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**Report of the  
Special Advisory Group on  
Military Justice and Military  
Police Investigation Services**

*presented to the Minister of National Defence on March 14, 1997*

*by*

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**Member:** *Lieutenant-General Charles H. Belzile, C.M.M., C.D. (Ret.)*

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14 March 1997

The Honourable Douglas Young, P.C., M.P.  
Minister of National Defence  
and Minister of Veterans Affairs  
MGen Georges R. Pearkes Building  
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Ottawa, Ontario K1A 0K2

Dear Minister:

In accordance with your Ministerial Direction dated 17 January 1997, we are pleased to transmit herewith the report of the Special Advisory Group on Military Justice and Military Police Investigation Services.

Yours sincerely,

Brian Dickson  
Chairman

Charles H. Belzile  
Member

J.W. Bud Bird  
Member

## *Foreword*

### **A CAUSE FOR CONFIDENCE**

This study and report about Canada's military justice system and its military police has been precipitated in part by a developing sense of malaise with regard to Canada's military establishment. A number of events have occurred over recent years which have fuelled a public perception of serious deficiencies within Canada's military structure and its leadership.

Because much of the current malaise invites questions about military law and discipline, and the unique system of command and control which has traditionally pertained to military forces in Canada and most countries of the world, it has been determined that this study of the military justice system within the Canadian Forces must be an important step in any serious effort to renew confidence in and respect for our military establishment at all levels.

At the outset, however, we feel compelled to comment in a positive and constructive manner on the generally very high calibre of men and women of all ranks and in all services of the Canadian military establishment with whom we have come in contact during the course of our study. It is our considered judgement that both the present and future leadership potential of the Canadian Forces is of the highest order.

As a result of our examination and investigation among a large number of expert witnesses, including men and women of all ranks and in all services of the Canadian Forces, we have come to the following range of conclusions about principles and directions which should underlie and reinforce the foundation of Canada's military justice system and the operations of its military police.

## DISCIPLINE, LAW AND MILITARY JUSTICE

- The maintenance of effective discipline by the established chain of command continues to be a prime prerequisite for a competent and reliable military organization.
- The main instrument of this disciplinary process is the traditional summary trial process, which permits the chain of command to administer discipline and justice in a swift, decisive and final manner, both under combat circumstances in times of war and in training circumstances in times of peace.
- Notwithstanding the imperative for discipline in military organizations, Canada is founded upon the supremacy of the Rule of Law, especially characterized by the *Canadian Charter of Rights and Freedoms*, which must be fully respected in the application of disciplinary measures within the military justice system.
- We perceive that, in recent years, the application of military discipline within the Canadian Forces has been overly cautious and inconsistent because of concerns by commanding officers about uncertainties over the effect of the *Canadian Charter of Rights and Freedoms*. Consequently, we have recommended certain changes in the summary trial process which we hope will encourage confidence in the use of this important method of discipline and leadership.
- Despite the difficult challenge of doing so, there are methods and skills of leadership which can be developed to sustain effective standards of military discipline and conform with the principles of the *Canadian Charter of Rights and Freedoms*.

## **MILITARY POLICE AND INDEPENDENT INVESTIGATIONS**

- The primary roles of the military police are two-fold: (a) field and garrison duties which are essentially of a military nature, and (b) investigative responsibilities which are almost wholly of a policing nature. These two distinctive roles are frequently in conflict as to their differing requirements for command and control responsibility.
- These two roles of the military police must be separated into structures that expressly reflect their differing nature: one, a traditional force of military police for military support functions at the garrison level under the established chain of command; and another, distinctive investigative policing service which reports independently of the chain of command.
- To enhance the independence of the investigative process and to strengthen the role of the military police, we are recommending that they be given the authority to lay charges for serious offences pursuant to the Code of Service Discipline, in consultation as much as possible with appropriate legal officers.

## **INDEPENDENT OVERSIGHT**

- An institutionalized process of oversight and review is required to ensure accountability for and transparency of the military justice system within the Canadian Forces community.
- A responsible and independent office should therefore be created to provide an avenue for complaints and concerns by individual members of the Canadian Forces with respect to any matter that touches on the military justice system or any other concerns of military personnel. This office should have the authority to investigate

and mediate any valid issue referred to it, and should report directly to the Minister of National Defence on an annual basis, or more frequently as may be required.

## CONCLUSION

Within the parameters of the foregoing directions and principles, our Special Advisory Group has endeavoured to describe the circumstances which presently pertain to Canada's military justice system and to the military police. We have offered a series of detailed recommendations which we feel will both sustain and enhance long term confidence in and respect for Canada's military establishment. In recognition of the commitment by the Minister of National Defence to move quickly in reinforcing the traditionally high levels of national and international regard which Canada's military has enjoyed, our proposals are advanced as much as possible in a context for immediate implementation.

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## I - INTRODUCTION

## ***CHAPTER 1: THE SPECIAL ADVISORY GROUP***

### **(1) THE MANDATE**

By Ministerial Direction issued on January 17, 1997,<sup>1</sup> the Honourable Douglas Young, Minister of National Defence, established an external advisory group, to be known as the Special Advisory Group on Military Justice and Military Police Investigation Services (the Special Advisory Group), and chaired by The Right Honourable Brian Dickson. The Minister also appointed Lieutenant-General Charles H. Belzile (Ret.) and Mr. J.W. Bud Bird as members of the Special Advisory Group.

The mandate of the Special Advisory Group was essentially two-fold. With respect to military justice, the Ministerial Direction stated:

The mandate of the Special Advisory Group [...] is to assess the Code of Service Discipline, not only in light of its underlying purpose, but also the requirement for portable service tribunals capable, with prompt but fair processes, of operating in time of conflict or peace, in Canada or abroad.

The Ministerial Direction then identified certain specific areas that should be considered by the Special Advisory Group, namely:

- a. the jurisdiction, powers of punishment, structure and procedures of both summary trials and courts martial;
- b. the adequacy of review mechanisms for summary trials and of civilian appellate review of courts martial;
- c. the role of the chain of command in the investigation of complaints and the laying of charges;
- d. the appropriate role, responsibility and organization of the Office of the Judge Advocate General in support of military justice;

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<sup>1</sup> A copy of the Ministerial direction is attached as Annex A to the Report.

- e. the relationship that should exist between the chain of command and the Office of the Judge Advocate General in the administration of military justice;
- f. the effectiveness of the current legal structure of the Code of Service Discipline in setting clear duties and standards for carrying out those duties in the administration of military justice; and
- g. actions, including changes in legislation, regulation or policy, to implement the Advisory Group recommendations.

As to the mandate of the Special Advisory Group in respect of military police investigation services, the Ministerial Direction stated that it was to:

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

The Ministerial Direction then went on to identify specific areas in which recommendations were sought, namely:

- a. the identification of current military police functions which must be retained inside the Canadian Forces to ensure effective military operations and discipline;
- b. the identification of requirements, if any, for military police to conduct investigations into serious criminal offences, at home or abroad and into matters which might be considered administrative in other Government departments;
- c. the independence of military police services, including the investigative function and the quality control of military police investigations and related activities;
- d. the establishment of a clear command and control framework for military police functions. In this regard, current status quo command and control arrangements are not to constrain findings and recommendations in any way;
- e. the establishment of an accountability framework including an adequate independent oversight mechanism, and a process by which complaints

and concerns about military police actions are received, investigated and resolved;

- f. the selection, training, military professional and leadership development required for military police personnel;
- g. the potential for greater cooperation with other Canadian police authorities; and
- h. the improvement of communications, to include information flow both internal and external to military police organizations.

The Ministerial Direction also gave the Special Advisory Group certain powers necessary to discharging its mandate, namely:

- a. to sit at such times and at such places in Canada as it may from time to time decide;
- b. to adopt such procedures and methods as it considers expedient for the proper discharge of its mandate;
- c. to have, subject to law, complete access to the personnel of the Canadian Forces and the Department of National Defence and to any information relevant to military justice and military police investigation services;
- d. to be provided, from within the resources of the Department of National Defence and the Canadian Forces, with adequate working accommodation and clerical assistance; and
- e. to be provided with or to engage the services of such staff and other advisers as it considers necessary to aid and assist in the review, at such rates of remuneration and reimbursement as may be approved by the Treasury Board.

Finally, the Ministerial Direction required that the Special Advisory Group report to the Minister of National Defence by March 15, 1997, a deadline with which we have complied.

## (2) THE PROCESS

In order to respect the deadline set out in the Ministerial Direction, the Special Advisory Group assembled a staff quickly and engaged a number of advisers to assist in studying and reviewing the various issues falling within the scope of its mandate.<sup>2</sup>

Immediately thereafter, the Special Advisory Group received a number of technical briefings<sup>3</sup> so as to enable its members to acquire essential background information relevant to a proper understanding of the numerous issues identified in the Ministerial Direction.

The Special Advisory Group travelled across the country to ensure that it would obtain the pertinent information and hear the opinions from Canadian Forces personnel who are or may be affected by the military justice system, including the military police investigation services. We advertised the holding of public hearings which took place in Halifax, Canadian Forces Base (CFB) Galetown, Vancouver, Edmonton, Winnipeg, CFB Valcartier and Ottawa, and invited written submissions from citizens, groups, associations or other interested parties in Canada.

As a result, and notwithstanding the short time in which the Special Advisory Group had to complete its work, a number of briefs were received and witnesses heard.<sup>4</sup> All submissions were reviewed and form part of the record of this study.<sup>5</sup>

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<sup>2</sup> A complete list of our staff and advisers appears in Annex B to this report.

<sup>3</sup> A complete list of the briefings appears in Annex C to this report. The documentation received during these briefings has been kept, indexed and returned to the Minister with our report. Documents were indexed under the letters "MJ", followed by a number assigned by our staff.

<sup>4</sup> A complete list of the briefs received and witnesses heard appears in Annex D to this report.

<sup>5</sup> A complete list of written submissions appears in Annex E.

We made a special effort to speak with Canadian Forces members of all ranks from all services, and arranged for a number of round table discussions. These were extremely informative and useful to the Special Advisory Group and we are most grateful to all Canadian Forces members who participated in these discussions for their candid and informative views.

### (3) THE REPORT

Our report is organized into several parts:

**Part I**, the introduction to this report, explains how we went about our work. We then outline some of the essential background which must be understood prior to entering into a detailed analysis of the problems and evaluation of the possible reforms to the existing military justice system and military police services.

**Part II** focuses on the relevant institutional framework, including the Judge Advocate General and the military police, and in this context reviews the investigative process leading to the laying of a charge.

**Part III** deals with the hearing process, following the laying of a charge, and analyses the two forms of hearings available, namely, summary trial and court martial.

**Part IV** concerns the review process of decisions and actions taken from the investigation stage to the disposition of an alleged offence by a service tribunal, and deals also with the establishment of an independent oversight mechanism for the Canadian Forces.

**Part V** sets out our afterword as well as a consolidated list of our specific recommendations.

Finally, a word should be said about the extent to which we can make very detailed recommendations concerning each aspect of our mandate. While, in some instances, we have commented on what may be considered to be technical matters, we have generally tried to concentrate on the larger issues, so as to provide direction and principles to guide future reform. In this regard, we are convinced that the Canadian Forces need a separate and distinct military justice system (of which an appropriate

investigative capability is an intrinsic part), and that the current system can be improved to meet the real needs and legitimate expectations of the men and women who are subject to the Code of Service Discipline.

## **CHAPTER 2: OVERVIEW OF MILITARY JUSTICE**

### **(1) PURPOSE OF MILITARY JUSTICE**

Canada, as a nation, has not known war on a massive scale for more than fifty years. As a country, we have been involved in many military as well as "peacekeeping" missions on a regular basis. Yet, the profile of the Canadian Forces (CF) has probably been higher in the eyes of the public at earlier times in our history than it is currently.

Nonetheless, Canada is committed to keeping a viable regular and reserve military force, the ultimate purpose of which is the defence of the nation. Virtually everything that the military does must be subordinated to that objective including, in particular, the fundamental need to maintain discipline.

The requirement for discipline has been expressed recently as follows:

An individual service member's commitment to serve on the Canadian Forces team means that he or she may be required at any time to undergo a risk of injury or even death in the service of Canada. Because the Canadian Forces must always be prepared on very short notice to fulfil its tasking, training must be as real as possible ...

A service member may be required to perform physically demanding labour, over long periods and in extremely arduous weather conditions, or may be required to serve in an isolated location, away from home and family, and in stressful circumstances for lengthy periods. All of these requirements exist, even in times of peace, but they are magnified in times of tension ...

In peace time, that commitment requires continuous exercises in a realistic manner, thereby exposing service personnel to the rigours of the operational environment and to the machines and the equipment of war.

In periods of armed conflict and international tension and, indeed, in peacekeeping operations, the operational environment is a reality, and required response all too often becomes unlimited liability.

Thus, in the final analysis, the service members' decisions and actions imply an acceptance of a wide range of possible consequences, up to and including death for himself or herself or for others.

An essential quality, which ensures that members of the Canadian Forces will be capable of carrying out their assigned missions in these difficult missions is discipline. Without discipline, the Canadian Forces or, indeed, any military force cannot function effectively and can become a danger not only to themselves but to others.<sup>6</sup>

It should not be surprising, therefore, that members of the CF are subject, not only to all the laws of the land like any other citizen, but as well to a Code of Service Discipline<sup>7</sup> that sets out numerous "service offences" - such as absence without leave and insubordination - which attest to the unique needs of the military.

It is also essential to have a military justice system which deals expeditiously, decisively and yet fairly with breaches of the Code of Service Discipline. For the purpose of military justice is not only to ensure discipline but also - and this must be emphasized - to do so in a way which encourages reform of the individuals concerned so as to return them to the performance of their duties as soon as possible. The need for an efficient and expeditious justice system is thus greater in the military than in civilian society. Commanding officers, especially in combat circumstances, cannot wait months or years before discipline is restored and justice done.

The need for a separate and distinct military justice system is inescapable. This was recognized by the Supreme Court of Canada as recently as 1992:

The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's

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<sup>6</sup> MJ140B, Captain (N) Reed, Testimony before the Somalia Inquiry, June 20, 1995, pp. 441-443.

<sup>7</sup> Part IV to IX of the *National Defence Act*, R.S.C., 1985, c. N-5.

security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals rather than ordinary courts have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus the need for separate tribunals to enforce special disciplinary standards in the military. I agree, in this regard, with the comments of Cattanach J. In *Re MacKay and The Queen* (1977), 36 C.C.C. (2d) 522, at pp. 524-5, 78 D.L.R. (3d) 655 at p. 657, [1978] 1 F.C. 233 (T.D.):

Without a Code of Service Discipline the armed forces could not discharge the function for which they were created. In all likelihood those who join the armed forces do so in time of war from motives of patriotism and in time of peace against the eventuality of war. To function efficiently as a force there must be prompt obedience to all lawful orders of superiors, concern, support for and concerted action with their comrades and a reverence for and a pride in the traditions of the service. All members embark upon rigorous training to fit themselves physically and mentally for the fulfilment of the role they have chosen and paramount in that there must be rigid adherence to discipline.

Many offences which are punishable under civil law take on a much more serious connotation as a service offence and as such warrant more severe punishment. Examples of such are manifold such as theft from a comrade. In the service that is more reprehensible since it detracts from the essential *esprit de corps*, mutual respect and trust in comrades and the exigencies of the barrack room life-style. Again for a citizen to strike another a blow is assault punishable as such but for a soldier to strike a superior officer is much more serious detracting from discipline and in some circumstances may amount to mutiny. The converse, that is for an officer to strike a soldier is also a serious service offence. In civilian life it is the right of the citizen to refuse to work but for a soldier to do so is mutiny, a most serious offence, in some instances punishable by death. Similarly a citizen may leave his employment at any time and the only liability he may incur is for breach of contract but for a soldier to do so is the serious offence of absence without leave and if he does not intend to return the offence is desertion.

Such a disciplinary code would be less effective if the military did not have its own courts to enforce the code's terms.<sup>8</sup>

Notwithstanding the requirement for a separate Code of Service Discipline and for a special court system to deal with breaches of that Code, it does not follow that the military justice system can be divorced completely from the rules of government and society as a whole. In particular, this system must be compatible with our Constitution, including the *Canadian Charter of Rights and Freedoms*.

We are convinced that there is a need for a separate and distinct military justice system, consistent with the primacy of the Rule of Law. Therefore:

- 1. We recommend that a distinct military justice system be maintained for the Canadian Forces, consistent with the supremacy of the Rule of Law, including the *Canadian Charter of Rights and Freedoms*, and subject to innovations and changes recommended in this report.**

It is also important, however, that reforms be consistent with the fundamental purpose of the military justice system as an instrument of leadership, so essential in fostering the discipline required for the maintenance of an efficient military capability.

## **(2) IMPORTANCE OF THE CHAIN OF COMMAND**

Just as it is not possible to understand the military justice system unless it is directly related to the need for military discipline, so it must also be recognized that all persons subject to the Code of Service Discipline have a commanding officer to whom they are accountable in matters of discipline. Service members are required to obey the lawful orders and instructions of their superiors. Commanding officers are in turn responsible to their superiors for all matters of discipline within their units. At each level of the military hierarchy, there is an expectation that the person at the next higher level has the authority to hold subordinates accountable, and to impose disciplinary and

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<sup>8</sup> *R. v. Généreux*, [1992] 1 S.C.R. 259, at 293-4.

administrative measures as a means of enforcing that accountability.<sup>9</sup> Military justice and the chain of command are, therefore, closely intertwined.

The commanding officer is at the heart of the entire system of discipline. By statute, regulation, custom and practice of the service, the commanding officer has been given the authority to investigate service offences, including the power to issue warrants, to search for evidence, to arrest and detain suspects, to lay or to have charges laid, and to conduct summary proceedings or recommend that the matter be disposed of by court martial. Where the commanding officer deals with the alleged offence summarily, he or she hears the evidence, decides upon guilt or innocence, and imposes the punishment.

We are persuaded that the existence of a strong chain of command is absolutely essential to any efficient and disciplined military. As one witness said, "if you are going to trust the chain of command to lead the Canadian Forces into battle, surely you must also trust it to administer military justice appropriately."<sup>10</sup> But there are certain cases where this objective requires the introduction of checks and balances to ensure that the inherent conflicts that can occur between respect for the chain of command on the one hand, and impartial investigation and adjudication of service offences on the other, do not undermine the legitimacy of the whole military justice apparatus.

We are convinced that the entire military justice system should remain in the hands of the military. We believe, however, that some adjustments must be made which, while reducing the powers of the commanding officers to a certain degree, will strengthen the chain of command in the long run by restoring its legitimacy. J.B. Fay said it well in 1975:

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<sup>9</sup> MJ 140B, Captain (N) Reed, Testimony before the Somalia Inquiry, June 14, 1995, p. 3.

<sup>10</sup> C.R. Hewson, lawyer, in his oral testimony before the Special Advisory Group on February 16, 1997, in Vancouver, B.C.

"Fairness and justice are indispensable ... When the serviceman has confidence in his commanders and believes in the organization, there is discipline ... It is from military law that the serviceman received his most tangible indication of the relationship between himself and those who command. It is under military law that he is tried and punished. If the military law system is a just system, then it will be recognized as such by the serviceman and thus it will promote and support the discipline upon which the military organization is based."<sup>11</sup>

Therefore:

2. We recommend that the existing Code of Service Discipline continue to be administered primarily by the chain of command, both in times of conflict or peace, in Canada or abroad, subject to innovations and changes recommended in this report.

### (3) MILITARY JUSTICE AND THE IMPACT OF THE *CHARTER*

What is military justice? This may seem like a simple question, but it quickly became obvious to us that there can be many interpretations of that phrase. The Ministerial Direction which created this Special Advisory Group, for example, implicitly focuses on military justice as a set of procedures to determine the guilt or innocence of persons charged with the commission of a service offence.

Military justice can also be interpreted to encompass more than just the trial process as such and to include the investigative stage which precedes the laying of a charge. In this respect, the investigative function of the military police can be seen and must be seen as an integral part of military justice. Certainly, in the minds of many CF members, problems relating to the independence and thoroughness of military police investigations were seen to be inextricably linked to the system of service tribunals that have jurisdiction over them.

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<sup>11</sup> J.B. Fay, "Canadian Military Law: An Examination of Military Justice" (1975) 23 Chitty's L.J. 120 at 123.

In addition, many service men and women do not understand why they are treated significantly differently than their civilian counterparts. They do not always comprehend, for example, the rationale for separate service tribunals, parallel to the civil courts. Nor do they understand or accept why their substantive rights, such as the right of free speech, should be restricted as a result of becoming members of the CF. To many of them, free speech and equivalent treatment with civilians should not be incompatible with military justice.

Thus it is clear to us that, particularly among the non-commissioned ranks and younger CF members, there are different expectations of the military justice system, understanding this phrase in the broadest possible sense. These men and women have grown up in the era of the *Canadian Charter of Rights and Freedoms* which was enacted in 1982. They may not have a detailed knowledge of that pivotal document, but they do know that it contains fundamental principles relating to free speech and equal treatment. They also know that it applies to all Canadian citizens.

Perhaps it should not be surprising, therefore, that non-commissioned members (NCMs) should question the summary application of discipline by their commanding officer, where investigations of possible offences may be somewhat lacking and the procedural safeguards misapplied or misunderstood.

What did surprise us, though, was the pervasive opinion among CF members that there is a double standard in the application of military justice between NCMs on the one hand, and officers on the other. For it is widely perceived among NCMs to whom we spoke, particularly of the junior ranks, that they are not treated the same way as are officers. They do not believe that investigations of officers by the military police are as thorough as they are of NCMs. They cannot understand how non-commissioned military police, for example, could fairly and thoroughly investigate an officer.

It is often said that perception is reality. Perhaps this is especially true in the administration of justice because any justice system, whether it be military or civilian,

depends for its legitimacy on the respect of the individuals that are subjected to it. When a significant number of individuals who are governed by that system have lost respect for this institution, and feel that there is a double standard, then there is a serious problem that must be addressed or the system will collapse. Thus, while a distinct military justice system is both desirable and necessary, we believe it is essential that all service members be treated equally, except where distinctions are clearly justified, such as with respect to the choice of the appropriate service tribunal or of the appropriate sentence where the impact of the punishment may have a disproportionate effect depending on the rank of the accused. Therefore:

3. **We recommend that it be declared, as a fundamental principle of Canada's military justice system, that every person subject to the Code of Service Discipline is entitled to its equal and uniform application without regard to rank.**

#### **(4) MILITARY JUSTICE IN TIME OF CONFLICT OR PEACE, IN CANADA OR ABROAD**

As we noted in the introduction to this report, the Ministerial Direction stated that our mandate was "to assess the Code of Service Discipline, not only in light of its underlying purpose, but also the requirement for portable service tribunals, capable, with prompt but fair processes, of operating in time of conflict or peace in Canada or abroad."

Some have argued that the military justice system should differ depending on whether the alleged offences were committed in Canada or abroad, in time of conflict or peace. To a certain degree, the current legislative framework already recognizes such distinctions. For example, standing courts martial, which as we shall see involve a single judge, were created essentially to enable courts martial to be convened expeditiously in a foreign country.

Further distinctions could be envisaged. For instance, it was suggested that for all but the most minor service offences committed in Canada, investigations could be

carried out by civilian police forces (like the RCMP), outside of the military police and the chain of command. Similarly, it was suggested that the power of a commanding officer to sentence a member to detention after a summary proceeding should only be available in time of conflict.

We have not been persuaded that it is workable or desirable to design a system of military justice that functions radically differently depending on the particular context: does a peacekeeping operation (such as the kind of mission in which Canada has been involved in the last several years) constitute a period of conflict which would engage different military justice rules and mechanisms? Similarly, would the period of intensive training that precedes deployment abroad trigger a different system of military justice? And since one of the criticisms of the current system of military justice is that it is too complicated, does it make sense to introduce a second system? We do not think so. We have come to the conclusion that the current system, with the adjustments that we recommend, will be sufficiently flexible to adapt to such circumstances as may arise.

**(5) INVESTIGATION OF SERVICE OFFENCES: One Role for the Military Police**

Contrary to many public perceptions, the investigation of service offences is not the main role of the military police. While investigations are conducted on a routine basis, most military police members carry on numerous other functions and tasks which are assigned to them by the commanding officer of the unit to which they are attached.

Military police have very broad responsibilities which can best be described as four core areas, namely, police, security duties, custodial duties and direct support to military operations. The performance of their police functions are similar to those of other police forces and include law enforcement, crime prevention and investigations. The security duties of the military police include those of security of personnel, materiel, information and information technology and those related to military intelligence. The

military police is also responsible for the custodial functions associated with service prisons or field detention barracks which may be required in operations.

It is in the field of operations that military police's most important war time duties reside. Thus, the military police has an operational function which includes, *inter alia*, battlefield rear area and site security, route reconnaissance as well as traffic control for tactical movement, control of refugees, custody of prisoners of war and sundry direct defence duties in specific areas such as airfields. In short, the primacy of the operational mission will prevail over other duties when military police are deployed with forces in the field, be it in actual operations or in training.

As a result of this reality, conflicts have been created in the past between the priority of service offence investigations and the priority of training and combat operations. This helps to explain why the military police have attracted critical comment, particularly with regard to its investigative functions. Along with these functional conflicts, the lack of independence from the chain of command, an alleged lack of training in investigative techniques and the inability to lay charges are all issues which have led many to criticize the process, and to advocate that the entire investigation function should be taken out of the hands and control of the military establishment. While we do not support such extreme measures, we have examined these issues thoroughly in this report.

## **(6) TYPES OF HEARINGS**

The unique needs of the military explain not only why it has developed a parallel system of military justice, but also account for why the military has developed two processes for the delivery of justice.

The first process is the summary trial which is conducted at the unit level by a commanding officer or his or her delegate, and affords the accused fewer procedural protections. Summary trials are designed for less serious service offences where unit

discipline is directly at stake. A minor theft may not interest civilian authorities. However, it threatens the very core of unit cohesion and must be dealt with swiftly by the chain of command whose fundamental responsibility it is to inculcate and foster unit discipline. The summary trial is the only practical means to achieve this objective.

Courts martial, on the other hand, are established to deal with more serious offences where the punishments can have very serious implications for the accused. While there are various forms of courts martial, they all afford extensive procedural rights consistent with the serious nature of the offences and possible consequences to the accused. The principal justification for courts martial is not so much the need for expediency (even though they are routinely convened faster than civilian criminal courts), but the sensitivity to the nature of military service offences which results from their being composed of military judges and panel members who serve with the CF. Moreover, courts martial are "portable": they can be convened wherever an offence has been committed even in a theatre of operations abroad.

#### **(7) IMPORTANCE AND SCOPE OF THE CODE OF SERVICE DISCIPLINE**

The Code of Service Discipline, representing as it does the core of the military justice system, should be given greater prominence than is currently the case in the *National Defence Act*. We believe that discipline is such a crucial part of what our military needs that the Code of Service Discipline should be a separate federal statute. Therefore:

- 4. We recommend that the existing Code of Service Discipline be re-enacted as a separate federal statute.**

The scope of the Code of Service Discipline is very wide, both in terms of the persons to whom it can apply and the range of offences it encompasses.

## A. Persons Subject to the Code of Service Discipline

The Code of Service Discipline describes the persons subject to it as follows:

- members of the CF serving in the regular force;
- members of the CF serving in the reserve force when, for example, they are called out on duty, are in uniform or in training; and
- certain categories of civilians who accompany members of the CF who are on posting overseas, for example, teachers in military schools.

Despite the breadth of the Code's application in terms of the jurisdiction of service tribunals over individuals, we have not received any submissions that it should be narrowed except for such radical proposals, with which we do not agree, that all service offences should be heard by civilian criminal courts. We therefore make no specific recommendations in this regard, and will leave it to the jurisprudence to evolve the criteria appropriate for determining the acceptable limits of service tribunals' jurisdiction.

## B. Types of Service Offences

Those persons who are subject to the Code of Service Discipline are liable to be charged with a number of "service offences".<sup>12</sup> Service offences fall into three main categories, namely:

- offences of a military nature (listed in ss.73 to 129 of the *National Defence Act*) such as negligence in the performance of military duty or absence without leave;

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<sup>12</sup> s. 2 of the *National Defence Act*, R.S.C., 1985, c. N-5.

- criminal offences created by other federal statutes, such as the *Criminal Code of Canada* and the *Narcotic Control Act*, which are incorporated into the Code of Service Discipline by s. 130 of the *National Defence Act*; and
- offences under the law of the country where a service member is stationed (s. 132 of the *National Defence Act*).

Although all of the above offences are defined as service offences, they are not all precisely of the same nature. Some are uniquely military, while others are ordinary criminal offences incorporated into the Code of Service Discipline. Still, some of the military offences explicitly created by the Code of Service Discipline, like stealing (s. 114), are also criminal as that term is used in common parlance. Moreover, within the range of military offences, some appear to be more serious than others. For example, desertion is more serious than absence without leave. Finally, a few offences such as murder and sexual assault when committed in Canada, have been excluded from service tribunals' jurisdiction, presumably because Parliament has determined that such offences have repercussions in society which transcend the interest of the CF in maintaining military discipline.

Attempts to categorize offences, and the likely punishments that they may attract upon conviction, reflect an underlying tension which is at the root of many of the problems that we have had to address. The requirement for military efficiency and discipline entails the need for summary procedures. This suggests that investigation of offences and their disposition should be done quickly and at the unit level. The "cost" of doing this is that it is not possible to offer the accused member the full panoply of procedural rights which could otherwise be afforded in the context of ordinary criminal proceedings - such as an independent and impartial tribunal and the right to counsel. This suggests that routine investigations and summary proceedings should be reserved for minor offences directly involving unit discipline.

But as we move away from relatively minor disciplinary offences to circumstances where the offence is a serious matter, the rights of the individual concerned begin to

outweigh the interests and needs of the unit. In those cases, it is necessary to afford the accused complete procedural protection by giving him or her access to a court martial.

Categorizing offences is desirable, not only to identify the forum in which the matter should be decided (be it summary trial or court martial), but also at the stage where the matter is to be investigated. The current legislation does distinguish to a certain degree between offences for the purpose of determining the appropriate forum that will dispose of the charge; but there are no formal rules or policies governing the nature of the investigation. Yet it would be very helpful to be able to identify at the outset whether the matter involved a serious or minor offence, so as to engage the appropriate police and investigative resources and thus ensure that, in serious cases at least, the independence of the investigation is protected - just as it is when civil authorities investigate criminal and quasi-criminal offences. A clearer delineation of the types of offences might also increase the confidence of commanding officers when exercising their discretion to hear a matter by summary trial or to recommend that a court martial be convened.

So there are many sound reasons why one would wish for a definitive list of offences which could trigger an appropriate investigation or determine the appropriate forum to try an accused. But apart from the clear cases, a minor disciplinary offence which should be tried at a summary trial or a serious offence which must obviously be tried by court martial, we have concluded that it is not possible to delineate a clear division between minor or serious offences. Still, the principle that minor offences should engage routine investigations and a summary proceeding, whereas serious offences should trigger specialized investigations and the full panoply of procedural rights offered by a court martial, has guided our deliberations and influenced the reforms we have suggested.

## **(8) PROPOSED REFORMS**

Fortunately, we did not have to reinvent the wheel. For we quickly found out that a large number of studies had been carried out, touching virtually every aspect of the

military justice system, including the role of the military police. For example, with the close collaboration of the Judge Advocate General, a Summary Trial Working Group was established which proposed numerous reforms to the summary trial process. The office of the Judge Advocate General also made certain proposals to monitor and control the power of commanding officers to lay charges, as well as many other recommendations relevant to our mandate.

On the military police side of the system a major study, called Operation Thunderbird, was launched in 1995 to review the entire organization of the military police. Some of the major issues canvassed concerned whether or not a special investigative force should be created and the extent of the authority of the Director General Security and Military Police (DG SAMP) to control military police resources.

We have also had access to an exhaustive study prepared and completed in 1996 for the Somalia Inquiry by Professor Martin L. Friedland of the Faculty of Law of the University of Toronto, which touches upon many of the matters falling within our mandate.<sup>13</sup>

Of course, we did not consider ourselves bound by any of the previous recommendations or studies we were briefed on, as will be readily apparent to the readers of this report. In fact, the Minister's clear instructions to us were to approach our mandate with thorough independence and impartiality. But we are nonetheless very much indebted to all those who have worked on these matters, and we will refer to the relevant studies and proposals as we deal with the specific issues they are intended to address.

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<sup>13</sup> MJ177, "Controlling Misconduct in the Military: - A Study Prepared for the Commission of Inquiry into the Deployment of Canadian Forces in Somalia", May 1996.

**(9) MAIN THEMES**

An analysis of the military justice system, including the investigative role of the military police, quickly reveals a few main themes or common denominators. These include:

- the authority of the chain of command versus the independence of investigations;
- the absolute discretion of the commanding officer to lay charges versus the need for impartiality and transparency; and
- the need for the swift administration of justice and discipline versus the rights of the accused.

These conflicting themes require a delicate balancing of interests and priorities, which protects the fundamental needs of the chain of command, while leaving it accountable in all matters of military justice. We hope that the reforms we have suggested in what follows will achieve the equilibrium of interests and rights required by members of the Canadian Forces in the 21st century.

## **II - INSTITUTIONAL FRAMEWORK**

## **CHAPTER 3: THE JUDGE ADVOCATE GENERAL**

### **(1) ORGANIZATIONAL STRUCTURE**

#### **A. Historical Background**

The position of the Judge Advocate General finds its origins in English common law. Articles of War issued by Charles I in 1639 contain the first mention of the Judge Advocate General. They gave the Council of War and the Advocate of the Army authority to enquire into offences committed in the army. Orders issued in 1662 by Charles II gave authority to the Judge Advocate of the Forces to take information and deposition as occasions should require in all matters before a court martial. After the passing of the *Mutiny Act* in 1689, the Judge Advocate General acted as legal adviser to the Commander in Chief. Initially, the Judge Advocate General had a combination of duties, with his officers acting both as prosecutors and as legal advisers to courts. This came to be regarded as undesirable, and the judge advocate gradually ceased to act as a prosecutor. For over a century, before 1893, the Judge Advocate General in England was a privy councillor, a member of the government and usually a Member of Parliament. He had direct access to the sovereign on matters pertaining to his office.

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

The duties of the Judge Advocate General have evolved through two world wars, a variety of peacekeeping/peacemaking operations, the introduction of a new *National Defence Act*, the unification of the CF, and the integration of the military and civilian headquarters.

## B. Current Situation

### (i) The Judge Advocate General

The *National Defence Act* provides authority for the Governor in Council to appoint the Judge Advocate General (JAG) for the Canadian Forces. The appointment of JAG is one of several Order in Council appointments under the *National Defence Act*, the others being a Deputy Minister, a Chief of the Defence Staff (CDS) and up to three Associate Deputy Ministers. The positions of CDS and JAG in Canada have always been filled by military officers.

The JAG is responsible in the performance of his duties to the Minister of National Defence and responsive to the CDS and the Deputy Minister in the provision of legal advice and services to the Department and the Canadian Forces. The JAG commands all legal officers, with the exception of military judges, working within the Office of the JAG.

The powers of the JAG, while they are referred to in the *National Defence Act*, are not set out explicitly in the legislation. He has little executive authority and his role is essentially that of an adviser. He may or may not be consulted on an issue, and if consulted his advice may be accepted in whole or in part, or rejected.

(ii) Office of the JAG

The JAG heads the Office of the JAG, presently composed of 81 regular force legal officers, 50 reserve force legal officers and a combined military and civilian support staff of 96 people. The Office of the JAG is organized on a regional basis with its main office at National Defence Headquarters (NDHQ) in Ottawa.

The NDHQ Office of the JAG is physically divided and dispersed, being located in four buildings in the National Capital Region. It is organized into five functional divisions: operations, military justice, personnel, materiel and advisory and legislation. These specialist activities taking place in the directorates within each division are coordinated by a Deputy JAG reporting directly to the JAG. The Chief Military Trial Judge also maintains offices in Ottawa.

(iii) JAG's Various Roles

Upon being consulted by the military police with regard to investigations of alleged offences, the Office of the JAG may become involved in giving advice on the sufficiency of the investigation or the conditions to be satisfied for the conduct of a search, but nothing obliges the military police to consult JAG.

Once an investigation is complete the legal branch, commonly through individual legal officers located in various regions, can be consulted by commanding officers and their staff to assist them in making the decision as to whether or not charges should be laid and, if so, what type of charges should be laid. There is, however, no requirement that legal officers be consulted for these purposes.

Once charges are laid the matter can proceed either by way of summary trial or to a court martial. Currently, the role of the JAG in a summary trial is limited and quite informal. Legal officers are available to be consulted by a commanding officer with regard to the proper procedure to be followed, but the ultimate authority is in the hands

of the commanding officer. A legal officer may also be consulted by the accused, or by the assisting officer, prior to the summary trial.

The role of the JAG in courts martial is much more involved. The legal branch is responsible for the prosecution of any service offence heard by a court martial, as well as for any appeal thereof to the Court Martial Appeal Court or the Supreme Court of Canada. Further, when an accused is tried by a court martial, he or she is given a right to defence counsel from the Office of the JAG.

Until recently, the JAG was responsible for the appointment of judges at courts martial. This role was substantially diminished after the decision of the Supreme Court of Canada in *R. v. Généreux*.<sup>14</sup> Under the new regime, the Office of the JAG is responsible for recommending to the Minister of National Defence the appointment of the military trial judges. Today, assignment of judges to the various courts martial is done by the Chief Military Trial Judge.

It is apparent, therefore, that the Office of the JAG is involved to a greater or lesser extent in various roles, some of which may be seen to be conflicting. These include advice at the investigation and charging stages, as well as prosecution, defence and judging of service offences. As a result, concern was expressed as to whether the Office of the JAG can really be impartial, particularly when providing legal advice to or representing accused CF members at courts martial.

## **(2) PROPOSED REFORMS FOR THE JAG**

As we have stated, the duties and responsibilities of the JAG are not set out clearly and comprehensively in the *National Defence Act* or in Regulations. This lack of precision contributes to uncertainty about JAG's roles.

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<sup>14</sup> [1992] 1 S.C.R. 259.

The JAG has persuaded us that the responsibilities of the Office of JAG need to be set out comprehensively in the *National Defence Act* and in Regulations. Specifically, JAG suggests that the *National Defence Act* provide as follows:

- a. a Governor in Council mechanism to appoint as JAG a commissioned officer with a minimum of 10 years experience in military legal duties;
- b. a term expressed in years subject to early termination or extension;
- c. a non-exhaustive statement of responsibilities including:
  - (i) JAG's duty as legal adviser to the Minister,
  - (ii) a duty to superintend/supervise the administration of military justice across the CF;
  - (iii) a duty to receive and record proceedings of courts martial;
  - (iv) a duty to conduct frequent inspections in the field concerning the administration of military justice pursuant to the duty of superintendence; and,
  - (v) the submission, annually, of a report to the Minister and the CDS on the administration of military justice in the CF.

We concur that the JAG's role should be more clearly defined in legislation.

Therefore:

5. **We recommend that the principal responsibilities of the Judge Advocate General be set out in the *National Defence Act*, and that, without limiting the generality of those responsibilities, the following provisions be included:**
  - a. **the Judge Advocate General's duties as legal adviser to the Minister of National Defence, the Department and the Canadian Forces;**
  - b. **the Judge Advocate General's duty to provide oversight and supervision to the administration of the military justice system across the Canadian Forces;**
  - c. **the Judge Advocate General's duties in respect of its separate defence, prosecution, and judicial functions;**

- d. **the Judge Advocate General's duty to report annually to the Minister of National Defence and the Chief of the Defence Staff on the overall effectiveness of the military justice system in the Canadian Forces.**

We also wish to comment specifically on the proposed duty of the JAG to review and supervise the administration of military justice and to report annually to the Minister and the CDS in these respects.

We are concerned about the lack of systematic reporting and transparency in some aspects of the military justice system. As but one example, it does not appear possible to obtain accurate and current statistics about the number of summary trials conducted, the nature of offences tried, or the sentences rendered.

Confidence in and respect for a justice system is greatly enhanced by public information and knowledge. Accordingly, we believe that the JAG should not only assume a clear review role and a corresponding duty to report annually on the functioning of the Code of Service Discipline, but also that its report should be released as public information. Therefore:

6. **We recommend that the Judge Advocate General annual report to the Minister of National Defence and the Chief of the Defence Staff be released to the public.**

### **(3) ORGANIZATIONAL CHANGES**

#### **A. Military Defence Counsel Services**

With respect to the provision of military defence counsel services, the Office of the JAG currently has an establishment of four officers to perform this function: one lieutenant-colonel and three majors. Their current tasks involve:

- legal advice to CF members who have been arrested or detained;
- legal advice to assisting officers concerning summary trials; and

- acting as defence counsel at courts martial and as counsel on appeal to the Court Martial Appeal Court.

The military defence function is currently housed in the same building as the Office of the JAG. It shares a law library and common support facilities.

JAG is considering the removal of the defence function from its current location, and perhaps from the JAG establishment. At the moment two options are being explored:

- a. civilian defence counsel could be provided through provincial Legal Aid programmes which would be reimbursed by National Defence. For cases arising in operational areas and outside Canada, the feasibility of provision of defence counsel services by qualified reserve force lawyers is also being explored; and
- b. the defence function could be moved outside JAG and co-located with other personnel services such as chaplains and medical services. JAG would remain responsible to assign qualified counsel to these functions for a fixed term and a Deputy Judge Advocate General not involved in prosecutions or the administration of military justice would be responsible for oversight.

While both options are being fully explored, JAG has reservations about contracting out the defence counsel function. With military counsel, the service member does receive the benefit of a more intimate knowledge about military justice and the CF. Speed and portability are of prime importance in military justice and the JAG personnel of the current defence cell are immediately deployable.

Still we heard from several members of the CF who believe that the defence counsel provided by JAG are not sufficiently independent: other lawyers from the JAG office could also be prosecuting them, or be advising military police and commanding officers about laying charges against them. In principle, therefore, we feel that the separation between the JAG office and defence services must be enhanced.

The first option described above presents the optimal separation. However, we think it would be cumbersome for the Department of National Defence to enter into

province by province agreements with legal aid plans that are already overburdened with costs and administration. It might be more feasible for the Department of National Defence to simply establish its own internal plan and to fund the defence of CF members where they have a right to legal advice. However, this could become more expensive and less expeditious than if the Department of National Defence were to maintain its own group of military defence counsel.

Accordingly, we are inclined to favour the second option proposed by JAG, on the assumption that a true separation can be preserved. The JAG is confident that such a separate defence office will be perceived among the ranks as being effective and independent.

~~There are many ways that the requisite separation of the JAG from defence legal services could be implemented. An appropriate solution will require planning and also a financial analysis of the costs involved. While we are not able to consider fully the specific alternatives as to how independent defence counsel services should most effectively be structured, we do believe that such services must be offered to CF members. Therefore:~~

- 7. We recommend that, whenever a Canadian Forces member is entitled to legal advice under the Code of Service Discipline, the Judge Advocate General provide such advice in a manner that is independent of the Judge Advocate General's prosecution and judicial functions.**

#### **B. Establishment of an Independent Prosecutor**

Under current regulations, the prosecutor for a court martial is appointed by the convening authority with the concurrence of the JAG. The prosecutor is the direct agent of the convening authority. The prosecutor has no authority, independent of the convening authority, to amend charges or to proceed or not proceed to trial having regard to the usual criteria of a reasonable prospect of conviction and the public interest. Where charges are amended or withdrawn, or a plea bargaining is entered into, the

convening authority makes the decision, albeit on advice of the legal officer assigned to prosecute the case.

According to Professor Don Stuart,<sup>15</sup> the Canadian tradition is that prosecutors play a quasi-judicial role in a special relation to the court. The role of prosecuting counsel is that of ministers of justice rather than partisan advocates. Professor Stuart further refers to the frequently quoted description of the prosecution role by Rand, J. for the Supreme Court of Canada in *Boucher v. The Queen*, [1955] S.C.R. 16:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction. It is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of facts is presented; it should be done firmly and pressed to its limit but also done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with a sense of the dignity, the seriousness and the justness of our judicial proceedings (at pp. 23-24).

There is no shortage of models for an independent prosecution function within the military justice system. The JAG advises us that for courts martial the prosecution function has two essential requirements: first, it must be performed separately from the chain of command and, secondly, it must ensure the independence of the prosecution function and reduce potential conflicts of interest. We concur that a separate JAG office should be established with operational responsibility for all prosecutions before courts martial. Therefore:

- 8. We recommend the appointment of an independent Director of Prosecutions responsible to the Judge Advocate General.**

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<sup>15</sup> D. Stuart, "Prosecutorial Accountability in Canada", in *Accountability for Criminal Justice: Selected Essays*, ed. P.C. Stenning (1995), p. 331.



## **CHAPTER 4: THE MILITARY POLICE**

### **(1) ORGANIZATIONAL STRUCTURE**

#### **A. Historical Background**

The military police originated in 1918 with the creation of the Corps of Canadian Military Police. From 1920 to 1939, there were only garrison level police left within the Canadian military. During World War II, the Canadian Provost Corps was formed almost entirely from RCMP volunteers and with traffic control being its principal task. By the end of World War II, there were well over 16,000 military police within the three services. After the war their number was significantly decreased, but then increased again with the onset of the Cold War and Canada's involvement overseas. During the unification of all three services, an integration of police services also occurred and they were placed under the authority of the Director of Security, and eventually under DG SAMP who reports to the Deputy Chief of the Defence Staff (DCDS).

#### **B. Current Situation: The Issue of Command and Control**

Currently, the military police organization consists of approximately 130 officers and 1,204 NCMs. By the turn of the century, it is anticipated that these numbers will decrease slightly to 120 officers and 1,106 NCMs.

Most military police are employed at bases and in units across Canada. The remainder fill positions at various headquarters such as the Canadian Forces School of Intelligence and Security (CFSIS), the Special Investigation Unit (SIU), the Canadian Forces Service Prison and Detention Barracks in Edmonton, and Canadian Embassies. There are also some military police employed with NATO and with the United Nations.

The military police exercise jurisdiction over all persons who are subject to the Code of Service Discipline throughout the world, including non-military personnel involved in an event or an offence occurring on or in respect of a defence establishment.

Military police personnel have a special status within the military justice system. They hold the title of "Specially Appointed Personnel" and, as such, are awarded certain powers in order to fulfil their policing duties.<sup>16</sup> For example, the military police is given the power to arrest and/or detain and the power to search. Moreover, s. 2 of the *Criminal Code of Canada* recognizes military police as peace officers. As a result, they can arrest for offences pursuant to the *Criminal Code* and lay charges in the civil criminal courts.

At NDHQ, DG SAMP is the senior CF security and police adviser. DG SAMP reports directly to the DCDS and is responsible for the development of national policy and guidance pertaining to policing, security and custodial matters that are common to the three environments, sea, land and air. However, the operations of military police in the field are the responsibility of each commander. In this context, DG SAMP provides only technical direction to the military police and has no executive authority over the conduct of their operations.

There are several options of command and control available for the military police. At one extreme is the status quo which appears not to fulfil all requirements. At the opposite pole is a posture which would place all military police resources, wherever they may be located in Canada or abroad, under the complete command and control of DG SAMP, which would not be fully accepted.

We appreciate that operational commanders will want to ensure their operational control is retained. Operations are paramount to them, as are their responsibilities to train the units under their command. Command and control arrangements with respect to the

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<sup>16</sup> *National Defence Act*, s. 156 and QR&O 22.02(2).

military police responsibilities in operational support of the commands must be reaffirmed. Since the requirements of the navy, the army and the air force are all different, the command and control provisions must be flexible as well.

Members of the military police, within DG SAMP and the current SIU, now perform certain tasks associated with military intelligence and counter-intelligence on behalf of the CF such as:

- the conduct of threat assessments against Canadian Forces resources;
- the identification and countering of activities that could pose a threat to the security of the Canadian Forces;
- the conduct of security briefings and debriefings; and
- the conduct of police and security intelligence liaison with other law enforcement agencies in Canada and abroad.

Those tasks are carried out through the maintenance of liaison with many sources, such as various intelligence networks, the RCMP, Canadian Security Intelligence Service (CSIS), civilian police forces in Canada and abroad, allied military forces and other government departments. Such duties have remained the responsibility of military police personnel because they are best trained for them. While this seems to work well in day-to-day operations, that may not be so in an operational theatre where the responsibility to gather all intelligence information is vested in the intelligence officer of the deployed unit or formation. That officer, usually working close to the deployed force commander, is in the best position to analyse information and keep the commander informed. Since training is intended to prepare our forces for deployment, it seems to us wise to establish this relationship on a continuing basis. That would mean placing those military police resources under the control of Director General Intelligence. Therefore:

9. **We recommend that command and control of military police required in the operational support of the commanders remain under their respective commands; that military police resources associated with the provision of intelligence and counter-intelligence be placed under the command of the Director General Intelligence; and that all other military police resources be**

**under the command and control of the Director General Security and Military Police.**

**C. Proposed Role of DG SAMP**

It has been suggested that the military police technical control does not enjoy the same level of influence with the chain of command as do other branches. A contributing factor could be that the military police technical supervisors do not have an input in the performance evaluation of those employed in lower headquarters and in the field. This inability to contribute to that evaluation process leaves the military police career progression entirely at the discretion of line supervisors. Thus a perception is fuelled that military police may even be reluctant to intervene with their operational commanders in the conduct of their policing duties. Affording technical input in the evaluation of principal military police personnel serving in the commands and bases would undoubtedly enhance the ability of DG SAMP to exert an appropriate level of influence over military police performance and career development. We have also heard that DG SAMP, although responsible for the technical standards and policies of the military police, is not sufficiently influential with regard to selection, recruiting and training policies. This appears to be inconsistent with DG SAMP's functions and responsibilities. We are making recommendations in each of those respects, including the need for continuing relationships with other police organizations such as the RCMP. Therefore:

- 10. We recommend that the role of Director General Security and Military Police be affirmed and enhanced as follows:**
  - a. to have primary responsibility for all military police selection and recruiting standards;**
  - b. to have primary responsibility for all military police training standards;**
  - c. to have direct responsibility for cooperation with the RCMP and other police forces in the development of the National Investigation Service;**
  - d. to have direct responsibility for review of all military police functions in the Canadian Forces;**

- e. to report directly to the Vice Chief of the Defence Staff.

The title of Director General implies the duties of a staff officer rather than a line responsibility. Because we envisage that DG SAMP would be both a senior police adviser for the Canadian Forces and a commander with respect to the National Investigation Service<sup>17</sup> and other military police resources, we feel that this role should be recognized by renaming the position as Canadian Forces Provost Marshal. Therefore:

11. We recommend that the responsibilities assigned to Director General Security and Military Police be established in the new position of Canadian Forces Provost Marshal.

## (2) TRAINING OF MILITARY POLICE

As do other members of the CF, military police undergo basic military training. Following that, NCMs in the military police will receive a variety of increasingly advanced courses pertaining to investigations and investigation management. One of these courses provides 50 days completely devoted to criminal investigation. It appears, at least in the opinion of the military police, that this training of NCMs compares favourably with the training given to peace officers in civilian police forces.

Conversely, unless commissioned from the ranks, military police officers receive only the basic Security and Military Police course. With respect to investigations, therefore, commissioned officers will have received very little training and experience. We feel it is very important for commissioned officers who will be commanding military police units to have a firm understanding of all investigative functions and be able to fulfil all of the demanding duties of a military police commander more efficiently.

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<sup>17</sup> We will address the National Investigation Service in detail in Chapter 5 of our report.

Our concern in this regard is consistent with the views expressed by some members of the CF that the investigative expertise and capabilities of the military police are not sufficiently developed through training and related experience. In other police forces, a peace officer becomes a specialized investigator only after formal training and years of experience under the guidance of senior police investigators. There is an incremental and structured approach required to prepare a peace officer for more complex and specialized investigations. This is not normally the case within the military, where postings and career progressions inhibit the continuity of employment necessary to complete a comprehensive training pattern. An exchange programme with other police forces would be of great assistance in this regard. Operation Thunderbird and other measures are addressing some of these concerns, but we feel that a more structured career approach to training and experience is required. Therefore:

- 12. We recommend that a comprehensive training process be introduced to improve the investigative capabilities of military police, including the following provisions:**
  - a. the training of military police personnel should be reassessed at all levels with a view to improving investigative skills;**
  - b. the employment of military police personnel should allow them to acquire and maintain acceptable standards of expertise to investigate serious matters;**
  - c. investigators, officers and non-commissioned members, should receive investigation and management training commensurate with their experience and responsibilities;**
  - d. investigators in the military police should be given the opportunity to gain practical investigative experience and expertise through an exchange and/or secondment programme with other police forces.**

## **CHAPTER 5: INVESTIGATION OF SERVICE OFFENCES**

### **(1) INTRODUCTION**

The investigative stage is vital to a justice system: any investigation must be conducted fairly and with integrity in order to have credibility. This fundamental principle is true of any investigation, whether conducted by military police or a civilian police force. Indeed, we shall see that independence, training, expertise and responsibility are all intertwined concepts which must be addressed before one can arrive at an acceptable structure for the investigation of service offences. Therefore, we will reserve our recommendations on this subject for the end of this chapter.

~~At the outset, we wish to review the criminal investigation process in the civilian justice system before addressing investigations in the military justice system.~~

### **(2) CRIMINAL INVESTIGATIONS IN THE CIVILIAN JUSTICE SYSTEM**

#### **A. Investigative Process**

In the civilian system, police agencies receive complaints from any member of society. Such a complaint will likely first be investigated by a constable on patrol. After assessing the nature and complexity of the investigation required, the peace officer will either complete the investigation or refer it to a specialized section of the police force, such as the homicide section, for further action.

The investigator has total control of the investigation within the bounds of immediate supervision. Thus, the investigating officer and the police force are generally able to make all investigative decisions without consultation. However, the more serious the offence and the more complex the investigation, the greater is the likelihood that the investigator will seek advice from the crown attorney's office during the investigation.

Generally, should the peace officer conclude that there are reasonable and probable grounds that an offence has been committed, that peace officer may lay a charge directly without any consultation. It is quite common however that, in serious or complex cases, a member of the crown attorney's office will be consulted on whether or not there are sufficient grounds to lay the charge. Except in provinces where a pre-charge screening process exists, the peace officer has the authority to appear before a Justice for the purpose of laying an information, or what is commonly known as a charge. This independent action is an essential element in ensuring integrity in the criminal justice system. It also places significant responsibility on the peace officer. In order to have reasonable and probable grounds, the investigator must address the substantive elements of the allegations, thereby demanding focus throughout the investigation. Such investigative action is also subject to external review once the laying of charges occurs. This process of accountability contributes to the development of more competent peace officers.

At some point in the investigation, a court brief is prepared by the investigator in which the details of the investigation are summarized. This is then forwarded to the crown attorney's office and to the accused. The authority then shifts to the crown attorney who can either prosecute the case, withdraw the charge, or ask the court to enter a stay of proceedings. While this decision rests ultimately with the crown attorney, it is often made in consultation with the investigating officer, and at times with the complainants.

## **B. Independence of the Investigation**

The independence of policing is aimed at ensuring the integrity of the justice system. This can be achieved only by ensuring that decisions and actions are taken on the merits of each case, without extraneous influences, except for checks and balances aimed at protecting the rights of accused persons.

In the civilian justice system, the checks and balances are provided in numerous ways. A peace officer is given certain discretionary powers, subject to monitoring and scrutiny throughout the investigation process. For example, the obtaining of a search warrant and the interception of private communications must receive prior judicial authorization. After certain operational activities have occurred, other mechanisms come into play permitting wider review and accountability. Thus, the information to obtain a search warrant becomes a public document and can be challenged in court pursuant to the *Canadian Charter of Rights and Freedoms*. There are further review provisions that enable members of the public to question the performance of the law enforcement agencies, such as the RCMP Public Complaints Commission and provincial police review boards. These various safeguards are designed to instill public confidence in the criminal justice system.

Consistent with these checks and balances, it is imperative that the investigative function should have a high degree of independence. The purposes and objectives of an investigation are reconstructing events, gathering evidence, identifying the elements of the alleged offence and identifying those responsible for it. Each of these purposes must be fulfilled and each of these objectives must be achieved with integrity and fairness.

### **(3) INVESTIGATIONS IN THE MILITARY JUSTICE SYSTEM**

#### **A. Investigative Process**

Any person may report that a service offence has been committed by a member of the CF. Usually, the commanding officer will be informed, and may or may not choose to involve the military police, depending upon the circumstances.

Once the matter has been reported to the military police, policy dictates the procedure to be followed.<sup>18</sup> This policy contemplates that the military police have full responsibility to complete the investigation without interference.

It should be noted, however, that there is no strict legislative guideline as to when the military police should be called to investigate, nor any requirement that investigations be conducted independently. In fact, the *National Defence Act*<sup>19</sup> gives the commanding officer authority to supervise an investigation. Consequently, the ability of a military police investigator to conduct an investigation with complete independence is not assured.

Throughout the investigation, the military police will access any resources required to complete the task successfully. A report will then be produced which will be submitted to the commanding officer for action and a copy will usually be provided to the local Assistant Judge Advocate General. Concurrently, a copy of the report is also sent to the appropriate Command Headquarters and in turn to the Directorate of Police Services at NDHQ.

## **B. Independence of the Investigation**

At the present time, the military police are under the command and control of their respective operational commanders. This relationship allows the chain of command to become involved in the military police investigative process. Although DG SAMP has technical influence over military police activities, that office does not currently have executive authority to direct the investigative process. Further, the current command structure causes investigation priorities to compete for resources with the operational priorities of the commander. As a result, it is perceived that the chain of command can exert influence upon military police investigations, inadvertently or otherwise. For

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<sup>18</sup> MJ057, Military Police Policies, A-SJ-100-004/AG-000, Vol. 4, Chapter 9, paragraph 7.

<sup>19</sup> s. 163(1.1).

example, the deployment of a unit to other duties can cause its military police to interrupt their current investigations.

Certainly, the present structure creates the appearance of a lack of independence between the investigative functions and the chain of command. This lack of independence contributes to the perception of a double standard in the military justice system. Many CF members believe that senior ranks are not investigated with the same intensity as lower ranks. As well, there is a common view that junior military police members have great difficulty in conducting investigations of more senior personnel. We believe that all of these circumstances justify the creation of a specialized and independent investigative force.

As a further consideration, we have seen that the military police have a very wide range of duties and in this regard they are significantly different from other police forces. It is clearly difficult to fulfil simultaneously both their military tasks and their investigative responsibilities as a single organization. This frequently leads to subordination of serious investigative functions to operational duties, and it also inhibits the development of investigative expertise. These factors also justify the existence of a specialized investigation unit.

It was suggested that independent expertise could be sought outside the military, possibly with the RCMP. While this suggestion has some appeal, it would not provide the necessary sensitivity to the military environment. For example, it is highly desirable that military investigators be trained under conditions of military operations. On the other hand, a lack of confidence in the competency of the military police does exist and the need for experience to complement their training is recognized. A joint forces operation approach to some investigations would not only enhance a particular investigation but also add to the knowledge and experience of the military police.

## C. Communications

In order to better perform their multiple functions, the military police require up-to-date communications capabilities. It is absolutely vital that they be able to communicate with other police forces, particularly during the conduct of serious investigations. While not in a position to judge this requirement in relation to other CF needs, the Special Advisory Group feels that the military police investigative capabilities will remain hampered until this void is filled.

### (4) LAYING AND DISMISSING A CHARGE

The laying of a charge is a "formal accusation that a person subject to the Code of Service Discipline has committed a service offence."<sup>20</sup> In practice, a charge is laid when it is done in writing, dated and signed<sup>21</sup> by the commanding officer or an officer or non-commissioned member authorized by the commanding officer to lay charges.

The commanding officer has the discretion to dispose of offences committed by members of the unit. The different options available to the commanding officer<sup>22</sup> are to take no action, to take administrative action, to lay or direct the laying of charges or to combine an administrative action with the laying of charges. He also has the authority to dismiss charges.

The contrast between service offence investigations in the military system and criminal investigations in the civilian system is significant. The commanding officer or members of the unit designated by him have the authority to decide whether charges should be laid and, if so, what charges will proceed against a member of the unit. After

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<sup>20</sup> QR&O 106.01 (1).

<sup>21</sup> QR&O 106.04 (6).

<sup>22</sup> MJ 031F, Col A.F. Fenske, "Military Justice: A Progress Report on Current Concerns and Directions for Reform" - Overheads, p. 14.

a charge has been laid, the officer or NCM who laid the charge must refer it to a delegated officer or commanding officer who has authority over the accused.<sup>23</sup> By comparison with civil criminal investigations, the police control the investigative resources and, in most jurisdictions, have the authority to lay charges. We are of the view that the authority to lay and proceed with charges must be reviewed and restructured.

We recognize that, for matters that are sensitive or of serious criminal nature, it is imperative that the investigation be conducted independently of the chain of command. This should include the final decision of whether or not to lay a charge. Therefore, in order to ensure complete transparency of the process, we are of the view that the investigative body be vested with the authority to lay charges when dealing with these types of cases, although we encourage it to consult with JAG prior to the laying of charges, at least during the initial stages of implementation. This new authority would also strengthen the position of military police in conducting their investigation duties amongst military personnel at all levels.

#### (5) A SPECIALIZED INVESTIGATION SERVICE

Prior to 1990, military police on bases conducted most of the local and some of the regional investigations. A separate unit of the military police, the SIU, conducted security investigations, certain serious investigations such as arson, illicit drugs, fraud, as well as other investigations of a national and international scope.

In 1990, Judge René Marin conducted a review of the SIU as it then existed. His report recommended, among other things, that the SIU's national and international criminal investigative mandate be removed. This was based on the principle that the two types of investigations, security and criminal, should be kept separate since their objectives are not the same. While this conclusion is consistent with the Government of

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<sup>23</sup> QR&O 106.095.

Canada's establishment of CSIS and the removal of certain security tasks from the RCMP, we believe that, given the narrower scope of functions faced by the Department of National Defence and the Canadian Forces, both roles can be accommodated within the same organization. This is particularly true if the current military police responsibilities for military intelligence and counter-intelligence were to be assigned to the intelligence organization, namely the Director General Intelligence (DG Int) where, in our opinion those functions rightfully belong. Since both the military police and DG Int share some resources, such as those at CFSIS, any liaison and coordination needed between the two organizations would be assured.

With respect to security investigations, we appreciate Judge Marin's point that they should be separate from serious criminal and service offence investigations. Accordingly, we are recommending that they remain separate functions within the military police or, if necessary, that the security clearance programme be contracted to appropriate agencies such as CSIS.

What concerns us primarily, however, is the fact that in the implementation of Judge Marin's recommendations, the military's specialized criminal investigative capabilities were weakened. The role was absorbed within the base military police structure and expertise diminished. We have received significant evidence that this has proved ineffective, and has resulted in subordination of the criminal investigative functions of military police to the operational needs of the commands. Accordingly, we are recommending the reorganization and enhancement of the current National Investigation Service (NIS).

As a result of the events that occurred in Somalia in March, 1993, an *ad hoc* national investigation team was put together to conduct an investigation of those incidents. In September 1993, the NIS was recognized formally under the direction of the DCDS. Currently, the command and control of the NIS is exercised by the Commandant of the Canadian Forces Support Unit (Ottawa) through a senior Security and Military Police officer. For national and international serious criminal

investigations, the NIS is presently tasked by DG SAMP. This team consists of seven military police including four investigators, two polygraph operators and a team leader. It is fully deployable and has conducted investigations in Somalia, the former Yugoslavia, Rwanda, Haiti and Korea.

We have concluded that an independent investigation force is required, one which is separate from the chain of command. DG SAMP should have executive authority over this force, reporting directly to the VCDS. In our view, this new unit should be created by merging the existing operations of the SIU with the reorganized NIS. By so doing, the best combination of current military police resources will be available to this new organization.

It is our opinion that the NIS should deal with service offences of a serious or sensitive nature or those requiring complex or specialized investigations. In practice, we believe that the specialized services of the NIS will be highly valued and widely used throughout the Canadian Forces at all levels. Therefore:

- 13. We recommend that the present Special Investigation Unit of the military police be merged with the National Investigation Service to provide specialized and professional investigative services to the Canadian Forces on a national and international basis.**
  
- 14. We recommend that the National Investigation Service of the military police be reorganized and tasked on the following basis:**
  - a. it would operate under direct command and control of the Director General Security and Military Police;**
  - b. it would operate independently of the chain of command;**
  - c. its investigative services would be initiated with respect to all service offences of a serious or sensitive nature, or offences requiring complex or specialized investigations;**
  - d. its investigators would have the authority to lay charges as a consequence of their investigations;**

- e. it would operate in cooperation with base/wing units of the military police and with other supporting units for logistical and administrative support;
  - f. review and oversight of its operations would be the responsibility of the Vice Chief of the Defence Staff facilitated by an annual report from the Director General Security and Military Police.
15. We recommend that all security clearance services required by the Canadian Forces be provided separately from service offence investigations and, if necessary, they be contracted to appropriate agencies such as the Canadian Security Intelligence Service.

### **III - HEARING PROCESS**

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## CHAPTER 6: SUMMARY TRIALS

### (1) INTRODUCTION

Summary trials are designed for minor service offences, where the likely punishments are not too severe. The proceedings are usually conducted by the accused's commanding officer. The object is to deal with the alleged offences quickly, within the unit, and to return the member to the service of the unit as soon as possible. In essence, the summary trial is designed as an efficient mechanism for the promotion of internal unit discipline. Approximately 98% of the 4,000-5,000 proceedings that take place yearly involving CF personnel are dealt with summarily, although the number of summary trials appears to have declined of late.<sup>24</sup>

One important conclusion from our hearings is that, while senior NCMs and officers believe strongly in the need for a separate justice system and the integral role of the chain of command, currently there is a reluctance to apply the military justice system, particularly at the summary trial level. Interestingly, this cautiousness appears to result from the enactment in 1982 of the *Canadian Charter of Rights and Freedoms*. Since that time, it has been perceived that greater procedural safeguards were due to service members and that regulations were becoming more difficult to administer. Also, demands of service members to be treated fairly and in accordance with the *Charter* became more insistent.

Yet, training in military law and the military justice system may not have kept up with these new demands, and many commanding officers appear to have become less confident in the discharge of their duties in these respects. As a result, we understand that frequently commanding officers, instead of charging members, will let a

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<sup>24</sup> We should note that, since 1992, comprehensive statistics concerning summary trials have apparently not been kept. While it is, therefore, very difficult to be precise in this regard, it seems to be generally agreed that there has been a decline in the number of summary trials held in the last few years, although this may in part be due to the significant reductions in CF personnel during that time.

disciplinary matter pass, or deal with it administratively, or even request the convening of a court martial, in order to be relieved of the obligation of conducting a summary trial.

Thus, there seems to be a serious problem at the core of the military justice system. Junior NCMs, who by their sheer numbers encounter the justice system most often, have begun to question its legitimacy. On the other hand, commanding officers charged with the administration of the system still believe in the need for their authority over it, but are reluctant to exercise that authority.

It is imperative, therefore, that any changes to the summary trial process not compromise the fundamental requirements of this mode of hearing, but instead promote efficiency and the enhancement of discipline while respecting the fundamental rights of the accused.

## (2) CURRENT PROCESS

Generally speaking, any infraction however serious may be disposed of by way of summary trial, although in respect of the more serious offences, such as mutiny, the commanding officer must inform the accused of the right to be tried by court martial.<sup>25</sup> Similarly, an election must be given when the commanding officer concludes that, if the accused were found guilty, a punishment of detention, reduction in rank or a fine in excess of \$200 would be appropriate.<sup>26</sup> If the accused person decides that he or she does not want trial by court martial then, if convicted, he or she faces a maximum punishment of 90 days detention.

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<sup>25</sup> QR&O 108.31(2).

<sup>26</sup> Further, it should be noted that even in respect of an offence for which no election to a court martial is provided, a commanding officer may decide to refer the matter to a higher authority with a recommendation for a court martial because of the seriousness of the offence or because the commanding officer believes it is otherwise required in the interest of justice.

A summary trial may be conducted by a superior commander, a commanding officer or a delegated officer. The jurisdiction over individuals and the powers of punishment differ depending on who is conducting the trial. Summary trials of non-commissioned members above the rank of sergeant and of officers up to and including the rank of major, may be conducted by officers above the rank of colonel or who have been appointed superior commanders by the Minister of National Defence for this purpose.<sup>27</sup> The powers of punishment of a superior commander are limited to severe reprimand, reprimand, or a fine to a maximum of 60% of monthly pay.<sup>28</sup>

A commanding officer may try an accused person who is either an officer cadet or a non-commissioned member below the rank of warrant officer. The powers of punishment of the commanding officer range from caution to detention up to 90 days.<sup>29</sup> Alternatively, a commanding officer may authorize an officer not below the rank of captain to exercise powers of trial and punishment of NCMs below the rank of warrant officer for offences not included in the list of offences which require an election to be provided. Such offences include disobedience of a lawful command, insubordinate behaviour and absence without leave. In those instances, the powers of punishment range from a caution to a severe reprimand.<sup>30</sup>

There presently is no right for the accused to be represented at summary trial by legal counsel, although there is a right to be assisted by an assisting officer, who will generally have no legal training. The military rules of evidence do not apply, although there is a requirement that witnesses be called to prove facts, and decisions must be

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<sup>27</sup> QR&O 110.01.

<sup>28</sup> QR&O 110.03.

<sup>29</sup> QR&O 108.27 and 108.33. Certain more serious punishments, however, must be confirmed by an "approving authority" who is an officer not below the rank of Brigadier-General or not below the rank of Colonel, who has been designated by the Minister of National Defence.

<sup>30</sup> QR&O 108.11.

made on evidence. An accused cannot be convicted of a service offence unless proven guilty beyond a reasonable doubt.

### (3) IMPACT OF THE *CHARTER* ON SUMMARY TRIALS

In the past few years, substantial work has been done within the military establishment to review the summary trial system. The impetus for this work was concern for the constitutionality of the summary trial process in light of the *Canadian Charter of Rights and Freedoms*, following the decision of the Supreme Court of Canada in *R. v. Généreux* which dealt with the constitutionality of service tribunals and, in particular, of courts martial.

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We consider the question of whether or not the current summary trial process is constitutionally valid to be vital, because summary trials are at the core of the military justice system. The chain of command has become cautious in using summary trials because of concerns over their constitutionality, uncertainty over the appropriate powers of commanding officers and an understandable reluctance to trample upon the rights of accused persons. Accordingly, we have obtained a legal opinion from our counsel<sup>31</sup> on this critical issue.

The opinion essentially concludes that, particularly with certain relatively minor improvements, the summary trial process is likely to survive a court challenge as to its constitutional validity. We are therefore of the view that, with changes we propose, the chain of command should be able to proceed confidently and fairly with imposing discipline at summary trials. We will discuss the appropriate changes in the remainder of this chapter.

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<sup>31</sup> See attached Annex F.

#### (4) PROPOSED REFORMS

The Summary Trial Working Group (STWG) produced a very extensive report on March 2, 1994, which was prepared in consultation with the commands. The report was approved by Armed Forces' Council in May 1994, subject to minor changes on the basis of advice received from the JAG. In all, fifty-nine recommendations were made. The vast majority of the recommendations could be implemented through amendments to the existing regulations and, in fact, draft regulations were prepared by the JAG prior to the end of December, 1996. We understand that any changes have now been put on hold pending the report of this Special Advisory Group.

While we neither intend to analyse every recommendation made by the STWG, nor the proposed changes to the regulations advanced by JAG, we think it is appropriate to review the major thrust of these recommendations and provide our advice in these respects.

##### A. Jurisdiction

Currently, there is a marked contrast between summary proceedings, which are relatively informal, efficient and speedy, and courts martial, which are more formal and cumbersome including as they must a full panoply of procedural protections required for trying more serious offences. Because the two trial processes are so different, it makes sense to attempt to delineate a relatively clear line between the types of offences that should be tried summarily and those that should be tried by a court martial. This delineation is a difficult objective to achieve, however.

On the basis that summary proceedings were intended to deal with minor issues related to unit discipline, certain amendments were proposed to the current QR&Os in an attempt to identify a number of the minor disciplinary and criminal offences that should normally be tried by summary trial.

Even those proposals implicitly acknowledge the difficulty of categorizing offences purely on the basis of their nature. While identifying five minor military offences as falling within the exclusive domain of summary proceedings, the proposed regulation adds the caveat that this will only be the case where the circumstances are sufficiently minor in nature that the officer exercising jurisdiction concludes in advance that a punishment of reduction in rank, or of a fine in excess of 25% monthly basic pay, would not be warranted if the accused were found guilty of the offence.<sup>32</sup>

In his briefing to the Special Advisory Group, Professor Friedland advised that it was difficult to categorize offences purely based on their nature. The circumstances surrounding the commission of the offence and the punishment likely to be imposed should also be factors in categorizing infractions as minor, and thus suitable for summary disposition, or serious and thus appropriate to be dealt with in a court martial. We agree with his view in this regard.

Accordingly, while we cannot define an exhaustive list or package of offences which could in all cases be dealt with summarily, we do see merit in the approach suggested by the STWG and supported by JAG. This would be based on a list of offences which, *prima facie*, would be dealt with at a summary proceeding, subject to the circumstances surrounding the commission of the offence and the severity of the likely punishment should the accused be convicted.

## **B. Powers of Punishment**

The first issue to consider in respect of the range of punishments that should be available at a summary trial is the extent to which they are necessary to achieve the main objective of a commanding officer, namely, the restoration and maintenance of discipline. That question should, in particular, be asked in respect of detention, the most severe form of punishment allowable at a summary trial.

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<sup>32</sup> MJ 141, QR&Os Chapter 108 - Draft Proposal.

(i) Detention

Detention of up to 90 days can be imposed by a commanding officer at a summary trial. Detention can be served on unit grounds, usually if the time to be served is fourteen days or less, or at the service detention barracks in Edmonton which we have visited during our study. Currently, detention also automatically entails a reduction of rank to that of private, with a corresponding loss in pay. The reduction in rank is permanent, in the sense that it continues following the expiry of the detention period, until the member's future performance justifies being promoted again.

Statistics suggest that there has been a sharp decline in the number of detentions since 1980. For example, in the year 1980-81, there were 340 admissions at the service detention barracks in Edmonton. By comparison, for the year 1994-95 there were only 41 detentions.<sup>33</sup>

It could be argued, on the basis of those statistics, that detention is no longer required as a military punishment, at least in respect of summary trial offences. However, we have heard from the commanders of commands and many other senior officers that it is important to retain this form of punishment, at least as an ultimate deterrent. Apparently, the alternative minor punishment of confinement to barracks is not deemed sufficiently severe to deal with serious unit discipline problems.

The STWG recommended that detention be removed as a potential punishment for summary trial offences. This recommendation appears to be based largely on the concern that the punishment of detention would attract the application of the *Charter*, and that the current system of summary trial would not withstand *Charter* scrutiny because it would fail to satisfy fundamental constitutional safeguards such as impartiality of the judge and right to legal counsel.

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<sup>33</sup> MJ031B, BGen. P.G. Boutet, "Summary Trial Reform: AFC Progress Report - Overheads", p. 33.

The JAG also had great reservations about detention as a form of punishment. For the JAG, this punishment is no longer considered militarily necessary in light of the proposed disciplinary focus of summary trials and the broader application of minor punishments.<sup>34</sup>

Instead of detention, the STWG proposed what it called correctional custody. The primary purpose of correctional custody would be to retrain, as opposed to penalize the convicted CF member. Correctional custody would not be carried out in contact with long term service prisoners, and would not exceed eight weeks. At this stage, the curriculum for correctional custody remains to be determined.

The JAG, for its part, expressed serious concerns about the concept of correctional custody on the following grounds:

- a. a correctional custody curriculum requires that there be a critical mass of CF members undergoing punishment, and it would need to be conducted at a correctional custody centre in order to assemble that critical mass;
- b. correctional custody is expensive in terms of facilities and personnel;
- c. informal discussions indicate that both the U.S. and U.K. with substantially larger forces, are having difficulties in terms of critical mass and expense;
- d. there is a doubt as to whether or not there would be real value to the training, as it would repeat recruit training; and
- e. much of what can be accomplished through correctional custody can be accomplished through other punishments available to commanding officers. For example, confinement to barracks or ship, which includes extra work and drill, and a fine, may to a certain degree duplicate the aims of correctional custody, while retaining the member within the unit.

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<sup>34</sup> MJ031A, BGen P.G. Boutet, "Military Justice: A Progress Report on Current Concerns and Directions for Reform", p. 24.

As a result the JAG, while agreeing that detention should be removed as a potential punishment in summary proceedings, did not feel that correctional custody as proposed was a practical alternative to detention at this time.

As a matter of principle, we have been convinced of the necessity, from a disciplinary point of view, of retaining the powers of the commanding officer to sentence a serving member of the CF to detention in appropriate circumstances. This is particularly so if alternative concepts such as correctional custody cannot be effectively implemented.

From a legal point of view, we do not share the concerns of the STWG or the JAG. On the assumption that detention as a form of punishment can be justified for military and disciplinary reasons, we are persuaded that a reviewing court would take this consideration into account in evaluating the constitutionality of the summary trial process. At the very least, if a court concluded that certain of the legal rights protected by the *Charter* had been infringed, such an infringement might be justified under s. 1 of the *Charter* if sufficient proof could be adduced to justify detention as a tool of military discipline.

On the other hand, we agree with Professor Friedland's view<sup>35</sup> that justifying the 90-day detention period could be difficult, since other countries like the United States and Britain have a maximum detention period of approximately one month. Therefore:

- 16. We recommend that detention of up to thirty days be retained as a possible punishment for offences in respect of which a member has elected to be tried by summary trial.**

It should be noted that, currently, whenever detention might be imposed, the regulations require that an election be provided to the accused to select a court martial,

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<sup>35</sup> MJ177, "Controlling Misconduct in the Military: A study prepared for the Commission of Inquiry into the Deployment of Canadian Forces in Somalia", May 1996.

where all the constitutionally required procedural safeguards are in place. The regulations also require that a CF member to whom an election is given must be afforded at least twenty-four hours to make this election. It seems to us that, to the extent that this choice is made on a fully informed basis and after consultation with counsel, which is not currently mandatory, any grounds for complaint if detention were imposed would be greatly reduced. Indeed, current constitutional law doctrine suggests that constitutional rights can be waived. To ensure that a full and valid waiver of rights is obtained, we think it should be secured in writing and only after a CF member has been provided an opportunity to consult military counsel free of charge, or a civilian counsel at his or her own expense. Therefore:

- 17. We recommend that, whenever an election is given to an accused to be tried by court martial rather than summary trial, the accused be afforded a right to consult with legal counsel to ensure that the election is made on the basis of full and complete information and that the election be set out in writing.**

With respect to detention, we consider the accompanying permanent loss of rank and attendant salary to be too harsh and not justified. Once a person has served detention, he or she should be able to rejoin the unit without any lasting effects arising from the punishment. The use of detention as the ultimate disciplinary tool is not well served if its effects go beyond the awarded period of detention. Therefore:

- 18. We recommend that, upon a Canadian Forces member being sentenced to detention following a summary trial, the member's rank and salary be reduced to that of a private during the period of detention, but that both the rank and salary be reinstated to original levels upon completion of the sentence.**

The JAG made a number of other recommendations regarding punishments that may be awarded at summary trials, and we wish to comment briefly on some of them.

(ii) Reduction in Rank

The JAG has proposed to limit this punishment to reduction of one substantive rank.

We concur with this proposal. If, in principle, the summary trial process is to be reserved for minor offences, the punishments that a commanding officer can render should not be too drastic. While detention is serious, it is limited in time. Reduction in rank, on the other hand, has long lasting career and financial impacts on the member. We think that any legitimate disciplinary purpose will be adequately served if the potential reduction in rank is limited to one rank. Therefore:

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- 19. We recommend that, whenever reduction in rank is awarded as a punishment following a summary trial, the reduction be limited to one rank below that of the accused at the commencement of the trial.**

Currently, a commanding officer presiding at a summary trial must apply for approval of a punishment where the commanding officer considers that a corporal, master corporal or sergeant should be sentenced to detention or reduction in rank, or a private should be sentenced to detention for a period exceeding thirty days.<sup>36</sup> This is done by submitting a punishment warrant to an approving authority. In keeping with the foregoing recommendations, which have significantly reduced the potential severity of detention and reduction in rank, we no longer see any justification for punishment warrants. Therefore:

- 20. We recommend removal of the requirement for punishment warrants in respect of certain punishments that a commanding officer may impose at a summary trial.**

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<sup>36</sup> QR&O 108.33.

(iii) Fine

Currently, superior commanders and commanding officers can impose fines of up to 60% of a member's basic monthly pay. Delegated officers, however, are limited to \$200. The JAG proposed to increase the maximum fine that delegated officers may impose from \$200 to 25% of the accused's monthly basic pay. We also agree with this proposal. There is no longer a rationale for limiting the delegated officer's jurisdiction to a specific and relatively minor fine. Affording the delegated officer the leeway to impose a fine on the basis of a percentage of base salary will enhance his powers, and bring fines more in line with contemporary levels of remuneration. Therefore:

- 21. We recommend that the powers of punishment of a delegated officer be increased to include a fine of up to twenty-five percent of the monthly pay of the accused.**

(iv) Confinement to Ship or Barracks

It was proposed that confinement to ship or barracks be applied uniformly to sergeants and below. The chief warrant officers we heard felt strongly that it would be inappropriate for a sergeant, who represents the first level of leadership, to be sentenced to this punishment. We concur that confinement to barracks should be limited to master corporals and below. Therefore:

- 22. We recommend that the punishment of confinement to ship or barracks be limited to master corporals and below.**

**C. Officer Training**

While summary trials are supposed to be relatively informal procedures, we have heard much evidence to the effect that, increasingly, many commanding officers are reluctant to use this procedure. They apparently refrain from hearing charges, or refer many accused to courts martial, because they either do not understand the process or feel

it is too cumbersome. Moreover, NCMs frequently comment that they do not feel officers are familiar with the rights of accused CF members.

We are strongly persuaded that the usefulness and fairness of summary trials depend upon the officers presiding at such trials being properly trained and thoroughly familiar with the relevant procedures and the rights of the accused. Further, all officers should only be permitted to conduct summary trials if they have been duly certified by JAG, after successfully completing courses specifically designed by JAG for this purpose.

Therefore:

23. **We recommend that increased training and education be introduced for all commanding and delegated officers to ensure that they are knowledgeable about their roles in the military justice system and competent to perform them. ~~But for exceptional circumstances, those officers should not be permitted to preside at a summary trial unless certified to do so by the Judge Advocate General.~~**

We note that the JAG has contemplated certain work instruments such as an "Aide-mémoire for the Conduct of Summary Trials" and precedents for the delegation of the commanding officer's powers. We commend and encourage such initiatives.

#### **D. Assistance to the Accused**

Currently, an accused is only entitled at a summary trial to the assistance of an assisting officer who ordinarily is not legally trained. It appears that many officers lack the proper training and expertise to provide the help needed by the accused. Therefore:

24. **We recommend that sufficient legal training and simple work instruments be provided to all officers and non-commissioned members who may be called upon to perform the role of assisting officer so that they will be in a position to provide adequate assistance to the accused.**

### E. Impartiality of the Officer Presiding at a Summary Trial

As we have previously explained, we believe the chain of command must remain directly involved in the conduct of summary trials. We are also convinced that this can be justified under the *Charter*, notwithstanding that commanding and delegated officers are neither impartial nor independent in the legal sense prescribed by the Supreme Court of Canada in *R. v. Généreux*.

Because officers presiding at summary trials are not necessarily impartial since they may know the accused and have a direct interest in the outcome of the trial, namely the well-being of their unit, we believe that they should be distanced further from active involvement in specific cases than is presently the case. Currently, there is no absolute prohibition against a commanding officer being involved in the investigation of an alleged service offence, or even the laying of a charge, as well as also presiding at trial. We understand that, as a matter of policy, commanding officers will not preside at trials if they have laid a charge, and that is why they will usually let their delegated officer lay the charge. Frequently, however, they will be involved in an investigation preceding the laying of a charge, at least to the extent of being kept informed.

We think that the impartiality of the summary trial process would be enhanced if commanding officers were systematically removed from the investigative and charging process. They would, however, continue to review the matter, including any investigation report and charge report, just prior to deciding whether to deal with the matter summarily or refer it to a court martial. Therefore:

25. We recommend that an officer be prohibited from presiding at a summary trial of a person charged with a service offence if the officer has been involved in the investigation or the laying of the charge.

## **F. Record of Summary Trial Proceedings**

There is another important matter which we feel should be addressed with respect to summary trials, namely the preparation of an adequate record of proceedings. Currently, we are given to understand that record keeping is inconsistent.

We are of the view that it would help the disciplinary goals of the summary trial process if a standardized record of summary proceedings were kept by each commanding officer or delegated officer. For instance, there could be a form which records the charge, the necessary steps in the pre-trial process, and the finding and sentence where applicable. The essential reasons for the finding and the sentence should also be noted.

These records would not only be kept in the custody of the commanding officer of the unit, but as well in a central NDHQ office which could compile a regular statistical analysis of the summary trial process. Further, the findings should be publicized on a regular basis so as to encourage respect for and uniformity within the Canadian Forces' disciplinary system. Many disciplinary tribunals also do this to provide guidance to their respective professions. Therefore:

- 26. We recommend that uniform records of summary trials be prepared and publicized on a regular basis throughout the Canadian Forces.**

## **CHAPTER 7: COURTS MARTIAL**

### **(1) INTRODUCTION**

Any court martial must be convened by an authority who is higher in the chain of command than the commanding officer of the accused. The Minister of National Defence, the Chief of the Defence Staff and the commanders of commands are convening authorities, as well as certain other senior officers who are specifically designated as such by the Minister. However, as a matter of doctrine and practice, the Minister of National Defence and the Chief of the Defence Staff do not become involved in convening courts martial.

At a court martial, the accused is judged by an impartial and independent panel of CF members, or by a military judge. The accused has the right to counsel and the military rules of evidence apply.

### **(2) TYPES OF COURT MARTIAL**

There are four types of courts martial, namely a General Court Martial, a Disciplinary Court Martial, a Standing Court Martial and a Special General Court Martial.

#### **A. General Court Martial**

A General Court Martial (GCM) has jurisdiction to try any person, including a civilian, who under Part IV of the *National Defence Act* is liable to be charged, dealt with and tried on a charge of having committed a service offence.

A GCM will consist of five members. The president must be an officer of or above the rank of colonel.<sup>37</sup> The president and members of each GCM are appointed by the Chief Military Trial Judge. At every GCM, a judge advocate, who is a military trial judge and performs functions analogous to a judge in a jury trial, must be appointed to officiate at the court martial and the Chief Military Trial Judge is the authority prescribed by regulation who may make such an appointment.

The role of the president is to ensure that the trial is conducted in an orderly and judicial manner and to be responsible for the proper performance of the duties of the court. With regard to punishment, the GCM can award the full range of punishments set out in the *National Defence Act*,<sup>38</sup> excluding minor punishments.<sup>39</sup>

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## B. Disciplinary Court Martial

A Disciplinary Court Martial (DCM) consists of three officers and is presided by the most senior officer. As is the case for a GCM, a judge advocate is appointed to officiate at the court martial. By regulation, no DCM can try an officer of or above the rank of major. Further, by regulation, a DCM can award a sentence which ranges from a fine to imprisonment for less than two years.

Generally speaking, GCMs and DCMs can be compared with a trial by judge and jury in our civil criminal courts. In contrast, however, the panel of officers at courts

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<sup>37</sup> Where the accused is of or above the rank of brigadier-general, the president must be an officer of or above the rank of the accused person and the other members of the court martial shall be of or above the rank of colonel. Where the accused is of the rank of colonel, all of the members of the GCM other than the president shall be of or above the rank of lieutenant-colonel. Where the accused is a lieutenant-colonel, at least two of the members of the GCM, other than the president, shall be of or above the rank of the accused person. An officer of a rank lower than the rank held by the accused will not normally be appointed as a member of the GCM.

<sup>38</sup> *National Defence Act*, s. 139(1).

<sup>39</sup> QR&O 111.17.

martial both finds the facts and determines the sentence. Moreover, members of the panel need not be unanimous on the finding of guilt; a majority will suffice.

### **C. Standing Court Martial**

A Standing Court Martial (SCM) may try any person who is liable to be charged and dealt with in respect of a service offence. However, an SCM cannot try a civilian or an officer above the rank of colonel.

The SCM consists of one officer, who is called the president and appointed by or under the authority of the Minister of National Defence. The scale of punishment is similar to that possessed by a Disciplinary Court Martial. SCMs are resorted to most often as they are easier to convene than DCMs.

### **D. Special General Court Martial**

A Special General Court Martial (SGCM) may only try a civilian. It consists of one person designated by the Minister of National Defence who is or has been a judge of a superior court in Canada, or is a lawyer of at least ten years experience. By regulation, the only punishments that can be imposed are death, imprisonment for two years or more, imprisonment for less than two years and a fine.<sup>40</sup>

## **(3) IMPACT OF THE *CHARTER* ON COURTS MARTIAL**

As we have seen, in its judgment *R. v. Généreux*, the Supreme Court of Canada considered and approved the necessity of a separate system of military tribunals. However, the Supreme Court had concerns about the independence of judges appointed to preside at courts martial. In particular, a majority of the Court considered that the system infringed on the right of an accused to be tried in a fair and public hearing by an

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<sup>40</sup> QR&O 113.04.

independent and impartial tribunal, as guaranteed by s. 11(d) of the *Canadian Charter of Rights and Freedoms*. The Supreme Court noted that, in order to satisfy the requirements of independence, a tribunal must meet three essential conditions, namely, security of tenure, financial security and institutional independence with respect to matters of administration that relate directly to the exercise of the tribunal's judicial function. A majority of the court found that the system in place at the time of the *Généreux* court martial failed all three requirements.

The current situation is that the *National Defence Act* does not require that the judge advocate at a GCM or DCM, or the person presiding at an SCM or an SGCM, be a member of the Canadian Forces Legal Branch. In practice, however, legal officers assigned for a fixed term to military trial judge duties have fulfilled this role. Since *Généreux*, these individuals have been posted to these duties for a fixed term of four years, normally, but not less than two years. They perform only judicial duties and are removable only for cause. They are paid separately from other legal officers, and their performance cannot be assessed by the chain of command or the JAG. The Office of the Chief Military Trial Judge has been established but it remains on the JAG establishment and it draws funds as required from the JAG budget. These changes were formally implemented prior to the Supreme Court of Canada's decision in *Généreux* and received favourable but measured comment by the Court.

The JAG is proposing that the Office of the Chief Military Trial Judge be organized as an independent unit of the CF, not responsible to the chain of command and with its own budget. Under this proposal, the Chief Military Trial Judge would:

- retain responsibility of the court reporting function;
- continue to appoint members of Disciplinary and General Courts Martial; and
- continue to assign cases to military trial judges.

The *National Defence Act* would be amended to make provision specifically for the Chief Military Trial Judge and his responsibilities.

We agree with this proposal. Courts martial are called upon to try very serious offences where the maximum guarantees of impartiality and independence must be assured. Therefore:

27. We recommend that the Office of the Chief Military Trial Judge be organized as an independent unit of the Canadian Forces and that the role and responsibilities of the Chief Military Trial Judge be set out in the *National Defence Act*.

#### (4) POWER OF SENTENCING

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As stated above, in the case of GGMs and DCMs, the sentence is decided upon by the Court members (loosely speaking, the "jury").

The officers serving as courts martial panel members bring military experience and integrity to the military judicial process. They also provide the input of the military community responsible for discipline and military efficiency which is, as some would argue, a function that a military judge may be somewhat less capable of doing. Nevertheless, we believe that sentencing should, as in the case of civil courts, become a judicial function.

There are several important reasons why sentences by panels may not be in the best interest of military justice. Members are chosen at random and rarely have the opportunity to award a sentence more than once or twice in their career. They are not well trained for the task, and experience suggests to some observers that the submissions made by prosecution and defence counsel, and the instructions of the judge advocate in the proceedings, do not compensate for the deficiencies in experience and qualifications. Further, court members are not trained to give reasons that explain the rationale for their decisions to the accused or the appellate court. As a result, there may be less

conformity with legal sentencing principles than if a qualified judge performed the sentencing functions. Finally, panel sentences are more difficult to defend on appeal, particularly due to the lack of reasons, and therefore they tend to be more successfully appealed.

On balance, we favour the emphasis on expertise, continuity, and transparency that would come from sentencing by a military trial judge over the potential advantage that may come from the panel providing better input of the military community. Therefore:

- 28. We recommend that the sentencing function at a court martial be performed by the judge presiding at the court martial.**

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#### **(5) MEMBERSHIP OF COURT MARTIAL PANELS**

Currently, only officers can sit as members of a GCM or a DCM. Yet, non-commissioned members with sufficient experience could bring an important dimension to court martial panels and reflect better the spectrum of individuals responsible for the maintenance of discipline, efficiency and morale. Accordingly, the JAG recommended that NCMs of the rank of warrant officer or higher should be eligible to serve on DCMs and GCMs, provided that the member be equal or senior in rank to the accused.

According to the JAG, this approach would have four important effects on the court martial process. First, it would more fully represent those members of the military with disciplinary responsibility. Secondly, it would increase the participation of enlisted personnel in important disciplinary proceedings. Thirdly, it would give fuller expression to the military's management and leadership culture. Fourthly, it would have the beneficial effect of increasing the pool of individuals available for court martial duties and of sharing the workload associated with those duties. We have considered this issue and agree with the JAG. Therefore:

29. We recommend that non-commissioned members of the rank of warrant officer and above be eligible to serve on Disciplinary and General Courts Martial, provided that the non-commissioned member is equal or senior in rank to the accused.

(6) SCALE OF PUNISHMENTS

Included in the scale of punishments provided for in the *National Defence Act* is "death". In World War I, twenty-five Canadian soldiers were executed: twenty-two for desertion, two for murder and one for cowardice. During World War II, three soldiers were sentenced to death but only one was executed; his offence was murder. No Canadian has ever been executed for the military offences listed in the present *National Defence Act*.

Previous Ministers of National Defence, on the advice of their respective Chief of the Defence Staff, have favoured removal of the death penalty from the Code of Service Discipline. The JAG recommends that the death penalty be eliminated. We agree. The death penalty was abolished in Canada in 1976. We are not persuaded of the usefulness of retaining this extreme form of punishment. Therefore:

30. We recommend that the *National Defence Act* be amended to remove the death penalty from the scale of punishments.

## CHAPTER 8: LIMITATION PERIODS FOR SERVICE OFFENCES

With the exception of a limited number of offences,<sup>41</sup> there exists a limitation period under the Code of Service Discipline requiring that a charge be laid and a trial commenced within three years of the offence occurring.

During the course of our work, it has come to light that this three-year limitation period has precluded the laying of charges and the trying of individuals allegedly involved in certain serious incidents, for example, at the Bakovici Hospital in Bosnia-Herzegovina. Hence, we have had to consider whether the limitation period contained in s. 69 of the *National Defence Act* should be retained, amended or discarded altogether.

The three-year limitation period draws its roots from early English military law. While the rationale for this time limit is not clear, it would seem to have been linked to the historic civilian distrust of standing armies in England.<sup>42</sup> The earliest written

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<sup>41</sup> Mutiny, desertion, absence without leave; service offences for which death could be imposed; and service offences under s. 130 of the *National Defence Act* that relate to a grave breach referred to in sub-section 3(1) of the *Geneva Conventions Act*; s. 69, *NDA*.

<sup>42</sup> See War Office, *Manual of Military Law* (London: 1899) at 12-18, discussing the development of early English military law. A soldier was only liable for service offences during times of war when a military code was in effect. Once an army demobilized, the military code expired which generally precluded any prosecutions for military offences, although by 1718 the law officers were advising the Crown that former soldiers remained liable for service offences: C.M. Clode *Administration of Justice under Military and Martial Law* (London 1874) at 102 fn. 5. Due to an inherent distrust of the monarchy which derived its power from standing armies, civilian Parliamentary leaders were historically unwilling to legislatively permit the Crown to maintain permanent land forces in times of peace. As a result, temporary Articles of War, issued under Crown prerogative to govern mobilized land forces, were seen to typically last no longer than three years. This arrangement implicitly established a three-year limitation period for prosecuting service offences: C.M. Clode *Military Forces of the Crown* (London 1869) at 389-91. Thereafter, as the practice of maintaining standing armies in England evolved, the need to discipline garrison troops gave rise to regularized military laws which eventually came to be regularized in 1688 under a succession of *Mutiny Acts* which first adopted a limitation period in 1760: Clode (1869) at 173.

English laws do not appear to provide a limitation period for prosecuting military offences. However, a customary three-year time limit for military prosecutions seems to have been established by the early 1700s, which subsequently gave rise to the first formal limitation period under English military law in 1760.<sup>43</sup> By 1869, the three-year limitation rule had become firmly established in the English military justice system, which continued to apply this time limit until 1987.<sup>44</sup>

The limitation periods for prosecuting military offences in other Anglo-American jurisdictions vary. A three-year limitation was formerly applied in the United Kingdom according to legislation specific to each service affiliation,<sup>45</sup> but the British Attorney-General was authorized to consent to the prosecution of military offences outside the three-year limitation on a case-by-case basis. Limitations for military offences in the U.K. forces have now been removed under military law, although accused persons can claim the benefit of applicable civil statutory limitations before service tribunals.<sup>46</sup> Similarly, Australia has dispensed with general limitation periods for military offences while recognizing the application of civil limitations to military proceedings.<sup>47</sup>

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<sup>43</sup> Clode (1874) at 102, fn. 6. After the three-year period had expired, it was determined by the English Attorney-General that courts martial had no jurisdiction over accused members even with their consent. Accordingly, the three-year limitation period presented an absolute defence for service members.

<sup>44</sup> Clode (1869) Vol. 1 at 174. The three-year limit for the commencement of proceedings was repealed by the *Armed Forces Act* (U.K.) 1986, s. 7. It is of interest to note that the initial limitation period for service offences in the United States dates back to 1806 and the 103rd Article of War which modelled a three-year limitation based on the three-year time limit under early English law. The American statutory limitation for military offences subsequently evolved to structure various general limits that incorporated a number of case-specific exceptions. A helpful review of the history of the American statute of limitations for service offences is presented at part V of the decision in *U.S. v. Troxell*, 30 C.M.R. 586 (B.R. Army 1961) starting at 592.

<sup>45</sup> A concise summary of the various limitations under current English military law is found at 41 *Halsbury* (4th) par. 363. Notably, the general three-year limitation may be waived by the Attorney-General on a case-by-case basis; *Army Act* 1955, s. 132(1); *Air Force Act* 1955, s. 132(1) provisos (a), (b); *Naval Discipline Act* 1957, s. 52(3).

<sup>46</sup> *Army Act* (U.K.) 1955, s. 132 (as amended by the *Armed Forces (U.K.) Act* 1986, s. 7).

<sup>47</sup> Notably, the *Australia Defence Force Discipline Act* provides at subsection 3(18) that a military accused may claim the benefit of any limitation in the law of the

New Zealand's basic statutory limitation is clearly modelled after the former counterpart British three-year limitation, but further incorporates other civilian statutory limitations to afford an accused at military trial the greatest benefit of available statutory time limits.<sup>48</sup> The New Zealand limitation rule, however, includes an override provision which enables the Attorney-General to allow prosecutions, notwithstanding that such actions would otherwise be statute-barred under civilian or military limitation periods.<sup>49</sup>

Article 43 of the *United States Uniform Code of Military Justice* has adopted limitation periods ranging from five years in certain circumstances to six months in others, and has exempted the application of limitations for certain serious offences similar to those at subsection 69(2) of the *National Defence Act* in Canada.<sup>50</sup> Notably, the American limitations constitute absolute defences, and are not subject to executive override. To determine what limitation period applies in a given situation, a careful reading of the limitation provisions at article 43 of the *Uniform Code of Military Justice* is required since there are a number of exceptions and caveats.<sup>51</sup> In comparison to the above-mentioned military justice systems, the U.S. limitations system appears to be the most complex as it entails a somewhat convoluted application.

A review of various Canadian limitation periods fails to uncover any general rationale for the process of establishing statutory limitations for offences under disciplinary codes of conduct. Under provincial police legislation, a charge must typically be initiated within six months of the occurrence of the alleged disciplinary

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Commonwealth or of a State or Territory.

<sup>48</sup> *New Zealand Defence Act* 1983, section 10B.

<sup>49</sup> *New Zealand Defence Act* 1983, subsection 10B(1).

<sup>50</sup> Generally see *U.S. Uniform Code of Military Justice*, article 43.

<sup>51</sup> It is noteworthy that civilian law limitations under state law have been held to not apply to military tribunals; *U.S. v. Johnston*, 699 F. Supp. 225 (N.D. Calif. 1988). While the application of civilian federal limitations at courts martial does not appear to have yet been judicially determined, it would seem that most situations invoke the statutory limitations found at article 43 of the *Uniform Code of Military Justice*.

offence.<sup>52</sup> However, the *RCMP Act* provides a one-year limitation period from the time the contravention and the identity of the member become known.<sup>53</sup> A review of the legislation for various self-governing professional disciplinary tribunals is similarly unhelpful in ascertaining the broad principles behind limitation periods, due to the generally diverse nature of statutory time limits.<sup>54</sup>

We can see no acceptable rationale for a limitation period in respect of service offences tried before a court martial and favour its repeal, except to the extent that a limitation period is specifically provided for in statutes incorporated by reference pursuant to the *National Defence Act*.<sup>55</sup> Therefore:

**31. We recommend that the *National Defence Act* be amended to remove the three-year limitation period in respect of service offences and to provide that an accused tried by court martial has the benefit of any limitation period applicable to a civil offence incorporated in the Code of Service Discipline.**

On the other hand, there is some merit to a limitation period in respect of offences tried by way of summary trial. Summary trials are supposed to deliver swift justice and deal with minor disciplinary offences. In that regard, it would seem inconsistent to allow a service offence to proceed to summary trial several years after it has occurred. The choice of the exact period is to a certain extent arbitrary, but we believe that a one-year limitation period would be appropriate. Therefore:

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<sup>52</sup> See for example, Nova Scotia Reg. 101/88, s. 16(2).

<sup>53</sup> *Royal Canadian Mounted Police Act*, R.S.C. 1985, c.R-10, ss. 43(8).

<sup>54</sup> For example, proceedings under the *Ontario Architects Act* regarding professional misconduct must be brought within two years: R.S.O. 1990 c.A-26, s. 46(7). An enforcement proceeding under the *Ontario Securities Act* must be brought within one year of the matter coming to the attention of the Ontario Securities Commission: R.S.O. 1990, c.S-5, c. 129(1). There is no limitation period for bringing disciplinary proceedings against a physician before the Ontario College of Physicians and Surgeons: *R. v. College of Physicians and Surgeons, ex parte Winter*, [1969] 2.O.R. 31 (H.C.J.)

<sup>55</sup> Thus, s. 130 of the *NDA* incorporates the *Criminal Code* and other federal statutes creating criminal and quasi-criminal offences which may have their own limitation periods.

**32. We recommend that the *National Defence Act* be amended to prescribe a one-year limitation period for any offence tried by way of summary trial.**

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## **IV - REVIEW PROCESS**

## CHAPTER 9: THE APPEAL PROCESS

### (1) SUMMARY TRIALS

Currently, there is no appeal from the decision of an officer who has found a member guilty at a summary trial. The only means of challenge is by way of a redress of grievance,<sup>56</sup> essentially an administrative procedure which is rarely used in this context. Alternatively, decisions of summary trials may be subject to judicial review to the Federal Court of Canada on very limited grounds, but this procedure is also rarely used.<sup>57</sup>

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<sup>56</sup> Section 29 of the *National Defence Act* allows "an officer or non-commissioned member who considers that he has suffered any personal oppression, injustice or other ill-treatment or that he has any other cause for grievance may as a matter of right seek redress from such superior authorities". Grievances and complaints by a member of the Canadian Forces can be filed through each level of the chain of command for settlement. QR&O 19.26 and 19.27 outline the rules governing the redress of grievance process.

The grievor submits his complaint to his superior officer, usually his Commanding Officer. If the Commanding Officer has not redressed the complaint within thirty days of its receipt by him, the complainant has the right to submit his complaint directly in writing to the officer responsible for the next level, the Formation Commander. The next levels are, respectively, the Commander of the Command, the Chief of the Defence Staff, and, finally, the Minister of National Defence.

Members of the Canadian Forces, however, are reluctant to avail themselves of the redress of grievance process for different reasons, including the fact that there is a perception within the system that undertaking this process will have adverse repercussions. This perception exists notwithstanding QR&O 19.26 which provides that no CF member can be penalized for making a complaint. Consequently, this process has been used only in serious cases of perceived injustice.

<sup>57</sup> The *National Defence Act* does not contain any disposition regarding the release of an individual pending appeal from a summary trial. At the moment, a member of the Canadian Forces being sentenced to detention has limited means of being released pending review of his case, which is done by redress of grievance. He must apply to the Federal Court Trial Division for a writ of prohibition or writ of habeas corpus.

There are three cases where a member of the Canadian Forces had been sentenced to detention summarily and the member filed a writ of prohibition which was granted by the Federal Court: *Glowczeski v. Canada* (1989) 3 F.C. 281; *Veilleux v. Canada* (1991) A.C.F. No. 821 T-2174-91; and *Fontaine v. Canada* (1990) 44 F.T.R. 266. For the purposes of ordering the release of the accused pending an assessment of the case on the merits, the Federal Court held that certain provisions of the *National Defence Act* and QR&Os were contrary to the provisions of ss. 7, 9, 11(e), 15(1) and 24(1) of the *Charter*. However, no judicial review of the summary trial process has ever resulted in a final decision from the courts, as the matters were settled before the

The STWG recommended a right of appeal and a trial *de novo* to a court martial when the punishment was correctional custody, reduction in rank or a significant fine. For its part, the JAG did not think that a trial *de novo* was workable. In its view, a trial *de novo* to a court martial distances the commanding officer from discipline, and is unnecessarily complex. Instead, the JAG suggested that there should be an administrative appeal to the next superior authority with powers of review or, alternatively, an expanded redress of grievance right.

In principle, we agree with the concept that a meaningful right of appeal or review should exist when a significant penalty is imposed following a summary proceeding. Such a right would improve the prospects that the constitutionality of the summary trial process would be upheld. However, consistent with the object of expeditiousness implicit in the summary trial process, and the fact that an accused who is awarded a significant punishment will have elected a summary trial, this right of appeal/review should not be used to delay the process, or be a way where an accused who is dissatisfied with his summary trial in effect decides to "re-elect" a court martial by asking for a trial *de novo*. In accordance with the principle that the summary trial procedure involves the chain of command, we see merit in the proposal by JAG that a review of the conviction and/or sentence would occur at the next level of the chain of command, but only where an election was afforded in the first instance. Therefore:

33. We recommend that, in all cases where an accused has elected to be tried by summary trial, the accused, if convicted, have the right to request that the appropriateness of the conviction and/or sentence be reviewed by the next level of command.

## (2) COURT MARTIAL APPEALS

A person convicted at a court martial has the right to have the legality of the conviction and of the sentence reviewed on appeal by the Court Martial Appeal Court

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courts could reach a decision on the subject.

(CMAC). The CMAC has the general powers of a civil criminal court of appeal and is composed of judges of the Federal Court of Canada, as well as designated trial and appellate judges of provincial superior courts. A formal appeal hearing is conducted before a minimum of three judges, with crown counsel being a legal officer appointed by the JAG. From the decision of the CMAC, the accused and the Minister of National Defence may, in certain circumstances, appeal to the Supreme Court of Canada.

The appeal provisions described above were last reviewed in detail in 1991. It appears that this review solved most of the problems, including providing for a comprehensive treatment of mentally disordered accused and for a crown right of appeal. There is only one matter upon which we should comment.

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Section 246 of the *National Defence Act* provides for a review of the proceedings of a court martial by the JAG where the appeal period has expired and even though no appeal has been made. The purpose of s. 246 is to ensure that court martial proceedings, which have not been the subject of an appeal, receive the scrutiny of a trained legal officer. Errors or irregularities identified may be corrected by the CDS, under recommendation of the JAG pursuant to s. 247.

Given the full appeal rights for both an accused and the CF and the existence of a review procedure by convening authorities under CFAO 111-1, this review is in our opinion unnecessary. Therefore:

34. We recommend that the *National Defence Act* be amended to repeal the sections that provide for a review of the proceedings of a court martial by the Judge Advocate General where the appeal period has expired, and no appeal has been made.

## **CHAPTER 10: OVERSIGHT AND REVIEW**

Quite apart from formal appellate review of summary proceeding or court martial decisions, we have heard several suggestions relating to the need to establish an office - such as the office of the Inspector General in the United States Army - whose mandate would include reviewing and handling complaints arising from military operations and service, including complaints about the military justice system and military police.

Currently, there exists the Chief of Review Services (CRS) whose office conducts audits of various programmes or processes of the CF. The CRS does not, however, routinely review the military justice system or the military police.

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We think that it is very important that CF members be given a voice, consistent with the appropriate authority of the chain of command, so that their concerns and complaints can be independently investigated and, if necessary, dealt with. For in the broadest sense, military justice must include an effective, independent channel or mechanism through which service members can express their concerns about any aspect of the military establishment, without feeling that their only outlet is the media. Such a mechanism would ultimately strengthen the chain of command.

Independent oversight is especially important for the military police and, in this regard, civilian oversight of police forces is particularly instructive. If an individual citizen complains to a civilian police force about improper conduct of its personnel, there is an expectation of and a right to a response. The situation should be no different in the military context.

The current trend in police forces around the world has been to adopt an oversight process that combines an internal and external review mechanism. In order for a police chief to be held accountable, he must be given the initial opportunity to resolve the dispute internally. This allows him to control the priority of investigative resources, in addition

to providing critical expertise in the form of internal investigators who have "inside knowledge" of the police organization. It is paramount that the police force be able to enforce internal discipline by demonstrating to its members and the public that misconduct will not be tolerated. An independent review capability is equally essential to ensure confidence and respect for the military justice system.

In this report, we have particularly recommended an increased role for the military police in the military justice system. With such an increase in responsibility and authority must come a corresponding professionalism and accountability. This responsibility should at all times be monitored by a process of oversight and review. We wish to stress, however, that oversight and review requirements go far beyond the military justice system and the military police. They pertain to a myriad of individual issues in which CF people may feel the need to have a voice and be heard. Therefore:

- 35. We recommend that an independent office of complaint review and system oversight, such as a military ombudsman, be established within the Canadian Forces, and that it report directly to the Minister of National Defence.**

## V - CONCLUSION

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## *AFTERWORD*

We wish to offer some brief comments related to the principles and directions that have evolved since the outset of our review.

After reading a multitude of documents pertaining to our mandate, and discussing the subjects of military justice and military police with a great many people, both in and out of the Canadian Forces, we have come to the conclusion that, while some significant reforms are needed, there certainly is no requirement for dismantling the existing military justice system. On the contrary, we have found the system to be essentially sound, as is its administration. Thousands of infractions to the Code of Service Discipline are dealt with every year, expeditiously and fairly. With the exception of a very few individual cases which have captured the public's attention, we have concluded following our review that the system as a whole works well.

Reforms are suggested, particularly but not solely with regard to the investigation of offences, the laying of charges, and the summary trial procedure. Our recommendations will, we believe, go a long way towards ensuring transparency in the administration of military justice and public accountability. We are confident that the implementation of our proposals will enhance the fairness and effectiveness of military justice, and will assist our military leaders in the maintenance of discipline and in the accomplishment of their tasks on behalf of Canada. We have found our Armed Forces to have professional and competent leadership, with men and women of all ranks dedicated to their calling. They deserve no less than the best tools and necessary resources to accomplish their mission. One of those tools they require is a justice system that is swift, fair and portable to any part of the world where they may be serving.

As we conclude our work, we wish to record our conviction that the navy, army, and air force will continue to serve and represent Canada with the same standards of

courage, competence and integrity they have demonstrated throughout our country's history.

It is with those sentiments foremost in our minds that we offer the following recommendations.

### ***LIST OF RECOMMENDATIONS***

1. We recommend that a distinct military justice system be maintained for the Canadian Forces, consistent with the supremacy of the Rule of Law, including the *Canadian Charter of Rights and Freedoms*, and subject to innovations and changes recommended in this report.
2. We recommend that the existing Code of Service Discipline continue to be administered primarily by the chain of command, both in times of conflict or peace, in Canada or abroad, subject to innovations and changes recommended in this report.
3. We recommend that it be declared, as a fundamental principle of Canada's military justice system, that every person subject to the Code of Service Discipline is entitled to its equal and uniform application without regard to rank.
4. We recommend that the existing Code of Service Discipline be re-enacted as a separate federal statute.
5. We recommend that the principal responsibilities of the Judge Advocate General be set out in the *National Defence Act*, and that, without limiting the generality of those responsibilities, the following provisions be included:
  - a. the Judge Advocate General's duties as legal adviser to the Minister of National Defence, the Department and the Canadian Forces;
  - b. the Judge Advocate General's duty to provide oversight and supervision to the administration of the military justice system across the Canadian Forces;
  - c. the Judge Advocate General's duties in respect of its separate defence, prosecution, and judicial functions;

- d. the Judge Advocate General's duty to report annually to the Minister of National Defence and the Chief of the Defence Staff on the overall effectiveness of the military justice system in the Canadian Forces.
6. We recommend that the Judge Advocate General annual report to the Minister of National Defence and the Chief of the Defence Staff be released to the public.
7. We recommend that, whenever a Canadian Forces member is entitled to legal advice under the Code of Service Discipline, the Judge Advocate General provide such advice in a manner that is independent of the Judge Advocate General's prosecution and judicial functions.
8. We recommend the appointment of an independent Director of Prosecutions responsible to the Judge Advocate General.
9. We recommend that command and control of military police required in the operational support of the commanders remain under their respective commands; that military police resources associated with the provision of intelligence and counter-intelligence be placed under the command of the Director General Intelligence; and that all other military police resources be under the command and control of the Director General Security and Military Police.
10. We recommend that the role of Director General Security and Military Police be affirmed and enhanced as follows:
  - a. to have primary responsibility for all military police selection and recruiting standards;
  - b. to have primary responsibility for all military police training standards;
  - c. to have direct responsibility for cooperation with the RCMP and other police forces in the development of the National Investigation Service;
  - d. to have direct responsibility for review of all military police functions in the Canadian Forces;
  - e. to report directly to the Vice Chief of the Defence Staff.
11. We recommend that the responsibilities assigned to Director General Security and Military Police be established in the new position of Canadian Forces Provost Marshal.

12. We recommend that a comprehensive training process be introduced to improve the investigative capabilities of military police, including the following provisions:
- a. the training of military police personnel should be reassessed at all levels with a view to improving investigative skills;
  - b. the employment of military police personnel should allow them to acquire and maintain acceptable standards of expertise to investigate serious matters;
  - c. investigators, officers and non-commissioned members, should receive investigation and management training commensurate with their experience and responsibilities;
  - d. investigators in the military police should be given the opportunity to gain practical investigative experience and expertise through an exchange and/or secondment programme with other police forces.
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13. We recommend that the present Special Investigation Unit of the military police be merged with the National Investigation Service to provide specialized and professional investigative services to the Canadian Forces on a national and international basis.
14. We recommend that the National Investigation Service of the military police be reorganized and tasked on the following basis:
- a. it would operate under direct command and control of the Director General Security and Military Police;
  - b. it would operate independently of the chain of command;
  - c. its investigative services would be initiated with respect to all service offences of a serious or sensitive nature, or offences requiring complex or specialized investigations;
  - d. its investigators would have the authority to lay charges as a consequence of their investigations;
  - e. it would operate in cooperation with base/wing units of the military police and with other supporting units for logistical and administrative support;

- f. review and oversight of its operations would be the responsibility of the Vice Chief of the Defence Staff facilitated by an annual report from the Director General Security and Military Police.
15. We recommend that all security clearance services required by the Canadian Forces be provided separately from service offence investigations and, if necessary, they be contracted to appropriate agencies such as the Canadian Security Intelligence Service.
16. We recommend that detention of up to thirty days be retained as a possible punishment for offences in respect of which a member has elected to be tried by summary trial.
17. We recommend that, whenever an election is given to an accused to be tried by court martial rather than summary trial, the accused be afforded a right to consult with legal counsel to ensure that the election is made on the basis of full and complete information and that the election be set out in writing.
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18. We recommend that, upon a Canadian Forces member being sentenced to detention following a summary trial, the member's rank and salary be reduced to that of a private during the period of detention, but that both the rank and salary be reinstated to original levels upon completion of the sentence.
19. We recommend that, whenever reduction in rank is awarded as a punishment following a summary trial, the reduction be limited to one rank below that of the accused at the commencement of the trial.
20. We recommend removal of the requirement for punishment warrants in respect of certain punishments that a commanding officer may impose at a summary trial.
21. We recommend that the powers of punishment of a delegated officer be increased to include a fine of up to twenty-five percent of the monthly pay of the accused.
22. We recommend that the punishment of confinement to ship or barracks be limited to master corporals and below.
23. We recommend that increased training and education be introduced for all commanding and delegated officers to ensure that they are knowledgeable about their roles in the military justice system and competent to perform them. But for exceptional circumstances, those officers should not be

permitted to preside at a summary trial unless certified to do so by the Judge Advocate General.

24. We recommend that sufficient legal training and simple work instruments be provided to all officers and non-commissioned members who may be called upon to perform the role of assisting officer so that they will be in a position to provide adequate assistance to the accused.
25. We recommend that an officer be prohibited from presiding at a summary trial of a person charged with a service offence if the officer has been involved in the investigation or the laying of the charge.
26. We recommend that uniform records of summary trials be prepared and publicized on a regular basis throughout the Canadian Forces.
27. We recommend that the Office of the Chief Military Trial Judge be organized as an independent unit of the Canadian Forces and that the role and responsibilities of the Chief Military Trial Judge be set out in the *National Defence Act*.
28. We recommend that the sentencing function at a court martial be performed by the judge presiding at the court martial.
29. We recommend that non-commissioned members of the rank of warrant officer and above be eligible to serve on Disciplinary and General Courts Martial, provided that the non-commissioned member is equal or senior in rank to the accused.
30. We recommend that the *National Defence Act* be amended to remove the death penalty from the scale of punishments.
31. We recommend that the *National Defence Act* be amended to remove the three-year limitation period in respect of service offences and to provide that an accused tried by court martial has the benefit of any limitation period applicable to a civil offence incorporated in the Code of Service Discipline.
32. We recommend that the *National Defence Act* be amended to prescribe a one-year limitation period for any offence tried by way of summary trial.
33. We recommend that, in all cases where an accused has elected to be tried by summary trial, the accused, if convicted, have the right to request that the appropriateness of the conviction and/or sentence be reviewed by the next level of command.

34. We recommend that the *National Defence Act* be amended to repeal the sections that provide for a review of the proceedings of a court martial by the Judge Advocate General where the appeal period has expired, and no appeal has been made.
35. We recommend that an independent office of complaint review and system oversight, such as a military ombudsman, be established within the Canadian Forces, and that it report directly to the Minister of National Defence.



## MINISTERIAL DIRECTION

1. Pursuant to my authority under Section 4 of the *National Defence Act*, I hereby establish an external advisory group reporting directly to the Minister of National Defence to be known as the Special Advisory Group on Military Justice and Military Police Investigation Services and I appoint to that Special Advisory Group:

- a. The Right Honourable Brian Dickson, PC, CC, CD, as Chairperson;
- b. Lieutenant-General Charles H. Belzile, CMM, CD (Ret); and
- c. Mr. J.W. Bud Bird.

2. The purpose of military justice is to promote justice, to assist in maintaining good order and discipline in the Canadian Forces, to promote military efficiency and effectiveness and thereby to strengthen the national security of Canada. The mandate of the Special Advisory Group in respect of Military Justice is to assess the Code of Service Discipline, not only in light of its underlying purpose, but also the requirement for portable service tribunals capable, with prompt but fair processes, of operating in time of conflict or peace, in Canada or abroad.

3. Without restricting the generality of the foregoing, the Advisory Group should consider and make recommendations concerning:

- a. the jurisdiction, powers of punishment, structure and procedures of both summary trials and courts martial;
- b. the adequacy of review mechanisms for summary trials and of civilian appellate review of courts martial;
- c. the role of the chain of command in the investigation of complaints and the laying of charges;
- d. the appropriate role, responsibility and organization of the Office of the Judge Advocate General in support of military justice;

- e. the relationship that should exist between the chain of command and the Office of the Judge Advocate General in the administration of military justice;
- f. the effectiveness of the current legal structure of the Code of Service Discipline in setting clear duties and standards for carrying out those duties in the administration of military justice; and
- g. actions, including changes in legislation, regulation or policy, to implement the Advisory Group recommendations.

4. The mandate of the Special Advisory Group in respect of Military Police Investigation Services is to assess the roles and functions of the Military Police, including the independence and integrity of the investigative process, against the delivery of effective police services to the Canadian Forces and the Department. The Special Advisory Group should consider and make recommendations that are responsive to the requirements of operational commanders. Without restricting the generality of the foregoing, recommendations should address the following issues:

- a. the identification of current Military Police functions which must be retained inside the Canadian Forces to ensure effective military operations and discipline;
- b. the identification of requirements, if any, for Military Police to conduct investigations into serious criminal offences, at home or abroad and into matters which might be considered administrative in other Government departments;
- c. the independence of Military Police Services, including the investigative function and the quality control of Military Police investigations and related activities;
- d. the establishment of a clear command and control framework for Military police functions. In this regard, current status quo command and control arrangements are not to constrain findings and recommendations in any way;
- e. the establishment of an accountability framework including an adequate independent oversight mechanism, and a process by which complaints and concerns about Military Police actions are received, investigated and resolved;
- f. the selection, training, military professional and leadership development required for Military Police personnel;
- g. the potential for greater cooperation with other Canadian police authorities; and
- h. the improvement of communications, to include information flow both internal and external to Military Police organizations.

5. The Special Advisory Group will be assisted in their review by Assistant Commissioner Lowell Thomas (RCMP Retired).

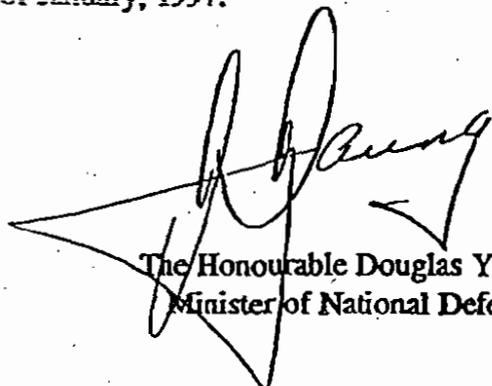
6. The Special Advisory Group is authorized:

- a. to sit at such time and at such places in Canada as it may from time to time decide;
- b. to adopt such procedures and methods as it considers expedient for the proper discharge of its mandate;
- c. to have, subject to law, complete access to the personnel of the Canadian Forces and the Department of National Defence and to any information relevant to military justice and military police investigation services;
- d. to be provided, from within the resources of the Department of National Defence and the Canadian Forces, with adequate working accommodation and clerical assistance; and
- e. to be provided with or to engage the services of such staff and other advisers as it considers necessary to aid and assist in the review, at such rates of remuneration and reimbursement as may be approved by the Treasury Board.

7. The Special Advisory Group is required to:

- a. report in both official languages to the Minister of National Defence by March 15, 1997; and
- b. deposit its records and papers with the Office of the Minister of National Defence as soon as is reasonably possible after the filing of its report.

Dated at Ottawa, Ontario, this 17th day of January, 1997.



The Honourable Douglas Young  
Minister of National Defence

## **ANNEX B**

### **Special Advisory Group on Military Justice and Military Police Investigation Services - Chairman, Members and Staff**

#### **Chairman**

The Right Honourable Brian Dickson, PC, CC, CD

#### **Members**

Lieutenant-General Charles H. Belzile, CMM, CD (Ret.)

Mr. J.W. Bud Bird

#### **Special Legal Counsel**

Guy Pratte

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#### **Advisers**

Colonel A.F. Fenske, CD

Lise Maisonneuve

Lowell E. Thomas

Lieutenant-Colonel S. Tremblay, CD

JAG Adviser

Special Legal Adviser

Special Police Adviser

Military Police Adviser

#### **Special Advisory Group Staff**

(including temporary staff)

Chief of Staff

Deputy Chief of Staff

Acting Deputy Chief of Staff

Public Information Officer

Secretaries

Hearing Officers

Research (Military Justice)

Research (Military Police)

Chief Clerk

Administrative Clerks

Financial Clerk

Driver

Translators

Lieutenant-Colonel J. Bérubé, CD (Ret.)

Major J.A. Rioux, CD

Captain P. Maloney (February-March)

Mrs. D. Blakeley

Diane Rabatich

Sandra Rosier (March)

Captain J.R. Forgrave, CD

Captain A. Lemieux (February)

Lucie M. Levesque

Captain M. Doi

Captain B.A. Shaw

Sergeant L.M. Lambert, CD

Corporal M.C.N. Gagnon

Corporal N. Vibert

Corporal J.A. Gervais

Corporal B.B. Sénécal, CD

Translation Services Public Works

Government Services Canada

## ANNEX C

### Technical Briefings

Deputy Commissioner C.G. Allen, Royal Canadian Mounted Police  
Admiral J. Anderson, CMM, CD (Ret.), Former Chief of Defense Staff  
Lieutenant-General J.M.G. Baril, CMM, MSM, CD, Commander Land Force  
Command  
Lieutenant-Colonel T. Battista, CD, Canadian Forces School of Intelligence and  
Security  
Brigadier-General E.B. Beno, OMM, CD, Director-General Military Personnel  
Master Warrant Officer F.P. Bertrand, CD, Canadian Forces School of Intelligence and  
Security  
Assistant-Director-General G. Boilard, Sureté du Québec  
Chief Superintendent G. Boniface, Ontario Provincial Police  
Brigadier-General P.G. Boutet, OMM, CD, Judge Advocate General  
General J. Boyle, CMM, CD (Ret.), former Chief of the Defense Staff  
Petty Officer Second Class M. Carbonneau, CD, CFB Montreal  
Colonel B.R. Champagne, CD, Deputy Judge Advocate General (Personnel)  
Assistant Commissioner D.G. Cleveland, Royal Canadian Mounted Police  
Lieutenant-Colonel P. Cloutier, CD, Director Police Services  
Assistant Commissioner D.C. Cooper, Royal Canadian Mounted Police  
Major D.M.A. Cooper, CD, Operation Thunderbird  
Mr. Y. Côté, Department of Justice  
Colonel R.L. Cowling, CD (Ret.)  
Brigadier-General J.S. Cox, OMM, CD, Land Force Command Inspector  
Major-General R.A. Dallaire, CMM, MSC, CD, Chief of Staff Assistant Deputy  
Minister (Personnel)  
Captain (N) A.E. Delamere, OMM, CD, Acting Director General Maritime  
Development  
Lieutenant-General A.M. DeQuetteville, CMM, CD, Commander Air Command  
Chief Warrant Officer J.J.L.M. Dessureault, MMM, CD, Land Force Command Chief  
Warrant Officer  
Master Warrant Officer P. Dowd, CD, National Investigation Service  
Chief Warrant Officer R.N. Elphick, MMM, CD, Air Command Chief Warrant Officer  
Superintendent R.F.S. Farrell, Royal Canadian Mounted Police  
Chief B.J. Ford, Ottawa-Carleton Regional Police Service

Detective Chief Superintendent W. Frechette, Ontario Provincial Police  
Professor M. Friedland, Faculty of Law, University of Toronto  
Lieutenant-Commander A.N. Gale, CD, Operation Thunderbird  
Rear-Admiral G.L. Garnett, CMM, CD, Commander Maritime Command  
Mr. J. O'Grady, QC [Legal Counsel for Admiral Anderson]  
Mr. B. Grainger, Adjunct Professor of Law, University of Ottawa  
Captain (N) D.J. Hurl, CD, Director Personnel Policy  
Captain (N) P.H. Jenkins, CD, Operation Thunderbird  
Mr. G. Jones, Investigator with Special Investigations Unit (Ontario)  
Brigadier-General D.M. Jurkowski, OMM, CD, Commander Fighter Group  
Commissioner G.S. Lapkin, Ontario Police Complaints Commission  
Inspector G.C. Mann, Ontario Provincial Police  
Mr. A. Marin, Director Special Investigations Unit (Ontario)  
Judge R. Marin  
Chief W. McCormick, former Chief of Police, Toronto  
Chief Petty Officer First Class T.R. Meloche, MMM, CD, Maritime Command Chief  
Petty Officer  
Major M.S. Morrissey, MMM, CD, Director Personnel Complaints Resolution 4  
Vice-Admiral L.E. Murray, CMM, CD, Acting Chief of the Defence Staff  
Captain (N) R. Neveu, CD, Program Evaluation Director  
Chief Warrant Officer J.L.G.G. Parent, OMM, CD, Canadian Forces Chief Warrant  
Officer  
Lieutenant-Colonel P. Pellicano, CD, Director Personnel Complaints Resolution  
Major-General K.G. Penney, OMM, CD, Chief of Review Services  
Commander C.J. Price, CD, Director of Law/Prosecutions and Appeals  
Colonel P.M. Samson, CD, Director General Security and Military Police  
Major J.G. Simpson, CD, Canadian Forces School of Intelligence and Security  
Mr. J.C. Tait, Senior Adviser to the Privy Council Office and Co-ordinator of Security  
and Intelligence [former Deputy Minister, Department of Justice]  
Mr. G.M. Thomson, Deputy Minister, Department of Justice  
Mr. J.G. Van Adel, Director General Audit  
Colonel A.R. Wells, CD (Ret.), [former Director General Security]  
Mr. K.W.J. Wenek, Director Personnel Policy 2  
Superintendent C. Wyatt, Ontario Provincial Police  
Ms. K.J. Young [Legal counsel for Admiral Anderson]  
Captain J.M.T. Zybala, Commandant, Canadian Forces Service Prison and  
Detention Barracks

## **ANNEX D**

### **Witnesses**

**HALIFAX 3 February 1997**

#### **Round table**

Petty Officer First Class A. Barnes, CD, Canadian Forces Naval Operations School

Ordinary Seaman C.S. Bell, HMCS Iroquois

Master Seaman D.M. Brayman, CD, Canadian Forces Naval Operations School

Petty Officer First Class S.J. Cakebread, CD, HMCS Glace Bay

Lieutenant-Commander M.N. Cameron, CD, HMCS Kingston

Chief Petty Officer First Class F. Childs, MMM, CD, Canadian Forces Naval  
Engineering-School

Master Corporal K.D. Colcy, 12 Wing Shearwater

Lieutenant-Commander R.M. Craig, CD, Canadian Forces Naval Engineering School

Corporal J.M. Cummings, Maritime Command Headquarters

Chief Petty Officer Second Class R.G. Doucette, CD, Canadian Forces Naval  
Operations School

Commander L. Edmunds, CD, Maritime Forces Atlantic Headquarters

Petty Officer Second Class P.M. Frechette, CD, HMCS Onondaga

Lieutenant-Commander D.C. Gardam, CD, Maritime Command Headquarters

Master Warrant Officer B. Greenan, CD, Maritime Air Group Headquarters

Lieutenant-Colonel M.W. Haché, CD, Maritime Air Group Headquarters

Master Seaman M.J. Hébert, Canadian Forces Naval Operations School

Able Seaman G.J.H. Hippern, HMCS Iroquois

Captain (N) D.S. MacKay, CD, Maritime Forces Atlantic Headquarters

Master Seaman D.F. McPhee, Canadian Forces Naval Operations School

Master Seaman S.J. Murphy, Canadian Forces Naval Operations School

Leading Seaman R.D. Purcell, Canadian Forces Naval Operations School

Master Corporal B.C. Pyke, Land Force Atlantic Area Headquarters

Lieutenant-Colonel C.T. Russell, CD, Land Force Atlantic Area Headquarters

Chief Warrant Officer D.F. Seed, MMM, CD, Land Force Atlantic Area Headquarters

Lieutenant (N) B.J. Stothart, CD, Maritime Forces Atlantic Headquarters

Lieutenant (N) G.D. Thompson, CD, Maritime Command Headquarters

## **Public Hearings**

Mr. Justice W. Goodfellow

Mr. D. Bright

Mr J. Pitzul, Nova Scotia Director of Public Prosecutions

Vice-Admiral L. Mason, CMM, CD (Ret.)

## **GAGETOWN 4 February 1997**

### **Round table**

Private I.S. Aitken, 2 Battalion Royal Canadian Regiment

Master Corporal R.J. Albert, 2 Battalion Royal Canadian Regiment

Master Warrant Officer S.M. Anderson, CD, 2 Battalion Royal Canadian Regiment

Chief Warrant Officer J.G. Brown, CD, Canadian Forces Armour School

Master Bombardier R.J. Burton, Canadian Forces Artillery School

Lieutenant-Colonel J.A.G. Champagne, CD, Canadian Forces Infantry School

Major C.D. Claggett, CD, 8 Canadian Hussars

Lieutenant-Colonel B. Clements, CD, 403 Squadron

Sapper S.M. Connors, 4 Engineering Support Regiment

Corporal W.L. Cox, Canadian Forces Infantry School

Master Seaman S.L. Hirlte, CFB Gagetown

Lieutenant-Colonel R.M. Hutching, CD, Canadian Forces Tactics School

Chief Warrant Officer J.R. Irvine, CD, Canadian Forces Infantry School

Major J.C.Y.F. Lafortune, CD, 128 Air Defence Battery

Colonel J.G.M. Lessard, CD, Combat Training Centre

Lieutenant-Colonel B. MacDonald, CD, CFB Gagetown

Squadron Sergeant Major J.R. Mercier, CD, 8 Canadian Hussars

Captain M.R. Mitchell, Canadian Forces Armour School

Chief Warrant Officer J.S. Mossop, MMM, CD, CFB Gagetown

Master Warrant Officer C.L. Nickerson, CD, 128 Air Defence Battery

Major G.B. Parks, CD, 4 Engineering Support Regiment

Sergeant A. Rose, CD, Canadian Forces Artillery School

Lieutenant-Colonel J.G. Rousseau, CD, Canadian Forces Armour School

Corporal T.W. Scantlebury, 8 Canadian Hussars

Warrant Officer E. Sharpe, CD, 4 Engineering Support Regiment

Major R.A. Smyth, CD, 2 Battalion Royal Canadian Regiment

Master Corporal G.P. Toneguzzo, CD, Canadian Forces Armour School

Major C. Waters, CD, CFB Gagetown  
Lieutenant-Colonel D.S. Wiley, CD, Canadian Forces Artillery School  
Captain S. Wyatt, Canadian Forces Infantry School

### **Public Hearings**

Mr. R. Annis, Royal Canadian Legion  
Mr. D. Hurley, former Dean of Law, University of New Brunswick  
Mr. T. Crowther  
Mr. B. Wentzell, Conference of Defence Associations  
Mr. J. Rycroft, Conference of Defence Associations  
Mr. V. Arslanian

### **OTTAWA 11 February 1997**

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### **Public Hearings**

Mr. J. Coulon, *Le Devoir*  
Mr. S. Taylor, *Esprit de Corps*  
Mr. M. Drapeau, *Esprit de Corps*  
Mrs. L. Desrosiers  
Mr. P.F.D. McCann

### **VANCOUVER 17 February 1997**

### **Round table**

Lieutenant (N) D. Avey, HMCS Discovery  
Corporal D.M.F. Halpenny, 6th Field Engineer Squadron  
Commander A.W.F. Hastings, CD, HMCS Discovery  
Master Warrant Officer M. Hatton, CD, British Columbia District Headquarters  
Major L. Jensen, CD, British Columbia District Headquarters  
Chief Petty Officer Second Class D.S. Locke, CD, HMCS Discovery  
Master Corporal M.J. Lundie, The Seaforth Highlanders of Canada Band  
Brigadier-General S.T. MacDonald, CD (Ret.)  
Private A.J.M. Maclean, The Seaforth Highlanders of Canada Band  
Lieutenant-Commander C.S. Marrack, CD, HMCS Discovery  
Master Seaman I.D. McCandless, HMCS Discovery

Private J.L. Rainey, The Seaforth Highlanders of Canada Band  
Lieutenant (N) L.A. Richmond, HMCS Discovery  
Master Corporal M.A. Salesse, British Columbia Regiment  
Warrant Officer T.R. Silva, CD, British Columbia District Headquarters  
Captain J.C. Vincent, British Columbia District Headquarters  
Lieutenant-Colonel W.A.S. White, CD, British Columbia District Headquarters  
Private D.M.B. Wieser, The Seaforth Highlanders of Canada Band  
Petty Officer Second Class R.K. Yanch, HMCS Discovery

### **Public Hearings**

Brigadier-General W.A.D. Yuill, OMM, CD, Colonel Commandant Security Branch  
Mr. R. Hewson  
Mr. M. Hunt  
Vice-Admiral C. Thomas, CMM, CD (Ret.)  
Mr. J. Dixon [policy adviser to the Right Honourable K. Campbell]

**EDMONTON 18 February 1997**

### **Round table**

Major G.O. Blenkinsop, CD, 1 Service Battalion  
Captain T. Bradley, Lord Strathcona's Horse (Royal Canadian)  
Lieutenant-Colonel D.A. Burke, CD, Land Force Western Area Headquarters  
Lieutenant T. Cadieu, Lord Strathcona's Horse (Royal Canadian)  
Lieutenant-Colonel M.D. Capstick, CD, Land Force Western Area Headquarters  
Sergeant S.H. Decaux, Lord Strathcona's Horse (Royal Canadian)  
Master Corporal W.L. Duval, Edmonton Garrison  
Lieutenant-Colonel J.M. Duval, CD, 408 Squadron  
Sergeant K.E. Ferris, Edmonton Garrison  
Private D.J. Gibson, 1 Battalion Princess Patricia's Canadian Light Infantry  
Captain T.E. Hall, CD, 1 Service Battalion  
Sergeant K.C. Jackson, CD, Lord Strathcona's Horse (Royal Canadian)  
Major-General N.B. Jeffries, CD, Commander, Land Force Western Area  
Corporal R.J. Lambert, 3 Battalion Princess Patricia's Canadian Light Infantry  
Master Warrant Officer L.J. MacEachern, CD, Edmonton Garrison  
Sergeant L.M. Millar, CD, 1 Service Battalion

Corporal G.T. Murray, Edmonton Garrison  
Lieutenant-Colonel K.A. Nette, CD, Edmonton Garrison  
Warrant Officer D.R. Paris, CD, Land Force Western Area Headquarters  
Lieutenant-Colonel E.F. Parker, CD, Land Force Western Area Headquarters  
Corporal S.A. Roberts, Edmonton Garrison  
Sergeant F. Robinson, CD, 1 Service Battalion  
Chief Warrant Officer T.J. Secretan, CD, 408 Tactical Helicopter Squadron  
Colonel W.G.S. Sutherland, CD, Commander, Edmonton Garrison  
Master Corporal M.P.J. Tupper, 1 Area Support Group  
Corporal S.R. Vanderwilp, 1 Service Battalion  
Master Corporal D.W. Weir, 408 Tactical Helicopter Squadron

**WINNIPEG 19 February 1997**

**Round table**

Master Corporal N.A. Bailey, Air Command Headquarters  
Leading Seaman M.K. Boyce, 17 Wing Winnipeg  
Petty Officer Second Class M.J. Charrette, 17 Wing Winnipeg  
Sergeant L.K. Dodd, Air Command Headquarters  
Major L. Doucette, CD, 17 Wing Winnipeg  
Corporal M.G. Dutcher, 435 Squadron  
Corporal S.G. Flynn, 17 Wing Winnipeg  
Captain R. Gribble, 17 Wing Winnipeg  
Master Corporal R. Keenan, Manitoba-Lakehead District Headquarters  
Major J.M. Mallais, CD, 1 Air Movements Squadron  
Chief Warrant Officer D.R. McAllister, CD, 402 Squadron  
Master Warrant Officer J.C. Peel, CD, 17 Wing Winnipeg  
Corporal M.J. Purll, 435 Squadron  
Sergeant Richard, 17 Wing Winnipeg  
Sergeant R.J. Ries, 435 Squadron  
Master Seaman M.R.J. Rivard, Canadian Forces School of Aerospace Studies  
Warrant Officer W.J. Robinson, CD, 17 Wing Winnipeg  
Captain M. Rozak, 17 Wing Winnipeg  
Captain G. Sanstere, 17 Wing Winnipeg  
Master Corporal D.N. Skinner, Canadian Forces School of Meteorology  
Lieutenant-Colonel A.L. Smith, CD, 17 Wing Winnipeg  
Sergeant B.N. Smith, 17 Wing Winnipeg

Lieutenant-Commander Stiff, CD, Canadian Forces School of Aerospace Studies  
Master Corporal C.R. Tompkins, 435 Squadron  
Captain M. Wakulczyk, 17 Wing Winnipeg  
Lieutenant-Colonel W.A. Weatherston, CD, Assistant Judge Advocate General  
Warrant Officer R. Wheadon, CD, 435 Squadron  
Master Corporal M. Wilkinson, CD, 17 Wing Winnipeg

### **Public Hearings**

Major-General E.W. Linden, CD, Chief of Reserves  
Brigadier-General P.T. Gartenburg, CD, Chief of Staff (Operations), Air Command  
Headquarters

### **VALCARTIER 21 February 1997**

#### **Round table**

Chief Warrant Officer F. Asselin, CD, 12e Régiment blindé du Canada  
Warrant Officer J.R.F. Beauchemin, CD, 5 Field Ambulance  
Warrant Officer J.R.C. Bouchard, CD, 430 Tactical Helicopter Squadron  
Corporal M.J.D. Bourque, CFB Valcartier  
Master Seaman B. Clément, 5 Military Police Platoon  
Brigadier-General J.M.C. Couture, CD, 5 Canadian Mechanized Brigade Group  
Headquarters  
Warrant Officer M. Dallaire, CD, 5 Military Police Platoon  
Master Corporal J. Francoeur, 2 Battalion Royal 22e Régiment  
Leading Seaman J.J.M.B. Garneau, CFB Valcartier  
Sergeant M.C.C. Gilbert, 5 Service Battalion  
Lieutenant-Colonel J.M.M. Hainse, CD, 1 Battalion Royal 22e Régiment  
Captain J.C.M. Héroux, 12e Régiment blindé du Canada  
Colonel J.C.S.M. Jones, CD, 5 Canadian Mechanized Brigade Group Headquarters  
Corporal J.M.L. Landry, 1 Battalion Royal 22e Régiment  
Warrant Officer J.R.G. Langlois, CD, CFB Valcartier  
Master Corporal L.A.C. Laroche, 5 Régiment d'artillerie légère du Canada  
Major J.A.D. Lortie, CD, 3 Battalion Royal 22e Régiment  
Lieutenant-Colonel J.F.M.D. Mercier, CD, District No. 3 Headquarters  
Master Warrant Officer J.J.N.L. Morin, CD, CFB Valcartier  
Chief Warrant Officer J.M.A. Parent, CD, 5 Canadian Mechanized Brigade Group

### Headquarters

Corporal A.G. Proulx, 5 Canadian Mechanized Brigade Group Headquarters  
Major A.J.G. Rochette, CD, 2 Battalion Royal 22e Régiment  
Master Corporal J.R.M. Roy, 3 Battalion Royal 22e Régiment  
Captain P. St-Laurent, 5 Combat Engineering Regiment  
Chief Warrant Officer J.N.A.M. Verville, CD, 711 Communications Squadron

### Public Hearings

Me J. Asselin  
Me G. Cournoyer  
Major S. René, CD, Land Force Quebec Area Headquarters

### Ottawa Military Police Round Table, 26 February 97

Corporal A.D. Bacon, 2 Military Police Platoon, Petawawa  
Leading Seaman D.S. Butcher, Canadian Forces Support Unit (Ottawa)  
Leading Seaman M.D.F. Dorion, CFB Montreal  
Corporal L. Fortin, Canadian Forces Support Unit (Ottawa)  
Corporal J.F. Hollett, 8 Wing Trenton  
Corporal R.T. McKean, 2 Military Police Platoon, Petawawa

## ANNEX E

### Written Submissions

B. Alce, Executive Assistant, Organization of Spouses Of Military Members  
(Canadian), Ottawa, ON

R. Adsett-MacIntyre, Ottawa, ON

V. Arslanian, Oromocto, NB

Master Warrant Officer K.R. Bell (Ret.), Ottawa, ON

Sergeant J.P. Bergin, 2 Battalion Royal Canadian Regiment, CFB Gagetown

Master Warrant Officer W.J. Blades (Ret.), Perth, ON

A.G. Bridgman, former member Royal Canadian Navy, Victoria, BC

D.J. Bright, Boyne Clarke Barristers & Solicitors, Dartmouth, NS

~~R. Britten, Ottawa, ON~~

Vice-Admiral N.D. Brodeur, CMM, CD (Ret.), Victoria, BC

T.F. Brown, OMM, CD (Ret.), Halifax, NS

Captain M. Bruce, CD, Winnipeg, MB

J.P. Burant, former member Canadian Army (WWII), Ottawa, ON

The Right Honourable A. Kim Campbell, PC, QC

Captain D.S. Carty, CD (Ret.), New Minas, NS

J. Chapman, Oakville, ON

M.M. Coady, Barrister and Solicitor, Arnprior, ON

Major R.K. Coleman, CD (Ret.), Kanata, ON

Major D.J. Crichton, Directorate of Force Planning and Program Coordination,  
Ottawa, ON

S. Crow, Roches Point, ON

Colonel M.W. Drapeau, OMM, CD (Ret.), Orleans, ON

C. du-Lude, Trenton, ON

Corporal D.J. Edward, CFB Calgary

J. Eggenberger, Earth Alive, Ottawa, ON

Chief Petty Officer First Class E.D. Enta, CD, Office of the Assistant Judge Advocate  
General (Atlantic), Halifax, NS

Major N.E. Eveline, Land Force Western Area Headquarters, Edmonton, AB

Major J.R. Fisher, CD, ADC, Barrie, ON

P. Forward, Managing Director, The Alliance for Public Accountability, Ottawa, ON

Petty Officer Second Class P.M. Frechette, HMCS Onondaga, Halifax, NS

Brigadier General P.T. Gartenburg, CD, Chief of Staff (Operations) Air Command  
 Winnipeg, MB (*The Garrison Times* article, Edmonton, AB)  
 D.H. Gladstone, Ottawa, ON  
 Lieutenant-Colonel M.W. Haché, Maritime Air Group Headquarters, Halifax, NS  
 R. Hainsworth, Toronto, ON  
 T. Harcourt, Keremeos, BC  
 R.W. Hatton, Montreal QC  
 Captain J.C.M. Héroux, 12e Régiment blindé du Canada, Valcartier, QC  
 R. Hewson, Bolton & Muldoon, Barristers & Solicitors, Vancouver, BC  
 Lieutenant-Colonel M.R. Hunt, (Ret.), Hunt and Boan and Associates, Barristers &  
 Solicitors, Victoria, BC  
 Sergeant Hutchinson, Canadian Forces School of Administration and Logistics,  
 Borden, ON  
 T.M. James, Blacks Harbour, NB  
 T.R. Johnston, WWII Veteran, Winnipeg, MN  
 Squadron Leader R.J. Jordan (Ret.), Ottawa, ON  
 P.C. Killaby, Barrister at Law, Mississauga, ON  
 P. Labiuk, Fraser Cheam Realty Ltd, Chilliwack, BC  
 Lieutenant-Colonel J.R. Lambie (Ret.), Winnipeg, MB  
 The Honourable G.S. Lapkin, Ontario Police Complaints Commissioner, Toronto, ON  
 E.L. Leblanc, CMM, CD (Ret.) Kimberly-Clark Nova Scotia, New Glasgow, NS  
 Chief Warrant Officer C.R. Lee (Ret.), Lower Sackville, NS  
 D.A. Lee, CM, CD, Lorne and Evelyn Johnson Foundation, Regina, SK  
 Corporal A. Levesque, 1 Service Battalion, Edmonton, AB  
 Warrant Officer B. Mack, Gloucester, ON  
 S. MacKenzie, Ottawa, ON  
 Master Corporal E. MacKenzie, 443 Maritime Helicopter Squadron, Victoria, BC  
 J.M. MacMillan, Etobicoke, ON  
 J. Marcoux, Sillery, QC  
 P.F.D. McCann, Barrister, McCann & Giamberardino, Ottawa, ON  
 M. Meilleur, ex-military policeman, Ottawa, ON  
 Chief Petty Officer First Class T.R. Meloche, MMM, CD, Maritime Command  
 Headquarters, Halifax, NS  
 Reverend A. Miller, CD, Minister Grace United Church, St. Thomas, ON  
 Vice-Admiral L. Murray, CMM, CD, Acting Chief of the Defence Staff, Ottawa, ON  
 Captain S.L. Oake, Gloucester, ON  
 Constable J. Ouellette, Crime Prevention Officer, Bathurst Police Service, Bathurst,  
 NB

N. Peel, QC, Law Office, London, ON  
Captain R.G. Pinault, CMM, CD (Ret.), Ottawa, ON  
Chief Warrant Officer M.R. Pittman (Ret.), Lower Sackville, NS  
Lieutenant-Colonel J. Pitzul, CD (Ret.), Halifax, NS  
Captain D.E. Pollard (Ret.), Hantsport, NS  
Chief Warrant Officer A.G. Powell, MMM, CD (Ret.), Winnipeg, MB  
Commodore D. Reilley (Ret.), Ottawa, ON  
Major S. Rene, CD, Provost Marshal, Land Force Quebec Area, St-Hubert, QC  
G. Richardson, CD, North York, ON  
Warrant Officer C. Roy, CD, Court Reporter, Office of the Chief Military Trial Judge,  
Ottawa, ON  
Captain M. Rozak, Vancouver, BC  
S.R. Scorsone, Toronto, ON  
R.G. Sellar, Barristers & Solicitors, Bayne, Sellar, Boxall, Ottawa, ON  
J. Shaw, Sydney, NS  
Captain J.L. Shone, Officer Commanding Administration Company, Royal Montreal  
Regiment, Westmount, QC  
Commander D.J. Statham (Ret.), Executive Director, Canadian Association of  
Military Professionals, Nepean, ON  
Captain R.J. Stokes (Ret.), Barrie, ON  
S.R. Taylor, Publisher, *Esprit de Corps Magazine*, Ottawa, ON  
Vice-Admiral C.M. Thomas, CMM, CD (Ret.), Victoria, BC  
Doctor M.J.C. Thomson, Dartmouth, NS  
Corporal P. Turcot, 5 Military Police Platoon, CFB Valcartier, QC  
Lieutenant-Colonel G. Turgeon, Commandant, Régiment de la Chaudière, Lévis, QC  
Corporal M. Webber, Military Police Section, Canadian Forces Maritime Experimental  
and Test Ranges, Nanoose Bay, BC  
Colonel B.K. Wentzell, CD, Vice Chairman (Atlantic), Conference of Defence  
Associations, Ottawa, ON  
C. Wheeler, Victoria, BC  
Brigadier-General W.A.D. Yuill, OMM, CD (Ret.), Colonel Commandant Security  
Branch, Vancouver, BC

## ANNEX F



Défense nationale National Defence

Special Advisory Group on Military Justice  
and Military Police Investigation Services  
110 O'Connor Street, Suite 403  
Ottawa ON K1A 0K2

Groupe consultatif spécial sur la justice militaire  
et sur les services d'enquête de la police militaire  
110 rue O'Connor, suite 403  
Ottawa ON K1A 0K2

March 13, 1997

The Right Honourable Brian Dickson  
Chairman  
Special Advisory Group on Military Justice  
and Military Police Investigation Services  
110 O'Connor Street  
Suite 403  
Ottawa, Ontario K1A 0K2

Dear Sir:

**RE: CONSTITUTIONAL VALIDITY OF SUMMARY TRIAL PROCESS**

### **I - INTRODUCTION AND SUMMARY OF CONCLUSION**

Further to your request of February 20, 1997 as Chairman of the Special Advisory Group on Military Justice and Military Police Investigation Services, we are pleased to provide our opinion concerning the constitutionality of summary trials involving Canadian Forces personnel and other persons subject to the Code of Service Discipline enacted pursuant to the *National Defence Act*, R.S.C. 1985, c.N-5, as amended (the "*NDA*").

Specifically, you asked us to opine on the extent to which the summary trial process provided for in the *NDA* and the relevant Queen's Regulations and Orders ("the *QR&Os*") complies with the constitutional requirements of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

For the reasons set out below, we have come to the conclusion that, while the matter is not free from doubt, the summary trial procedure could withstand a challenge made on the basis of the *Charter*. We are of the opinion that although the relevant legislation, in some circumstances, probably infringes an accused's constitutional rights to an impartial and independent tribunal and to be represented by counsel, such violations have a reasonable chance of being justified pursuant to s. 1 of the *Charter*.

We consider, however, that the chances of the summary trial procedure surviving a *Charter* challenge (whenever detention might be imposed or a *Criminal Code* offence is tried as a service offence) would be improved if certain changes were made to the current system, such as:

- (a) securing from any accused a fully informed waiver of rights to an impartial trial and to counsel, subsequent to receiving legal advice or the offer of legal advice;
- (b) reducing the maximum period of detention that can be imposed at a summary trial to 30 days;
- (c) providing a right of review of any sentence of detention to the next level of command;
- (d) prohibiting the commanding officer conducting the trial from any prior involvement with the investigation or laying of the charge;
- (e) providing that only officers who have been certified by the Judge Advocate General, after receiving appropriate training, may conduct summary trials; and,
- (f) improving the training of all officers who may be called upon to act as "assisting officers", and providing them with clear and comprehensive work instruments to help them in discharging their obligations to the accused.

## II - STATUTORY AND FACTUAL BACKGROUND

### A. Scope of Application of the Code of Service Discipline

Persons subject to the Code of Service Discipline include all members of the regular force, members of the reserve force when they are on duty, and civilians who may be accompanying the Canadian Forces abroad. However, only regular and reserve members of the Forces can be tried by summary trial.

The Code of Service Discipline encompasses a wide range of so-called "service offences". Some of the service offences explicitly created by the *NDA*, such as disobeying a lawful command, are clearly of a military nature. A second group of offences are criminal in nature, as the *NDA* incorporates the *Criminal Code of Canada* by reference as an additional series

of service offences.<sup>1</sup> Thirdly, offences created by the laws of other countries in which Canadian Forces personnel may be involved are also incorporated as service offences.<sup>2</sup>

It is clear, therefore, that the jurisdiction of service tribunals<sup>3</sup>, such as commanding officers presiding at a summary trial, is very wide.

### B. Description of Summary Trial Process

A summary trial can be conducted by a commanding officer<sup>4</sup>, a superior commander<sup>5</sup> or a delegated officer<sup>6</sup>. For the purposes of this opinion we have, however, focused on the powers of the commanding officer since, in the current legislative and regulatory scheme, it is the only level which can impose the punishment of detention and thus engage the most serious concern over the constitutionality of the summary trial process.<sup>7</sup>

Theoretically, summary trials can be used to try any service offence. Jurisdiction is limited, however, in terms of the persons that can be tried through this process. Commanding officers can only try an officer cadet or a non-commissioned member below the rank of warrant officer.<sup>8</sup>

Moreover, a commanding officer is precluded from trying service offences where the accused has elected to be tried by court martial.<sup>9</sup> An accused must be given a right to be tried

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<sup>1</sup> *NDA*, s. 130.

<sup>2</sup> *NDA*, s. 132.

<sup>3</sup> *NDA*, s. 2.

<sup>4</sup> *NDA*, s. 163(1).

<sup>5</sup> *NDA*, s. 164(1).

<sup>6</sup> *NDA*, s. 163(4).

<sup>7</sup> The commanding officer may impose a detention of up to 90 days, but any portion thereof over 30 days is only effective if approved by an "approving authority" (ss. 163(2)). A superior commander has no power to impose detention (ss. 164(4)). While the *NDA*, ss. 163(4)(a), enables a delegated officer to impose detention not exceeding fourteen days, this power is taken away by *QR&O* 108.11 which limits the delegated officers' punishment to, at most, a severe reprimand.

<sup>8</sup> *NDA*, ss. 163(1)(a).

<sup>9</sup> *NDA*, ss. 163(c).

by court martial where he or she is charged with certain specific military offences (generally the more serious ones), or with any offence prescribed in another federal statute or created under law applicable outside Canada.<sup>10</sup> Finally, an election must be given whenever the commanding officer concludes that if the accused were found guilty, a punishment of detention, reduction in rank or a fine in excess of \$200 would be appropriate.<sup>11</sup>

Prior to making his or her election, the accused must be given a minimum of twenty-four (24) hours to consider the matter.<sup>12</sup> At this time, however, the accused is afforded no right to legal assistance in order to make an informed choice.

A commanding officer conducting a summary trial will usually not be a lawyer or have any other formal legal training. He or she will be trying a member of his or her own unit and, thus, is likely to have an intimate knowledge of this person's professional record. Moreover, it is generally accepted that a commanding officer has a direct professional interest on the outcome of a summary trial since he or she is responsible to the chain of command for maintaining discipline within his or her unit.

A commanding officer cannot conduct a summary trial of an offence where he or she carried out or directly supervised the investigation of that offence, or if the trial relates to an offence in respect of which a warrant was issued by that commanding officer.<sup>13</sup> However, nothing prevents the commanding officer from being informed of the nature and progress of an investigation; nor is there any express legislative prohibition against the commanding officer trying an accused in respect of a charge which that officer has laid, although we understand that this is discouraged as a matter of policy.

Once charged, an accused does not have the right to legal counsel, although the commanding officer retains a discretion to permit an accused to retain counsel (at his or her own expense) at a summary trial.<sup>14</sup> The accused does have the right to an "assisting officer"<sup>15</sup> who usually is not legally trained. The assisting officer's role is to explain to the accused the procedure

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<sup>10</sup> *QR&O*, art. 108.31(2).

<sup>11</sup> *QR&O*, art. 108.31(1)(b).

<sup>12</sup> *QR&O*, art. 108.31(3).

<sup>13</sup> *NDA*, ss. 163(1.1).

<sup>14</sup> *QR&O*, art. 108.03, Note (c).

<sup>15</sup> *QR&O*, art. 108.03(1).

at a summary trial, and compare it to the court martial procedure if an election is involved.<sup>16</sup> The role of the assisting officer at trial is to assist the accused during the trial to the extent requested by the accused.<sup>17</sup>

While there appears to be no legislative requirement that the results of any investigation be disclosed to the accused, Canadian Forces Administration Order 19-25 stipulates that this must be done "as soon as possible after the accused has been charged and, in any event, not less than 24 hours prior to the commencement of the trial".

Summary trials are held in public to the extent "that the accommodation permits", unless the accused requests that the public be excluded and the commanding officer is of the opinion that the request should be granted.<sup>18</sup>

Evidence at a summary trial will be taken under oath if the commanding officer so directs or if the accused requires it. The accused can be heard, if he or she so requests, and call any witness he or she wishes, unless the request is frivolous and vexatious.<sup>19</sup>

During the trial, the commanding officer must:

- "... receive any evidence that (he or she) considers will be helpful in determining whether to
  - (i) dismiss the charge,
  - (ii) find the accused not guilty;
  - (iii) find the accused guilty, or
  - (iv) remand the accused to a higher authority ..."<sup>20</sup>

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<sup>16</sup> QR&O, art. 108.03(7) and (8).

<sup>17</sup> QR&O, art. 108(5).

<sup>18</sup> QR&O, art. 108.29(5).

<sup>19</sup> QR&O, art. 108.29(2)(g).

<sup>20</sup> QR&O, art. 108.29(f).

The commanding officer must receive any further facts that should be brought out in the interest of the accused and any relevant submission by or on behalf of the accused.<sup>21</sup> Finally, after hearing the evidence, a commanding officer shall consider whether it has been proved beyond a reasonable doubt that the accused committed the offence stated in the charge and, if so, shall determine what sentence should be imposed.<sup>22</sup>

We have been advised that summary trials are by far the procedure used most frequently to deal with charges that service offences have been committed. According to the latest statistics, approximately 98% of all charges are disposed of by way of summary trial. Some 4,000-5,000 such trials are held annually.

In the course of the technical briefings given to the Special Advisory Group, the need for an efficient and summary trial process was repeatedly emphasized as an essential tool for the maintenance and fostering of discipline within military units. For the purposes of our opinion, we accept that there is such a need. We also assume that the punishment of detention is required at the summary trial level for the maintenance of unit discipline. We shall discuss later, in the context of our legal analysis of the constitutionality of the summary trial process under section 1 of the *Charter*, the question of whether the specific legislative limitations on the rights of the accused can be justified in light of those factual assumptions.

### III - LEGAL ANALYSIS

#### A. Application of the *Charter*

There is no doubt that the *Charter* applies to the *NDA* and the regulations passed pursuant to s. 12 of the *NDA*, including all *QR&Os* relevant to the conduct of summary trials. S. 32(1)(a) of the *Charter* states that it applies "to the Parliament and Government of Canada in respect of all matters within the authority of Parliament ...". The *NDA* is clearly passed pursuant to the constitutional authority of Parliament stipulated in paragraph 91(7) of the *Constitution Act*, 1867, to make laws in respect of militia, military and naval service, and defence. Further, in *R. v. Généreux* [1992] 1 S.C.R. 259, the Supreme Court of Canada clearly assumed that the *Charter* applied to service tribunals.

The effect of the application of the *Charter*, which is part of the Constitution of Canada, is that to the extent that any law is inconsistent with its provisions, that law has no force or effect.

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<sup>21</sup> *QR&O*, art. 108.29(2)(h).

<sup>22</sup> *QR&O*, art. 108.32(1).

Apart from numerous substantive rights (e.g., free speech and equality rights), the *Charter* contains a number of "legal rights" which essentially provide for important procedural protections in cases where the state wishes to interfere with the life, liberty or security of the person. Thus, s. 7 provides that:

"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof, except in accordance with the principles of fundamental justice". (Emphasis added)

Further, s. 11(d) provides that:

"Any person charged with an offence has the right "to be presumed innocent until proven guilty according to a fair and public hearing by an independent and impartial tribunal." (Emphasis added)

In *R. v. Généreux*, the Supreme Court suggested that where a potential infringement falls squarely within one of the specific legal rights prescribed by the *Charter*, such as section 11, one should begin the analysis at that point, and only consider section 7 as an alternative.<sup>23</sup> Since it is certainly arguable that the summary trial process violates s. 11(d) of the *Charter*, we shall first consider that possibility. We will then consider the applicability of s. 7.

#### **B. Section 11(d) of the *Charter***

The specific legal rights provided for in section 11 of the *Charter*, including that in ss.(d) "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal", depends upon a person having been charged with an "offence".

In *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, a majority of the Supreme Court of Canada ruled that:

"... it is [...] preferable to restrict s. 11 to the most serious offences known to our law, i.e., criminal and penal matters, and to leave other "offences" subject to the more flexible criteria of "fundamental justice" in s. 7." (at p. 558)

<sup>23</sup> [1992] 1 S.C.R. 259, at p. 310. See also *R. v. Pearson*, [1992] 3 S.C.R. 665, at p. 688 and *Dehghani v. Canada* (M.E.I.), [1993] 1 S.C.R. 1053, at p. 1076.

Therefore:

"... all prosecutions for criminal offences under the *Criminal Code* and for quasi-criminal offences under provincial legislation are automatically subject to s. 11. They are the very kind of offences to which s. 11 was intended to apply." (at p. 560)

Nevertheless, the Court went on to state that when a person is charged with a disciplinary offence which is primarily intended to maintain discipline, s. 11 rights could still be triggered, "not because they are the classic kind of matter intended to fall within s. 11, but because they involve the imposition of true penal consequences."<sup>24</sup>

Accordingly, if an offence is criminal or *quasi*-criminal, or if conviction could lead to true penal consequences, one is entitled to invoke the s. 11 rights stipulated by the *Charter*.

As we saw earlier, service offences include *Criminal Code* offences and these can be tried by summary trial. Moreover, purely military service offences (i.e., those stipulated in ss. 74-129 of the *NDA*) can attract detention of up to 90 days, which punishment must obviously be considered a "true penal consequence". It follows, in our opinion, that at least when detention is a possible punishment or a *Criminal Code* offence is tried as a service offence, an accused would be entitled to claim the rights enshrined in s. 11 of the *Charter*, including those included in ss. 11(d).

An accused at a summary trial is therefore entitled to be judged by an "independent and impartial tribunal" whenever detention is a possible punishment. In *R. v. Généreux*, Chief Justice Lamer, on behalf of the majority, stated:

"I emphasize that the principles of independence and impartiality embraced by s. 11(d) seek to achieve a two-fold objective; first, to ensure that a person is tried by a tribunal that is not biased in any way and is in a position to render a decision which is based solely on the merits of the case before it, according to law. The decision-maker should not be influenced by the parties to a case by outside forces except to the extent that he or she is persuaded by submissions or arguments pertaining to the legal issues in dispute." (at pp. 282-3)

Relying on the decision in *R. v. Valente*, [1985] 2 S.C.R. 673, the Court distinguished between the concepts of "independence" and "impartiality":

"To assess the impartiality of a tribunal, the appropriate frame of reference is the "state of mind" of the decision-maker. The circumstances of an individual case must be examined to determine whether there is a reasonable apprehension that the decision-maker, perhaps by having a personal interest in the case, will be

subjectively biased in a particular situation. The question of independence, in contrast, extends beyond the subjective attitude of the decision-maker. The independence of a tribunal is a matter of its status." (p. 283)

The Supreme Court went on to identify the three essential components of judicial independence, namely, security of tenure, a basic degree of financial security, and institutional independence with respect to matters of administration that relate directly to the exercise of the tribunal's judicial function.<sup>25</sup>

In our opinion, there is little doubt that the summary trial process, when conducted by a commanding officer, fails the test outlined by the Supreme Court of Canada in *R. v. Généreux*, in respect of both the requisite impartiality and independence.

As stated earlier, a commanding officer will often know the member appearing before him or her; he or she may be aware of the nature and progress of the investigation; and he or she has a professional stake in the outcome of the trial. Thus the commanding officer cannot be said to be impartial.

Moreover, the commanding officer does not enjoy the institutional independence required. He or she has no security of tenure and his or her financial remuneration and progress within the ranks will depend on the overall discharge of his or her duties, including the maintenance of discipline within the unit which the summary trial procedure is, in part, designed to foster.

Therefore, the summary trial process provided for in the *NDA* and the related *QR&Os* does not constitute an "independent and impartial tribunal" within the meaning of s. 11(d) of the *Charter* whenever a criminal offence is tried as a service offence, or the punishment of detention might be imposed.

Furthermore, s. 11(d) is likely breached as well as a result of the failure of the legislative enactments to afford the accused a right to the assistance of counsel during the summary trial. For s. 11(d) refers also to a "fair and public hearing". We are of the view that a fair hearing necessarily entails the right to counsel.<sup>26</sup>

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<sup>25</sup> *R. v. Généreux*, *supra*, at 284-285.

<sup>26</sup> *R. v. McKibbin* (1988), 45 C.C.C. (3d) 334 (Ont. C.A.).

### C. Section 7 Rights

Even if s. 11 were not to apply to summary trial proceedings when detention is a possible punishment or a *Criminal Code* offence is being tried as a service offence, an accused could seek to rely on s. 7 of the *Charter*.<sup>27</sup>

Section 7 affords any person the right not to be deprived of the right to life, liberty and security of the person, except in accordance with the principles of fundamental justice. The principles of fundamental justice embrace at least the principle of "natural justice". This would include a right to be heard by an unbiased tribunal.<sup>28</sup>

For the reasons already stated in connection with our analysis of the applicability of s. 11(d) of the *Charter*, we are of the opinion that a commanding officer presiding over the trial of a member of his or her own unit cannot be said to be unbiased. At a minimum such a situation creates, if not an actual bias, at least a reasonable apprehension of bias.

Furthermore, the principles of fundamental justice would entail the right to counsel at the summary trial,<sup>29</sup> since the right to make "full answer and defence" is constitutionally protected and an accused is entitled to receive the assistance of counsel where that is necessary to make full answer and defence.<sup>30</sup>

It follows that the failure to provide a right to counsel for the assistance of an accused at summary trial when his or her liberty is at stake also constitutes a violation of his or her s. 7 constitutional rights.

### D. Justifiable Limits of *Charter* Rights

Notwithstanding that *Charter* rights may have been breached, it is possible that such breaches can be constitutionally acceptable if the requirements of s. 1 of the *Charter* are satisfied. Section 1 states:

"The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

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<sup>27</sup> *R. v. Wigglesworth*, *supra*, at 252; *R. v. Généreux*, *supra*, at 148.

<sup>28</sup> *P.W. Hogg*, *Constitutional Law of Canada*, (3rd ed.), Vol. 2, at pp. 44-12, 44-45 and 44-48.

<sup>29</sup> *R. v. McKibbin* (1988), 45 C.C.C. (3d) 334 (Ont. C.A.).

<sup>30</sup> *R. v. Silvini* (1991), 5 O. R. (3d) 545 (Ont. C.A.); *R. v. Seaboyer*, [1991] 2 S.C.R. 577.

Any limit on *Charter* rights must, at a minimum, be "prescribed by law". There is no doubt that the limits we have been discussing satisfy this requirement: they are explicitly set out in the *NDA* and the *QR&Os*. The key question, therefore, is whether those limits are reasonable "and can be demonstrably justified in a free and democratic society".

The classic test to establish that a limit is reasonable and demonstrably justified in a free and democratic society was enunciated by Dickson C.J. for a unanimous Supreme Court of Canada on the issue in *R. v. Oakes*, [1986] 1 S.C.R. 103:

"To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom" ... The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test" ... Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question ... Third, there must be a proportionality between the *effects* of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance". (pp. 138-139)

According to Professor Peter W. Hogg, this test can be broken into four separate criteria, namely:

1. Sufficiently important objective: The law must pursue an objective that is sufficiently important to justify limiting a *Charter* right.
2. Rational connection: The law must be rationally connected to the objective.
3. Least drastic means: The law must impair the right no more than is necessary to accomplish the objective.

4. Proportionate effect: The law must not have a disproportionately severe effect on the persons to whom it applies."<sup>31</sup>

In order to justify the limits on the summary trial process included in the *NDA* and relevant *QR&Os*, we must therefore analyze their compliance with each criterion in turn.

1. Sufficiently important objective

The objective of a summary trial, and of the attendant punishments, is to deal with discipline problems swiftly, within the unit. In our opinion, given the peculiar needs of the military justice system, which were recognized by a majority of the Supreme Court of Canada in *R. v. Généreux*,<sup>32</sup> there is little doubt that this branch of the *Oakes* test is satisfied. We note as well that virtually every country that has a similar military tradition as Canada, such as the United Kingdom and the United States, has an indigenous military justice system which includes a summary trial process.

2. Rational Connection

To fulfill the rational connection test, the law must be "carefully designed to achieve the objective in question."<sup>33</sup> According to Professor Hogg, "The essence of rational connection is a causal relationship between the objective of the law and measures enacted by law."<sup>34</sup>

Therefore, to pass the rational connection test, it must be shown that trial by a commanding officer without legal counsel is related to the swift administration of military discipline. We think this can be shown. Clearly, imposing the requirement of an impartial tribunal would lead to delays that are inconsistent with the requisite expediency. Indeed, the requirement of an impartial tribunal and of legal counsel would likely delay even further the ultimate adjudication. Therefore, limiting such rights as are guaranteed by ss. 11(d) and 7 of the *Charter* are limitations rationally connected to the objective of dealing swiftly with service offences.

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<sup>31</sup> Hogg, *Constitutional Law of Canada*, (3rd ed.), p. 35-17.

<sup>32</sup> *Supra*, at 293-4.

<sup>33</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103, at 139.

<sup>34</sup> *Constitutional Law of Canada*, *supra*, at p. 35-27.

3. Least drastic measures

This is the crucial part of the *Oakes* test. It requires that the law "should impair as little as possible the right or freedom in question".<sup>35</sup> "The idea is that the law should impair the right no more than is necessary to accomplish the desired objective".<sup>36</sup>

Whether the impairment is the minimum tolerable to achieve a valid statutory objective involves complex questions of judgment and evidence which preclude an unequivocal answer to the question of whether the summary trial passes this branch of the *Oakes* test. But we are of the view that a reasonable argument can be made that this criterion is also satisfied.

As we have seen, while the commanding officer is not independent or impartial or even unbiased within the requirements of sections 7 and 11(d) of the *Charter*, the legislator has attempted to set boundaries on his or her lack of impartiality. For example, the commanding officer cannot preside a trial if he or she has been actively involved in the investigation or issued a search warrant. Furthermore, during the trial, he or she must ensure that all evidence that could assist the accused is presented.

Similarly, with regard to the right to counsel, the legislation affords the right to an "assisting officer", chosen by the accused, and the extent of whose assistance and participation is determined by the accused.

These limits appear to us to achieve a reasonable balance between the rights of the accused and the objective of swift justice. It is true that, in the search for an acceptable equilibrium, the fact that an accused could receive the punishment of detention suggests that the impairment of rights would be more difficult to justify. But it should be remembered, in this respect, that the accused elected a summary trial, and would have been advised by his assisting officer of his or her entitlement to a court martial which includes an impartial tribunal and a right to counsel. Moreover, we put some weight on the assertion of military officers that detention is a necessary tool of military discipline which must be available at the summary trial level.

The Supreme Court of the United States, in *Middendorf v. Henry* 425 U.S. 25, upheld the constitutionality of a summary trial procedure where an accused could be sentenced to one month's detention and hard labour. Although the analysis of the Supreme Court is, of necessity, not on all fours with that required under the *Charter* (since the American Constitution does not have an equivalent to our s. 1, the decision is instructive. The

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<sup>35</sup> *R. v. Oakes*, *supra*, at 139.

<sup>36</sup> *Constitutional Law of Canada*, *supra*, at p. 35-28.1.

U.S. Supreme Court, in a majority opinion written by Chief Justice Rehnquist, did consider the requisite balance of interests between the rights of the accused and the needs of the military for expedient delivery of justice for relatively minor service offences, even when detention was the punishment involved. The majority of the Court found that factors militating in favour of the right to counsel at "summary courts martial" were not so extraordinarily weighty as to overcome the legislative balance made by Congress to dispense with such a right.

The Court found that:

"... presence of counsel will turn a brief, informal hearing which may be quickly convened and rapidly concluded into an attenuated proceeding which consumes the resources of the military to a degree which Congress could properly have felt to be beyond what is warranted by the relative insignificance of the offences being tried. Such a lengthy proceeding is a particular burden to the Armed Forces because virtually all the participants, including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline".<sup>37</sup>

The U.S. Supreme Court also relied on the fact that the accused had elected a summary trial process.<sup>38</sup> Consequently, the Court found that the balance achieved in the legislation was constitutionally defensible.

Similarly, we are of the opinion that it can reasonably be argued that the balance achieved in the *NDA* and the *QR&Os* between the rights of the accused and the needs of the military is reasonable and impairs the accused's constitutional rights no more than is necessary to accomplish the desired objective.

#### 4. Proportionate Effect

In the fourth branch of the *Oakes* test, the Court must assess the "proportionality between the effects of the measures which are responsible for limiting the right or freedom, and the objective which has been identified as of "sufficient importance"". <sup>39</sup> In *R. v. Edwards Books and Art*, Dickson C.J. stated that the effects of the military measures "must not so severely

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<sup>37</sup> 96 S. Ct. 1281 (1976), at 1292-1293; applied in *Weiss v. United States*, 114 S. Ct. 752 (1994).

<sup>38</sup> 425 U.S. 25, at 47-48.

<sup>39</sup> [1986] 1 S.C.R. 103, at 139.

trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement".<sup>40</sup>

It is obvious from what we have already said in respect of the third branch of the *Oakes* test that we are of the opinion that this fourth criterion can also be reasonably argued to have been satisfied by the current legislative balance between the accused's and the military's interests.

Accordingly, we consider that the abridgements to an accused's constitutional rights to an impartial and independent tribunal and to counsel at summary trial could be justified pursuant to s. 1 of the *Charter*.

#### E. Suggested Improvements

While, as discussed above, we are of the opinion that the current summary trial process could be justified under s. 1 of the *Charter*, we are also of the view that improvements could be made to the current system which would increase the chances that it would pass *Charter* scrutiny. We wish to discuss those briefly.

##### (i) Election and Waiver of Rights

In the cases most likely to raise constitutional concerns, an accused is offered the choice of a court martial where he or she will be afforded the protection of being tried by an independent and impartial tribunal, as well as a full right to legal counsel.

The existence of this election certainly improves, in our view, the chances that the summary trial process could be defended. Indeed, the Supreme Court of Canada has ruled in previous cases that *Charter* rights could be waived. But the validity of a waiver of a procedural right is dependent on it being clear and unequivocal that the person is waiving the procedural safeguard involved and is doing so with full knowledge of the rights the procedure was enacted to protect.<sup>41</sup>

The *QR&Os* currently make it mandatory, when the accused must be offered a right to elect a trial by court martial, that the assisting officer makes the accused aware of the differences between a court martial and a summary trial.<sup>42</sup>

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<sup>40</sup> [1986] 2 S.C.R. 713, at 768.

<sup>41</sup> *R. v. Barile*, [1994] 3 S.C.R. 173, at 203-4; *Korponay v. Attorney-General of Canada*, [1982] 1 S.C.R. 41, at 49; *R. v. Richard* (1986), 110 C.C.C. (3d) 385 (S.C.C.).

<sup>42</sup> *QR&O* 108.03(8).

We think that the constitutional weight of the election, as amounting to a valid waiver of *Charter* rights, could be enhanced if it were obtained in writing, and this after the accused has had an opportunity to consult with legal counsel prior to signing the waiver. In this regard, we agree with Professor Martin L. Friedland, of the Faculty of Law of the University of Toronto, and the opinion he expressed to this effect in "*Controlling Misconduct in the Military: A Study Prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, (pp. 99-100).

(ii) Detention Period

Currently, the detention period that can be awarded by commanding officers (albeit with the approval of a "confirming authority") is 90 days. While the military may be able to adduce credible evidence showing that the punishment of detention must be available at a summary trial as a tool of military discipline, there does not appear to be much evidence to justify why a period as long as 90 days should be required. Prior to 1950, we understand that the maximum period of detention that could be awarded by summary trial in Canada was 28 days. In the United States, only 30 days can be awarded at a summary court martial.

Accordingly, we are of the view that reducing the period of detention to approximately 30 days (which is the period of detention which a commanding officer can currently impose without the confirming authority) would enhance the chances that a court would find that the limits on procedural rights are justifiable in a free and democratic society.

(iii) Impartiality of the Commanding Officer

We have seen that the current *QR&Os* obligate the commanding officer to obtain all evidence that may be favourable to the accused, and also that the *NDA* disqualifies him or her whenever he or she has been directly involved in an investigation or the issuance of a search warrant. To this extent, therefore, the legislator has attempted to ensure some measure of impartiality at the summary trial level.

But we think the legislator could go farther by prescribing that, except where this is not practical, a commanding officer should never preside at a trial if he or she has been involved in laying the charge. Moreover, certifying commanding officers, after appropriate training in the conduct of summary trial, would improve the chances that commanding officers knew exactly what their duties are in this context.

(iv) Training of Assisting Officers

Assisting officers are usually not lawyers. The assistance they can provide will vary widely depending upon their understanding of the military justice system. All officers who may be called upon to act as assisting officers should receive appropriate training, and be provided with comprehensive and clear working instruments to help them perform their role.

(v) Appellate Review

It appears that the principles of fundamental justice enshrined in s. 7 of the *Charter* do not include a guarantee to an unqualified right of appeal.<sup>43</sup> Nonetheless, we are of the view that adding some form of review, whenever the punishment awarded at summary trial is detention, might buttress the argument that a proper balance of the rights of the accused and of the military justice system had been struck. Thus, if an accused sentenced to detention could, immediately thereafter, appeal the sentence to the next level of command authority, this would introduce a greater measure of independence and impartiality, since the matter would be reviewed by someone other than the person directly responsible for the accused member.

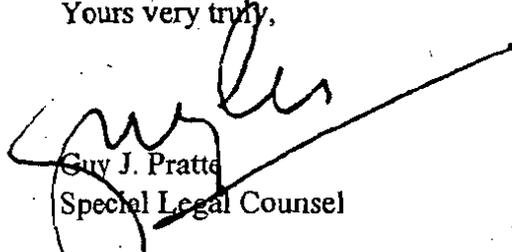
IV - CONCLUSION

Therefore, we are of the opinion that:

1. the current summary trial procedure as provided for in the *NDA* and the *QR&Os* infringes ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*, but that such breaches could be justified pursuant to s. 1 of the *Charter*; and that,
2. the chances that the summary trial procedure could be justified pursuant to s. 1 of the *Charter* would be improved if certain relatively minor improvements were made, such as securing a valid waiver of constitutional rights, shortening the period of detention, limiting further the involvement of a commanding officer prior to trial, improving the training of commanding officers and assisting officers, and providing for some form of review of any summary trial decision when detention is imposed.

We trust that this legal opinion meets your requirements.

Yours very truly,

  
Guy J. Pratte  
Special Legal Counsel

GJPLM:mp

Yours very truly,

  
Lise Maisonneuve  
Special Legal Advisor

<sup>43</sup> *R. v. Robinson* (1989), 63 D.L.R. (4th) 289 (Ont. C.A.).

