilled office to investigate and report on any such matters of impropriety or abuse.

Our conclusion is that substantial structural reforms, including the creation of an independent office of Inspector General, must be implemented if the military justice system is to be allowed to continue to function, for it no longer meets the minimum standards of human rights, justice and procedural fairness. Our military personnel deserve better.

Ottawa, Ontario
March 2021

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[4] Mme Raymond was a young corporal when she was sexually assaulted by her superior, Warrant Officer André Gagnon, on a defence establishment in 2011. When the CF NIS failed to investigate her sexual assault complaint, she filed a harassment complaint with the CAF, and her chain of command suggested that she partake in a mediation procedure. She was then transferred out of her unit. After the cancellation of her scheduled promotion to the rank of Master Corporal, Mme Raymond was compulsorily released by the military in 2012 – on the date marking the anniversary of her assault. In March 2013, WO Gagnon was first charged under section 129 of the *Code of Service Discipline*. Only, after the national media showed an interest in the matter was WO Gagnon charged under the *Criminal Code* for the sexual assault. He was subsequently found not guilty by a Court martial in August 2014. The case was appealed to the Court Martial Appeals Court and then to the Supreme Court of Canada, where a *de novo* trial was ordered and to be conducted before the civilian criminal court. In Mars 2021, WO Gagnon plead guilty to sexual assault.

[5] Volume 2, Chapter 16 "*Accountability*" of Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured legacy: the lessons of the Somalia Affair - report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, 1997 (CP32-65/1997), at pp 397-403.

English / Anglais		Français / French	
BOI	Board of Inquiry	**CE**	Commission d'enquête
CAF	Canadian Armed Forces	**FAC**	Forces armées canadiennes
CDS	Chief of the Defence Staff	**CÉMD**	Chef d'état-major de la défense
CFMP	fCanadian Forces Provost Marshal	**GPFC**	Grand prévôt des Forces canadiennes
CF NIS	Canadian Forces National Investigation Service	**SNE FC**	Service national des enquêtes des Forces canadiennes
CMAC	Court Martial Appeal Court	**CACM**	Cour d'appel de la cour martiale
CO	Commanding Officer	**Cmdt**	Commandant
CM	Court Martial	**CM**	Cour martiale
CSD	*Code of Service Discipline*	**CDM**	*Code de discipline militaire*
Cr. C.	*Criminal Code of Canada*	**C. cr.**	*Code criminel du Canada*
DAOD	*Defence Administrative Orders and Directives*	**DOAD**	*Directives et ordonnances administratives de la Défense*
DDCS	Director of Defence Counsel Services	**DSAD**	Directeur Service d'avocats de la défense
DM	Deputy Minister	**SM**	Sous-ministre
DND	Department of National Defence	**MDN**	Ministère de la Défense nationale
DND/CF LA	Department of National Defence/ Canadian Forces Legal Advisor	**CJ MDN/FC**	Conseiller juridique après du ministère de la Défense nationale et des Forces canadiennes
DMP	Director Military Prosecutions	**DPM**	Directeur des poursuites militaires
FA	Final Authority in the Grievance Process	**ADI**	L'autorité de dernière instance en matière de griefs
HQ	Headquarters	**QG**	Quartier général
HMCS	Her Majesty's Canadian Ship	**NCSM**	Navire canadien de Sa Majesté

IA	Initial Authority in the Grievance Process	**AI**	Autorité initiale en matière de griefs
JAG	Judge Advocate General	**JAG**	Juge-avocat général
MGERC	Military Grievances External Review Committee	**CEEGM**	Comité externe d'examen des griefs militaires
MND	Minister of National Defence	**MDN**	Ministre de la Défense nationale
MP	Military Police	**PM**	Police militaire
MPCC	Military Police Complaints Commission	**CPPM**	Commission d'examen des plaintes concernant la police militaire
NCM	Non-Commissioned Member	**MR**	Militaire du rang
NDA	*National Defence Act*	**LDN**	*Loi sur la Défense nationale*
NDHQ	National Defence Headquarters	**QGDN**	Quartier général de la Défense nationale
NIS	National Investigation Service	**SNE**	Service national des enquêtes
PM	Provost Marshal	**GP**	Grand prévôt
QR&O	*Queen's Regulations and Orders*	**ORFC**	*Ordonnances et règlements royaux applicables aux Forces canadiennes*
RCAF	Royal Canadian Air Force	**ARC**	Aviation royale canadienne
RCMP	Royal Canadian Mounted Police	**GRC**	Gendarmerie royale canadienne
RCN	Royal Canadian Navy	**MRC**	Marine royale du Canada
RF	Regular Force	**FR**	Force régulière
RMC	Royal Military College	**CMR**	Collège militaire royal
SMRC	Sexual Misconduct Response Centre	**CIIS**	Centre d'intervention sur l'inconduite sexuelle
VCDS	Vice Chief of the Defence Staff	**VCÉMD**	Vice-chef d'état-major de la défense

TABLE OF PROPOSED CHANGES

Legislative changes

NDA	RECOMMENDATION	REASONS (BRIEF)
9.2(1)	Repeal the JAG's superintendence function.	This function properly belongs to the Minister of Justice.
29.11	Impose a reasonable time limit for the Final Authority to issue a grievance decision.	The current system does not provide a time limit, and the result is that grievances routinely take 5 or more years to be resolved.
18.5(3)	Repeal entirely.	MP should be allowed to proceed with an investigation without interference from non-military police command structures, including the VCDS.
45	Repeal the ability for a BOI to investigate non-combat deaths in Canada.	All non-combat deaths of CAF members should be investigated by civilian Coroners.
70	Include "sexual assault" as a matter which cannot be heard by service tribunal	The CAF lack the requisite expertise to hear sexual assault cases.
82	Maximum penalty for sedition should be 14 years imprisonment, from the current life imprisonment.	Consistent with the civilian standard at s.59 of the *Criminal Code*.
139	"*Forfeiture of Seniority*" be removed from the Scale of Punishments	No practical meaning in 2021.

139	Eliminate one of the two punishments of "*Severe Reprimand*" and "Reprimand" from section 139 of the *NDA*.	There is no realistic distinction between the two punishments.
154 **155**	Remove the ability for a military member to arrest and/or order the arrest of another, without a warrant	Powers of arrest should be authorized only by a military judge.
167	A military panel hearing a *Criminal code* offence, where the punishment is greater than 5 years' imprisonment, should be made up of 12 persons	The *Canadian Charter of Rights and Freedoms* s.11(f) requires a criminal accused appears before a jury of their peers. Members of the military should not be denied this right.
203.95	Amend the sentencing principles to make them consistent with the *Cr.C.* For example, include the ability for a guilty party to serve their sentence within the community or his unit.	Make the *NDA* consistent with the contemporary civilian standard.
228	Restrict prosecution's appeal rights to only include appeals on questions of law.	Make the *NDA* consistent with the civilian standard.
230	Allow an accused to appeal a conviction on questions of fact	Make the *NDA* consistent with the civilian standard at ss. 675(1)(a)(ii) of the *Criminal Code*
230.1	Remove the right of the Minister of National Defence to appeal a Court Martial decision.	The current framework offends the right to an independent prosecution. The right of appeal should vest with the prosecution service.

249 **249.11** **249.12** **249.13** **249.15**	Remove the ability of the Governor in Council to review findings of guilt and/or punishment at court martial	This current ability offends the separation of powers doctrine. Only judges should be able to review judicial decisions.
249.27	Repeal this section, as it enables a criminal record to flow from a disciplinary conviction.	A criminal record should only result from a criminal conviction.
273.5	Remove the right of a Commanding Officer to execute a search warrant.	Search warrants should only be issued by military judges

Structural changes (no particular order)

	RECOMMENDATION	**REASONS (BRIEF)**
1	Military Prosecution Services should be supervised by the Attorney General of Canada or the Federal Director of Public Prosecutions.	Having the Military Prosecution Services subject to the JAG offends their independence and s.7 of the *Charter,* as the MPS are not independent of the chain of command.
2	Military Defence Services should be supervised by the Attorney General of Canada.	Having the Military Defence Services subject to the JAG offends their duty of independence.
3	Remove rank from judges, lawyers, doctors, dentists, padres, and police officers.	There is no reason for these specialists to hold rank. Section 60 of the *NDA* should not apply to such specialists.

		Removal of rank from specialists removes any ethical conflicts when having to decide between loyalty to their clients, and loyalty to the CAF; and creates true judicial and police independence, as these roles no longer would be subject to the chain of command.
4	The Sexual Misconduct Response Centre (SMRC) must be removed from the control of DND	Parliament should appoint an Inspector General of the Armed Forces who would act as an advisor to Parliament to specifically deal with the issue of sexual misconduct
5	Courts martial should become a specialized division of the Federal Court of Canada.	The current court martial system lacks independence, and their expertise could be subsumed by the current compliment of Federal Court judges. Moreover, the very small case load does not warrant the administrative burden of the current court martial system.
6	Enable members to form a professional association to protect their professional interests in the framework of democratic institutions	This is consistent with the approach of our allies in Austria, Belgium, Bulgaria, Denmark, Finland, Hungary, Ireland, Norway, Romania, Switzerland, and the Netherlands
7	Rebrand "Judge Advocate General (JAG)" as "CAF Legal Advisor"	This is more accurately describes her role and function. She is not a judge, or an advocate.
8	Allow Prosecution Service the right to proceed summarily for hybrid offences	Currently, the *NDA* does not recognize hybrid offences, or their character. All criminal offences are disciplinary offences under the *NDA*.

PART I – GENERAL

INTRODUCTION

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

Our commitment to these values must be renewed on every occasion, and the institutions that sustain them must be cherished. Among those who valiantly uphold these values and institutions are the soldiers, men and women, of the Canadian Armed Forces [CAF] who put their lives on the line each and every day to protect and defend our country and what we stand for. Many recognize that we owe them an eternal debt of gratitude, but few acknowledge, let alone are prepared to correct, how severely we have deprived them of their basic human rights by failing to reform and modernize our antiquated military justice system. Canadian soldiers and civilians tried in Canada before military 'courts', including summary trials, Court Martial and other quasi-judiciary or administrative proceedings, constitute a second class of Canadians that are denied the very rights we as citizens are so proud of and committed to.

There is clearly no aspect of our National Defence more important and critical than our people, yet their rights have been set aside by gross indifference. Unlike most of our Allies, the current Canadian military 'justice' system fails to provide all the guarantees set forth in our Constitution or international law. For instance, Canadian military 'judges' are, like their medieval counterparts, '*soldiers first'* that are subordinated to a military chain of command that staunchly refuses to evolve and embrace positive change.

MILITARY LAW DEFINED

The body of law in Canada known as '*military law'* with its own governance regime and penal justice system tends to evolve slowly, quite separately and apart from

civil society.[1] This is due in large part to two interconnected factors. First, the Judge Advocate General (JAG), who reports to the Minister of National Defence (MND), alone has the unfettered governance over all the key actors in the military justice system. Second, the distinctiveness of the military justice system from the mainstream of national (criminal and administrative) law is reinforced by the fact that only a very tiny number of judges, lawyers, professors, legislators and public officials who concern themselves with military law.

The bulk of Canadian military law is derived, in large part, from customs and traditions as well as a statute of Edward I in 1279, in which it was enacted that, by virtue of Royal Prerogative, the Sovereign had the "*right to command*" all the military forces in the nation.[2] The Royal Prerogative also accorded the Crown the power to regulate and discipline the army and the navy. This mechanism was replaced by medieval *Rules and Ordinances of War,* a list of regulations issued by the King at the beginning of every expedition or campaign. The *Articles of War* (originally established in 1653[3] and amended in 1749 by an Act of Parliament) were drawn up in 1757 to govern British military and naval forces and to regulate the behaviour of soldiers and sailors.[4]

It should be noted that in Canada the federal government is granted exclusive jurisdiction over the "*Militia, Military and Naval Service, and Defence*" pursuant to

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1 As defined by Honorary Colonel and retired Justice Ian Binnie of the Supreme Court of Canada, "military law cuts across all the major areas of jurisprudence, including constitutional and administrative law, private rights and, of course, criminal law." See foreword to *Military Justice in Action; Annotated National Defence Legislation*, 2nd edition, by Hon. Gilles Létourneau and Professor Michel W. Drapeau, Carswell, Scarborough, 2015 [*Military Justice in Action*].

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

3 The requirement for summary proceedings was first recognized by the British Parliament with the passage of the *Mutiny Act* in 1689. Centuries later, and despite the enactment of the *Canadian Bill of Rights, 1960* (S.C. 1960, c. 44.)*;* the *Canadian Human Rights Act* (R.C.S. 1985, c. H-6.)*;* the *Charter of Rights and Freedoms, 1982* (Part I of the *Constitution Act*, *1982,* being Schedule B to the *Canada Act* 1982 (UK), 1982, c. 11.), summary trials are still in existence under the *NDA.*

4 See: Preface to *Military Justice in Action*, supra note 1.

section 91(7) of the *Constitution Act, 1867*[5]. In the exercise of this jurisdiction, the Canadian Parliament passed *An Act respecting the Militia and Defence of the Dominion of Canada*[6] to govern Canada's armed forces. The *Naval Service Act*[7] and the *Royal Canadian Air Force Act*[8] were subsequently enacted in the 1940s.

Following these legal documents, Parliament re-examined all legislation applicable to the armed forces in Canada in 1950 before enacting a comprehensive *National Defence Act* (*NDA*)[9] which included in a single statute all legislation related to the Department of National Defence (DND), the Royal Canadian Navy (RCN), the Canadian Army and the Royal Canadian Air Force (RCAF) establishing, *inter alia*, a uniform process for administering military justice in the three services.

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

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

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5 30 & 31 Victoria, c. 3 (U.K.).

6 S.C. 1868, c. 40 [The *Militia Act, 1868*].

7 9-10 Edward VII, S.C. 1910, Chap. 43.

8 4 George VI, S.C. 1939, Chap. 15.

9 R.S.C., 1985, c. N-5.

CALL FOR REFORMS

> "*The Canadian military's anti-intellectual conservatism, its rejection of reform, its failure to engage in challenging thinking – even of the basic strategic norms that disappeared as the Cold War ended – flew in the face of rapid change in Canadian society itself… it resisted change. It resented civilians telling it what it ought to do.*"[10]

Such clamouring has not led parliamentarians to make legislative changes that would contemporize the military justice system. Yet, one would legitimately expect changes which are in-line with the *Canadian Charter of Rights and Freedoms* and contemporary Canadian legal doctrine and principles as well as in harmony with reforms enacted by a majority of our allies. Ironically, however, when Parliament did act, the military was able to delay the implementation of many of such reforms. For instance, some of the sections of Bill C-15 enacted on June 19, 2013[11] have yet to be put in force. Similarly, Bill C-77, enacted on June 21, 2019,[12] which adds a Declaration of Victims' Rights integrating (and customizing) the *Canadian Victims Bill of Rights*[13] into the *National Defence Act* (*NDA*) and replaces Summary Trials has yet to be put into force.

The expansion of the military justice system has resulted in a corresponding loss of a high number of rights for soldiers, including the constitutional right to a jury trial: the right to a preliminary inquiry, the loss of the benefits of a hybrid offence, etc., for those prosecuted before and tried by military tribunals.

Of note, civilians including dependents, contractors, and journalists as well as members of their family accompanying the CAF abroad fall under the jurisdiction of military tribunals.

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10 Professor David J. Bercusson, "Up from the ashes; The re-professionalization of the Canadian Forces after the Somalia Affair" (2009) 9:3 *Canadian Military Journal* 31, at p 34.

11 *Strengthening Military Justice in the Defence of Canada Act,* S.C. 2013, c. 24.

12 *An Act to ament the National Defence Act and to make related and consequential amendments to other acts,* S.C. 2019, c. 15.

13 R.C.S. 2015, c. 13, s. 2.

PURPOSE

As detailed below, having a demonstrated interest in the Canadian military justice system, we are honored to present our views for the reform of the Canadian Military Justice.

BACKGROUND AND EXPERTISE

Colonel-Maître® Michel W. Drapeau, OMM, CD, LL.L., LL.B.

Prior to joining the legal profession, Colonel-Maître® Drapeau served in both the Regular Force and the Reserves for a total of 34 years. He received the Order of Military Merit (OMM) and the Canadian Forces' Decoration (CD) in recognition for his long and exemplary military service. At the time of his voluntary release in 1993, he was serving in the dual appointments of Executive Secretary, National Defence Headquarters (NDHQ) and Secretary of Armed Forces Council. This was followed by a two-year appointment as a Public Service executive in the positions of Director Corporate Administration and acting Director General Corporate Management Services at NDHQ.

Between 1996 and 2002, Colonel-Maître® Drapeau attended law school, earning a law degree in civil law (LL.L.) and in common law (LL.B.) before articling at the Federal Court of Appeal under the supervision of the Honorable Gilles Létourneau. Immediately after being called to the Ontario Bar in 2002, Michel Drapeau opened his own law firm – Michel Drapeau Law Office (MDLO) – focusing on military law. Since 2002, MDLO has been serving almost exclusively the military community from across Canada and abroad, as well as DND civilians and veterans. During that period, Colonel-Maître® Drapeau and his MDLO colleagues[14] appeared before courts martial, the Ontario

[14] Collaborating authors Mr. Joshua Juneau (B.A., J.D.) and Me Stéfanie Bédard (LL.L., J.D.) are also lawyers practising mainly in military law at Michel Drapeau Law Office, where each completed their articles of clerkship for the Law Society of Ontario under the supervision and guidance of articling Principal Michel Drapeau. In addition to being members of the Law Society of Ontario, Me Bédard, who holds law degrees in both civil law and common law, was subsequently called to the Barreau du Québec as Canadian legal adviser, and Mr. Juneau was called to the Queensland Bar. Mr. Juneau also contributed to the evolution and advancement of military law, namely as counsel of record for the Fynes inquiry and through his involvement at the House of Commons for Bill C-77, *An Act to amend the National Defence Act and to make related and consequential amendments to other Act*, concerning the unconstitutional nature of military summary trials.

Superior Court, the Federal Court, the Court Martial Appeal Court (CMAC) and the Federal Court of Appeal, all of which about military administrative law matters.

In 2009, Colonel-Maître® Michel W. Drapeau was appointed by the Senate of the University of Ottawa as an Adjunct Professor, and taught courses on Military and Veterans Law for many years. In 2020, he was selected by the Ontario Bar Association to receive the Distinguished Service Award for his contribution to the legal profession.

Honourable Mr. Justice (ret'd) Gilles Létourneau,
B.A., LL.L., LL.M., Ph.D.

In addition to obtaining a Bachelor of Arts (B.A.) and civil law degree (LL.L.), Justice Létourneau hold a master's degree in criminal law and criminology (LL.M.) and a doctorate (Ph.D.) in Criminal Law and Procedure.

Since being called to the Barreau du Québec in 1969, Justice Létourneau established an impressive and varied legal career practising in both the private and public sectors, including through work with the Quebec Department of Justice, the Centre communautaire juridique du Québec, the Société Québécoise d'information juridique (SOQUIJ), as well as Vice-Dean, Director of Undergraduate Studies and Professor of Law at the Université Laval. Justice Létourneau also served as, and as Vice-President and President of the Law Reform Commission of Canada in Criminal Law and was Associate Secretary General (Legislation) of the Executive Council and Secretary of the Legislation Committee for several major legislative reforms in Quebec.

After being appointed Queen's Counsel in 1991, he was appointed judge of the Federal Court of Appeal of Canada and of the Court Martial Appeal Court of Canada in 1992. He sat on the Court Martial Appeal Court of Canada for more than 20 years.

In the mid 1990's, Justice Létourneau attained public prominence a Chairman of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia. This Commission of Inquiry proved to be a fundamental cornerstone in the 1998 reform of Canadian military justice system and of the *National Defence Act.*

In 2013, Justice Létourneau was awarded the Médaille du Barreau du Québec in recognition of the excellence of his outstanding and significant contribution to the advancement of law.

PUBLISHED AUTHORS IN CANADIAN MILITARY LAW

In 2006, the Honorable Gilles Létourneau and Colonel-Maître® Michel W. Drapeau produced the first-ever published compendium of the Canadian military statutes and law titled *Canadian Military Law Annotated* by Carswell. Their intention was to advance the law and to increase access to it in a very specialized domain particularly for those who do not possess a comprehensive or intimate knowledge of the Canadian military or the Canadian military law.

The co-authors further published legal texts together on Canadian military law, including a much-expanded book titled *Military Justice in Action* in 2011 and its second edition published in 2015.[15] This later edition contains a special chapter discussing the need to reform the *National Defence Act.*[16]

[15] Of note, a collaborating author to this paper, Mr. Joshua Juneau, also contributed to the production of both editions of *Military Justice in Action* in 2011 and 2015.

[16] Michel W. Drapeau, Joshua M. Juneau, Walter Semianiw and Sylvie Corbin, *WINDS OF CHANGE,* (13 November 2015) Conference and Debate on Canadian Military Law, University of Ottawa, Faculty of Law. See link at the following address: https://www.mdlo.ca/news. See Chapter 2, which highlights some of the derogations from the civilian justice system for the persons who are subject to military law and particularly the military *Code of Service Discipline.* It also proposes a number of changes to the military justice system to both preserve public confidence in its fairness and to bring it closer to the standards being set by other military justice systems around the world.

PART II - MODERNIZATION OF MILITARY JUSTICE[17]

"*The military justice system cuts across every aspect of the law: labour, administration, constitutional, public and private, discipline and criminal law. On many fronts, military justice is in need of a fundamental review to achieve fairness, efficiency, justice and compliance with the Canadian Charter of Rights and Freedoms. Reforms are also required to bring the existing military justice system in line with societal norms and values as well as evolving global trends in military justice that reveal a convergence of the military and civilian justice systems and more adherence to human rights standards.*

The expansion of the military justice system in Canada has resulted in the loss of a number of rights, including the constitutional right to a jury trial, for those prosecuted before and tried by military tribunals. Also, over time the disciplinary jurisdiction of military tribunals has expanded to the point where only the offences of murder, manslaughter, and abduction of children, when committed in Canada, cannot be tried by service tribunals. Further, civilians and members of the military families accompanying the Canadian Forces fall under the jurisdiction of military tribunal"[18]

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17 As discussed below, there are existing differences between the Canadian military and the Canadian civilian justice system which are no longer warranted or justified as they deny justice and fairness to military members. Similarly, the expansion of the Canadian military justice system has resulted in a corresponding loss of a high number of rights for soldiers and civilians tried by our military tribunals.

Strangely, but in keeping with this divide, victims of crimes that are investigated or prosecuted under military jurisdiction have been patently excluded from the *Canadian Victims Bill of Rights* which was enacted in 2016. It is somewhat unseemly to think that CAF members, who volunteer to put their lives on the line to defend our security and values, must give up their basic human rights which are so essential to those not in uniform. As will see below, this situation was corrected by Bill C-77, which was enacted on June 21, 2019. Disappointingly, this void still exists as the Office of the JAG has yet to promulgate enabling regulations so as to put the statute into force.

Therefore, for the past four years, victims of crimes that are investigated by the military police or CF NIS, or prosecuted by military prosecution authorities have been denied their rights as victims of crime.

18 See "A Word of Introduction", *Military Justice in Action,* supra note 1.

GENERALLY

The following will discuss and address issues with the Canadian military justice system that have been identified but have yet to be corrected by the Canadian government.

In Part III below, we will address what we consider to be the many important areas of law that should be considered for the reform of the *National Defence Act*. As noted below, over the past two decades, some of the suggestions for reform have already been addressed by authors in previous publications. Reference to these texts will be made, where appropriate. For the sake of convenience, these will be addressed in a chronological manner in PART III A below. This will be followed by additional proposed areas of reform which will be discussed in PART III B below. In each of these instances, we will be making a recommendation for reform.

CONSTITUTIONAL ISSUES

Because a Canadian in uniform is a Canadian citizen first, prosecutorial and judicial decisions on legal issues that affect them, as well as the rights and responsibilities of these Canadian 'citizens in uniform' should be immune from interference by the military chain of command[19] as they are from political interference in the civilian penal system. Unfortunately, this is currently not the case.

In 2017, the book titled "*Behind the Times: Modernization of the Canadian Military Criminal Justice"* noted again that the Canadian military justice system is in desperate need of reform.

> "[…] *there are existing differences between the Canadian military and the Canadian civilian justice system which are no longer warranted or justified as they fundamentally deny justice and fairness to Canadian military members . . . Over the years, attempts to modernize the National Defence Act (NDA) to bring it more in line with globally*

[19] The chain of command is first an authority and accountability chain extending from the office of the CDS to the lowest element of the CAF and back to the office of the CDS. It is also a hierarchy of individual commanders taking decisions within their linked functional formations and units. The chain of command therefore, is a military instrument joining a superior officer – meaning any officer or non-commissioned member who, in relation to any other officer or non-commissioned member, is by the *NDA*, or by regulation or custom of the service, authorized to give a lawful command to that other officers or non-commissioned officers.

accepted standards of justice, or even our own domestic penal system, have been serially resisted by the Canadian military legal establishment. Several of the reforms that have been made are the result of pressures that were initiated from outside, none the least the judiciary, but not within the DND or the military itself."[20]

We are convinced that substantial reforms are required to bring the existing Canadian military justice system in line with Canadian societal norms and values as well as evolving global trends in military justice which reveal a convergence of the military and civilian justice systems and more adherence to human rights standards. This is a huge and pressing undertaking.

Also, we believe that reforms to our military justice system should ensure that it corresponds only to strict functional necessity for the military, without encroaching, as it currently does, on the jurisdiction that can and should belong to civil society and ordinary (civilian) courts.[21] Moreover, such convergence should be examined through the lens of a modern civil society untrammeled by the executive and the military chain of command.

PART III A – PRIOR PUBLISHED SUBMISSIONS FOR REFORMS

We now wish to address what we consider to be the many important areas of reform that should be considered to the *National Defence Act*. Over the past two decades, some of the suggestions for reform have already been addressed by me and others in previous publications. For the sake of convenience, these will be addressed in a chronological manner in this PART III A. This will be followed by number of other

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[20] Gilles Létourneau and Michel W. Drapeau, *Behind the Times: Modernization of Canadian Military Criminal Justice*, (30 March 2017) [*Behind the Times*], at p 17. Of note, a collaborating author to this paper, Mr. Joshua Juneau, also contributed to the production *Behind the Times.*

[21] This is in accord with the Draft Principles Governing the Administration of Justice Through Military Tribunals published by the United Nations during its 62nd Session (Doc E/CN.4/2006/58, (2006), Principle 20, which provides, *inter alia*, that:

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

proposed areas of reform which will be discussed in PART III B below. In each of these instances, we will be making a recommendation for reform.

CANADIAN BAR REVIEW - 2003

In an article published in 2003 in the Canadian Bar Review[22] we discussed the following two punishments contained in the Scale of Punishments at section 139 of the *NDA:*

a. Forfeiture of Seniority[23]

The article addresses the futility of the punishment of "*forfeiture of seniority*" in the *NDA* Scale of Punishments:

> "*Today, at worst the forfeiture of seniority might have a slight impact upon a CF member by delaying one's entry into a given promotion zone. On rare occasions, seniority could come into play, say for ceremonial or protocol reasons. Otherwise, it is a concept devoid of any real meaning for establishing standing among military members with a given rank level*."

Recommendation. We recommend that the punishment of "*Forfeiture of Seniority*" be removed from the Scale of Punishments.

b. Reprimands[24]

There are no known modern formulae to differentiate between the punishment of "*Severe Reprimand*" from the punishment of "*Reprimand*" which are also contained in the *NDA* Scale of Punishments. In a begone era, the two were distinguished by the fact that a "*Severe Reprimand"* entailed an entry on the regimental conduct sheet of

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22 Michel W. Drapeau, "*Canadian Military Law: Sentencing under the National Defence Act: Perspectives and Musings of a former soldier*", (2003) 83: 1-3 *Canadian Bar review* 391.

23 *Ibid,* at pp 444-446.

24 *Ibid,* at p 447.

an individual while a simple "*Reprimand*" was only recorded on the company conduct sheet of an individual. Such distinction is no longer applicable.

Recommendation. Given the absence of any real distinction today, section 139 of the *NDA* should be amended to eliminate one of the two punishments of reprimand from section 139 of the *NDA*.

MILITARY JUSTICE IN ACTION – 2015

The second edition of *Military Justice in Action* published in 2015 contains a special chapter discussing the need to reform the *National Defence Act. That* chapter proposes the review of a number of areas, the most significant of which being discussed below with specific reference to the location of the extracts or passages quoted from Chapter 2 of *Military Justice in Action*.

a. Differential penalties for same offences[25]

A number of military offences (such as desertion, mutiny, sedition, spying) contained in the *Code of Service Discipline*, are in fact duplication of offences that are contained in the *Criminal Code of Canada* [*Cr. C.*] However, there are significant differences as to how these offences are treated under these two statutes. By way of example, consider the offence of sedition. Section 59 of the *Cr. C.* sanctions an accused to a maximum imprisonment of 14 years while section 82 of the *NDA* provides for the possible sanction of life imprisonment for a member of the military.

Recommendation. Such differences in the severity of the maximum sentence are not compatible with the concept of equal justice for all and they should be eliminated.

[25] *Military Justice in Action*, supra note 1 at pp 40-41.

b. The loss of the constitutional right to a jury trial[26]

Paragraph 11 (f) of the *Canadian Charter of Rights and Freedoms* (*Charter*) denies a person prosecuted before a service tribunal the right to a jury trial. [27] In lieu of a jury trial, the accused is given a trial by a General Court Martial composed of a panel of five (5) military members[28] presided over by a military judge. The loss of a jury trial in this context is quite significant.[29]

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

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26 *Ibid*, at pp 42-48.

27 Subsection 11(f) of the *Charter* reads as follows:

11. *Any person charged with an offence has the right […]*

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

28 Honourable Gilles Létourneau, *Introduction to Military Justice: an Overview of Military Penal Justice System and its Evolution in Canada*, (Montréal: Wilson & Lafleur, 2012) at p 6 [*Introduction to Military Justice*].

> *"It is not unreasonable to think, on the one hand, that it is easier to obtain a unanimous verdict from only five, as opposed to twelve (12) people, and, on the other hand, that such unanimity ought to be more readily achievable from five (5) people trained in the same mindset and having the same institutional baggage than from twelve people coming from different walks of life, who do not belong to the same school of thought and who do not have a common institutional baggage."*

29 As the Court Martial Appeal Court of Canada (CMAC) pointed out in *Leblanc v. Her Majesty the Queen*, [1982] 1 SCR 344 a jury of twelve (12) persons, chosen by the prosecution and the defence from civil society at large, offers a better guarantee of justice than a panel of five (5) members from the military chain of command.

c. The loss of the benefits of a hybrid offence[30]

A very large majority of the offences contained in the *Cr. C.* are hybrid offences which means that they can be prosecuted by way of indictment or by summary conviction. However, hybrid offences under the *Cr. C* loose that characteristic in the military penal justice system where they become mere service offences.

Recommendation. We recommend that the *NDA* be amended to respect the formal expression of the will of the legislator which was actuated through the process of *enactment* of hybrid offences in the *Cr. C.*

d. The loss of a preliminary inquiry[31]

As a result of the transformation of *Cr. C.* offences into service offences, an accused before a military tribunal loses the right to a preliminary inquiry.

Recommendation. We recommend that the *NDA* be amended to respect the formal expression of the will of the legislator which was actuated through the process of *enactment* of a preliminary inquiry in the *Cr. C.*

e. The right of appeal[32]

Under section 230.1 of the *NDA*, the prosecution can appeal to the Court Martial Appeal Court (CMAC) against the legality of a finding of "*not guilty*". Section 228 of the *NDA* deems the terms "*legality*" and "*illegal*" to relate to either questions of law alone or to questions of mixed law and fact. As a result of the broad meanings given to these terms the prosecution in military trials can appeal on a question of mixed law and fact.

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30 *Military Justice in Action*, supra note 1 at pp 48-49.

31 *Ibid,* at p 49.

32 *Ibid,* at pp 49-50.

i. In a criminal trial before a civilian tribunal no such power exists for the prosecution. Thus, at law, the balance with respect to appeals is tipped in favor of the accused in criminal proceedings before a civilian tribunal.

ii. However, in proceedings held before a military tribunal, the same balance is tipped in favour or the prosecution to the detriment of the accused.

iii. It appears that this situation runs afoul of the presumption of innocence.

Recommendation. We recommend that section 230.1 of the *NDA* be repealed to respect the formal expression of the will of the legislator in his enactment of the *Cr. C*.

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f. The power to review and substitute findings and punishments or to commute or remit punishments[33]

Pursuant to sections 249, 249.11, 249.12, 249.13 and 249.15 of the *NDA* a finding of guilty and sentence imposed can be reviewed by reviewing authorities situated outside the judicial hierarchy. These sections authorize the Governor in Council to review the Court Martials guilty finding as well as the punishment that it imposed. Both the accused and the CDS can seek such a review.

Recommendation. Such provisions go against the doctrine of the separation of powers and against deep-rooted notions of the judicial process in Canada and the decisional independence of the judiciary. The executive should play no part in the judicial process and we recommend that these provisions be repealed.

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g. The sentencing range[34]

i. An accused prosecuted before a Court Martial is not entitled to many of the sentencing options available to a civilian tribunal sitting in criminal matters.

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33 *Ibid,* at pp 50-52.

34 *Ibid,* at pp 52-53.

This includes a sentence of imprisonment to be served within the community or his unit.

ii. Also, section 203.95 of the *NDA* states that only one sentence shall be passed on an offence when multiple findings of guilt are made at trial under the English text. [the French text gives the sentencing judge discretion in the matter.]

Recommendation. We recommend that the *NDA* be amended to respect the formal expression of the will of the legislator which was actuated through the process of *enactment* of a variety of sentencing options in the *Cr. C*.

h. A criminal record for a disciplinary offence[35]

In Canada, convictions by a disciplinary board for offences like conduct prejudicial to the profession do not give rise to a criminal record. Yet, section 249.27 of the *NDA* lists a number of offences[36] for which a criminal record may follow conviction if the sentence passed is higher than a severe reprimand, a reprimand, a minor punishment or a fine exceeding one month of basic pay.

Recommendation. Usually, a criminal record relates to the guilty verdict, the nature and the objective gravity of an offence; not the severity or lack of it, or the nature of the punishment. We recommend that this provision be repealed.

BEHIND THE TIMES: MODERNIZATION OF MILITARY JUSTICE –2017

The aforementioned 2017 book titled "*Behind the Times: Modernization of the Canadian Military Criminal Justice*" proposes a variety of reforms under the following titles. These are summarized below.

35 *Ibid,* at pp 53-55.

36 Offences such as s. 85 – Insubordinate behavior; s.86 – Quarrels and Disturbances; s. 90 – Absence without leave; s. 91 – False statement in respect of leave; s. 97 – Drunkenness; s. 129 - Conduct to the Prejudice of Good Order and Discipline.

a. The loss of the Constitutional Right to a Jury Trial [37]

This has been discussed at part b of "Military Justice in Action", above.

b. The lack of Independence of the Prosecution Services[38]

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

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

c. The lack of Independence of the Defence Counsel Services[39]

A fair and independent justice system requires independence of its three essential components: military judges, prosecutors and defence counsel.

Recommendation. As is the case with legal aid in Ontario, Quebec and other Canadian provinces, the Directorate of Defence Counsel Services (DDCS), if any, should be independent and be a separate legal statutory entity falling under the supervision of the Attorney General.

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37 *Behind the Times,* supra note 20 at p 52.

38 *Ibid,* at p 61.

39 *Ibid,* at p 62.

d. The scope of the Prosecution and the Accused's Right of Appeal[40]

An accused's right to appeal against a military finding of guilt is narrower than an accused's right against a similar finding made by a civilian criminal court. As a matter of fact, subparagraph 675(1)(a) (ii) of the *Cr. C* allows a person convicted by a civilian criminal court to appeal against the finding of guilt on a question of fact with leave of the Court of Appeal or a certificate of the trial judge that the case is a proper case for appeal. An accused tried by a military tribunal is not given that right by the *NDA*. Thus, at law, the balance with respect to appeals is tipped in favour of the accused in criminal proceedings before a civilian tribunal. However, in proceedings held before a military tribunal, the same balance is tipped in favour of the prosecution to the detriment of the accused. Once again it appears that this situation runs afoul of the presumption of innocence.

Recommendation. As granted to a person convicted by a civilian criminal court by subparagraph 675(1)(a) (iii) of the *Cr. C*, the accused should have the right to appeal, with leave, a question of fact.

e. The Minister of National Defense's Power to Appeal[41]

Under section 230.1 of the *NDA*, the MND or counsel instructed by the Minister has the right to appeal to the CMAC decisions of a Court Martial. Under such circumstances, the MND cannot reasonably be perceived as being an independent prosecutor who can act in a manner that is autonomous and independent from the chain of command. Moreover, it is very difficult to see how the granting of a minister's power to appeal can be reconciled with the legislative intent surrounding the reforms made in 1999, which was to ensure that the military justice system remained independent of the chain of command. Indeed, the principle of independence with regard to decisions to prosecute requires that such decisions also be protected as much as possible from interference by members of the military

40 *Ibid,* at p 63.

41 *Ibid,* at p 65.

hierarchy. When a member of the military hierarchy, like the MND, is entrusted with decisions of this sort, the problems are substantial. Therefore, as determined in *R v Gagnon*[42], section 230.1 of the *NDA*, which confers on the MND the right to appeal, does not satisfy the constitutional requirement of prosecutorial independence. It should be of no force and effect to the extent that its holder is not independent. The section is not a justifiable limit that can be saved under section 1 of the *Charter*.

Recommendation. As found recently by the CMAC in the case of *R v Gagnon* and proposed by the Right Honourable Brian Dickson in his Second Report[84], the right to appeal against an acquittal by a Court Martial or the CMAC should be exercised by an independent authority, without interference by or pressure from the chain of command. The MND is part of the chain of command and should not have this right.

f. The Chain of Command's Power to issue Search Warrants[43]

The general rule for a valid search is that the police will require prior judicial authorization to conduct the search (for example, by obtaining a search warrant) and that there are reasonable and probable grounds that justify it. Once these requirements are satisfied, state intrusion on privacy would be justified. These standards apply where there is a reasonable expectation of privacy and section 8 *Charter* protection varies depending on the context constitutional protection when the search involves state intrusion into a person's home. However, the safeguards may be reduced in the case of a search at the border. Pursuant to s. 273.3 of the *NDA*, warrants can be issued for the search of quarters under the control of the Canadian Armed Forces and occupied for residential purposes by any person subject to the *Code of Service Discipline*. The search also extends to any locker or storage space located in those quarters. The warrants may be issued by a Commanding Officer (CO) satisfied by information on oath that there is in these places evidence of the commission of an offence against the *NDA* or anything intended to be used for the commission of an offence against a person for which a person may be arrested without a warrant. The CO must have reasonable grounds to believe that an offence has been committed.

42 (2015) CMAC 2.

43 *Behind the Times,* supra note 20 at p 67.

Under s. 273.5, all the requirements and safeguards contained in s. 273.3 do not apply to a Commanding Officer (CO) of a military police unit.

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

g. The Scope of the Arrest Power and the Duty Not to Arrest[44]

Pursuant to sections 154 and 155 of the *NDA*, an officer and a non-commissioned member are invested with the power and authority to arrest, or order the arrest, without a warrant, of every person 'who has committed, is found committing or is believed on reasonable grounds to have committed a service offence, or who is charged with having committed a service offence'. In a proposed addition, i.e. s. 155 (2.1) enacted in 2013 through Bill C-15[45], limitations were put on that power to arrest without a warrant. Unless ordered by a superior officer to do so, an officer or a non-commissioned member cannot arrest or order the arrest of a person without a warrant for an offence that is not a serious offence if, broadly stated, the public interest may be satisfied without so arresting the person or there are reasonable grounds to believe that the person will not fail to attend before a service tribunal.[46]

Recommendation. Pursuant to section 7 of the *Charter of Rights and Freedoms* which guarantees to everyone the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of

44 *Ibid* at p 70.

45 Supra note 11.

46 *Behind the Times,* supra note 20 at p 71: there are three fundamental problems with these three provisions.

fundamental justice, arrest with or without a warrant should be judicially authorized by a military judge or, as found by the Court Martial in *R. v. Levi-Gould*[47] by persons capable of acting judicially so as to ensure and maintain public confidence in the administration of penal military justice.

h. The Chain of Command's Power to Review and Substitute Findings and Punishments[48]

This has been discussed at part f of "Military Justice in Action", above.

i. Military Police Independence[49]

The Military Police (MP) is headed by the Provost Marshal,[50] a military officer serving in the rank of Brigadier-General. Military Police independence is compromised by way of s.18.5(3) of the *National Defence Act*, which permits the Vice Chief of the Defence Staff (VCDS) to "issue instructions or guidelines in writing in respect of a particular investigations." [51] Under this statutory power, the VCDS is

47 2016 CM 4002.

48 *Behind the Times,* supra note 20 at p 73.

49 *Ibid,* at p 73.

50 *National Defence Act,* ss. 18.3 and 18.4.

51 The Canadian Forces National Investigative Service (CF NIS) with is the investigative arm of the Canadian Forces Military Police which was established in 1997 with the mandate to investigate serious and sensitive matters related to the DND and the CAF. It performs a function similar to that of a Major Crimes unit of the RCMP or a large municipal or provincial police agency. It has authority over persons subject to the *Code of Service Discipline*. Civilians deployed with the military can be subject to the *Code of Service Discipline.* The CF NIS has the authority to lay criminal charges in civilian court in cases where civilians break the law on or in relation to military property.

All members of the CF NIS are members of the Military Police; members of the CAF who hold military rank. A military rank not a requisite to do police work, and neither is wearing a CF uniform and other

able to provide instructions and guidelines in specific cases, which could presumably include instructions to and/or not to investigate a particular person or matter. This is problematic because it strips the MP of the ability to freely investigate without the interference of an executive arm of Government. It is difficult to understand why the VCDS should retain such power. Moreover, there is no requirement to make these instructions public.

MP officers operate with a duality of roles. On the one hand they are peace officers under s. 2 of the *Criminal Code* and are an autonomous organization within the military with very specific operational military tasks such as a) traffic control on the battlefield; b) handling and custody of prisoners of war. On the other hand, they are members of the military, subject to a chain of command and are duty bound to follow orders from superior officers.

CF insignia. In fact, it might be a distraction or inhibition, or a perception of both, to conduct their policing work in an independent manner. In their day-to-day routine, NIS personnel are subject to the dictates of their MP superiors, who rely on their CF rank hierarchy and the *Code of Service Discipline* to enforce their orders and directives. There is no escape from this because, as CF members, NIS personnel are absolutely required to obey legal orders emanating from their seniors in rank.

The Commanding Officer of the CF NIS reports directly to the Provost Marshal; the Provost Marshal is appointed by CDS and reports to the VCDS. [S. 18.2 of the *NDA* refers] The CF NIS headquarters is located in Ottawa. .See Office of the Canadian Forces Provost Marshal and Military Police Group Headquarters, *Canadian Forces Provost Marshal – Annual Report 2019-2020: Canada's Military Police,* Department of National Defence, at link: https://www.canada.ca/content/dam/dnd-mdn/documents/reports/2019/canadian-forces-provost-marshal-report-fiscal-year-2019-2020.pdf.

Yet, in a very unconvincing manner, several NIS subjects have testified that, when conducting an NIS investigation, which brings them into contact with CF members of high rank, they are able to break, or remodel their habit of obedience, and respect for the same military rank yet not become intimidated by the rank of the person whom they are investigating, or intimidation.

In addition to the presence of a Military Police organization for each service, in the United Kingdom there is a highly specialized Ministry of Defence Police Force (MDPF) made up of civilian police officers and civilian staff. The MDPF has responsibility for crime prevention and detection, investigation of serious offences on military establishments (i.e. fraud or deaths), the physical protection of the defence establishment as well as Defence Research establishments and critical national infrastructure assets as well as the security of Crown property. Offences committed by civilians relating to the military are dealt by the MDPF while service offences by military personnel are generally dealt with by the military police.

Recommendation. The MP should be allowed to proceed with an investigation without interference from non-military police command structures, including the VCDS. Though command influence may play a role with respect to the laying of charges under the *Code of Service Discipline*, they should not be permitted to instruct the conduct of a military police investigation in a specific case. Section 18.5(3) of the *NDA* should be repealed.

j. DND/CAF Boards of Inquiry and Coroner's Inquests[52].

When a CAF member dies from a sudden death, the military normally conducts an *in-camera* military Board of Inquiry (BOI) which may be ordered pursuant to s. 45 of the *NDA*. The purpose of the BOI is taken from the convening order, which typically states: "to investigate the causes and contributing factor(s) that may have led to the death of [that member] and identify applicable preventative measures, if any." Customarily present on a BOI panel are a president and several CAF members, including a public affairs officer. Upon completion of the investigation, a Report is produced by the president of the BOI, which must pass scrutiny at the unit and formation level and eventually receive the approval of the CDS. The report is not made public and is only made available to families of the deceased on request through the *Access to Information Act*[53].

This is quite different from the civilian counterparts' approach to sudden deaths. When a person dies suddenly or through suspicious circumstances in Canada, a Coroner's inquest may be conducted to determine the cause of death. In Ontario, the stated purpose of a Coroner's inquest is "to serve the living through high quality death investigations and inquests to ensure that no death will be overlooked, concealed or ignored." After the Coroner's inquest is complete, the findings may then be used to generate recommendations to help improve public safety and prevent future tragedies.

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52 *Behind the Times,* supra note 20 at p 82.

53 R.S.C., 1985, c. A-1.

In the United Kingdom, all published Service Inquiries are available to the public online, as are a Boards of Inquiry, internal reviews, and Military Aircraft Accident Summaries.

Recommendation. All non-combat deaths of CAF members should be investigated by Coroners through the medium of inquests to ensure that there is a sufficient element of public scrutiny, that it is conducted by an independent tribunal, and that it involves the relatives of the deceased and is prompt and effective.

k. The Right to Grieve[54]

At the time of writing, there are currently more than 1000 registered grievances. This is one grievance for every 60 CAF members. Such a high plurality is unknown even in a unionized work environment and should be cause concern. Of these one thousand grievances, more than 700 are with the Final Authority awaiting decision. For a regular force barely over 60,000 members, this is an astonishing number, that may demonstrate a either a leadership crisis, or a morale crisis, or both.

One further thing, over the past few years, the CDS and senior generals have divested themselves of one of the most important tools of generalship: to be immediately, directly and personally involved in addressing or redressing instances of abuses and/or other systemic deficiencies brought to their attention by soldiers aggrieved by the actions or omissions of junior commanders. The current CAF Grievance Process does not fulfill its purpose. In order to "fix the process" and in so doing eliminate the backlog some structural changes should be considered. [55]

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54 *Ibid,* at p 88.

55 To cure the backlog the following two changes should be considered.

1. *Compensation and Benefits*. Of the 1000+ grievances currently in the system, about 40% concern compensation and benefits (C&B). To limit the grievance backlog, the Queens Regulations and Orders could be amended to make all issues of C&B not grievable; from heron, such issues would only be reviewable by the Director, C&B who is the expert in such matters. Whether or not a member is entitled to C&B is, at its core, a matter of black letter law. A member is either entitled to C&B, or they are not. Decisions of the Director, C&B would be subjected to judicial review on the standard of 'correctness' per s.2 of the *Federal Courts Act.*

2. *Annual Performance Evaluation Reports*. The issue is that many, many grievances are filed each year by members who disagree with their superior officer's Personal Evaluation Reports (PERs) evaluation.

Despite the existence of a rather large administration spread out throughout various levels of the chain of command, the grievance process cannot and does not meet its statutory obligations towards the serving men and women of the Canadian military. For instance, it is not unusual for Michel Drapeau Law Office to be waiting between 3 to 6 years or even more to wait for a decision by a Final Authority.[56]

After an Initial Authority decision, the grievance system compels these grievances to be sent to the Chief of Defence Staff for review, despite that many of the aggrieved are junior members, or non-commissioned members. The Final Authority has no personal knowledge of the day-to-day work, quality of output, leadership capability or promote-ability of the vast majority of the aggrieved. For nearly all PER grievances, the Chief of Defence Staff would not even know their name. It is silly to have the FA spend time reviewing PERs for persons separated by 8 ranks or more, which is often the case. A solution could be to make PERs excluded from the CAF grievance process. Instead of filing a grievance, a member should be offered a right of annotation, which could be a memo written by the member, that would be appended to the PER, that would detail disagreements that member has with a particular rating of comment(s). Both the Chain of Command and Merit Review would then become cognizant of these annotations and where applicable take a member's objection into consideration.

[56] In the UK, since 2015 there is a Service Complaints Ombudsman who provides an independent oversight and investigation in support of the grievance process for the UK Armed Forces. The Ombudsman makes an annual assessment as to whether the Service Complaints system is efficient, effective and fair.

The current target time to resolve a Service Complaint is 24 weeks. However, in 2019 only 46% of Service Complaints were closed within 24 weeks. The Naval Service managed to close 74% of the Service Complaints within the time target. See United Kingdom, *Annual Report 2019*, Service Complaints Ombudsman for the Armed Forces, at https://www.scoaf.org.uk/download/4386/ which indicates that grievances [identified as "*Service Complaints"*] must be resolved within a reasonable timeframe and without undue delay to avoid a negative impact on wellbeing. The average number of weeks taken to finalize a Service Complaint in 2019 was 36 weeks.

In Australia, there is an Inspector General who has independent oversight, review and coordination of complaints made under the military Redress of Grievance process. Where a complaint cannot be resolved within the chain of command, members may initiate a complaint by lodging a Redress of Grievance (ROG) or complaint to the Inspector-General of the Australian Defence Force (IGADF). The Office of the IGADF is intended to provide a mechanism whereby the military justice system is reviewed and audited, independently of the chain of command. The IGADF may investigate matters arising from both the discipline and administrative systems. The role of the IGADF is to identify systemic causes of injustice within the military justice system, rather than supplant existing avenues of recourse available to individuals. The IGADF does not have the power to implement measures arising out of his or her investigations. The IGADF's only power is to make recommendations to other authorities who may remedy the matter. See Australian

Recommendation. Ideally, an effective grievance procedure helps the chain of command to discover and remedy problems before they can cause discontent and adversity in the workplace. In 2003 the late Chief Justice Lamer "recommended new measures to end the unacceptable delays… that, from now on, decisions respecting grievances be rendered within a time limit of twelve months." Also, in 2003 the Chief Justice recommended that the CDS "*be required to report annually on the CAF Grievance Process, including the timeliness of the review of grievances*." This is still not happening. These recommendations should now be formalized in the *NDA* statute.

l. CAF Jurisdiction over Sexual Assaults[57]

For the past two decades, the military has received several warnings about the deep-seated crisis of rampant sexual misconduct in its ranks. A few months after the 1997 publication of "*Dishonored Legacy*"[58] a report which addressed the lessons of the *Somalia Affair* under the themes of leadership and discipline failures, cover-up by the chain of command and a lack of accountability, the media alerted the public to this toxic matter. *MacLean's Magazine* published four cover stories in 1998 under such titles such as: "*Rape in the Military*"; "*Of Rape and Justice*"; and, "*Speaking Out"*. Astonishingly, in response to this crisis affecting both the safety and integrity of soldiers as well as the reputation of the institution, in 1998 Cabinet transferred the investigation and prosecution of sexual assaults to the military to "*enable the military to deal with the incidents swiftly for the sake of unit cohesion."*[59] In plain language

Government, Department of Defence, "Inspector General", *Military Justice,* at https://www.defence.gov.au/mjs/igadf.asp

57 In In 1998 section 70 of the *NDA* was amended to give jurisdiction to the military over 'sexual assaults". See *Behind the Times,* supra note 20 at p 96.

58 Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured legacy:: the lessons of the Somalia Affair - report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, 1997 (CP32-65/1997). [*A Dishonoured Legacy*].

59 At that time the military did not have any prior experience in investigating and prosecuting such crimes. Section 70 of the *NDA* was amended.

this meant that 'unit cohesion' – an euphemism for military control – was to take precedence over the safety, integrity and dignity of soldiers.

Other warnings followed. For instance, the 2010 high-profile sexual assaults of Colonel Russell Williams brought vivid attention to this issue. In April 2014, *MacLean's* published another major cover story titled "*Our Military's Disgrace*". In 2015, the Globe and Mail reported on the existence of a sexualized culture at the Royal Military College (RMC). In February 2016, la Société Radio Canada broadcasted "***Femmes au combat***" in which five female soldiers denounced the lack of action taken by the military in response to their sexual assaults by fellow soldiers. This was quickly followed in 2015 by a strings of media reports about sexual misconduct at the RMC in Kingston. However, except for the occasional comment in the House of Commons, parliamentarians appear satisfied to let the military "deal" with the problem!

Also, in 2015 an external review on sexual misconduct was conducted by the Honorable Marie Deschamps, former Justice of the Supreme Court of Canada. Not surprisingly, she found that a large percentage of incidents of sexual misconduct were not reported. There was a deep mistrust by the victims that the military did not take their complaints seriously and that such conduct was generally ignored, or even condoned, by the chain of command. Victims feared negative repercussions, lack of career progression, expressing concern about not being believed, being stigmatized as weak, labeled as troublemakers, being subjected to retaliation by peers and supervisors, and/or diagnosed as unfit for work. Me Deschamps also found that the Military Police lacked the appropriate skills and training to deal with sexual-assault victims.[60]

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[60] The 2015 Final Report of Fynes Public Interest Hearing by the Military Police Complaints Commission (which is available at the following link: http://mpccwet4.imatics.com/01/1400/3700/2011-004/index-eng.aspx) indicates some serious inadequacies in training and experience of Military Police office in conducting criminal investigations.

> "**[29]**. *Many of the other recommendations and findings for which the Military Police provides no answer also relate to areas where, in the Commission's view,* ***the deficiencies were serious, obvious and inexcusable.*** *The Commission identified clear, often egregious deficiencies in the interactions by the Military Police with the Fynes throughout the investigations under review, including: the repeated failure to provide them with substantive information and answers to their legitimate questions; the failure to fulfill commitments made to them; the failure to provide appropriate*

In the wake of this report, the CDS launched Operation Honour and opened **an in-house** reporting center. From the get go, we have denounced the fact that DND/CAF has purposely ignored seven (7) of the ten (10) recommendations made by the Honorable Marie Deschamps in her March 27 2015 Report on her External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces[61] in which she insisted that an INDEPENDENT Center for accountability for sexual assault and harassment, outside of CAF, be created.[62] Under the pretext that a Sexual Misconduct Response Centre (SMRC) was placed under the control of DND at NDHQ is most certainly not the sort of independence and distance envisioned by the Honorable Me Deschamps or expected from CAF personnel who are victims of sexual assault or harassment. At NDHQ, the organization elements of DND and CAF are conjoined and there is little daylight between the two.[63]

Then in November 2016, Statistics Canada published the results of a survey on sexual misconduct. The responses received from over 43,000 members did not bring anything new to the table. However, it brought forward '*certainty*' about the scope and severity of the matter. Consider: a) among Regular Force members, 27.3% of women and 3.8% of men had been victims of sexual assault at least once since enrolling; b) about 960 members had been victims of sexual assault in the previous 12 months; and, c) 49% of women who were victims of sexual assault identified their

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explanations and apologies once the failure to disclose the suicide note was discovered; and the failure to take steps to return exhibits because there were no processes in place to deal with them." [Our emphasis]

61 Marie Deschamps, External Review Authority (27 March 2015) *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces – Recommendations:* https://www.canada.ca/en/department-national-defence/corporate/reports-publications/sexual-misbehaviour/external-review-2015/recommendations.html

62 Recommendation 3 of her Report reads as follows:

"*Create an **independent** center for accountability for sexual assault and harassment outside of the CAF with the responsibility **for receiving reports of inappropriate sexual conduct,** as well as prevention, coordination and monitoring of training, victim support, monitoring of accountability, and research, and to act as a central authority for the collection of data*." [Our emphasis]

63 This matter was discussed at the meeting of the SCOND parliamentary committee on February 22, 2021.

supervisor or someone of a higher rank as the perpetrator. Obviously, since the launch of Operation Honour, several members disobeyed the orders of General Vance.[64]

Nevertheless, the conviction rate by courts martial for sexual assault offences is dramatically lower than the rate in Canada's civilian criminal courts for similar offences.

> *"Since Operation Honour was launched in 2015, only one soldier has been convicted of sexually assaulting a female member of the Canadian Armed Forces by Canada's military legal system. (...) In addition, plea bargains in which* [to avoid a criminal record] *accused individuals can avoid Criminal Code convictions by pleading guilty to military specific discipline offences like drunkenness, conduct to the prejudice of good order and discipline, and disgraceful conduct have been used in some cases involving aggressive sexual attacks. Sanctions for even these serious sexual attacks involved fines and reprimands."*[65]

In November 2020, the CAF introduced "*The Path Towards Dignity and Respect*" that replaces the previous Action Plan issued in April 2015.

Recommendations. The SMRC must be removed from under the control of DND at NDHQ.

As a matter of priority, legislative changes which have been introduced and received Royal Assent in Bill C-77 in June 2019 must be put into force immediately to ensure that victims of crime be immediately entitled to the same protection afforded to every other individual in Canada – Canadian citizen or otherwise – under the *Canadian Victims Bill of Rights*.

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64 Of note, former Chief of Defence Staff, General Jonathan Vance, is currently under investigation for allegations of sexual misconduct during his service, and his successor, Admiral Arthur McDonald, was suspended from his duties as new Chief of Defence Staff amid investigations on allegations of sexual misconduct. Needless to say, the allegations have hindered many members of the CAF's trust in the chain of command and the effectiveness of Operation Honour.

65 Elaine Craig, "An Examination of How the Canadian Military's Legal System Responds to Sexual Assault", (2020) 43:1 Dal LJ 63.

Secondly, the *National Defence Act* must be amended to return jurisdiction for sexual assaults to civil courts. [S. 70 of the *NDA* refers.]

Finally, and perhaps most importantly, the time has come to appoint a civilian personality as the Inspector General of the Armed Forces who would act as an advisor to the Minister and Parliament to specifically deal with this issue leaving the CDS to concentrate on the performance of his military missions and tasks.

m. Freedom of association[66]

In 2010, the Council of Europe adopted a recommendation on the 'Human Rights of Members of Armed Forces' which states, *inter alia*, that "*members of armed forces have the right to freedom of peaceful assembly and to freedom of association . . .* [they] *should have the right to join independent organisations representing their interests . . .*"[67]

As a result, there is currently a well-structured social dialogue taking place in Austria, Belgium, Bulgaria, Denmark, Finland, Hungary, Ireland, Norway, Romania, Switzerland, and the Netherlands concerning military associations. The central question in these debates is how to respect the rights of military personnel to the freedom of association and assembly while at the same time meeting the *needs and legitimate concerns of the military, given its unique function.*

***Recommendation*.** Members of the CAF should fully enjoy the right to stand up a professional association geared to protecting their professional interests in the framework of democratic institutions. Without a professional association to represent their collective social interests, soldiers rely on bodies such as the Military Police Complaints Commission (MPCC), the DND/CAF Ombudsman, the House of Commons (in particular the Standing Committee on National Defence), or the CAF grievance process to present a counterweight to correct a wrong. But this is clearly not enough.

66 *Behind the Times,* supra note 20 at p. 102.

67 Council of Europe, Committee of Ministers, *Human Rights of Members of the Armed Forces,* Recommendation CM/Rec (2010) 4, adopted at the 1077th meeting (24 February 2010). of the and explanatory memorandum.

PART III B: CURRENT RECOMMENDATIONS FOR REFORMS

OFFICE OF THE JAG[68]

One of the areas which needs to be reformed on a priority basis is the status of the JAG; its lack of independence from command influence; and, the immense and conflicted powers vested in that office.

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

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

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

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

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

a. **Misleading title.** The JAG's multi-layered jurisdiction is enhanced further by a very misleading title, Judge Advocate General, since the JAG is not a judge. The position was stripped of that function decades ago.[69]

b. **JAG has a plenipotentiary mandate**. Over the past decades, the JAG has been conferred an extremely wide mandate over the administration of the military penal and disciplinary justice system.[70]

   i. First, The JAG is responsible for the superintendence of the administration of military justice in the Canadian Forces. He or she has monopolistic authority to provide advice to all stakeholders in the military justice system on practices, developments and reforms. This item will be further discussed immediately below.

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[69] In the United Kingdom, the JAG is a High Court judge and has not been part of the UK Department of Defence since 1948. The UK JAG does not hold a military rank. He is part of the Royal Courts of Justice Group of Her Majesty's Courts Service. As a civilian judge, the UK JAG is independent of the executive branch and is not accountable to Government. The same goes for the UK JAG team of Judge Advocates, who are civilian judges and sit as the trial judge in Courts-Martial.

[70] The Office of the National Defence and Canadian Forces Legal Advisor (DND/CF LA) is a departmental legal services unit established by the Department of Justice, and in this respect is separate from the Office of the JAG. The Office of the DND/CF LA was specifically created to act as legal adviser to the CAF in matters for which the JAG does not have jurisdiction. The Office includes civilian lawyers from the Department of Justice, administrative staff, and military legal officers assigned by the JAG. The DND/CF LA is a Senior General Counsel of the Department of Justice who reports to the Assistant Deputy Attorney General (ADAG) of the Public Safety, Defence and Immigration (PSDI) Portfolio, yet is accountable to the Minister of National Defence.

> "*The DND/CF LA is part of the Public Safety, Defence and Immigration (PSDI) Portfolio of the Department of Justice. A Senior General Counsel and Legal Advisor is responsible for the DND/CF LA and is accountable to the Deputy Minister, DND for the proper management of human and financial resources made available by the DND to the DND/CF LA. The Senior General Counsel and Legal Advisor reports to the Assistant Deputy Attorney General (ADAG) of the PSDI Portfolio and is accountable to the ADAG for the proper management of human and financial resources made available to the DND/CF LA by the Department of Justice, and for the quality of legal services provided by the DND/CF LA*."

See Canada, Department of Justice, "Corporate Publications", *Office of the Legal Advisor to the Department of National Defence and the Canadian Forces*, August 2010, at link: https://www.justice.gc.ca/eng/rp-pr/cp-pm/aud-ver/2010/ndcf-dnfc/03.html.

ii. Second, the JAG supervises both the Director of Defence Counsel Services (DDCS) and the Director of Military Prosecutions (DMP); two individuals appointed by the Minister of National Defence[71] to roles with conflicting duties and interests.[72]

a) The JAG may issue instructions or guidelines in writing in respect of prosecutions in general, or in respect of a particular prosecution.[73] This may constitute improper considerations taken into account in the exercise of prosecutorial discretion.[74]

b) The JAG may also issue general instructions or guidelines in writing in respect of defence counsel services.[75] The military justice system is arguably the only system in Canada where both Crown prosecutors and Defence counsel report to the same immediate supervisor.

iii. Third, the JAG acts as legal adviser[76] to the Department of National Defence, the Canadian Armed Forces, the Minister of National Defence, and the Governor General[77] on matters related to military law. [78]

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71 *National Defence Act,* s. 249.18(1) and s. 165.1(1).

72 *National Defence Act,* s. 249.2(1) and s. 165.17(1).

73 *National Defence Act,* s. 165.17(2)-(3).

74 *R. v. Cawthorne,* [2016] 1 SCR. 983, at para 34.

75 *National Defence Act*, s. 249.2(2). The JAG cannot issue specific instructions for the DDCS about a particular defence case.

76 The Judge Advocate General is directly responsible for advice on international law (including the Geneva Convention and the Law of Armed Conflict as well as operational law), criminal law and military justice policy, military training and education, rules of procedures, rules of engagement, grievances, boards of inquiry and summary investigations, elections law, compensation and benefits, military personnel law and the organization, command, and control of the Canadian Armed Forces.

77 *National Defence Act,* s. 9.1. However, the Minister of Justice is also the official legal adviser of the Governor General in all matters relating to the administration of justice within Canada, not within the jurisdiction of the governments of the provinces. See s. 4(b) of the *Department of Justice Act*. The Minister of Justice and the JAG therefore have concurrent jurisdiction and functions as legal adviser to the Governor General in matters relating to military law.

78 *National Defence Act,* s. 9.1.

iv. Fourth, the JAG is responsible to conduct, or cause to be conducted, regular reviews of the administration of military justice.[79]

v. Fifth. As part of the "Executive Branch", the JAG also proposes changes to the *National Defence Act* and its regulations and, where appropriate, opposes any such reform. The JAG Directorate on Military Justice also is responsible for the drafting of Queen's Regulations and Orders.

vi. Sixth. The JAG has '*command*' responsibility over all military lawyers and non-commissioned members posted to a position within the Office of the Judge Advocate General which includes the DMP and DDCS.[80]

vii. Seventh. The JAG oversees the Canadian Forces Legal Branch[81] which provides him or her with the authority to manage the career of all legal officers including their postings, appointments, selection for post-graduate training and performance evaluation.

Overall, the JAG functions require its incumbent to be totally loyal and partisan to the interests of the military as an institution as well as to the chain of command. This leaves no scope for the JAG to reform the military justice system in ways that would be seen or perceived by the chain of command to be against its interest or the interest of CAF as an institution. Therefore, only soft reforms acceptable and compatible with the military mind and the views of the chain of command are likely to result from any in-house self-initiated review of the military justice system.

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79 *National Defence Act,* s. 9.2(2).

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

81 All military legal officers are members of the CAF Legal Branch.

Recommendations.

- The current JAG position should be retitled as the Military Legal Advisor. As such, he or she should be reporting to the CDS and provide legal advice, as and when required, to the Commander-in-Chief, the Minister of Defence and the CAF on issues pertaining to military law.

- The current JAG should be divested of his superintendence function vis-à-vis the military justice system. Those functions properly belong to the Minister of Justice. This will be discussed immediately below.

- The current JAG should be divested of all his supervisory duties over the Director of Military Prosecutions and the Director Defence Counsel Services.

    - A civilian barrister should be appointed as the DMP and he should report to the Attorney General.

    - Serious consideration should be given to retire the position and office of Director of Defence Counsel Services.

- The current JAG should be divested of his duty to conduct, or cause to be conducted, regular reviews of the administration of military justice. That function properly belong to the Minister of Justice.

- The title Judge Advocate General properly belongs to the head of the military judiciary whether that person is a military officer or a civilian judicial person.

DENIAL OF RIGHT TO LEGAL COUNSEL

Despite all of the above, while the CAF has the right to be represented by the JAG or CF Legal Advisers, members of the CAF are currently denied the right to act through legal counsel in administrative matters and issues of law, including administrative review procedures, grievances and release procedures, and many disciplinary matters.

Military administrative law seeks to protect the rights of soldiers, sailors, and airpersons within the CAF by ensuring that the practices therein are governed not only by

their statutory framework, but also by the principles of fundamental justice; meaning the basic tenets that underpin the common law, including procedural fairness, equality, and natural justice.

All Canadians, except for members of the CAF, have the presumptive common law right to act through legal counsel before an administrative tribunal and/or through administrative processes that directly impact their rights, privileges, or interests. Interestingly, the Final Authority in the CAF grievance process is an administrative tribunal as defined in the *Federal Courts Act,* yet the CAF do not recognize a member's right to act through legal counsel, even before the Final Authority.[82]

As stated by Lord Denning and the Federal Court of Appeal of Canada, when a person's reputation or livelihood is at stake,[83] that person has the right to counsel and the right to speak by counsel:

> *"We see it every day. A magistrate says to a man: 'You can ask any questions you like'; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him. And who better than a lawyer who has been trained for the task? I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He also has a right to speak by counsel or solicitor".*[84]

No administrative tribunal in Canada actively undermines a person's right to legal counsel quite like the CAF. The CAF's regulations, specifically Defence Administrative Orders and Directives (DAOD) 2017-1, section 12.2, have misrepresented the spirit and intent of the Supreme Court of Canada in *Honda v. Keays,*[85] which preserves a right to legal counsel in all places of employment in Canada.

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82 DAOD 2017-1, *Military Grievance Process,* (issued 23 February 2012, and updated 26 November 2015).

83 In the CAF, reputation is often intrinsically linked to career advancement and livelihood.

84 *Pett v Greyhound Racing Association (No.1),* (1969) 1 Q.B. 125, Lord Denning at p. 132; see *Canada v. C.A.T.C.A.,* 1984 CarswellNat 49, Federal Court of Canada – Appeal Division; see also *Howard v. Stony Mountain Institution*, 1985 CarswellNat 2, Federal Court of Canada – Appeal Division.

85 [2008] 2 SCR 362.

SUPERINTENDENCE OF THE MILITARY JUSTICE SYSTEM[86]

Section 4 of the *Department of Justice Act*[87] proclaims that the Minister of Justice is the official legal advisor of the Governor General and is the legal member of the Queen's Privy Council for Canada. Section 4(b) stipulates that the Minister of Justice "***shall*** *have the superintendence of all matters connected with the administration of justice in Canada, not within the jurisdiction of the provinces*."

On the other hand, sections 9.1 and 9.2 of the *National Defence Act*, which are reproduced below, provides for a quasi-identical role for the JAG vis-à-vis military law. However, this can be confusing as the Minister of Justice is clearly responsible for the superintendence of all matters connected with the administration of justice in Canada which do not fall under the jurisdiction of provincial governments. [88]

a. s. 9.1 of the *NDA*. "*The Judge Advocate General acts as the legal adviser to the Governor General, the Minister, the Department and the Canadian Forces in matter relating to military law."*[89]

b. *s.* 9.2(1) of the *NDA*. "*The Judge Advocate General has the superintendence of the administration of military justice*."

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86 The military is among the least democratic institutions in human experience; martial customs and procedures clash by nature with individual freedom and civil liberty, the highest values in democratic societies. Civilian control allows a nation to base its values and purposes, its institutions, and practices, on the popular will rather than on the choices of military leaders, whose outlook by definition focuses on the need for internal order and external security.

87 R.S.C., 1985. c. J-2.

88 The Minister of Justice's superintendence with regards to matters related to the administration of military justice in Canada cannot therefore have been granted to the JAG by the *National Defence Act*. The JAG's superintendence of the Canadian military justice system can only extend to all matters of the administration of military justice outside Canada.

89 The term "*military law'* is defined at section 2 of the *Criminal Code of Canada* as including "all laws, regulations or orders relating to the Canadian Forces." Generally speaking, the JAG defines "military law" as a broader body consisting of the law relating to the constitutionally separate system of military justice as well as the governance, administration and activities of the Canadian Armed Forces.

Read together the above provisions could be interpreted to mean that in Canada the military has been granted an exclusionary status as well as an independence of decision and action within a wide sphere of competence over a significant aspect of Canada's sovereignty. This could also be taken to mean that in Canada's democracy the military has been granted near full autonomy over the military justice system almost as if it were operating as a state within a state.

Recommendation.

a. As noted above, the JAG should be divested of his superintendence functions and reviews of the administration of military justice. Those functions properly belong to the Minister of Justice.

b. An alternative is to entrust the superintendence of the military justice system to an Inspector General for the Armed Forces.

PARLIAMENTARY OVERSIGHT OVER MILITARY JUSTICE

The Canadian Parliament has rarely played a significant role in providing civilian (non-judicial) oversight over the Canadian military. One of the solid recommendations made by Justice Gilles Letourneau, Chair of the Commission of Inquiry into the deployment of the Canadian Airborne Regiment to Somalia,[90] was to appoint an Inspector General,[91] reporting to Parliament. Regrettably, this recommendation was disregarded.

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90 Established by Order In Council, P.C. 1995-44, 20 March 1995.

91 See *A Dishonoured Legacy,* Volume 2, supra note 58 at pp 397-409.

According to the Chair, a civilian Inspector General would be directly responsible to Parliament constituting an essential part of the mechanism Canadians would use to oversee and control the CAF and the defence establishments. The Inspector General would be appointed by the Governor in Council and made accountable to Parliament with broad authority to inspect, investigate and report on all aspects of national defence and the armed forces. The Inspector General office would incorporate the concepts of both a military inspector and an ombudsman. The Inspector General conducts inspections focused on systemic problems within the chain of command and the military justice system and investigations focused on complaints about misconduct of individuals of any rank or position. He would also be charged with overseeing the military justice system. In his role as an Ombudsman, he would provide assistance focused on helping to mediate conflicts between individuals and the CAF and help to redress injustices to individuals. Any member of the

Instead, Parliament has relied on the creation and operation of the Military Police Complaints Commission (MPCC),[92] the Military Grievances External Review Committee (MGERC),[93] and the office of the DND/CAF Ombudsman.[94] All of which reporting not to Parliament but to the Minister of National Defence.

Parliamentarians have a duty to question and hold to account governments and ministers who exercise control over CAF officers and officials who have discretion over how the Canadian Forces are trained, prepared and deployed and how officers authorize the use deadly force. These are topics that matter, and which should, but very often do not, occupy parliamentarians charged with the oversight of Canada's national defence.

Recommendation.

Of the various instruments available to Parliament, the committees on national defence of the Senate and the House of Commons seem best suited to provide effective parliamentary oversight of National Defence and the Canadian Armed Forces. These committees may not, however, reach their full potential as presently conceived and structured. Chief among the reforms needed, we would emphasize the importance of examining the annual estimates in detail; increase the experience and knowledge of committee members, perhaps by regulating their periods of appointment to committees; and provide expert staffs and other support to committee work.

CAF, and any public servant in DND, would be permitted to approach the Inspector General **directly** for whatever reason and without first seeking prior approval of any member of the CAF or DND.

92 Recently, the United Kingdom provided for oversight of the military police (called the Service Police) in *Armed Forces Bill 2021,* following the recommendation of the corporate report, Service Justice System review by the Ministry of Defence (published 27 February 2020) – also known as the Lyons Report – which is meant to provide a robust yet welcome civilian oversight.

93 The militarization of oversight organizations. Oddly, this major oversight body has been staffed with several recently retired CAF officers defeating the purpose of having true "civilian' oversight performed in this critical area affecting the rights of soldiers. Currently, two Vice-Chairpersons as well as the DG Operations and General Counsel are all retired senior CAF Officers who recently served in Regular Force in the rank of Colonel.

94 An external and independent body such as an Inspector General should be appointed to review the reports prepared by these bodies and report to Parliament. The USA, Australia, and Germany have such a system.

LACK OF INDEPENDENCE OF MILITARY JUDGES

Presently, there are four full-time military judges. These military judges are members of the Canadian Armed Forces and as such are subject to the *Code of Service Discipline* and are required to become acquainted with, observe and enforce the *NDA* and its regulations, and all other regulations, rules, orders and instructions. Like any other commissioned officers, they are subordinate to the chain of command.[95]

Recently, the former CDS placed the Office of the Chief Military Judge under the control of the VCDS for discipline matters.

Light workload

In 2019, the military judiciary only heard from 44 defendants at the trial level. Of these trials, about half involved guilty pleas, and the other half largely concerned minor disciplinary offences.

In a Spring 2018 Report, the Auditor General openly criticized the military judiciary as being inefficient, marred with delay and plagued with "systemic weaknesses."[96] In December 2018, the Standing Committee on Public Accounts found that the CAF did not administer the military justice system efficiently, as evidenced by excessive delays throughout the process.[97]

No independence

Three out of the four Court Martial judges have declared themselves lacking independence or impartiality; in its current form, military courts have been deemed

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95 See s. 60 of the *NDA* and articles 4.02 and 19.015 of the *QR&O*s. See paras 15, 91 and 171 of *Canada (Director of Military Prosecutions) v. Canada (Office of the Military Judge)* 2020 FC 330.

96 Office of the Auditor General, *Report 3 – Administration of Justice in the Canadian Armed Forces,* 2018 Spring Reports of the Auditor General of Canada to the Parliament of Canada. See link: https://www.oag-bvg.gc.ca/internet/English/parl_oag_201805_03_e_43035.html [*Report 3* – Spring 2018]

97 Office of the Auditor General, *Report 3 – Canada's Fighter Force – National Defence,* 2018 Fall Reports of the Auditor General of Canada to the Parliament of Canada. See link: https://www.oag-bvg.gc.ca/internet/English/parl_oag_201811_03_e_43201.html [*Report 3* – Fall 2018]

unconstitutional[98] because judges are subject to disciplinary authority of the VCDS and subject to the military's *Code of Service Discipline*.[99] Military judges are beholden to the executive government, and this is inappropriate as it violates the Doctrine of Separation of Powers.[100]

Judges should not hold military rank and should not be subject to the orders and directives of the military's chain of command. This could be done by amending the *National Defence Act* such that, upon appointment, military judges would retire their rank and assume the role of 'Judge' distancing themselves from both the military chain of command and the *Code of Service Discipline*. They would remain subject to the existing Military Judges Inquiry Committee appointed by the Chief Justice of the CMAC.

Recommendation.

There is no need for a parallel system of military justice since the civilian judiciary could aptly subsume the very small number of courts martial currently taking place in Canada. This is the approach taken by many of our European allies. Courts martial jurisdiction could be assumed by a military division added to the Federal Court of Canada. Merging the Office of the Chief Military Judge (total of 21 personnel) with the Federal Court of Canada and creating a 'military division' therein would address this issue. Besides realizing substantial personnel and operations financial savings by having, for example, a single registry as well as technical, financial and clerical support staff, a military division[101] at the Federal Court would give access to a pool of qualified Federal

98 *R v. Crépeau,* 2009 CM 4014 (per D'Auteuil J); *R v. Pett,* 2020 CM 4002 (per Pelletier J); *R v. D'Amico,* 2020 CM 2002 (per Suksdorf J).

99 *National Defence Act,* s.60.

100 *Constitution Act,* 1867.

101 The head of that division should hold the title of Judge Advocate General. This military division would hold "courts martial" (Standing or General Court Martial in accordance with ss. 166 and 173 of *National Defence Act.)* Court martial trials could be held in current Federal Court locations.

- This has already been done in the United Kingdom (UK) and Australia. [See section 196(6)(a) and (b) of the Australian *Defence Force Discipline Act 1982*.]

- In Australia, a person shall NOT be appointed as the Judge Advocate General unless the person is or has been a Justice or Judge of the federal court or of a Supreme Court of a State or Territory. See section 180 of the Australian *Defence Force Discipline Act 1982*.

Court judges who are already well experienced in all aspects of federal law, including the *NDA*, since many of them regularly sit on the already established Court Martial Appeal Court.[102]

COURTS MARTIAL[103]

a. 2008 BRONSON (DMP) REPORT.[104] In 2008 an external review of the DMP organization was the subject of a Bronson Report which concluded, *inter alia*, that on

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- In New Zealand, the JAG is also the Chief Judge of the Court Martial. See New Zealand, section 203 of the *Armed Forces Discipline Act 1971*.

- Also, section 15 of the *Irish Defence Act, 1954* specifies that the Judge Advocate-General shall be a practicing barrister-at-law of at least ten years' standing but shall NOT be a member of the Defense Forces, and shall be appointed by, and hold office during the pleasure of, the President.

[102] Many will likely insist that a judge at a court martial absolutely needs to have 'military experience.' Paradoxically, judges sitting at the Court Martial Appeal Court or the Supreme Court of Canada would have to have 'military experience' to hear an appeal.

Yet, a crime is a crime is a crime, whether committed by a person in uniform, a lawyer, a physician, an accountant, a diplomat, or a hockey player. Also, any mitigating and special circumstances or context of a given crime can be taken into account by any sentencing or a reviewing judge, if properly pleaded by defence counsel.

Judges of the Federal Court are trained initially when they are newly appointed and continuously during their careers in all areas of the federal law, criminal or civil. Additionally, Federal Court judges already sit on cases dealing with a range of military administrative law matters. Moreover, many of these judges already sit as appellate judges on the Court Martial Appeal Court which is itself presided by a judge of the Federal Court of Canada.

[103] There are two types of courts martial:

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

b. A Standing Court Martial who may try any person charged with a service offence. It is presided by a military judge.

[104] Judge Advocate General, *Court Martial Comprehensive Review,* Interim Report (21 July 2017). See link at: https://www.canada.ca/content/dam/dnd-

average, DMP prosecutors had 2.25 years of experience as a prosecutor. The report recommended that prosecutors should stay in their positions for a minimum of five years. A review conducted by the Auditor General in 2018 found that the length of prosecution experience of military prosecutions had not increased since 2008.

b. 2009 BRONSON (DDCS) REPORT.[105] In 2009 an external review of the DDCS organization was the subject of a Bronson Report which, *inter alia*, contrasted the volume of cases that were dealt with at trial each year by military defence counsel (approximately 10-12) with the volume of cases dealt with each year by civilian criminal defence counsel (approximately 70-100) and concluded that the number of files being handled by military defence counsel was very low. The report further observed that "*despite the seemingly small caseload, the DDCS lawyers appeared at times to be quite fatigued and in some cases, even overwhelmed by the work*." The report also noted, "*many of the incoming counsel lack experience and leave just when they are developing expertise in litigation*," recommending an increase in the level of experience in the system, so that "*the quality of representation in courts martial would increase and have a positive effect on the military justice system."*

c. 2017 COURT MARTIAL COMPREHENSIVE REVIEW.[106] In 2017, the JAG published in draft form its internal report titled *Court Martial Comprehensive Review* which purpose was to conduct a legal and policy analysis of the CAF's Court Martial system. The report provides a policy-based analysis and discussion of the system along with a range of representative options for enhancing it. As directed by the Judge Advocate General, the review focused on assessing the effectiveness, efficiency, and legitimacy of the current system, and of options to enhance the system. It also provides a comparative analysis of the Court Martial (or equivalent) systems of ten countries that were visited by the comprehensive review team – some from the Anglo-American tradition of military justice, to which Canada belongs (the United States;

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mdn/migration/assets/FORCES_Internet/docs/en/jag/court-martial-comprehensive-review-interim-report-21july2017.pdf [*Court Martial Comprehensive Review*].

105 *Ibid*. Andrejs Berzins and Malcolm Lindsay, *External Review of the Canadian Military Prosecution Service*, Ottawa, Bronson Consulting Group, 2008 [2008 Bronson (DMP) Report].

106 *Court Martial Comprehensive Review*, supra 102. Andrejs Berzins and Malcolm Lindsay, *External Review of Defence Counsel Services,* Ottawa, Bronson Consulting Group, 2009 [2009 Bronson (DDCS) Report].

Ireland; the United Kingdom; Australia; and, New Zealand), and others from the Civil Law tradition of military justice whose operational focus mirrors that of Canada (Norway; Denmark; Finland; France and the Netherlands).[107] On January 17, 2018 the JAG has decided to take no further action on the contents of that report since it does not represent the views of the Office of the JAG. She would rely instead "on the results of the next independent review … pursuant to section 273.601 of the *National Defence Act."*

d. 2018 AUDITOR GENERAL REPORT.[108] In Fall 2018, the Auditor General of Canada published a report which concluded that:

i. The JAG did not have the information needed to oversee the military justice system. Also, various stakeholders, notably the Military Police, the DMP, DDCS and the Office of the JAG, had their own case tracking systems that did not capture all the needed information.

ii. Many of the recommendations made by the former Independent Review (Justice Lesage) had not yet been implemented.

iii. The JAG had not reviewed or studied the Summary Trial processes in the last ten years.

iv. The DMP did not develop clear and defined processes to ensure it could implement a prosecution policy that governs how decisions to proceed to Court Martial are well founded, made by the right people and are properly documented.

v. The JAG did not establish a formal agreement with these DMP and the DDCS to define how overall supervision can be exercised without compromising their ability to perform their functions independently.

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107 *Ibid.*

108 *Report 3* – Fall 2018, supra note 97.

vi. The JAG did not assess whether current practices and processes affect the independence needed by both directors to carry out their distinct roles in the military justice system.

vii. The CAF did not administer the military justice system efficiently. There were delays throughout the various processes for both summary trials and Court Martial cases. In addition, systemic weaknesses, including the lack of time standards and poor communication, compromised the timely and efficient resolution of military justice cases.

viii. The Office of the Judge Advocate General did not provide effective oversight of the military justice system and did not have the information needed to adequately oversee the military justice system.

Recommendation. The current Court Martial system lacks the required inherent independence and lacks organizational cohesiveness and basic organizational efficacy expected of a Canadian court of record. As noted earlier, courts martial jurisdiction could and should be assumed by a military division added to the Federal Court of Canada.

MILITARY JUSTICE AND *CRIMINAL CODE* OFFENCES[109]

Section 130 of the *Code of Service Discipline* incorporates the entire *Criminal Code* and other federal acts such as the *Controlled Drugs and Substances Act* and the *Firearms Act* into the *National Defence Act,* thus turning such offences into "*service offences*" when they are committed by a person subject to the *Code of Service Discipline*. However, the particularities of hybrid offences and the distinction between indictable offences and summary conviction offences are not considered when incorporating the *Cr. C*. into the *NDA*.

Military Police and Power to Arrest Without a Warrant

Section 495(1) of the *Cr. C*. enables peace officers to arrest a person without a warrant, and this power is limited to serious offences, *to wit,* indictable offences, or

109 *Military Justice in Action,* supra note 1 at pp 355-357. See also *R. v. Ellis,* 2010 CMAC 3.

situations where the individual is caught committing a *Cr. C.* offence. For clarity, s. 450(2) of the *Cr. C.* states that a civilian peace officer cannot arrest without a warrant a person who commits a *Cr. C.* offence that is punishable by summary conviction or a hybrid offence, unless that person is caught in the act by the peace officer.[110]

Sections 154 through to 156 of the *NDA* provide that an officer may arrest, without a warrant, any individual – who may or may not be subject to the *Code of Service Discipline* – in similar circumstances. Nevertheless, the power of the military police to arrest a person subject to the *Code of Service Discipline* is broader than that of civilian peace officers. Interestingly, the military police can arrest an individual without a warrant so long as the military police believes that this person committed or is about to commit a service offence, which includes administrative and disciplinary infractions punishable by summary hearings (formerly known as summary trials).

Commentary. Simply stated, the military police's power to arrest individuals without a warrant is overly broad and strips military and civilians of their fundamental safeguards pursuant to s. 9 of the *Charter,* leaving room for abuse of power and arbitrary detention.

Duplicating Offences and Punishment

It is worth mentioning that the *Code of Service Discipline* contains a mix of military disciplinary offences which duplicate *Cr. C.* offences.[111] The *Criminal Code* contains provisions such as, but not limited, to offences like mutiny, assault and battery, sexual assaults, uttering threats, criminal driving offences and treason which can be tried before and punished by civilian criminal courts.

These offences can also be prosecuted and tried before military tribunals pursuant to s. 130 of the *NDA*. Pursuant to s.129 of the *NDA* the offenders can be tried and punished by the military courts for the same offences prosecuted before the civilian criminal courts, thereby creating an unfair situation of double jeopardy.

Recommendation. When the offences have been dealt with by the civilian criminal courts, that should be the end and the military then should take the appropriate administrative

110 *R. v. Feeney*, [1997] 2 SCR 13, at para 29 and 35. See also *R. v. Storrey,* [1990] 1 SCR 241.

111 *Introduction to Military Justice,* supra note 28, at p 27.

measures required in the circumstances. In other words, there should be no duplication of trials and punishments.

PROMOTION AND APPOINTMENT OF GENERALS / ADMIRALS

a. **Appointments made by the Governor in Council**

The Chief of the Defence Staff (CDS) is appointed by the Governor in Council on the advice of the Prime Minister.[112]

The Judge Advocate General (JAG) is also appointed by the Governor in Council on the advice of the Prime Minister.[113]

b. **Senior Appointments made by the CDS**

Also, at present the CDS selects and appoints the Vice Chief of the Defence Staff (VCDS) as well as all heads of the three components (Royal Canadian Navy, the Canadian Army, the Royal Canadian Air Force), senior commanders of commands such as Canadian Joint Operations Command, the Canadian Special Operations Forces Command, the Canadian Forces Intelligence Command, the Personnel Command and the Deputy Commander of the North American Aerospace Defence Command

c. **Promotions and appointments of generals and admirals**

Promotion to the ranks of Brigadier-General and Commodore is competitive.

Promotion to the ranks of Major-General [Rear Admiral] and Lieutenant-General [Vice Admiral] is by selection of the CDS and approval by the Minister.

112 See s. 18 of the *NDA*.

113 See s. 9 of the *NDA*.

	1994	2004	2013	2015	2018	2020
Estimated size of Regular Force	72,364	61,715	65,500	67,500	66,000	65,000
Number of generals and Flag officers	94	72	100	116	136	143

P.S. As an aside, despite the fact that the relative size of the Regular Force has remained relatively stable at around 66,000 over the past two decades, the number of generals/admirals has grown exponentially as indicated in the table above.[114] This top-heavy structure called "brass creep" has reached record level under the leadership of General Vance. Shouldn't Parliament establish a ceiling on the number of generals the CDS is authorized to appoint?[115]

d. Commentary.

The military tends to be an insular institution, due in part to its desire to preserve characteristics it often perceives as essential to its efficiency and readiness; such as esprit de corps and conservative social values. As a result, it is not surprising to find that the cultural, ethic and gender composition of the military often differ from that of society as a whole. Any such gap can lead to some form of isolation from civil society. To prevent this, it is important for civil leadership to exercise some form of scrutiny and control over the promotion and appointment of senior military leaders. Yet, in Canada the selection, promotion and appointment[116] of the most senior

[114] In the USA, there are 900 general /flag officers to lead 1.3 million troops. This is one (1) general for every 1,400 troops. The US Marines, which are 178,477, strong have a cadre of 83 generals.

The British Army is 81,000 strong and it has 85 generals, which is one (1) general for every 2,400 soldiers.

The CAF is currently 65,000 strong and is has 143 generals/flag officers. In Canada there is one (1) general for every 450 soldiers. The CAF currently has at least three times as many as it should.

[115] This contrasts with the situation in the United States, as shown in footnote 114. The numbers speak for themselves.

[116] For instance, during the term of office of General Jonathan Vance which extended from 2015 to 2020 inclusive, the latter appointed six (6) separate officers to the position of Vice Chief of the Defence Staff. The VCDS lays a pivotal role in the control and administration of the Canadian Forces. His principal responsibilities are: the implementation of the Defense Services Program; acting as the Chief of Staff for NDHQ; and, acting as the CDS in the latter's absence or incapacity. [s. 18.1 et 18.2 of the *NDA*.]

military leaders is left at the sole and entire discretion of the individual holding the office of the CDS. The nation plays no part in the promotion and command selection process for these senior leaders.[117]

Although appreciative of the fact that the military requires significant authority, autonomy and control over technical military matters, including those dealing with doctrine, professional development of its members, discipline, military personnel policy and the internal organization of units and other entities, there is nonetheless a need for civil society to maintain control and exercise influence over such an institution, particularly for succession planning purposes and to ensure that top military leaders are selected for their military know-how and experience as well as their ability to integrate political, social, economic, fiscal, technological, cultural values and factors prevalent in Canadian society. This difficult job should not be entrusted to the judgment of a single individual. Parliament should play a leading role

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Early in General Vance's tenure, LGen Thibeault was the VCDS. He left office on August 5, 2016. From that point onwards, General Vance appointed six different officers as the VCDS: Vice Admiral (VAdm) Norman: (2016-2017); VAdm Lloyd (for a few months in 2017); Lieutenant-General (LGen) Parent: (2017-18); LGen Wynnyk: (2018-19), LGen Lanthier: (2019-20); and LGen Rouleau (Jul 2020 -). Few organizations can strive under such turbulence: seven VCDS in five short years. Experts and laypersons alike acknowledge the critical importance of stable and consistent executive leadership to the success of any organization. Given their short tenure, none of these six VCDS served long enough to implement their own set of ideas, values or objectives through to realization. Inescapably, a '*wait and see*" stance would set in throughout NDHQ as each successive new VCDS would also soon depart. Progressively, the VCDS position is devalued to the point that subordinates and equals alike inevitably disengage from the office holder. The end result: the likely cynical belief that the *"raison d'être"* for a VCDS no longer matter.

The selection and appointment of the officer for the position of the VCDS should no longer be left to the entire discretion of the CDS.

[117] Given that every armed forces commissioned officer is appointed by the President, in the USA, promotions above the rank of captain in Army and Air Force and lieutenant in the Navy requires the confirmation by the Senate. A vigilant Senate examines the recommendations for the appointment and promotion of General and flag officers to ensure that the nominees they confirm meet the highest standard of accountability. Personnel actions involving General and Flag Officers that require Senate confirmation include nominations, appointments, reappointments, extensions, assignments, reassignments, promotions, and retirements.

Library of Congress, Congressional Research Service, *Generals and Flag Officers: Senior Military Officer Confirmations,* "CRS Report for Congress" (January 2004), See link: https://www.everycrsreport.com/reports/RS21714.html

over the appointments of top commanders.

DISHONOURABLE RELEASE

Section 15 of the *Queens Regulations and Orders* lists five broad release items:

- Items 1 (Misconduct) and 2 (Unsatisfactory Service) are "dishonourable" release items;
- Items 3 (Medical), 4 (Voluntary) and 5 (Service Completed) are considered "honourable" release items.

The stigma associated with a dishonourable release from the CAF is obvious. Not only are there the lifelong consequence of having been declared "dishonourable" but being released under items 1 or 2 also removes any ability to ever gain employment with the public service or hold a government security clearance.

Normally, a dishonourable release from the CAF follows a criminal conviction. For example, a member who is convicted of murder would then be administratively released from the military under item 1. Less serious criminal convictions, for example assault or voyeurism, may attract an item 2 release.

The issue is with the wording of Item 2(b) which provides that a member may be released for "*unsatisfactory performance"* under the following circumstance: "*who has the ability to improve but continues to display a lack of application or effort in the performance of his duties*."

In our view, though a member who displays the above attributes may not be suitable for military service, but are not deserving of a "dishonourable" release. Moreover, there may be other underlying issues that have contributed to their lack of motivation, such as marital difficulty, mental health issues, or a death in the family.

There is no reason to dishonorably release a member who lacks motivation. It, in itself, is not dishonourable conduct, and a more appropriate release item in these circumstances would be under item 5, which allows for release of members who are "unsuitable for military service" (Item 5(f)).

Recommendation: We recommend that art. 15.01 of the *Queens regulations and orders,* Item (b), be repealed.

PROFESSIONALS (Specialists) WITH MILITARY RANKS

Having judges, lawyers, doctors, dentists, padres, judges and police officers holding military rank directly interferes with their independence and autonomy. Each of these roles has ethical obligations towards their particular profession and should not be seen as servants of the Crown. By virtue of holding a military rank, however, each of these roles has *prima facie an* overall duty of loyalty to the Chief of Defence Staff and to DND as well as the Canadian Armed Forces, and, by virtue of their rank there are *de facto* a member of the chain of command.[118]

a. Military doctors and lawyers face ethical conflicts when having to decide between loyalty to their clients, and loyalty to the CAF. For example, our law office represents a Plaintiff whose treating physician, a military doctor, has refused to provide an expert medical opinion because it would be against the interest of their employer, the Crown Defendant. This is in violation of physicians' professional duty to act in their patients' best interests.

b. Judicial Independence is a constitutional principle.[119] Despite this, Military Judges are considered to be "soldiers first" and as such are subject to the *Code of Service Discipline*, are placed under the disciplinary authority of the Vice Chief of Defence Staff (VCDS) and are legally obliged to observe a litany of directives and orders from the chain of command concerning a wide range of subjects.[120]

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118 Defence Administrative Order and Directive (DAOD) 7023-0. – *Defence Ethics* (issues 26 June 2001, last modified 17 February 2015).

119 *Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.,* [1997] 3 SCR 3.

120 *National Defence Act,* s.60.

c. Police independence with respect to law enforcement decisions of criminal investigation and laying of charges was recognized by the unanimous Supreme Court in the 1999 case of *R. v. Campbell*[121], [as a constitutional principle.

Military specialists should not be subject to the chain of command or hold rank, as there is no purpose for it, and it interferes with their independence. It is cavalier to think that a military judge, lawyer, doctor or padre could deliver binding orders or hold the requisite skillset to command a brigade of soldiers onto the battlefield into harms way; yet, at present, the military's top padre, lawyer and doctor are all Major-Generals – the top judge is a Colonel. This is problematic.

Recommendations

1. Military specialists should assume titles of their civilian counterparts, and only wear uniforms in a theatre of operation. Military Judges will be called "Judge." Lawyers will assume titles such as "Junior Associate", "Senior Associate", and "Managing Director." Doctors will be called "Doctor." Padres will be called "Priest"/ "Rabbi"/ "Imam" etc.

2. Section 60 of the *National Defence Act* shall not apply to specialists.

DELAYED IMPLEMENTATION OF STATUTES

For reasons unknown, DND/CAF takes an inordinate time to put into forces legislative changes. Consider the following two recent examples:

1) Strengthening Military Justice in the Defence of Canada Act, *S.C. 2013 c. 24 assented to 19 June 2013. 41st Parliament, 1st Session.*

i. On October 7, 2011 Bill C-15 was introduced before Parliament. As with all pieces of legislation, Bill C-15 went through extensive consultations, including multi-day debates before the Standing Committee on National Defence, the Senate Committee on National Defence, Parliamentary hearings, multiple written submissions by high-ranking officials, academics and experts in military law –

121 [1999] 1 SCR 565.

national and international. Throughout the process the (then) Judge Advocate General was directly involved with his staff overseeing the Bill's parliamentary development.

ii. On June 19, 2013 Bill C-15 received Her Majesty's approval, and the following year several JAG officers received Meritorious Service Medals (Military Division) from the Governor General for their work on Bill C-15. At the time, it was widely recognized as important and transformational.

iii. For reasons unknown, despite the passage of more than 7 years since receiving Royal Assent, some of important amendments proposed by Bill C-15 have yet to come into force. Many of these amendments involve strengthening the military justice system. For example, Bill C-15 was meant to improve the broken Canadian Forces grievance process, by giving the Chief of Defence Staff the power to "*reinstate*" a member as a grievance remedy. This would allow the Chief to place an aggrieved in a position they would have been had an injustice not occurred – akin to a tort remedy. This improvement has yet to be put into force.

iv. When it comes to legislation coming into force, timelines are important. Under sections 2-3 of the *Statutes Repeal Act*[122] S.C. 2008, any parts of an Act not put into Force after nine (9) years will be repealed. In this way, if the Canadian Forces waits long enough, they can undermine the will of Parliament. In our view, this is exactly what may have happened concerning Bill C-15, and may represent an undisguised challenge to democracy and the supremacy of Parliament.

2) ***An Act to amend the National Defence Act and to make consequential amendments to other Acts****, S.C. 2019 c. 15 assented to 21 June 2019. 42nd Parliament, 1st Session C-77.*

i. This was supposed to be another welcomed transformational piece of legislation for the military justice system. Among other significant reforms to the military justice system, it sought to provide rights to members of the military who were victims of crime and abolished the ancient and most unfair summary trial process.

122 S.C. 2008, c. 20.

ii. Disappointingly, in the year since receiving Royal Assent none of this Bill has come into force. None. The reason: JAG officers are busy developing supporting regulations. This means that, in the interim, members of the Canadian Forces are still being made to face archaic and unconstitutional summary trials, where their rights to legal counsel and right to a fair trial do not exist, all the while facing the possibility of true penal consequences, including a loss of liberty and having a criminal record.

iii. Failure to act on this important piece of legislation gives the impression that the Canadian Forces generally, and the military justice system specifically, are not concerned with fulfilling the will of Parliament in a meaningful way, or in following through to ensure that critical enhancements are made for the betterment of our soldiers.

Recommendation. With 200 or more full time JAG lawyers on the payroll with the Canadian Armed Forces, it should not be such a daunting task for the Office of the Judge Advocate General, to put into place supporting regulations. Yet the delays continue to astound, with the result that the will of Parliament is playing second fiddle. This is one more reason as to why the JAG should no longer be responsible for the superintendence of the military justice system. Canadian soldiers, sailors and aviators deserve to have a world class military justice system, and this is currently not the case. Far from it.

CONCLUSION

Over the years, attempts to modernize the *National Defence Act* (*NDA*) to bring it more in line with global trends, or even our own domestic civilian penal system, have been resisted by the Canadian military legal establishment. Several reforms made as a result of pressures were initiated from outside of the military, including the judiciary**,** but not within the DND or the military itself.

Ministers of National Defence depend mainly on the advice and guidance of the CDS and the Deputy Minister of National Defence when formulating policies and making decisions. At present, Parliament is dependent mostly on advice emanating from the same two sources and on occasional studies that do not always meet its needs. This handicaps

Parliament in its role of supervising military affairs because it does not have easy access to critical analyses of defence matters.

There is evidence that Canadians and Parliamentarians want a review process that is straightforward and independent. We are of the opinion that a civilian Inspector General, properly supported and directly responsible to Parliament, must be an essential part of this mechanism to oversee and control the CAF and the Defence establishment. The Inspector General of the Canadian Forces should be appointed by the Governor in Council and made accountable to Parliament.

Finally, at present, the Canadian penal military justice system mitigates the right to equality before and under the law as well as the right to equal protection and benefit of the law guaranteed by section 15 of the *Canadian Charter of Rights and Freedoms.* The military justice system must be brought into with contemporary Canadian legal doctrine and principles in order to not only prevent it from falling further behind global trends, but also to ensure that all members of the CAF benefit from the very fundamental rights and freedoms they defend. Parliament should embark upon a review of the *National Defence Act* which will lead to its evaluation and rejuvenation to ensure its harmony with the ordinary law of Canada. Such reform of the military justice system would have implications not only for those in the military, but also to ensure the CAF assumes its rightful place within Canadian society.